

THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW



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**THE DEVELOPMENT OF THE LAW RELATING TO
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THE UNIVERSITY OF ZAMBIA

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L 411 OBLIGATORY ESSAY

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the LL.B Degree of the University of Zambia.

TOPIC : THE DEVELOPMENT OF THE LAW RELATING TO
PUBLIC SECURITY IN ZAMBIA, AND THE ROLE
OF THE JUDICIARY IN THE DEVELOPMENT OF
PUBLIC SECURITY LAW IN ZAMBIA.

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DEDICATION

To my grandmother, Aledi, who toiled
unreservedly in order to educate us.

Words cannot express our deepest thanks
to you, ' **Ambuya.** '

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CHAPTER ONE

INTRODUCTION

For the emergent independent states particularly those in Africa, the aspirations of the new governments were, amongst other things, that any efforts for development should be couched in peaceful and stable conditions. The governing philosophy was that the newly independent states needed peace, order and public security. This elusive concept of public security has been given as justification for the declaration of states of emergency throughout the world, and much so in Africa.

It is against this background that this paper traces the history of legislation that is still applicable in Zambia today but which is a direct product of the pre-independence period.

Not to be outdone the courts and the crucial role they have played in interpreting the issues arising out of the application of public security law, will also lay claim as a subject of this paper.

This chapter begins its analysis from the time when Northern Rhodesia was under British protection as a protectorate territory. The historical nature of this chapter being paramount, it does not claim to be exhaustive though. It is our wish that it will provide a firmer insight into the foundations of the legislation under discussion, and that it will be an eye opener to the later public security laws applicable in an independent Zambia.

THE COLONIAL STARTING POINT ; 1927

1.

In 1927, the Northern Rhodesia Legislative Council enacted the Northern Rhodesia **Emergency Powers Ordinance**. By reading into the provisions of this short piece of legislation - it only had six (6) sections - one can come to an understanding of the anxiety to place in the hands of the Governor of the territory powers which were deemed necessary to ensure the safety of the public. The Ordinance for instance by Section 2(1) empowered the Governor to declare a state of emergency in the whole or part of the territory, whenever it appeared to him that any action had been taken or was immediately threatened to be taken by any person on so large a scale as to be likely to endanger the public safety or to deprive the community of any of the essentials of life. The governor could take any other measures which he deemed essential for the public safety and the life of the community. This subjective discretion that was placed in the hands of the governor afforded him control over the life of the community.

The **Northern Rhodesia Emergency Powers Ordinance** underwent amendment in 1939, the significance of which was to vest the governor with more powers to deal with any situation arising out of an emergency. This amendment was however necessitated by the situation arising out of the outbreak of the Second World War. The new regulations among other things prohibited the communication by any person of information which was likely to prejudice both the defence of the realm as well as the efficient prosecution of the war. The likely inadequacy the new regulations were meant to forestall was that the earlier regulations only covered acts likely to be prejudicial

to the safety of the public and the life of the community. Consequently, the new regulations sought to protect, inter alia, His Majesty's armed forces, vessels, aircraft, munitions of war, and armaments from vulnerability to the enemy.

The **Emergency Powers (Colonial Defence) Order-in-Council 1939 and 1940**, which governed the **Emergency Powers (Emergency) Regulations** was revoked in 1946.³ The revocation marked the end of application of the regulations which received their force from the Emergency Powers Ordinance and the regulations thereunder.

A major step in the development of public security law came through the **Emergency Powers Order-in-Council of 1956** which amended the earlier 1939 Order-in-Council. At this stage the Emergency Powers Order-in-Council conferred overwhelming authority on the governor. One instance of this can be demonstrated through the provisions of the 1956 Emergency Powers Order-in-Council in relation to repugnancy of any of the emergency regulations vis-a-vis any other legislative enactments.

By **Section 8**

" Emergency regulations and any orders or rules made in pursuance of emergency regulations shall have effect notwithstanding anything inconsistent therewith contained in any enactment and any provision of any enactment which may be inconsistent with any emergency regulation or any such order or rule shall, whether or not that provision has been amended, modified or suspended in its operation under that order to the extent of such inconsistency shall have no effect so long as such regulation, order or rule remains in force. "4

Present day emergency powers confer exactly the same powers on the President of the Republic.⁵

The Emergency Powers Order-in-Council of 1939 and 1956 respectively, were invoked in September of 1956 to have effect in the then Western Province (now Copperbelt Province). Further regulations were made pursuant to Part II of the Emergency Powers Orders-in-Council, 1956 to provide for, among other things the detention of persons. The Order-in-Council did previously provide for the detention of persons and deportation and exclusion of persons from the territory. However, the new regulations afforded the governor of the territory the power to detain persons when satisfied that the measure was necessary for the purposes of maintaining public order. The provisions for the detention or restriction of persons was included to deal with the strike by African mineworkers. The mineworkers were unhappy with the 'discriminatory' conditions they were working under.⁶ Their strike action was a way of driving the point home that they were not pleased with the overly unproportional wages, in comparison to their compatriot whites, that they received. The control exercised by the authorities over the mineworkers' union leaders was considered to be a means to curb any iota of violence that the leaders could instigate. Any such violence could have possibly led to widespread bloodshed.

In December 1956, the Legislative Council passed the **Emergency (Transitional Provisions) Ordinance** in order to exercise control over people who were likely to mar the 'smooth administration of society.' As suggested by its name, this Ordinance was to have effect until the 31st of December, 1957. The Ordinance further provided that any detention or restriction order would continue in force after the emergency regulation ceased to have effect, such detention order to continue in force for a month after the expiry date.⁷ This piece of legislation was evidently meant to extend any detention or restriction orders that were in existence when the emergency proclamation would cease to have effect.

It was in the midst of the Federation of Rhodesia and Nyasaland, as well as at the time of the rising agitation by the majority of indigenous Africans against colonial rule, that these Emergency Powers Ordinances and their respective regulations were being swiftly effected. It is felt that a brief background to the coming of the Federation of Rhodesia and Nyasaland will greatly assist in reaching an understanding of the eventual political developments in the territories affected, as well as providing a firmer insight into the reasons for the colonial government action in terms of law as it affected the security of the public.

