THE UNIVERSITY OF ZAMBIA

THE MAKING AND REMAKING OF CONSTITUTIONS IN ZAMBIA: THE NEED FOR A NEW PERSPECTIVE

A Dissertation Submitted to the
School of Law
in Candidacy for the Degree of
Master of Laws

By

JOHN P. SANGWA

Lusaka, Zambia
October, 1994

To

Ben

PREFACE

There are many reasons to justify this work. Throughout the seventy years of British colonial hegemony in Zambia the constitutional order which evolved was authoritarian with the supreme power vested in the Governor. A few years before independence drastic steps were made to transform this arrangement into one emphasising constitutionalism and democracy. Within eight years of independence the independence constitutional order was found to be a fetter in meeting the most pressing needs of a newly independent country desperate to forge national unity and address other imbalances created by years of imperial domination.

The Constitution was severely amended until it was replaced by the One-Party Constitution of 1973. Under the new arrangement it was envisaged that the fight for political power was to be pursued in a less divisive way, through one legitimate party. Instead of spending time and energies fighting for power, under the new order it was visualized that attention was to be directed at addressing poverty, ignorance, disease and other social evils.

After nearly two decades of one-party rule the problems which the system was constituted to address, assumed greater proportions. Authoritarianism took a new meaning and dimension. The principal cause of the economic, social and political malaise was found to be the very system of power arrangement. The solution was found in creating a new constitutional order guaranteeing constitutionalism and democracy. The constitutional makers,

and later the negotiators from the two main political parties, the United National Independence Party (UNIP) and the Movement for Multi-Party Democracy (MMD) turned to the Independence Constitution for inspiration in determining the new constitutional arrangement. But before it could even come into force, the 1991 Constitution was labeled as a compromise constitution put together to facilitate the holding of the multi-party elections. A Commission has since been constituted to look into the drafting of another constitution, the fourth constitution since independence.

It was under these circumstances that this work was conceived and shaped. Zambia's constitutional position necessitated a lot of questions and the most pressing are: what was wrong with previous constitutional orders? What needs to be done to ameliorate the position? And what are the prospects for the future? This work attempts to address these questions and this is for some good reasons. There are already some works on constitutional law in Zambia, but most of them focus on certain aspects of Western constitutionalism and they illustrate how the realisation of such ideals has failed.[1] The works are rich in outlining the various abuses perpetrated under the previous constitutional orders and in particular failure of respect for human rights. The writers focus mostly on the constitutional texts and analysis of case law. They eschew

---

[1]Alfred Chanda, "Zambia: A Case Study in Human Rights in Commonwealth Africa" (JSD dissertation, Yale University, 1992), Ludwig Sondashi, "Zambia's Single Party Presidentialism" (Ph.D. dissertation, Warwick University, 1990), and Lawrence Zimba, *Zambian Bill of Rights*, (Nairobi: East Africa Publishing House, 1984).

political, economic and historical forces in the working of the constitution. This has been the major weakness of their treatises. The working of government is considered to be the concern of political scientists and history for historians. There is a general view that lawyers are not equipped to inquire into the relationship between the economy and the law. This work is a modest attempt to break away from this tradition and consider public law from the political, economic and historical perspectives, and show how they affect the constitutional order.

History is important in that it has shown that law was one of the tools employed by the colonialists to control tribal groupings and transform them into one heterogeneous social formation. The law was used to create new institutions of government and practices. The new leaders who took over power from the British Government did not create a complete break with the past but built on what was left by the Colonial Government. To ignore this is to give an incomplete picture of the constitutional history.

The political perspective is important in that various institutions of government and practices, which have found expression in the medium of law started as political decisions. The role of the lawyers has been to translate such decisions into legal prescriptions.

The economy has an impact on the constitutional order and laws of any country. The economic beliefs of government are relevant in determining how the government will use the law. If a government believes in participating in the

economy of the country certainly there will be use of the law to give effect to these ideas.

The approach adopted in this work is profitable in that law is perceived as part of society influenced by the historical, economic and political forces present. Consequently, both the empirical and more traditional techniques of legal research have been employed in this work. But a deliberate attempt has been made to avoid analysis of case law. Most of the cases of constitutional significance have been subjects of exhaustive inquiries by other scholars.[2]

This work, by its very nature, called for some arbitrary decisions to be made. The discussion of the connection between law on the one hand, and the economy, politics and history on the other have not been exhaustive, but merely illustrative of the impact the latter have had on public law. The examination of the judiciary has been deliberately excluded for two reasons. Other scholars[3] have already ably dealt with the subject and, secondly, the judiciary did not play a crucial role in the constitutional development of Northern Rhodesia. The real power in the Territory revolved around the legislature and the executive.

Although this work was conceived over three years ago real work did not start until two years ago and the fact

---

[2]See especially Chanda, "Zambia: A Case Study in Human Rights in Commonwealth Africa" and Zimba, *Zambian Bill of Rights*.

[3]The most outstanding work is that by Joshua L. Kanganja, *Courts and Judges in Zambia: The Evolution of the Modern Judicial System* (Ph.D. dissertation, University of London, 1980).

that this part of the work has been written means that I have survived those moments of frustration: when nothing seems to be going right and one has every reason to give up. I could not have reached this stage without the help of many people. I would like to thank Fred M'membe, the Managing Director of Post Newspapers Limited, for extending to me the use of computers and printing facilities at *The Post* and his staff for teaching me how to use the equipment by osmosis. Without his assistance, which came at the most opportune time, this work would have taken twice the time it has taken to complete, and its outlook would not have matched the current one. I would like to thank Dr. Alfred Chanda under whose supervision this work was carried out. Not only did he supervise me, he encouraged and gave me the inspiration to go on. He stood by me at the most critical time the way a true friend would. I would also like to record my gratitude to Dr. Chaloka Beyani of Oxford University, Wolfson College, and his family for the friendship and support which I received in the month of April, 1993 when I stayed with them. This gave me the opportunity to collect some materials, from the Bodlein Library, which have been helpful in refining some parts of this work.

I would also like to thank the staff of Bodlein Library Oxford University and University of Zambia Library Special Collection Division for their unfailing assistance in locating the various materials I needed. I would like to thank the people with whom I shared the ideas in this work, some of their criticisms helped me revise and refine my own

ideas. I would like to thank Robert Simeza, who did not contribute directly to this dissertation, but took care of certain matters on my behalf, and this gave me the opportunity to concentrate on this work. Finally I would like to thank my wife, Vivien, for enduring the long hours I stayed away, while carrying our son Benjamin. May this work be a reminder that those hours were not spent in vain, and may it be a challenge to Ben.

TABLE OF CONTENTS

INTRODUCTION

When Zambia celebrates her thirty-first independence anniversary she is also likely to commemorate the enactment of her fourth constitution since independence. This will represent an average of a new constitution every eight years: one of the highest rates of constitutional change in Commonwealth Africa. This is an unimpressive record in so far as it is generally accepted that a constitution is a body of rules which define and limit the exercise of governmental power, and regulate the major political activities in the country. It cannot, therefore, be frequently subjected to change like any other ordinary piece of legislation.

The position brings into question: the constitution-making process pursued in the making of previous constitutions; the content; their relevance to Zambia given the country's economic, social and political forces; the competence of the drafters and response to constitutional theories; and finally the prospects of a viable constitutional order emerging in Zambia. These are some of the issues addressed in this work.

The thesis is that Zambia's constitutional experience is unsatisfactory, hence there is need to change the constitutional perspective which has influenced previous constitutions. Although the country's constitutional order evolved in an era dominated by the classical constitutional perspective, which emphasise constitutionalism, democracy and respect for human rights, the foundation laid down during colonial rule was largely supportive of

authoritarianism. It was, however, gradually reformed to limit power. The process of transformation was completed with the granting of independence in 1964.

The country became independent under a constitution which promised restraint on arbitrary power and supported a government of laws as opposed to a government of men. The years after independence witnessed the re-transformation of the constitutional order to support absolutism. The process was completed in 1972 and consolidated from 1972 until the end of 1980s when it collapsed in the face of demands for reform towards democratic rule. Events since 1991 have revealed moves towards the retention and consolidation of old authoritarian structures.

The constitutional order which emerged between 1899 and 1964 was silent on the economic and social welfare of people. The government was not obliged to address them. They were to be resolved through the industry of the individuals, in line with the laissez-faire thinking which coheres with the classical constitutional perspective.

To the new African nationalist leaders, who took over from the departing colonial masters, independence meant the eradication of the imbalances associated with colonialism. They were, therefore, faced by economic and social inequalities associated with nearly a century of colonial rule. It was their responsibility to address the disparities and give independence its real meaning.

The constitutional changes which occurred after independence were carried out on the premise that they were designed to empower the government deal with these

problems. After nearly thirty years of independence the task of forging the bonds of unity and nationhood, converting a subsistence economy into a modern cash economy, industrialising the country and erasing poverty, disease and illiteracy, in short raising the standard of living of the people, are far from being resolved. In fact they have assumed new dimensions.

