CONSTITUTIONAL DEVELOPMENT

IN

Z A M B I A

1890-1975

A dissertation submitted to the University of Zambia in partial fulfilment of the requirement for the award of a Master's Degree in Law (LL.M)

by

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CONSTITUTIONAL DEVELOPMENT IN ZAMBIA 1890-1975.

Abstract.

Abstract: Zambia is today a one party state. Though this would appear to represent a clean break with the past, in reality, however this is not entirely accurate. To the extent that there is an absence of a plurality of political parties or that because of the demands which a single party system entails there has got to be a limitation on freedom of association and assembly and communication, the proposition that a single party state represents a clean break with the past would appear to hold water but the legal realities make it absolutely difficult to get away from history.

For instance the constitution of the Zambia Independence Act and the Zambia Independence Order had to be preserved is so far as this was not inconsistent with the new order. Even more important perhaps is the fact that although the one party-state constitution contains a number of original features such as the Commission of investigations popularly known as the Ombudsman and the concept of the Leadership Code the One Party Constitution preserves and perpetuates by way of organic growth the constitutional development during the colonial period and even before.

Though Zambia today is a one party state it has experienced different forms of administrations. The Zambia

Independence Act 1964 an enactment of the British Parliament provided for the termination of the British protectorate status over the territories of Northern Rhodesia and that they would henceforth become the independent republic of Zambia. Between 1924 and 1964 Northern Rhodesia experienced the British system of colonial government headed by a Governor and supported by a legislative council and an Executive Council.

Before 1924 going back to the 1890s Northern Rhodesia was administered by a commercial concern incorporated by Royal charter, the British South Africa company. Basing its right to rule on the agreements entered between itself and Lewanika the traditional ruler of the Lozi in the North West of Rhodesia and agreement entered between company officials and chiefs in North Eastern Rhodesia it caused to be promulgated in 1900 the North Eastern Rhodesia Order in Council and the Barotseland North Western Rhodesia Order in Council of 1899 in order to facilitate the administering of the two components of Northern Rhodesia. In 1911 however, the two parts were amalgamated in the Northern Rhodesia Order in Council of that year. The British South Africa company had an official representative during

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company Rule in Northern Rhodesia called an administrator but he could not make laws for the territory, thus up until 1924 when Company rule was terminated in Northern Rhodesia by an Order in Council the country was administered by proclamations made either by the High Commissioner in South Africa or by the Commissioner in Nyasaland (Malawi) today some of these proclamations are still being enforced in Zambia.

During company charter rule in Northern Rhodesia the interests of the British settlers were not always coincidental with those of the British Government and the interests of the Company coincided with neither of these. In addition the interests of the indigenous people were not identical with those of the company, which as a commercial concern its motives were ensentially profit oriented.

It was therefore, not surprising when the British government following a report by a commission which had visited the area at the time terminated company rule by the Northern Rhodesia Order in Council of 1924, and Northern Rhodesia became a protectorate. Northern Rhodesia began to experience the colonial form of government. This form of government was to go on until 1953 when Northern Rhodesia was incorporated together with Southern Rhodesia and

Nyasaland in the federation of Rhodesia and Nyasaland. With the F.R.N. Act the Federation of Rhodesia and Nyasaland was established and the Federation (Constitution) Order-in-Council promulgated.

This period was marked by intense African opposition to these forms of Administrations and because Northern Rhodesia remained a protectorate during the Federation period with the federal framework this made it possible for constitutional development to take place even though this left the Federal constitutional development behind. As a result of the frantic constitutional developments in Northern Rhodesia in a bid to widen the franchise this ultimately led to the formation of a black government in 1962 following a coalition of the two main black political parties. And with the dissolution of the Federal arrangement in 1963, this paved the way for full independence status for Northern Rhodesia. The General Elections of January, 1964 following the new self-governing constitution adopted in 1963 unshered in a black government and in May, 1964, at an independence conference in London a Republican constitution was finally agreed upon and promulgated in an order-in-council formally made by the British Monarch under the Zambia Independence Act 1964 which created the Republic.

The scope of this paper therefore, will be from the 1890s when the British South Africa Company attempted to provide a system of administration to 1973 when Zambia, after having experienced different constitutional arrangements finally adopted a one party-state constitution. Our concern therefore, is with a type of constitutional law which is in written form and derives from institutions and modes of legislation unknown to customary law. Though a lawyer writing on government would invariably concern himself with the rules governing those institutions "rules" as Professor Nwabueze points out in the introduction to his book presidentialism in commonwealth Africa are not to be regarded as a selfsufficient subject of study. The underlying political and social forces motivating them are as vital as the rules. This is more so with regard to the present study. The development of constitutional law in Zambia has inevitably been shaped by the political and social forces which characterised the changing focus in power relationships. For instance the federation of Rhodesia and Nyasaland was brought about by European settlers mostly in Northern and Southern Rhodesia who thought that such an arrangement would finally give them dominion status like that enjoyed by Australia and Canada. But the Africans on the other hand saw it as the embodiment of white supremacy and they were thus determined to fight it. In

Barotse Province (as it was then called) on the other hand, the ruling elite there felt that because of the treaties which Lewanika had entered with Company officials in the 1890s they were to be consulted on any constitutional changes which would affect their position and hence the inclusion of provisions referring to their special position in the constitutions of 1911, 1924-1953 and finally in 1961. And even in 1964 when the republican constitution was finally agreed upon in London a separate agreement. The Barotseland Agreement had to be signed in order to assuage the fears of the Litunga when independence finally came on 24th October, 1964.

The nationalists on the other hand were determined to have one Zambia, One Nation in which all the people will have equal status hence the gradual but determined effort to bring Barotse Province on par with all other provinces.

Thus the approach adopted in this paper is not one of dealing with the rules in vacuo but of dealing with the rules against a back drop of social and political under-currents which determined them. Thus the rules will, as it were form the framework-the skeleton, while the social and political forces the flesh with which to help us understand the course and nature of constitutional development which Zambia has gone through.

The Domain of Inquiry

This paper will therefore attempt

a) to monitor the historical evolutionary stages through which Zambia's Constitutional development has passed. Northern Rhodesia (Zambia) compared to Nyasaland (Malawi) or Rhodesia has seen more Constitutional Changes than any of the two countries. First under Charter rule and then Colonial protectorate Zambia was going through a Constitutional metarmophosis which reached its high water mark between the period 1958 and 1964 when for the first time the Africans of Northern Rhodesia began to be enfrachised albeit with some means, educational and property qualifications but by the beginning of 1964 the Africans had won Universal adult suffrage for themselves. Thus within a period of six years Zambia was to have four different Constitutions. There was a new constitution in 1959 then 1962 and in 1963 there was the internal self-governing Constitution which was itself replaced in May 1964 by a Republican Constitution agreed at a Conference in London.

On the other hand Malawi evinces a different picture from Zambia. Malawi was not opened by Charter Company but by missionary endeavours. The British Government took over Control of the territory in 1902 when an Order-in-Council

appointing a Commissioner to administer the protectorate in the name and on behalf of the Majesty was made. In 1907 the High Commissioner was replaced by the Governor, an executive Council and a legislative Council. This position remained essentially the same until 1962 when a new Constitution was introduced which brought an African Majority in the Legislative Council. A new Constitution was agreed to in May 1963 which brought in internal self-government and finally independence in July 1964.

Southern Rhodesia like Zambia was under Charter Company rule but the white settlers gained early control of Government to warrant the conferment of a self-governing Constitution in 1923. This Constitution remained the same until 1961 when a new Constitution was introduced. In 1965 Rhodesia Unilaterally declared itself independent after failure to reach agreement with the British Government. In 1969 some changes were made in its Constitution in preparation for a Republican Status in 1970. But the 1961 Constitution has remained in force all along.

All the three territories became part of the ill fated Federation of Rhodesia and Nyasaland in 1953 which finally met its waterloo in 1963 after implacable resistance to its implementations by the politically conscious Africans from Zambia and Malawi.

(b) to show that the British Constitutional provisions and institutions which have characterised powers, procedures and traditions of the colonial government continue to buttness the system. We will contend that though Zambia's political parties could have opted for any Constitutional formula, their familiarity with the British one made their choice of the former much more certain.

(c) an examination of Zambia's present Constitutional Legislation i.e. the One Party State Constitution. It will be contended that the principles of democracy are no less protected and enjoyed by the people in the One Party State than they were when Zambia was under a multi-party system. It is not necessarily the Constitutions which make or break the system but the people running such systems. Thus an apparently democratic Constitution can be violated at will by its framers thus making it no better than a villains manifesto.

PART II

When Zambia became a One Party State in 1973 the question that was being asked by many people was whether the coming of the One Party State heralded the end of democracy in the country. In other words was this the end of Constitutionalism in so far as political groups would not be allowed to freely organise opposition to the One and only governing party, the United National Independence Party.

Quite apart from the question of democracy itself the other question was as to the implementation of the new system itself. Thus a Constitutional lawyer writing on the Zambian Constitution might be tempted to confine himself to the present Constitution in disregard of any earlier developments, but as Claire Palley has shown in her book the Constitutional History and the Law of Southern Rhodesia 1888 - 1965 'such learning becomes an abstract catalogue of Constitutional devices and prescriptions and does not convey an understanding of reality unless it is encased in its historical context of relevant imperial policy, and unless also various constitutions are seen as stages in an evolutionary process of the political development and later abandonment of Imperial power.'

My interest in this kind of research therefore has had to be accompanied with a concommitant methodology.

Thus Constitutions being the instruments which create the organs of Government and which confer on them the powers with which they conduct their day to day activities meant that an examination of the Constitutional phases through which Zambia has passed would not only be of interest to the academic Lawyer but also to the administrator in the Government engaged in the formulation of policies. During the entire period of Colonial rule in Northern Rhodesia the basic documents of the Constitution remained the Orders in Council and the Instructions passed under 'the Royal Sign Manual' and 'Signet' to the Governor and Commander-in-Chief of . . . . . Northern Rhodesia. These instruments were made by the British Monarch and during this whole period of colonial rule and during which the power to change these documents was never passed to the Government of Northern Rhodesia. After independence this power to alter the Constitution was passed on to the Zambian Government first under rigid conditions which required the Draft Bill to be promulgated in the Gazette thirty days before its first reading and to have a majority of two-thirds at its second and third reading. In addition there was to be plebiscitory endorsement of such alteration if it related to the entrenched Clauses such as those relating to human rights and the amending procedure itself. In 1969 as a result of a Constitutional

Amendment of that year the provision relating to a referendum was removed and now parliament can alter the Constitution by a two-thirds majority at its second and third reading in addition to its having promulgated in the Constitution thirty days before its first reading.

Method of Research

The research upon which this paper was based was conducted during the latter half of 1977 and early 1978 following the successful completion of part 1 of the Programme. As the footnotes will show the vast part of the work involved visiting the National Archives, the High Court Library, the Archives and Library at Freedom House which is the Headquarters of UNIP, Zambia National Information Services offices and finally the National Assembly Parliament. These are all situated in Lusaka. I also visited the Museum in Livingstone. This was particularly relevant for assessing the period of the British South Africa Company.

In all these places I looked at the relevant documents for my paper. The National Archives proved the most important single source of information particularly for the early part from 1924 to 1958 but again certain documents could not be found because they might have been

removed out of the Archives by some other researcher or may be as a result of Change of Staff some of the documents were got removed to other places. Some of the documents had been removed to S. Rhodesia and Malawi following the break-up of the Federation of Rhodesia and Nyasaland in 1963. Again some documents can only be found in London. Another problem encountered was that no comprehensive Study of Zambia's Constitutional development has been undertaken before and thus the paper in fact represents a pioneering effort in this area. In addition the debates of the Legislative Council and after independence the National Assembly have been of great use.

The Student of Constitutional history and Development is not entirely confined to documents, Articles and official publications thus I have been greatly assisted by discussions with persons who in one way or the other might have been connected with the research. But again the handicap was that not many people feel free to talk about the Constitutions as some of them fear to be quoted even after the assurance that that was not going to be done. Mr. Sikota Wina former Minister, MP and member of the Central Committee of UNIP helped me understand the period 1958-1964 when the Nationalist Struggle was gathering momentum. At the time he was concerned with publicity. Mr Munukayumbwa Sipalo who was the Secretary-

General of UNIP and later Minister in the Zambia Government also helped me understand the period better. Several other people helped me with this period but requested not to be referred to by name.

As far as the One Party State Constitution is concerned not many people were free to talk about it. An interview sought with Mr. Mainza Chona who was the Chairman of the One Party State Constitution was unsucessful. At Freedom House an interview with the office of the Secretary General on the working of the Leadership Code for instance was also unsuccessful and thus I had to rely only on Annual Conference Reports of the National Council of UNIP and even these were secured after my credentials were carefully verified. At the same time as far as the working of Parliament was concerned not many people including parliamentarians were free to talk about its role under the One Party State. Most of them simply referred me to the Constitutional provisions. However in order to enhance my understanding of it I also attended a few Sessions of parliament and these proved quite helpful too.

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TABLE OF CONTENTS

		Page
Abstract		ii
Preface		1
Acknowledgements		5
CHAPTER:		
1.	Early Constitutional Evolution up to 1924 - Chartered Company Rule	1
(i)	The Charter	3
(ii)	The Lochner Concession	6
(iii)	The Barotziland-North Western ..... Rhodesia Order in Council	13
(iv)	North-Eastern Rhodesia Order in Council 1900	18
(v)	Legal Consequences of the Treaties	28
(vi)	Northern Rhodesia Order-in-Council 1911	36
(vii)	The Buxton Report	42
(viii)	The Devonshire Agreement	43
II.	Termination of Company Rule and the Imposition of Colonial Rule	46
(i)	The Legislative and Executive Council of Northern Rhodesia	54

Page

(ii) The Rhodesia and Nyasaland Royal Commission 74

III. Constitutional Changes 1948-1963 80

(i) African Affairs 80

(ii) European Development 91

(iii) The Franchise 98

(iv) The 1959 Constitution 100

(v) The 1962 Constitution 122

(vi) The Legislature 122

(vii) The 1963 Constitution 128

(viii) Voters' Qualifications 129

(ix) Qualifications for Membership of the legislative Assembly 130

IV. The First Republic 131

(i) The 1964 Election 131

(ii) The May 1964 Independence Conference 131

(iii) Characteristics of the 1964 Constitution 134

(iv) Republic of Zambia 136

(v) The Legislature 137

(vi) The Executive 138

(vii) The Judiciary 138

(viii) The Barotseland Agreement, 1964 139

V. Northern Rhodesia in the Federation of Rhodesia and Nyasaland. 149

Page

(i) Why Federation 149

VI. The Second Republic 166

(i) Zambia's One Party State Const. 166

(ii) Composition of the National Commission 170

(iii) The August 1973 Constitution..... 171

(iv) The Legislature -Composition and Election 177

(v) Voters' Qualifications 179

(vi) Qualifications for Election as a Member and Vacation of Seats 180

(vii) Financial Powers 181

(viii) Elections Under One Party State..... 182

(ix) Parliamentary Elections 185

VII. The Role of Parliament in Zambia's One Party State 191

(i) The Role of the Party 200

(ii) The Executive 206

(iii) Elections of President 207

(iv) Qualification for Election to the post of President 209

(v) The Prime Minister and Cabinet 210

(vi) The Judiciary 215

Page

(vii) Service Commissions 216

VIII. CONCLUSION 227

(i) The Break-Up of the Federation..... 239

(ii) The issue of National Unity 242

Footnotes 247

BIBLIOGRAPHY 273

CHAPTER 1

EARLY CONSTITUTIONAL EVOLUTION UP TO 1924

CHARTERED COMPANY RULE

European expansion in Central Africa was spearheaded by missionaries, traders and hunters. But it was only during the 19th Century that the European powers began to stake out effective political claims in the interior and Britain too was not to be left behind in her quest to create an African Empire[1]. But at this period Britain was not very interested in direct territorial expansion. She was not yet prepared for the difficult and expensive task of governing these far off lands. In fact one of the alternatives which used to provide security for British merchants and investors was to encourage European Settlement so that stable white governments would emerge.

But during the last half of the century a new idea came up, that of using Chartered Companies run by private investors but given defined political and administrative powers which would thus shoulder the cost of colonisation without burdening the taxpayer.[2] The advantages for such schemes were many and varied. As pointed out earlier these companies would supply the capital without making demands on the taxpayer. In the process they would start building

the necessary administrative, political and commercial infra-structures at a time when European governments were not prepared to devote their limited resources to overseas territories. And of course, company rule was no new experiment having been tried before in Africa and elsewhere[3]

It was Cecil John Rhodes with his dream of the British Empire extending from 'Cape to Cairo' who after having amalgamated with rival interests in South Africa thought of the idea of asking for a Royal Charter which would facilitate the assumption of government outside British rule.[4] He was successful and on 29th October 1889 the British South Africa Company received its charter.[5] It was henceforth to determine the destiny of the Rhodesias' for more than thirty years.

