SCHOOL OF LAW
OBLIG ESSAY
1994/95

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

I RECOMMEND THAT THIS OBLIGATORY ESSAY PREPARED UNDER MY SUPERVISION BY LISIMBA MUTAKELA

ENTITLED

THE BAROTSELAND AGREEMENT : TO WHAT EXTENT WAS IT ABROGATED? A CONTRACTUAL AND ADMINSTATIVE LAW APPROACH.

BE ACCEPTED FOR EXAMINATION , I HAVE CHECKED IT CAREFULLY AND I AM SATISFIED THAT IT FULFILLS THE REQUIREMENTS RELATING TO FORMAT AS LAID DOWN IN THE REGULATIONS GOVERNING OBLIGATORY ESSAYS.

25th Nov '94
DATE

SUPERVISOR

" MEN MAKE THEIR OWN HISTORY, BUT THEY DO NOT MAKE IT JUST AS THEY PLEASE, THEY DO NOT MAKE IT UNDER CIRCUMSTANCES CHOSEN BY THEMSELVES, BUT UNDER CIRCUMSTANCES DIRECTLY ENCOUNTERED, GIVEN AND TRANSMITTED FROM THE PAST."

MARX & ENGELS

DEDICATION

TO MY PARENTS - MY MOTHER THE LATE C.M INAMBAO AND MY FATHER M.V LISIMBA FOR THE PRICELESS GIFT OF LIFE THEY GAVE TO ME.

TO MY FAMILY FOR THE LOVE AND CARE THEY HAVE SHOWN ME, THE ENCOURAGEMENT THEY OFFERED ME SPIRITUALLY PHYSICALLY, MENTALLY AND MATERIALLY.

TO MY FREINDS FOR THEIR CONTRIBUTION IN MOULDING THE PERSON I AM ESPECIALLY MATEMBO MATONGO FOR HER OFTEN RADICAL VIEWS.

TO ALL THESE I DEDICATE THIS MY WORK WITH THE STRONG CONVICTION THAT WITHOUT THEM I WOULD NOT HAVE BEEN THE PERSON I AM.

ACKNOWLEDGEMENT

IN THIS RESEARCH MANY THANKS GO TO MY SUPERVISER Mr N. MUKELABAI TO WHOM I OWE MUCH FOR HIS GUIDANCE.
I AM HIGHLY INDEBTED.
TO MY FATHER WHO HAS GREATLY HELPED ME BY SUPPLYING ME WITH LITERATURE ON THE TOPIC, MY GREATEST GRATITUDES. I WOULD DO GREAT INJUSTICE TO MYSELF IF I DO NOT ACKNOWLEDGE THE SUPPORT RENDERED TO ME BY ALL PERSONS WHO HAVE TAKEN A HAND IN THE MAKING OF THIS PAPER ESPECIALLY MY SISTER , MBOLOLWA LISIMBA.
WHILE I ALONE AM WHOLLY RESPONSIBLE FOR THE ERRORS THAT SHOULD BEFALL THIS MY PAPER.

CONTENTS

as part of the Republic of Zambia to take place of the treaties and other agreements hitherto **SUBSISTING BETWEEN** Her Majesty the Queen and the Litunga of Barotseland".

This inevitably leads to the question: Why enter into this Pact at the time Britain was relinquishing its power over the territory? Why was the agreement only entered with the Barotseland and not any other area or part of Northern Rhodesia?

It may be appreciated that through the various treaties the British government enjoyed special relationships with the Barotse government which relationships were being transfered to the Northern Rhodesia in a political and democratic intercourse and a sign of unity, peaceful co-existence and good amity.

If the agreement was meant to replace the earlier treaties, then it must be treated on a basis similar to those treaties in terms of their legal nature and effect. Its legal effect could hardly have been any greater than that of the treaties which it replaced. An initial difficulty arises, however, in that all the treaties did not appear to have been of the same nature or effect. Some h
implication in both international and
were confined t

into effect of the earlier concessions as they are commonly called. This undoubtedly is a very important part of the study as these earlier concessions had a direct bearing on the 1964 agreement as is stated in the preliminary to this paper. As its preamble stated, the agreement was meant to take the place of the earlier treaties when Britain relinquished its powers and jurisdiction in the country to an independent Republic of Zambia. It was the price for the Barotseland coming into the new republic and thereby enabling the country to merge into independent statehood as one united nation.

The concessions analysed in this chapter are the WARE concession of 27th June, 1899, the LOCHNER concession of 26th June, 1890, the Concession Treaty of 25th June, 1898, the Concession Agreement of 17th October, 1900 and the Concession Agreement of 11th August 1909.

1.1 THE CONCESSION TREATIES

Before going deeply into the the discussion of these treaties, it must be born in mind that these were of international status since at their respective dates Barotseland was still an independent state. Barotseland was sovereign enough to enter into such agreements. The company which is not strictly subject of international law, is deemed to have entered into the agreement on

behalf of its sovereign thereby completing the two contracting parties as required by International Law.

But why did the British enter into such agreements with the Litunga? Francis Coillard who greatly influenced the then Litunga has shown that due to fear of potential violence from neighbouring tribes, the Litunga sought protection 1. In one letter Coillard wrote on behalf of Lewanika to Khama, chief of the Bechuanaland, who was also Lewanika's personal ally he wrote:

> "I understand that now you are under the protection of the great English Queen. I do not know what it means. But they say there are soldiers living at your Palace, and some Headmen sent by the Queen to take care of you and protect you against the Matebele... are happy and quite satisfied... I am anxious that you should tell me very plainly my friend because I have a great desire to be received, like you under the protection of so great a ruler as the Queen of England"2.

Further and more importantly the concessions were entered into to promote Commerce up and above their intention of amity.

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1. Mutumba Mainga, Bulozi under the Luyana Kings (Longman Group limited London 1973) P.173

2. Caplan L Gerald, The Elites of Barotseland 1878-1969 (C Hurst & CO London 1970) P.46

It may be interesting to note that the stipulations of 1889 and 1890 concessions were adequately provided for in the later concessions of 1898. Under the concession of 1898, king Lewanika, for himself, his heirs and successors and for his people, with the advice and consent of the British council purported to have granted to the company or its assigns the "sole absolute and exclusive perpetual right and power"[3] to:

a) Carry on any manufacturing, commercial or other trading business;

b) Search for, dig, win and keep diamonds, gold, coal, oil and other precious stones, minerals or substance;

c) Construct, improve, equip, work and manage public works railways, tramways, roads, bridges, lighting, waterworks and all other works and conveniences of general public utility;

d) Carry on the business of banking in all its branches;

e) Buy, sell, refine, manipulate, mint and deal in precious stones, spices, coin and all other metals and minerals;

f) Manufacture and import ammunition of all kinds

g) To all such things as are incidental or conducive to the exercise, attainment or protection of all or any of the aforegoing rights and powers"

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3. See Concession Treaty of 25 June 1898. Also African South No.1146

These rights granted by the 1898 Treaty extended to the whole of Barotseland territory or "any future extention thereof including all subject and dependant territory"[4]. However, it is worth noting that this treaty, like all the others did not purport to be a cessetion of powers of government as such, though it did, however, purport so to do only to a limited extent. The company was given "administrative rights to deal with and abjudicate upon all cases between white men and between white men and natives"[5]. Further, like in the previous concessions, the 1898 concession sought to "protect the said King and nation from all outside and inside interference or attack"[6]. The Litunga bound himself "not to give or enter into any agreement, concession, treaty or alliance with any person company or state. It being understood that this agreement shall be considered in the light of a treaty of alliance made between the Barotse nation and the government Her Britanic Majesty Queen Victoria". The Imperial government also expressed desires, for economic purposes, not to have any conflicts with Bulozi as (The Bulozi) geographically lay well to the flank of the direct line of Cecil Rhodes' Cape to Cairo Railroad. So to this end and in order to win favour with the Bulozi King the Imperial government negotiated for a solution that appeared to leave the Lozi a large measure of autonomy in the valley.