The situation demands a new perspective in constitution making and discourse - a new attitude towards the constitution.

For any future constitution of Zambia to be viable and relevant it must address not only the issue of power, but also the economic and social welfare of the people. Whilst the need to limit government and ensure constitutionalism is acknowledged, the government should not be so limited and uncommitted as to fail to address the most pressing needs of the people. The promotion of the people's welfare is the very essence of government. The government must be obliged to take positive action and introduce policies designed to improve the quality of life of the people. The situation demands a new attitude towards the constitution and constitution-making.

The dissertation is divided into six substantive chapters and a conclusion. In chapter one the classical and the anti-classical constitutional perspectives are discussed - their origins and development. Every constitution is a product of the history of the country where it has emerged. The history of Zambia is a history of colonial rule, and the making of Zambia was the work of

foreign entrepreneurs in search of solutions to their own problems. To ignore this is to tell a half story. Chapter two, therefore, focuses on the various forces leading to the creation of Northern Rhodesia and establishment of British influence.

In chapter three an attempt has been made to build on chapter two, showing how the extension of British influence north of the Zambezi and the making of Northern Rhodesia influenced the constitutional foundation for the Territory. An effort has been made, in the fourth chapter, to show the dual legacy of colonial rule: authoritarianism, which was the mode of government from 1899 right through to 1963, and constitutionalism and good government introduced in the last few months before independence. The response of the new African leadership to the contradictory legacies has been examined in chapter five. Zambia's response to the second wind of change which is still sweeping through the African Continent is discussed in chapter six. The conclusions and recommendations are considered in the seventh chapter.

Although this study is about Zambia, what has been discussed is true for other countries as well, especially those with a history similar to that of Zambia. The effort expended on this work will be well spent if people elsewhere find the ideas advanced relevant to their own countries.

CHAPTER ONE

PERSPECTIVES IN CONSTITUTION-MAKING: A HISTORICAL INQUIRY

Introduction

Over the past centuries most societies have experienced serious economic, social and political adjustments precipitated, partly, by the rise of different economic ideologies, in particular economic individualism, and welfare and socialist economics. From the legal philosophical viewpoint the changes fitted in well with other developments: the rise of different jurisprudential theories; analytical positivism and sociological jurisprudence. Both attempt to define the law, its functions, and functioning in a given social setting. From the constitutional law perspective the economic ideologies and the various legal theories cohered very well with two separate constitutional perspectives: the classical and the anti-classical, or instrumental, traditions. On the one hand there developed the trinity of laissez faire economic ideology, analytical positivism and the classical constitutional perspective. On the other hand, another opposing triune of welfare and socialist economic ideologies, sociological jurisprudence and the anti-classical constitutional perspective. Each constitutional perspective focuses on specific problems which the constitution must address and provides explanations for the

problems and a constitutional strategy to solve them.[4] In this chapter we examine the historical forces which gave rise to these developments, in particular the classical and the anti-classical constitutional perspectives.

I. Classical Constitutional Perspective

1. Economic Individualism

The classical constitutional perspective is associated with the rise of the epoch of economic individualism, which emphasised the non-intervention of the government in the economy of the nation. The economy was to be controlled purely by market forces and the government's role, in the market, was to protect it from external influence.[5]

The idea of economic individualism is associated with Adam Smith. In his work, *An Inquiry Into the Nature and*

---

[4]For a detailed discussion of these ideas see generally Robert Seidman, "A Commentary On the Draft Constitution of Namibia", *The Third World Legal Studies: 1988 - Building Constitutional Orders in Sub-Saharan Africa,* 36-39: see also Seidman, "Perspectives and Constitution Making: Independent Constitution for Namibia and South Africa", *Lesotho Law Journal* 3 (1987), 45: *The State, Law and Development* (London: Croom Helm, 1978), pp. 44-55.

[5]Though this view has had considerable influence its strict application is not possible. See Paul Vinogradoff, *Outlines of Historical Jurisprudence* (London: Oxford University Press, 1920), p. 94. The writer observes:

> Within the range of this view of restricted state influence we are made to feel that the solution of the problem depends on a certain conception of social intercourse: the state is assigned purely negative duties, because the numerous positive requirements of human life ought to be met by the energy of individuals and their co-operation on non-political lines. In practice, however, there are no States which hold themselves strictly within the limits of negative protection. All historical commonwealths attend more or less to the positive requirements of their subjects - *to their welfare. (emphasis is mine)*

Causes of the Wealth of Nations, [6] published in 1776, Adam Smith presented the most impressive system of economic analysis in the eighteenth century. Its influence has survived criticism for the past two centuries. *The Wealth of Nations* developed from his early work published in 1759.[7] Adam Smith maintained that private interest did not undermine the common good. He opposed government restrictions on self-interest as inimical to the economy. He argued that with the market free of government control, savings promoted capital investment and capital investment led to increased division of labour, greater productivity and rising real incomes.[8]

Smith's economics of individualism rested on the premise that if individuals were free to follow their own self-interest and engage in beneficial economic activities, not only the individual, but society as a whole would gain in the process. However, if government interfered with the individual's commercial initiatives, individual welfare along with that of the society would suffer.[9] So profound was the impact of his ideas that they are often quoted and applied.

---

[6]With an Introductory Essay by Joseph Shield Nicholson, (London: T Nelson & Sons Paternoster Row, 1886).
[7]Idem, *The Theory of Moral Sentiments*, with a Biographical and Critical Memoir by Dugald Stewart, (London: Bell & Sons, 1887)
[8]Everett J. Burtt, *Social Perspectives in History of Economic Theory* (New York: Saint Martin's Press, 1972), p. 42.
[9]Ibid., pp. 44-5.

2. The Rise of Analytical Positivism

Laissez faire economic ideas combined very well with analytical positivism as a legal philosophy. Analytical positivism emerged as a result of the inadequacies of the ruling Natural law theories. Natural law shared the common feature of turning away from the realities of the actual law in order to discover in nature or reason principles of universal validity. Actual laws were explained or condemned according to these cannons. Unverified hypotheses of this type failed to satisfy the intelligence of an age nurtured in the critical spirit of new scientific learning.[10] The chief proponents of the positivistic movement were the great utilitarians, Jeremy Bentham (1748-1832)[11] and John Austin (1790-1859).[12]

---

[10]Dias, *Jurisprudence* (London: Butterworths, 1976), p. 451.

[11]Bentham was interested in bringing all individual and social actions within the scope of the principle of utility - often known as the "greatest happiness principle." He turned his attention to the law; and in order to render it an efficient system of social control he set out to purge positive man-made law, of the connection with natural law, hence Bentham's reputation as the first thorough-going legal positivist. See *Bentham and Legal Theory*, ed. M.H. James, (Belfast: Northern Ireland Legal Quarterly, 1973), p. 1. Most of what Bentham wrote in an attempt to explain the nature of law was not published in his life. Elements of his command theory appeared in, *"A Fragment on Government"* (1776) and *"An introduction to Principles of Morals and Legislation"* (1789). His major work on legal theory remained in manuscript form until it was discovered by Professor Charles Everett in 1939, well over a century after his death. It was published in 1945 as *The Limits of Jurisprudence Defined*. In 1970 it was republished under the editorship of Professor Hart under the title: *Of Laws in General*.

[12]The popularising of the command theory was left to Bentham's student, John Austin. Six of his lectures were published in 1832 as *The Province of Jurisprudence Determined*. The book is generally considered the standard exposition of the command theory. Austin's later lectures were published posthumously. They applied the legal theory set out in *The Province* to a wide range of legal concepts. See J.W. Harris, *Legal Philosophies* (London: Butterworths,

Austin's objective, in his preliminary work *The Province,* was to identify the distinguishing characteristics of positive law and free it from the perennial confusion with the precepts of religion and morality, which had been encouraged by the natural theorists.[13] This was accomplished in his first lecture.[14] He defined law as a rule laid down for the guidance of an intelligent being by another intelligent being having power over him. He distinguished between *laws properly so called* and *laws improperly so called.* Laws properly so called were sub-divided into laws set by God: Divine law or law of God and laws set by men to men which he called *positive* to distinguish it from Divine law.[15] Laws set by men also fell into two categories. The first consisted of laws set by men to men neither as political superiors, nor in pursuance of rights conferred upon them by such superiors, for example rules of the club or those set between master and servant. The second category involved laws set by political

---

1980), p. 25. It must, however, be noted that Austin's jurisprudence, unlike Bentham's, was quite independent of the utilitarian philosophy, which he expounded so zealously as the basis of his thinking: See Roscoe Pound, "Fifty Years of Jurisprudence", *Harvard Law Review* 51 (1938), 807.

[13]See Professor Hart's introduction in John Austin, *The Province of Jurisprudence Determined* (London: Weidenfeld and Nicholson, 1968), p. x. This approach excluded or ignored the historical or functional inquiries of the law, which became the central concern of later legal philosophies. Such an approach has many weaknesses. Rarely is it possible to study institutions as they are except in the light of their origins and past influence. See Dias, *Jurisprudence,* p. 454: G.W. Paton and David Derham, eds., *A Text-Book of Jurisprudence* (London: Oxford University Press), p. 8. Morality, historical, economic, social and political forces, have an impact on law, but are excluded from consideration.

