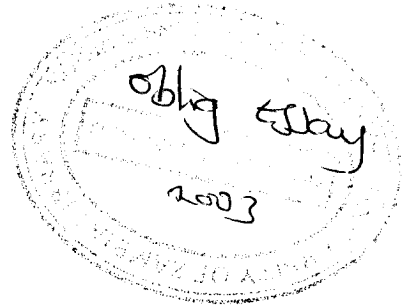
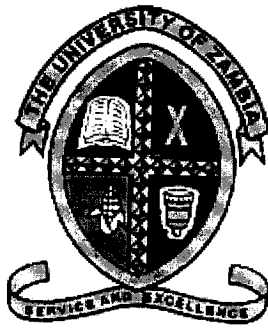


oblig essay

2003



UNIVERSITY OF ZAMBIA  
SCHOOL OF LAW

I recommend that the Obligatory essay prepared under my supervision by SYDNEY I. IMASIKU

Entitled:

THE USE OF LEGISLATION IN THE INTEGRATION OF BAROTSELAND  
INTO ZAMBIA

be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements relating to format as laid down in the regulations governing Obligatory essays.

Mr. S. WATAE:  
(Supervisor)

Date: 19/12/2003

Obligatory Essay

On

THE USE OF LEGISLATION IN THE INTEGRATION OF  
BAROTSELAND INTO ZAMBIA

by

SYDNEY I. IMASIKU

Computer NO 97260096

submitted to the University of Zambia in  
partial fulfilment of the requirements of the  
Bachelor of Laws (LLB) Degree programme

School of Law  
University of Zambia  
Lusaka

November 2003

## DEDICATION

This paper is dedicated to a number of individuals all of whom I cannot include here:

My **FATHER**, Lang Mubiana Imasiku: You have been a fountain of knowledge and a source of strength to me—without you I would not have got this far.

My **MOTHERS**: Idah Sibajene Muzyamba and Josephine Imasiku. One bore me and the other raised me. I love you both for the love, caring and hope you have provided me over the years. I owe my life to you.

- My **BROTHERS** and **SISTERS**, Nawa, Mataa, Inonge, Inutu, Yetambuyu and Peggy. May the light that I have shown be a guide to you.

- Negroes T. Dube. You have been a father and a friend. Also, you have been there for me.

My **COUSINS**, Imbula, Mataa, Patricia, Carol, Imasiku, Mulambwa, Haibu, Brian, Inonge, Akombayetwa ... May we restore to our family what it has lost over the years.

Finally, to my **HERITAGE** through the Lozi people. May this be a paper that will help us all unite with the rest of Zambia, so that we can truly be **One Zambia, One Nation**.

## ACKNOWLEDGEMENTS

I would like to acknowledge my supervisor, Mr. S. Watae, without whose meticulous help this paper would not have been realized. I thank you for allowing me the space and room to put my ideas to paper, and the constant guidance you have given me when need arose.

I would like to thank my friends at the University of Zambia (UNZA), for making my journey through the years smoother than I expected. My life here would not have been complete without:

- Sydney Chisenga
- Douglas Zulu
- Lundu K. Mazoka
- Abel Nyirenda
- Moses Chitambala
- Bwalya Kesho
- Zinzi Kasauka
- Happy Chongo
- To My Class

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*'Truly the pen is mightier than the sword, and in the hands of experts... achieved more in Barotseland than the most potent lethal weapon in many of our less fortunate dependents.'*

*Colin Hardin*



## 1.0 CHAPTER ONE - INTRODUCTION

The aim of this paper is to discuss the use of legislation in the integration of Barotseland into Zambia, which is known now as Western Province. This paper is capable of covering much ground, from constitutional law, land law to international law; it is able to address many issues, but a selected list of issues will be addressed for the purposes required by its author. The central theme it will address itself to will be the eventualities occurring to the Western Province and how many of them are interlinked.

### 1.1 THE COMMENTS FOR AND AGAINST SECESSION

Over the past few years, there have been calls from a group of 'Lozi Loyalists' for the recognition of **The Barotseland Agreement** of 1964 and the eventual secession of that part of Zambia from the rest of the country. These proponents, calling themselves the Barotse Patriotic Front (BPF), have in recent times made several calls and attempts at having their issues addressed and say they do not need to negotiate with government and are ready to use any means to become autonomous. According to certain documents, The BPF is only ready to negotiate the modalities of handing and taking over between the Zambian government and the Barotseland. The documents written by

BPF president Mutangelwa Imasiku warns that the Zambian government will be taught a tough lesson if it does not succumb to BPF's demands.

*"The Zambian government requires a tough lesson to force it understand the mythology of the Barotse Kith and Kin when it comes to issues of their fatherland. Let it be understood that the restitution of the Barotseland in itself must not be an issue of negotiations. It is a matter of the self-styled neo-colonialist, simply respecting the Barotse people's wish,"*

Imasiku says in his 13-page document. He says government has been manipulating the Barotse Monarchy for over three decades, which has resulted into the suffering of the people of the area. He says The BPF will not stop the struggle and shall use whatever means to make Barotse self-determined. The idea to form the Barotse Patriotic Front was initiated in 1992 when the Zambian cabinet refused to address the Barotse Agreement, an agreement that was signed by government, the British government and the Barotse Royal Establishment (BRE) in 1964. Most of the Copperbelt and the Southern Province was treated as the Barotseland, the Kafue River being the boundary<sup>1</sup>. The BPF so far has materials circulated around the country that are also available on the Internet. Government's initial reaction when the pamphlets were first reported as having been in circulation was through then minister of Home Affairs Peter Machungwa, who declared them as seditious. This initial reaction was mild and the claims

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<sup>1</sup> [http://www.oneworld.org/afronet/monitor/39\\_stry2.htm](http://www.oneworld.org/afronet/monitor/39_stry2.htm)

by the Home Affairs Minister were counteracted by the BPF, which said the materials were educational and were not meant to be in any way seditious<sup>2</sup>.

It would seem that government's full reaction was yet to come, and Mutangelwa was yet to feel the strength of government that would come through its law enforcement wing- the Police Service. In neighbouring Namibia, the group of rebels calling themselves the Caprivi Liberation Group (CLA) was agitating for secession from Namibia. Most of these are Lozi by descent and it followed that their cries for secession harmonised with that of Mutangelwa and his group:

*"The Caprivi secessionists have started a beautiful journey in the right direction because their plea for autonomy had fallen on deaf ears in the past,"*

The BPF leader warned the Zambian President Frederick Chiluba to 'take a leaf' from what was happening in Caprivi as it would likely occur in Zambia:

*"All Lozis world-wide should contribute materially to the cause of the Caprivi secessionists. We are ready to defend our democracy, brothers and the UN charter,"*

Mutangelwa said. The BPF leader also confirmed speculations of a meeting between his people and Caprivi secessionists held at Katima Mulilo to confer over how secession would be achieved forcefully, if not by peace<sup>3</sup>.

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<sup>2</sup> [http://www.oneworld.org/afronet/monitor/39\\_stry2.htm](http://www.oneworld.org/afronet/monitor/39_stry2.htm)

<sup>3</sup> <http://www.anc.org.za/anc/newsbrief/1999/news0806>

This provided the opportune conditions for government to react to his erstwhile statements that threatened not only Zambia's border's integrity, but was likely to cause turmoil in the western part of the country and lead to a diplomatic rift between Zambia and neighbouring Namibia. In August 1999, Imasiku Mutangelwa was sought by police for questioning for making statements supporting a separatist rebellion in Namibia. Later the same month, Mutangelwa sought asylum in the residence of the South African high commissioner, but his request was denied. Mutangelwa subsequently was arrested and charged with belonging to an unlawful society in contravention of the Zambian Societies Act. The case against him was referred by the Magistrate's Court to the High Court, where it remained still pending at year's end, though he was released on bail after his arrest<sup>4</sup>.