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4. see copy in No.320 African South 392

5. Ibid

6. mutumba Mainga PP 195-201

The company was content to concentrate economic development and direct European administration in regions which had never more than loosely under Lozi control.7

As a treaty of cession, therefore the most generous construction of the 1898 treaty would be that it ceded to Britain power over Barotseland's external affairs including of course its relation with neighbouring African counties. With the exception of adjucatory powers in disputes between white men and between white men and natives, power of internal government was preserved intact for the King and his chiefs and council. this was stated in the proviso to the treaty: "Nothing written in this agreement shall otherwise affect my constitutional power or authority as chief of the said nation." Further that " all cases between natives shall be left to the King to deal with and dispose of."

So by virtue of the 1898 concessions, Barotseland was made a protectorate of Britain. A protectorate is no more than power over a country. Oxford Advanced Learners Dictionery defines protectorate as a country that is controlled and protected by a more powerful country. This is when a country not itself within the dominitive nations bounderies but is under the exclusive control of that dominitive nation. A protectorate implies that one power assumes control of another country's external relations and promises to

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7. Ibid

protect that country from external attack.

International Law recognises this relationship whereby the protector controlled external affairs of the protected state while the protected state remained a person in International Law.

> "the case of a Protectorate or protected state arises in practice when a state puts itself under the protection of a strong and powerful state, so that the conduct of its most important international business and decisions on high policy are left to the protecting state."[8]

Cases of Protectorate depend either on particular terms of the treaty of protection or conditions under which the Protectorate is recognised by Third Powers as against when it is intended to rely on the treaty of protection. Although not completely independent, a protected state may enjoy a sufficient measure of sovereignty to claim jurisdictional immunities in the territory of another state.[9] The rule therefore 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 such that it is **Territorium Nullius**. The protection of the

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8. J.G Stark, Introduction to International Law, 6th edition [Butterworth, London 1967] P.106

9. Per Lord Finlay in Duff Development co. v Kelantan Government [1924] AC 797 esp 814

Barotseland was on the express consent and approval of the British government and King Lewanika of Barotseland as well as their successors.[10]

The latter concessions of 1900 and 1909 had different impetus to them. This was because they were concluded after Britain had obtained sovereignty over Barotseland as envisaged in earlier agreements. These agreements could no longer rank as treaties between two subjects of International Law. This observation was made in the famous decision of the Privy Council in RE Southern Rhodesia.[11]

> "The Lippert Concession was not one of those public acts by which one independent sovereign however humble, enters into political relations with the agents of another. Instruments of that character have been common enough in the British empire. They derive their judicial character from their recognition and adoption by the Crown, and in interpreting them it must be borne in mind that they are state documents. The Lippert concession is not of this character. Like the Rudd Concession it received the approval of the High Commissioner on behalf of the Crown, but it is essentially a private contract though entered

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10. Concession was approved on 23rd Nov 1901, Africa South No.1146

11. [1919] AC 211

into by the concessionaire, its effect must depend upon the construction of its terms according to ordinary legal rules."[12]

By comparison, Lewanika lost his former status as a subject of International Law by virtue of the emergence of protectorate status. The legal status of these concessions was on the same standing as the 1964 Agreement. For their implications, turn to the third chapter.

It may seem that in these latter concessions, certain minimal agreements or arrangements which were overlooked in the 1898 concession were included. The terms of agreement include the natives rights to their present lands, villages, gardens and foundations. Further Lewanika's rights on unoccupied lands was highlighted. It is instructive to note that the Northern Rhodesia Order in Council continued to safeguard the spaecial status of Barotseland. It forbade the company

"to allienate from the chief and people of the Barotseland the territory reserved from the prospecting by virtue of the concession of Lewanika to the British South Africa Company dated 11th November 1909."[13]

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12. PP 235-236 per Lord Sumner delivering judgement of the board

13. its provision were brought into operation by the N Rhodesia proclamation No.1 of 17th August 1911.

Between 1890 and 1924 Barotseland and later Northern Rhodesia was administered by a commercial concern inorporated by Royal Charter, subject to ultimate British control,[14] although this was terminated on 1st February 1924, by the Northern Rhodesia Order in Council. The company got its authority from various treaties and agreements entered into with King Lewanika. The British South Africa Company itself had on 29th October 1889 received its charter from Her Majesty's government. Article 3 of the charter 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 teaty - The Imperial government retained the right to supervise company affairs. The British government through the British South Africa Company could go round these stipulations.

And so fate had it that in 1899 the British Crown assumed full powers of government over Barotseland under the Barotseland North-Western Rhodesia Order-in-Council of that year. There was a proviso that the Crown had power and jurisdiction "by treaty, grant, usage, sufferance and other legal means." It seems that sovereign powers of government were so assumed without grant, express or implied by King Lewanika. This amounted to unilateral abrogation by the British of the early treaties of 1890 and 1898 which preserved, to the exclusion of the British authorities the autonomy and sovereignty of Barotseland. King Lewanika had no remedies

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14. Royal charter of incorp of the B.S.A.C 29 October, 1889.

either in English Law or in International Law for these violations. The English Court would not entertain any challenge by him of the unwarranted action of the Crown. And from 1899, by virtue of the British asumption of sovereign power of agreement within his kingdom, he lost his former status as a subject of International Law, becoming thereafter utterly incapable of enganging in normal diplomatic pressure. After 1899 Barotseland - Northwestern Rhodesia became a special type of protectorate known as "Colonial Protectorate" which is a protectorate in which the Crown has assumed the entire substance of sovereignty, leaving in the indigenous community only the bare title of sovereignty. As far as powers of government are concerned, it is this bare title that marks the difference between a colony and a colonial protectorate. A formal act of annexation is necessary to appropriate this bare title of sovereignty and so make the territory a colony. With this title of sovereignty conferred by annexation goes dominion - the territory becomes a colony and part of Her Majesty´s dominions. Without it it remains a protectorate and therefore technically a foreign country, notwithstanding that the full powers of government (i.e the substance of sovereignty) have been assumed. Formal annexation never took place in Barotseland.

This British assumption of plenary powers of government meant that King Lewanika´s having lost his international personality, could only enter into agreements with the British Crown merely on ordinary contract principles with enforcement from Common Law of

contract and from any statute enacted for their purpose. Further any powers of government reserved to him under the pre-existing treaties became ipso facto abrogated and could thereafter be exercised only if recognised or permitted, expressly or impliedly, by the new sovereign authority and only to the extent and subject to the limitations that new sovereign authority might impose. This consequence follows necessarily from the nature of sovereign powers as illimitable. Whoever has it can exercise it to pass any kind of law abolishing or reducing the right and powers of individuals, groups or communities within the state.