[14]Austin, *The Province of Jurisprudence Determined,* pp. 9-33.

[15]Dias, *Jurisprudence,* p. 470.

superiors: by a sovereign person or sovereign body of persons, to a member or members of an independent political system in which that person or body was sovereign or supreme. Austin termed *positive law* as law simply or strictly so called and this was the subject of jurisprudence. [16]

Bentham and Austin advanced two concepts which constitute the foundation of the positivist approach to law: laws as commands and the sovereign. A command was seen as an expression by one person of the desire that another person should do or abstain from some action accompanied by a threat of punishment which is likely to follow disobedience.

> ...the ideas or notions comprehended by the term command are the following.(1) A wish or a desire conceived by a rational being that another rational being, shall do or forebear. (2) An evil to proceed from the former, and to be incurred by the latter, in case the latter comply not with the wish. (3) An expression or intimation of the wish by the words or other signs.[17]

Commands are laws once two conditions are satisfied; first, they must be general and second, they must be commands of the sovereign.[18]

Both Bentham and Austin maintained that the sovereign exists in every political society whatever its constitutional form. The sovereign may be a person, as in the case of a monarchy, or a group of people in the case of a parliamentary democracy. The sovereign is obeyed by most of the people in society but pays no such obedience to

---

[16]Austin, The *Province*, pp. 9-11.
[17]Ibid., p. 17.
[18]H. L. A. Hart, "Positivism and the Separation of Laws and Morals", *Harvard Law Review* 71 (1957-8), 602-3.

others. Law, according to the positivists, was the command of commanders who cannot be commanded.[19]

> Positive laws, or laws strictly so called are established directly or immediately by authors of three kinds:- by monarchies or sovereign, as a supreme political superior; by men in a state of subjection, as subordinate political superiors: by subjects as private persons in pursuance of the legal rights. But every positive law, or every law strictly so called is a direct or circuitous command of a monarch or sovereign number to a person in a state of subjection to its author and being a command (and therefore flowing from a determined source), every positive law is law proper, or a law properly so called.[20]

Positivists' insistence on the command theory compels them not to consider prescriptions, which sustain social formations, which are not necessarily legal in nature. These have become the proper items of investigation in sociological jurisprudence. They include customary laws, international law and above all constitutional law. Austin maintained:

> Here I would briefly remark that I mean by the expression constitutional law, the positive morality or compound of positive morality and positive law, which fixes the constitutional structure of the given supreme organ, ... the character of the person, or the respective character of persons in whom, for the time being the sovereignty shall reside and ... which determines ... the mode wherein the sovereign power shall be shared by the constituent members of the sovereign number or body.[21]

---

[19]Ibid., p. 603: Professors Hart and Fuller seem to represent the contemporary views on positivism. An evaluation of the positivists ideas is beyond the scope of this work. However, see Lon Fuller, "Positivism and Fidelity to Law- A Reply to Professor Hart", *Harvard Law Review* 71 (1957-8), 630.

[20]Austin, *The Province*, p. 134. See also pp. 211, 224. For Bentham's contribution to the concept of the sovereign see J.H. Burns, "Bentham on Sovereignty: an Exploration", *Bentham and Legal Theory*, ed., H.M. James, p. 133.

[21]Austin, *The Province*, p. 258-9.

Constitutional law was positive morality enforced merely by the moral sanction.[22]

Constitutional law, including customary and international laws, were excluded because they were not commands: no higher authority exists to enforce a constitutional norm against its governmental addressee.[23] As they were not self-executing and for want of a higher authority to enforce it, the positivists had problems fitting them into their conceptual framework.[24]

Other contentions can be gleaned from the works of the utilitarians. Bentham and Austin advocated the separation between what the law *is* and what it *ought* to be: between the law and morality. The law as it *is* actually laid down has to be kept separate from propositions that *ought* to be law. The distinction between a proposition that *is* law and that which *ought* to become law is that the former has passed through one or more of the media, which regulate the use of the label *law.*[25] In Zambia, statutes and judicial precedents make up the proper law of the land. Whether a rule is morally acceptable or not is inconsequential, it is still law provided the seal of validity is stamped on it.[26]

Morality, according to Austin, meant every conceivable standard by which human conduct may be judged that is not

---

[22]Ibid. See also pp. 253-268

[23]Harris, *Legal Philosophies*, pp. 27-8: See also Seidman, "Perspectives and Constitution Making", pp. 52-3.

[24]Whereas Bentham considered that a constitution might preclude the sovereign from issuing certain kinds of laws, Austin on the other hand perceived any legal limit on the highest law making powers as an absurdity and an impossibility: See Fuller, "Positivism and Fidelity to the Law", p. 634.

[25]Dias, *Jurisprudence*, p. 452-3

[26]Ibid.

law: the inner voice of conscience, notions of right and wrong based on religious beliefs, common conception of decency and fair play, culturally conditioned prejudices. These are excluded from the province of the law.[27]

From the sociological perspective there are serious objections to confining juristic studies to the analytical method. The role of a jurist labouring under the influence of the positivist ideas has been accurately captured by Kantorowicz:

> The prevailing idea of the jurist is this: A superior magistrate with academic training, he sits in his cell armed only with a thinking machine, though concededly one of the finest types. The only furniture is a great table, upon which the official code lies before him. One hands him any case you will, actual or hypothetical and performing his duty, he is prepared with the help of purely logical operations and a secret technique, intelligible only to himself, to point put with absolute exactness the decision predetermined by the law-giver in the code.[28]

Roscoe Pound has ably summed up the principal characteristics of the analytical school: First, they consider the developed legal systems only; Second, positivists regard the law as something made consciously by lawyers, the legislature or the judiciary; Third, they chiefly see the force and constraint behind legal rules. The sanction of the law is enforcement by the judicial organs of the state, and nothing that lacks an enforcing agency is law; Fourth, the typical law is statute; Fifth their philosophical views are usually utilitarian.[29]

---

[27]Fuller, "Positivism and Fidelity to Law", p. 635.
[28]Ibid., p.596.
[29]Ibid.

3. Analytical Positivism and Economic Individualism

Analytical positivism resounded well with laissez faire economic ideas. Since positivism focused on the formal identification of the law, it was silent on the ideals of economic individualism. Law properly so called did not influence the behaviour of either the governors or the governed towards the attainment of identified societal goals. Law merely served to resolve disputes arising in the free market.[30]

According to laissez faire economic theories, the main spring of the economic activities is the production process determined by a mechanism powered by private profit motive. Profit is an end and not a means to an end. The market is the master and not an instrument of the people to achieve the greatest "happiness of the greatest number."[31] Any legislation which attempts to regulate the market is ill-favoured.

Laissez faire economic philosophy endorsed the view that the law does not influence people's behaviour. It merely serves to settle disputes arising from the market. The role of a judge was, therefore, important. He sat to determine the rights of the various parties to the disputes. It was not for him to determine the social consequences of the dispute or that of his decision. This was in harmony with analytical positivism as it was mainly concerned with the formal identification of the law and its

---

[30]Seidman, "Perspectives and Constitution Making", p. 52: What emerged from the Courts in terms of legal decisions is the subject of jurisprudence.

[31]J. Wilczynski, *The Economics of Socialism,* ed. Charles Carter, (London: George Allen & Unwin, 1982), p. 214.

application as a dispute settling mechanism, and not with its content or functioning and whether or not it was morally acceptable.

Professor Friedman has illustrated the connection between analytical positivism and economic individualism in his assessment of the lawyer during this epoch.

> Throughout the nineteenth and early twentieth centuries, the predominant economic philosophy of democracy was that of laissez-faire, with private enterprise as the chief instrument and promoter of economic activity and development. The function of the State remained restricted to defence, foreign affairs and certain limited administrative and police activities, while the main stream economic and social life proceeded through private channels. Hence the predominant training and function of the lawyer was in the field of private law as counsel and advocate, as judge litigating between parties and as a legal scholar analysing the legal order and concepts of this type of society.[32]

The role of the lawyer was purely Austinian; he merely dealt with the law as laid down and applied it to settle disputes between parties. He was never trained, nor attempted to concern himself with the content of the law or its working in society. Friedman further observes:

> From the beginning of the nineteenth century, together with the rise of positivism as the predominant legal philosophy, the lawyer became more and more the craftsman, the technical expert essentially detached from the policy-making role of the social reformer and legislator.[33]

It was not the duty of the sovereign to use the law to regulate the behaviour of the participants in the market. Laws, as commands of the sovereign, at best played the

---

[32]Wolfgang G. Friedman "The Role of Law and Function of the lawyer in the Developing Countries", *Vanderbilt Law Review* 17 (1963), 181-2

[33]Ibid., pp. 183-4

function of deciding disputes, not of constraining the market or directing the market in a particular direction.[34]

4. The Fundamentals of the Classical Constitutional Perspective

From the constitutional law viewpoint there arose an influential constitutional tradition: the classical constitutional perspective, which resonated very well with both laissez faire economic philosophy and analytical positivism. The role of the constitution is to address the age old problem of abuse of power. Lord Acton aptly illustrated it in his often quoted words:

> I cannot accept your cannon that we are to judge Pope and King unlike other men, with a favourable presumption that they did no wrong. If there is any presumption it is the other way against the holders of power, increasing as the power increases. Historic responsibility has to make up for the want of legal responsibility. *Power tends to corrupt and absolute power corrupts absolutely.* Great men are almost always bad men, even when they exercise influence and not authority...(emphasis is mine).[35]

People vested with power can abuse it either by using it to the detriment of the people it is supposed to benefit, or use it to further their own interests at the expense of the general welfare of the people. The classical constitutional perspective identified this as the problem to be addressed by the constitution. The objective is to ensure constitutionalism - limit power of government through a number of constitutional devices.