Southern Rhodesia had been declared a self governing territory in 1923, while Northern Rhodesia and Nyasaland were declared Protectorates in 1924. The possibilities of amalgamation of the two Rhodesian territories after World War Two seemed, with the possible advantages, in sight.⁸ The two Rhodesias were dependent on each other for the copper from the north and coal from Wankie; moreover a large economic unit would "provide security and confidence for .. attracting capital"⁹ The main impediment to straightforward amalgamation of these territories would be the consideration of what part the indigenous Africans would play in the set up. The Africans had to be protected by the colonial office against danger of oppression by the white colonialists. The suspicions over the proposals for Federation were, for the Africans, accelerated by their mistrust for the white man. After several consultations between the various representatives concerned with the formulation of the Federation, it was agreed in principle in 1951 that the States to the protectorates would be preserved, land and political questions would be the concern of each territory and the consent of the inhabitants of the proposed Federal territory should be obtained before the union was set in place.¹⁰

In August of 1953, an Order-in-Council was proclaimed creating the Federation of Rhodesia and Nyasaland, albeit the resistance by the Africans who had even boycotted the conference on Federation. On October 24 of the same year, Federation of Rhodesia and Nyasaland came into being.

Opposition towards Federation by the Africans in the northern territories was on the grounds that the harsh discriminatory policy practiced in Southern Rhodesia would spread over the whole of the federal territory.¹¹ In this vein, the African National Congress led by Harry Nkumbula, and the African Mineworkers Union planned massive protest action aimed at urging the colonial office to consider the calls for scrapping Federation. The resultant widespread strikes and civil disobedience campaigns¹² went only to show how serious the indigenous Africans were in their demands.

Perhaps it is against such a background that the **Emergency Powers (Amendment) Ordinance, 1957** was enacted. The main purpose of this statute was to make provision for the making of regulations that were necessary to check any action by any person which may have led to a declaration of a state of emergency¹³

It is submitted that the prevailing political conditions in Northern Rhodesia between the period of Federation and eventual independence substantially shaped the law that dealt with the preservation of public security.

RISING MILITANCY : 1958 - 1960

The fight for political independence gained further momentum in 1958. The African National Congress (ANC), divided over whether to take part in the planned general elections under the Benson Constitutional Plan, received a set back when there was a split within its ranks by a militant wing of the organisation. This breakaway movement formed the Zambia African National Congress (ZANC) under the leadership of Kenneth Kaunda. Law and order broke down as violence erupted between the members of the rival political parties. ZANC was vehemently against the planned elections scheduled for March 1959. The governor, fearing a mass of violence and lawlessness, issued the **Safeguard of Elections and Public Safety Regulations, 1959** under the authority of the Emergency Powers Ordinance, 1927.¹⁴ The Legislative Council by resolution¹⁵ prolonged the operation of the Safeguard of Elections and Public Security Regulations for a further three (3) months, the aim being to continue the detention of the ZANC leaders who had been held

since March. The government was bent on ensuring that its efforts to create tranquility in the territory were not rendered fruitless. Every effort was made to keep away the leaders of the banned ZANC Party from their followers. It was these followers who were feared could possibly break down the whole security system at the behest of their leaders. The enactment and regulations thereunder were "in the interest of public security and law and order." It is under this same guise of protecting the public interest that the operation of this statute¹⁶ underwent amendment and was stretched to operate until 1960¹⁷

The year 1959 marked a watershed in the politics of Northern Rhodesia then, because it was in October of that year that the United National Independence Party (UNIP) was born. This Party replaced ZANC. Before the year came to an end the political detainees were released and the former ZANC leaders were welcomed into the UNIP hierarchy. It was also at this time that the resounding call for political freedom grew louder. The agitation that marked the reaction against federation could be seen firmly in place by the height to which acts of sabotage, arson and violence had reached. The places most affected were the volatile Copperbelt, the Northern Province as well as the Central Province.

The government of the day felt that more stringent regulations were needed to forestall any eventual breakdown of peace and security.

1960 TO INDEPENDENCE

In 1960 the Emergency Powers Ordinance of 1927 was repealed and replaced by the **Preservation of Public Security Ordinance**. The main provisions of the repealed Ordinance however remained intact. The new ordinance was intended to assist the government deal with threatened emergencies, actual emergencies as well as the aftermath of any trouble that may have arisen out of an emergency situation.

The tension created by the agitation for political freedom in Northern Rhodesia did not take a turn for the better; if anything the use of the Preservation of Public Security Ordinance to deal with the deteriorating situation only steeled the opposition's vigorous resistance. The year 1961 saw the beginning of the 'CHA CHA CHA' campaign. This was a form of physical violence and action targeted at persons, buildings, institutions, roads and other vital infrastructure as a way of expressing the Africans' displeasure at continued colonial subjection.

The violence was widespread and was at its most dangerous in the Northern, Copperbelt and Luapula Provinces. Consequently a state of emergency was declared in August 1961 over the Northern and Luapula Provinces. There followed thousands of convictions involving mostly UNIP supporters for offences contrary to the Preservation of Public Security Ordinance and its respective regulations.

The Independence process was meanwhile in motion and elections were conducted in 1962 in which both the whites and the Africans participated. The result was that a coalition government of UNIP and the ANC went on to be formed since no party had won decisively.

In the general election of January 1964, UNIP came out victorious and Kenneth Kaunda became the first Prime Minister of Northern Rhodesia. On the 24th of October 1964, Zambia attained its independence.

Incidentally, a state of emergency had been proclaimed on the 27th of July 1964 by the governor of Northern Rhodesia, Sir Evelyn Hone.¹⁸ The governor invoked the emergency powers under the Preservation of Public Security Ordinance to contain trouble that had broken out between Alice Lenshina's followers and the government authorities. Alice Lenshina was the leader of the Lumpa Church which was a fanatical society whose religious conviction was that its members should not be subject to any earthly form of authority. The Lumpa followers barricaded themselves in separate villages. In one of the battles a European Police Inspector together with an African Constable were murdered in a settlement camp on 24th July, and Lundazi was overrun five days later by the sect members.¹⁹

The emergency proclamation by the governor in July 1964 applied to Chinsali and Lundazi districts where the trouble was rife. The violent clashes between members of the Lumpa Church and the security forces was reason enough for the Government to declare that a situation existed which, if allowed to continue, might lead to a state of emergency. This declaration constituted the beginning of the operation of a semi-state of emergency.