This new Chartered Company was one of several which came into existence that time.[6] In 1881 a Charter was given to the British North Borneo Company while in 1886 the Royal Niger Company came into being and in 1888 the Imperial British East Africa Company was created.[7] There is also evidence that Germany carried out its early colonial expansion through Chartered Companies.[8]

(i) The Charter

The extent of the Charter's field of operation was left deliberately vague comprising 'the region of South Africa lying immediately to the north of the British Bechuanaland (Botswana) and to the north and West of South African Republics and to the West of the Portuguese Dominions (Mozambique).'[9] This definition of the Company's field of operation fitted properly with Rhodes' ideal of the extension of the British Empire over as much of Africa as possible. Though it would appear that for the time being, the immediate reason for the acquisition of the Charter was the occupation of Mashonaland.[10]

The petition[11] asking for the Charter had referred not only to concessions already obtained but also to concessions which might be obtained in the future, and accordingly while Article two of the Charter authorised and empowered the Company to use and retain for the purposes of the Company and on the terms of the Charter, the full benefit of the concessions and agreements made and all interests, authorities, and powers comprised or referred to in the concessions'. Article three authorised the Company to exercise such powers of jurisdiction and government as it might 'from time to time' in future acquire 'by any concession, agreement, grant or treaty'. Further the Company was put under an obligation

to preserve peace and good order[12] and was permitted to maintain a police force. Native Civil law was to be respected[13] and freedom of religion was to be maintained[14] the imperial government, on the other hand, retained the right to supervise the Company affairs[15] and the company was bound to fulfil the stipulations on its part contained in any concession, agreement or treaty[16] and that differences between the natives and the Company were to be submitted to the Secretary of State. Finally the Imperial Crown reserved the right to revise the Charter after twenty-five years and at the end of every year as far as administration and public matters were concerned.[18] Though the imperial government retained the right to supervise the Company affairs no local machinery was set up at the beginning so that the company officials were left to do as they pleased.[19]

These were no doubt far reaching powers given to a company which were soon converted into sovereign rights. The immediate purpose for the Charter was the occupation of Mashonaland north of the Limpompo River. The events which finally culminated in the occupation of Mashonaland and then Matabeleland and finally Rhodesia by force have been fully documented elsewhere[20] and it is not the purpose of this work to dwell on them in detail and will only be referred to them

in so far as they help to elucidate the factors which led to the Constitutional development of Zambia.

In the area that was to be called Northern Rhodesia[21] the political occupation of the area was spearheaded by Rhodes with his Chartered Company and by the British Government in the East. In the North-West resided a powerful Kingdom that of the Lozi, with their King, Lewanika. For a long time Lewanika had sought British Protection in order to protect himself against the Ndebele raids from the South and also from internal opposition. In pursuance of this objective Lewanika had always been in Contact with Khama, paramount Chief of the Mangwato who had, themselves came under British Protection in 1885.[22] Lewanika had received an assurance from Khama that he had nothing to fear from British Protection. Lewanika thus implored Coillard - the missionary who was resident in his capital to write Shippard the administrator of Bechuanaland (Botswana) soliciting the protectorate of the British Government. In the meantime prospectors were visiting Lewanika's Kingdom and to one of these - Harry Ware, Lewanika granted a concession giving Ware the right to look for minerals to mine them when found for a period of twenty years however, the arrangement reserved Barotseland proper, the plain and its neighbourhood where the Lozi themselves lived, from mining or other activity by Europeans. In return, Ware agreed to pay Lewanika the sum of

£200 annually plus 'a royalty of four per cent on the total output of the minerals in the territory.[23] The territory was said to extend east from the river Majili, south from the cattle path leading to the Ila country and north from the Zambesi river but no eastern boundary was delineated. It was from Ware that Rhodes bought the concession a few weeks later on behalf of the newly formed British South Africa Company and soon after he sent a representative to Barotseland to offer British protection and to make a new treaty embodying these arrangements.

(ii) THE LOCHNER CONCENSION

Frank Lochner the representative who was sent by Rhodes to Lewanika arrived in Barotseland in March 1890 and on 27th June 1890 the Lochner treaty was signed.[24] The Company was given 'the sole, absolute and exclusive and perpetual right and power to carry on any manufacturing, commercial or other trading business and to search for dig, wire and keep diamonds, gold, coal, oil and all other precious Stones, minerals, or substances and the King further bound not to give or enter into any agreement, concensions, treaty or alliance with any person, company or state it being understood that this agreement shall be considered in the light of a treaty between my said Baretse nation and the Government of Her Britannic Majesty Queen Victoria.' The extent of the

Kingdom was understood to include the Lunda and Luvale in the north, the Kaonde to the north-east and Ila to the east including the Tonga and Toka to the south-east.[25] In effect then as a result of the Lochner Concession the Company assumed the whole of what was to become North-Western Rhodesia while its authority over all the peoples named by Lewanika rested solely on its agreement with the Lozi.

The Company in return undertook 'to protect the said King and nation from all outside interference and attack.' And further it agreed that it would and assist in the education and civilisation of the native subjects of the King by the establishment, maintainance, and endowment of schools and industrial establishments and by the extension and equipment of telegraphs, and of regular 'services of postal and transport communication and the Company further promised to appoint a British Resident to reside permanently with the King.' The royalty which was to be paid to Lewanika in the Ware Concession was confirmed and finally the Company 'agreed to pay Lewanika and to his successors in perpetuity, an annual sum of (2,000) two thousand pounds sterling or the equivalent thereof in, trading goods at the option of the King.'

There would appear to be several reasons why Lewanika signed the Lochner Concession. Firstly the Lochner Concession seemed to answer his overriding desire to be under the

Protectorate of the Great White Queen as is evidenced by the clause implying the Queen's protection in which it had been stated 'that any agreement with the Company was to be considered in the light of a treaty or alliance made between the Barotse nation and the Government of Her Britannic Majesty Queen Victoria; Secondly with the Clause agreeing to aid in the education and civilisation of the native subjects of the King, by the establishments'. Lewanika saw the 'means by which his dynamic policy for the modernisation of his nation could be implemented.'[26] Thirdly and perhaps most importantly Lochner himself deliberately declined to clarify his position in relation to the Company and the British Government. When it suited him he would argue that he was the representative of the Queen and that the Company was a department of the British government'. Sometimes intimating that it was the Company which was protecting Khama.[27] In fact this led to the Foreign Office in London acknowledging that 'Mr Lochner may have made too free a use of Her Majesty's name in communicating with Lewanika.'[28]

The years following the signing of the Lochner concession were marked by frustration and even purported cancellation[29] of the concession by Lewanika as the Company failed temporarily or permanently to honour the terms of it. For instance no payment was made for the first Seven years

and no School or industrial establishment was ever maintained with Company money and the British Resident promised in the concension did not arrive until 1897.[30] The consequence of this was that Lewanika and his people bitterly felt that the officials of the Company had let them down and even began to doubt whether they truly represented the Queen of England. Another effect of the concension was that the Lozi lost a big slice of their country which was given to Germany in the Anglo-German Agreement of 1 July 1890 and similarly in the West of the Barotseland country following the Anglo-Portuguese Convention in 1890 the King of Italy in an arbitration award in 1905 the new boundary ceded much of the Barotse country to the Portuguese.[31]

As earlier pointed out the British Resident promised in the Lochner concension did not arrive until June 1897 Seven years after the Lochner concension was entered into. The man who was appointed to this post was Robert Coryndon, a Company man and once private secretary to Rhodes. At the time when he arrived £14,000 had accrued since the signing of the Lochner concension. This was not however paid to Lewanika.[32]

Even more important perhaps, apart from the failure of the Company to honour its obligations under the Concession, were the inadequacy of the terms of the concension

in conferring powers of administration. The concension only gave the company rights in land solely for mining and trading purposes, it did not give the company administrative powers. The implication of this was quite obvious, firstly no land could be granted to settlers by the Company nor could the company assume any administrative powers without a new concension being agreed upon. Secondly the monopoly of the trade granted to the company under the concension could not be permitted in view of Article twenty of the Company's Charter and thirdly the Lochner concension had not been ratified by the British Government in accordance with section 4 of the Company's Charter.

This therefore necessitated the granting of another concension on the Company conferring administrative powers. Hence a new concension, the Lawley concension was entered into in 1898 at the Victoria Falls. The document differed from the Lochner Concension in three important aspects. While it confirmed the right given in the Lochner Concension on the Company to land for mining and other trading purposes, the British South Africa Company was also given the right 'to make grants of land for farming purposes in any portion of the Batoka or Mashukulumbwe country to White men approved by the King.' The British South Africa Company was also granted administrative rights to deal with, and adjudicate upon all cases between white men and between white men and

natives while leaving to the King all cases, between natives to deal with and dispose of and finally the grant of £2,000 promised to Lewanika in the Lochner concension (which was never paid anyway) was reduced to the sum of £850, such subsidy to be in satisfaction and inclusive of the royalty agreed upon by the King and Mr. H. Ware on the part of the country known as Ware's Concension or the Batoka country.'[33] Curiously enough the Lawley concension was not signed[34], perhaps this was so because Lewanika and his people wished a clause to be added which it would appear was not agreed to by the Company at the time of signing the treaty. The clause reserved from prospecting the whole of what was afterwards regarded as 'Barotse proper to the East of the Zambezi but provided that this reservation would be withdrawn if payable gold was not discovered in the rest of the country'. The concension was not ratified by the British Government presumably because Lewanika did not sign it though the British Goverament when asked to ratify the document went on to say that the terms of the concension were inappropriate to present circumstances because though the agreement purpoted to be a treaty or alliance between the Barotse nation and Her Majesty's Government this position had already been superceded by the extension over Barotseland of Her Majesty's Protection in terms of the Order in Council of the 28th November 1899. Further that the grant

of a Monopoly of trade was inconsistent with the terms of the Company Charter and that the undertaking to protect the Baretse from outside interference or attack implied the maintainance of an armed force under the control of the Company which would be inconsistent with the provisions of the Supplemental Charter.[35] The effect of this was that the Company obtained from Lewanika a new concension confined to the grant of such rights as are not open to the objections mentioned and a concension later known as Concession B[36] was signed by Lewanika and the Company in 1900. In its terms the new Concension left out the provision relating to the monopoly of trade and the clause relating to the reservation of Barotseland proper. The concession of 1900 undoubtedly confered extensive administrative powers to the Company particularly outside Barotseland proper. This concension together with the ones which were signed in 1906 and 1909 brought serious conflict between the administration and the Lozi ruling Class thus raising doubts as to whether Lewanika and his indunas really understood the implications of the agreements. It is quite probable that the Company had not revealed to the Lozi the full extent of the concension or alternatively that the Lozi never understood the full import of it and even more importantly that the Lozi might have been threatened into accepting its terms.[37]

But whatever the prevarications and frustrations which followed the signing of the Lechner concession and then the Lawley concession of 1898 and that of 1900 there is no doubt that with these independent initiatives the Lozi had 'opened a window on to the modern World'[38] with results which 'profoundly affected the subsequent course of history in Central Africa.'[39]

It will be recalled that when the British Government was asked to ratify the Lawley concession of 1898 it replied that in any event Her Majesty had extended her Protection over Baretseland in terms of the Order in Council of the 28th November, 1899[40]. It is to this Constitutional set up we now turn.

(iii) <u>The Baretziland-North Western Rhodesia Order-in-Council 1899.</u>[40]

At first the Baretziland - North Western Rhodesia did not go quite far. The entire Northwestern Rhodesia was regarded as having been subject to Lewanika and the treaties entered into between himself and the Company. For instance the administrator did not have power to settle disputes between Africans. The Order was made under Foreign Jurisdiction Act of 1890 and, the limits of the Order were the parts of Africa bounded by the River Zambezi, the German South West Africa (Namibia) the Portuguese Possessions

(Angola) the Congo Free State (Zaire) and the Kafue river.[41] It was further provided in Article four of the Charter that any parts of Africa north of Zambesi could be included within the limits of the Order and the High Commissioner for South Africa was to exercise powers and jurisdiction on behalf of Her Majesty.[42] It was he who was empowered to appoint the administrater together with judges and Magistrates.[43] Further the High Commissioner was also empowered to provide by proclamation for the administration of justice, the raising of revenue by the imposition of taxes though he required assent of Company with respect to order raising revenue to be sought.[44] The Commissioner was enjoined when issuing such proclamations to respect any native laws and customs ... except so far as the same are incompatible with the due exercise of Her Majesty's power and jurisdiction.[45] Finally Her Majesty's Government was given overriding powers to disallow certain proclamations.[46] As might be expected, one of the direct effects of this Order was the use of the power which was given to the High Commissioner to issue proclamations. The North Western Rhodesia Order in Council of 1899, in accordance with the treaties entered into between Lewanika and the Company, did not make clear the position with regard to native jurisdiction beyond stating that native civil law was to be respected unless 'incompatible with the due exercise of Her Majesty's power and jurisdiction'.

It was therefore inevitable that the Company's officials found it difficult to adhere to this position hence a proclamation was issued in 1905[47] which left to the King and Kuta in the reserved area only 'Civil and Criminal cases between natives of a minor kind in which native Custom is not repugnant to English Law.' The proclamation extended Administrative jurisdiction in Barotseland to encompass all 'serious cases' between Africans such as murder and witchcraft. And in 1905 the Administrator's Courts and Magistrates' Courts were established,[48] to be guided by native law in native civil law cases.[49] Because of these changes and encroachments in Lozi jurisdiction a High Court of North Western Rhodesia was established in 1906 and as a result Barotseland retained considerably reduced judicial powers.[50]

Shortly after the promulgation of the 1899 Order in Council another Order[51] was issued. The Barotsiland-North Western Rhodesia Order in Council of 1902 simply amended Article 2 of the Barotsiland North Western Rhodesia Order in Council 1899 by stating that hence forth Gazette would mean 'the official Gazette of the High Commissioner for South Africa. The Order also repealed the definition given to the term 'Colony'.[52]

Meanwhile the company administration sought further concessions from the Lozi administration whereas the concession of 1900 gave the Company the right to grant land in

Toka and Ila country to white men approved by the King now the administration sought authority to issue land over all the Barotse-North Western Rhodesia (save the usual reserved portion) to whoever the administration considered a bona fide fide farmer or Settler Lewanika granted this request.[53] The Colonial Office recognised that the concession amounted to 'a Land grant of the whole of North-Western Rhodesia, except Lewanika's own reserve.' The effect of this concession was to empower the administration to sell land outside Lewanika's own reserve which authority Lewanika subsequently denied ever having given it. Like in nearly all other transactions between the Lozi ruling class and the Company officials, it is possible that the full implication of the concession was never made clear to Lewanika and Secondly that the Litunga did not (as he later asserted) intend to give such powers to the Company but simply to allow them use of HIS land. In 1909 the last important concession was agreed upon, the effect of which was to turn over the ownership of the land outside the reserved area to the Company. Again, the Lozi ruling Class protested but to no avail.

Finally in 1911 when the two administrative Units of Northern Rhodesia were amalgamated in the Order of that year, the question of who owned land outside the Barotse reserved came up. The Lozi ruling Class disagreed with the Clause which

allowing the Company to sell land outside the reserved area to Europeans. But again the Company rode roughshod over their feelings.

The advent of British rule in Barotseland-North Western Rhodesia was fraught with unresolved problems between firstly the Lozi administration and the British Crown and Secondly the Lozi administration and the Company officials. It is doubtless true that the whole British policy in Barotseland right from the beginning was a political sleight of hand. Firstly, because Lewanika's desire was to be under British Protection and not through some other agent. The British Government together with the Company officials deliberately failed to clarify their exact relationship to Lewanika. Lewanika was made to believe that he was under British Protection when he was infact at the mercy of a Commercial concern. As early as 1907 therefore hardly a decade of company rule Lewanika was able to tell the High Commissioner in South Africa that he wanted to pass direct to British rule, but as usual the High Commissioner averred that the King of England was 'perfectly satisfied' with the Company administration. There was no doubt that the British Government connived in the Actions of the Company, though there were times when Her Majesty's Government used its supervisory jurisdiction to disallow certain proclamations

The real position therefore was that Barotseland was in treaty relationship with the Queen of England but under the protection of the British South Africa Company.

(iv) NORTH-EASTERN RHODESIA ORDER IN COUNCIL 1900.

The Barosiland North-Western Rhodesia Order-in-Council of 1899 divided Northern Rhodesia into two district administrative Units. In the north east unlike in the North-West the British Government itself took a leading part. The primary aim of Her Imperial Majesty's Government was the suppression of Slave trade. In order to do this the British Government employed certain officials who went on treaty making expeditions with the numerous Chiefs who inhabited these areas. Unlike in the North West, in the North East there was a host of Chiefs and the British Government wished to enter into agreements conferring British Protection with these Chiefs. In 1891 with the field of operation of the company extended over the Zambezi[56] and the extension thus brought the combined operation between the British Government and the Chartered Company. The British territory north of the Zambegi was to be divided into two parts one of which would be administered by the Government while the other part would be administered by the Company. And as a result of

treaties by Harry Johnston, who later became High Commissioner for British Central Africa, Thomson and Alfred Sharpe both of which were Company officials the Foreign office issued a formal notification which was published in the London Gazette that 'Under and by Virtue of Agreements with the native Chiefs and by other lawful means, the territories in Africa, hereinafter referred to as Nyasaland districts are under the Protectorate of Her Majesty the Queen'.[57] It has since been observed that the wording of these treaties were vague and that many of the 'Chiefs' who signed them had in fact no authority to do so. As Hanna says 'the whole business of treaty-making with illiterate Chiefs whose legal notions were far removed from those of a nineteenth century White man was always open to misunderstanding'.[58] At the time however the whole purpose of the treaties was to prove to other competitors Claims to company's extension of the Company's influence. Secondly other tribes were implacably opposed to the signing of treaties with Concession seekers such as for instance the Bemba and Mpezeni's Ngoni of North Eastern Rhodesia but even in these areas the British Government either simply ignored the defiance shown by these tribes and declared their areas to be under British influence or conquered them into Submission.