---

[34]Seidman "Perspectives and Constitution Making," pp. 51-2.
[35]Lord Acton, "Essays on Freedom and Power", quoted from Harry W. Jones, "The Rule of Law and the Welfare State", *Essays on Jurisprudence from the Columbia Law Review* , (Columbia University Press, 1963) pp. 400-1.

At least five such devices are identifiable in constitutions drafted under the sway of this perspective: (1) The provision of a neutral state machinery able to serve any party in power. (2) Democratic elections held at periodic intervals.(3) The delineation of the area of government power and private rights through a bill of rights. (4) Checks and balances amongst the various organs of government in line with the doctrine of separation of powers. (5) Through observance of the Rule of Law.[36] The classical constitutional perspective holds great influence in constitution-making. Nearly all written constitutions are embodied with most of these devices pantomiming the American and the British Westminster constitutional models, without regard to diversity in the economic, social and political forces present in societies in which they are transplanted.

The essence of a constitution drafted according to this perspective is to secure a limited government. A leading African scholar has written:

> Government is universally accepted to be a necessity, since man cannot fully realise himself - his creativity, his dignity and his whole personality - except within an ordered society. Yet the necessity for government creates its own problems for man, the problem of how to limit the arbitrariness inherent in government, and to ensure that its powers are to be for the good of the society. It is the limiting of arbitrariness of political power that is expressed in the concept of constitutionalism. Constitutionalism recognizes the necessity for government, but insists upon a limitation being placed upon its power.[37]

---

[36]Seidman, "Perspective and Constitution Making," p. 59.

[37]O. B. Nwabueze, *Constitutionalism in Emergent States* (London: C. Hurst & company, 1981), p. 1. In this work Professor Nwabueze has examined how well the idea of constitutionalism has worked in the newly independent

Professor de Smith has also succinctly amplified the concept. He prescribes what he considers to be the minimum conditions necessary to achieve constitutionalism.

> A contemporary liberal democrat, if asked to lay down a set of minimum standards may be very willing to concede that constitutionalism is practised in a country where the government is genuinely accountable to an entity or organ distinct from itself where elections are freely held on a wide franchise at frequent intervals, where political groups are free to organise in opposition to government in office and where there are effective legal guarantees of fundamental civil liberties enforced by an independent judiciary; and he may not easily be persuaded to identify constitutionalism in a country where any of these conditions is lacking.[38]

Central to the classical constitutional perspective is the desirability and content of bills of rights, the structure of government, the electoral system, the importance of judicial independence and the choice between the American or British model of the executive.

In a true Austinian style the constitution seeks to fix the constitutional structure of the supreme organs of government, the character of the person or the respective character of the person in whom, for the time being the sovereignty shall reside and determines the mode in which the sovereign power shall be shared by the constituent members of the sovereign number or body.[39] The constitution attempts to address the problems confronting nineteenth

---

countries of Africa. His conclusion is that the performance has been poor, see especially pp. 302-3. See also Mahmood Mamdani, "The Social Basis of Constitutionalism in Africa," *Journal of Modern African Social Studies* 28 (1990), 359-374.

[38]S.A. de Smith, *The Commonwealth and its constitution* (London: Stevens & Sons, 1964), p.106.

[39]Austin, *The Province*, pp. 258-9.

century European and American societies:[40] The constitution confers upon the government limited or no power to intervene in the economic and social affairs of the country.[41]

---

[40]The most pressing problems of these societies was to guarantee the commercial liberties of the people, whereas those in Africa are substantially different, S.K. Asante, "National Building and Fundamental Rights," *Cornell IJL* 2 (1969), 84, quoted in Alex Amankwah "Constitutions and Bills of Rights in the Third World Nations: Issues of Form and Content", *The Comparative and International Journal of Southern Africa,* 21 (1988), 207. At least four important tasks face every newly independent government in Africa:

> First, to forge the bonds of unity and nationhood, and to foster wider loyalties beyond parochial, tribal or regional confines. Second, to convert a subsistence economy into a modern cash economy without unleashing social turbulence and economic chaos. Third, to industrialize the country and to introduce a sophisticated system of agriculture. Fourth, to erase poverty, disease and illiteracy, raise the standard of living of the people, and in short create a modern state with all its paraphernalia.

These are the social and economic tasks. Seidman identifies other problems which are political in nature and unique only to South Africa and Namibia: (1) Eradication of apartheid; (2) Broaden popular democratic participation; (3) Government must obey the popular will and (4) Make radical institutional changes while, nevertheless, keeping the machinery of government functioning: See Seidman, "Perspectives in Constitutional Making", pp. 47-8. Except for the Constitution of Namibia and recently South Africa's interim Constitution, constitutions for most independent African countries both Anglophone and Francophone, are silent on the economic, social and political problems facing them. In a true laissez-faire tradition these tasks are left to be "met by the energy of individuals and by their co-operation on non-political lines": See Vinogradoff, *Outlines of Historical Jurisprudence* , p. 94.

[41]See for instance the tables of contents of all the constitutions that have been drafted for Zambia: *Northern Rhodesia (Constitution) Order in Council, 1962*, this can be said to have been the first constitution in the sense the word *constitution* has come to be understood today, a document providing for the structure and organs of the government; The Northern Rhodesia (Constitution) 1963; the Independence Constitution of 1964; the One-Party Constitution of 1973 and the Constitution of Zambia of 1991. They all deal with matters pertaining to the formal structure of government. They are completely silent on the

From the classical constitutional perspective a constitution does not play an instrumental role: it has no impact whatsoever on the behaviour of the governors and the governed. It is seen principally as a dispute solving mechanism, describing and defining the various organs of government, and not as an instrument of social, economic and political change, which can be used to mould the behaviour of the people towards the realisation of the most pressing social, economic and political needs. The understanding of the relationship between the economy and the constitution by the Constitution Commission, chaired by a Professor of law, which drafted the Third Republican Constitution of 1991, is instructive on this point.

> The Commission would like, in the first place, to make a general important observation on the relationship between the economy of a country and its constitution. Unless the economy of a country is supportive, no constitution, not even the best one, can provide the desired happiness and development to the people. A prosperous economy therefore, is the necessary facility to a good constitution.[42]

According to the Commissioners, the existence of a stable economy is an important factor in having a sound and effective constitution, and not that a constitution can contribute to the improvement of the economy. The constitution may oblige the government of the day to take certain measures designed to improve the economy and the general well-being of the people. But from the classical constitutional standpoint the constitution has no

---

economic and social problems facing the country, which have heightened over the years.

[42] *The Report of the Constitution Commission* (Lusaka: Government Printer, 1991), p. 11. (Also known as the Mvunga Constitution Commission.)

instrumental function to play other than establishing the framework of government. The Commission went on to say:

> The Commission took time to reflect on its understanding of the constitution. A constitution is the fundamental law of the land. All organs of state should derive their powers from the constitution. Any action by any organ of the state that does not comply with the constitution is invalid. The constitution in this sense distributes powers to all the organs of the state. It also ensures the fundamental liberties of the citizenry. Ultimately the constitution derives its authority and legitimacy from the people.... In a plural democracy *a constitution cannot set out party programmes, be they social, economic, political or otherwise*.... In this diversity the constitution must not be rigid but not too flexible either... the constitution must not be subjected to too frequent changes as a matter of routine. In the area of fundamental freedoms and rights, a written constitution must ensure these. The assurance lies in the enforcement of the rights and freedoms in a court of law in the event of any violation (emphasis is mine).[43]

The commissioners concluded: "Central to the constitution and constitutional rule is the Doctrine of separation of powers."[44]

These are ideas that can be lifted from standard text-books on constitutional law written by most Western liberal writers. They sum up what the constitution is and its function, in the classical constitutional perspective. It also reflects the understanding of the role of the constitution by people charged with the responsibility of drafting a constitution for a country approaching the twenty-first century crippled by economic, social and political problems of unprecedented magnitude. So deeply ingrained are these ideas that the picture that emerges is

---

[43]Ibid., pp. 11-2.
[44]Ibid., p. 13.

that there is no other way of looking at the constitution and its operation.[45]