The operation of the emergency declaration after its proclamation will be effectively dealt with in the next chapter. It is only ironical that a newly independent country should inherit with it a state of Emergency situation. This only reflected an atmosphere of insecurity and instability that purportedly existed in the nation. Furthermore it is only paradoxical that the implications of the state of emergency declaration by a pre-independence governor would in later years be at the centre of a heated legal debate among constitutional lawyers in Zambia.

CONCLUSION

The development of the law of public security in Northern Rhodesia as traced in the foregoing chapter gives an indication of the nature and pace of review that the law governing public security underwent. In addition, the discussion has allowed a further insight into the use to which these particular laws were put, viz, to ensure the maintenance of law and order as well as importantly, to confront and forestall any politically inspired disturbances.

The concern of the following chapter shall be a preview of the period after independence. It will preoccupy itself with an assessment of the unfolding events which climaxed in the ushering in of the One Party State and how all these political changes influenced, in the main, the Preservation to Public Security Act and the Emergency Powers Act.

FOOTNOTES

1. No. 9 of 1927
2. Emergency Powers (Amendment) Regulation, 1939. Regulation 19 in Government Notice No. 178, 1939
3. Emergency Powers (Colonial Defence) Order-in-Council 1939 and 1940, Expiration of Emergency Legislation, in Government Notice No. 65 of 1946
4. Emergency Powers Order-in-Council, 1956
5. Emergency Powers Act, Cap. 108 Laws of Zambia Section 4
6. Hall, R. Zambia (Pall Mall Press, London, 1965) p 177
7. Emergency (Transitional Provisions) Ordinance 1956. Section 3
8. Philips, L.C.E. The Vision Splendid : The Future of Central African Federation (Heinemann, London, 1960) p 283
9. Ibid; p 32
10. Ibid; p 288
11. Mason, P. Year of Decision : Rhodesia and Nyasaland in 1960 (Oxford University Press, London, 1960) p 22
12. Ibid; p 32
13. Emergency Powers (Amendment) Ordinance 1957. Section 3
14. Section 2 (1)
15. Legislative Council Debates, Hansard No. 98 (1959) p 94.
16. Safeguard of Elections and Public Security Regulations
17. Emergency Powers (Amendment) Ordinance, 1959
18. Government Notice No. 374 1964
19. Mac Pherson, F. Kenneth Kaunda of Zambia : The Times and the Man (Oxford University Press, London, 1974) p 442 - 443

CHAPTER TWO

INTRODUCTION

In this chapter we will see the significant role the legislative arm of government played in effecting amendments to the existing law relating to public security. Of prime concern will be the various constitutional amendments after the historic 1969 referendum.

The author also traces the historic development of the statutes that were adopted at independence from the pre-independence era and how these laws were appropriate for the prevailing political conditions in the region.

The state of emergency is also under focus in this chapter. The essay will throw light on the reasons for the continued existence of the state of emergency.

Attention will also be drawn to the mechanism adopted to institute the one-party state system of government in Zambia. This will be an attempt to bring out the realities of the constitutional provisions that were included in the new constitution, these provisions which sought to ensure protection of fundamental rights and freedoms. In the interim, the chapter looks critically at the governments stance towards protection of rights of individuals in the face of constant threat to these rights under an emergency declaration.

THE OPERATIONS OF A STATE OF EMERGENCY

At independence, there were two statutes, apart from the provisions in the independence constitution, which directly dealt with public security. These were :

The Emergency Powers Ordinance, 1964 and
The Preservation of Public Security Ordinance, 1960

The former replaced the Emergency Powers Orders-in-Council whose effect ceased to operate at midnight on the eve of Zambia's independence. This was because the Zambia Independence Order, 1964 stipulated that "the Emergency Powers Order-in-Council shall cease to have effect as part of the laws of Zambia."¹ Interestingly, most of the provisions in the old Emergency Powers Ordinance were retained in the Emergency Powers Ordinance of 1964.

As for the Preservation of Public Security Ordinance 1960, it was already in operation when independence was attained. This was because the Ordinance's provisions came into operation "during any period when a declaration made under paragraph (b) of subsection(1) of Section 29 of the Constitution has effect."² The Preservation of Public Security Ordinance continued its operation after independence as a result of the Zambia Independence Order which stipulated that the governors emergency declaration of 27th July, 1964 was continued in force until April 1965.³ Consequently, as long as the state of emergency existed in the nation, the Preservation of Public Security Ordinance would have effect. The Preservation of Public Security Regulations were originally in force in the Northern Province as well as Lundazi District. The emergency proclamation was subsequently extended to the rest of the country.⁴

The provisions of the above mentioned Ordinances would come into effect whenever an emergency proclamation was in force. Section 29 of the Zambia Independence Order (now Article 30 of the Zambian Constitution), governed emergency proclamations.

In consideration of the importance of that section, wholesome allowance will be afforded to quote and reflect on the provisions of the said section .

By S: 29(1) The President may, at anytime, 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.

It is agreed that "an emergency seems to pre-suppose some event, usually of a violent nature, endangering or threatening public order or public safety."⁵ The danger however looms large that the power to declare the emergencies may be abused by the executive. This fear is further compounded by the fact that the President has further powers under the Preservation of Public Security Act and The Emergency Powers Act to make regulations as may appear to him to be necessary or expedient to secure the security of the public. Nevertheless the Executive authority was kept in check in several ways. Firstly an emergency declaration would cease to have effect at the expiration of five days beginning with the publication in the case of a declaration made when Parliament was sitting or, at the expiration of twenty one days in any other case unless the National Assembly approved the declaration before such expiry.⁶ This meant that if the National Assembly did not approve an emergency proclamation before the expiry of the five or twenty one day period, whichever case it may be, the operation of such emergency proclamation would be discontinued. The length of time for which an emergency proclamation would be effective was made dependent on the legislative body.