Other people have been involved in calls for the secession of Barotseland. These include Agenda for Zambia former President Akashambatwa Lewanika, who apart from making serious statements of secession, had gone beyond the border to consult Lozis living in Namibia which shares the border with the 'the Barotseland'. The Lozis

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<sup>4</sup> <http://www.state.gov/g/drl/rls/hrrpt/1999/278.htm>

in Namibia's Caprivi Strip who have formed the Rebel movement have continued their cry with some escaping from that country to seek political asylum in neighbouring Botswana. If not critically addressed observers feel the Barotseland issue might spark a rebellion that will affect the region like is the case in the neighbouring Democratic Republic of Congo where Tutsis are fighting to wrestle power from the Kabila government<sup>5</sup>.

## **1.2 CHAPTER CONTENTS**

The above circumstances highlighted need to be addressed and discussed considering several questions from the context of what took place, how it took place and when it took place. The surrounding circumstances of the inclusion of Barotseland into Zambia must be brought to the attention of the discussants and the enormous task before them need to be brought to the fore. Information on how events occurred and what the factors that were taken into consideration need to be brought to light. This paper proposes to do this by considering a six-tier approach to the subject of its research. The six chapters that will be used, including this one, will outline and discuss in depth the position of Barotseland as it was and as it is now.

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<sup>5</sup> [http://www.oneworld.org/afronet/monitor/39\\_stry2.htm](http://www.oneworld.org/afronet/monitor/39_stry2.htm)

The second chapter will consider European intrusion into Barotseland and it will show how manipulating the British South Africa Company was in making Litunga Lewanika III part with some of his authority of governance in return for 'protection from her majesty'. Through concessions entered into between him on the one part, and they on the other, it will be shown how this had implications for the Litunga as an individual at international level and for Barotseland's autonomy in the subsequent Chapter. It will be shown how, as a protectorate, Barotseland's ruler lost his ability to be able to negotiate on behalf of his nation as opposed to his ability to do so before being granted the status of protectorate.

The third chapter will look at how over time the agreements between the company and Lewanika were given recognition by Orders in Council from the British Government that took over administration of the territory now called Barotseland. This is also in relation to his status as an international person. This is of interest considering that as a protectorate, Barotseland had all its external relations taken care of by its 'protector', and thus this entailed it having limited capacity to engage in international relations on its own behalf.

When the nationalist government of Dr. Kenneth Kaunda took over the reins from the British in 1963 and shortly before independence, they were faced with the problem of 'keeping the status quo' that subsisted between Lewanika and Her Majesty's Government. Their motto of 'One Zambia, One Nation' was in direct conflict with the recognition of Barotseland's protectorate status. Negotiations between the government on the one hand, and the agitators for secession, whose interests had been recognised by the previous 'government' and who naturally expected such interests and special status to be recognised by the new government had to be made. This culminated in the signing of the **Barotseland Agreement** of 1964 that proposed to do this and eventually secure self-rule of the Lozis. Such agreement was subsequently abrogated using subtlety on the part of government through legislation; this will be the focus of the fourth chapter.

In order to complete the integration of Barotseland into Zambia, several Acts of Parliament were passed to either take away the few remaining provisions of the Agreement or leave it even less recognisable and make it obsolete. The fifth chapter thus will look at Acts such as Land (Conversion of Titles) Act<sup>6</sup>. Of interest here will be issues of land law and particularly the relation between

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<sup>6</sup> Cap 289

the power and authority of the president to alienate land and the 'supervisory role' of the traditional authority when this is being done.

The Local Courts Act<sup>7</sup> brought with it the abolishment of the special status of the separately recognised courts of Western Province. When considering this aspect of the research, the relationship between the traditional courts that existed and the local courts that replaced them will be considered. It will be shown that though the local courts have replaced the traditional courts, there are areas of interest, such as in land matters, where the superiority of the traditional courts asserts itself. Case law will be considered in looking at these.

Several legislation before and after independence took into consideration the 'special status' of Western Province but most of these were subsequently repealed and this removed any special status the province had. The Western Province (Land and Miscellaneous Provisions) Act 1970 will be considered and how it took away the efficacy of the **Barotseland Agreement**. However, this Act was not the only one that helped the government alter the Province's special position - chief among legislative acts that were used to change this status was an

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<sup>7</sup> Act No. 20 of 1966



amendment to the country's constitution; that will be looked at in the fifth chapter.

Because of the events that have led to the integration of Barotseland into Zambia as Western Province, the proponents for its secession have argued that the current status of Western Province as Zambia's poorest province is to blame, largely in part, on government's neglect in having the province developed. Development, they have argued would bring with it the realisation by its inhabitants that they should have their own 'country' that would be able to sustain itself without help from the Zambian government. Again, the BPF has been in the forefront of this argument and they say that the recent discovery of diamonds is the reason why the government does not want to allow them to secede. There have been speculations that diamonds exist in Lusu Sesheke, in Kataba southwest of Kafue National Park, in Senanga's Nangweshi Island on the Zambezi River, at Sioma Falls and Liuwa National Park<sup>8</sup>. The last chapter of this paper seeks to address some of the concerns expressed by the BPF as regards development in Western Province as well as give certain recommendations after tracing the history of the Province's current status.

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<sup>8</sup><http://www.reliefweb.int/w/rwb.nsf/0/02DE0F34E7611359C125680900443150?OpenDocument&StarKey=Botswana>

## 2.0 CHAPTER TWO - EUROPEAN INTRUSION INTO BAROTSELAND

### 2.1 THE ROLE OF THE BRITISH SOUTH AFRICA COMPANY

The inclusion of Barotseland into Zambia cannot be discussed without alluding to Zambia's historical link with the British. Up until the second half of the 1880s, the British government had been quite content to see the area known as the 'northern Zambezia' pass into the hands of other European powers such as Portugal. European expansion into the interior of Africa meant spending taxpayers' money on such exploits - that was costly and it meant among other things that the taxpayers would have to be appeased or the issue of spending their money in foreign lands would inevitably be a contentious point at the next election. The British knew this and as such abstained with a contented attitude as other powers claimed their share. Cecil Rhodes, however, was not and had a grandiose idea of a role he felt he had to play in Africa. His quest to see British domination as one of the powers with interests in Africa had been spurred as early as when he was twenty-four<sup>9</sup>. To achieve this he set to form a company that would achieve British domination in Africa from its foot to its head; this dream is referred to also as Rhodes' Cape to Cairo dream. Rhodes was successful and as a result, on 29<sup>th</sup> October 1889, his

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<sup>9</sup> R. Hall. *Zambia*: 54 - 55

British South Africa Company received its Royal Charter of Incorporation<sup>10</sup>. With the Charter by his side Rhodes set to claim England's share in Africa.

When Rhodes took his first decisive action north of the Limpopo in 1888, his immediate objective was not Barotseland, but Matebeleland. This domain was ruled by Lobengula and was rich in cattle. Early explorers brought tales of fabulous wealth of great reefs of gold waiting to be exploited and it was widely known that the high veldt lands of the subject Mashona offered great prospects for white settlement<sup>11</sup>. This was achieved using an array of manipulative methods including manoeuvring individuals in key positions. Lobengula was handled with the aid of missionaries and his deposition was closely related to the manipulation of Lewanika since the two rival kings were played off against each other with consummate expertise. Moreover, without the concession wrung from Lobengula, there would have been no foundation for the subsequent granting of a royal charter to the British South Africa Company<sup>12</sup>.

