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THE STATE OF EMERGENCY AND ITS
PRACTICAL APPLICATION IN ZAMBIA

by

MBAMBARA ANOCK

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DEDICATED to

My brother Arnold Mbambara who has made
tremendous sacrificial effort in my
education.

"Posterity will ever honour and
cherish your efforts."

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Faculty of law
University of Zambia

MBAMBARA ANOCK

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CHAPTER 1

INTRODUCTION

National Security from both internal and external dangers is vital for any country's smooth running of its own affairs. In fact the very existence of a sovereign state depends to a large extent on the ability of that state to effectively contain dangers from within and outside itself. Equally important, however, for any democratic country is the need to protect individual freedoms given or recognised by both the municipal and international law.

To ensure maximum security, Zambia like many other countries has at its disposal legislation that empowers the Executive to exercise emergency powers whose effect includes extinguishing certain basic Human Rights. But appearing on the Zambian statute book are Human Rights that have been recognised and rendered justiciable.

In light of this seemingly self contradictory state of affairs, it has often been an issue of great controversy to determine objectively and with substantial certainty, circumstances in which, and the extent to which the security of a nation must override individual freedoms and liberties. Professor Nwabueze observes that

"The state must take sufficient power to preserve itself. The rights of the individual, it has been said, depend for their very existence and implementation upon the continuance of the organised political society that is ordered society established by the constitution."

It is worthy noting the area of uncertainty however as Nwabueze does:

"The point of controversy is, however, in what circumstances and subject to what safeguards should individual rights yield to the claim of extra-ordinary powers by the government to preserve the nation? Should every threat to the peace and security of the state, whether real or imaginary, justify encroachment upon the rights of the individual?² Many indeed will be inclined to respond negatively to the latter question.

However regardless of any political or social justifications advanced at any time during the state of emergency, it can hardly be disputed that this state of emergency under which Zambians have until recently been governed must be examined in theory and practice which examination must provide the basis on which sound emergency legislation which enhances and furthers democratic ideals while providing the state with sufficient power to preserve itself may be founded.

It is in this regard that this essay examines, in this first chapter, the theoretical background of the concept of state of emergency. The object of this part of the essay will be to determine with substantial objectivity what the state of emergency is and how inevitable it is if at all. It will be examined, the circumstances in which a declaration of state of emergency what ever its kind can legally and objectively be justified. where a state of emergency has been duly declared, its effect on Human Rights is, if not within our full knowledge already, to be discussed herein but only in brief.

Having established an objective or standard conception of the state of emergency in the preceding chapter, it will provide the basis upon which we shall examine in the second chapter the genesis of the state of emergency in Zambia. This part of the thesis will examine, in comparison with the circumstances discussed in the first chapter, the real reasons and conditions that "necessitated" the introduction and implementation of emergency laws in Zambia. Our major concern in this area will centre on investigating the nature and ambit of the law which provided for the use of emergency powers and this inevitably entails a careful consideration of the practical application of such emergency laws.

It is in this vane that from the very start a well defined area of concentration is highlighted as distinguished from other literature that has endeavoured to explore this field of Human Rights. It is to be observed for example that while a number of scholars have only explored issues of Human Rights in Commonwealth Africa,³ and thereby exposing an overview of the protection or violation of Human Rights in such countries, this research makes a narrow approach by looking at Human Rights through emergency laws in Zambia and it provides an update in the same.

Among the most notable and distinguished scholars are Dr. A.W. Chanda and professor L.S. Shimba who provide detailed work on the provision, recognition and violation of Human Rights in Commonwealth Africa generally and Zambia in particular. Indeed very many other researchers whose work we may from time to time refer to have ably done their part. But the area is far from exhaustion and this work is neither intended to be little the work of any of these distinguished scholars nor to exhaustively deal with this unexhaustive area of Human Rights. Rather this work concentrates on and confines itself to a single area with a view to provide a basis for a reformulation of the law to suit the new or envisaged democratic epoch.

In the following part of this chapter we endeavour to define the concept of emergency by looking at various pieces of legislation and other scholarly work. This must provide us with the background to the concept under discussion.

THEORETICAL BACKGROUND TO THE CONCEPT OF STATE OF EMERGENCY

A state of public emergency has been defined as:

"An exceptional situation of crisis
or public danger actually or imminent,
which affects the whole population
or the whole population of the area to which
the declaration applies and constitutes a
threat to the organised life of the
community of which the state is composed."⁶

Thus the Jamaican constitution has categorically defined the period of "public emergency " as any period during which-

- a) Jamaica is engaged in any war; or
- b) There is in force a proclamation by the Governor-General; declaring that a state of public emergency exists; or
- c) There is in force a resolution of each House supported by the votes of a majority of all the members of that House declaring that democratic institutions are threatened by subservion"⁷

Comparatively a state of public emergency in Zambia is governed (not defined) by the constitution, preservation of public security act and the Emergency Powers Act. The use to which these statutes have been put will be our main focus in the following chapters, but it is observable from the outset that these statutes neither set any minimum standards nor define the

concept of public emergency itself and thereby endowing the executive with unfettered discretionary power to decide when and when not there is an emergency situation.

Probably not many can disagree that rights and freedoms of individuals can only be meaningfully protected if the security of the state or community to which such individuals are part is duly secure. The basic individual right therefore is the right to a free, safe and secure sovereign state. Abraham Lincoln thus aptly said:

"Often a limb must be amputated to save life, but a life is never wisely given to sake a limb."⁸ The rationale therefore for providing extra-ordinary powers in the legislation is clear and can be summed up thus:

"Every man thinks he has a right to live and every government thinks it has a right to live. Every man when driven to the war by a murderous assailant will oversee all laws to protect himself and this is called the great right of self defence. So every government when driven to the wall by a rebellion will trample down a constitution before it will allow itself to be destroyed. This may not be constitutional law but it is a fact."⁹

Justifications for emergency legislation range from the problems of national integration, threat posed by external enemies or internal political dissidents Geo-political position, effects of under development and economic crisis, to lack of democratic traditions. This is especially so in third world countries. In recognition of such the International law has also allowed for emergency legislation. Article 4 of the International Covenant on Civil and Political Rights allows state parties in times of emergency and when the declaration is in force to institute measures derogating from certain individual rights, but to the extent only and strictly as demanded by the exigencies of the situation.¹⁰

Notwithstanding the inevitability of emergency laws, it is to be observed that various legal instruments have set minimum standards by either expressly defining circumstances in which a partial or full state of emergency may be declared or by prohibiting legislation which confers such power as to derogate from non-derogable rights, so that individual rights are not subjected entirely to the whims and caprices of the executive. In this regard the International Covenant on Civil and Political Rights while allowing for emergency laws¹¹ states also that the measures taken must not only be as required by the exigencies of the situation but also that they must not be inconsistent with their obligations under international law and should not involve discrimination solely on the ground of race, colour, sex language, religion or social origin. In fact the instrument also provides for non-derogable rights of freedom from torture or cruel, inhuman or degrading treatment or punishment, the right

to life, freedom of thought, conscience and religion and others.