Furthermore, the operation of an emergency declaration that had been approved by a National Assembly resolution was only limited to a period of up to six months from the date of approval of the declaration. The National Assembly had both the mandate to extend the operation of an emergency for further periods of six months

and to revoke an emergency declaration at any time.⁷ Pursuant to the then section 29 of the Constitution therefore, a state of emergency could be extended every six months. As earlier observed⁸ Sir Evelyn Hone's emergency declaration continued to operate from the independence date until April 1965. The National Assembly continued to renew the emergency proclamation every six months on the 24th of April and October respectively. This trend of renewing the emergency declaration every six months continued until after the 1969 referendum. The developments after 1969 will come into focus in a later part of this essay. It is our wish to highlight here the invocation of the state of emergency and the reasons advanced to justify the continued renewal of the emergency proclamation.

REASONS ADVANCED FOR CONTINUANCE OF THE EMERGENCY PROCLAMATION

Zambia was among the first African states south of the Equator to attain political independence. The country consequently found itself in a position where some of its neighbours were still waging the struggle for independence. In Southern Rhodesia (now independent Zimbabwe), a minority white regime practiced the policy of racial segregation. Unwilling to share power with the indigenous people of the area, the white led government made a unilateral declaration of independence (UDI) in November of 1965 under the leadership of Ian Smith. As a result of Zambia's open support for the Rhodesian black nationalist movements which were trying to wrestle power from the hands of the white minority, "Zambia's position with UDI in place was fraught with dangers of which we are very much aware"⁹

Apart from its efforts to strangle the Zambian economy, the military retaliation launched by Southern Rhodesia against nationalist guerillas who were harboured in Zambia proved costly for the country. Vital infrastructure and installations were destroyed. This was in addition to the loss of innocent lives. Similarly, guerilla warfare raged on in the Portuguese colonies of Angola and Mozambique as the respective nationalist movements tried to dislodge the Portuguese colonialists. Among the targets was the Benguela railway on which Zambia was dependent for the transportation of imports and exports.

It was destroyed several times in the ensuing war.¹⁰ Apparently, Zambia's strategic geographic position in the region seemed to have forced her "to be immediately involved in the struggle not from choice but from necessity"¹¹

The external threat to the nations security aside, the situation within the country itself called for close monitoring by the government. Multi-party politics had the effect of creating tribal factions. The rival partys were inclined on appealing for support on tribal lines. All this eventually led to what have been aptly described as 'violent clashes' between party foes. It is not the authors wish to delve into the details of the inter party rivalry and what kind of damage or suffering the country was faced with. The brief account of the threat to the security of the nation from both internal and external influences, it is hoped, has put in perspective the governments anxiety to maintain law and order. At best, the state of emergency proclamation could only be continued.

THE 1969 REFERENDUM : HOW IT AFFECTED PUBLIC SECURITY LEGISLATION

As the UNIP-led government came to grips with the running of government it was realised that some hitches encountered as it ventured into its various programmes of development were merely technical in nature. Among these difficulties were the provisions of the 'referendum clause' in the constitution of the republic. This fell under Section 73 of the constitution. The clause outlined an outwardly laborious procedure whenever a constitutional amendment, in respect of certain matters, was sought to be made. These matters were those that affected fundamental rights and freedoms, the judiciary and the exercise of legislative power. The laid down procedure when effecting any amendment to be made was that before a Bill was introduced in parliament it had to be published in the Gazette at least thirty days before its first reading. On its second and third readings, the Bill had to receive the support of at least two-thirds of the members of the House. Finally the Bill had to receive the support of the majority of the citizens entitled to vote in parliamentary elections.

In 1969, a nationwide referendum was held whose goal was, once the required majority of votes from the citizens was obtained, to abolish the elaborate constitution-amendment procedure. If the referendum was successful it would mean that parliament would exclusively amend any constitutional provisions provided a two-third majority was obtained in the House and the Bill had been published in the Gazette thirty days prior to its first reading.

At the end of the voting exercise, the referendum clause was removed by a majority vote of the registered electorate and the **Constitution (Amendment) (No. 3) Act of 1969** removed the earlier 'arduous' procedure when amending certain constitutional matters. The significance of this will now be seen as reflected by subsequent legislation that affected the law of public security.

In the same year 1969 Parliament passed the **Constitution (Amendment) (No. 5) Act of 1969** which amended the provision that governed the review of detention or restriction orders by a reviewing tribunal. Before this amendment, the law was that a detainees case should be reviewed within one month, and in the case of restriction, within six months of such order. Thereafter, a review could take place at intervals of not less than six months. The amendment created a new Section 26A which provided that a person could now be detained or restricted for up to a year before his case could be reviewed at his request by an impartial and independent tribunal. In addition the review by a tribunal could not be conducted at intervals of less than a year. Desirable as removing the referendum clause was and taking into consideration the governments haste in bringing about meaningful development, the move facilitated the easy passage of legislation that could muffle the enjoyment of individual civil liberty. Opposition to the creation of the new section mentioned above was not minimal. Despite the governments assurances of its commitment to the protection of individual rights and freedom and that detainees still had access to judicial remedies such as writ of habeas corpus ad subjiciendum, the opposition Members of Parliament could only come short of calling the new legislation 'devilish' and being tainted with dictatorial traits.¹² It can only be reasonably observed that a plausible reason was never given to justify

the extension of the period before which a detention a restriction order could come up for review. Slowly but severely, the constitutional provisions guarding against encroachment of civil liberties were being undermined.

The Constitution underwent further amendment in 1969, this time by the **Constitution (Amendment) (No. 33) Act of 1969**. This amendment made provision to allow for the derogation from fundamental rights and freedoms of the individual which were enshrined in Chapter III of the constitution. Entitlement to these rights and freedoms was not absolute. It was made subject to the law that was in operation during any period when the Republic was at war or when a declaration under Section 29 (ie emergency declaration) was in force. The continued emergency declaration has therefore played a complementary role in the operation of the Preservation of Public Security Act as well as the Emergency Powers Act.

Of prime concern to us is that this amendment further stipulated that an emergency declaration under Section 29 of the Zambia Independence Constitution would continue in force unless revoked either by the President or by a National Assembly resolution, or unless there was a new President, in which case the declaration would lapse within seven days of his assumption of office. The result of this provision was the abolition of the requirement to renew an emergency declaration every six months by the National Assembly. Hence the reference to date that an indefinite state of emergency is in operation in Zambia.