The Charter of the Company then was to extend over the

territories under British influence north of the Zambezi as far as the German East Africa (Tanzania) and the Congo Free State (Zaire) Nyasaland however was excluded but its boundary was to follow the Nyasa Congo watershed all the way northwards to the German frontier. The political control over the Company sphere was to be exercised by the High Commissioner of British Central Africa until 1 January 1894 and after that date the arrangement was renewable at the discretion of the government for a further period not exceeding two years.[59]

Meanwhile by an agreement concluded in 1891[60] Her Majesty's Commissioner of British Central Africa was to administer the Company's new territory at the Company's expense, dispense justice and control the police force. The Company was to bear the cost of maintaining a police force by paying £10,000 a year. As a result of an agreement between the Company and the British Government dated 24 November 1894 the Commissioner was asked to religuish administrative control West of the protectorate not later than 30 June 1895 and that the Company's subsidy should cease at the end of that year.[61]

It can rightly be said that the separate existence of Northern Rhodesia dates from 30 June 1895 but it was not until 1900 that the British Government firmly placed the area east of the Kafue river on an organized administrative basis with

the promulgation of the Order in Council of that year having made separate arrangements for the rest of the territory in the previous year by the North Western Rhodesia Order in Council. Even this arrangement however did not bring North Eastern Rhodesia under the overall administrative control of Northern Rhodesia, for, the general supervision of the area continued to be exercised by the Commissioner for the territory but the pending unification of the two administrative units of Northern Rhodesia in 1911 finally transfered to the High Commissioner for South Africa Supervisory function of the area thus bringing it under identical control with that of North Western Rhodesia.

The North Eastern Rhodesia Order-in-Council 1900

The limits of the Order were said to be 'parts of Africa bounded on the west by the boundaries of the Congo Free State (Zaire) and of Barotseland-North Western Rhodesia as defined in the Order of 1899 on the South by the Kafue River and the river Zambezi down to its junction with the Luangwa river; thence by the midchannel of the Luangwa River northwards to where it is cut by the 16th Degree of latitude and from this point by the Anglo-Portuguese boundary eastwards to the frontier of British Central Africa Protectorate on the east by the aforesaid frontier. On the north by the

Anglo Germany frontier to the South shore of Lake Tanganyika and the Southern frontier to the Congo Free State as far West as Lake Mweru including the island of Kilwa in the British sphere.'[62]

Unlike the Barotziland-North Western Rhodesia Order-in Council of the previous year the North Eastern Rhodesia Order in Council of 1900 went further in its extent as there were no recognized Concensions which conferred administrative powers on Chiefs to which it might have been made 'subject'.

Hence it provided for the appointment of an Administrator[63] who was assisted by native Commissioner[64] and a local police force. The High Commissioner for British Central Africa was empowered to issue Queen's regulations in order to provide for justice, the raising of revenue[65] with the consent of the Company. A High Court[66] was created to dispense justice according to English law though native law was to be applied to Civil cases between Africans unless contrary to natural justice.[67] The Order also created an organ for Settler opinion, namely a Council[68] to assist the administrator though he was not bound by its decision.[69] In Article 39 and 42 the Order disallowed discriminatory legislation. In Article 39 it declared that no conditions, disabilities or restrictions shall without the previous consent of the Secretary of State be imposed upon natives . . . save in

respect of arms ammunition 'liquour.' And in Article 42 a native was empowered to acquire or dispose of land 'on the same condition, as a person who is not a native'.

With the declaration of a Nyasaland Protectorate in 1907[70] a new Order in Council the North Eastern Rhodesia Order in Council 1907 was promulgated. This Order amended the North Eastern Rhodesia Order in Council 1900 by substituting the term 'Governor' for that of 'Commissioner' and the term 'Nyasaland' to replace 'British Central Africa'.[71] Finally in 1909 an Order was promulgated transfering powers 'hither to exercised by the Governor administering Protectorate of Nyasaland to High Commissioner for South Africa.'[72] Thus between 1907 and 1911 the High Commissioner of South Africa was exercising in North Eastern Rhodesia the same kind of jurisdiction as the one he was exercising in North Western Rhodesia hence this inevitably finally brought North Eastern Rhodesia under the overall administration of Northern Rhodesia. In the north west British Administration was brought about first by the promulgation of the Barotziland North Western Rhodesia Order-in-Council in 1899 then followed the North Western Rhodesia Order in Council of 1902 which merely extended the High Commissioner's jurisdiction to the area. This was completed by the Order of 1909[73] which revoked Article 10 of the Barotziland Order-in-Council of 1900 and in Article Four and Five authorised the publication of proclamations in the Official Gazette of the High

Commissioner.

Thus Company administration was finally formalised by the British Government with the promulgation of these Orders-in-Council.

In the South of the Zambesi, however, the position was different. It will be remembered that Rhodes' main aim in seeking the Royal Charter was the occupation of Mashonaland. In the petition asking for the Charter the Company was authorised to exercise such powers.of jurisdiction and government as it might 'from time to time' in future acquire by any concession, agreement, or treaty. This meant in effect that the Company was authorised to administer powers of jurisdiction as long as it was allowed to do so by the Chiefs concerned. We have seen that in Barotseland this position was followed, though even there Company obtrusively usurped Lavanika's sovereignty. In the North East it can hardly be said that the Company was 'allowed' to exercise its jurisdiction in all cases. It is known for instance that the Ngonis and Bembas did not willingly submit to Company rule. They were in the final analysis terrorized into submission by the might of Company's 'gun' power.

In the South the position was completely different from that which obtained in the north. Here Lobengula

the powerful potentante of the Matabele refused company encroachment in his Kingdom but was in the final analysis made to submit.

Following the occupation of Mashonaland by the Company pioneers the British Government issued an Order-in-Council[74] authorising the High Commissioner to issue proclamations making provision for the administration of justice, the raising of revenue and generally for pure and good government of all persons within the Chartered sphere of influence in accordance with the Foreign jurisdiction Act of 1890.[75] The High Commissioner then appointed a Resident Magistrate who later became the Administrator.[76] In 1893 following the Matabele rebellion Matabeland was occupied by the Company and in 1894 the Matabeland Order in Council[77] was issued. This provided for the nomination of the administrator with the approval of the Secretary of State assisted by a Council consisting of 4 members. Finally in 1898 Southern Rhodesia received an order in Council. In Southern Rhodesia Order in Council of 1898 provision was made for the office of Resident Commissioner and the executive and legislative Council. The Administrator was to preside over both and the executive Council was to consist of the Resident Commissioner and at least four members nominated by the Council while in the legislative Council in addition to 5 nominated members

there were to be four elected members representing the Settlers. With the election of these four members Southern Rhodesia was set on the road to Self-government achieving parity in 1907 and the Settlers attained majority in the legislative Council in 1917. From then on the number of elected members in the Council outnumbered that of the officials and this contributed to Southern Rhodesia becoming a Self-governing colony in 1923.

Curiously enough the British Government had intended to extend the Matabeland Order in Council to the north of the Zambezi this was prevented by the Jameson Raid of 1896.[78] It was felt that it would be dangerous to strengthen the Company any further. Also while Southern Rhodesia had a legislative Council it was prevented from legislating for the north. Thus Southern Rhodesia used Roman Dutch Law whereas in the north English Law was the mainstay.

In the administration of affairs in the north the imperial government retained wide powers but only on paper. In practice however it exercised nominal influence. We have seen that in the Company Charter the Secretary of State could object to proceedings of system of Company whereas in the Orders of 1899 and 1900 Her Majesty could disallow an offending proclamation or Ordinance. In the final analysis however, the imperial administration relied for information on

the 'men on the Spot' the Company administrators. The High Commissioners were themselves primarily concerned with affairs in Nyasaland and South Africa and this had to depend on information given to them by the Company administrator and his team, the Secretary for native affairs District and native Commissioners. And so no attempt was ever made to legislate without the go ahead of the Company administrator. Up until 1911 the imperial government did not have a representative on the spot. It was only in 1911 that the Resident Commissioner was made answerable to the High Commissioner in South Africa.

We have seen how between 1898 and 1911 Lewanika 'had lost whatever governing powers he had possessed or could have exerted outside Barotziland proper and even within his reserved powers, he had no more than a limited subordinate'.[79] And with the promulgation of the Order in Council in 1899 Lewanika lost his Sovereignty, 'henceforth' as Stokes rightly says, 'Lewanika's authority rested on sufferance and not autochtonous right'.[80] In the north east between 1907 and 1911 Company administration was gradually being absorbed into North Western Rhodesia. In 1907 Nyasaland became a protectorate and though the Governor continued to issue Queen's regulations for the Company sphere North Eastern Rhodesia was nevertheless drifting away from the new British protectorate and this was finalised in 1909 when the Governor's powers were transfered to the High Commissiner for South Africa.

The stage was therefore set for the amalgamation of the two northern Units into one entity-Northern Rhodesia - which finally came about in 1911.

(v) Legal Consequences of the Treaties

The legal nature and effect of the treaties which were entered into between Lewanika and the British South Africa Company in Barotseland-North Western Rhodesia and those entered between the Company and African Chiefs in North Eastern Rhodesia has to be looked for, first in international law and then in British Domestic law.

In as far as North Western Rhodesia is concerned these treaties assumed an important significance in 1964 when Northern Rhodesia's Republican Constitution was being discussed in London. The Lozi, because of their special position which they had enjoyed in Northern Rhodesia based upon these treaties, sought to extend this status into independent Zambia hence the signing of the 1964 Barotseland Agreement which preserved to Barotseland the special position it had enjoyed under British rule. The legal effect of the agreement will be examined in Chapter IV of this paper but for now it is important to place the treaties in their proper legal perspective vis-a-vis the British Government.

The Ware concension of 1889 and the Lochner Concension of 1890 were covered in the 1898 Treaty. As we have seen the Lochner concension only gave the company

rights in land solely for mining and trading purposes, it did not give the company administrative powers.

This necessitated the granting of another concension on the company conferring administrative powers. Hence a new concension the Lawley concension was entered into in 1898 at the Victoria Falls.

Though it was not a cession of powers of government as such, the British South Africa Company was however given 'administrative rights to deal with, and adjudicate upon all cases between white men and between white men and natives' while leaving the King all cases between natives to deal with and dispose of. On its part the company undertook 'to protect the King and nation from all outside interference and attack,' while King Lewanika bound himself not 'to give or enter into any agreement, concension, treaty or alliance, with any person, Company or State, it being understood that this agreement shall be considered in the light of a treaty or alliance made between my said Barotse nation and the Government of Her Britannic Majesty Queen Victoria.'

The treaty further declared that 'nothing written in this agreement shall otherwise affect my constitutional power or authority as Chief of the said nation.'

In effect this treaty gave to Britain power over Barotseland's external affairs and in so far as internal affairs were concerned the King's powers were still wide except powers of adjudication in disputes between white men and between white men and natives which were reserved to the Company.

Thus as a result of the treaty Barotseland became a protectorate of Britain.

A protectorate implies that one power assumes control of another country's external relations and promises to protect that country from external attack. As Hall said 'the mark of a protected State or people, whether civilised or uncivilised, is that it cannot maintain political intercourse with foreign powers except through or by permission of the protecting State.'[81] It is merely, in the conclusive words of Sir Henry Jenkyns, "a country which is not within the British dominions, but as regards its foreign relations is under the exclusive control of the King so that its government cannot hold direct communication with any other foreign power with that government.'[82]

International Law recognised this relationship whereby the protector controlled external affairs of the protected State while the protected State remained, a

person in International Law. Indeed in Re Southern Rhodesia[83] which involved questions relating to the Origin of British jurisdiction in Southern Rhodesia the Privy Council dismissed the notion that indigenous African Communities inhabiting the area were still in a nomadic stage of development at the time the British arrived, On the contrary, the Board was of the view that there existed a tribal organisation serving the purposes of Government of the communities and its existence excluded any 'question of White Settlement among aborigines destitute of any recognizable form of sovereignty."

In as far as Britain was concerned the Legal machinery which she employed in the governing of the protectorates derived from the Foreign Jurisdiction Act. The first Foreign Jurisdiction Act was passed in 1843.[84] It sought to regulated. Crown Jurisdiction over British subjects who lived outside the British dominions and yet were not directly subject to the jurisdiction of the country in which they lived. The Act permitted the Crown to exercise jurisdiction wherever 'by treaty, capitulation, grant, usage, sufferance, and other lawful means.' In section 1 the Act gave the Crown power,

'to hold, exercise and enjoy and power or jurisdiction which Her Majesty now hath or may, at any time hereafter have within any country or place out of Her

Majesty's dominions, in the same and as ample a manner as if Her Majesty had acquired such power or jurisdiction by the Session or conquest of territory.'[85]

Thus the Crown could legislate in terms of the Foreign jurisdiction Act, Between 1843 and 1890 a number of amendments were made to the Act culminating in the jurisdiction Act of 1890 though this did not bring about major changes in the law.

The relevant question which we have to consider now is the extent of British Jurisdiction in the protectorates and in particular in the Barotseland-North Western Rhodesia. In other words, was the sovereignty in Barotseland divided between the Crown and King Lewanika following the signing of the treaties. The rule in international law is that for a country to exercise jurisdiction in another country-there must be permission, express or tacit of the sovereign of that State unless such a territory belongs to no one.i.e. unless it is a territorium nullius. We have however noted that this position was rejected in Re Southern Rhodesia in a far as African countries were concerned. This rule of international Law requiring consent applies to a protecting power in relation to its protectorate, since the latter is, to the protecting power, a foreign country.[86]

The Question now is whether, from the viewpoint of English Muncipal Law the Crown is bound by the Treaties by which it originally acquired jurisdiction in Barotseland so as to affect Lewanika's Constitutional position. It has however been observed by Denning L.J. (as he then was):

> Although the jurisdiction of the Crown in a protectorate is <u>in law</u> a limited jurisdiction, nevertheless the limits may <u>in fact</u> be extended indefinitely so as to embrace almost the whole field of government. They may be extended so far that the Crown has jurisdiction in everything connected with the peace, order and good government of the area, leaving only the title and ceremonies of sovereignty remaining in the Sultan. The Courts themselves will not mark out the limits. They will not examine the treaty or grant under which the Crown acquired jurisdiction nor will they enquire into the usage and sufferance or other lawful means by which the Crown may have extended its jurisdiction ... Once jurisdiction is exercised by the Crown the Courts will not permit it to be challenged.[87]

Thus as far as English law is concerned the Courts will only look at any instruments issued by the Crown to see what jurisdiction the Crown has in fact exercised and that these 'are conclusive as to the extent of the Crown's jurisdiction.'[88] This is the authority emanating from the doctrine of 'Act of State.' The Courts are precluded from

'enquiring into the consequence of acts of British Government which are inseparable from the extension of territory.'[89] And an act of State has been defined as 'an act of the Executive as a matter of policy performed in the course of its relations with another State, including its relations with the subjects of that State unless they are temporarily within the allegiance of the Crown.'[90]

And so in 1899 the Queen's authority superseded that of Lewanika and the treaties made by him and thus the terms of the treaties could only be operative in so far as they were allowed by the British Government or were not in consistent with the 1899 Barotziland-North Western Rhodesia Order-in-Council. Thus after 1899 as a result of this British assumption of sovereignty Lewanika lost his status as subject of International Law. Though of course Barotziland North Western Rhodesia still remained a protectorate but it was a protectorate in which the Crown had virtually assumed entire sovereignty. In other words after 1899 Barotziland was a 'colonial protectorate' but not a colony as this would have necessitated a formal act of annexation. It still remained a 'foreign country' and in point of fact no formal annexation took place in Barotseland or any other part of Northern Rhodesia.

As a result of the Barotziland-North Western Rhodesia Order-in-Council of 1899 and the North Eastern Rhodesia Order-in-Council of 1900 Northern Rhodesia Chiefs lost their status as subjects of international law and thus any agreements which they entered into with the British Crown could no longer operate as treaties in international law but merely as ordinary contracts deriving their force from the English Common Law of contract and any other statute bearing on such agreements. The importance of this change of status in so far as Northern Rhodesian Chiefs are concerned and King Lewanika in Particular is directly significant in so far as the Agreements of 17th October 1900 and that of 11th August 1909 are concerned and finally to the Barotseland Agreement of 1964 which will be discussed in Chapter IV.

(vi) Northern Rhodesia Order-in-Council 1911.