It is discernable also from the definition of the state of emergency¹² that only "an exceptional situation of crisis or public danger actually or imminent and which constitutes a threat to the organised life of the community" qualifies to be an emergency situation. Even exponents of these extra-ordinary powers envisage, as a situation of public emergency, a catastrophic situation which involves matters of life and death to the people or state itself not an imaginary threat. A number of international instruments¹³ equally indicate the extent to which emergency powers can override individual rights during a state of emergency.

Such minimum standards¹⁴ can however be meaningfully observed if they are reflected in the local legislation so that they are recognised and enforced by individuals. We have observed in this regard how the Jamaican¹⁵ constitution has categorically defined the period of public emergency. The Zimbabwean constitution provides that the primary responsibility for the imposition and continuation of a state of emergency be given to the legislature.¹⁶ Noteworthy also is the constitution of Ghana and the 1979 Nigerian constitution which set defined circumstances to constitute the state of emergency.¹⁷

An examination of the Zambian emergency legislation shows a marked difference from the above legal instruments. Contemporary Zambian legislation on emergency power shows that firstly the constitution under articles 30 and 31 provide thus:

"The president may at anytime...declare that a situation exists which if is allowed to continue may lead to a state of public emergency.

The sub-articles to the above cited articles deal only with the duration, revocation or expiration of the declaration. But the whole power to determine when and when not there is a situation of public emergency remains with the president (in consultation with cabinet for an emergency).

Secondly and pursuant to these constitutional provisions, when ever the president makes the declaration as provided under article 30 or 31 of the constitution either of the following two statutes come into operation, that is to say the Preservation of Public Security Act (cap. 106) and the Emergency Powers Act (cap. 108) of the Laws of Zambia. These two statutes differ substantially with regard to the nature of the declaration, duration of the declaration, regulations made and the powers conferred. However they are both intended for "Public Security."²⁰ This term of "Public Security" has itself raised controversy in litigation.²¹ This, it is observed because in the first place, there is no objective standard or conception of what constitutes a state of emergency within which the true interpretation of the term "public Security may be found. It has been argued that "it is precisely the absence of a clear definition of public security which has inevitably culminated in the gross abuse of security powers"²²

In short this forms the legal basis for emergency powers in Zambia and we will examine in the next chapter how these laws have evolved and how they have been put to use or implemented.

NOTES ON CHAPTER 1

1. Nwabueze B.O. Presidentialism in Commonwealth Africa. (St. Martin's Press, New York) 1974, p. 304
2. Ibid p.304
3. Nwabueze B.O.'s works on Presidentialism in Commonwealth Africa, Constitutionalism in Commonwealth Africa and Judicialism in emergent states.
4. Chanda A.W., J.S.D. thesis
5. Zimba L.S. Ph.D thesis
6. Chanda A.W. J.S.D. thesis p.232
7. Banner David, Emergency Powers in peace time; modern legal studies (Sweet & Maxwell London) 1985 P.4

8. Letter by Lincoln Abraham to Huges in J. Nicolny and J. Hay, Complete Works of Abraham Lincoln, (New York 1905) 11 p. 508
9. Op.cit p. 2
10. Brownlie (ed) Basic Documents on Human Rights (2nd ed; 1981) p. 129-130
11. Article 4 (1)
12. See Note 6
13. Paris Minimum Standards of Human Rights Norms in a State of Emergency (August 26- Sept. 1, 1984) I.L.A.
14. Ibid
15. See Note 7
16. Hatchard John, "Emergency Powers in Zimbabwe: An overview of Post-Independence developments" Vol. 18 , Zambia Law Journal 1986 p. 35 or section 66 of the Constitution of Zimbabwe.
17. S.33(a) of Ghana Constitution defines the state of emergency as including any action that has been taken or is immediately threatened by any person or body of persons-
 - a) which is calculated to deprive the community of the essentials of life or
 - b) which renders necessary the taking of measures safety, the defence of Ghana and the maintenance of public order and supplies and services essential to the community.

The 1979 Nigerian constitution under section 265 also makes provision to the same effect.
18. Article 30(1) of the 1991 Constitution of Zambia

20. Section 2 of the preservation of public security Act (cap. 106) and section 3(1) of the Emergency Powers Act (cap. 108) of the Laws of Zambia.
21. e.g. Cullinan, J. in the case of Kaira v. The Attorney-General (1980) ZR 65 at p. 80 and Silungwe C.J. in the case of Mudenda v. The Attorney-General (1979) ZR 24 at p. 248
22. Chanda A.W., "The Legal basis of emergency Powers in Zambia," Zambia Law Journal (1986) Vol. 18 p. 23

CHAPTER 2

STATE OF EMERGENCY IN THE SECOND REPUBLIC

2.0 THE GENESIS OF THE STATE OF EMERGENCY IN THE SECOND REPUBLIC

2.1 BRIEF BACKGROUND

Before Zambia's Independence in 1964, there existed three pieces of legislation in Northern Rhodesia intended to deal with full political emergency situations. These were:- The Emergency Powers Order in Council 1939-61 which applied to other British Colonies in Africa/Asia as well; the Emergency Powers ordinance (cap. 29 of the laws of Northern Rhodesia) and the Preservation of Public Security Ordinance 1960 (ordinance No.5 of 1960)

Like any other emergency laws, the rationale for these laws was to ensure public safety, the maintenance of public order, the defence of the territory, the suppression of mutiny rebellion or riot and for maintaining essential supplies and services to community.

Initially these pieces of legislation did not assume a large measure of application. However in due course when ideas of nationalism characterised the "natives", the necessity to apply these laws manifested. In 1959, in the case of Expate Mwenya; ¹ the Governor's ability to act independently by invoking his powers conferred on to him by the emergency laws came under test. Mr. Mwenya in this case, a native of Northern Rhodesia suffered two restriction orders by the Governor of Northern Rhodesia in accordance with the powers granted by the Emergency regulations 1956 of Northern Rhodesia. Upon his restriction to the rural district of Mporokoso in Northern Rhodesia he applied for a Writ of Habeas Corpus to the English Divisional Court directed to the Secretary of State for the Colonies; the Governor of Northern Rhodesia and the Commissioner for Mporokoso District on grounds that he had unlawfully been detained and therefore sought to be released. The governor's authority and independence was vindicated when the court held that an English court could not issue a writ of habeas corpus to the governor or commissioner in a foreign territory like a protectorate. By reverse implication this holding meant that the protection of colonial subjects was weakened.