Many African peoples had white domination thrust upon them during the imperialist scramble for Africa. Some

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<sup>10</sup> Ibid: 55

<sup>11</sup> R. Hall: 54 – 55

<sup>12</sup> Ibid: 59

asked for and quickly received European protection. A few, however, had to plead and importune before a white nation paid them attention or heeded their calls for protection. Khama invited British protection, received it, and tried to exploit it to secure his own position on the throne. When Lewanika requested British protection it nearly led to his overthrow, and because his 'protectors' took a decade to materialise, his position during that period remained extremely insecure<sup>13</sup>. Continually Lewanika actively sought a helping hand from Europe, for he was haunted by the possibility that he might be dethroned by his own people, as had occurred once before, or destroyed by the Ndebele, who were threatening a military invasion.

## 2.2 THE ROLE OF FRANÇOIS COILLARD

In the search of protection from the British, mention must be made of the role that the missionary François Coillard played in these proceedings. Coillard was tireless in his efforts when politics would advance his evangelical aims, and fear that the Portuguese Catholics would acquire his Barotse parish fuelled him to persuade Lewanika repeatedly to hurry in obtaining 'British Protection'. This was almost unnecessary: Lewanika's uneasy hold on the throne and the threat of Lobengula's *impis* was enough to convince Lewanika that with British

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<sup>13</sup> L. G. Caplan. *The Elites of Barotseland 1878 - 1969*. : 38

protection he would be safe from within and from without<sup>14</sup>. Through Coillard Lewanika wrote to the administrator of Bechuanaland requesting British protection, but this overture was referred to Rhodes who had just obtained the charter of his British South Africa Company. Rhodes immediately dispatched a representative, F. E. Lochner, to Barotseland, and in 1890 this emissary concluded an agreement with Lewanika and his chiefs<sup>15</sup>. With the inclusion of a clause that the company was to aid in the education and civilization of the native subjects of the Kingdom besides providing protection for the King, Lewanika saw the means by which his idea of modernising his nation would be realised<sup>16</sup>.

Under the Lochner Concession, the Company obtained mineral and commercial rights throughout Barotseland and adjacent suzerainties, in return for which Lewanika was to receive a subsidy of £ 2000 a year. This arrangement was conceived in misunderstanding: Lochner had implied that he represented the British government directly, whereas only the British-South Africa Company provided the protection, for which Lewanika had contracted. Lochner time and time again invoked the name of Queen Victoria; this was expected, but he went much further: he

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<sup>14</sup> Ibid 63

<sup>15</sup> Ibid: 56

<sup>16</sup> Ibid: 54

told Lewanika he was an ambassador from the Queen and had been sent to offer her protection for Barotseland - he was not merely seeking a concession, but an alliance between the Barotse nation and 'the government of Her Britannic Majesty'<sup>17</sup>. Perhaps it is this misuse of Her Majesty's name that caused Lochner to overlook certain terms required by his masters in negotiating a concession that later proved futile to the aspirations of the Company.

The Lochner concession or Barotse concession is not the only concession that Lewanika entered into in his quest for protection from the British. As was later proved, the concession was undesirable to Rhodes because it failed to grant administrative powers to the BSA Company as well as did not allow the company to allocate land to settlers without a new concession with Lewanika. For his part, Lewanika and his people doubted whether Lochner really represented the Queen. As dissatisfaction grew in both camps, the Company defaulted on its annual payments to Lewanika, while for his part Lewanika had long since repudiated the Concession<sup>18</sup>.

The company's desire to acquire powers of administration

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<sup>17</sup> Ibid: 67 - 68

<sup>18</sup> [www.marcusgarvey.com/acrosszambezi.htm](http://www.marcusgarvey.com/acrosszambezi.htm)

and powers to allocate land led to the negotiation of a new concession, which to a large extent referred extensively to the stipulations of earlier concessions. Lewanika as well as other indunas were summoned to the Victoria Falls on 25th June 1898 to agree to a new concession that conferring administrative powers in Barotseland to the BSA<sup>19</sup>. Through the 1898 concession King Lewanika, for himself, his heirs and successors and for his people, with the advice and consent of the Barotse Council granted to the company or its assignees the 'sole absolute and exclusive perpetual right and power' to:

- Carry on any manufacturing, commercial or other trading business;
- Search for, dig, win and keep diamonds, gold, coal, oil and other precious stones, minerals, or substance;
- Construct, improve, equip, work and manage public works, railways, tramways, roads, bridges, lighting, waterworks, and all other works and conveniences of general or public utility;
- Carry on the business of banking in all its branches;
- Buy, sell, refine, manipulate, mint and deal in precious stones, spices coin and all other metals

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<sup>19</sup> L. G. Caplan: 75

and minerals;

- Manufacture and impart arms and ammunition of all kinds;
- Do all such things as are incidental or conducive to the exercise, attainment or protection of all or any of the foregoing rights and powers<sup>20</sup>.

There are a number of other things to note about this agreement. Firstly, it differed from the earlier Lochner concession in three ways:

- It gave the Company the right to deal with and adjudicate upon all cases between white men and between white men and natives;
- The Company could make such grants of land for farming purposes in Toka and Ila country to white men approved by the King;
- As compensation for this extension of the Company's authority, the annual grant to the King of £ 2 000 set down in the 1890 concession was reduced to the sum of £ 850<sup>21</sup>.

Secondly, it was expressed to extend to the whole of the territory of Barotseland 'or any future extension thereof including all subject and dependent territory.'

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<sup>20</sup> The Lawley Concession – Gervas Clay – Your Friend Lewanika – The Treaty of 1898 (later called concession "A", Appendix 'D') p105

<sup>21</sup> Caplan G.E.: 75



Thirdly, the company was given 'administrative rights to deal with, and adjudicate upon all cases between white men and between White men and Natives ' while 'all cases between natives shall be left to the king to deal with and dispose of'<sup>22</sup>. The company undertook 'to protect the said King and nation from all outside interference or attack.'<sup>23</sup>

The Lawley Concession was never to be signed, probably because Lewanika had unsuccessfully bargained for something that was not included in it: asking for protection meant to the British government that an armed presence would have to be deployed in Barotseland; this was inconsistent with provisions of a supplementary charter establishing the BSA<sup>24</sup>. It was also felt that the grant of monopoly of trade was contrary to Article twenty of the Royal Charter. As a result, the British Government did not sanction the Concession. The British Government, through its foreign office, maintained that this was unnecessary in the wake of the Order-in-Council of 28th November 1899<sup>25</sup>. Further to this, because Rhodes' prime interests were political control and commercial profit, but it soon became evident that there was no gold to be had in Barotse country, and interest in the area flagged.

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<sup>22</sup> Op cit.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

### **3.0 CHAPTER THREE - THE RHODESIA ORDERS IN COUNCIL**

#### **3.1 INTRODUCTION**

A discourse of the history of Zambia would be inadequate and incomplete without alluding to the events leading to the adjoining of North - Eastern and North - Western Rhodesia. This adjoining took place with initial steps taken to firstly recognise Barotse formally as a British Protectorate with the BSA as agent on behalf of Britain, then the adjoining of North - Eastern and North - Western Rhodesia, followed finally with the end of company rule in 1924 and replaced with the formal administration of the territory by the British government. Such a discussion would also have to take into account the circumstances that altered initial agreements between the representatives of the BSA Company and the Barotse Royal Establishment. The intended purposes, for instance, of the agreement signed at the Victoria Falls that was to grant, among other things, rights to the BSA Company to alienate land to white settlers, to grant suzerainties over the adjoining land to Barotseland, as well as give it the right to adjudicate in matters between white men and between white men and natives, was superseded by certain Orders in Council that had the effect of overriding these concessions.

Lewanika's hopes of securing his position as king from within and without through the protection of the British was seemingly answered by the various concessions that he had entered into. In fact, with the acceptance by Coryndon of the Lochner Concession his troubles appeared to be dissipating.