The Northern Rhodesia Order-in-Council of 1911 was to all intents and purposes modelled on the North Eastern Rhodesia Order-in-Council of 1900.[91] In Article 2 the Barotziland North Western Rhodesia Order-in-Council 1899, 1902 and 1909 and the North Eastern Rhodesia Order-in-Council 1900 and 1907 and 1909 were revoked, while the Units of the Order were said to be parts of Africa bounded by Southern Rhodesia, German East Africa Nyassaland, (Malawi) and Portuguese East Africa (Angola). The majority of the Articles in the North Eastern Rhodesia Order-in-Council were repeated in the Northern Rhodesia Order in Council of 1911. A High Court for Northern Rhodesia was set up.[92] No Discriminatory legislation[93] was to be allowed while native law was to be observed so far as it was not repugnant to natural justice. In Article 13 a provision for a Council was enacted to assist the Administrator. This was a recognition of the need to give a voice to the white settlers. It will be remembered that this provision was incorporated in the North

Eastern Rhodesia Order in Council of 1900 but nothing was ever done by the Company to put it into effect. Now the Company was asked to create one 'as soon as the company by resolution of its Board of Directors considers it expedient' of a Six member Council to advice the administrater. The Company was to appoint all the Six members though three were to be from among the Settlers. Soon after the whole country was placed under one administrator the Kafue farmers petitioned the High Commissioner for an Advisory Council provided for in the Order in Council. Two years later in 1913 the North Western Rhodesian farmers asked for a full legislative Council. None of these ideas however were immediately entertained at the time and with the outbreak of the First World War in 1914 they were shelved-but only for the time being.

There were also some Articles in the Order which safeguarded the special status of Barotseland. The first forbade the Company 'to alienate from the Chief and people of the Barotse the territory reserved from prospecting by virtue of the concessions from Lewanika to the British South African Company dated the 17th October 1900 and 11th August 1909.'[94] The second[95] was that relating to the power given to the Company to remove Africans to make way for White settlement. It was held that this should not be

deemed to limit or affect the exercise by the Chief of the Baretse of his authority in tribal matters.' Finally there was Article 42 which provided that outside the protected area natives might purchase unoccupied land in exactly the same way as white men.' The Losi vehemently denied that they had ever intended to allow settlers or anyone else for that matter to buy land, but the administration turned a deaf ear to their protestations.

Save for minor[96] amendments the Northern Rhodesia Order in Council 1911 remained the substantive law of Northern Rhodesia under Company rule. In 1918 an advisory council provided for in the Order-in-Council of 1911 was established. It consisted of five elected members. Four elected from North Eastern Rhodesia. Only male British subjects over twenty-one years of age who received not less than £150 a year or who occupied premises of no less value were allowed to vote.[97] It had neither legislative nor executive powers nevertheless it provided the small settler population of Northern Rhodesia with an outlet for voicing their opinion they demanded the right to veto finance bills and complained about the Company's land distribution in the country, the failure of the Company to encourage immigration and the diversion of African labour to Southern Rhodesia.[98] Because of the ineffectiveness of the Council the

Settlers were dissatisfied. The Dual role of the Chartered Company, as a commercial concern and as an administering power meant that it was serving two masters simultaneously. Thus it failed to endear itself to the Settlers and dissatisfaction with its operations was rampant.

This position had long been reached in Western Rhodesia. Lewanika and his people had no love lost between themselves and the Company right from the beginning of Company rule. They had long since seen the shortcomings of company administration and had demanded direct British overrule. Lewanika had demanded direct British administration in 1907 when he met the South African High Commissioner, equally in 1917 just one year after Lewanika's death - Yeta -the new Litunga had demonstrated beyond doubt[99] in what Ranger has described as 'the only coherent African view presented to the debate on the governmental future of Northern Rhodesia'[100] the whole gamut of Company sins of Ommission and Commission which were done in North Western Rhodesia. At the time therefore when the advisory Council was formed in Northern Rhodesia all sorts of possible forms of administrative structures were being discussed in relation to Northern Rhodesia,[101] ranging from a responsible government for the local Europeans in Northern as well as a Southern Rhodesia to a government formed by the amalgation

of the two Rhodesia. There were also ideas for the Union of the two Rhodesias with South Africa. But one thing was certain both the White settlers in the north and south of the Zambesi were dissatisfied with Company administration. In the north the bitter cup of Settler dissatisfaction finally overflowed when the administration sought to introduce income tax without the consent of the elected representatives of the council. A petition signed by 175 of the Settlers was sent to the King in London. They complained that 'the white population are allowed no share whatever in any kind of government in the Territory' and demanded that 'the expenditure and Collection of all moneys from the public of Northern Rhodesia shall be subject to the approval of, and be controlled by, the Advisory Council. The petitioners also demanded that the council should have a vote over all future legislation. The Question of the distribution of land was also raised 'the British South Africa Company claims to own all the land and minerals in the country as a private concern, and the people claim that both these belong to the Crown, and say that the country will be greatly impoverished if the greatest part of its wealth is thus taken from the Crown as Custodian for the people of this territory.[102]

Meanwhile events in Southern Rhodesia were also reaching a climax. In the Supplemental Charter which was granted in 1915 to the Chartered Company after the expiry of the initial twenty-five years granted in the 1899 Charter there was a clause which provided that 'if at any time after twenty-ninth October, 1915, the legislative Council of Southern Rhodesia, shall by an absolute majority.. pass a resolution praying the Crown to establish in Southern Rhodesia the form of government known as Responsible Government and shall support such Resolution with evidence showing that the condition of the territory financially and in other respects is such as to justify the establishment of such a government' [103] steps would be taken accordingly. And in 1920 the Responsible Government party won the elections and the majority of the Legislative Council voted for a resolution in favour of a Responsible government [104] and in accordance with the 1915 Charter the British Government was bound to take note of their decision. The Company too had been bitterly disappointed in 1918 when the Council Judicial Committee of the Privy handed down its decision [105] in the matter concerning who owned the unalienated land in Southern Rhodesia. The Judicial Committee said that the ownership of the land rested in the Crown by right of conquest and that the Company was simply an agent of the Crown.

All these developments thus paved the way for the exit of Company administration in the two Rhodesias. And consequently in 1921 the Colonial Secretary appointed a Commission to inquire into the future of the two Rhodesias.

(vii) THE BUXTON REPORT

The Commission[106] reported that Southern Rhodesia should be given responsible government with safeguards for native interests and that there should be held a referendum in Southern Rhodesia to determine the adoption or rejection of the Constitution. In other words the alternatives of Responsible government and whether the Colony should be merged with the Union should be decided by referendum as soon as possible.

In Northern Rhodesia as a result of the Settler petition His Majesty's Government the political goings on were also included in the Buxton Commission. The Commission asked the Company 'at once to consider the creation of a legislative Council on which the settlers would have an adequate representation. The report also referred to the land question-it said 'in Northern Rhodesia there was no conquest and no consequent settlement, but only a series of agreements and instruments made in wholly different circumstances from those which prevailed in Southern Rhodesia'...'

The Report therefore suggested that the only satisfactory course was to obtain a decision from the Privy Council and which might also touch on the financial position. It is quite interesting to note that while the settlers had achieved unofficial majority in the Legislative Council in Southern Rhodesia on the north no legislative or executive Councils had been formed.

(viii) THE DEVONSHIRE AGREEMENT

The Devonshire Agreement of 1923 like the Buxton Commission of 1921 applied to both Northern and Southern Rhodesia. In the north the agreement set Northern Rhodesia irrevocably on the road to Crown Colony Status. Both financial claims by the Company on the one hand and the British government on the other were abandoned. The Imperial Government was to assume 'full and entire control of the lands through North Western and North-Eastern Rhodesia, to be administered as it thinks best in the interests of the native population and in the public interest in general.' The Company was to retain perpetual enjoyment of the mineral royalties while it received the half net proceeds of all alienation of land in North Western and North Eastern Rhodesia until 1965 and also it retained its freehold estates in North Eastern Rhodesia. There was also a Special protection

for the railway Companies as a result of their heavy investment.

At last the Company Charter rule was over. The Administration of the two Rhodesias was a burden the Company was ill-prepared to shoulder. Lewanika's dream of being under direct British rule was at last realised by posterity. The British administration unable to shoulder the financial burden of administering Barotziland-North Western Rhodesia had paid no attention to Lewanika's requests for direct British administration. But events were to prove otherwise for the British government. The British Government had refused to listen to the Lozi ruling class - but they could not continue to ignore settler demands for Constitutional Changes in the two territories any longer. Two errors were committed by the British Administration in so far as the position in Barotziland-North Western Rhodesia was concerned. Firstly the Lozi ruling class received a system of administration which they never asked for namely Company rule with its dire consequences. Secondly The Order of 1911 'marked the final encapsulation of Barotseland within the larger Colonial entity of Northern Rhodesia, thus shattering Barotziland's separate Treaty Status with Britain',[107] something which the ruling class neither sought nor wanted, thus sowing seeds of conflict which inevitably came up with the

advent of Northern Rhodesia's Independence. The Company itself as Richard Hall rightly points out had 'left as its monument one of the most neglected territories in Africa.'[108]

Chapter II

Termination of Company Rule and the Imposition of Colonial Rule.

The Company's rule came to an end in Northern Rhodesia on 1st April 1924. The Devonshire agreement was to a large extent incorporated in the Northern Rhodesia Order-in Council of 1924 which also laid down the new Constitutional structure for the territory.[1] Northern Rhodesia thus became a protectorate with a constitution of the usual crown colony type. The Order was issued under the Foreign Jurisdiction Act.[2] The Imperial Government through the colonial office set up an administration on the British colonial model headed by a Governor. He was also the direct representative of the British Monarch. The Order in Council of 1924 set up a legislative Council[3] to pass ordinances and an executive council[4] whose role was to advise the Governor. The Governor presided over both the Executive and Legislative Councils Executive power was concentrated in his hands. He was Commander-in-Chief of the Armed forces.[5] His assent was

necessary for all legislation[6] and he could subdivide the territory into Provinces.[7] He represented the King for Ceremonial purposes. In his social and administrative functions he was assisted by the Executive Council of Senior Civil Servants to whom all instructions from the Secretary of State for the Colonies had to be communicated but he was not compelled to follow its advice though he had to inform the Secretary of state of his reasons.[8] The British Government had full authority to legislate for the peace order and good government of Northern Rhodesia without the participation of or consultation with the legislative Council 'as if this order had not been made.'[9] Thus British Parliament remained the ultimate source of law for the territory. Orders in Council were promulgated by the Crown which effected constitutional and important policy Changes.[10] There were also Royal Instructions[11] issued by the crown directed to the Governor for the proper administration of the territory. For instance in the Royal instructions passed in 1924 addressed to the Governor the Composition of the Executive Council was stipulated.[12] All local ordinances were to respect "native laws or customs by which the civil relations of any native Chiefs, tribes or populations under His Majesty's protection are now regulated except so far as the same may be incompatible with public safety, natural law and

morality."[13] There is also mention of the Barotseland concessions and the Order stipulate that

'it shall not be lawful for any purpose whatever to alienate from the Chief and people of the Barotse the territory reserved from prospecting by virtue of the concessions from Lewanika to the British South Africa Company dated 17th day of October 1900 and 11th day of August 1909"[14].

The Order further stipulates that "all rights reserved to or for the benefit of natives by the afore said concessions as approved by the Secretary of State shall continue to have full force and effect."[15] And in Article 43 of the Order the authority of the Chief of the Barotse in tribal matters is upheld. Certain categories of bills were specifically reserved. These included those referring to the protection of African rights except those dealing with arms, ammunition and liquor for Africans.

"Unless he shall have previously obtained His Majesty's instructions upon such Bill through a Secretary of State or unless such Bill shall contain a clause suspending the operation thereof until the signification in the Territory of His Majesty's pleasure thereupon, the Governor shall reserve:

(i) "Any Bill saved in respect of the supply of arms,

ammunition or liquor to natives, whereby natives may be subjected or made liable to any conditions, disabilities, or restrictions to which persons of European descent are not also subjected or made liable".[16] Article 40 of the Order also stipulates that

'no conditions, disabilities, or restrictions which do not apply to persons of European descent shall, without the previous consent of a Secretary of state, be imposed upon natives (save in respect of the supply of arms, ammunition and liquor), by a Proclamation Regulation or other instrument issued under the provisions of any Law, unless such conditions, disabilities or restrictions shall have been explicitly prescribed, defined and limited in such law.'[17] There is also a provision in the Order that the Governor shall reserve for consideration by the British Government not only the discriminatory legislation but any other legislation of which the Colonial Secretary may disapprove.[18] The Crown also reserved power to disallow by simple decree on the advice of the Secretary legislation already enacted.[19] In addition protection was given to investors with regard to bills affecting mining revenue or railways.[20]

All these provisions were entrenched and there was no provision by which the legislative council could amend

the constitution. All amendments could only be effected by the British Government.

Thus Northern Rhodesia in 1924 was comparable in Constitional status to Southern Rhodesia in 1898. In that year the British Government issued an Order in Council[21] which introduced the institutions of the Southern Rhodesian government. There was a legislative Council of four members who were elected while five were appointed by the Company.[22] An executive Council was also established and all its members were appointed by the Company. The 1898 Order also set up the High Court of Southern Rhodesia and entrusted the appointment of judges to the Company though this was made subject to the approval of the British Secretary of State for the Colonies.[23] The Order of 1898 remained in force in Southern Rhodesia until 1923 when Southern Rhodesia became a Self - governing colony following a referendum on October 27, 1922 when the electorate opted for internal self-government as opposed to intergration into the Union of South Africa which had come into being in 1910 as a British Dominion. A new Order in Council declared

'whereas British subjects have settled in large numbers in the Territories of Southern Rhodesia, it is expedient, with a view to the further development of the said territories, that they should be annexed and should henceforth form part of His Majesty's Dominions."[24] Southern

Rhodesia therefore became a Self-governing colony with Letters Patent, a Constitution which provided for a legislative assembly[25] of thirty members, all elected and a cabinet system operating with the agreement of the legislature[26] and having mostly unlimited internal control over its affairs. And with the exception of those sections bearing on native affairs[27] the legislature could amend the Constitutional Letters Patent by a two-thirds majority.

The position of Northern Rhodesia in 1924, on the other hand, compared somewhat favourably to that of Nyasaland. Firstly both territories were protectorates and in 1907 Nyasaland's Constitutional structures were set up.[28] The only difference was that the British Government retained far greater control over the affairs of Nyasaland than was the case with Northern Rhodesia.

Thus although it may not be improper to refer to the pre-independence period in Northern Rhodesia as the colonial period - Northern Rhodesia was never in fact a British Colony but a protectorate. The only difficult was that the protectorate agreements were reached not by the British Government as such but by officials of the British South Africa Company and rulers in this part of the world. It is arguable in fact that these agreements were ordinary

commercial agreements although in this particular case these agreements were eventually recognized by Britain but the recognition did not generally detract from the fact that the concensions extracted from the African rulers were in most cases one sided - that is in favour of the Company, secondly because there was the inevitable question relating to the extent of the territories there was ambiquity as to the size of the territories and this encouraged the company to peg out land claims which may not have belonged to the rulers with whom they entered into agreements. In some cases too, there was the tendency to 'give away' large parts of territories to some other colonising powers even in the face of opposition from the indigenous occupants of the territories.

Firstly because Northern Rhodesia was a protectorate, this meant that her people were British protected persons and this seems to be quite peculiar to English law. The fact that Northern Rhodesia was a protectorate meant that British Protected persons were unable to vote since the franchise was limited to British Citizens this remained the position in Northern Rhodesia up until time of Federation of Rhodesia and Nyasaland when in the new Constitution of 1958 Africans were enfranchised for the first time.

Secondly the idea of protectorates was in fact

internationalised after the first World War. The League of Nations was formed following the end of hostilities whose purposes were somewhat similar to the present United Nations Organisation.

One of the Characteristics of European Wars was that the vanquished lost colonies thus Germany lost Tanganyika and South West Africa. But the territories were not simply handed over to the victors but the League of Nations disposed of the German Colonies as 'Mandates', and not as legitimate objects of conquest. Thus Tanganyika became a mandate of Britain and South West Africa that of South Africa. The general view at the time was that mandated territories were to be developed for the benefit of indigenous peoples which would eventually see them through to majority rule. And when the United Nations Organisation was formed after the demise of the League of Nations after 1945 another idea was introduced-that of Trust Territories.

Northern Rhodesia however remained a British protectorate but the development of the notion of 'protectorate' in the international arena affected the discharge by Britain of her responsibilities over Northern Rhodesia.[29] And Colonial administrators now had the problem of deciding how native trusteeship was to be interpreted in East and Central Africa.

The Legislative and Executive Council of Northern Rhodesia

The Northern Rhodesia Order in Council of 1924 set up the legislative and executive arms of Government. Sitting astride over these two bodies was the Governor. He was the direct representative of the British Monarch in Northern Rhodesia. Because he was appointed by the Crown he did not depend on local support. He made appointments and could dismiss or suspend officials. As a rule he was a Colonial civil servant and wielded enormous power. Executive power was concentrated in his hands. In his duties he was assisted by an executive Council and he was obliged to consult it on all important matters but could disregard its advice though he had to report to the Secretary of State for the Colonies for disagreeing with it and the members of the council could require that their views be placed on record.

The executive Council was composed of the Governor and nine officials-five ex officio members and four nominated members.[30] These Members of the executive Council were called officials. In 1924 the executive council was composed entirely of officials and it was not until 1939 that non officials began to sit on it.[31] The ex officio Members were to consist of persons exercising the functions of Chief Secretary to the Government, Attorney General, Treasurer, Secretary for Native Affairs, Principal Medical officer.[32]

These heads of departments were colonial civil servants and not politicians. They were also members of the legislative Council.[33]

The legislative Council on the other hand consisted of the five ex officio members and the four nominated officials. In addition in 1926 there were five elected Unofficials.[34] The first unofficial members to the first legislative Council in 1924 were nominated to it in order to make it possible for the introduction of the future electoral system.[35] The Governor remained President of the Council until 1948 when he was replaced by an elected Speaker.[36]

The Governor and his officials were responsible to the Crown and did not depend on local support for their tenure of office. They depended on the British Government for their promotions and in general this entailed constant transfers from one post to another within the empire and the settlers felt that because of this constant movement the officials could not develop deep interest for the territory to which they were posted. In particular the question of the role of the native in the Northern Rhodesian Society remained a bone of contention between the British Government on the one hand and the Settlers on the other and between the Settlers and the Northern Rhodesian Government and the British Government on the other hand and between all of these

and the African on the other.