Further still, any right of property held by King Lewanika and his people became subject to the same sovereign power, and thereafter liable to be taken away, diminished or otherwise regulated by the exercise of that power. It avails them nothing that the treaties had stipulated that such rights shall be respected as Lord Dunedin stated in the judgement of the Privy Council in Vajesingji Zoravarsingji v Secretary of state of India.[15]

> "When a territory is acquired by sovereign state for the first time that is an act of state.... in all cases the result is the same. Any inhabitant of the territory can make good in the Municipal Courts established by the new sovereign only such rights as that sovereign has, though his office is recognised. Such rights as he had under the

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15. [1924] LR 51 Ind. App. 357 esp 360.

rules of predecessors avail him nothing

More even if a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations."[16]

In close tally with our history, it may be observed that after 1899 the British Crown could, in exercise thereof, have abrogated completely both the constitutional power of Lewanika as King of the Barotse and the rights of property of himself and his people reserved under the treaties. According to British Colonial Law: " a mere change of sovereignty is not to be presumed as meant to disturb rights of private owners".[17] To avoid a vacuum in and the possible ruination of society the sovereign authority is presumed in the absence of legislation or action to the contrary to have acquiesced in the continuation of pre-existing legal system under which the private rights are held.[18]

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16. This argument could have been used by the Zambian government on the question of the Barotseland agreement.

17. Per Lord A.C 399 at 407

18. Sammut v. Strickland [1938] AC 678

1.2 **BAROTSELAND POST 1911**

In the successive order in council the policy was implemented by which Barotseland became a part of Northern Rhodesia in 1911. The order in coucil of that year enjoined the High Commissioner for Northern Rhodesia to " respect any native laws or customs by which the civil relations of any native chiefs, tribes or populations under Her Majesty's protection are now regulated, except so far as the same may be incompatible with due exercise of Her Majes power and jurisdiction.[19] Further be lawful for an

d that nothing in g power to regulate the conduct of natives shall be deemed to limit or affect the exercise of the chief of the Barotse of his authority in tribal matters".[21]

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19. Section 18 of order. see N Rhodesia proclamation No.1 of 1911

20. Section 40

21. Section 44

All subsequent orders in council and statutes up to the time of independence repeated the recognition bestowed upon the treaty stipulations of the 1911 order in council. Thus, when the first native authority ordinance was passed in 1929 giving the Governor of Northern Rhodesia power to constitute the chiefs as statutory native authorities for their respective areas, it was expressly that the Governor's power to appoint and remove chiefs and to institute an enquiry into disputed succession of chieftaiship shall not apply to Barotseland.[22]

In 1936 the Barotseland native authority under the 1936 Barotse native administration was established under the 1936 Barotse native Authority Ordinance and Barotse Native Authority Courts Ordinance This enhanced further the seperateness of the Barotseland.

This recognition of the seperateness of Barotseland by the Northern Rhodesia constitution of 1911 was repeated in all the subsequent

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22. Had the government of Zambia not interfered with certain provisions which were inherited like this one, problems like the recent Kaoma wrangle could not have occured. Also in Barotse fund Ordinance 1925, it is provided that a certain proportion of tax paid by the natives of Barotseland anywhere in Northern Rhodesia is to be constituted into special funds from which Paramount Chief was to be paid and the balance applied for the benefit of Barotseland.

constitutions up to 1964. This is no wonder the litunga Mwanawina on entering into the agreement stated:

> "When in 1889 my father King Lewanika sought protecion of Queen Victoria that protection was granted on the understanding that the Barotse government would continue to govern the people of Barotseland in accordance with the agreements made and when in 1911 King Lewanika agreed that this country should de administered as part of the new Northern Rhodesia he agreed on the understanding that this arrangement would not affect the powers of the Barotse government."[23]

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23. Daily Mirror 10th April, 1964

CHAPTER TWO

2.0 THE AGREEMENT AND ITS PROVISIONS

2.1 INTRODUCTION

This research is intended to analyse the status and, as it were, impetus that should be accorded to the Barotseland agreement and, if at all, the Barotse people. Much of the legal implications will be dealt with in the third chapter. The task in the chapter is one of a descriptive nature - that is, it will enumerate the section as provised for in the agreement. Additionally where need arises an explanation will be offered. It may seem that much legal battle between the Barotse people or government, as the case may be, and the Zambian government streams from either or one of the parties not having to interprete the obligation pertaining to the agreement. At one time the Litunga sued the Attorney General for abrogating the agreement.

> "... the Plaintiff believes that the Defendant entered into the agreement in bad faith and efforts made by the Plaintiff to the Defendant to ensure the provisions of the agreement are observed and adhered to have not been heeded by the Defendant".[1]

At the time the agreement was signed Kaunda was the Prime Minister of Northern Rhodesia and the Principle Secretary for

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1. Weekly Post 8th-14th November,1991.This matter was however discontinued to pave way for ex curia settlement.

commonwealth relations and colonies Duncan Sunday signed for the British government. Sir Mwanawina Lewanika III signed for the Lozi people. Under the agreement which came into force on the 24th october 1964 the Litunga was empowered to make laws for the Western Province regarding a number of issues. The constitution of newly independent Zambia and for that matter certain statutes upheld the agreement by, in the case of the latter, providing certain provisions directly from the agreement. This will be seen later in the chapter.

It has been advanced by some scholars that Britain was not a party to the agreement. The signature of the British Secretary of state for commnwealth relations and colonies merely meant the approval of the Britsh government to the agreement, as Northern Rhodesia from 18th May, 1964 had full internal power of governance over BarotseLand. Conversely since the agreement was subject to British approval.[2] Nothern Rhodesia was not yet an international person and only attained this after Northern Rhodesia became independent. So to this end, it may be regarded as a mere contract.[3]

2.2 THE BAROTSE AGREEMENT 1964

Section I of the agreement merely dealt with the citation and commencement.

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2. Gerald Caplan the elites of Barotseland.P 209

3. Its legal implicatin shall be stated in third chapter.

Section II provided that the constitution of the Republic of Zambia would include the provisions agreed upon at the constitutional conference held in London, May 1964 relating to:

(a) The protection of human rights and fundamental freedom of the individual,

(b) The judiciary, and

(c) The public service and those provisions shall have full force and effect in BarotseLand.

This section meant to retain in the constitution those provisions which formed the basis of the London meeting. The report [4] of the London conference did not resolve how the form of the bill of rights should be, so that the 1969 amendment to this chapter (of fundamental rights) could not have been a breach of any agreed form.

Section III (1) provided that "The people of Barotseland shall be accorded the same rights of access to the high court of the republic of Zambia as are accorded to the other citizens of the republic under the laws for the time being in force in the republic and a judge who normally sit in lusaka shall regularly proceed on circuit in Barotseland at such intervals as the due adminstration of Zambia may require.

Section III (2) the people of Barotseland shall be accorded the same rights of appeal from decisions of the republic of Zambia

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4. London conference of May 1964 [unreported]

as are accorded to the republic under the laws for the time being in force in the republic. This section required that the laws regulating access to the court system of circuit sessions should not be changed to the prejudice of the Barotse people.

Section IV (1) stipulated that the government of the Republic of Zambia would accord recognition as such to person who is for the time being the Litunga of the Barotseland under the customary law of Barotseland.

Section IV (2) the Litunga acting after consultation with his council would be the principal local authority for the government and administration.