A constitution drafted according to the classical constitution perspective often excludes the aspirational or the Directive Principles of State Policy and Basic Duties clauses, which help to remind the political leadership of the economic and social needs of the people. The Commissioners correctly observed that "these principles and duties are not justiciable and cannot, therefore, be enforced. But these principles and duties are a constitutional reminder to any government in power of its obligations towards the well being and welfare of its

---

[45]Seidman, "A Commentary on the Constitution Of Namibia," p. 39. The understanding displayed by the commissioners is hardly surprising. Most of the lawyers in former British possessions are either trained in Britain or pursued a British styled legal training in their home countries, which socializes them "in bourgeois-democratic constitution tradition." For the past three years the writer has been a tutor in Constitutional Law in the Law School of the University of Zambia and has been able to make some observations. Since the University opened in 1969, there has only been some incremental changes in the syllabus. The design of the course is virtually the same and focuses mostly on the discussion of the American and British constitutional models. Students are, therefore, much more conversant with these models than their own. The library shelves are still cluttered with books on these models. Contrary ideas on the constitution and its role, such as the ones Professor Seidman has been advocating, are unknown among the students and the teaching staff of the Law School. Those who have heard of them casually dismiss them. They consciously refuse to think of the constitution and law generally other than from the classical stand-point. Most of the courses being offered are completely devoid of any coherent theoretical or conceptual framework. Products of the Law School are essentially lawyers in the Austinian sense, and see themselves as defenders of human rights and custodians of the legal order, even when such a stand is glaringly detrimental to the welfare of the majority. See Friedman "The Role of the Law and the Function of the Lawyer in the Developing Country," p. 181. Also see Muna Ndulo, "Legal Education In Zambia: Pedagogical Issues" *Lesotho Law Journal* 2 (1986), 75.

people."[46] The Commissioners noted in their Report: "There was considerable support for the inclusion of the Directive of Principles of State Policies in the constitution in order to serve as a reminder to government of its obligations to provide social, economic and cultural services and facilities to the people."[47] The Commission recommended that the Directives be included in the constitution, but the proposal was rejected by the Government.

The drafters of the 1991 Constitution were influenced by the classical constitutional perspective, although, events seem to indicate a consistent decline of the hands-off approach to economic and social affairs in Western societies. Early in the twentieth century Western societies experienced the triumph of a new political philosophy. It was acknowledged that in any decent society the state is not an end in itself but an instrument to be assessed in terms of its contribution to the welfare of the individuals who compose the national community.[48] Changes in living conditions and political attitudes have led to the acceptance of the notion that greater economic and social good of the greater number requires the abandonment of the hands-off approach and the adoption of public measures directly and explicitly aimed at general economic betterment.[49]

---

[46]*The Report of the Constitution Commission*, p. 12-13.
[47]Ibid., pp. 224-5
[48]Jones, "The Rule of Law and the Welfare State," p.400
[49]Ibid.

Over the years the United States has moved from a laissez faire, and law and order tax collecting state to a highly interventionist capitalist welfare State. To achieve this goal a host of new institutions have been created - the Federal Reserve Bank, the Interstate Commerce Commission, the National Labour Relations Board, the welfare system and many other institutions,[50] whose creation was unthinkable a few decades ago. The American constitution as a document prescribing the structure of government, has consequently ceased to correspond with reality.[51] Third World Countries legal draftsmen, on the other hand, continue to be guided by the classical perspective and draft constitutions designed to deal with nineteenth century liberal capitalistic problems. This point requires further discussion in the light of the United States Constitution as a prototype of the classical constitution perspective.

5. The American Constitution as the Hallmark of the Classical Constitutional Perspective

The ideas which influenced the American constitution-making process and content are illustrative of the trilogy of analytical positivism, economic individualism and the classical constitutional perspective. Unlike other subsequent constitutions identified with the classical tradition, the American Constitution is a product of a long standing tradition which dates back to the time of

---

[50]Seidman, "Perspective in Constitution Making," p. 70

[51]Ibid. See also Wilczynski, *The Economics of Socialism*, p. 219.

Aristotle. It involves establishing a link between the nature and requirement of an economic regime, and the character of the political state. This tradition has gradually disappeared among liberal scholars starting from early nineteenth century, but has been kept alive by the Marxists scholars.[52] The establishment of a link between

---

[52]Walter Dean Burnham, "The Constitution, Capitalism and the Need for Rationalized Regulation", in *How Capitalistic is the Constitution?* eds. Robert A. Goldwin and William A. Schambra (Washington DC: American Enterprises for Public Policy Research, 1982), p. 75. This is a cardinal issue in the anti-classical constitutional perspective. It follows that though the American Constitution is the archetype of the classical constitutional perspective, its drafting process did not follow the path advocated by that tradition as Seidman seems to suggest, but the anti-classical tradition. See Seidman, "Perspective and Constitution Making," p. 49: "The history of written constitutions - and of the classical tradition - began with the United States constitution of 1787 and in Europe, with the Belgian constitution of 1831. These became the archetype constitutions embodying the classical tradition. *They arose in an economic culture dominated by laissez-faire theory and the legal culture dominated by analytical positivism"* (emphasis is mine). The two constitutional models could not have been influenced by analytical positivism. The foundation of analytical positivism was laid down by Bentham and popularised by Austin. Bentham's major work was not published until 1945 and Austin's in 1832. By this time the two constitutions had already been drafted and were in force. To this extent the writer disagrees with Seidman. What is, however, true and an alternative explanation, is that both constitutions, especially the American, were influenced by laissez-faire economic ideas. Since the economic ideas resonate well with analytical positivism, it follows that the Constitution drafted under the influence of laissez-faire economic ideas naturally cohered very well with analytical positivism which arose long after the constitutions had been drafted. It can, however, be argued that the drafting of the American Constitution was preceded by functional and historical inquiries. As a result the Constitution revealed a link between the structure and the functioning of government, and a corresponding economic structure. This important exercise was gradually abandoned, and by the time of the rise of analytical positivism, it can safely be said, it had completely ceased to exist. The constitutions that arose after the rise of analytical positivism, it may be argued, were the ones influenced by the positivist thinking. They forsook historical and functional inquiries

the structure and the functioning of a political system, and a corresponding economic structure was considered imperative.

The American Constitution was drafted at a time when economic changes of great significance were taking place: from a landed capitalism based on slavery to an emerging, but dynamic capitalism based primarily, but not solely on trade and small scale manufacturing.[53] Guided by laissez faire economic ideas the protagonists sought an end to the feudal privileges and to all artificial and collectivist barriers to the liberation of the individual. The individual's pursuit of rational self-interest, it was argued, would release productive energies benefiting the society as a whole.[54]

The founding fathers concluded that man is governed not by virtue or reason but by his passions; his desire for self-gratification and he is happiest when left alone to pursue these desires. However, no one is safe in this pursuit for happiness unless all are guided by a government of laws.[55] Government restrictions on individual self-interest were a danger to the economic well being of the individual and that of the society he lived in.

---

before embarking on constitution making. They represent the class of constitutions properly drafted according to the classical perspective. They reflect the influence of the laissez-faire economic ideas and analytical positivism, and copied a great deal from the American and the Westminster constitution models without regard to their historical background and functional objectives.

[53]Edward Greenberg, "Class Rule Under the Constitution," in *How Capitalistic is the Constitution,* p. 149.

[54]Burnham, "The Constitution, Capitalism," p. 76

[55]Forrest McDonald, "The Constitution and Hamilton Capitalism", in *How Capitalistic is the Constitution,* p. 103.

The demand of the time, therefore, became that of devising a constitutional framework which would accord sufficient protection for the commercial liberties: those relating to the ownership and use of the property, freedom of contract to produce and distribute goods and services; to enable the economic system to function in a manner largely consistent with the description of capitalism.[56]

The American Constitution did not, therefore, in a stroke terminate the existing conditions and usher in capitalism, instead it had a utilitarian objective. It was designed to protect and support the emerging capitalist order. This was realised by using constitutional rules to delineate the extent of private rights and that of government power. Using various constitutional devices, which have become commonplace in most of today's written constitutions, its principle objective is to limit governmental power and deal with the evil of abuse of power. A good government, according to laissez faire thinking, was one which governed least and was granted at best limited power to intervene in the economic, social and political affairs of its citizens.

6. Positivism, Economic Individualism and Classical Constitutional Perspective

The classical constitutional perspective cohered very well with laissez faire economic ideology and analytical positivism. The classical tradition holds that a

---

[56]Bernard H. Siegram, "The constitution and Protection of Capitalism" in *How Capitalistic is the Constitution?* P. 107.

constitution cannot be employed or drafted in such a manner as to induce a desired pattern of behaviour in the governors and the governed. Its function is merely to create and define the organs of government. Above all, it determines the extent to which the government power can be used and the area exclusively reserved for private rights. To this extent the classical tradition agrees with analytical positivism as it perceives legal rules, including constitutional rules, as incapable of serving an instrumental objective. It defines the rights of the individual and serves as a dispute settling mechanism.