The first Governor of Northern Rhodesia, Sir Herbert Stanley, saw the role of the Unofficial Members in a much more limited way. In his inaugural address to the Legislative Council he declared 'It is hardly necessary for me to emphasize,' he said, 'that a council such as ours is not a parliament in the generally accepted sense of that term. It is constituted on a different basis, which obviously places the government in a position to exercise effective control. The object of having unofficial Members on this council is that they should ventilate the opinions and represent the views which are held in various parts of the country, and bring before the government considerations which otherwise might escape the notice of the government."[37] In other words the Governor saw the legislative council as an advisory. However the Settlers saw themselves in a different light. As far as they were concerned they were certain that they were moving along the road to responsible self-government. 'The differences between a parliament and this council are small and ... should not be emphasized. It is more like a parliament than it is unlike a parliament. We are to all intents and purposes a Parliament and likely to become a parliament;[38] asserted Mr. Leopold Moore, the man who founded the territory's first newspaper, the

Livingstone Mail. He described those that were going to be elected as a 'parliamentary elected minority'.[39] As for the attitude of the Settlers towards the Africans we can take the view expressed by one of five nominated Settler representatives for purposes of establishing a franchise and Constituencies Mr Ellis. He declared, "The position of the European settlers in this country is such that they must take unusual care to protect themselves, and most also adopt a parental and protective attitude towards the mass of uncivilised and ignorant Natives among whom they dwell. As the powers of the present government will eventually be handed over to an elected government, I consider that it must important that we would make one now so that when the time comes, the elected government will be such that it is capable of protecting the civilised European population as well as the backward Native population.'[40] Referring to the question of giving the vote to the African he said "If we decide that all races who may happen to be British subjects are to be entitled to vote, we shall never be entitled to recall that right, and this country will probably eventually be controlled by people who are quite unfit to govern'.[41]

The franchise qualifications restricted the vote to British subjects[42] and because Northern Rhodesia was a protectorate Status this completely disenfranchised the

Africans who were themselves British protected persons. The same disqualification applied to a large number of coloured on the technical ground that 'illegitimate children of British fathers, born outside His Majesty's Dominions, did not count as British subjects, though Africans and coloureds could become British subjects on payment of a fee'.[43]

The vote was given to British subjects of twenty-one years and over these were also literacy and residential qualifications. All intending voters had to fill the application form in English. They either had to have, an annual income of at least £200 or occupy a house or other buildings within the electoral area, with or without land, to the value of at least £250, ownership of a mining claim of not less than £250. The period of residence in the electoral district varied in some ways but 6 months was the standard one. Married women of not less than 21 years of age could obtain the vote on their husband's qualifications. An undischarged bankrupt or a recently convicted criminal may not be enrolled as a voter. Persons who held property under any system of 'communal or tribal occupation' could not vote.[44]

Candidates for election were required to satisfy additional requirements such as thirty months residence in

the territory during the preceding four years while conviction for a serious crime disqualified. Candidates were required to deposit £20 on nomination which was forfeited if Candidate failed to poll one fifth of the votes of the successful candidate.[45]

With the publication of these franchise qualifications therefore, the settlers believed that they had completely excluded the native from the vote and by implication from power. Settlers felt that they dwelt among 'masses of uncivilized and ignorant natives'[46] and that 'there is not one intelligent native in the country'.[47] One Unofficial member went so far as to say that 'it seems to me to be a well established fact that Europeans are the only people in the world who are capable of exercising the right of election.... Non-European peoples can only be represented satisfactorily by some method of nominating Europeans to do so.[48]

Thus, as far as the Unofficial members were concerned they did not think that the legislative council could concern itself with African affairs. Said Mr. Moore in 1927 'The Natives do not come into contact with this House. They are governed by the people of this country; not governed in the sense that they are legislated for by the people but

they are governed by the people who employ them.[49]

And so right from the beginning the White settler plans for the African carried with them the stigma from which they were never excused, that of trying to form a White oligarchy like the one in Southern Rhodesia. These utterances sowed eternal seeds of distrust in the minds of the African for the white motives.

The Imperial government on the other hand believed that men of all races were to be given equal opportunities but in so far as this applied to Northern Rhodesia this was to be done when the Africans were 'able to stand on their feet.' The crucial question was really when this was going to happen. The Africans were to be kept in a permanent State of tutelage first by the British Government and then by the Settlers.

The Settlers believed that if they increased the control of the legislature it was not going to be long before official control in the legislature would give way to the establishment of a responsible government or in the alternative amalgamation with Southern Rhodesia. These two aims amalgamation and Responsible Government were two main political goals for the settlers for the coming decades.

Amalgamation of Northern Rhodesia and Southern

Rhodesia was not infact a new subject. In 1915 the Chartered Company had put up proposals for the amalgamation of the two territories[50]. But the scheme had floundered because of the opposition it met both in the North and the South. In the north, the white settlers did not want to be dominated by the South and as far as white Rhodesians were concerned they did not want to be saddled with the 'black north'.

During the 20's the Settlers revived the idea, but up to 1930, the majority were still opposing the idea. In 1928 two members of the legislative council advocated for amalgamation. Mr. Moore in reply to one of the speeches said 'The nominated member said it was preferable to be governed by the Government of a United Rhodesia than from Downing Street. Of course, he knows. He must know. He has the God like faculty of knowing everything. My experience is much more limited than his and I say you can do even worse than Downing Street. I think if there was a chance of anything being worse than Downing Street, it would be by submitting all our affairs, and direction, to a United Rhodesia'. 'My opinion is,' he added, 'that (in a United Rhodesia) whatever money is available will be spent where the balance of voting power is, and that is not north of the Zambesi...'[51]

Thus when the first motion proposing amalgamation was introduced in the council in November 1929, it was supported only by its mover and seconder.[52] The majority of the Unofficials felt that the time was not ripe and as a matter of fact they hoped for self-government for Northern Rhodesia and that amalgamation could only be considered when Northern Rhodesia would have made progress comparable to that enjoyed by Southern Rhodesia. This confidence of the Whites towards responsible government was to be shaken by an event which 'overnight' changed their opinion. In the meantime however, the settlers in 1929 increased their Unofficial strength from five to seven.[53]

The policy of imperial trusteeship in East and Central Africa was being tested by the British Government beginning in the early 20's. In 1923 for instance Lord Devonshire's, White Paper, Indians in Kenya stated: 'His Majesty's Government think it necessary definitely to record their considered opinion that the interests of the African natives must be paramount, and that if, and when, those interests and the interests of the immigrant races should conflict the former should prevail. Obviously, the interests of the other communities, European, Indian or Arab must severally be safeguarded... But in the administration of Kenya

His Majesty's Government regard themselves as exercising a trust on behalf of the African population, and they are unable to delegate or share this trust, the object of which may be defined as the protection and advancement of the native races.'[54]

At the time however this declaration was scarcely noticed by the settlers in Northern Rhodesia.

The immediate sequel to this Declaration would appear to have been periodic conferences between 1925-1926 between East African Governors and some Northern Rhodesian delegates for some kind of federation of their territories. The final Conference being at Victoria Falls in 1926 where the delegates agreed that a Federation of their countries was quite impracticable.[55] However as a result of these moves for a closer association in the East African territories, the British Government in 1927 appointed a commission[56] to examine general issue and the question of closer association of Central African territories. Under the Chairmanship of Sir Edward Hilton Young the Commission reported that the strongest foundation of European civilisation and British rule was 'in the size of the white community which must always remain a relatively small island in the midst of a greatly preponderant black population, but

in the establishment of a rule of justice which will enlist the loyalty of the native people and strengthen their confidence in British rule'.[57] It went on to declare that European political leadership would 'never be secure until it rests on consent and not on privilege.'[58] On the actual question of closer union itself the recommendations amounted to some form of apartheid under imperial rule. It was envisaged that both immigrants and natives would develop along different lines local self-governing institutions in their own areas, while the imperial government would play the role of an impartial arbiter. 'Our idea is that while each pursues its own distinctive and natural line of development they may be able to settle down together in a single state without the fear of a struggle for domination provided this is available an impartial arbiter to decide issues on which there is a conflict of racial interests. It can be the destiny of the Imperial Government to fill this role'.[59] The Commission also suggested the formation of a Central authority in East Africa which would look after the affairs of the countries involved. Though the ultimate aims of trusteeship would have made it possible for 'black and white some day to meet on equal terms, intellectually, socially and economically and that 'the racial and economic antagonisms may be merged in

a community of interests which will admit of some form of free representative government[60] the ideal of separate development was obvious in these recommendations and it would have been difficult to predict with certainty as to what was going to happen when this dual policy would have been achieved. The settlers might have opted for the logical conclusion of separate development and that is independence for the different homelands as is happening in South Africa today.

At a lower level this dual policy was not substantially different from the theory of Indirect Rule. In essence the theory was for the advancement of African peoples towards self-government. Propounded in Lord Lugards book 'The Dual Mandate in British Tropical Africa,'[61] the theory became the guiding principle for British colonial policy in Africa. Other colonial powers such as the French, the Portuguese and the Belgians on the other hand intended to transform their African societies and ultimately produce Africans who would be save their colour portuguese, Frenchmen or Belgians.

As for the British the 'Lugard Doctrine' was felt to be the most effective way of governing the new possessions.

And so in 1927 in Northern Rhodesia a conference of district commissioners and administrators recommended the introduction of Indirect rule.[62] As a result in 1929 the legislative Council in Northern Rhodesia introduced the Native Authority Ordinance and the Native Courts Ordinance. The Secretary for Native Affairs said. 'The new Bill (Native Authority Ordinance) introduces a more advanced form of native administration, which gives to the Chiefs the management of their own affairs within their tribal areas, and it is hoped it will preserve and maintain all that is good in native custom and tribal organisation'.[63] The Native Courts Ordinance on the other hand was introduced to establish courts in the tribal areas for the adjudication of minor civil and criminal cases. The Order in Council of 1924 had established the High Court of Northern Rhodesia.[64] Appeals would lie from native courts to Magistrates' Courts and (thereafter to the High Court). There was also provision for appealing to the Privy Council[65]. Finally in 1936, in accordance with the Government's policy of extending indirect rule a new Native Authority Ordinance was introduced which brought Barotseland within the same administrative system like other areas of Northern Rhodesia. And to complete this system of indirect rule in 1928 the Northern

Rhodesia (Crown lands and Native Reserves) Order in Council was introduced set apart Native reserves for Africans.[66]

What shook the confidence of the Settlers towards their esteemed goal of self government was not the introduction of indirect rule as such. It is true that the effect of the policy was fully appreciated at the time. Though it was intended to strengthen tribal administrative structures in fact however it tended to undermine them. First of all, the policy infact encouraged African political consciousness. The development of the Copperbelt in the 30's meant that thousands of Africans both men and women would leave their homes in search of paid employment. It was also from their wages that they were going to pay their taxes. The concentration of various ethnic groups on the Copperbelt helped to arouse African political consciousness, and though the government believed that the African was not going to be a permanent feature of Urban life on the contrary as a result of this concentration of the Africans in the new environments of the Copperbelt it became a melting pot for African political activities.

It was not these contradictions in the avowed system of indirect rule which ruffled the equanimity of the

settlers, important as they were at the beginning, but the publication in 1930 of a report which seemed to emphasize once more the imperial responsibility over the Africans in East and Central Africa. Lord Passfield the Secretary of State in the Labour government issued in 1930 a memorandum on British native policy in East Africa which at that time was deemed to include territories north of the Zambezi.[67] The policy on Native affairs which was adumbrated by Lord Passfield was in fact quoted from Lord Devonshire's White Paper, Indians in Kenya, which has already been quoted. In effect the the Memorandum affirmed British trusteeship for native races in East Africa and the importance of reposing ultimate political control in imperial hands 'even if unofficial majorities were established in the local legislatures.'

This clearly meant that the Northern Rhodesia settlers will have to be denied ultimate advance to self-government which their counterparts in Southern Rhodesia were enjoying. The Northern Rhodesian settlers were as a result angered by these recommendations and a protest was forwarded to the Secretary of State.[68] British colonists hold that the British Empire is primarily concerned with the furtherance of the interests of the British race.

and only thereafter with other British subjects and the nationals of other countries in that order'. They continued 'the natural trustees of barbarous and less developed races are their civilised neighbours. The assumption of Trusteeship by the Imperial Government is uncalled for and inadvisable since that Government cannot know, as do the white settlers in the country living among natives, the needs, the opportunities and the capabilities of races who are as unknown by the Imperial Government. Interference, directed by uninformed authorities, resident many thousands of miles away in the relations and affairs of White settlers and the African races can lead only to resentment and antagonism? As a result of this protest a Joint Select Committee of Parliament was set up which interpreted the doctrine 'to mean no more than that the interests of the overwhelming majority of the indigenous population should not be subordinated to those of a minority belonging to another race, however important in itself'.

The Unofficials in the legislative Council rejected the report and even the explanation by the Governor to the Unofficials[69] did not seem to help matters. Unlike in the past when the Settlers views on amalgamation with Rhodesia differed, with the publication of the passfield

Memorandum the settlers were determined to get rid of colonial control so that they could control the affairs of Northern Rhodesia themselves. An independent observer might have been forgiven for thinking that Northern Rhodesia was on the wedge of a drastic Change in native policy as a result of the passfield Memorandum - but the truth really was that the memorandum itself was fraught with contradictions which made its implementation difficult.

But as far as the unofficial members of the legislature were concerned they were determined to oppose its implementation if any, after all they were the people who were in effect supposed to implement the prosposals and their opposition was surely going to make matters very difficult for the Government. Hence with the publication of the memorandum differences of opinion which the Settlers might have had over their future were cast aside and they were now set on the road to amalgamation of the two Rhodesias. Numerous resolutions during the coming years were passed in favour of amalgamation. In January 1936, for instance, the Northern Rhodesia Unofficials and representatives of political parties in Rhodesia met at the Victoria Falls and resolved in favour of 'the early amalgamation of Northern and Southern Rhodesia under a

constitution confering the right of complete self-government.'[70] This remained an article of policy for the White settlers in both North and South of Rhodesia until after the Second World War when circumstances seemed to suggest that the British Government would never agree to such a scheme and that perhaps an association such as a Federation would be considered. The campaign for amalgamation which was finally abandoned in 1948 has been well documented elsewhere[71] and it is not the purpose of this paper to go into its details.

But what were the Africans thinking all this time? It is no doubt true that the only time the settlers ever seriously discussed native affairs was after the publication of the Passfield Memorandum. And even then shewing that they had nothing to do with the native.[72] The only lone voice which appeared to be in support was that of Captain Brown, Member for the Midland Electoral Area. 'I ask you, Why fear the native? He is one of our greatest assets.'[73] The legislative council was not to admit of Africans until 1954 and it was only in 1938 that the first member to represent African interests was nominated. But in reality however the Africans were not dormant. As early as the 1930's they had begun to concern themselves with the affairs of the country. They began forming Welfare

associations where they discussed their relationship with the Europeans. These welfare associations were later to be established all over the line of rail and in 1946 a Northern Rhodesia Federation of Welfare societies was formed. And in 1948 it renamed itself the Northern Rhodesia African Congress-with Godwin Lewanika, a Lozi moderate as its President. In 1951 the leadership was to be taken over by Mr Harry Nkumbula.[74]

In the meantime also the settler administration, partly as a result of one of the recommendations of the Commission which was appointed to probe into 1935 African Copperbelt Strike and partly as a result of common sense began to form African representative bodies which kept the administration in touch in so far as African feeling was concerned. From 1938 onwards Urban Advisory Councils were formed along the line of rail. In 1943 the District Commissioner for Kitwe for instance appointed Harry Nkumbula to one of these councils. Later these urban advisory councils were organised on regional basis and as a result regional councils (later to be called provincial councils) were formed and the provincial councils were finally transformed into a national Council which in 1948 was empowered to appoint two representatives to the Northern Rhodesia legislative

Council.

All these African inspired organisations opposed amalgamation with Southern Rhodesia. At their meetings resolutions were usually made which opposed any amalgamation with the South.

Meanwhile in 1938 the Unofficial members in the legislative Council were made equal in number to the officials by reducing the number of nominated official members from four to three and by appointing for the first time an Unofficial member to represent African interests.[75] In 1941 the officials were increased by one again while the elected unofficial members were also increased by one.[76] In this way the balance between the officials and Unofficials was maintained. The Unofficial strength was further increased in 1945 when the number of nominated Unofficial members was increased from one to five. And three of the nominated were to represent native interests.[77] This gave the Unofficials an increase over the Unofficials. The Unofficials were to increase their strength further when their number was raised from eight to ten and the nominated five reduced to four though two of the four had to be Africans. The officials were also increased from five to six.[78] There was no doubt that the unofficial element in the Northern Rhodesia legislative Council were getting their share in

the running of the country. Beginning in 1939 Unofficials began to sit in the Executive Council and even to hold official posts and later on even being made responsible to the legislative Council.[79]

The Rhodesia and Nyasaland Royal Commission.