Section IV (3) The Litunga acting after consultations with his council would be authorised and empowered to make laws for Barotseland in relation to the following matters:

a) Litungaship;

b) The authority [then known as the Barotse Native government later to be Known as the Barotse government]

c) The authorities then known as the Barotse Native Courts;

d) The status of members of the Litunga's Council;

e) Matters relating to local government

f) Land;

g) Forests;

h) Traditional and customary matters relating to Barotseland alone;

i) Fishing;

j) Control of hunting;

k) game preservation;

l) Control of bush fires;

m) The institution then known as the barotse Native treasury;

n) The supply of beer;

o) Reservation of trees for canoes;

p) Local taxation and matters relating thereto and

q) Barotse local festivals

Under section V (1) the Litunga and his coucil would continue to have powers hitherto enjoyed by them in respect of land matters under customery law and practice.

Subsection (2) The Barotse Native Courts would have original jurisdiction [to the exclusion of any other court in Zambia] in respect of matters concerning rights over or interest in land in Barotseland to the extent that those matters were governed by the customery law of Barotseland.

There was a proviso to this that nothing was to be construed as limiting the jurisdiction and powers of the High Court in relation to units for orders of the kind then known as prerogative of Writs of Order. The parties also agreed that "save with the leave of the Court known as the Sikalo Kuta, no appeal shall lie from any decision of the Courts at present known as the Barotse Native Courts.

On the question of financial responsibility, the agreement provided that the Zambian government would have the same general responsibility for providing finacial support for the administration and economic development of Barotseland as it had for other parts of the country and would ensure that, in discharge of this responsibility, Barotseland was treated fairly and equitably in relation to other parts of the republic.

And regarding implementations, the agreement whose signing was also witnessed by the last governor of Northern Rhodesia, Sir Evelyn Hone, stated inter alia, that: "the government of the republic of Zambia shall take such steps as may be necessary to ensure that the laws for the time being in force in the republic are not inconsistent with the provisions of the government."

In the annex to the agreement, it was observed that the Litunga and the National Council of Barotseland had always worked in co-operation with the central government over land matters in the past.

To this end, the Litunga and his council agreed that central government should use land required for public purpose and that it should adopt the same procedure as those which applied to leases and rights of occupancy in the reserves and trustland areas where applicable.

Section III of the annex notes that the Barotse memorandum had indicated that Barotseland should become an integral part of Northern Rhodesia. In these circumstances the Northern Rhodesia government will assume certain responsibilities and to carry these out they would have to have certain powers in so far as land was concerned, apart from confirmation of wide powers to the Litunga over customery matters the position was as follows:

The Northern Rhodesian government did not wish to derogate from any of the powers exercised by the Litunga and council in respect of land matters under customery law and practice.

The Northern Rhodesian government would ensure that the provision of public services and the possibility of economic development in Barotseland were not hampered by special formalities.

The Northern Rhodesia government recognised and agreed that full consultation should take place with the Litunga and council before any land in Barotseland was used for public purposes or in the general interests of economic developlment.

It was agreed that the position regarding land in Barotseland in an independent Northern Rhodesia should be as follows:

(a)There would be the same system for land administration for the whole of Northern Rhodesia including Barotseland. this meant that the

government lands department would be responsible for professional advice and services with regard to land alienation in all parts of Northern Rhodesia and that the same form of document should be used for grants of land for government purposes and for non-government purposes and non-customery purposes.

(b)The Litunga and council of Barotseland would be charged with the responsibility of adminstering Barotseland.

2.3 THE BAROTSELAND AGREEMENT POST 1964

The foregoing section of this chapter is the agreement as it was envisaged. Though explicit in its provision, the Barotse agreement was percieved differently by the groups involved. To the UNIP government, it was a simple expedient which it could, if neccesary repudiate in imposing its authority over Barotseland. To the Litunga, it was the means to preserve the traditional prerogatives of the Lozi ruling class.[5] This notwithstanding if this was the agreement, legally, groups could have had remedies. With time the face of the agreement has changed severely.

The Barotseland was meant to be a piece of legislation which would be incorporated in the legal order of the nation. To that effect

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5. Caplan P.210

the Zambia government proceeded to make various changes to the pieces of legislation to incorporate some provisions of the agreement. The changes seem to have been made soon after Zambia attained its independence in 1964.

It will be recalled that the agreement had provisions to the effect that the Litunga of Barotseland acting after consultation with his council, would be authourised and empowered to make laws for Barotseland in relation to land matters. Section IV for instance states that:

> " save with ..... leave of court ..... known as saa-sikalo kuta no appeal shall lie from any decision of the courts at present known as the Barotse Native Courts to the High Court of the republic of Zambia."

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a proviso to the effect that the Saa-Sikalo may grant leave to an intersted party who is reffered to in subsection(I) to appeal to the High Court against such decisions. This appeal had to be made 30 days of such decision.[7] No one could appeal against the refusal of the Saa-Sikalo Kuta to grant such leave. It should be noted that no such privilege was accorded to any local court in any other area in Zambia. Infact any local court in any local courts decisions was appealable meaning that anyone agrieved by a decision of a local court situated in an area other than the Western Province could appeal to a Surbodinate Court against such decisions.

The agreement, in section III, provided that the Litunga acting after consultations with his council was to be authorised and empowered to make laws for Barotseland relating to forests and fishing. In the forests and fisheries act these provisions were also incorporated:

> "No person would without licence do the following acts on statelands or on any land, the rights to which the Litunga and the people of Barotseland were entitled and which had not been declared a protected forest area. fell, cut, take, work, burn, injure or remove any reserved tree whether standing or fallen or any tree which was growing within ten yards of a bank of any river

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7. section 57(2)

and to fell, cut, work, burn, injure or remove any other major forest produce."

The foregoing had a proviso that no licence would be issued in respect of any land under the Litunga except with prior consent of the Litunga.

The fisheries Act Cap 314 provided that the Western Province was exempted from the provision of the Act which regulated the methods of fishing, issuance of net licences and permits, offences and penalties. Specifically the Act provides that the provisions of the Act would not apply:

a) Within the territorial limits of the Western Province, to the African inhabitants thereof living under the tribal rule of the Litunga of the Western Province.

b) To any fish exported by the Litunga of Western Province.

" Provided that nothing herein contained shall be deemed to authorise any person other than the Litunga to export any fish from within the Western Province, save in accordance with and subject to the provisions of this Act."

The subsequent section further stipulated that notwithstanding anything to the contrary contained in this Act, at the request of the Litunga or of any chief or Induna nominated by him and approved

by the President any net licence or other licence to fish might be issued without payment of any fee to any African who was resident in the Western Province and was under the tribal rule of the Litunga.[8]

Parliament also found it necessary to make amendment to the Natural Resources Act.[9] in order to give the Litunga wide ranging powers over the territory's natural resources including control of bush fires and conservation of such resources when it stated:

> " This Act shall not apply to any land the right to which the Litunga of the Western Province and the people of the Barotse are entitled except with the consent of the said Litunga."[10]

It will be recalled that the Barotseland agreement stipulated that when Northern Rhodesia became independent, the republican constitution would amended to include a provision relating to the protection of human rights and fundamental freedom of the individual.

To this end the 1964 constitution included a provision that no law shall make any provision that was discriminating either of itself

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8. S.26

9. Cap 315

10. 59

or in its effect.

> " No person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority." [11]

Notwithstanding this provision in the constitution, the government proceeded to make changes to the statutes in order to incorporate the salient provisions of the Barotseland agreement into the laws of Zambia. This meant that for the most part of it, the agreement became law, observable by any citizen in the country.