Three Orders - in - Council may be taken to be the pillars of Barotseland's change of constitutional setup in relation to the BSA Company, and more specifically, with the British government. The three collectively changed not only the constitutional set up of Barotseland, but also changed the ability of Lewanika to be able to make covenants with other 'nations' on behalf of his kingdom.

### **3.2 THE BEGINNING OF FORMAL RECOGNITION OF BRITISH PROTECTION OVER BAROTSELAND - 1899**

It has been noted that for a long while Lewanika sought British protection actively with the help of persons such as Coillard. His concerns were soon to come to an end. In February 1899 the British foreign Office told the Colonial Office that the Portuguese Government be informed of the British claim concerning the extent of Barotseland. In April of that year, Lewanika was told by a representative of the Company (a Mr. Milner) that the

Queen had made a treaty with the King of Portugal by which the whole of Barotseland was under the Queen and Portugal would have nothing to do with it. He added though, that there was still some dispute as to the exact point to which Barotseland extended towards the west<sup>26</sup>.

### **3.3 THE BAROTSELAND/NORTH WESTERN RHODESIA ORDER - IN - COUNCIL OF 1899**

With news such as the above Lewanika's frantic efforts for British protection in order to secure himself from his opposers within the Lozi ruling class and from potential enemies such as the Matebele were seemingly resolved. In 1899 the Barotseland/North Western Rhodesia Order - in -Council was promulgated and this Order added to his fears dissipating. The content of the Order was to recognise formally the extension of protection to Barotseland by the British. The Order was promulgated to permit the administration of Barotseland and give jurisdiction in cases between white people<sup>27</sup>. As well as this, it was one of two Orders that divided Northern Rhodesia at the Kafue River into two distinct administrative units<sup>28</sup>.

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<sup>26</sup> G. Clay: 114

<sup>27</sup> Ibid: 115

<sup>28</sup> L. G. Caplan: 75

### **3.4 THE NORTH EASTERN/WESTERN RHODESIA ORDER -IN -COUNCIL OF 1911**

The delimitation of North Western Rhodesia firmly established by the Barotseland/North Western Rhodesia Order - in - Council was only part of the grandiose scheme at work in Cecil Rhodes' mind. What seems to have been left out of discussions between Lewanika and his 'protectors' was the fact that other mineral concerns were running parallel to his interests for protection. This became apparent with the passing of the Order -in - Council of 1911 that marked the final encapsulation of Barotseland within the larger colonial entity of Northern Rhodesia. With it came the shattering of the separate treaty relationship with Britain and from then on Barotseland became one of the seven provinces of Northern Rhodesia for all intents and purposes<sup>29</sup>. From then on Barotseland was embroiled in the politics of not only their relationship with the British, but were just a minority among a group of ethnic tribes seeking recognition of their rights, as well as recognition of their aspirations.

### **3.5 THE 1924 RHODESIA ORDER IN COUNCIL**

To further cement the content of the Barotse/North Western Rhodesia Order - in - Council another Order in

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<sup>29</sup> Ibid: 102

Council was passed - the 1924 Rhodesia Order in Council that provided for the direct supervision of the territory now known as Northern Rhodesia from the BSA Company to the British government. The interests of the Lozi ruling class were seemingly put into perspective by the passing of this Order. By then Lewanika had died and the throne was acceded to by Yeta who was informed that with the Crown taking over the administration of Northern Rhodesia, from 1<sup>st</sup> April 1924 onwards the Lozi would stand even closer and have a more direct relationship with the Crown<sup>30</sup>.

The coming of direct rule was the moment Lewanika had vainly awaited since 1886, and which, after the Company officials began dismantling the Lozi Empire, the entire ruling class agreed was absolutely crucial. To them direct rule was the only possible means to the desired end: to be under a benevolent and economically disinterested government, and to restore the former rights and privileges of the ruling class<sup>31</sup>.

### **3.6 INTERNATIONAL LAW AND BAROTSELAND'S STATUS**

The significance of the Orders in Council collectively in relation to the ability of Lewanika to engage in

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<sup>30</sup> L. G. Caplan: 131

<sup>31</sup> Ibid: 131 - 132

international relations can be understood from the context of international law. The various concessions entered into by Lewanika with representatives of the BSA Company created a series of treaties whose tantamount effect, it will be remembered, were subject to conformity with the Orders in Council that were passed after the formal recognition in 1899 of British Protection over Barotseland with the promulgation of the Barotseland/North Western Rhodesia Order in Council. By 1924 when another Order in Council was passed handing over the territory to the British Government, Barotseland had become a dependent state. This in turn meant that it became a subject of international law with a limited capacity. According to Professor Georg Schwarzenberger, the status of Barotseland can be likened to that of an international protectorate or a dependent state. As an independent state, Barotseland may have surrendered so much of its sovereignty or the exercise thereof that, for all practical purposes, it became a dependent state under the suzerainty or control of another international person (Britain), without losing the empty shell of its sovereignty<sup>32</sup>. However, it is more likely that Barotseland could be considered to have been a colonial protectorate because as at 1924 there was little semblance of

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<sup>32</sup> G. Schwarzenberger. *A Manual of International Law*: 60

Barotseland's sovereignty remaining by virtue of the Order in Council of that year<sup>33</sup>.

### **3.7 THE WHITTILING AWAY OF LEWANIKA'S AUTHORITY**

By the time direct rule came to Northern Rhodesia, Lewanika had lost most of his authority and the little that was passed to Yeta was a shadow of his father's former self. This can be attributed to a number of subtle as well as drastic changes that the BSA Company introduced in Barotseland.

#### **3.7.1 THE HUT TAX**

The introduction of the Hut Tax is an instance of the withering of this power. This tax, which was introduced in 1904, was levied on every adult male (eighteen years old and over) and was quickly agreed to by Lewanika. Lewanika hoped to collect this tax on behalf of the Company from subservient tribes as he was their overlord and that as they had paid in the past tribute to him, so would they continue to pay tax which was only tribute in another form<sup>34</sup>. This was not to be the case, however, and Lewanika found himself in a dispute with Coryndon, who strongly objected to this arrangement and the collection of tax outside the Barotse valley as he felt the natives

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<sup>33</sup> Ibid

<sup>34</sup> G. Clay: 133



would refuse to pay to Lewanika's Indunas as they would recognize the difference between tribute paid to their own chiefs and hut tax which was traditionally paid to the White Government in other parts of Southern Africa. With negotiations it was finally agreed that the Administration would collect taxes outside the Barotse valley<sup>35</sup>.

The significance of the dispute between Coryndon and Lewanika and Lewanika's final allowance of the collection of taxes by the colonial administration is not seen until one realises that this was one of the reasons Lewanika lost authority over his territories. The Company officials knew that with the implementation of taxes, they had provided themselves, as well as the white settlers with a steady and ready flow of manpower. Though these impositions did not appear particularly large, they constituted a major source of revenue to the territorial government and their hold over it would not cease anytime soon regardless of whose interests, including Lewanika's, they trampled in getting it<sup>36</sup>.

### **3.7.2 THE ABOLISHMENT OF SLAVERY AND BAROTSE'S COMPLEX AGRICULTURAL SYSTEM**

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<sup>35</sup> Ibid

<sup>36</sup> P. Keatley. *The Politics of Partnership: The Federation of Rhodesia and Nyasaland*: 237

The second source of the whittling away of Lewanika's authority can be traced to the abolishing of slavery with the Emancipation Proclamation of 1906. The abolishing of this phenomenon, having been introduced to the Lozi in 1850 by the Makololo, as well as tribute, affected the complex agricultural economy of the Plain, making it difficult to carry out public works and to keep up the full round of agricultural activities. A great economic loss was thus attained through these reforms, which were replaced with paid labour and taxation<sup>37</sup>.