As a result of the conference in 1936 which took place between the elected members of the Northern Rhodesia Legislative Council and by representatives of all political parties in Rhodesia which resolved in favour of 'Constitution conferring the right of complete self-government in the interests, of 'all the inhabitants' of both colonies' the British Government appointed a commission in March 1938 to enquire 'whether any and if so what, form of closer co-operation or association between Southern Rhodesia, Northern Rhodesia and Nyasaland is desirable and feasible, with due regard to the interests of all the inhabitants, irrespective of race, of the territories concerned and to the special responsibility of our Government in the United Kingdom of Great Britain and Northern Ireland for the interests of the Native inhabitants.'[80]

The enormous task of the Commission cannot be over emphasised. The Settlers looked at it as the one that was going to deliver them into a United Rhodesia where the

whites and the Children were going to lord it over the Africans. The African fears were justified. They feared that amalgamation would bring them under the same native system like the one that was operating in Southern Rhodesia. They were aware that they could derive no tangible benefit from such a Union. The settlers knew that though they were using economic arguments for the scheme the ultimate aim was to form a white oligarchy in Central Africa which was going to seek Dominion status from Britain and then have nothing to do with the Africans. The commission itself was torn between two conflicting theories. Segregation and trusteeship. Segregation was practised in Southern Rhodesia while in both Nyasaland and Northern Rhodesia imperial responsibility for the native peoples as a result of their protectorate status simply made the whole amalgamation scheme anathema to them.

The Commission in its recommendations believed that the three territories 'will become more and more closely interdependent in all their activities and that identity of interests will lead them sooner or later to political unity. If this view should commend itself also to your Majesty's Government in the United Kingdom, we recommend that it should take an early opportunity of stating its acceptance

of the principle."[81] The acceptance of amalgamation in principle was consequently recommended although the Commission expressed the view that it should not be recommended immediately. One of the reasons being that 'the avowed policy of segregation (in Southern Rhodesia) under the name of Parallel Development, and the institution of colour bar clearly stand in the way'.[82] The Commission failed to recommend either unification of the territories or Federation. As a practical step the Commission recommended the creation of a Central African Council which was going to consolidate co-operation between the three territories and thereby open the way for amalgamation. In so far as Northern Rhodesia was concerned the Commission recommended Unofficial majority in the legislative Council and parity between Unofficials and Officials in the Executive Council.

In the Northern Rhodesia legislative Council debate of 6th June 1939 the Report was condemned vehemently by the Unofficials. The Commissions reasons for rejecting amalgamation were felt to be Unconvincing and the leader of the Unofficials, Sir Leopold Moore, declared 'I simply dismiss the White Commission as a waste of time and money by a lot of men who did not know what they were doing, never should have been sent out, were badly selected, and quite unfitted

for the job'.[83]

The outbreak of the second world war shelved the question for a while but before the end of hostilities Colonel Stanley, Secretary of State for the Colonies said in the House of Commons that the British Government had 'after careful consideration the amalgamation of the territories under existing circumstances cannot be regarded as practicable.'[84]

With the question of amalgamation rejected by the British Government the Unofficials in Northern Rhodesia appeared also to be changing their original demands. Though there were still calls for amalgamation and responsible government for Northern Rhodesia, a number of the Unofficials notably Gore Brown and Roy Welensky had shifted their ground somewhat and now began to support the idea of Federation. Secondly the attitude of some of the Unofficials to the Africans was changing. 'I am convinced the African is right when he opposes Amalgamation with Southern Rhodesia ....'[85] declared Gore Brown. 'I stand back to no one in my desire to see the African progress. If the only distinction between the African and ourselves is this question of education, and far more capable people than myself suggest it is

then it is a difference that will disappear'[86] said Sir Roy Welensky.

It was therefore not surprising when Sir Roy referring to a trip where a Northern Rhodesian delegation was going to make to London said 'We do want an opportunity of discussing the Federation issue with the Secretary of state for the colonies'.[87]

At about the same time the Nationalist Party in South Africa came to power. It was committed to a policy of apartheid and to cut South Africa's links with Britain. Thus from the majority of the settlers' point of view there was need for a strong state in Central Africa which would act as a bulwark against Afrikaner expansionism.

And so when it was clear that amalgamation would never be accepted the idea of Federation was suggested. In so far as it related to Central Africa the idea was not a new one. Both the Hilton Young Commission and the Bledisloe Commission made some recommendations about Federation but the scheme was not accepted because of the constitutional differences in the three territories. But the idea of Federation was now considered attractive. Britain could still retain her imperial responsibility in relation to the two

protectorates of Northern Rhodesia and Nyasaland while the Federal Government would look after the economic interests of the three territories. As a result of these goings - on a Conference was arranged in February 1949 in which the three territories were involved to look at the question of Federation.

CHAPTER III

CONSTITUTIONAL CHANGES 1948-1963

African Affairs

Up until 1948[1] Africans in Northern Rhodesia had no direct representation in the legislative council. In that year two Africans selected by the newly formed African representative council from among its members were appointed to the legislative council by the Governor by instrument under the public seal and they were supposed to be persons not holding any office of emuluments under the crown in the territory.[2] And as we have seen it was only in 1938 that provision was made for the representation of African interests by a nominated unofficial member.

The problem of African representation by Africans or as the administration would have liked to call it-native local government-was initially taken care of with the formation of Native Authorities in the rural areas, the result of which was the enactment in 1929 of ordinances[3] for the proper and organised running of African affairs. In 1936

the Northern Rhodesia Native Courts Ordinance was introduced which defined the jurisdiction of native courts. This system of native administration did not apply to Barotseland. In Barotseland with the successive treaties entered into during the early twentieth century between Company officials and Lewanika a different political organization operated. The Paramount Chief and his council formed the legislative, judicial and executive body and it was only with the enactment of the Barotse Native Authority Ordinance 1936 and the Barotse Native Courts Ordinance of the same year that the system fell under the direct supervision of the Central Government. In this system appeals would then lie from the Superior native authority-i.e. the Paramount Chief and council-acting in its judicial capacity to the High Court.[4] This, as the administration hoped, would herald a system of indirect rule which would guide Africans towards running their own affairs. But in Northern Rhodesia new factors began to surface which made the Native Authorities less suited for the effective administration of Africans. In their quest for paid labour Africans left their homes to look for employment and with the development of the Copperbelt in the late 20s' and hence the establishment of industrial Centres Africans found themselves in these areas thus

weakening the tribal organisations. Lord Hailey was to write 'Northern Rhodesia will provide a significant test of the question whether native authorities are able to maintain the respect and interest of a population which is subject to the powerful influence of industrial and Urban life.'[5]

It therefore became imperative to devise some alternative system for consulting Africans outside the traditional native structure.

In 1936 the newly elected member of the Legislative Council for the Northern Electoral Area, Liet-Col. Stewart Gore-Browne asked in the Legislative Council, whether there was an adequate system of native representation and consultation on matters that affected them.[6]

'The question of ultimate native representation and immediate native consultation is one which is exercing a great many people', he said. He told the Legislative council that he had been addressing a meeting of Africans on the possible amalgamation of the two Rhodesias. One of the Africans in the meeting wondered why Africans were not consulted on the matter. When Gore-Browne asked how this could be done the Speaker suggested that Chiefs could Speak on behalf of the people, but twenty others in the room said

'No, they cannot talk for us, they do not know what they are thinking, they do not know anything about it.'[7] He then said 'I am glad you brought this up and asked me this question, because this is exactly what a lot of us want to know, and if you could suggest how native opinion could be consulted we would be very glad to hear it'.[8]

Fundamental Changes were thus occurring in the attitudes of the unofficial members towards the Africans. No doubt the majority of their views still smacked of paternalistic benevolence but there was now an unavoidable realisation that it was necessary to consult Africans themselves and Gore-Browne took a leading part in this. 'The only solution to the problem ... is to admit frankly that we regard the native races as our partners, potential partners if you will, junior partners far as for ahead as it is possible to look, and to frame our native policy accordingly'.[9]

Thus the Government realising the need for consultation of African opinion-particularly the urban Africans' needs, began to establish a system of tribal elders' advisory councils which were later extended to all the mine compounds on the copperbelt.[10] Later, native advisory councils which were finally called Urban advisory

Councils, together with Native Urban Courts were instituted.[11] The functions of those organisations were to act as Channels of communication from the Government to the people and Vice versa. Membership of the Councils were partly elected by the tribal elders' Councils and the boss boys'-which were some kind of 'little trade unions' appointed by the Mining managements and partly nominated by the District Commissioner.

This step was taken further in 1942 when Colonel Gore-Browne put specific proposals before the Legislative Council[12] for extending the system of urban advisory councils to all the urban areas in the Copperbelt towns, and for the inauguration of native provincial councils composed of members elected by the African Urban Advisory Councils and the tribal native Authorities. Although they were regarded as purely advisory, Gore Browne saw them as assisting the Provincial commissioners and representative or representatives of African interests in the legislative council for a general discussion of political issues with Africans. Though Gore Browne had obtained the support of both the unofficials and the officials and though again on general they were sympathetic but during the debate

questions were asked as to the actual operation and effect of the proposed measures. Was Gore Browne expecting too rapid a change? One of the Unofficial members, Major Mckee for the Midland Electoral area raised questions which once again brought to the surface the bogey of the Settlers. 'I think some people will ask where does this lead to'. He went on to say that though many Europeans would have no objection to native progress, they feared it might have effects detrimental to the contended rights of the European Community. But on the other hand member of the Northern Electoral area Mr. Roland Welensky said that the country should expect direct African representation in the legislature eventually: meanwhile if the system of provincial councils would make the system of representation by a European more effective then it was the duty of all the members to support the proposal.[13] Consequently the motion was passed without a division. The Regional Council, Western Province, held its opening session at Luanshya on the 20th of December 1943.[14]

The meetings of these bodies following their formation proved quite useful. They infact provided a common meeting ground for the up coming intelligentsia and the traditional Chiefs and as a result there was a gradual transformation of the native local governments along more

representative trends. The councils used to sit under the Chairmanship of the Provincial Commissioner though in 1945 it was found necessary to hold preliminary sessions under African Chairmanship. Often too the Secretary for native affairs and District Commissioners including Gore Browne himself attended. Because of the progress that was being made with the provincial councils plans were underfoot at about this time to form an African Representative Council for the whole territory which was thus formed in 1946. The members of the African Representative Council were elected by various Provincial Councils and there were also four appointees of the Paramount Chief of Barotseland.[15] Though their role was purely advisory the Government entrusted them with the role of scrutinising Bills which were likely to affect African Affairs.

'It is not your function to make the laws of the land but you will have a hand in the shaping of those laws which affect Africans and it is for that reason that draft legislation will be submitted to you'[16] explained the Acting Governor of Northern Rhodesia at the first session of the African Representative Council.

Yet the importance of these bodies in the Constitutional development of Zambia cannot be over emphasized.

Their procedures were modelled on the Legislative Council. The African Representative Council itself had the sole prerogative of nominating Africans to the Northern Rhodesia Legislative Council. In this way the Africans were contributing albeit in a small way to the Growth and development of experiments in Constitutional development.

True they were administration sponsored bodies, and perhaps from the Government's point of view it was intended that the Chiefs and the rural representatives would, with their conservative views and their disdain for reform contain the urban members of the councils but as their contributions were to show they opposed the administration on their political hobbyhorses amalgamation, self government and finally federation. Their members in the Legislative Council spoke with vehement conviction against the political changes which the settlers were trying to introduce. And as Hall points out[17] 'the administration began to sponsor a system which was to undermine its hallowed doctrine of indirect rule and speed the penetration of tribal areas by modern nationalistic thinking'.

However the penetration of the whole country by modern nationalistic thinking was to be provided not by administration sponsored advisory bodies but by organisations

formed by Africans for African interests. These were the welfare associations which sprang along the line of rail starting from Livingstone up to the Copperbelt during the early 30s. They drew their inspiration from the Mwenzo Welfare Association which was formed in 1923 in Northern Province[18] which in turn was inspired by the Nyasaland Native Associations in Nyasaland. In 1946 the Northern Rhodesia Federation of Welfare societies was formed which sought to bring into one umbrella the various welfare societies in the country and in September 1946 the Federation of Welfare Societies held its annual Conference at Munali School in Lusaka and before the Conference broke up it renamed the Federation of Welfare Societies the Northern Rhodesia African Congress.[19]

The delegates resolved that they would no longer consider Gore Browne as their representative. This was a reaction to his statement in the legislative Council on twelfth January 1948 asking for Responsible Government. The delegates condemned 'responsible government, amalgamation and federation and demanded that Northern Rhodesia should be 'declared a Protectorate in the trust sense of the word and that the misleading name of 'Northern Rhodesia' be changed to 'Queen Victoria's Protectorate.' Even the African

Representative Council during its meeting in 1948 opposed the granting of responsible government to Northern Rhodesia and demanded that there should be on both the Legislative and Executive Councils equal African and European Unofficial representation and that African Representation by nominated Europeans should be abolished.[20]

In this way therefore, the interests of the two bodies though nurtured in different circumstances became identical when pitted against the drive for European Self-government, amalgamation and finally federation. These African bodies were able to organise effective opposition against European designs for control of the Constitutional development in Northern Rhodesia. This became evident in 1939 when the Bledisloe Commission was touring the country. Africans in the northern territories were unanimous in opposing any ties to Southern Rhodesia.

'There is no contesting the fact that a very large number of the natives of this territory have worked in Southern Rhodesia and have an intimate knowledge of conditions there, and that though their views may not have been formed with the clarity of a jurist or the profundity of a political philosopher, they were held nonetheless stoutly and they were unanimously opposed to amalgamation

with Southern Rhodesia.'[21]

Thus the importance of these African Socio-political Associations cannot be overemphasized in the constitutional development of Northern Rhodesia. It is important to place them in the proper setting in order to facilitate understanding of subsequent forces. The African Representative Council for instance remained responsible for the selection of African members of the legislative Council until 1959 when Northern Rhodesia held elections under one of a series of some of the most complicated constitutions ever devised by Britain for any of her depe-ndencies. In so far as the African National Congress was concerned, (as it became in August 1951)[22] as a full-fledged political movement for Africans in Northern Rhodesia it was responsible for putting up Constitutional proposals for 1958 Constitution. Though the majority of its proposals were not included in the Constitution, the proposals provide a useful metewamd by which to gauge the rapid Constitutional awareness of the Africans in the territory.

The thrust of this paper therefore is that we cannot understand Northern Rhodesia's Constitutional development in vocuo but that to understand the manner of its development it is important to look at the social and political forces

which conditioned its development and as Davidson says[23] when he referred to the forces which shaped the Northern Rhodesia Constitution 'it is necessary to know the aims of the individuals and social groups who have worked within the framework which it has provided, and this necessitates the study of far more than purely Constitutional matters.'

European Development

As we have seen by 1948 the Unofficial members of the Legislative Council were increased to ten while the official members remained at nine. Two Africans were appointed to represent African interests for the first time, while two other representatives of African interests remained European. Though this gave the Unofficial a majority over the officials it was still possible for the Governor to command a voting majority in the council by using the votes of the four representatives of African interests in the support of his measures. The Unofficials on the other hand regarded the 1945 and the 1948 Constitutions as conferring on them the responsibility to control the legislature provided they were unanimous and Gore-Browne was elected leader of the Unofficial members' Association. All these measures were viewed by the Unofficials as bringing close the day when responsible government would be given to them.

In so far as the executive council was concerned, it was not until the out break of the war that Unofficials were admitted in its ranks. In 1927 Unofficials in the Legislative Council had demanded representation on the council but this was not accepted at the time. The Bledisloe Commission had suggested parity on the executive council between officials and unofficials. With the advent of the 1939-45 war Unofficials were appointed to the Executive Council.[24] These changes also made it possible for Unofficials to be given administrative posts. But at this time, though there were unofficials on the executive council Officials dominated the policy making body and responsibility for every government department was still with the officials. Subsequently four Unofficial members of the legislative council including one of the Europeans nominated to represent African interests could sit on it. These Changes were brought about as a result of the 1948 Constitutional Changes. Under the new arrangements the views of the Unofficial members were to carry the same weight in the Executive Council as they did in the legislative council subject of course to the overriding powers of the Governor. And the Governor was replaced by the Speaker as President of the executive Council.