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11. Section 25(2) of the 1964 constitution. This may seem to contradict the very law which recognised the distinctexistence of the Barotseland. The big question would be - what law would prevail

CHAPTER THREE

PARLIAMENT AND THE AGREEMENT

From 1964 the legislative power of the republic was vested in the parliament of the nation which consisted of the president and a national assembly.[1] Though this power was so granted the Zambian constitution provided that certain constitutional provisions like the "entrenched clauses" [2] could only be changed by special procedures.It could have been legislatures intention that embodying a written constitution in a formal document and protecting it as a kind of fundamental law would ensure against amendment by simple majorities in the legislature. As also outlined in the preceding chapter the core of the Barotseland agreement was embodied in the many laws of Zambia which laws imparted generality from the constitution. In fact the Zambia independence act, 1964 stipulated that no change in the effect of the Barotseland agreement shall be recognised by the constitution as being valid.[3]

By effect,then, since an ordinary act of parliament could not repeal certain laws, judges in the republic were empowered to declare statutes as unconstitutional if these went against the constitution. They can insist, for instance, that power should be

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1. 1964 Constitution S. 57
2. Part III (S.13-30) and Part VII
3. S.8(2) of Act

subject to due process of law and similar guarantees if a statute could attempt to infringe them. In short the government is founded on the constitution and among the major features of constitutional supremacy are a divisions of power among several organs between legislative, executive and judiciary. The Judges thus derive their power from these seperation of powers.

The survival of a constittional government depends ultimately on the extent to which the fundamental rules and practices are agreeable to the behaviour, customs and ways of the majority of the people.

This depends in part on the extent to which the constitution is capable of developing, modification and change by amendment, interpretation and practice. The most succesfull constitutions have been those which have permitted development frequently without changing the letter of the constitution.[4]

THE REFERENDUM OF 1969

Regard must now be had to the 1969 constitution amendment act. Which act allegedly abrogated the agreement. Parliament had been vested with legislative power by the constitution which power it puportedly exercised.

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4. Oxford companion to law.David M. Walker clarendon press oxford 1980 P. 278-279.

Before venturing deeply into the amendment provisos or effect, it may be wise to pose a question as to what effect there was of any enactment by parliament before the 1969 Act. Particular attention may be drawn to section 72 of the 1964 constitution. By that section was stated:

> "In so far as it alters -
>
> a. this section
>
> b. chapter III or chapter VII of this constitution or
>
> c. section 71 (2) or 73 of this constitution an act of parliament under this section shall not come into operation unless the provisions contained in the act effecting that alteration have, in accordance with any law in that behalf been submited to a referendum in which all persons who are registered as voters for the purposes of elections to the national assembly shall be entitled to vote and unless those provisions have been supported by votes of a majority of all the persons entitled to vote in the referendum.

This notwithstanding, however, parliament could alter the constitution in so far as it formed part of the Zambian law by a simple majority votes of not less than two-thirds of all the members of the assembly.[5]

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5. S.72(1) & (2)

So effectively the June 1969 referendum was held to amend S.72 (III) of the constitution.It was dubbed as a " referendum to end all referendums". The governments reason to hold this referendum seems to be that it was a tidious, laborious and lengthy to subject the citizens of Zambia to referendums each time any amendment was sought(Pertaining to the aforementioned sections).With this event marked a very important political avenue in the history of Zambia. The 1969 referendum, having been succesful made parliament solely responsible for amending the constitution. The referendum took away peoples rights and was fully supported by the majority of Zambians (although the barotseland agreement proponents argue that all the peoples of barotse opposed the referendum - it may still be held however that in so far as they form a part of the citizenary of Zambia their votes do not count if,like in this referendum, they are in the minority.)

With this hypothesis stated it may be correct to further state that the rights and obligations created by the Barotseland agreement of 1964 had been validity and effectively abrogated by the Constitution Amendment Act 1969. By virtue of S. 57 of the Constitution the Act was a valid exercise of the Sovereign power vested in Parliament. The Agreement was an ordinary contract ,s and as such incapable of confirming by its own force powers which

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6. This aspect will be considered at length in the next section

would enable a Party to it to effect the legal relations of Persons who are not Parties to it. Although the Rights and obligations created under it were confirmed by the Independence Order 1964, they retained their essential character as contractual rights and obligations, the effect of the Independence order being merely to Transfer from the Queen to the President of Zambia these rights and obligations. This entails that as contractual rights and obligations they did not have the effect of constitutional limitations on the legislative power of Parliament. An Act of Parliament alleged to be inconsistent with any of the obligations of the Agreement could not be unconstitutional on that ground, whether it was enacted as a constitutional amendment or not though it would be safer, perhaps, to use the Procedure of a constitutional amendment for a total abrogation of the Agreement.

3.3 THE AGREEMENT AS A CONTRACT

As briefly stated in the foregoing section the obligation arising from the agreement were of a contractual nature. a private contract has not much efficacy than a public treaty. Whereas a private contract is enforced against the state in the national Courts a public treaty, as the agreement may thought of as having been, is not unless given force of law by statute or for that matter the constitution. A private contract cannot however affect the legal relations of persons who are not parties

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to it. No rights or duties can be imposed upon them by virtue of the contract. A party, by mere force of contract, cannot exercise powers of government over persons generally. Moreover, like a Public treaty, it is subject to the soverign power in the state. A contract to which the state is a party cannot operate to limit or fetter its soverign power of government. However morally reprehensible this may be it can always legislate to annual its obligations under such contract. Britain did it in 1965, though the right here did not originate in contracts; the Nigerian government however did precisely what has been discussed, and since rights of private property were involved a procedure appropriate to amendment of the Constitution had to be used.7 In both cases the principle was however the same since in both cases an act of Parliament was used to annual a liability to pay a specific sum of money which had been adjudged against the government in Court proceedings. The claim in Britain was for compensation for the destruction of the appellant's installations in Rangoon during the second world war. The destruction had been ordered by the general officer commanding in Burma in Pursuance of the Policy of the British government to prevent vital resources falling into the

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7. The lagos town planning (compensation) Act 1964. The cases that necessitated the passing of this legislation were Nassar & Sons (Nig) Ltd v Lagos Executive Development Board (1969) 4 FSC 242. Lababedi v Chairman LEDB (1962) 1 All NLR 691 (PC)

hands of the enermy. The Japanese army was then advancing and in fact captured Rangoon a day after the installations were destroyed. The house of lords held that the appellants were entitled to compensation for destruction of the installation.8 The government immediately secured the passage of legislation, War Damage Act, 1965 relieving itself of liability to pay for such War damages and made the Act retrospective.

3.4 THE AGREEMENT AS CONCESSION

The Barotseland Agreement was made under the auspices of British Law. Why this assertion? This is because the Barotseland Agreement was meant to replace the oldConsessions but the matter and initial essence of these consessions were to be observed. It may be pertinent thus to venture into whether Britain was bound to observe these treaties. The rule of International Law say no country or person can exercise within the territory of another country powers of government, executive, legislative or judicial, except with Permission express or tacit of the sovereign of that country. Only in a territorium nullius, that is a territory belonging to no one, that power of Jurisdiction can be acquired by mere occupation without grant. It has been argued that African contries were not capable of acquisition by mere occupation at the time of European Scrabble for Africa. The famous case of Re Southern Rhodesia.9 the privy council dismissed as 'fanciful'

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8. Burma Oil Co v Lord Advocate (1965) AC 75 (HL)

9. (1919) AC 211

the suggestion that the Indegeneous African comunities inhabiting the area were still in the nomadic stage of development at the time the British arrived; the Board, on the contrary, observed that there existed a tribal organisation serving the purposes of government of the communities and the extent

"question of whether such

of

ignty, being private

= that of the conceding kingdom.11

Occupation in order to creat title to territory must be effective occupation .This means that there must be,accompanying the occupation, action such as the planting of a fort which shows that the state not only desires, but can and does control the territory.12 From this it follow that mere discovery of an unappropriated territory is not sufficient to create a title, for

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10. Ibid pp 215-216

11. Mining Rights in Zambia Kenneth Kaunda Foundation 1987 p.76

12. J.L. Briefly The law of nations 6th Ed p. 164

discovery alone does not put the discoverer in a position to control the territory discovered,however he may desire or intend to do so.13

In order to exercise functions of government of one country within another of a civilised state there must be a gran of a formal treaty or other engagement of similar validity and not by mere prescription or acqienscence. This rule of international law equally applies to a protecting power in relation to its protectorate, since the latter is, to the protecting power, a foreign country.