THE COMING OF THE ONE PARTY-STATE CONSTITUTION

The year 1973 became an important one in the constitutional development of Zambia. At a press conference on 25th February 1972, the President of the Republic had declared that the governments decision to establish a one-party state was in accordance with the wishes of the people who had increasingly demanded the establishment of such political system.¹³ To lay a foundation for the formation of a one-party state, the government had therefore appointed a commission called the Chona Commission on the Establishment of One Party Participatory Democracy.

This Commission was given the task of travelling round the country and gather the peoples views on the type of one-party constitution they would like to see in place. It was to be from these views that the Commission would come up with recommendations on the changes to the constitution of Zambia necessary to bring about One Party Participatory Democracy.

The Commissions terms of reference were of course diverse. However, it is only within the competence of this discussion to address the terms of reference, and the Commissions eventual recommendations, that were immediately concerned with public security legislation and other provisions in any enactment. As an important pointer, the commission was to ensure that the rule of law, independence of the judiciary and more importantly, the protection of fundamental individual rights should continue to be maintained.¹⁴

Part II of the Commissions Report contained the recommendations that dealt with protection of fundamental rights and freedoms. The Commission was of the view that there be no detention without trial except whenever a state of emergency proclamation was in force. The government did not find it hard to come to terms with this recommendation because an emergency proclamation was already in force and so no difficulty would arise in effecting any lawful detention. It was further proposed that a detainee be furnished with a written statement specifying the grounds for his detention or restriction within ten (10) days of such order. This arrival at the ten day period within which to furnish a person with grounds was a likely compromise between the fourteen day period which was in the statute book then, and the previous period of five days under the Independence constitution. Commendably the Commission strove to ensure that a detainee had recourse to legal representation that might afford his release in the shortest possible time.

Another of the Commissions recommendations was that notification of detention or restriction be published in the Government Gazette within fourteen (14) days of such detention or restriction. The time provided for in the Constitution was thirty days. The Commission

attached importance to safeguarding fundamental rights and freedoms of the individual. It further suggested that the reviewing tribunal be established to review detention and restriction cases within three months of the detention. This was a proposed departure from the period of one year, as established by law, before which an independent tribunal could be set up to review any detention or restriction orders. This resolute concern for individual liberty was further exemplified by another radical recommendation the Commission made. It advised that the decision of the independent-tribunal reviewing detention and restriction cases must be binding on the detaining authority.

The proposals put forward by the Commission recognised that the state must possess significant power through emergency legislation to protect itself, the government generally rejected the proposed safeguards. Its contention was that at that stage in Zambia's national development and in view of the country's geo-political position in Southern Africa, those recommendations could not be implemented without detriment to her security and sovereignty.¹⁶ With due respect to the ruling party's concern for the security of the nation, could it be reasonably argued that individual rights should yield to the governments extraordinary powers accrued from emergency legislation? It is submitted that the answer to this question should be in the negative. The author strongly feels that to continue to maintain an ominous piece of legislation that purports to be for the 'safety' of the public is a sure way of facilitating the denial of justice.

A new one party-constitution was adopted when the President assented to the Constitution of Zambia Bill No. 30 1973, on 25th August 1973. The new constitution commendably recognised the individual rights and freedoms and importance of their protection. On a more sombre note, the emergency declaration and the laws which drew their authority from it compromised the enjoyment of these rights and freedoms.

The Second Republic was thus born finding legislation to deal with emergencies or threatened emergencies, firmly in place. The period outlined in this chapter was marked by the prominence the legislative arm of government played in enacting laws that were related to public security. However subtle a role these pieces of legislation may seem to have played in curtailing full enjoyment of civil liberties, their full impact was felt by ordinary Zambian citizens.

Nevertheless the courts have a say in matters where a person alleges that his constitutional rights have been, are being or are likely to be contravened in relation to him.¹⁷ It is with this in mind that the role of the judiciary in the development of the law related to public security will be viewed in Chapter 3.

FOOTNOTES

1. Zambia Independence Order, Laws of Zambia Volume X Appendix 3
Section 13
2. Section 3(1) Preservation of Public Security Ordinance, 1960
3. Section 7 Zambia Independence Order
4. By Statutory Instrument No. 1359 of 1965
5. Nwabueze, B.O Constitutionalism in The Emergent States
(Fairleigh Dickinson University Press, New Jersey, 1973) . 175
6. Section 29(2) (a), (b) Zambia Independence Order
7. Ibid, Section 29(3),(4)
8. see note 3, infra
9. Legum, C (ed). Zambia : Independence and Beyond. The Speeches of Kenneth Kaunda. (Nelson, London, 1966) p 227
10. Zambia News, 2nd April, 1967
11. Pettman, J.D Zambia : Security and Conflict (Dorset, London, 1974)
p 179
12. National Assembly Debates, 1969 October No. 44
13. Quoted from "Report of the National Commission on the Establishment of a One Party Participatory Democracy"
14. Ibid
15. Nwabueze, B.O Presidentialism in Commonwealth Africa
(St. Martins Press, New York, 1974) p 326
16. Government White Paper on the Report of the National Commission on the Establishment of a One Party Participatory Democracy.
(1972) p 2
17. see Article 29 Constitution of Zambia Cap 1 Laws of Zambia (1973 e

CHAPTER THREE

INTRODUCTION

Individuals in Zambia have over the years since independence been able to challenge, through the judicial court process, acts of the Executive done under the authority of any law which allows for the taking of measures required for the preservation of public security. In response, the courts have risen to the occasion whenever called upon to adjudicate on matters arising out of such challenge. It is the purpose of this chapter to examine the role played by the judiciary in Zambia in the development of the law relating to public security.

The scope of the chapter will be guided a great deal by case law reports at the authors disposal. In this respect because of the nature of law reporting in Zambia, the law reports for the period after 1985 for Zambian cases were not readily available and hence the limitation on the scope of the chapter.

The chapter will be divided into two, Part I covers the period after independence until 1987. The second part will focus on the Supreme Court decision in Rao v Attorney General with emphasis on the question whether economic sabotage falls within the ambit of the Preservation of Public Security Act.

PART I : A STUDY OF SOME PREVENTIVE DETENTION CASES IN ZAMBIA

From the outset without prejudice to the generality of the theme of this chapter, it is worth observing that the court cases to be placed under our scrutiny in this discussion involved the exercise of the power to detain persons under the authority of the laws in operation because of an emergency proclamation. This power to detain entails restriction on the freedom of movement of an individual. The question to be addressed in the analysis of these cases is: which law in Zambia authorises the taking away of a persons freedom of movement ostensibly in the interests of the safety of the public.