This position was clarified in April 1949 when an official statement was issued by the British Colonial Secretary Creech Jones, who was visiting Central Africa at the time. 'The conclusion reached in the London discussions last July ... should be understood to mean that, without prejudice to the Constitutional position of the Executive Council, the Governor will accept the advice of the Unofficial members of the Executive Council when the four Unofficials are unanimous, except in cases where he would feel it necessary to use his reserved powers.'[25] Earlier in November 1948 the Governor had appointed[26] Member for South Western Electoral area Mr. G.B. Beckett as member for Agriculture and Natural Resources. Though the British Government continued to reassure the Africans that their interests would not be subordinated to those of the settlers, these concensions which were being given to the Settlers could point to no other conclusion other than that the Unofficials were increasing their political power. By the Northern Rhodesia Legislative Council (Amendment) Order in Council (No. 2) of 1948[27] the Governor was reserved the right to address council at any time when he thought fit and the duration of the council was extended from a period of three years to five years.[28] After 1954 all the four Unofficial members were given portfolios. Northern Rhodesia was therefore

slowly evolving a Ministerial system. The Executive Council was thus responsible to the Governor and the legislative for the administration of the Government departments within their portfolios. They would therefore appear to have formed in effect a Cabinet and the principle of collective Cabinet responsibility applied to the decisions of the Executive Council subject of course to the Governor's reserved powers. At this time all members of Government used to sit on the same side of the legislative Council and in effect constituted a kind of Government front bench. All these Changes were brought about by the Northern Rhodesia (Legislative Council) Amendment Order in Council 1952. The Legislative Council now constituted of a Speaker, four ex officio members, four nominated official members, two nominated Unofficials appointed to represent African interests. There were also twelve elected Unofficial members and the number of African representatives was increased from two to four.[29] The ex officio members consisted of the Chief Secretary to the Government, Attorney General, Financial Secretary and the Secretary for Native Affairs.[30] The four African members were P. Sokota, S.H. Chileshe, R.M. Nabulyato and L.H. Ngandu.

It must also be borne in mind that by this time

Federation had been introduced in Central Africa, African opposition to it having been ignored by its protagonists.[31] The settlers therefore reached their highest stage in political development and were quite confident that the next round of Constitutional changes would usher in responsible government.

In order to consolidate their position the Unofficial members of the Legislative Council had formed themselves into an association called Unofficial members' Association and the Chairman of the association was given precedence in the Executive Council Sitting immediately behind the Chief Secretary.

Mention has already been made of the fact that in 1953 Northern Rhodesia became part of the Federation of Rhodesia and Nyasaland. Federation was simply imposed on the Africans despite their vehement and seasoned opposition to it. The British Government and settler protagonists of Federation tried to justify it on economic grounds but the Africans knew very well that what the settlers hoped for was to gain dominion status for their creation and thus transform the Federation into democratic White oligarchy and thus place Africans in perpetual subjugation. The struggle by the Africans of the Central African Federation

is discussed in the next Chapter. Suffice to mention that though the British Government had succumbed to settler pressure and that Federation had been introduced and that though the Federation Constitution stipulated that no change would be made to the set up until after the Federal Review Conference in 1960, the British Colonial Office was loath to reliquish its ultimate Control of the territory. The upshot of this arrangement was that the territories, particularly the Northern ones were able to develop constitutionally along their chosen paths.

In Northern Rhodesia therefore it can be argued that the 'Campaign against Federation gave Africans an opportunity to play a major part in nationalist politics.'[32] Though perhaps it is true to say that 'federation period marked the highest point of the 'protest' movement against Settler domination and at the same time gave birth to a truly nationalistic movement, nevertheless in its original form it was essentially a protest movement which placed Africans in a defensive position and therefore at the time it was difficult for them to demand African Selfgovernment.'[33] And although the African National Congress had made several proposals beginning in 1954 for its representation in the Legislative Council it was not until 1956 following the passing

of a motion in the Legislative Council to the effect that Constitutional talks should begin during the first quarter of 1957 and that the proposed Constitutional Changes should be announced in early 1958 that Congress grasped the opportunity to put constructive proposals involving parity of representation and an equivocal demand for universal adult suffrage.[34] As a matter of fact these Constitutional Changes were taking place at the same time in the Federal Constitution itself and Southern Rhodesia. In May 1956 the Southern Rhodesia Government had appointed a Commission under the Chairmanship of Sir Robert Tredgold, to investigate a new franchise system for the colony 'under which the Government is placed and remains in the hands of Civilised and responsible people.' The Tredgold Report[35] was published in March 1957. The recommendations were based on a Common voters roll with a higher and lower franchise qualification.

The Constitutional Changes in Northern Rhodesia started in 1957 also resulted in proposals based on the Tredgold two-tier pattern, when Colonial Secretary, Lennox Boyd, published the British Government's Scheme in a White paper in September 1958.[36] However in the Northern Rhodesia proposals in addition to Special and Ordinary voter's rolls there were also Special and Ordinary Constituencies.

(iii) The Franchise

The Northern Rhodesia Constitution of 1959 prescribed voter's qualifications and disqualifications. But before we examine the actual provisions of the 1959 Constitution it is proposed to examine the franchise laws since 1924 when Northern Rhodesia became an Imperial Protectorate. These voters qualifications will up to 1959 reveal the dominance of the European Electorate in the Control of the legislature.

In 1918, the Company agreed to the formation of an Advisory Council for the settlers. The Advisory council had neither legislative nor executive functions but the members could 'discuss with the administration any question affecting the White inhabitants of the territory, and draft legislation, the promulgation of which was not urgent in point of time, could be submitted to it for observation'. Though the Advisory council had no legislative functions its five Unofficials were elected. The Franchise was limited to White male adults who were British subjects and over 21 years. They must have been in receipt of a salary of not less than £150 a year or who had property of no less value. The effect of these qualifications was not only to deny franchise the Africans but also white women of British stock.

In 1924 with the coming of Protectorate status the Advisory Council was transformed into a Legislative Council. The qualifications for voters and electors were made by the Council itself. Generally speaking there were no significant changes in the franchise from introduction of crown rule to the 1959 Constitution-also known as the Benson Constitution. Up until 1959 a voter had to be a British Subject of 21 years of age. There were also means of qualifications. The voter had to have a house or other building within the electoral area to the value of £250, or a mining claim of not less than £250. An income, wages or salary at the rate of £200 per year. The Period of residence was 6 months in the electoral district but there was later added the requirement that a voter should have resided in the electoral district for which registration is sought for an additional period of three months. There were also literacy qualifications the voter was required to register in English without assistance.[37]

Quite apart from the fact that the voters needed to be British Subjects these high income and property qualifications effectively barred Africans from exercising their right to vote.[38]

(iv) The 1959 Constitution

As a result of the announcement in 1956 that Constitutional talks should begin early in 1957, the Governor of Northern Rhodesia Sir Arthur Benson accordingly held discussions with individual members and with leaders of other political organisations. The Northern Rhodesia African National Congress was also included in the talks. Nkumbula and Kaunda thus met the Governor in February 1958. The African Times reported 'this is the first time in the ten year history of the African Congress that the Governor of the Territory has received its leaders to discuss political matters.

Obviously this was an important stage in the political and Constitutional development of Northern Rhodesia. The fact that the Governor saw it fit to ask the African Politicians for their views on the kind of Constitution Northern Rhodesia was going to have marked an important milestone.

The Congress leaders told the Governor that until 1964 the Africans were prepared to accept - Black-White Parity in the Legislative Council and to allow Europeans to have a 7 to 3 majority in the Executive Council. The leaders also demanded that the principle of 'One Man One Vote' must be introduced at once. They proposed that a Speaker appointed

by the Governor, 35 Elected members, comprising of 21 Elected Africans, 14 Elected Europeans and 7 nominated Officials making 21 African members and 21 Europeans. As regards the Executive Council, the African National Congress proposed a Governor as President, 3 African Elected members, 3 European Elected members and 3 European officials. This gave the European a majority of 7 in the executive council[39] but the proposals were rejected on grounds that Europeans might paralyse the Government if the plan was accepted. 'Are you implying, Your Excellency, that for our demands to be met we have to be in a position to paralyse Government'[40] asked Mr Kaunda.

The United Federal Party on the other hand made proposals which were similar to those in the Federal Electoral Act and also similar to the Government proposals. The United Federal Party recommended for instance that the number of officials in the legislative council should be reduced from eight to six and that the leader of the legislature should be an ordinary elected member who should also preside over the executive Council. The Party also demanded Unofficial majority in the Legislative Council. The Party also made liberal' gestures by agreeing to the enfranchisement of the British Protected persons and that the number of African members should be increased from four to eight and that

there should be one seat for an African in the executive Council. Finally the United Federal Party recommended a two tier common roll with high qualifications for the Upper roll which would be exclusively for whites and lower qualifications for the lower roll which could cater for the black majority. The Party also recommended that the territory should be divided into fourteen Constituencies distributed along the line of rail and eight Special constituencies covering the African Reserves and Rural areas.[41]

As it turned out the Government's proposals when published were on the lines of the United Federal Party Proposals. Rejecting the African National Congress parity proposals, the Government White paper said 'parity in the Constitution could not but consolidate and perpetuate a racial outlook'.[42] The Government felt that parity of representation would undermine its hallowed object that 'political parties should develop on non racial lines and that politics should cut across race.

This policy of non-racial politics first found expression in what came to be known as the Moffat Resolutions which were made in the Legislative Council of Northern Rhodesia on 29th July, 1954 and upon which the Government now based its policy for Constitutional Changes.

The Resolutions were that

(a) The object of policy in Northern Rhodesia must be to remove from each race the fear that the other might dominate for its own racial benefit and to move forward from the present system of racial representation in the territorial legislature towards a franchise with no separate representation for races.

(b) Until that objective can be fully achieved a period of transition will remain during which special arrangements in the Legislative and Executive Councils must continue to be made so as to ensure that no race can use either the preponderance of its numbers or its more advanced stage of development to dominate the other for its own racial benefit.

(c) During this period of transition, Special legislation must be in force to protect, to the extent that may be necessary, the interests of either race. Meanwhile the Council notes and agrees with the statement of the Secretary of state that it is the duty of Her Majesty's Government to ensure that on contentious issues the balance is fairly held.

(d) Every lawful inhabitant of Northern Rhodesia has the right to progress according to his character, ability and industry without distinction of race, colour or creed.

In the Government recommendations it is interesting

to see how important things were said but which later events showed the Government never considered seriously. For instance while affirming the view that "the new Constitution must win the confidence of all the peoples of Northern Rhodesia' and that 'no system that leaves any substancial section of the people labouring under a justifiable grievance can, in the end prevail, because government must ultimately rest on the Consent of the governed'[43] the Government did not hesitate to reject the African National Congress' proposals out of hand thus ensuring that the Constitution was not going to be durable. In the event as earlier pointed out the Governor rejected Congress demands and patterned the new Constitution on the Federal Party's Proposals.

There was to be a two tier Common roll with higher and lower qualifications and a legislative council comprising the Speaker and thirty members.[44] This represented an enlargement of the previous Legislative Council from twenty-six to thirty members, twenty-two of whom were to be elected Members six officials and two unofficial nominated members. For the purpose of returning elected members to the Council Northern Rhodesia was divided into twelve[45] electoral districts comprising mainly urban European areas and six[46] electoral districts covering mainly the African dominated areas. There were to be two electoral districts covering

the same area as the twelve electoral districts and there were to be two other electoral districts covering the six Special constituencies. Despite the Governments avowed non-racial approach to the political problems of Northern Rhodesia, in effect this insured that the twelve ordinary constituencies and the two reserved Europeans Constituencies would return fourteen Europeans and the six special and two reserved Constituencies for Africans would return eight Africans.[47] There were to be four ex officio members comprising the Chief Secretary, Attorney General, Minister of Finance and Minister of Native Affairs. The Royal Instructions[48] of that year issued by Her Majesty in Council to the Governor of Northern Rhodesia made new provision with regard to the Constitution and procedure of the executive Council and modified certain provisions of the earlier Royal Instructions. The executive Council was now to consist of the four ex officio members.[49] In addition there were to be such other members who were styled for the first time as Ministers who were to be six in number and who were appointed by the Governor by Instruction under the public Seal of the Territory[50] and these were to hold office during her majesty's pleasure. In the 1959 Constitution the practice of appointing two Europeans for African interests was discontinued.

The Northern Rhodesia (Legislative Council) Order in Council 1959 provided for substancial Changes in the Franchise. The British Government's view at this time was that politics should develop on party as opposed to racial lines though the British Government insisted that any move towards a 'non-racial' Society had to be a gentle one.[51] The effect however of the Changes in the Franchise were to secure a suitable balance in representation between Africans and Europeans. The Constitution insured that both races were represented by a member of their own race in the legislative Council.[52] Thus the Legislative Council was in effect divided along racial lines. The immediate effect of the Changes was that the elected members had a majority of twenty out of thirty seats. Therer was a reduction in the number of official members and there was an Unofficial majority in the executive Council. With the United Federal Party having a majority in the executive Council and the legislative Council cabinet government and party control were appearing.

The Elections were based on common voters' roll and qualified franchise. There was an increase in the number of African voters and the Changes gave the Africans the opportunity to qualify for the franchise but the Europeans were assured of ultimate control because the votes of the Africans in the Ordinary Constituencies and the two reserved

European Constituencies were devalued by 33⅓%. This in effect meant that once special voters reached 33⅓% in the Ordinary Constituencies and the reserved European Constituency the extra votes would be of no value until the Africans could meet the raised franchise qualifications prescribed but because of the high educational and means qualifications this would not be attained by Africans. In the six Special Constituencies on the other hand and the two reserved African Constituencies the Special votes were of equal value with the ordinary votes and because of the preponderance of European votes these were bound to return Africans who represented mainly European opinion. The Legislative Council at this time could legislate on all matters except Constitutional ones which did not fall under the Federal Control. All Laws passed by the Legislative Council required the Governor's assent.[53] The Governor had powers though to legislate independent of the council.[54]

As far as franchise qualifications were required all voters[55] were required to (a) be either a citizen of the United Kingdom and Colonies or of the Federation or is a British Protected person by virtue of his connection with Northern Rhodesia (b) have resided in the Federation for two years and in the Constituency of registration for at least three months. (c) be at least 21 years of age and (d) is

able to complete in English and without assistance, the application for registration as a voter and has an adequate knowledge of the English language.

In addition there were separate qualifications for Ordinary and Special voters. For Ordinary voters (a) an income of not less than £720 per annum or ownership of property worth £1,500 (b) A primary education and either an income of £480 per annum or ownership of property worth £11,000 or (c) four years secondary education and either an income of £300 per annum or ownership of property worth £500; Certain categories of voters were exempted from the above requirements provided they satisfied the general requirements

(a) Ministers of religion who had undergone certain stipulated courses of training and periods of service in the ministry and followed no other profession or gainful occupation.

(b) Members of certain religious bodies with two years secondary education who had been in the services of their religious body for four years and followed no other profession or gainful occupation

(c) Chiefs recognized by the Governor or those certified to be of equivalent status in Barotseland

(d) The wife (but only the Senior wife of any polygamous marriage) of any person who was qualified as an 'ordinary' voter.[56]

The Special voters on the other hand needed to have an income of £150 and property worth £500 or alternatively an income of £120 plus two years secondary education. In addition the following Class of persons were entitled to register as Special Voters.

(a) Pensioner in receipt of a monthly or annual pension earned after twenty years service with one employer,
(b) Headman or hereditary councillors of two years' standing who were recognized by their Chiefs, provided that they were performing this office without pay. In order to qualify for this privilege the headman had to be in charge of a village which had an unbroken existence since 1924 or contained at least twenty-five tax payers.
(c) The wife (but only the senior wife of any polygamous marriage) of any person who was qualified as a 'Special' voter.[57]

In addition to those voting requirements every 'Special' candidate standing for election was required to obtain a certificate from two thirds of the Chiefs recognized by the Governor in his constituency that those Chiefs have no objection to his standing as a candidate.[58] This

provision was particularly resented by the nationalists. They argued that the provision 'discriminated against African Candidates standing for special constituencies and thus made their word difficult'. Secondly they argued that the provision gave the Governor power to dictate [illegible] to nominate for election to the Legislative Council thus to accept it they argued would have been tantamount to accepting direct dictatorship and despotism.[59] The other provision in the Constitution devalued the Special votes in both the 'ordinary' and the two European reserved constituencies to One-third of the votes cast by ordinary votes.

The nationalists reaction to these proposals led to the more militant members breaking away from the African National Congress and thus forming a rival political organisation, the Zambia African National Congress led by 'Kenneth Kaunda. This movement boycotted the elections which were to be held on 20th March 1959. In the meantime however there was violence in Northern Rhodesia which was the result of the Africans dissatisfaction with the Constitutional proposals. This unrest was not confined to Northern Rhodesia alone but to the rest of the Central African Federation. The result was that first in Southern Rhodesia then in Nyasaland State of emergencies were proclaimed in February and March 1959. In Northern Rhodesia

on 11th March 1959 the Governor declared the Zambia African National Congress illegal and the majority of its leaders were detained.

On 20th March however, the general election was held under what became to be known as the Benson Constitution named after the Governor of Northern Rhodesia. It was as we pointed out largely boycotted by 'the Zambia African National Congress. The 'older' African National Congress however took part. In the ensuing election four political parties and some independants took part. The United Federal Party captured thirteen of the twenty-two elected seats. It had captured eleven of the fourteen Ordinary Seats and the two African reserved Seats. The Dominion Party won one ordinary seat. The Central Africa Party won the two European reserved Constituencies as well as one of the Special Seats. Two Special Constituencies were won by African independents. Two other Special Seats were also won by Africans. The leader of the African National Congress Mr. Nkumbula won a single seat for his party.[60]

Though the avowed British aim was to encourage politics to develop along Party and not racial outlook of the electors. At the same time it was argued that the Constitution would ensure that government remained in responsible hands who would look to the whole community and not to the

narrow interests of their races. But again the practical effect of the elections was the polarisation of political parties along racial lines. As the 1962 Constitution was to demonstrate Whites largely voted for White Candidates and Africans for African Candidates.