So can british domestic law apply the aforementioned to the extent of binding the British government not to effect Lewanika Constitional Authority in BAROTSELAND. Once it was held that the English Courts could enforce this limitation so as to stop the British Government exceeding its Jurisdiction in a protectorate or other foreign Country wherein it has some measures of Jurisdiction In Nyali Limited v Attorney General 14 the subject fell specifically for decision. By an agreement of 1895 the sultan of Zanzibar entrusted the adminstration of the territory of Kenya to officers appointed by the British government and responsible entirely to it. The powers so ceded related to the executive and

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13. Ibid

14. (1956) 1 QB 1

Judicial administration and to the levy of taxes, duties and tolls. The Agreement expressly provided that nothing therein contained should affect the sovereignty of the sultan in the territory. Just as in the case of the treaties with Barotseland where the effect of concessions which were later adopted by the British government was to extend to Barotseland Her majesty's protection but it was stated on behalf of King Lewanika that

> " nothing written in these agreements shall otherwise affect my constitutional power or anything as Chief of the said Barotse nation."

In the Nyali case an order in council made in 1897 for regulating the exercise of Her Majesty's Jurisdiction in the protectorate expressly recognised the civils of the Jurisdiction as defined by agreement. However under a Subsequent order in Council of 1902, these limits were exceed and power assumed generally for the peace, order and good government of the protectorate without any grant, express or implied, by the sultan. It was held by the Court of appeal of England that this extension of Jurisdiction, though made without grant, cannot be challenged in the English Courts. In that case Denning L J observed that

> "although the Jurisdiction of the crown in the protectorate is in Law a limited Jurisdiction nevertheless the limits may in fact be extend indefinitedly 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 peace, order and good government of the area leaving only the title and ceremonies of remaining in the sultan. The Courts themselves will not mark out the limites. They will not examine the treaty or grant order which the crown may have extended its Jurisdicition....once Jurisdiction is exercised by the crown the courts will not permit it to be challenged. Thus if any order in Council is made affecting the protectorate the Courts will accept its validity without question.... It follows, therefore that in the present case we must look not at the agreement with the sultan, but at the orders in Council and other acts of the orders in council and other acts of the crown so as to see what Jurisdiction the crown has in fact exercised; because they are the best order indeed they are conclusive as to the extent of the crown's Jurisdiction." 15

In the South African case of Sobbuza v Miller,16 the Crown exceeded the Jurisdiction inherited by it from South Africa in Swaziland, but the privy Council held the extension of Jurisdiction in disregard of treaty stipulations to be unimpeachable.

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15. Ibid p.15

16. [1926] A.C 518 especially Per Lord Haldane at p.522-524

This is the position of English Law. The crown is not bound legally by stipulations in its treaty with a foreign country, which limit the extent of its Jurisdiction in that country or which reserve to the authorities of the Country exclusive powers of internal government. Its authority to extend its powers in disregard of such stipulation is sanctioned by common Law prerogatives. It is "an act of state."

This may also apply to the Zambian Government in regard to the Barotse Agreement - Since the Zambian government had regard to the financial and security aspect in the running of the Borotseland and further the Zambian government had the mechanisms towards the peace, order and good government of the land it could not be expected to be bound legally by the Agreement stipulations.

Still further, since the Agreement was meant to replace the old earlier concessions between the British crown and the Litunga, it may only be a logical conclusion that the same effect be had to the 1964 Agreement as was had to the earlier agreement, that is, the extent to which the British government was bound must sill apply to the Zambian Government.

CHAPTER FOUR

4.0 THE PROBLEMS OF THE AGREEMENT

4.1 INTRODUCTION

This chapter tries to look at the problems ocassioned by the obrogation of the agreement. As a preamble stated it must be appreciated that these problems are too numerous to be elaborated in this work. That would need a full thesis. Rather in this research regard will only be had to those topics which the author regards as standing out among the many problems namely: the issue of Restoration of the agreement,the question of Chieftainship and that of secession. Regard will be had further to the Law pertaining to secession to see the constitutionality of such an endeavour.

4.2 RESTORATION OF THE AGREEMENT

It has been the Barotse Royal Esablishment's concern that the government's policy on local authorities in Zambia especially the Royal Establishment and in particular the Barotseland Agreement is being marginalied by the government from an issue of national concern requiring national and individual approach to a mere provincial issue which in terms of government policy should be resolved in the context of what has been obtaining in other provinces of Zambia. The Barotse Royal establishment reject this approach by government on ground that the basis for such comparison does not exist. They argue that they are not asking anything from

the government which they did not have before. They cite the latin maxim of of nemo dat quod no habet saying that the Barotseland was a state with its own laws and defined territory and they agreed to amalgamate or merge with Zambia on the terms and conditions set out in the Barotseland Agreement 1964. On this premises the Royal Establisment seek the Restoration of their rights and property which were in their view, unlawfully withdrawn from them without their consent. The Litunga of the western Province once sued the government for allegedly failing to honour the agreement. He sought a declaration by the High Court that the agreement was still valid and government should observe it.1 The Royal Establishment argued that "although the government of the Republic Under the administration of Dr K.D. Kaunda purported to abrogate the said Agreement by the Constitution of Zambia Amendment Act No 5 of 1969 It nevertheless subsequently acknowledged in its letter to the Royal establishment that the Agreement was, after all still subsisting and agreed to discuss the mechanics of the implementation of its terms." 2

The Royal Establishment advance that the Restoration of the Agreement is all that is required and this involves the Repeal of the legal instruments which breached and ultimately purported to abrogate the agreement and they propose that the government:-

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1. Reported in Zambia Daily Mail Thur 13th Dec 1991

2. Interview with the Litunga 15th Sept 1994 at Royal Palace

(i) Re enacts the Barotse Native Authority ordinance and the Barotse Native courts ordinance with such amendments as circumstances allow

(ii)Amends the local government Act and the local courts Act in so far as they purports to repeal certain provisions of the Barotse Native Authority and the Barotse Native Courts Ordinances.

(iii) Repeal the Constitution of Zambia Amendment Act No 5 of 1969 which purported to abrogate the Barotseland Agreement.

(iv) Repeal the Western Province (Land Miscellaneous Provisions) Act of 1970.