To the extent that through a number of constitutional devices the government's degree of influence in the social, economic and political lives of the people is limited, a constitution drafted according to this perspective agrees with laissez faire economic philosophy. Laissez faire ideology calls for a limited role for the government in society. The course of social development is not to be managed, but left to the private persons, and the law is to assume only the minimum function of maintaining public order, settling disputes and at most adjusting conflicts of social interests as they arise in an otherwise undirected society.[57]

In line with the laissez faire thinking the constitution is silent on economic, social and political development issues. This went well with analytical positivism. Positivism is concerned with the formal

---

[57]Harry W. Jones, "The Creative Power and Function of Law in Historical Perspective", *Vanderbilt Law Review*, 17 (1963), 135-6.

identification of the law, but the content and functioning of law in a given social setting is not the subject of jurisprudence. Constitutions drafted according to this perspective have no regard to time and place.[58] The classical constitutional perspective, analytical positivism and laissez faire economic ideology harmonised well with each other. In each other they found nutrients for their respective survival.

The classical constitutional perspective ignores many social variables, which have influence on law, with serious consequences. It follows that a good constitution, in the positivist sense, in one social setting remains a good constitution wherever it is transplanted. This proposition is unattainable. The positivists ignore the law of non-transferability of legal institutions and practices.[59] The consequence in constitution-making is the reproduction of provisions in one constitution into another without pausing for a moment to ask: how well such provisions have performed in the polities of their origin; their functional objective and historical background and their relevance to the new setting. These are crucial questions from the sociological jurisprudence stand-point. Constitution-making under the influence of the classical constitutional perspective is summed up by Seidman:

> The world around, sentences, paragraphs, whole sections and chapters float from one constitution to the next. Constitution-drafting sometimes seems like participating in an elaborate buffet, with elegant constitutional provisions from other

---

[58]Seidman, "Perspective and Constitution Making", p. 63.
[59]For a detailed discussion of the law of non-transferability, see Ibid., p. 56.

existing constitutions spread across the glittering sideboard from which the constitution-maker can fill her place to her taste.[60]

II. The Anti-Classical Constitutional Perspective

By the beginning of the twentieth century many changes had taken place. The boom associated with the industrial revolution precipitated economic, social and political transformation of unknown magnitude. Societies grew to unprecedented levels and became more and more complex to the point that societal activities could no longer be regulated by market forces. The argument that man under the sway of his avarice, stimulated by commerce, tends to go about with his business quietly seeking gratification in the pleasing reward of his private activities with little to be gained and much to be lost by disturbing the public tranquillity,[61] could no longer be supported by facts. This self-regulating mechanism, it was argued, made it possible for the government to be relatively unconcerned with the private lives and opinions of its citizens and to allow them a great measure of personal liberty.[62] The industrial market capitalism of the twentieth century caused unique, overwhelming, complex and interrelated problems: economic stagnation, inflation, resource shortages, community disruptions, poverty, pollution and many other problems. It, therefore, became imperative for an institution, and not man, to step in and regulate the activities for the

---

[60]Ibid., p. 56.
[61]Marc F. Plattiner, "American Democracy and the Acquisitive Spirit," in *How Capitalistic is the Constitution*, p. 9.
[62]Ibid., p. 10

benefit of all. This marked the end of the era of unplanned capitalism.

1. The Socialist and Welfare Economic Ideas

In the area of economic ideologies the idea of economic individualism was peacefully supplanted by welfare economics and through revolutions by socialist economic ideas. The socialist economic ideas are associated with Karl Marx (1818-1883) and Friedrich Engels (1820-1895).[63] Marx, like many other philosophers of his time had a strong scholarly foundation. The great economic, social, political and intellectual upheavals which took place in Europe before 1830 provided the starting point for his intellectual inquiries. In England it was the industrial revolution, in France the political revolution and the intellectual revolution in Germany. Theoretically these changes found expression, before Marx, in the political economy works of Ricardo and Adam Smith, the writings of historians of the French revolutions and restoration, and the German idealist philosophy from Kant to Hegel.[64]

---

[63]Karl Marx emerged as one of the most outstanding thinkers of his time and has been dubbed as prophet, sociologist, economist and teacher; see Joseph A. Schumpeter, *Capitalism, Socialism and Democracy,* (New York: Harper Brothers Publishers, 1950). By the time of his death Marx had produced an impressive collection of literature spread over the last forty years of life. In a work of this nature it is not possible to restate his ideas. His original works and those of other writers about him, would provide a better picture about the man and his ideas. Also encyclopaedia such as *Encyclopedia Britanica, The International Encyclopedia of the Social sciences* and *Encyclopedia of Social Science* provide readily digestible materials about Marx and his works.

[64]*Encyclopaedia of Social Sciences,* 1963 ed., s.v. "Karl Marx."

Marx's breakthrough came with his major proposition: "Legal relations and political forms cannot be conceived as autonomous phenomena nor as manifestations of the so-called general unfolding of the human spirit. They are rather rooted in the material conditions of life which Hegel after the fashion of the English and French of the eighteenth century summed up under the name of civic society: the anatomy of this society is to be sought in its economics."[65] Upon this major proposition Marx embarked on the study of the economics of France in 1844. His theoretical achievement does not lie in the formulation of a new system of political economy on the basis of the classical concept of labour, value and the socialist conclusion drawn from it, but rather in his radical criticism of the very principles of political economy. He later applied the materialistic conception of history to discover development laws of modern capitalist economy. This new method of the science of history and society strictly empirical in procedure and Hegelian dialectic in conceptual structure is the joint product of Marx and Engels.[66] After 1848, they constantly applied the materialistic principle to various areas of the economic, political and cultural life of the modern capitalist society and its preceding stages.

The originality of Marx's thought lies in his great efforts to synthesize in a critical way the entire legacy

---

[65]Ibid.
[66]Ibid.

of social knowledge since Aristotle.[67] His objective was to achieve a better understanding of the conditions of human development and with this understanding to accelerate the actual process by which mankind was moving towards an association in which the free development of each is the condition for the development of all. The desired system under which this was attainable was a communist society based on rational planning, cooperative production and equality of distribution, and most important liberated from all forms of political and economic hierarchy.[68]

Marx's ideas were later amplified by Lenin and they were implemented for the first time in the Soviet Union and followed in many other European and African countries. All socialist countries subscribe to Marxism-Leninism, which in addition to economic philosophy also embodies sociological, moral and political precepts.

The general characteristics distinguishing the socialist from the laissez faire economic system can be reduced to four fundamental elements: First, there is concentration of power in the communist party representing the working class. The system is run on mono-party rule and consequently the party provides continuity of economic policy and makes overall value judgments. The national scene is so overwhelmingly dominated by the party and so the economic and non-economic social objectives are intimately integrated in state actions. Second, the means of production is socially owned. Capital and natural

---

[67] *International Encyclopaedia of the social Sciences*, 1972 ed., s.v. "Karl Marx."
[68] Ibid.

resources are socialised including land, manufacturing industry, banking, finance, and domestic and foreign trade. Third, the market mechanism is largely replaced by, or at least substantially supplemented with economic planning, which is normally the responsibility of the state planning commission. Economic processes are subordinated to macro-social objectives laid down by the party. Fourth, the national income is socially and equitably distributed. Property incomes, (rent, interest and profits) are virtually eliminated, while earned incomes are based on the quality of work. Private consumption is supplemented by the system of collective goods and services provided by the state.[69]

For decades after the death of Karl Marx his economic theories were either ignored or dismissed by non-Marxists as erroneous. But as the socialist movements began to win political power in many parts of the world, starting with the Soviet Union, and as the great depression of the 1930s and the Keynesian revolution exposed the limitations of the laissez faire capitalism interest in Marx's economic ideas revived and intensified.[70]

At the hands of the British economist John Maynard Keynes and later economists, the laissez faire economic philosophy received its demise. Keynes maintained that competitive market mechanism did not automatically provide full employment of labour. He attacked the teachings of

---

[69]Wilczynski, *The Economics of Socialism*, pp. 2-3. An evaluation of these ideas as to what extent they can be realised is beyond the scope of this study.

[70]Burtt, *Social Perspectives in the History of Economic Theory*, p. 137.

classical economists as destructive and advocated an increased role for the state in controlling the level of investment.[71] Writing in 1924 Keynes argued, "In bringing in the state; I abandon laissez faire - not enthusiastically not from contempt of that good old doctrine , but because whether we like it or not, the conditions for its success have disappeared."[72]

The end of the hands-off approach characteristic of the laissez faire era paved way for welfare state economics in the Western capitalist world. The identifying characteristics of the welfare economy are chiefly: First, there is a vast increase in the range and detail of government regulation of privately owned economic enterprise; Second, the direct furnishing of services by government to individual members of the national community - unemployment and retirement benefits, family allowances, low cost housing, medical care and the like and; Third, increased government ownership and operation of industries and businesses which at an earlier time were or would have been operated for profit by individuals or private corporations.[73]

The difference between the socialist and welfare economic ideologies lies more in the extent of state involvement in the economy of the nation. This prompted some economists from the capitalist and socialist countries to coin the *Converging Theory*. The former sharp distinction between capitalist and socialist economies have been

---

[71]Ibid., pp. 229-30.
[72]Ibid., p. 234.
[73]Jones, "Rule of Law and Welfare State", pp. 400-1.

obliterated to some extent by the process marked by increased equality, departure from free enterprise and increasing state intervention in the capitalist world, with liberal economic revisionism incorporating several elements of capitalism in the more developed socialist countries.[74] The government, which was viewed as a by-stander, became the mover in the economic activities of the nation. To carry out these new responsibilities the state begun to rely more and more on the law to discharge them.