As earlier seen,¹ the situation prevailing in Zambia in relation to an emergency is that of a threatened emergency or a semi-state of emergency. The implication of the operation of this kind of emergency in Zambia is that the provisions of the Preservation of Security Act² come into play, since by section 3(1) of this Act "the provisions of this Section shall have effect during any period when a declaration made under paragraph (b) of sub-section (1) of Articles 30 of the Constitution has effect." The said section goes on to provide, inter alia, for the making of regulations to provide for the detention of persons.³

Our modest approach to seeing these powers in action begins with the case of William Muzala Chipango v The Attorney-General for Zambia.⁴ The applicant applied for a writ of habeas Corpus against a detention order made by the President under the then regulation 31A (now regulation 33) of the Preservation of Public Security Act.⁵ He sought the courts declaration that the constitutional provisions guiding detention had not been complied with by the state, therefore rendering his continued detention unlawful. The applicant contended that the relevant provisions under Section 26A paragraph (a) and (b) of the constitution had not been complied with, to wit; that the grounds of detention which should have been furnished not more than fourteen days after the commencement of his detention were furnished after sixteen days. He further alleged that the publication of the detention order in the Government Gazette had not been done within the stipulated one month period but insisted seven weeks had elapsed before the publication.

Delivering judgement, Magnus, J. noted that the state had failed to comply with the mandatory constitutional requirements regarding detainees. A detainee should be given the maximum opportunity to enjoy the rights left to him. The result of non-compliance with these mandatory requirements was to render the continued detention of the applicant

unlawful. The learned judge expressed the view that "these are constitutional conditions subsequent to arrest. They are all mandatory ... and if they are not followed, I can only conclude that such non-compliance must render further detention unconstitutional."⁶ The court ordered the release of the applicant.

The court therefore stood out in defence of the rights left to a detainee as provided for in the Constitution. It insisted on strict compliance with obligatory constitutional provisions that guarded against possible encroachment on an individual's liberty.

The Supreme Court of Zambia in Sharma v The Attorney General⁷ considered the issue which similarly turned on compliance with the constitutional requirements, but this time the requirement to furnish the detainee with grounds of detention. The appellant was detained under regulation 33(6) of the Preservation of Public Security Regulations. This detention (hereinafter referred to as 'police detention') was subsequently revoked and the appellant then served with a detention order signed by the President (referred to as 'presidential detention'). Grounds of detention for the presidential detention order were served on the appellant as required by Article 27 of the Constitution⁸ within the stated time.

It was submitted on behalf of the applicant that the provisions of Article 27 of the Constitution applied both to police detention orders and presidential detention orders. Failure to furnish grounds by the police within the stipulated fourteen day period rendered the applicants continued detention unlawful, and he should therefore be released..

Setting out judgement, Baron, D.C.J stated that grounds for a police detention must exist at the time of the arrest. Making reference to regulation 33 and its sub-regulations which gave authority to detain, he said at page 165 : "Each of them authorises, for its different purposes,

during any period when the Republic is at war^{or} a declaration under Article 30 of the Constitution is in force, the deprivation of a man's liberty without trial and during such deprivation the safeguards set out in Article 27 must apply."

The result of this is that the police must be able to justify detention by producing grounds for which they reasonably believed it was necessary to take the action they took. In the absence of such grounds, a detention is invalid. Again in the case of a presidential detention order, there must be grounds which justify the taking of a measure as drastic as detention without trial.

Another matter arising out of a presidential detention order was dealt with in the case of In Re Kapwepwe and Kaenga.⁹ This was an appeal to the Court of Appeal against a decision of the High Court refusing to issue appellants writs of habeas corpus.

Briefly, the facts were that the applicants had been detained under regulation 33(1) of the Preservation of Public Security Regulations. The first applicant was served with documents in compliance with the Provisions of the then Section 26A(1)(a) of the Constitution requiring furnishing the detainee with a statement specifying 'in detail' the grounds upon which he had been detained. The first applicant argued that the grounds of detention with which he was furnished did not specify in sufficient detail information which could enable him make adequate representation.

How the court dealt with the first applicants claim is illustrative of the way it arrived at the test to be applied when dealing with the issue of specifying in detail grounds upon which a detainee can make adequate representation. The judgement of Baron, J.P is illuminating. Stressing the far reaching powers of detention, the learned judge noted that the furnishing grounds in detail was one of the ways of enabling a detainee make meaningful representation.

At p. 263, he said, "In approaching the statement of grounds, one cannot look for language as precise as that which one requires in legislation" and later, "And if, approaching the matter in this way the ground furnished is capable of being intelligently understood and is sufficiently definite to furnish materials to enable the detained person to make a representation, S.26A(1) (a) has been complied with."

Applying these tests to the facts, the first applicants appeal was dismissed on the basis that grounds alleging a conspiracy to endanger the safety of persons and property during stated months, and in consequence of that conspiracy a number of people being assaulted and threatened with death, property being destroyed and damaged, all contained enough detail to enable the detainee know what was alleged against him.

The Courts, it can be seen, have throughout endeavoured to underline the principle of strict compliance with established constitutional provisions by the detaining authority. Though the state is liable for an action for damages in lieu of non-compliance with these constitutional provisions, "that is a very small consequence compared to the necessity to safeguard the rights and liberty of the common man." 10

**PART II : DO ECONOMIC CRIMES FALL WITHIN THE AMBIT OF THE
PRESERVATION OF PUBLIC SECURITY ACT?**

One of the most arduous tasks that the Zambian Courts faced in the last decade was the interpretation of 'public security,' as defined under the Preservation of Public Security Act, in relation to economic crimes. It is accepted that crimes of a highly organised character became prevalent in Zambia during the 1980's. Notorious among such vices were illegal dealings in drugs, illegal export of precious stones and flouting of exchange control regulations.

These syndicates were highly organised and those involved, or implicated, ranged from customs officials to prominent Zambian citizens. It was observed in the process by analysts that such clandestine activities were capable of denying the country the much needed foreign exchange - thus lending credence to the term 'economic sabotage' ¹¹

The measures taken by the State to police the situation included detention of persons suspected of involvement in the illegal activities. To this end, the Preservation of Public Security Act was employed. But do these acts constitute a threat to public security?