Thirdly, there was no opportunity of finding an alternative means of maintaining prosperity. With the rail line passing east of the Kafue River Barotseland became a backwater cut off from the areas of commercial advantage and economic advancement. Faced with these circumstances, Lewanika was not to realize his dream of British overrule for himself and his people. An opportunity for him to 'address the situation' did not avail itself and by 1914 when Britain and German were at war the politics of Europe took centre stage over those of the British colonies. Two years later with the war still raging, Lewanika fell ill and died on 4<sup>th</sup> February. He died full of honour, loved and respected by his people as a great leader, leaving the heart of his country

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<sup>37</sup> M. Mainga. *Bulozi Under the Luyana Kings*: 204

reserved to the Barotse (Ma Lozi) by treaty rights and his own family secure on the throne. No African ruler of his time achieved more<sup>38</sup>. However, the reservation of his country would be subject over the next fifty or so years to the qualms of other political players that included the liberation agitators who would spearhead the emancipation of the territory known as Northern Rhodesia. For his successors, this meant further securing their interests in another agreement, the **Barotseland Agreement** of 1964. Throughout this agreement, its negotiators would not fully comprehend the true meaning of their negotiations and grasp the significance of the agreement for their political future as a protectorate when such responsibility would be shifted from the British to the newly independent Zambian nation's government.

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<sup>38</sup> G. Clay: 155 - 156

## 4.0 CHAPTER FOUR - THE BAROTSELAND AGREEMENT: ITS FORMATION AND ABROGATION

### 4.1 THE POLITICS OF FEDERATION

The politics that were to entangle the Lozi ruling class after the year 1924 were to be more complex than those precedent to it. Because their kingdom had been incorporated into the larger nation of Northern Rhodesia, theirs was just one of a myriad of deep rooted interests of an awakened society of Africans whose political consciousness had been roused by their realisation that by keeping quiet they would be left behind calls for independence sweeping across the African continent. Indeed the legacy that Lewanika left to the heirs to his throne was one that no other African leader at that time had achieved, but the events after this achievement that would determine Barotseland's political destiny were unimaginable in the mind of not only Lewanika, but also in the minds of his heirs.

In April 1953, then Northern Rhodesia governor Sir Gilbert Rennie addressed a public meeting in Mongu of about five hundred people. He raised the case for Federation and it is recorded that precisely eight were

in favour of it<sup>39</sup>. His was just one of a number of groups that then Litunga, Mwanawina, had to contend with in securing the interests of his kingdom as his predecessor, Lewanika had done.

#### **4.2 THE THREE POLITICAL INTEREST GROUPS OF NORTHERN RHODESIA**

As of April 1953, three groups can be accredited with having a stake in the political future of Northern Rhodesia. The first group consisted of the white settlers who had over the years migrated to the lands of central Africa in hope of settling down in lands secured for them by the BSA Company, which interests were now secured with the coming of overrule. This group further intended to consolidate their interests by securing for themselves an African settlement veiled from the interests of the indigenous group of Africans. Through individuals such as Rennie they approached the Lozis and emphasised repeatedly the proposition that since the Queen approved the Federation, opposition to it would be tantamount to being disloyal to the Queen. This argument was irresistible, even to Mwanawina<sup>40</sup>. He and his advisers of the Kuta were later to issue a statement which would raise no objection to the Federation, provided that

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<sup>39</sup> L. G. Caplan. *The Elites of Barotseland*: 177

<sup>40</sup> Ibid

rights under the Lewanika Concessions were preserved in the Federal Constitution, and that that part of Northern Rhodesia known as Barotseland be styled or declared by Order in Council as the Barotseland Protectorate<sup>41</sup>. These interests were acknowledged by the Governor and he reassured the Kuta that they would be met.

The effect of the Litunga and his Kuta's agreement to these aversions and their attitude of acquiescence would further entangle the Lozis in the power struggle that would emerge in the three territories involved in the Federation's drive to independence. They were to become only one of three factions with interests in the self-rule of then Northern Rhodesia that would become Zambia.

#### **4.3 POLITICAL INTERESTS AMONG THE LOZIS**

Meanwhile, other Lozi factions were not at ease with the existence of the Federation. On the Copperbelt, as well as along the line of rail a group of Lozis banded together to form the Barotse National Association. Lozis hostile to the paramount chief quickly overtook this group, originally formed to show urban Lozi support for the Barotse Government. At the same time, another faction within Barotseland was formed that consisted of young educated men whose 'enlightenment' outside the territory

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<sup>41</sup> Ibid

revealed to them the dangers of Federation. Two brothers, Newo and Clement Zaza, led this group. Inevitably the two groups were brought together by their virtually identical criticisms of the Lozi ruling class and emerged as the voice through which the nationalist agitators would penetrate Barotseland<sup>42</sup>.

Mwanawina and the Kuta made it clear repeatedly about their suspicions of the Federal government, and of Sir Roy Welensky's continuing demands for dominion status for the Federation, and of the demands of white Northern Rhodesians for a new Constitution giving them greater powers at the expense of the Lozi ruling class. Despite this though, he chose not to side with the agitators of independence. This pitted him against not only the white settlers on one side, but also fellow African natives on the other. The Federal government had perceived in him a devoted ally and an apparently firm bulwark against the forces of African nationalism, and continued to use him on the one hand to secure their interests against the nationalist agitators, while on the other keeping him at bay by making sure he was placid. This was achieved by an array of methods that included sending him to attend the 1959 Queen's New Year Honour List celebrations where Mwanawina was honoured and became Sir Mwanawina Lewanika

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<sup>42</sup> Ibid: 179

III, KBE. He was the first and last African chief so honoured<sup>43</sup>.

At the time of his honouring, the position of Mwanawina and the Lozi ruling class, as well as that of the Federation of Rhodesia and Nyasaland seemed invulnerable. However, this was not to be so for long. The return of Dr. Hastings Kamuzu Banda in Nyasaland, and the break away of a militant group of Northern Rhodesian African Nationalists from Harry Nkumbula's African National Congress to form the Zambian African National Congress, which in October 1959 would become the United National Independence Party (UNIP)<sup>44</sup>. It was against this party that, as Lewanika had long ago appealed to the British Crown against Lobengula's Ndebele, so now would his son continue to repose his security with Her Majesty's Government against Kenneth Kaunda's alien nationalists<sup>45</sup>.

It would seem that the Lozi ruling class either was unaware of the events happening elsewhere in the Federation, or were paying little attention to events as they unfolded. Though they repeatedly used whatever means to dampen the voices of agitators for independence within Barotseland, and largely managed to do so, it would seem

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<sup>43</sup> Ibid: 184 - 185

<sup>44</sup> Ibid: 191

<sup>45</sup> Ibid: 193



that they did not fully comprehend the extents of calls for independence from the rest of the territory.

#### **4.4 THE WEAKENING OF THE FEDERATION AND THE INDEPENDENCE OF NORTHERN RHODESIA**

The weakening of the Federation that would eventually lead to Northern Rhodesia's independence began with the first multi-racial elections of 30<sup>th</sup> October 1962. Out of 104 000 ballots cast, the white dominated and ruling United Federal Party received less than one-fifth of these. Kaunda's UNIP formed a coalition with Harry Nkumbula's African National Congress (ANC) which thrust the UFP into opposition<sup>46</sup>. Elsewhere, the return to Nyasaland of Dr. Banda signalled its secession from the territory, which was announced formerly by R. A. Butler in December 1962. With the sanctioning by Britain of Nyasaland's secession from the territory, it was clear that the break up of Federation was going to begin even before the territory reached its tenth birthday. On February 1<sup>st</sup> 1963, Nyasaland entered a new phase with full internal self-government that had been negotiated in London conference of the previous November<sup>47</sup>. Back in Northern Rhodesia, moves begun as early as 1961 when Ian Macleod at the Colonial Office began a series of

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<sup>46</sup> P. Keatley. *The Politics of Partnership: The Federation of Rhodesia and Nyasaland*; 486

<sup>47</sup> Ibid: 487

conferences. These conferences would lead up to a new Northern Rhodesian constitution and an African government in Lusaka- the Kaunda coalition that became reality in January 1963 and whose first act was to table a motion calling for secession from Federation<sup>48</sup>.