Thus by use of the aforementioned laws the colonial government was able to suppress many seemingly rebellious activities. In the same year 1959 in the case of R v. Chona, ² the Governor using his unfettered powers under the emergency laws as indicated by the Mwenya ³ case acted against Mainza Chona of UNIP.

In this case, Mr. Chona in his capacity as secretary of UNIP issued a press statement which among others exposed the evils of colonial rule. The circular read in part:

"Those of you who have attended the courts while trying your political colleagues must have the same impression as myself in that the courts are here to rubber stamp oppression and to administer mock justice. As for native courts, all of you must have got the impression that they have been reorganised to jail any African that the government Administration Officials want to be jailed whether he has committed an offence or not.⁴

Mr. Chona was, on the basis of this information, charged with the offence of publishing "seditious publication" contrary to section 53 of the Penal Code. He contended that there was no "seditious intention" in publishing the information and that all he was doing was to expose the injustices being suffered by Natives and Native Politicians. The will of the colonial government was upheld in the judgement even though it was clear that the law of sedition as understood and practised in Britain was to be compromised by this kind of judgment.

2.2 THE BEGINNING OF THE STATE OF EMERGENCY: CIRCUMSTANCES
AND LEGISLATION

On July 28, 1964, the Governor issued a proclamation under which section 4(2) of the Preservation of Public Security Regulations Ordinance came into effect. Regulation 31(A) read;

"Whenever the Governor is satisfied that for the purpose of preserving public security it is necessary to exercise control over any person, the Governor may make an order against such person directing that such person be detained..."

Forthwith the territory became under a state of semi-emergency. Initially this semi-emergency situation was calculated to deal with native political dissidents. However soon after the issuing of the proclamation, there was an uprising of the Lumpa church of Alice Lenshina. The Lumpa "were fighting for the right to remain above the law, the right to establish a private state within the state, and the right to offer violence with impunity to the representatives of law and order. No government could ignore a challenge of this kind without forfeiting the right to rule.⁵ The rebellion was crushed, about 600 people died and many in excess of 19,000 fled to Congo.⁶ However the state of semi-emergency was justifiably renewed for after every six months. Also in 1964 upon attainment of independence, the emergency Powers order in Council was terminated by section 13 in the Zambia Independence order 1964 which stipulated that the Order in Council "cease to have effect as part of the laws of Zambia."

The Emergency Powers ordinance was also revoked and replaced by the Emergency Powers Act 1964 which came into force on eve of Zambia's Independence. The Preservation of Public Security Ordinance was merely renamed the Preservation of Public Security Act.

The independence Constitution provided that the continuation of declaration of emergency, full or semi, would require to be sanctioned by the national Assembly every six months. Thus by force of the Zambia Independence Order, the state of semi-emergency declared by the colonial government in July 1964 during the Lumpa uprising was continued after independence. Under this kind of situation authoritarian rule was increased. This had two basic justifications: "firstly since most countries attained independence at different times, those that got theirs earlier were confronted with the possibility of imperialist agents being infiltrated into their countries from neighbouring countries which were not yet independent"⁷.

"Secondly since colonial rule was notorious for its "divide and rule" policies and tribal loyalties, which had been deliberately encouraged by colonialists threatened the peaceful evolution of monogeneous nation and therefore it was fact necessary for a young state to arm itself with sufficient pre-emptive powers to forestall any such disruptive development."⁸

In this vane therefore it was felt that because of Zambia's geo-political position, Zambia's harbouring of rebels of neighbouring countries who fought for independence and the keeping of refugees, the emergency situation be continued. Indeed under these circumstances national security was impaired. Reports⁹ indicate that during this period of time economic infrastructure were destroyed due to constant raids that ensued from neighbouring countries from about 1978 to 1979.

However, what could be termed major changes in Zambia's emergency legislation were introduced in 1969 and 1974 by two constitution amendments; namely Amendment (No.5) of 1969 and Amendment No. 18 of 1974. Many changes regarding revocation, approval etc of the emergency declaration were effected by these amendments. As shall be seen on application, a detainee only remained with constitutional safeguards which could realistically asserting, be granted at the court's mercy. As highlighted in chapter 1, three sources of law guided any emergency declaration depending on the kind of emergency; the constitution, preservations of public security Act cap. 106, and Emergency Powers Actcap. 108. Let us now see how these statutes were practically applied.

2.3 THE PRACTICAL APPLICATION OF EMERGENCY LAWS IN THE SECOND REPUBLIC

The use of emergency powers in the Second Republic in certain instances can fairly be described as the "use of a gun to destroy a mosquito." Our endeavour here is not to determine whether or not the state of emergency was reasonably required but how the state of emergency itself was applied.

We have noted earlier that at the declaration of the semi-emergency in July 1964, two statutes in addition to the constitution governed emergency declaration i.e. the preservation of public security Act and the Emergency Powers Act. The 1969 and 1974 constitutional amendments earlier mentioned had adverse effect on the rights of detainees and restrictees. The president was given overwhelming discretionary power to detain people if he was satisfied that such people constituted a threat to public security. An issue over the justiciability of an emergency declaration arose in the case of Simon Kapwepwe and Elias kaenga v. Attorney-General¹⁰ Baron J. stated that:

"It must be stressed that the president has been given power by parliament to detain persons who are not even thought to have committed any offence or to have engaged in activities prejudicial to security or public order but who perhaps because of their known associates or for some other reason, the president believes it would be dangerous not to detain."¹¹

This was indeed so. Section 3(3) of P.P.S. Act (cap. 106) provided:

"If the president is satisfied that the situation in Zambia is so grave that it is necessary so to do he may by statutory instrument make regulations to provide for the detention of persons."¹²

Also s.33(1) of Preservation of Public Security Act (cap. 106) provided:

"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...and detained."¹³

Regulation 33(6) of preservation of public Security Act cap. 106 also provided that:

"Any public 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 of not exceeding twenty-eight days pending

a decision whether a detention order should¹⁴
be made against him..."

With this legal force, the authorities were well armed to deal with any situation. We shall discuss here how these powers were used to counter threats to public security from within and outside the country.