2. Sociological Jurisprudence[75]

It, therefore, became imperative for legal thinkers to re-examine the new role of law in society. [76] The formal

---

[74]Wilczynski, *The Economics of Socialism*, pp. 2-3 and 219. The recent events leading to the collapse of the Communist Block countries have been ignored in this study and are just beyond the scope of this work.

[75]The term *sociological jurisprudence* has been used liberally to include what is known as *sociology of law*. Some scholars insist on maintaining a distinction between the two. The latter is associated with Roscoe Pound: See Paton and Derham, *A Text-book of Jurisprudence*, p. 29. The movement is associated with sociological jurisprudence and in order to be distinct from the sociology of law it is sometimes referred to as the *Functional School*. The main difference between the two is that sociology of law attempts to create a science of social life as a whole and covers a great part of general sociology and political science. The emphasis of the study is on society and law as a mere manifestation, whereas functional or sociological jurisprudence concentrates on law and considers society in relation to it: Dias, *Jurisprudence*, pp. 583-4. Dias, on the other hand, dismisses this distinction as irrelevant. The same approach has been followed here. In fact it is not even possible to allocate most of the authors into any of the two camps.

[76]See Roscoe Pound, "The Scope and Purpose of Jurisprudence", *Harvard Law Review*, 24 (June 1911), 591: *Harvard Law Review* 25 (April 1912) 140 and 489. In these three articles Pound has traced the development of sociological jurisprudence up to the time of his writing. He started by examining the various schools of jurists and their method of jurisprudence and continues the discussion in the second part focusing on the sociological jurists in

analysis of law advocated by the positivists could not account for these developments and had to confess bankruptcy leading to the rise of new approaches to the study of the law. Whereas the positivists approach focused on the formal structure of the law and to explain the criteria for the validity of legal propositions, the new approaches were concerned with the relationship between the law and society: its content, purpose and operation.[77] Attention is directed at variables ignored by positivists: historical, economic, social and moral, which have a bearing on society.[78] Accent shifted from individual rights to social duties and functions the law fulfills in society.

Sociological jurisprudence is made of many approaches to the study of law, and some of them represent distinct and independent schools of jurists. They are, however, sociological to the extent that they study the law in relation to society. The social study of law assumes four forms: (1) The inquiries which seek the social origins of the law and legal institutions. They are concerned with the *oughts* and the factors which shape them. (2) The examination of the impact of laws on various aspects of society. (3) The inquiries which deal with the task which laws should perform in society. (4) Lastly, to find the

---

their relation to sociological jurisprudence. He concludes the discussion in the third part.

[77]Dias, *Jurisprudence*, p. 513, 580.

[78]Sociological jurisprudence seems to have had the most influence. The impact of the American Realist Movement and the Anthropological Approach cannot be ignored. In this study, however, we shall concern ourselves with the approaches that are essentially sociological in nature.

social criteria by which to test the validity of laws.[79] So wide is the area covered by these strategies, that here we can at best merely attempt a synopsis to show the impact of sociological jurisprudence.

The inquiries which seek the social origins of laws and legal institutions are mainly the historical, and economic approaches. They are sociological to the extent that they investigate the law in relation to society, and the genesis of legal rules and institutions. The most outstanding and purely sociological studies on the origins of laws and legal institutions are the works of Ihering (1818-1892).[80] Ihering attempted to explain the origins of laws and legal institutions without emulating Karl Marx's evolutionary principle or Savigny's *Volksgeist*. In his work, *Law as a Means to an End*, Ihering was convinced that the origin of the laws was in sociological forces. He perceived *purpose* as the critical factor in human life. "The fundamental idea of the present (Law as a Means to an End) consists in the thought that purpose (human purpose) is the creator of the entire law, that there is no rule which does not owe its origin to a purpose i.e., practical motive."[81] Law is part of human conduct and in the idea of purpose he found the motivating force of laws, which are only instruments of serving the needs of society. Their

---

[79]Dias, *Jurisprudence*, pp. 584-5. This is adopted from Dias, the fact that not all jurists are agreeable to this classification is well noted.

[80]Rudolf Von Ihering, *Law as a Means to an End* (New York: Augustus M. Kelly Publishers, 1968)

[81]Ibid., see the Introduction, p. xxix.

purpose was to further and protect the interests of society.[82]

Ihering saw the major problems of society as being that of reconciling selfish with unselfish interests and to suppress the former when they clash with the latter. Ihering maintained that law does not exist for the individual as an end, but serves his interests with that of the society in view. In order to reconcile the individual with society, it is necessary to balance various interests which he classified as individual, state and social.[83] The cardinal point which emerges from Ihering's analysis is that laws are one of the means of achieving an end, namely, social control.[84]

The economic approach is associated with the works of Karl Marx and his close friend Frederick Engels. They did not, however, advance any clear theory of law. The law, like the state, was an instrument of domination by the minority capitalist class: the owners of the means of production against the majority working class. Both law and the state were to wither away after the establishment of the socialist state, hence they did not consider it

---

[82]Ihering in his second volume to *"Der Zweck im Recht", Law as Means to an End,* cited Bentham as a commendable utilitarian. He however differs slightly with Bentham. Bentham's theory is purely individualistic: law is to be invoked as a means to an end of securing the interest of the individual. With Ihering, however, law is a social force created by society, and to be used for the benefit of the individual only in so far as the interest of the individual coincides with that of the society: Ibid., see the Editorial Note, pp. xviii-xiv.

[83]For a detailed discussion of the various interests in addition to the work of Ihering, see Roscoe Pound, "A Survey of Social Interests", *Harvard Law Review,* 57 (1943), 1.

[84]Dias, *Jurisprudence,* p. 586.

imperative to formulate an independent theory of law.[85] However, some principles can be gleaned from their works.

To Marx and Engels, the law was part of the superstructure, determined by and reflecting the existing economic system.[86] Since the economy was dominated by the minority capitalist class as opposed to the majority working class, the law takes the class character of the ruling capitalist class. Law is an instrument employed by the economically powerful to keep the working masses under subjection.

The only positive use of law Marx and Engels perceived was after the overthrow of the capitalist class, in the process of establishing the dictatorship of the proletariat. Law was to be used by the working majority to

---

[85]The development of a general theory of law became the concern of the later Russian scholars of whom Pashoukanis (also spelt as Pashukanis) and Vyshinski seem to be the most outstanding. There are other reasons for the delay in the development of a socialist theory of law, other than the Marxist-Leninist teachings, until well after the 1930s. One of them was the German Jurisprudence: See S. Dobrin, "The Soviet Jurisprudence and Socialism", 1936 *Law Quarterly Review*, 402. In this article Dobrin examines in some detail the ideas of Professor Pashoukanis, the Director of the Institute of Soviet Construction and Law of the Communist Academy and Editor-in-Chief of the Institute's publication *The Soviet State*, before he was discredited. Under the influence of the teachings of German jurists in particular Laband and Jellinek, Pashoukanis maintained: "In the capitalist societies national economy is regulated by law, chiefly by private law, by civil codes. Under socialism civil codes will become unnecessary." These theories were rejected in 1936 and their advocates removed from any position of influence on national affairs. Pashoukanis was removed and dubbed a "spy and wrecker" and his theories were officially deemed to have been the means by which he deliberately sought to weaken the Soviet State for treasonable ends. See also A. Nove, "Some Aspects of Soviet Constitutional Theory", *Modern Law Review*, (1949), 12

[86]See Vinogradoff, *Outlines of Historical Jurisprudence, pp. 276-7*

crush and eliminate the capitalist minority and institute the dictatorship of the (proletariat) majority working class. However, when the communist or classless society is established there will be no domination or inequality. The instruments of domination will then wither away.[87] Dobrin states, whilst assessing the ideas of Pushoukanis,

> Moreover, a capitalistic society, that is to say, a society depending for its very life on the free exchange of commodities is the only social formation in history of mankind which allows the idea of the law to obtain its highest development with all its ramifications and manifestations. There were traces of law in the pre-bourgeois societies - to the extent to which even such societies practised the exchange of commodities. To the same limited extent law may survive temporarily in the transitional social formation between capitalism and complete communism (creating the dictatorship of the proletariat during socialism). With the complete disappearance of commodity relations and their replacement by planned (organized) production and distribution, law will disappear. Any compulsory rules which may still continue to be necessary in the common interest, will become pure rules of expedience, free from any legal incidents and admixtures.[88]