Before considering how the courts dealt with this question, it would be convenient to lay out the definition of 'public security' provided for in the Preservation of Public Security Act.

Section 2 provides :

" In this Act, the expression 'public security' includes the security of the safety of persons and property,

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

Of interest is the fact that preventive detention measures had previously been taken on account of alleged unlawful economic activities which were considered 'prejudicial to the economic security of the Republic.' However, the issue of relevancy of grounds of detention to public security was never raised then.¹²

A turning point came in the case of Kaira v Att. Gen.¹³ The applicant was detained pursuant to a detention order made under regulation 33(1) of the Preservation of Public Security Regulations. The grounds of detention served on the applicant alleged that he had unlawfully externalised, and attempted to externalise huge sums of money. These activities were prejudicial to the security of the public.

The applicant claimed that his detention was invalid for a number of reasons. He contended, inter alia, that the grounds for his detention were not relevant to the purpose of the Preservation of Public Security Act under whose authority he had been detained. Section 2 (as set out above) of the Preservation of Public Security Act did not embrace economic activities, he contended.

The learned Attorney General however submitted that the maintenance of supplies and services essential to the life of the community should be construed to include the aspect of the nations economic security. The denial of money and any other facilities which facilitate the maintenance of supplies and services the community needs can be said to threaten the economic security of a nation. Any chaos that arises out of such deprivation can threaten the very life of the nation, and hence economic security falls within the meaning of public security as defined by Section 2.

Cullinan, J. in passing, observed that many as the consequences of a weakened economy may be because of activities such as currency smuggling, the connection was not in any way proximate with public security. The onus was on the detaining authority to show that the grounds of detention were sufficiently connected with public security. The respondent had not done so and the applicants detention was pronounced invalid.

Circuitous as the reasoning might be, the merit of the decision can be discovered from the reminder Cullinan, J. gives in the same case at page 83, where he says :

" It must be remembered that the Preservation of Public Security Act is a product of pre-Independence legislation and was enacted, as I see it, primarily to prevent civil unrest. The words 'Public Security' in their ordinary sense surely mean the security of the safety of all persons and property ... and the preservation of law and order. "

The Preservation of Public Security Act was therefore not concerned with economic prosperity but the preservation of the life of the community. If Parliament had intended the definition to include the aspect of the the nation's economy, it would have been better to insert such words as the 'maintenance of the national economy' to cover the question of economic security.¹⁴

The decision in Kaira¹⁵ was a subject of appeal to the Supreme Court at the time of the Supreme Courts' decision in Rao v Att. Gen.¹⁶ This latter, all important case also turned on the issue of 'economic sabotage.' The Supreme Court, in a mammoth judgement explored and ventured to pronounce what the law was with regard to whether economic sabotage fell within the ambit of the Preservation of Public Security Act.

Rao v Att. Gen.¹⁷ was an appeal against the dismissal by the High Court of an application for a writ of habeas Corpus ad subjiciendum. The applicant was the subject of a detention order made under reg. 33(1) of the Preservation of Public Security Regulations. The grounds of detention served on the applicant alleged that the applicant had been involved in the illegal trafficking and smuggling of precious stones between Zambia and unknown foreign countries. The applicant, the grounds went on, knew or ought to have known that such activities were highly detrimental to the economy of Zambia since precious stones were a source of foreign exchange which was in critical shortage at the time. There was therefore genuine apprehension that if left at large the applicant would persist in these activities and thus it had been found necessary to detain him.

The critical issue raised in the application was whether illegal economic activity such as those alleged in the grounds of detention fell within the definition of public security as provided under Section 2 of the Preservation of Public Security Act.

In his judgement the learned Chief Justice was of the considered view that the definition of public security in Section 2 (as set out above) was not exhaustive because of the word 'includes.' Any classification of acts which were not specifically mentioned in the definition but have a sufficient connection with public security would fall within the ambit of the definition. It was here that the departure from the decision in Kaira¹⁸ is marked.

Following the Chief Justices careful reasoning, it seems the disagreement on the proximity of economic activity and public security was with regard to the circumstances under which any detention was made. Cullinan, J. in *Kaira v Att.-Gen.* appears to have been hoist with his own petard because he says "while a breach of exchange control regulations can be said to have a connection with public security, I do not consider that such connection is in any way proximate.¹⁹ This argument thrives on the belief that if an activity does not immediately pose a threat, then the connection to public security is not proximate. In the present case however, the deprivation of the scarce foreign exchange through illegal trafficking in precious stones was "manifestly prejudicial and indeed proximate to public security because it affected the maintenance of supplies and services essential to the community, and also (affected) public order as demonstrated by the (1986) food riots. " 20

The varying circumstances prevailing therefore appeared an important indicator towards the reasonableness of any action taken to preserve the security of the public. As long as, in the circumstances, it can reasonably be expected on common sense standard that an activity could affect public security, there is no need to distinguish between activity directly leading to a situation of insecurity and activity which creates or conduces an environment and conditions in which a situation of insecurity is bound to occur. The circumstances prevailing in Zambia required that a reasonable person would be wary of the likely dire effects on the economic life of the nation if the little foreign exchange available was drained.

Giving a dissenting opinion, Bweupe, AJ. S was of the view that the intention of Parliament when enacting the Preservation of Public Security Act should be considered. Tracing the history of this Act, he came to the conclusion that the definition of public security under Section 2 did not envisage to affect such activities as drug

trafficking, illegal externalisation of funds, smuggling of rhino horns etc, but was meant to deal with such disorders as arson, intimidation, riots or unlawful assembly. The framework of circumstances which moulded the Preservation of Public Security Act at the time "could not be a basis for bending the *ejusdem generis* rule to enable the court arrive at the meaning of the word 'crime' ²¹ in Section 2 in view of the present economic climate. The nexus with public security notwithstanding, 'economic crimes' were not within the spirit and intendment of the definition under Section 2.

It was probably in anticipation of such an interpretation as offered by Bweupe, A.J.S that the Attorney General had published the Preservation of Public Security (Amendment) Bill No. 8 of 1987. It sought to amend Section 2 of the Act by the insertion immediately before the words 'supplies and services essential to the life' of the words 'the economy of Zambia.' This would clearly show that economic activities are covered by the Preservation of Public Security Act.