#### 4.5 THE WORK OF L.K. WILSON

These events sowed remarkable political interests in the few years to come in Barotseland. UNIP stressed that secession would create great economic hardship. These calls fell unheeded by the ruling class. However, fearing these developments, the Litunga began correspondence pressuring for secession for Barotseland. A Salisbury lawyer, L. K. Wilson, was invited to delve into the Lealui archives for evidence to support the ruling class' demands<sup>49</sup>.

Wilson produced three documents from his work. The first was a detailed record of guarantees of Barotseland's status as set down in several concessions signed by Lewanika, and thereafter repeatedly reaffirmed by successive Governors and Secretaries of State and enshrined in the Constitutions of 1924, 1953 and 1961. The second document presented the Lozi case for

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<sup>48</sup> Ibid: 491

<sup>49</sup> L. G. Caplan. *The Elites of Barotseland*: 202

protectorate along the lines of the High Commission Territories. This was based on Barotseland's legal rights, its existence as a nation prior to the creation of Northern Rhodesia, the failure of the colonial government to develop Barotseland, the unsuitability of western democracy for African conditions, and the ostensible material advantages of becoming an independent protectorate. Finally, Wilson produced a detailed written constitution for the new 'Protectorate of Barotseland'<sup>50</sup>. These efforts seemed fruitless, for as most of the ruling elite discovered, there was a minority that still believed in secession. Publicly they conceded that secession would not be granted and called instead for a kind of semi-independent status for Barotseland that would continue to share 'common services' with Zambia.

#### **4.6 UNIP AND THE SIGNING OF THE BAROTSE AGREEMENT**

By January 1963 UNIP had taken sole possession of the central government. At the end of several talks with the Barotse government the central government was forced to capitulate on its stance that Barotseland should join Zambia without its special status being recognised. The Litunga insisted on an agreement being formally incorporated into the Zambian Constitution recognising Barotseland's special status. However, as no other tribe

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<sup>50</sup> Ibid: 202 - 203

in the territory had received so much special attention in the nationalists' advance towards full independence, the UNIP representatives drew a line. To single out the Lozi in the constitution was to flout UNIP's 'One Zambia, One Nation' motto to an extent that the party was not ready to accept. A joint communiqué was issued at the end of 1963 declaring that 'Northern Rhodesia and Barotseland would go forward to independence as one country'. Added to this, the Litunga and Kaunda agreed upon a formal treaty to be signed by the British, Barotse and Northern Rhodesian governments<sup>51</sup>.

On May 15<sup>th</sup> 1964, the Litunga and his party flew to London where they met with Duncan Sandys and Kaunda. They found Kaunda unwilling to entrench any agreement into the constitution, and on the advice of Roland Bell, the Lozi representatives agreed to a separate treaty with the British representative signing as a witness. This treaty was known as the **Barotseland (London) Agreement**. It was clear at the time, however, and became increasingly evident later on, that the Lozi failed to grasp the crucial distinction. For this reason, though they were disappointed that the agreement would not be incorporated into the constitution, they considered themselves to have

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<sup>51</sup> Ibid: 207 - 208

won a substantial victory<sup>52</sup>. For the agreement to establish Barotseland's position within Zambia in place of the earlier agreements between Britain and Barotseland, which would be terminated when Northern Rhodesia became fully independent in October that year<sup>53</sup> was something that not even Lewanika had fathomed in his wildest of imaginations. Barotseland was to become an integral part of Zambia with its rights reserved. However, none of the Lozi representatives seemed to comprehend that the reason Kaunda was prepared to grant such privileges as well as insist on a separate treaty rather than a clause in the constitution was that the **Barotseland (London) Agreement** was agreed upon merely as a passport to enable Zambia to integrate Barotseland and proceed to independence as one country. The Zambian government was not morally obliged whatsoever to respect or honour the said agreement<sup>54</sup>. The agreement amounted to no more than an ordinary contract that was subject to ordinary law with no legal enforceability. It could not be enforced against the government veiled by various statutory instruments granting it protection from certain actions against it<sup>55</sup>. Given these circumstances, the agreement was only morally enforceable.

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<sup>52</sup> Ibid: 209 - 210

<sup>53</sup> Ibid

<sup>54</sup> Ibid: 210

<sup>55</sup> An example would be the State Proceedings Act

## 5.0 CHAPTER FIVE - THE COMPLETION OF INTEGRATION AND THE ESTABLISHMENT OF LOCAL COURTS

### 5.1 THE BEGINNING OF THE BAROTSE AGREEMENT'S ABROGATION

It will be remembered from the previous chapter that the Lozi representatives had insisted on the attachment of the **Barotse Agreement** to the independence constitution. Such request was denied them, and though after the signing of the agreement they considered themselves to have won a major victory, they were soon to appreciate the significance of the denial of their request. The Constitution is the supreme law of the land, and had they attached the agreement to it, their interests would have been secured. However, having not done so, they were to soon realise the significance of having not attached the agreement to the constitution.

The first signs of unwillingness to fulfil the agreement on the part of the UNIP government were apparent when, in October 1969, it introduced a bill to cancel the **Barotse Agreement** of 1964 and abolish all the rights, liabilities and obligations which attached to the agreement. This was done through the Constitutional Amendment Act<sup>56</sup>, which abrogated the agreement in its entirety, by an addition to section two that read:

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<sup>56</sup> Act No 33 of 1964

*This section shall not apply to the Barotseland Agreement which shall on and after the commencement of the Constitution (Amendment) (No 5) Act 1969, cease to have effect, and all rights (whether vested or otherwise), liabilities and obligations there under shall there upon lapse.*

The effect of the above section was to amend section 20 (1) of the Independence Order that recognised the rights, liabilities and obligations created under the Barotse Agreement. With the requirement that only two thirds of the House of Parliament vote in favour of an amendment, one of the final nails was placed into the coffin for secession. On the 15th of October, the second reading was overwhelmingly passed by Parliament<sup>57</sup>. Subsequently, the bill became law.

#### **5.1.1 THE CHANGE OF THE LAND TENURE SYSTEM THROUGH LEGISLATION**

In Northern Rhodesia, the history of land rights is found partly in various concessions and certificates made between chiefs in both North Eastern and North Western Rhodesia and the BSA Company. From 1890 onwards the Company began to make grants on the strength of these concessions, and although the Company's authority to do so was largely open to doubt, its actions were subsequently recognised by the British Government<sup>58</sup>. With

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<sup>57</sup> L. G. Caplan. *The Elites of Barotseland*: 221

<sup>58</sup> W.M. Hailey. *An African Survey*: 738

the British Government eventually stepping into the territory before handing it over to the UNIP Government, it is arguable by construction that all the rights and obligations accruing to the Company, which then accrued to the British, finally accrued to the UNIP government. This meant that the authority over land matters were thus in the hands of the latter. With this authority over land came the authority to make legislation for the further administration of that land. This was the case when, in 1969, Parliament began to pass new land tenure legislation which transferred control over the use of land from the Litunga to the state<sup>59</sup> as a final act by Government to have control of the land in Western Province, both *de jure* and *de facto*. The Act, known as the **Western Province Land and Miscellaneous Provisions Act**<sup>60</sup> provided in its preamble and specifically in section 2 that all land in Western Province was from that point onwards<sup>61</sup> to be vested in the President as a reserve within the meaning of and under the Zambia (State Lands and Reserves) Orders of 1928 - 1964. The Act was made to amend various laws that made special provision in relation to Western Province. This was a severe blow to the Lozi ruling class and especially to the Litunga. Litunga means 'earth' and if the Litunga lost control of