As a result of this election there were Six Unofficial Ministers, two of whom were Africans in the executive Council. Four ex officio members, the Chief Secretary, the Attorney General and the Minister of Finance, together with the Minister for Native Affairs were also members of the executive council. The executive Council was still largely advisory to a powerful Governor who could still disregard the advice of the executive Council. The Governor was also still required to assent to bills.

The 1959 Constitution therefore satisfied neither the Europeans nor the Africans. The Zambia African National Congress which was banned prior to the March 1959 Elections was revived in July 1959 as the African National Independence Party and together with another movement called the United National Freedom Party merged to form the United National Independence Party-UNIP, whose leadership Kaunda resumed when he was released from detention in January 1960.

Meanwhile constitutional and political events in Central Africa were happening which greatly assisted the

the nationalists in their cause to change the 1959 Constitution.

As a result of the disturbances in Central Africa the British Government appointed on 6th April 1959 a Commission of inquiry[61] under the Chairmanship of Mr Justice Devlin to inquire into the disturbances in the Nyasaland protectorate and events leading up to them. In particular the commission was required to inquire into the allegations by the Governor of Nyasaland that there was a plot by Nyasaland African Congress to kill all Europeans. The Commission found that there was no 'murder plot[62] and that if the Government 'had had no information about a murder plot... they would still have declared a state of emergency on or about 3 March.[63] But the Commission was told that the cause of the disturbances was the continuing Federation of Rhodesia and Nyasaland.

In Northern Rhodesia a Commission was also appointed by the Governor to inquire into the circumstances giving rise to the making of the Safeguard of Elections, and Public Safety Regulations, 1959, in accordance with Section 48(1) of the Emergency Powers Ordinance.[64] The Commission alleged that '... a general Challenge to the maintainance of law and Order was being made by Zambia, and the Government had knowledge that its leaders were pressing on towards the completion of their plans for widespread disorders to occur as soon

as they had been arrested'.[65]

In July 1959 the British Prime Minister Harold Macmillan announced in the House of Commons the appointment of an advisory Commission 'to advise the five governments in preparation for the 1960 review on the Constitution and framework best suited to the advancement of the objectives contained in the Constitution of 1953 including the preamble'.[66] On the following day he stated that the British authority in Northern Rhodesia and Nyasaland would be preserved until they became fully self-governing-only then would the Federation go forward to full independence and membership of the Commonwealth.

The Monkton Commission[67] (so named after its Chairman (Lord Monkton) toured Northern Rhodesia between mid February and March. The Africans associated the Commission with the maintainance of the Federation. This was so because its terms of reference excluded secession and the question of the break up of the Federation.

The question of the Review of the Federal Constitution was contained in Article 99 of the Constitution of the Federation of Rhodesia and Nyasaland. It provided that 'no less than seven no more than nine years from the date of the coming into operation of this Constitution, there shall be convened a Conference consisting of delegations from the Federation,

from each of the three Territories and from the United Kingdom, chosen by their respective Governments for the purpose of reviewing this Constitution. In terms of this Article therefore, the Review Conference could have met any time between 1960 and 1962. In addition to this requirement a joint statement by the United Kingdom and Federal Government of 27th April 1957[68] announced that the Conference to review the Federal Constitution should be held in 1960 and that the purpose of this Conference is to review the Constitution in the light of the experience gained since the inception of Federation and in addition to agree on the Constitutional advances which may be made. Northern Rhodesia was represented by 3 members. The British Labour Party refused to nominate representatives to serve on the Commission. Africans in Northern Rhodesia and Nyasaland boycotted the Commission.

In its report the Commission emphasized the 'almost pathological' dislike of the Federation among Africans in the two northern territories as well as the belief that the Federation had prevented African political advance. The Commission thus recommended that there should be an African Majority in the Legislative Council and an Unofficial Majority in the Executive Council, 'so as constituted as to reflect the composition of the legislature. The Report also urged the British Government to declare that it would take

these steps in the near future and it also suggested that Northern Rhodesia's Constitutional Conference be held without delay even before the Federal review.

The Moncton Commission Report was published in October 1960. In the meantime the nationalists were putting pressure on the Colonial and British Government to change the Northern Rhodesia Constitution. Twice in March and May 1960 the new Colonial British Secretary Iain Macleod had indicated that the British Government had no intention of amending the Northern Rhodesian Constitution. He had said in March 'Let me therefore say again that my Colleagues and I have no plans in contemplation to amend the Constitution in Northern Rhodesia, although I cannot predict the outcome of the Review of the Federal Constitution or guarantee that its result may not entail certain consequential Changes in territorial Constitutions.'[69]

But by August of the same year the Governor in Northern Rhodesia was having informal meeting with Kenneth Kaunda, Leader of UNIP and in September Macleod announced that a Constitutional Conference for Northern Rhodesia would be convened after the Federal Review early in 1961.[70] Thus for the first time African Nationalism scored a major political victory over the Federal Government and the Settler politicians of the United Federal Party. UNIP felt confident of wresting favourable Constitutional proposals from

the British Government, one of the reasons being that a Constitution guaranteeing African Majority in the Legislative Council had been granted to Nyasaland.[71]

The Federal review Conference for its part was held in 1960 but it was a failure and had to be abandoned and never to meet again. As Mulford points out[72] 'in restrospect it seems remarkable that the Federal Review was ever held at all, let alone with all the Federation's diverse and deeply divided delegations in full attendance. For the British and the Federal Governments the price of this Brief victory amounted to nothing less than relinquishing the initiative in the struggle to Central Africa's nationalist leaders.'

Indeed the Constitutional Conference which was held in London revealed the depths of distrust and suspicion which existed between the various delegations. However the Northern Rhodesia Conference which had also started by late December 1960 dragged on to February 1961 and the British Government finally announced its draft Constitution.

The February proposals[73] called for a Legislative Council of forty five elected members. Like in the Benson Constitution the two Voters' rolls were retained and the Legislative Council was to consist of fifteen members elected by each roll and fifteen elected by both rolls

together. There were also to be Six officials and such nominated members as the Governor might appoint on instructions from the British Government. The votes of the two rolls were to be weighted in order to produce a multi racial assembly. Thus Candidates in these National Constituencies in order to qualify for election would be required to obtain the same prescribed minimum percentage of votes cast on each roll. Each of the three sets of Constituencies were to extend over the whole territory but Upperroll Constituencies concentrated in Urban areas and lower roll Constituencies in the rural areas.[74] There was to be an executive Council consisting of three or four officials and Six Unofficials of whom two would be Africans and the other two non Africans. The principle of collective responsibility was to be maintained. The proposals also included a provision for a House of Chiefs and a Constitution of a Bill of Rights. It was stated that proposal plan was to be discussed separately with the Litunga of Barotseland, who retained his special relationship with the British Government.[75]

The Constitutional arrangements relating to the National Constituencies were not finalised and both UNIP and the Federal Government intensified their pressure on the British Government. These proposals for the National Constituencies proved to be the most contentious and also vital for the final outcome of the Elections which were to be held

under this Constitution. The initial minimum percentage which Candidates were supposed to attain was put at 15 per cent. This plan though grudgingly accepted by the Nationalists was opposed by the Federal Prime Minister Roy Welensky, and thus set about trying to change it. The Contention was that this type of arrangement could have resulted in the national Seats being captured by one race. Thus in the June proposals which superseded the February proposals certain changes had been made. It was proposed that four of the seven double-member Constituencies proposed were to return one European and one African member while the fifteenth National seat was to be reserved for Asian and Coloured voters, voting together in a national Constituency extending over the whole territory.[76] It was also proposed to hold one by-election in cases where National seats were frustrated and also that a Candidate had to obtain 20 per cent of the votes cast by one of the two rolls.[77]

The minimum percentage requirements were also altered. It was explained in the June proposals that under the February proposals a National Candidate whose main support lay within the Upper roll was at a disadvantage compared with a candidate whose main support lay in the Lower roll. It said 'an obligation to secure the same minimum percentage of the votes cast on each roll in order to

qualify would thus require a Candidate to win many votes from the predominantly African Lower roll electorate than from the largely non African Upper roll and this would impose a heavy burden on Candidates who were not themselves African.'[78] The Report went on 'unless the qualifying percentage was set unreasonably high, it might be possible in some National Constituencies for an African Candidate to qualify solely by obtaining African votes on both rolls, thus defeating the purpose intended by the Constitution that political parties should be obliged to seek support from both races.'[79]

Thus it was suggested that the minimum support required by a Candidate should be expressed as 12½ per cent or 400 votes (whichever was the less) of the votes Cast by each race in the election. This new arrangement was defended on the ground that a definite figure would help the Candidates to secure the minimum support required and that the formula would give 'practical effect to the principle that national members would be obliged to seek support from votes of both races.

The Africans of Northern Rhodesia reacted to this news with anger. There were disturbances in the country and in certain areas UNIP was banned, then in September 1961 the British Colonial Secretary announced that Britain would

reopen discussion on the details of the new Northern Rhodesian Constitution.

As a result of this change of heart on the part of the British Government the final proposals were announced in February 1962. The adjustments made to the June Proposals were not fundamental as such but the contentions requirement, which had stipulated that the National Candidates must acquire 12½ per cent or 400 votes (whichever was the less) was adjusted to simply 10% of the votes cast by each race.[80]

Both UNIP and the United Federal Party accepted the Changes and thus began the task of registering voters and Campaigning for the elections. Thus in retrospect it can be said that the African Leaders showed considerable foresight in their opposition to the absolute figure of 400 votes. For a settler Candidate to score 400 Votes among the Africans would have been considerably easier and equally for an African Candidate to secure 400 votes among the Whites.

The 1962 Constitutional proposals thus found their way into the Northern Rhodesia (Constitution) Order in Council of 1962. Thus ended the period (1957-62) of fancy franchises as this period became popularly known.

dissolution of the council or death or resignation of a member.[84]

The Qualification of candidates for the Legislative Council were that a member had.[85]

(a) to be qualified for registration as a voter and is so registered.

(b) satisfied the appropriate authority that he could Speak English well enough to take an active part in the proceedings of Council.

(c) been a member of the Legislative Council.

A person was qualified to be elected a member for a higher roll if he was registered as a voter under the higher franchise and Vice versa for Candidate in the Lower franchise. On the other hand a person was qualified to be elected a member of the Legislative Council for a national Constituency if he registered under the higher or lower franchise. A person qualified to be elected for Special national Constituency, had to be registered as a voter for the purpose of returning to the Council the member for that Constituency.

As a result of these Changes brought about by the Northern Rhodesia 1962 Constitution the country was divided into.[86]

(a) Fifteen higher roll Constituencies

(b) Fifteen Lower roll Constituencies

(c) Seven national Constituencies

(d) One national Constituency covering the whole country.

The National Assembly Seats were distributed in such a way that one Candidate was returned or elected in each higher franchise and one to represent each lower franchise Two Candidates were to represent each national Constituency by voters registered under the higher franchise or under the lower franchise in every electoral area that was within that Constituency who were Europeans or Africans or Coloured persons who had declared themselves interested in returning member for National Constituency. There was also to be one member elected for the special National Constituency by the voters registered under higher franchise or under Lower franchise who were either Asians or Coloured persons who had not declared that they wish to return members to national Constituency.

The Qualifications[87] for voters were generally similar to those in the 1959 Constitution. As pointed out, the Constituencies were divided into higher and Lower roll. There were general qualifications such as being citizen of United Kingdom and Colonies or Federal Citizenship including British Protected Persons. A voter had to be over 21 Years and [illegible] resident in the Federation for 2 years and

able to complete form of application in English.[88]

In addition to these above qualifications a voter had to qualify as an ordinary voter[89] in order to vote in the upper roll and a Special voter in order to vote in the lower franchise Constituency.

The Constitution also provided for a House of Chiefs,[90] whose duty was to discuss any bill introduced into or proposed to be introduced into the Legilative Council which was referred to it by the Governor.[91]

This provision had appeared before in the proposals which were submitted to the British Government by the Nationalists in 1959. At that time UNIP had proposed the formation of Central Council of Chiefs whose role was to safeguard customary law, culture and tradition, and to act as guardians of the Nation by Checking on legislations that affected the nation and Checking on any other legislation.[92] In Article 80 the Constitution confirmed the Concensions which were entered into between representatives of the Queen and the Paramount Chief of Barotseland in 1900 and 1909.

The requirement for general voters that they had to be able to complete in their own handwriting in English and without assistance such form of application for registration received a judicial interpretation in favour of UNIP in 1962.

In the case of Re Simukonda[93] an applicant had filled in a registration form but was found to have made a spelling mistake.

It was held-inter alia by the magistrate that a registration form was not required to be completed with 100 per cent accuracy and trivial errors did not vitiate it. The discretion in assessing the magnitude of such error lay with the Magistrate. In fact in the 1962 Constitution the right of an education officer to administer word test was removed.

In the ensuing elections which were held in October Unip had secured a large number of Seats in the lower roll and thus a high proportion of African votes but only a small number of Europeans votes. Another notable feature of the 1962 Election Campaign was the alliance between UFP AND ANC which secured for each party some seats in the National Constituencies. At the end of the day UNIP had fourteen seats and ANC Seven. The UFP had Sixteen seats, the Liberal Party was utterly defeated. After these elections Harry Nkumbula Leader of the ANC finally yielded to pressure and together with UNIP formed the first African Government. Only 37 of the 45 Seats had been Fielded because some Constituencies were frustrated so that they returned no members.

In the attempt to make this Constitution multiracial there was as we have already pointed out a requirement that in the executive Council there had to be 2 African members and 2 non-Africans.[94] Nkumbula had the only two Europeans between both parties thus this gave ANC the necessary lever in the coalition bargain. UNIP and ANC thus had three Ministers each in the Coalition Government.

The 1962 Constitution thus marked an important watershed in the Constitutional development of Northern Rhodesia. Though the Constitution was complicated and that it failed to achieve its avowed non-racial aim, in restrospect it can be seen that its introduction made it possible for the African parties to wrest, once and for all, political power from the Europeans and to usher in a period of self-determination which was to end with independence in 1964.

The UNIP/ANC Coalition took office at the end of 1962 and immediately began a new Campaign of secession from the Federation of Rhodesia and Nyasaland. Thus in February 1963 the new legislative Council passed a motion calling for immediate secession from the Federation which was granted by the British Government in March 1963. The Federation of Rhodesia and Nyasaland was accordingly dissolved in 1963 and in September 1963 the Governor announced

that the general election would be held in January 1964 and that the registration of voters was to begin immediately.

The 1963 Constitution

The Constitution which was finally drafted at the end of 1963 and which came into operation in January 1964 was based on Universal adult suffrage. The Legislative Council was renamed the Legislative Assembly.[95]

The Northern Rhodesia (Constitution) Order in Council declared in its introduction that its intention was to make fresh Constitutional provision for Northern Rhodesia conferring internal self-government.

The Legislative Council, renamed the Legislative Assembly was increased from its membership of 45 as was the case in 1962 to 75, of whom 65 were to be elected by African voters and 10 by European voters. Thus the country was divided into 65 main roll constituencies and 10 reserved roll Constituencies.[96] The Northern Rhodesia Constitution of 1963 was essentially based on the British parliamentary democracy, the British Cabinet system and Constitutional guarantees of human rights.[97] Internal self-government was guaranteed though reserve powers in respect of Royal Instructions still remained.[98] The Constitution also provided for the office of Chief Minister[99] who was appointed by the Governor. There were to be 13 Ministers and the Cabinet

consisting of the Prime Minister and the other Ministers.[100] The Cabinet was collectively responsible to the Legislative Assembly for any advice given to the Governor. The Governor was no longer a member of the legislative Assembly. The Constitution also provided the safeguard of a Constitutional Council empowered to delay legislation inconsistent with the Declaration of Rights,[101] on to review any legislation referred to it by not less than seven members of the Legislative Assembly. If such legislation was held inconsistent with Chapter 1 of the Constitution, the Bill could be held up for Six months.[102] The House of Chiefs already a feature of the 1962 Constitution provided a second Chamber.[103] It comprised of 4 representatives from the then Barotseland appointed by the Litunga and 22 others representing the other provinces.[104] The Barotseland Concensions were also guaranteed in the Constitution.[105]

Voters' Qualifications.

Before the Northern Rhodesia Order in Council 1963 was enacted, the Northern Rhodesia (Electoral Provisions) Order 1963 under which Qualification of Voters' Regulations of 1963 were made came into being. These regulations together with the Qualification for membership Regulations made under the Northern Rhodesia (Electoral Provisions) Orders 1963 finally found their way into the Constitution.

The property, income and educational qualifications were removed from the Constitution. Instead a voter could either be a British protected person, British subject or British protected person resident for 6 years. He was also required to be over 21 years.[106] A voter on the other hand could be disqualified if he was insane.[107] Qualifications for Membership of the Legislative Assembly.

Candidates had to be over 21 years. They had to be qualified for registration as a voter and had to satisfy the appropriate authority that they can speak, write or understand English well enough to take an active part in the proceedings of the Assembly. Candidates had also to be ordinarily resident in Northern Rhodesia for a period of not less than 2 years immediately before the date of his nomination as a candidate or for periods amounting on aggregate to not less than 3 years during the 10 years immediately before the date.[108] A Candidate could be disqualified if he was obedient to foreign power or state, if he was adjudged bankrupt or if he was certified insance or if he was under sentence of death.

The Constitution also provided for a Court of Appeal, a High Court and appeals could lie to the Majesty in Council.[109]