It is interesting to note how the Supreme Court decided this question of economic crimes. The dissenting opinions assisted in bringing out the inadequacy, as well as doubts, about the use of Preservation of Public Security Act to deal with economic crimes. What this suggests is that law in this regard needs to be amended to offer a clear cut position so that confusion and doubt does not arise.

The need for a clear cut position as suggested above becomes even more evidently clear in the light of the possible misuse of emergency powers. This can be illustrated by the events of February 1988 in which the President revoked traders licences and acquired their property, on the authority of the Emergency Powers Act.²²

The Constitution of Zambia, under Article 30 governs emergencies. This paper has shown that a semi-state of emergency is in operation in Zambia. The Emergency Powers Act can however only come in operation when a full state of emergency is in force. "Therefore it is only open for one to argue that the said (emergency) regulations could possibly have been irregularly made." ²³

Part II of this Chapter has made an attempt at seeing how the Preservation of Public Security Act was challenged in relation to economic crimes. The Courts' analysis of the question whether or not these crimes are governed by the Act was discussed. We have attempted to show that the Preservation of Public Security Act has its shortcomings. The author also sought to share the view that emergency laws in Zambia should be amended to rid them of this inadequacy, and that it is possible for such laws to be inappropriately used if such clarity is not made.

The next and final chapter is an overview of the foregoing chapters, and will also seek to comment on any possible future developments.

Footnotes

1. Chapter 2 supra p. 17
2. Cap. 106
3. Section 3 (3)(a), Cap. 106
4. Selected Judgements of Zambia (1970) No. 28
5. Cap. 106
6. op. cit p 187
7. (1978) ZR 163
8. Cap. 1
9. (1972) ZR 248
10. per Doyle C.J Att. Gen. v Chipango SJZ (1971) p55, 62
11. Southern African Economist Feb/March 1988 p 27
12. see for instance Re Seegers (1976) ZR 117
13. (1980) ZR 65
14. per Cullinan, J. Kaira v Att. Gen (1980) ZR 65, 80
15. op. cit
16. unreported, Supreme Court Judgements. No. 30. 1987
17. Ibid
18. (1980) ZR 65
19. Ibid; p 79
20. Silungwe, CJ in Rao v Att. Gen S.J.Z No. 30 (1987) p 197, 203
21. Bweupe. A.J.S Ibid p 267
22. Cap. 108
23. 'The Use of Emergency Powers in Zambia : (A Comment on The Revocation of Trading Licences and Seizure of Property. 1988) by Mumba Malila in LEGALITY, a University of Zambia Student Law Journal, 1988/89

CHAPTER FOUR

CONCLUSION

Having noted the historical background of the law of public security in Zambia and the role played by the judiciary in the development of public security law, the last chapter will progress on a brief consideration of what has been highlighted in the foregoing chapters and will also endeavour to make some suggestions.

To begin with, emergency legislation in Zambia has had its share of contradictions even from earliest times. Notably, the early emergency powers vested in the governor in 1927 were an anticipation of the occurrence of an event ~~or~~ events which would necessitate the invocation of these powers. It is submitted however that this early piece of legislation was in operation in other British colonial territories which had begun experiencing political strife. The move to adopt these powers in Northern Rhodesia was a protective measure taken to prevent being caught unawares by any event that could occur in the territory. The main fear was politically motivated agitation for political independence.

It was also seen in chapter one that emergency laws conferred overwhelming authority ~~to take any measures which~~ ^{on} the governor of the territory. The authority to take any measures which the governor deemed essential for the safety of the public as well as the life of the community has been a stigma which remained ingrained in the public security laws adopted in Zambia after independence.

From the first chapter, it becomes evidently clear that emergency powers were put to effective use to avert, and control any political unrest, strikes as well as a rebellious religious uprising. The maintenance of law, public order and security was the ultimate preserve of these emergency laws.

It can be commented that credit goes to emergency legislation that enabled the authorities to deal with the real dangers that arose after independence such as the military menace posed by the minority regime of Ian Smith to the south. Chapter two focussed on the transition to a One Party State system of government. It was seen how some of the credible recommendations forwarded by the Commission were reflected by the government, on the grounds that Zambia was still in a precarious geo-political position. This has continued to be the prominent reason for continuing the state of emergency.

However, the continued state of emergency is questionable given the changed geo-political situation in the Southern African region. It is with this in mind that it is worth noting that our Members of Parliament have been on the forefront calling for the lifting of the state of emergency. The situation where Zambia was in forefront in calling for freedom in Africa and yet it continued to detain people for long periods without trial should not be allowed. ¹

In chapter three it was seen how the courts have interpreted issues arising out of detention orders. It was realised from the discussion that the courts have stood out for the strict observance of the laws guiding detention. The seemingly inadequate and doubtful nature of the law for the preservation of public security, in relation to economic acts which are deemed prejudicial to the security of the public, was also exposed in the second part of chapter three.

Thoughts for The Future

The measure of preventive detention in Zambia is only authorised when an emergency proclamation is in force. It is suggested that to avoid a vacuum once an emergency is lifted, new legislation in relation to detention, must be explored. The author however takes cognizance of the experiences this developing country has gone through, especially in the economic sphere, with regard to activities that have the potential of disrupting the life of the community. This notwithstanding, declarations of emergency must be reserved for grave situations.

It is also suggested that a bold attempt be made to give guidelines as to what acts should be deemed prejudicial to the security of the State. The Presidents discretion in the matter must not be left to cast an ominous doubt about what constitutes 'acts prejudicial to public security'

Recent developments indicate that the emergency declaration may make a slow exit from the Zambian statute books. The President, indicated at a press conference on 15th August 1990² that the emergency declaration would in future be subject to renewal in parliament on a quarterly basis.

With such a welcome consideration, it is hoped that this paper has been able to highlight in an adequate manner the development the law governing public security in Zambia, and that it has also assisted to draw a picture of the role played by the courts in the development of the law of public security.

Footnotes

1. Times of Zambia December 5 1989
2. Times of Zambia August 16 1990

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Re Cain, Selected Judgements of Zambia (1974) 42