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<sup>59</sup> Op cit

<sup>60</sup> Act No 47 of 1970

<sup>61</sup> The Act was assented to on the 14<sup>th</sup> of October 1970



the land, he lost everything. The Lozi can pinpoint this as the beginning to the end of whatever remained of their claims for secession. With subsequent Acts such as the Land Conversion of Titles Act still vesting all land in Zambia under the President, the Litunga's authority over land was only operative in as far as it was not inconsistent with the lands Acts passed. Illustrations exist on this point such as those in the cases of *Siwale and six others v Ntapalila Siwale*<sup>62</sup> as well as in *Village Headman Albert Phiri Mupwaya and another v Mathew Mbaimbi*<sup>63</sup> where it was held that in alienating land in a customary area, there is need to consult interested parties before such alienation can be effected. This is in line with the provisions of the Lands Act<sup>64</sup>, which is the successor of the Land (Conversion of Titles) Act, and which also provides that all land in Zambia is vested in the President. The effects of these provisions is not appreciated till one considers that fact that this places a limitation on the Litunga's ability to arbitrarily use his position to alienate land to whomsoever he wishes regardless of who has an interest in it. The whittling away of the Litunga's authority that had begun with Lewanika so many years ago and the integration of

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<sup>62</sup> SCZ Appeal No 24 of 1999

<sup>63</sup> SCZ Appeal No 41 of 1999

<sup>64</sup> Section 3 (1)(4)(c)(1) of the Lands Act CAP 184 of **The Laws of Zambia**

Barotseland into Zambia was almost at a completion with the various legislative changes taking place.

## **5.2 THE ESTABLISHMENT OF THE LOCAL COURTS**

Another way of assessing the effects of the actions by government in integrating Western Province into Zambia is by considering the establishment of the Local Courts under the Local Courts Act<sup>65</sup>. Before independence and the enactment of the Local Courts Act, Zambia had a distinct dual legal system of native courts that applied customary law, and subordinate courts that applied statutory law. The native courts that were subsumed into the current local courts with the creation of the Act derived their existence from the Native Courts Ordinance<sup>66</sup>. However, a separate Ordinance recognised the existence of a separate native court system for Barotseland<sup>67</sup>. The Native Courts Ordinance applicable to the rest of the country provided that its provisions were not to apply to Barotseland in section 3. Thus, a separate court system subsisted in Barotseland with a traditional system of courts known as Kutas delivering justice as tradition had provided over the years. However, with the passing of the Local Courts Act, government in effect repealed the Barotse Native Courts Ordinance, which ended the special status of

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<sup>65</sup> Act No 20 of 1966

<sup>66</sup> CAP 158

<sup>67</sup> Barotse Native Court Ordinance (1965) CAP 160

Barotseland and further removed any remaining aspect of the **Barotse Agreement** as well as furthered the integration of Barotseland into Zambia.

#### **5.2.1 THE INHERENT PROBLEM OF THE LOCAL COURTS IN MATTERS OF LAND**

The conversion of Barotseland's former courts under the Native Courts Ordinance to courts under the Local Courts Act whilst solving one problem created another inherent problem in integrating the province. Because most of the court justices appointed to the bench of the Barotse native courts were indunas (or headmen), these had a greater understanding of the traditions of the Lozi. More importantly, they had knowledge on land matters and were better placed to adjudicate over these. With the removal of the indunas and with their replacement by local court justices, it can be argued that the ability of the latter to adjudicate over land matters thoroughly can be put to question. The question to be asked is: 'are they delivering justice in land disputes, given that they are not leaders of the territories adjudicated over, and therefore do not understand the extents of the land and the intricate relations of land matters as an induna would?' This question becomes more pertinent when one considers that appeals from the local courts in order to go to the High Court have to have the 'approval' of the

Saa Sikalo Kuta<sup>68</sup>. The local court justices thus become subject to the authority of the royal establishment in land matters, despite them being members of the judiciary. This is seen in the case of *Walubita v Mwemba*<sup>69</sup>. In that case the issue was whether Section 57 (1) (a) of the Local Courts Act does not empower the High Court to grant an extension of time within which to appeal from a decision of a Barotse local court concerning a "land matter", nor does the High Court have an inherent power to grant such an extension. On construction, section 56A (3) of the Local Courts Act empowers the High Court to hear an appeal from a Barotse local court concerning a land matter where application has been made by the appellant to the Kuta within thirty days of the decision appealed against, even though the Kuta has not granted leave to appeal until after the end of that thirty - day period.

The said subsection (3) 5 reads: -

(3) An application for leave to appeal under this section shall be made, and where such leave is granted, the appeal shall be entered, within thirty days of the decision appealed against:

Provided that no appeal shall lie from the refusal of the Saa-Sikalo Kuta to grant such leave.

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<sup>68</sup> This is the supreme administrative and quasi judicial body of the Lozi

<sup>69</sup> (1968) ZR 143 (HC)

Apparently, the ordinary meaning of subsection (3) is that, for an appeal from a decision of a local court in Barotse Province relating to a land matter to lie to the High Court, three things must be done within thirty days of the local court's decision, namely:

- (1) The appellant must apply to the Kuta for leave;
- (2) The Kuta must grant leave; and
- (3) The appeal must be entered.

In the instant case, the appellant wished to appeal against a decision relating to a land matter of the Nalolo Local Court given on the 29th November 1967. On the 16th December 1967, he filed a notice of appeal that incorrectly stated that the appeal was to go to the subordinate court of the first class for the Mongu District, instead of applying to the Kuta for leave to appeal to the High Court. The notice of appeal was apparently sent to the Kuta and there treated as an application for leave, which the Kuta granted on the 9th April, 1968, that is, well outside the said thirty-day period. No rules had been made and no forms prescribed by the Chief Justice under section 67 of the Act to regulate the practice and procedure upon an application to the Kuta under subsection (2) of section 56A of the Act. There was a need therefore to construct the statute with a view to revealing the intentions of legislature and

avoid absurdity, which required a look to be taken at the earlier existing statute<sup>70</sup>.

### **5.3 THE RECOGNITION BY STATUTORY COURTS AND LEGISLATION OF TRADITIONAL COURTS**

Before the coming into force of the Act on the 1st October, 1966, there was no appeal under the Barotse Native Courts Ordinance to the High Court from a decision of what was then called a native court in any civil proceedings relating to rights in or over land in the Barotse Province<sup>71</sup>. The Act, however, conferred the right to such an appeal, with the leave of the Kuta. The intention of the legislature was not that such right should be rendered nugatory by delays not on the part not of an appellant but on that of a local court or the Kuta of their stay.

The significance of the case above for the purposes of this paper is not in its holding but in the High Court's recognition of the existence of the traditional courts and its authority in the handling of certain cases such as land in the instant case. Though it has been recognised that the traditional courts have been abolished with the introduction of the local courts, the

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<sup>70</sup> Ibid

<sup>71</sup> Section 33 (4) of Cap. 160

former courts still exist *de facto*. It is submitted that their 'abolishment' by the Local Courts Act has had little effect on them in terms of their ability to dispense justice. What has been affected is their recognition *de jure* by the Act that has supplanted their position in the judicial hierarchy with the local courts. Their existence is recognised by other provisions such as the provision that allows a local court justice to sit with traditional assessors when deciding a customary law case, the section quoted in the *Walubita* case, and ultimately, by the Constitution of Zambia, which indirectly recognises the continual existence of traditional laws in article 6 of the Constitution of Zambia Act.