It has been argued that the Preservation of Public Security Act regulations have been used to counter threats from minority regimes against political opponents for political reasons.¹⁵ These arguments are supported by reports¹⁶ which indicate that within ten years between March 1971 to about September 1981, about 901 detention orders and restrictions had been issued. It was discovered in fact that most of those detained in 1970 were opposition MPs, members of the Lumpa and Watch Tower Sects, leaders of the Mine Union of Zambia and the Trade Union.¹⁷

All those that were arrested and detained were alleged to be threats to public security. Even political parties that were banned under the Societies Act constituted threats to public security. People from almost all sectors of society had suffered or been affected by the powers under the Preservation of Public Security Act. Even University students, lecturers and trade unionists were victims of emergency powers but opposition politicians most of all. "Forming or belonging to an opposition party was equated with treason. Anybody who did not toe the UNIP line could be detained or restricted without trial."¹⁸ Although

discretionary powers are by their very nature difficult to challenge, vital issues and questions of law arose during these massive detention and restrictions. It is these that must concern us for now. It is clear that where stipulated procedures have not been properly complied with, actions in pursuit of discretionary powers may be invalidated. The bulk of cases that came to the courts centred around the interpretation of the phrase "Public Security" and the effect of non compliance with the constitutional provisions regarding such detention.

We have already referred to the case of Kapwepwe and Kaenga v. Attorney General¹⁹ where the issue was whether in the manner the emergency powers were granted, there was any room to challenge them on the basis of the reasonableness of the allegations, Baron J.P. stated that:

"There is no onus on the detaining authority to prove any allegation beyond reasonable doubt or indeed to any other standard or to support any suspicion, the question is purely for his subjective determination!"²⁰

The court in this case observed with approval the statement in the case of Bombay v. A.R. Vaidya²¹ the grounds for detention are not charges but reasons for the detention. By their nature the grounds are conclusions of fact and not complete detailed recitals of all the facts, and ruled that a detention order was not the same as a criminal charge and was therefore not to be proved beyond reasonable doubt. It has been observed that

practically this implied that it became extremely difficult for a detainee to challenge a detention order on the basis that the grounds for his detention was not sufficiently detailed. The detaining authority on the other hand had a subjective consideration of the grounds of detention. Indeed the court's interpretation of the constitutional provision that "any person who is arrested or detained shall be informed...the reasons for his arrest or detention"²² was a relaxed one. These being the only safeguards available to the detainee it is submitted ought to have been interpreted strictly to the advantage of the detainee or restrictee. Where especially the powers pursuant to which an authority is acting on discretionary it is axiomatic as Magnus J. stated that:

"When persons take upon themselves to cause another to be imprisoned, they must strictly follow the powers under which they are assuming to act..."²³

The issue that assumed controversy as noted was one of "public security". This was against the background that many opposition parties had been banned for fear of jeopardising public security. The language in which the law was couched made the determination of what constituted "public security a matter of pure subjective determination as shown by regulations 3(3) (a), 33 (1) and 33(6) of the Preservation of Public Security Act.

In the case of Kaira v. Attorney General, Cullinan J.²⁴ defined the concept of public security as "The security of safety of persons and property; maintenance of supplies and services essential to the life of the community; the maintenance of public order; the maintenance of the administration of lawful authority and the maintenance of the administration of justice."²⁵

However, according to section 2 of the Preservation of Public Security Act the term "public Security" had an inclusive meaning, it included

"...The security or safety of persons, the maintenance of supplies and services essential to the life of the community, and the prevention and suppression of violence, intimidation, disorder and crime, the prevention and suppression of rebellion and concerted defiance of and disobedience to the lawful authority and the maintenance of administration of justice."

This indeed was a wide domain within which any unlawful act could fall. Silungwe C.J.²⁶ stated that this definition is not "exhaustive" but was "illustrative". where therefore Mr. Chibwe was detained on the grounds that he allegedly externalised three million kwacha, the court held that such action too was

prejudicial to public security within the meaning of the phrase under section 2 of the preservation of public security act.

It followed from this interpretation that any purely economic crime qualified to be prejudicial to public security and therefore render the perpetrator amenable to detention under the emergency regulations.

We have noted how emergency powers were applied and how interpretation of the law made it difficult for detainees and restrictees to find any solace in the law.

Where however the issue was failure to comply by the detaining authority with certain constitutional provisions, the courts were reluctant to uphold state action. In the case of Joyce Banda v. Attorney General, the applicant was detained under authority of regulation 33(6) of the Preservation of Public Security Act as a suspect in a murder case. No grounds of detention were supplied to her. She was not charged but released before the expiry of the twenty-eight day period stipulated in the constitution. The High Court held that her detention for the period of nine days was lawful. This decision was revoked on appeal to the Supreme Court which held that:

"The obligation to justify a deprivation of liberty is a common law obligation and that the release of the detained person does not relieve the person responsible for a deprivation of liberty of the obligation to justify it in any case where its lawfulness has been put in issue."²⁸

This appeared to be a prompted reaction from the courts to the growing practice by police of detaining people before they established any grounds. They enforced section 33(6) with massive impunity, no wonder Baron D.C.J. lamented in the case of Mulwanda v. Attorney General,²⁹ that "the way in which regulation 33(6) continued to be used becomes increasingly disturbing..." "Alarming" is perhaps a more appropriate word"³⁰

Where therefore the executive made a procedural error as was the case in Mundia v. Attorney General,³¹ the grounds of detention were supplied after 14 days, the courts granted the relief sought and invalidated the detention. However even where the courts made an order to release the detained, the Lenshina case shows how reluctant the state was in complying with the court order. This is probably why the court stated in the case of Nkumbula v. Attorney General³² that it was not in a position to make ineffectual orders which it was plain the state would not comply with. Generally the use to which emergency powers were put in the second republic was such that it rendered ordinary law largely otiose. The state of semi-emergency was as noted "used to detain persons in the mechanical services branch thefts, army officers suspected of theft, suspected breaches of exchange control regulations, common conspiracies, espionage, murders, robberies, no offence etc. In fact its use is so frequent that it is feared that in some cases the police are believed not to begin any detailed investigation into the commission of an offence until after a suspect is detained."³³

President Kaunda himself had his own reasons for detaining his opponents:

"For the opposition he has said they are violent, destructive, tribalistic, agents of imperialism and racist minority regimes, subversive and engaged in anti-Zambia and other forms of treasonable crimes. To the mining union workers and other trade union leaders he had given as his reasons for detaining them: attempts at industrial sabotage through strikes, leadership feuds, anti-party and anti-government policies and wage and other untenable demands for their unions. For most foreigners, they have been detained for spying, economic sabotage, bribery and corruption to obtain citizenship, currently smuggling and counterfeiting money, attempts to confuse and subvert the integrity of the nation."³⁴

Clearly such activities, if they ever took place do not come even close to the threat to public security even where the term assumed an unexhaustive meaning. A tendency developed, as notes Nwabueze, to view any threat to the security of the ruling party and to the president's tenure of office as a threat to the security of the nation.³⁵ Scholars have thus argued that "the semi-state of emergency was sustained not for the preservation of public-security as the executive claimed, but for the preservation of the ruling party, UNIP, and its leader of over 30 years, Kenneth kaunda"³⁶

Although it is useful to argue that the emergency powers were abused, it is prudent to acknowledge that the abuse was tolerated by the law itself. It is noticeable for instance that an implication of the discretionary powers given under these two emergency statutes is that neither the reasonableness of the president's or police officer's truth of the facts providing the grounds for the detention order can be questioned by the courts, lest the courts substitute their own subjective determination for that of the president or the concerned officer.