(v) Returns all assets taken by the Zambian Government from Barotse plus damages.[3]

The Royal Establishment advance that if the government refuse to honour the Agreement then they see no reason for honouring it themselves. The effect of this is that the Barotseland or its people can not be expected to be bound by the same agreement which has been neglected. Furthermore, they argue, since the merger of the Barotseland into the Republic of Zambia was only made possible with the Consent of the litunga exercised under Section 112(1) of the Northern Rhodesia (Constitution) Order in Council 1963, which

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3. interview with Mr Griffs Mukande[late] Ngambela of the Litunga on 14th Sept 1994

was in force at the time of the agreement, then it seems only that Royal Establishment's Consideration should be had to the question of the Litunga's withdrawal of such consent where it appears that the litunga was induced to grant the consent by fraud or by misrepresentation of facts that the Zambian government would honour its obligations in the Barotseland. They argue that the litunga cannot be held a hostage by his own consent and where such consent was obtained by deceit or fraud then it becomes only logical that such consent be withdrawn.

> "The rest of Zambia cannot hold us in perpetual enslavement on account of an agreement which we entered into voluntarily."[4]

The barotse Royal Establishment however leaves everything in the hands of the government to weigh the consequences of the Breach of a " legally binding Agreement" [5] The litunga contends that although the Zambian Independence Act of 1964 and the Zambia Independence Order were repealed by 1973 Constitution of Zambia the rights and obligations of the President as stipulated in Section 20 of the Independence Order were preserved by Section 11(2) and 12 of the 1973 Constitution.

The purported obrogations of the Barotse Agreement were, therefore,

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4. A letter from the Litunga Ilute Yeta reported in the Post Tues 5th April 1994.

5. Griffs Mukande

in the establishment's view, of no effect because the constitution still continued to confirm the obligations of the President to Barotseland.

> "Even if the abrogating Acts were to be construed as amending the Zambia independence Order, 1964 it is our considered view that such amendments discriminated against us in relation to other people to whom the President had similar obligations arising from Section 20 of the Zambia Independence Order 1964." [6]

4.3 CHIEFS IN THE BAROTSELAND

There has been a rising ethnic tension in the Kaoma District of Western Province, Resulting in the Barotse Royal Establishment's agitation for the dethronement of the Nkoya Chiefs Mutondo and Kahare. The litunga is still looked at as the pillar of the land in the Western Province. Powers pertaining to chiefs, as outlined in the Barotse agreement, were vested in the litunga and he was the one who had the power to appoint, recognise or otherwise dismiss any chief. The government 's stand on recognising the two chiefs is seen as unsurpation of the authority.

The Barotse see the government's approach to be intending to relegate the litunga to the level where his status in Barotseland

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6. Reported in the Zambia Daily Mail 8th April 1994

would not be determined in accordance with the Barotseland Agreement 1964.[7] They argue that the governement is entitled at any time to come up with any policy on the role of Chiefs in Zambia but in the case of the litunga and Chiefs in Barotseland Agreement 1964 is already defined by the Barotseland Agreement 1964. The role of the litunga as defined by Section 4(2) of the Barotseland Agreement, 1964 states that

> "The litunga of Barotseland acting after consulting with his council as constituted for the time being under the Customary law of Barotseland, shall be the Principal local authority for the Government and administation of Barotseland"

The Royal Establishment further advance that the Republic Constitution be restricted in its authority when it was applied to Barotseland.

> "The constitution must only apply in areas which are provided for in the Barotse agreement. The powers of the President in exercising his executive functions should be restricted when it came to Barotseland. The litunga should be the principal authority of government in the western province..." [8]

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7. The Litunga 15th Sept 1994

8. Representative of Barotse Royal Establishment submitting to The Mwanakatwe Constitution Times of Zambia Fri March 4th 1994

The litunga in a letter to President Chiluba stated that "the Barotse people have never been ruled by other people and for several centuries we have been managing our own affairs without interference from anyone except for a brief period under the Makololo" 9 It was reported that the litunga was angry with the President's decision to recognise what he described as the "so-called Kaoma Chiefs" Mutondo and Kahare without the approval of the Barotse Royal Establishment, saying this is a violation of the Barotse customary law. The litunga advances that since the Barotseland is a kingdom and the chiefs Act recognises the customary law Jurisdiction of the litunga the two chiefs exercise of Nkoya Jurisdiction in Barotse Customary law Jurisdiction is contrally to the Barotse customary law so that they may go elsewhere away from Barotseland where they could exercise their Jurisdiction. 10 The Chiefs Act provides that no person shall be recognised as the holder of an office unless "in the case of a chiefly office in the Western Province, other than the office of litunga, the Person to whom recognition is accorded is recognised by the litunga and traditional Council to be a member of a ruling family in the Western Province."11

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9. Reported in Zambia Daily Mail Fri 8th 1994

10. Ibid

11.S.112

4.4 THE BAROTSELAND AND SECESSION

Time and again the issue of secession of the Western Province has cropped up and skeptics wonder whether or not the Royal Establishment may take to the pressure and seek to secede. When the Mwanakatwe Constitutional Review Commission was deliberating one Petitioner urged the government not to honour the Barotse agreement but instead to facilitate the cutting off from the rest of the country of the Province. [12]

The Royal Establishment has on several ocassions reiterated that under no circumstances will they secede from Zambia. Their decision may stem from the fact that Northern Rhodesia was a union of two countries namely Barotseland North Western Rhodesia and the North Eastern Rhodesia following the passing of the Northern Rhodesia Order in Council, 1911. Not withstanding such almalgation of the two countries, Her Majesty's government continued to recognise the land rights so acquired from Lewanika and in consideration thereof Her Majesty's government agreed to assist Barotseland politically, economically and socially. The northern Rhodesia (Constitution) Order in Council of 1963 provded that

> "all rights of whatever kind reserved to or for the benefit of natives by the concessions from lewanika Paramount Chief of Barotseland to the British South Africa Company dated 17th October, 1900 and 11th August

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12. Reported in the post Issue No. 212 Sept 13th 1994

1909 respectively as approved by a Secretary of state and as varied from time to time by any agreement to which Her Majesty or the Governor with the approval of a secretary of state is a party shall continue to have full force and effect". 13

It has been argued that the extent of Lewanikas land which was ceded to the British South Africa company by the concession of 1900 and 1909 was specified in the Barotseland north western rhodesia order in council of 1899.14 The land ceded to the British south africa company included Southern province, Lusaka province, much of Central province and the Copperbelt province. The Barotse royalist point out that the concession of 1898 between Lewanika and Robert Thorne corydon was sighned at victoria falls in Livingstone on the 25th June, 1898. If Livingstone in the southern province was not under Lewanikas control, they argue then, there is no way Lewanika could have travelled to a foreign land to sig an agreement of this nature.15

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15. M. Gae

The royalist allege further that her majesty's government could have had no cause for extending the boundary of Lewanika's land beyond jurisdiction because at the time of the concessions of 1900 and 1909 the entire Northern Rhodesia was already under the jurisdiction of her majesty's government following the passing of two orders in council namely the barotseland north-western Rhodesia order in council 1889 and the north-eastern Rhodesia order in council 1900. They allege that the 1899 order in council covered the eastern and northern province.