## **6.0 CHAPTER SIX - CONCLUSION**

### **6.1 THE FEASIBILITY OF SECESSION**

The events over the years occurring to Barotseland that have led to its integration into Zambia as Western Province have led to a situation where it can be concluded twofold that, firstly, secession is not feasible for the Lozi given the events that have occurred over the last hundred years or so. Secondly, in order for secession to be allowed of Western Province, a number of legislative changes have to be made. The work of Wilson shows that the Lozi cries for secession can be validated given that the agreements that led to their integration were entered into on an understanding that they would have complete autonomy within their territory and be in a direct relationship of protectorate recognition with Her Majesty. This is the basis of their argument. However, commercial interests on the part of the BSA Company, political expediency on the part of the colonial administrators, and legislative manoeuvring on the part of the post independent government have overtaken their interests. Through out negotiations with the Company it has been seen that of prime interest of the ruling class was the maintenance of their political authority over their people, as well as securing their financial interests as is evidenced by Lewanika's bargains for a



greater share in the tax collections<sup>72</sup>. The pertinent question therefore, should not be whether given the circumstances secession is possible if considered, but whether it is what the **Lozi People** would like to have and if it is in their interests, as opposed to what the ruling elite desire. This question is answered with the aid of a few pointers. Firstly, Western Province is heavily dependent on government for funding. It is landlocked and poverty stricken, and without the discovery of minerals, it would have to live on charity from somewhere<sup>73</sup>. The Third National Development Plan indicated that government funding to Western Province constituted 16.4 per centum of its total financing to the provinces, amounting to Kwacha 24 600 000, while it contributed very little to the country's national gross product<sup>74</sup>. Given these statistics, the current situation of integration is beneficial to the province.

## **6.2 THE PACIFICATION OF THE LOZI THROUGH LEGISLATION**

### **PROVIDING FOR THE LITUNGA**

In order to pacify any dissent among the Lozi people, a number of legislative provisions have been created that have tried to coat with sugar the bitter pill that the Lozi ruling class has swallowed over the years. This has

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<sup>72</sup> Lewanika and the kuta received 10 per centum of the taxes collected

<sup>73</sup> Hall: 239 - 240

<sup>74</sup> See the Third National Development Plan's Provincial Investment Programmes, Part IV

been done by giving 'special' recognition of the Litunga and some of his nominees. Examples abound:

- Part XIV of the miscellaneous provisions of the Constitution defines "Chief" as meaning a person who is recognised by the President under the provisions of the Chiefs Act or any law amending or replacing that Act as the Litunga of Western Province, a Paramount Chief, Senior Chief, Chief or Sub-Chief or a person who is appointed as Deputy Chief;
- The second schedule to the Income Tax Act specifically states that the income of the Litunga of the Western Province as Litunga and the income of any Chief received as a Chief from the Government are exempt from tax<sup>75</sup>.
- According to the Chiefs Act, any person who, immediately before the commencement of the Act was recognised under the Barotse Native Authority Act, Chapter 159 of the 1965 Edition of the Laws, as the Litunga of the Western Province shall be deemed to have been accorded equivalent recognition under the Act<sup>76</sup>.
- According to the Forests Act<sup>77</sup>, despite a least of prohibitions as to who cannot cut down trees, another list provides that, notwithstanding the

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<sup>75</sup> Part I of the Second Schedule, section 2 on Exempt Office Holders

<sup>76</sup> Section 15(1)(b) of the Chiefs Act CAP 287

<sup>77</sup> CAP 199

foregoing prohibitions any nominees of the Litunga of the Western Province or of the Mwandi Kuta shall at any time be granted licences free of charge to cut trees for canoes or to enter the said area in search of honey or game<sup>78</sup>.

### **6.3 THE ROLE OF THE LEGISLATURE IF SECESSION IS TO BE CONSIDERED**

Legislative power in Zambia is vested in the National Assembly, constituting the President and Parliament. Subject to Articles 78 and 79, Parliament can make and amend laws subject to criteria that include the reading of bills and through the support of two-thirds of all members of the Assembly on both the second and third reading. What this implies is that Parliament may be in a position to make law allowing for secession. Given that Members of Parliament represent the areas from which they come, it can be submitted that this is easily attainable in relation to parliamentary representatives from the Western Province. However, this is subject to some provisos. The first is that the Member of Parliament, though a representative of the area he represents, has no obligation to give the views of his constituency in Parliament. This was established in the case of *Chafferse*

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<sup>78</sup> Subsidiary legislation. Sections 5 and 6 on national and local forests

*v Goudsmid*<sup>79</sup>. A Member of Parliament has a privilege to either represent his views or those of the electorate, and an action neither for *mandamus* nor for *certiorari* can lie against the Member of Parliament. This privilege is further clothed with statutory protection by virtue of Article 87 of the Constitution that states that the National Assembly and its members shall have such privileges, powers and immunities as may be prescribed by an Act of Parliament. Given the above provisions, and given that Members of Parliament from Western Province have no obligation to broach the wishes of the Lozi people in Parliament. Many of them toll the party line and follow party policy, which, it is submitted, may largely be inconsistent with the cries of secession.

As well as what has been identified above, other Members of Parliament from other constituencies in Zambia who do not appreciate the significance of the cries for secession may not vote in favour of legislation allowing it. They do not owe an obligation to anyone to vote in favour of such a legislation, and the areas from which they come may not take kindly to any special treatment being conferred on one ethnic group. Any such attempts would violate Article 1 of the Zambian Constitution, which recognises that Zambia is a **unitary, indivisible,**

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<sup>79</sup> (1894) 1 QB 196

multi-party and democratic sovereign state. Given its indivisibility the members of parliament may not be willing to allow secession. Sub-article 2 recognises that all power resides in the people who shall exercise their sovereignty through the democratic institutions of the State in accordance with the Constitution. Married with sub-article 3 that provides that the Constitution is the supreme law of Zambia, and if any other law is inconsistent with it that other law shall, to the extent of the inconsistency, be void, it is arguable that the Lozis are a minority that cannot secure the required numbers to achieve secession. The Constitution binds all persons in the Republic of Zambia and other organs of government. It is the supreme law of the land reflecting the wishes of Zambians. Any attempts at secession is likely to cause turmoil as this would in a way entail special treatment of Lozis which is what was not the intention of the early leaders of the country by refusing to incorporate into the Zambian Constitution the recognition of Barotseland's 'special status'. No other tribe in the territory has received so much special attention in the constitution. To single out the Lozi in the constitution is bound to bring disunity between this group and other ethnic groups that have lived up to now without any civil strife. Calls for secession are likely to cause the same results as the Rwandan genocide as they

border on ethnocentrism, which is the belief that one's culture, way of life or ethnicity is superior to that of others. This must be avoided.

#### **6.4 RECOMMENDED REFORMS**

In view of the above, the best alternative to secession would probably be to advocate for devolution in the country's governance. This would give each region its own state government affording autonomy, while unifying the various units with the provision of a federal government. This model is currently in place in the United States of America. The African example would be the example of Nigeria. However, separate regional autonomy for Western Province would entail specific legislation to that effect. Secondly, in all areas where federalism subsists states are very large, affording a variety of human resource. Besides this, each state subsists on its own funding which is not the case with Western Province as has been shown above. Thirdly, there is likely to be a duplication of governmental structures, which is costly. Whether with the activities of the current constitutional review commission submissions will be made for the provision of such an arrangement in the constitution or not, entirely depends on the agitators for secession. They should realise that rather than cut itself off from the rest of the country and continue being a backwater of

development that started in the days of the BSA Company rule, the Western Province is better off integrated to the rest of Zambia. As well as this, the views of the Lozi people should be heard and an assessment made of whether they would rather have secession or be content with their integration in the unitary and indivisible state of Zambia.

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