The real problems, it is submitted was not necessarily with the manner of application of the law but the nature of the law itself. While the semi-state of emergency expired days in the third republic, the laws remained largely unchanged and in the next chapter we shall discuss how these same laws have been applied.

CHAPTER TWO NOTES

1. (1959) 1 QB 241
2. (1962) N.R.L.R. p. 344
3. See Note 1
4. (1962) N.R.L.R. 344 at p. 346
5. Quoted in L. Chartan, Spark in the Stubble (1969) p. 140
6. Republic of Zambia, provincial and District Government Annual Report; 1961, annexure A. p. 10 (Jan Pettman, Zambia: Security and Conflict) 1974 p. 95
7. A.M. Baba, African Socialism or Socialist Africa? (London 2 e.d press, 1981) p. 169
8. Ibid p. 169
9. Times of Zambia, March 7 and August 23, 1973
10. (1972) Z.R. 248
11. Ibid p.
12. section 3(3) (a) of the P.P.S. Act (cap. 106)
13. section 33(6) of preservation of public security Act
14. section 33(1) of preservation of public security Act
15. B.O. Nwabueze, Presidentialism in Commonwealth Africa p. 341
16. Govt Gazette Notices between 1971-1981
17. Chanda's A.W. LLB. Obligatory Essay p.50
18. Chanda's A.W. J.S.D. thesis p. 329
19. (1972) ZR 248
20. Ibid
21. (1951) S.C. 157
22. Article 27 of the Constitution of 1972

23. In *Chipango v. A-G* (1970) ZR 31 at 182
24. (1980) ZR 65
25. Ibid Per Cullinan J.
26. In *Mudenda v. A-G* (1979) Z.R. 24 at 248
27. (1978) ZR 233
28. Ibid p. 239
29. (1976) ZR 277
30. Ibid Quoted in *Joyce Banda v. A-G case*
31. (1974) ZR 248
32. (1972) ZR
33. Shamwana E. Police have much Power of Detention (1980)
Vol. 7 L.A.Z. Journal
34. G. Haamaundu, The development of the Law of detention and restriction during peace times in colonial and post colonial Zambia from 1911-1974 (1975 obligatory - UNZA special collections)
35. Nwabueze B.O., presidentialism in Commonwealth Africa p.298
36. Chanda A.W. J.S.D. thesis p. 304.

CHAPTER 3

THE STATE OF EMERGENCY IN THE THIRD REPUBLIC

On 1st November 1991, a new regime came into power to take control of the third republic state apparatus. In this chapter we will briefly present an update of the law pursuant to which the new executive derived its emergency detention powers. This part of work is concentrated on the zero option plan because this was the sine quonon for the declaration of the emergency. The law is however first analysed hereunder.

Articles 30 and 31 of the 1991 constitution are of particular interest for now. Article 30(1) provides:

"The president may, in consultation with cabinet, at any time, by proclamation published in the Gazette declare that a state of public emergency exists."

This naturally, if properly done means that cap. 108 comes into operation. However the declaration made under clause (1) of this article ceases to have effect upon the expiration of seven days from the day the declaration is made, unless it has been approved by a resolution of the National Assembly supported by a majority of all the members not counting the speaker.¹ However the

majority required here could just be a simple majority and where the National Assembly is controlled by and large by the ruling party in number, this safeguard proves worthless. Further more where the declaration is made just before dissolving parliament² then the declaration may continue unless revoked by the president himself.³ Where however the national Assembly has approved the declaration by a resolution that resolution if not revoked by the National Assembly itself⁴ continues until the expiration of three months or may be extended for periods of not more than three months⁵ at a time.

Under article 31, (1) it is provided that:

"The president may at any time by the proclamation published in the Gazette declare that a situation exists which, if is allowed to continue may lead to a state of public emergency."⁶

Provisions regarding approval or revocation are the same as provided under article 30, and it is worthy noting that both these declarations end seven days after the new president assumes office.⁷

However article 25 which provides for derogation from fundamental rights and detention provides that:

"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of articles 13, 16, 17, 19, 20, 21, 22, 23, or 24 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 if it is shown that the measures taken were, having due regard to the circumstances prevailing at the time, reasonably required for the purpose of dealing with the situation in question."

Advertently or inadvertently this (article 25) permits no such derogation when article 31 has been put in operation by the president. This basically means that where a proclamation is made pursuant to article 31 and there by putting cap. 106 in operation, no detention can be made. This kind of situation has rendered detention regulations under cap. 106 virtually inoperative or useless. However, regulation 33(6) as amended by Amendment No.2 of the Preservation of Public Security regulations of 1993 states:

"Any police officer of or above the rank of Superintendent 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 seven days pending a decision whether a detention order be made against him...."

However, the president's powers under cap. 108 have remained unchanged and they include making orders for the detention of persons, restriction of movements, acquisition of property on behalf of the republic authorization to enter and search any premise, prohibition of the publication and dissemination of matters prejudicial to public order, prohibition, restriction and control of residence, movement and transport of persons and authorization of the doing of such other things as appear to the president to be strictly required by exigencies of the situation in the country.⁸ Against this legal background the president can only make orders for detention under the Emergency declaration (article 30) not threatened emergency (article 31).

It is noticeable that article 30(1) gives the president unfettered discretion of deciding when and when not to declare an emergency. The only requirement under this article is that the president should consult cabinet and in so far as consultation can go, the response of the cabinet is irrelevant.

Following the November 1991 elections, UNIP was defeated by a large margin and out of desperation, it sought to do what ever it legitimately could to come back to power.

On 24th and 26th February 1993 two documents were discovered and published by the Times of Zambia News paper. These two documents, the "Zero Option Plan"⁹ and the "Radical Plan"¹⁰ were alleged to have been published by UNIP. In part these documents read:

"The aim of UNIP is to wrest power from MMD government in order to form a government responsive to people"s needs. This must be done before 1996 general elections."