The royalist argue that therefore the barotseland was seperated from the rest of Zambia on account of the conceesions whose place would have been taken by the barotseland agreement, 1964. They state that if the government refuses to honour the barotseland agreement 1964 then they see no restraint in the way of Barotsland being one with those parts of Zambia previously comprised of the Barotseland north western rhodesia and this would entail the invalidation of the Zambia (state lands and reservse) orders 1928 to 1964 whose roots it is observed, are emboded in the concesions. They see no question of cessation of barotseland from Zambia arising under the circumstances stating that their decision not to do so is not based on fear or any cowardly considerations but on principle_ the principle being that you cannot secede from yourself.[16]

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16. Ngambela Griffs Mukande

In underscoring the fact that seccesion was not a policy of the royal establishment Ngambela Griffs Mukande stated that all the royal establishment wanted was to discuss the restoration of the pact. "The lozi did want to seced because as Zambians they would have nowhere to go."[17] The royal establishment argue that it is in their humble view seccesion is a matter of right and is in inherent in the barotseland agreement, 1964 so that the parties to the agreement reserve the right to revert to their original status if the agreement under which they intended to achieve unity no longer work.[18]

THE CONSTITUTIONALITY OF SECESSION

The purpose of government is the protection and well being of the people and a government which has become destructive of that purpose forfeits its claim to the allegiance of the people.[19]
It is generally conceded that the people may be morally justified in resisting by force a government which has persistantly abandoned its responsibility to protect them.[20] As Sir Kenneth Wheare emphatically states a constitution is not morally binding upon all citizens in all circumstances.

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17. Reported in Zambia Daily Mail Fri 8th 1994
18. Reported in The Post April 5th 1994
19. Nwabueze B.O. p 267
20. Ibid

He states thus:

> "There are circumstances in which it is morally not right to rebel, to refuse to obey the constitution, to upset it. A constitution may be the foundation of law and order in a community, but mere law and order is not enough. It must be good law and order. It is conceivable surely that a minority may be right in saying that it lives under a constitution which established bad government and that, if all else is tried and fails, rebellion is right. No doubt it is difficult to say just when rebellion is right and just how much rebellion is right but that it may be legitimate is surely time."[21]

But it must be noted that this is merely a moral issue. For a constitution can not legalise its own destruction by force.[22] It should be stated outrightly that the zambian constitution does not contain any provision expreslly creating a right to secede from the nation.

So since the constitution is supreme any proclamation of secesion as well as being inconsistent with certain specific provisions of

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21. Ibid p.268

22. Ibid

the constitution, can be calculated to destroy or impair its supremacy.

The effect is that if seccesion is void ab initio it is as if it never took place at all. The obligations of the seceding state and its inhabitants to respect the constituion and laws of the state remain unimpaired. Acts done after the proclaimation of secesion are not made any less treasonable by this fact.

However although obligations remain unimpaired rebellion does effect rights of the insurgent state and its inhabitants.It operates to suspend their civic rights, though it does not destroy them completely.[23] "

> During this condition of civil war, the rights of the state as a member and her citizens were suspended.The government ..... refusing to recognise their constitutional obligatitons, assumed the character of enemies, and incured the consequences of rebellion."[24]

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23. Ibid p.275

24. Per C.J. Chase in Texas v White, 7. wall 700 [1869] 724 esp. 727

CHAPTER FIVE

CONCLUSION

Legally speaking it may seem that by virtue of the constitutional amendment of 1969, the barotseland agreement lost its effectiveness.Parliament exercised the powers confered upon it by the constitution and effected the change.As has been reiterated the agreement, as an ordinary contract, was incapable of effecting its own force on the legal relations of persons not parties to it. There were no constitutional limitations on the legislative power of parliament by the agreement.To this effect then parliament could legislate contrary to the agreement and this would not make the act any unconstitutional dsepite the fact that the agreement was recognised by the independence act.Perharps the position would have been different if the agreement was not a seperate treaty only recognised by the independence act.It should have been the constitution or substantial part of it.

Circumstances in which the agreement was made have become onerus as to thwart the development to which the nation of Zambia feels intitled.In this regard the government felt itself strong enough to disregard certain provisions of the agreement whether or not there were legal justification for doing so.

The barotse people advance that since the very basis upon which they merged with the rest of the nation has been avoided it would be equitable to relieve themselves of the contractual obligations.They are advocating that they be granted damages for

the breach of the agreement.Whether or not they have a valid legal claim the government must be aware of the volatile situation that this may cause bearing in mind that there may be discontent from other tribes of the nation and civil strife may result.What is the solution?

RECOMMENDATIONS

The barotseland agreement may need to be reviewed through the process of mutual consutation, respect , calmness and agreement between the respective concerned camps.To this end the government should invariably contact directly with the Barotse establishment at a high level possible so that the issue is amicably resolved and the national integrity restored.

The restoration of the agreement does not however render it unreviewable.In the spirit of amity it may be inevitable to revert to free choice and mutual agreement of the constitution.Survival of the nation depends to a great extent on the flexibility and openess of the Government's approach.The government should discuss with the traditional leaders from all provinces to resolve the agreement.To avoid a repeat of the crumbling empires of eastern europe and the tragedies of disintergrating African countries this may be the ideal approach.Character assassinations only bring chaos in a young like Zambia.The solution to the barotse agreement is a political one.Experience has shown that a purely judicial solution would not be condusive to a national unity.

Zambia has since 1964, changed greatly ,politically, socially,

CHAPTER FIVE

CONCLUSION

Legally speaking it may seem that by virtue of the constitutional amendment of 1969, the barotseland agreement lost its effectiveness.Parliament exercised the powers confered upon it by the constitution and effected the change.As has been reiterated the agreement, as an ordinary contract, was incapable of effecting its own force on the legal relations of persons not parties to it. There were no constitutional limitations on the legislative power of parliament by the agreement.To this effect then parliament could legislate contrary to the agreement and this would not make the act any unconstitutional dsepite the fact that the agreement was recognised by the independence act.Perharps the position would have been different if the agreement was not a seperate treaty only recognised by the independence act.It should have been the constitution or substantial part of it.

Circumstances in which the agreement was made have become onerus as to thwart the development to which the nation of Zambia feels intitled.In this regard the government felt itself strong enough to disregard certain provisions of the agreement whether or not there were legal justification for doing so.

The barotse people advance that since the very basis upon which they merged with the rest of the nation has been avoided it would be equitable to relieve themselves of the contractual obligations.They are advocating that they be granted damages for

the breach of the agreement.Whether or not they have a valid legal claim the government must be aware of the volatile situation that this may cause bearing in mind that there may be discontent from other tribes of the nation and civil strife may result.What is the solution?

RECOMMENDATIONS

The barotseland agreement may need to be reviewed through the process of mutual consutation, respect , calmness and agreement between the respective concerned camps.To this end the government should invariably contact directly with the Barotse establishment at a high level possible so that the issue is amicably resolved and the national integrity restored.

The restoration of the agreement does not however render it unreviewable.In the spirit of amity it may be inevitable to revert to free choice and mutual agreement of the constitution.Survival of the nation depends to a great extent on the flexibility and openess of the Government's approach.The government should discuss with the traditional leaders from all provinces to resolve the agreement.To avoid a repeat of the crumbling empires of eastern europe and the tragedies of disintergrating African countries this may be the ideal approach.Character assassinations only bring chaos in a young like Zambia.The solution to the barotse agreement is a political one.Experience has shown that a purely judicial solution would not be condusive to a national unity.

Zambia has since 1964, changed greatly ,politically, socially,

culturally and otherwise so much that it could be virtuaaly impracticable to implemnt the agreement in full.However this does not intail that there can be no redress even for the sake of national unity. To properly understand which rules would govern the lives of a young nation like ours vis-a-vis the agreement, regard must be had not only to the judicial practice but also to the humbler, extensive non-judicial and what is more non-legal practice.For the solution to this problem may not lie in the agreement.Rather the answer may be the preserve of the plain man's misunderstanding of the actual position.

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