No doubt this intention was unconstitutional. In fact the plan was to put in place certain officers. These officers could be used to organise demonstrations like the ones in Tianmen square (in China) and Romania. The rural population could also be incited so that chaos would reign through out Zambia and not only cities and towns.

This civil disobedience was to be created because it was realised by UNIP members that, "there is no other way UNIP would get back to power unless it creates chaos in the governance of this country..."

The party must transform itself into a revolutionary one." The aim of the radical plan was to weaken the power base of the MMD government by targeting certain groups, that is, the youths, students, the unemployed, intellectuals, businessmen, women lobby groups, the labour movement churches and teachers. The programme also intended to put sufficient pressure on the government so as to sufficiently weaken it and eventually bring it to a halt and pave way for presidential and general elections by the end of 1993.

What appeared more alarming to the government was the source of funding. The Zero Option document disclosed that funding would be sought from "friendly parties and governments in the Middle East like Iran, Iraq, Libya and the Palestinian Liberation Organisation (P.L.O.)"

This state of affairs threw the government into panic. Fear reigned in government circles. Peace and stability of the government was severely threatened by these documents.

In view of this political atmosphere, on 4th March 1993 president Chiluba declared a threatened state of Emergency through statutory number 32 of 1993 published in the government Gazette. The Preservation of Public Security Act (cap. 106) became operational therefore and pursuant to the regulations therein, a number of detentions were made and most of those detained were members or sympathisers of the vanished UNIP. The detainees included Wezi Kaunda, Rabbison Chongo, Rupiah Banda, Peter Lishika, Major Macpherson Mbulo, William Banda, Cuthbert

Ng'uni, Stephen Moyo and Lucy Sichone. These were picked up and detained on 5th or 6th March 1993.

The president justified the declaration of this emergency by saying that democracy was being threatened by a few people bent on plunging the nation into chaos.¹¹ He stated that their plan and conduct constituted a threat to National Security. It became a debatable issue whether the political scenario deserved emergency powers at all.

Clearly these detentions were unlawful and upon realising this, the president took a corrective measure by declaring a full state of Public Emergency through statutory instrument number 36 of 1993.¹² It is a contestable issue whether this corrective measure retrospectively made lawful the unlawful detentions made pursuant to the regulations under the Preservation of Public Security Act.

We have noted in the preceding chapters the effect of the Emergency Powers Act. All other laws except the constitution are silenced. The president has power to make regulations for the detention, restriction deportation and exclusion from Zambia of aliens.¹³ He can acquire "any property or undertaking,"¹⁴ make amendments to any enactment or apply the enactment without amendment.¹⁵ In short, his powers are wide. This basically means that a detainee or restrictee has only the constitution to fall back on. Also while the president has power to detain any person, it must be assumed that such a person must have some connection however remote to the circumstances that necessitated

the emergency powers. What was observed during these detentions however was contrary to the spirit of the emergency regulations. Stephen Moyo for instance was detained so that he can explain his personal communications with former president of the republic and two documents he had entitled "God Loves Zambia" and "where do Sharks Swim".¹⁶ In fact some of the detention orders given to some detainees indicated no connection at all with the Zero Option or Radical Plan.¹⁷

What was even more alarming was the lack of the law to guide the police or detaining authorities in carrying out interrogations. This resulted in the use of underhand methods in questioning the detainees. Torture was employed. A number of detainees were tortured. In fact it is believed that as a result of that torture one of the detainees later died. The Post Newspaper lamented:

"Until irrefutable medical evidence is available to prove otherwise, we hold President Fredrick Chiluba responsible, together with all those who agree to allow and continue to support state sanctioned thuggery and those who give co-operation to imprisonment without trial, investigations during and after arrests, and risking the lives of people like Cuthbert in the heartless hands and sick, inhuman minds."¹⁹

During national Assembly debates, levy Mwanawasa, then Vice President admitted that the state had little knowledge of the scope and intent of the said documents. This he said was the reason why investigations during and after arrests had to be done.²⁰ This however, though justifying acts of preventive detention rendered big an issue which could have been dealt squarely well by the ordinary law of the land. In fact a number of innocent detainees suffered these detention only to be released after a fortnight or so. Freedom of movement or the right to liberty is precious. It has been said that it is better that many guilty men be set free than punishing one innocent man. Of course it has been argued as President Nyerere Julius did that:

"I agree that in the idealistic sense of the word, it is "better" that 99 guilty men should go free rather than one innocent man being punished. But in the circumstances of a nation like ours other factors have to be taken into account. Here in this union conditions may well arise (emergency conditions) in which it is better that 99 innocent people should suffer temporary detention than that one possible traitor should wreck the nation. It would certainly be complete madness to let 99 guilty men escape in order to avoid the risk of punishing one innocent person."²¹

It can be argued however that Zambia, at least by 1993 did not share similar circumstances or conditions referred to by Nyerere. the gravity of the documents, it is submitted was not inherent in but simply ascribed to them. Emergency regulations render people subject only to the whims and caprices of the authorities besides the constitution. It can hardly be justified that the zero option plan and the radical plan constituted such a threat to public security as to subject citizens who had rejected "perpetrators" of the documents at the polls, vulnerable to their illegal intentions.

Although it is outside the scope of this work to pursue the court cases based on the Zero Option and the Radical Plan, it suffices to state here that a few were convicted and sentenced on separate charges. Bwendo Mulengela and Peter Lishika were charged with being in possession of seditious material. Other charges were; retaining classified official documents without authority, communicating seditious material and treason felony. It can be noted therefore notwithstanding the supremacy of peace and security of the citizens and stability of the government, that any threat to the powers that be had taken a label of threat to public security - the way the phrase was interpreted in the second republic has remained unchanged in the third republic.

The foregoing overview has highlighted the practical application of the state of emergency in Zambia's second and third republics. It is useful at this time to make a brief comparison of our emergency laws with laws of other lands.

3.0 A COMPARATIVE ANALYSIS OF THE OBJECT AND IMPLEMENTATION OF THE STATE OF EMERGENCY

The whole essence of preventive detention is to restrict the freedom of a person the guilty of which you have not established. It is detention on mere but strong suspicion that such a person might cause trouble, or is a danger to the peace and security of the state. In many jurisdictions especially commonwealth countries, the executive arm of the government retain immense discretionary powers regarding invocation and implementation of the state of emergency. In many lands where a calamitous situation necessitated the use of emergency laws, the governments become obstinate or reluctant to lift the state of emergency even when conditions that necessitated the state of emergency have long come to and end. It is correct to note that "states of emergency pose a serious threat to fundamental rights not so much because of their existence perse but because of the potential for the abuse of power by governments." ²²

John Hatchard observes for instance regarding Zimbabwe which got its independence in 1980 that "despite independence, the state of emergency has remained in force and in January 1986 it was renewed for the 40th time." ²³ This is not different from our Zambian second republic and justifications for it are similar. It is interesting to note however that by section 66 of the Zimbabwe constitution, the responsibility for the imposition of and continuation of a state of emergency is primarily given to the legislature. That is to say by section

68 of the constitution of Zimbabwe, the president acting on the advice of the cabinet, may by proclamation declare that a state of emergency exists in Zimbabwe or any part thereof. However such proclamation requires the approval of the House of Assembly within fourteen days failing which the declaration shall cease to have effect and the president is bound to revoke it.

Professor Nwabueze also notes that "in practically all the presidential regimes in Commonwealth Africa, the authority to declare an emergency belongs in the first instance to the president alone; parliamentary approval comes only after the initial declaration by the president and is then given again as a matter of course."²⁴ This in itself renders such authority subject to abuse. Much of the problem however appears to be not necessarily with the person or institution in whom the power to declare the emergency is vested but the imprecision in the drafting of the law itself so that the executive is given a wide domain within which to act abuse is justified and the manner of implementation of the emergency powers. In Zambia's experience of the state of emergency, there has been basically two areas of controversy or just one. The first one has been the need to make an objective determination of when and when not a situation existed which if left loose would jeopardise state security; the second one was to formulate a precise and unambiguous definition of what constitutes public security. Public outcry has normally ended at these two issues. It is suggested however that an important area has to be given force. That is to say from the time a suspect is arrested to the time his case, if charged, is heard in the court. This is the time when the detainee is left

only with the law to fall back on. Seeing that all other laws except the constitution are silenced, it is within the constitution that the individual must find solace. But the provision and strengthening of a proper procedure to be taken in emergency situation when detaining, arresting, interrogating and so on would be meaningless if the judiciary is not armed with sufficient independence from the manipulation of the executive.

We have noted in the earlier chapters that emergency declarations are necessary only to the extent that the threat to public security for which they have been declared continues. Scholars have argued that in the second republic of Zambia conditions which justified the existence of the semi-state of emergency ended in the early 1970s. The problem was no longer one of public security but the security of UNIP and President Kaunda. There was always law to justify this state of affairs. This law has not changed substantially. In the next concluding chapter, we will enumerate some of the problems characterising the emergency legislation and to that end make the necessary suggestions.

NOTES FOR CHAPTER THREE

1. Article 30(2) of the constitution 1991
2. Article 30(3)
3. Article 30 (4)
4. Article 30 (6)
5. Article 30 (5)
6. Article 31(10)
7. Articles 30(7), and article 31(7)
8. Emergency Powers Act cap. 108
9. Published on 24th February 1993 - Times of Zambia
10. Published on 26th February 1993- Times of Zambia
11. Times of Zambia March 6th 1993
12. Government Gazette of March 8, 1993
13. Cap. 108 s. 3(2)(a)
14. Cap. 108 s.3(2)(b)
15. Cap. 108 s.3(2)(d)
16. Times of Zambia March 23 1993
17. March 23 Times of Zambia
18. Cuthbert Ng'uni (The Post, Tuesday, September 27, 1994)
19. the Post, Tuesday 278, 1994
20. Parliamentary Debates March 10, 1993: 1638
21. Nyerere J. Speech inaugurating the University College of Dar-es-Salaam, represented in issue No.2, Review of Contemporary law, (1964) 11 - 13
22. Hatchard John, "Emergency Powers in Zimbabwe, an overview of Post-Independence developments," Zambia Law Journal p.

23. Ibid p. 35
24. Nwabueze B.O., Presidentialism in Commonwealth Africa (St. Martin's press, New York) 1974 p. 266 - 267

CHAPTER 4

4.0 CONCLUSION

It may be assumed in certain quarters that abuse of discretionary power will normally depend on the personality of the individual vested with such power. This infact is even much more the reason why discretionary powers, a necessary evil, must be conferred selfishly by the law giver. This is especially true where such powers have a bearing on the fundamental rights of the individuals.

Over-zealous use of emergency powers may prove counter-productive in the sense of exacerbating the problem they were designed to solve. It is a democratic ideal to respect the rights of minorities and to tolerate rights of dissent, of free expression and association so vital to the promotion of peaceful change in society and to the formulation of public opinion essential to genuine accountability of government¹.

The Zambian experience of governance under emergency powers in the second and part of the third republic and the law as it provides for the emergency situation leaves much to be desired. Thus the question; to what extent should security laws of a nation override individual freedoms and liberties can fairly be answered; to the extent that the president deems it fit-as shown by our examination of the laws and practice in the preceding

We have noted already that the experience we have undergone must provide us with the foundation for building up a legal framework that will not only ensure state security but also uphold individual rights and protect the same from the whims and caprices of the person or institution in whom emergency powers are vested.

In building this foundation the issues we have to grapple with are many: How can we ensure that the law relating to an emergency situation is not unnecessarily wide and therefore subject to abuse while at the same time it guarantees state security? How can we narrow the gap between the law as we provide it in the statute book and the actual practice when an emergency is declared? No doubt this entails precision and accuracy in the manner certain terms and concepts are defined. Certain minimum standards need to be set and adhered to.

It is acknowledged that the safety of the people is the highest law (salus populi, suprema lex esto). But the term safety is meaningful when there is a threat or danger. It has been stated infact that "a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation." ²

The development of Zambian emergency legislation has not been for the better. It was noted in chapter two how the two amendments to this law in 1969 and 1974 respectively ³ brought to bear on the duration and revelation of the emergency declaration. Even contemporary legislation lacks precision in many instances.

Article 30(2) of the 1991 constitution for instance talks of the majority of the national Assembly who if they support the declaration, it may continue in force after seven days. To be a proper check or safeguard; it is not safe merely to state that there must be a majority. It is useful in a democratic state to state the minimum of that majority and probably even make it a requirement that a certain percentage of that majority must be members of political parties other than the ruling one (assuming of course that emergency powers are vested in the president who belongs to the ruling party).

This can ensure that government action remain subject to safeguards provided by the legislation and even judicially backed up by an effective and justifiable constitution so that rule by regulation is weakened. The question then is: What in the law shall be the sine qua non for the emergency or semi-emergency declaration?

A United Nations study of 36 constitutions in the early 1960s lists a wide range of threats to the well-being of the polity which those constitutions recognised as permitting the taking of emergency measures: International Conflict, war, rebellion, insurrection, subversion or the harmful activities of counter-revolutionary elements; disturbance of the peace, public order or safety; danger to the constitutional authorities; natural or public calamity or disaster; danger to the economic life of the country or parts thereof; the maintenance of essential supplies and services for the community.

All of these situations can pose a danger to the peace and stability of the state. The test however is whether they are completely unprovided for in the ordinary law of the land, or whether such a law if it exists proves to be inadequate to deal with the situation. This is in view of the fact that the liberty of a man's person is more precious to him than all the rest that follow. Professor Nwabueze notes:

"There is no reason why the provision of food and clothing, housing, education and medical and sanitary services can only be done at the cost of depriving individuals of their personal liberty or their freedom.

Therefore it is useful to set out clearly in the law the conditions and circumstances when and when not a state of emergency may be declared. Open ended as they are, articles 30(1) and 31(1) of the 1991 constitution provide enough room for abuse. It is suggested that another institution preferably an independent statutory tribunal be armed with review powers to check the necessity or otherwise of an emergency declaration which should have a force of law when a prescribed number of the members of the National Assembly approve it within the shortest prescribed period of time. It must also be provided in the law that the end of the emergency situation as determined by the tribunal must automatically terminate the declaration.

It is suggested also that the derogations of the emergency law from fundamental rights must be as strictly required by the exigencies of the situation. It is not necessary to silence all the rights when the exigencies of the situation require that only certain rights be derogated from.

When it comes to application or use of the emergency powers, the crisis moments must not be used to unduly legitimise illegal or un constitutional acts. In efficiencies of the authorities that may lead to abuse of the law must not be justified by unnecessary and instant changes in the law. Lord Atkin stated in the case of Liversidge v. Anderson⁶ that "...a midst the clash of arms, the laws are not silent. They may be changed (legitimately) but they speak the same language in war and in peace."

The overview presented in chapters two and three show specifically that the abuse of emergency powers emanated from the imprecision of the language in which the law itself is couched. This weakness traces ultimately to the basic law and the amendment provision therein. It is suggested that amendment of any constitutional provision be submitted or subjected to referendum. This is because where the power to amend the basic law is vested in the institution like National Assembly whose composition can change or be influenced by the executive, it can result in a frequent declaration of emergencies. O'Boyle M.P. notes that:

"Frequent use of emergency powers to cope with the crises coupled with the success of those powers acclimatizes administrators to their use, and makes recourse to them in the future all the easier. The danger is, that succeeding generations of administrators inherit these powers as being efficient and unobjectionable, and in a particular emergency, do not give proper consideration to the possibility of less drastic measures being used."

Where however the state of emergency is provided for in the statute, a clear definition of what constitutes such terms as "public security" must be provided as well. This will make it an objective determination of what must constitute a threat to public security.

Seeing that to a large extent an emergency declaration silences all other laws except the constitution, it is within the constitution that most of these safeguards discussed must be provided. This of course is not to suggest that the ordinary law which must be examined first before the emergency law is invoked is to be disregarded. Infact it has been stated that only those grave situations or matters of life and death not provided for or for which ordinary law becomes inadequate can be handled by emergency powers to the extent demanded by the exigencies of the situation.

Alternatively, to ensure a proper application of the emergency powers, it is suggested that some kind of an emergency powers application code be put in place which must provide for the manner in which cases under the state of emergency are to be handled. This distinction is important because it can ensure that the traditional safeguards in an emergency code can properly be guarded for the safety of the victims of the abused powers.

From the whole essay however we can draw the conclusion that a traditional object of emergency legislation is not to make it punitive or suppressive in nature. To the formulation of a sound emergency legislation therefore it is suggested that some of the following guiding principles may be helpful.

There should only be resort to emergency powers in those situations where the government can show it to be absolutely necessary. It is the public security in clearly defined terms that must be threatened not on individual's office or imaginary threat. It must be abundantly clear, both in terms of the general situation and in respect of their application to individual cases, that existing ordinary powers are inadequate.

The measures taken must not go beyond what the exigencies of the situation demand. Minimum standards must clearly be set. There should be the minimum derogation possible from existing civil rights and freedoms in both municipal and

international law. In no circumstances should there be derogation from those rights and freedoms regarded as non-derogable under international obligations. Resort to emergency powers should not be prolonged further than is absolutely necessary.

The measures taken must have a democratic aim and be subject to effective and periodic parliamentary control of their invocation, use and continuation. Or better still an independent statutory tribunal can be armed with these functions. There should be a measure of review by an independent judiciary.

The measures should be clearly and precisely formulated, preferably in statutory rules, so that all concerned are able to make an adequate assessment of their respective powers, rights and obligations.

The introduction and exercise of each measure should be accompanied by adequate safeguards against its abuse. In circumstances where safeguards provided in existing law (e.g. habeas corpus) are likely to prove inadequate the measure itself ought to contain special remedies, procedures and provision for compensation to check abuse. Where there is doubt about whether sufficient safe-guards can be provided, careful consideration must be given to whether it is better to refuse to grant the power rather than run the risk of

abuse, or whether the power is so vital that risk must be run.⁸

Of course these are but only guiding principles and are not therefore sacrosanct. In a pluralist democratic country a legal framework which is biased toward the promotion of individual freedoms may be preferred.

However, it is important that as society progresses a paralld progress is reflected in the law. In Zambia today many aspire for democracy, the law relating to the state of emergency can not afford to lag behind. We have to make the necessary changes while we have the ability to do so. Finally I agree with Justice Sulterlend's observation:

"For the saddest epitaph which can be carved in memory of a varnished liberty is that it was lost because its possessors failed to stretch forth a serving hand while yet there was time."⁹

NOTES ON CHAPTER FOUR

1. David Bonner, Modern Legal studies; Emergency Powers in peace time (London, Sweet and Maxwell) 1985, p. 15
2. Per Justice Davies in Exparte Milligan (1966) (UN) 4 WALL 2, 126, 181 ed 281, 287.
3. Amendment No.5 of 1969 and Amendment No. 18 of 1974
4. United Nations Department of Economic and Social Affairs, Study of the Right of Everyone to be free from Arbitrary Arrest, Detention and Exile, U.N. Doc. ECN 4/826 Rev. 1 (1965) at p. 184
5. Nwabueze B.O. Constitutionalism in the Emergency States, at page 155.
6. (1946) A.C. 206
7. M.P. O'Boyle, "emergency Situations and the protection of Human Rights: A Model Derogation provision for a Northern Ireland Bill of Right" (1977) 28 N. ILQ. 160 at p. 164
8. See Note 1 at p. 21-22
9. In Associated Press v. N.L.R.B. (1937) 301 US 103, 141

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