The economic approach arose as a direct reaction to the positivist movement and to the economic, social and political changes which followed in the wake of the industrial revolution. Formal positivism is indifferent to justice or injustice of the existing conditions of life. It fell into disfavour with those who were dissatisfied with

---

[87]Ibid.: Dobrin, "Soviet Jurisprudence," pp. 418-19, n. 42

[88]Ibid., Dobrin further notes that in 1930 at the height of the enthusiasm for plans and planning, under the influence of the first five years' plan, it was officially announced that socialism had won finally and irrevocably. Hundreds of communists, among them judges, investigators and procurators sincerely believed in the assertion that socialism would make any state authority unnecessary and do away with it. In response thereto, in some places judges began to close the courts and students of law were doubtful as to the future value of their education. See pp. 420-21.

the existing economic, social and political conditions. Positivism appeared to endorse the legality of unjust laws. The objective of the economic approach is to improve the conditions of the poor working people who perceive in it new hope and encouragement. It is revolutionary in purpose and appealed to those interested in rebelling against the existing orders.[89]

The historical approach on the other hand did not spring up as a reaction to the positivist ideas. It developed in response to the collapse of the ruling Natural law ideas, almost at the same time that analytical positivism arose.[90] The approach is sociological in that it looks at the position of law in society. It delves into the past and examines its evolution with a view of explaining its position today: the extent and how the past has a bearing on the law today.

The historical school of jurisprudence was initiated by Savigny (1779-1861). The story of the circumstances which prompted him to formulate the basic tenets of the school is well known.[91] He maintained that the nature of any particular system of law reflected the spirit of the people (*Volksgeist*) who evolve it. All law making should

---

[89]Dias, *Jurisprudence*, pp. 543-44

[90]Ibid. 513-5

[91]A proposal by a professor of civil law, Thibaut of Gottingen to create a general codification of the statutes of the Germany states in a logically coherent system on the pattern of the Roman jurisprudence and of the civil code of France, prompted a reply from Von Savigny, who contended that law is as much a part of the national inheritance as the language or religion and cannot be treated as a dead material to be cast and recast by professional jurists and statesmen according to their view of what is reasonable: See Vinogradoff, *Outlines of Historical Jurisprudence*, p. 128.

follow the course of history. Law is not universal, it varies with people and age. In order to carry out any law reform a deep knowledge of the society involved was a pre-requisite.[92]

The new developments led to the reconsideration of the main position of jurisprudence. Law is no longer considered in its formal aspects as the command of the sovereign, but in its material content as the opinion of the country on matters of right and justice. Instead of tracing law as the deliberate will of the legislator, it is identified with the gradual workings of customs. The proper function of legislation is limited to declaration of an existing state of legal consciousness, and not as creation of new rules by individual minds. Direct legislation was rejected, while customary law assumed the place of prominence, studied with particular interest and regarded as the genuine manifestations of popular consciousness.[93] Savigny was *convinced that the problems in his time were caused by one* generation of lawyers who took a mass of rules from another generation without question, accepting it as a systematic whole worked into the unity for practical purposes, without disentangling and examining the separate elements, which had gone to make it. No distinction was drawn between what was still a living force and what was dead and of antiquarian interest.[94]

---

[92]Dias, *Jurisprudence*, pp. 517-8. This is a very important consideration in the anti-classical perspective.
[93]Vinogradoff, *Outlines of Historical Jurisprudence*, p. 129.
[94]Walter J. Jones, *Historical Introduction to the Theory of Law* (London: Clarendon Press, 1940), p. 57.

The second aspect of the sociological study of the law involves the study of the impact of laws in society. The work of Eugen Ehrich[95] (1862-1922) is unique in this category. Ehrich built on the foundation laid down by Savigny who maintained that law depends on popular acceptance and that each group creates its own living law.[96] The laws found in formal legal sources such as statutes and decided cases give only a partial picture of what really goes on in society; norms which govern life are only imperfectly and partially reflected in them. He drew a distinction between the norms of decision, by which he meant what is traditionally understood to be law, and norms of conduct which govern life in society: the living law.[97] There is often a divergence between the two. He maintained:

> To attempt to imprison the law of a time or of a people within the sections of a code is about as reasonable as to attempt to confine a stream within a pond. The water that is put in the pond is no longer a living stream but a stagnant pool, and but little water can be put in the pond. Moreover, if one considers that the living law had already been overtaken and grown away from each one of these codes at the very moment the latter were enacted and is growing away from them more and more every day, one cannot but realize the enormous extent of this as yet unplowed and unfurrowed field of activity which is being pointed out to the modern legal investigator.[98]

---

[95]Eugen Ehrich, *Grundlegung der soziologie des Rechts*, translated by Moll in 1936 as *Fundamental Principles of Sociology of Law*, with an Introduction by Roscoe Pound, (New York: Russell and Russell, 1962); See also Pound, "An Appreciation of Eugen Ehrlich" *Harvard Law Review* 36 (December, 1922), 129.

[96]Paton and Derham , *A Text-book of Jurisprudence*, p. 29.

[97]Ibid.

[98]Ehrich, *Fundamental Principles of the Sociology of Law*, p. 488.

The law of any society has to be sought outside the confines of formal legal materials: in society itself. It follows that the norms emanating from the state and its organs are only one instrument of social control and should be considered in conjunction with others such as customs, morality, and practices of groups and associations,[99] factors traditionally ignored by the positivists. According to Ehrich, there are many reasons why a person obeys the law other than fear of sanction as contended by the positivists.[100] He maintained that different societies, and even the same societies at different times, have had different feelings about what is socially important. The line between legal on the one hand, and moral and social rules on the other hand often shifts.[101] It is, therefore, important that the scope of jurisprudence should be enlarged to include the observational study of law since the formal laws are only ancillary to the living law.[102] Ehrich's ideas constitute a significant departure from the positivists study of the law.

The next study of law focuses on the task of law in society. No account of the role of the law in society would be complete without mention of the pioneer contribution of Bentham. Bentham viewed man as governed by pleasure and pain. The function of the law was, therefore, be to promote the greatest happiness of the greatest number. In line with

---

[99]C.K. Allen, *Law in the Making* (London: Oxford University Press, 1978), p. 29.
[100]Seidman, *The State, Law and Development*, pp. 99-164. Seidman has quite ably advanced his own theory as to why people obey the law.
[101]Dias, *Jurisprudence*, p. 589.
[102]Ibid., pp. 589-70.

the utilitarian ideas, Bentham maintained that the approval or disapproval of a legal rule was determined by the extent it contributed to the increase or decline of happiness.

"Nature", said Bentham, "has placed mankind under the governance of two sovereign masters, pain and pleasure. The principle of utility recognizes this subjection and assumes it as the foundation of that system. By the principle of utility is meant that principle which approves or disapproves every action which appears to augment or diminish the happiness of the party whose interest is in question."[103] He favoured legislation on a drastic scale to remedy the evils which he saw around him, but once they had been eradicated legislation was to aim at providing subsistence, abundance and equality of opportunities and security for all.[104] The sovereign power of making laws was to be wielded not to guarantee the selfish desires of individuals, but consciously to secure the common good. "The common good", Bentham maintained, " ought to be the object of the legislator; a general utility ought to be his reasoning."[105]

Bentham also argued that law making should be designed to achieve social ends. The conscience of the people has to be trained so that they learn to find pleasure in ways that are not anti-social. Laws should, therefore, be made which would render anti-social behaviour unprofitable; a source

---

[103]Quoted from Ihering, *Law as a Means to an End*, Editorial Preface, p. xviii.
[104]Friedman, "The Role of Law and Function of the Lawyer," pp. 183-4
[105]Ihering, *Law as a Means to an End*, p. xxi: Dias, *Jurisprudence*, p. 593.

of pain to the doer as opposed to pleasure.[106] Laws must be judged by their consequences.

Bentham's maxim still holds true to this day, though it has not escaped criticism; Paton and Derham have attempted to restate it:

> Every law should be examined functionally to see if in the main it will assist in the development of the potentiality of the common man. Society must make its choice on an empirical basis; it cannot foresee the exact results of any reform but the ultimate justification for a particular society or state is in the quality - moral, intellectual and personal - of the citizens it produces.[107]

Another major contributor to this perspective is Roscoe Pound (1870-1964) of the Harvard Law School. Pound, like Ihering, believed that interests constitute the principal subject matter of law, and that the task of law in any social milieu is to satisfy human wants and desires.[108] He held that the end of the law must be to satisfy a maximum of wants with the minimum of friction. Pound was interested in the end of the law:

> For the purposes of understanding the law of today, I am content with a picture of satisfying as much of the whole body of human wants as we may with the least sacrifice. I am content to think of the law as a social institution to satisfy social wants - the claims and demands involved in existence of civilized society - by giving effect to as much as we may with the least sacrifice, so far as such wants may be satisfied or such claims given effect by an ordering of human conduct through politically organized society. For the present purposes I am content to see in legal history the record of a continually wider recognizing and satisfying of human wants or claims or desires through social control; a more embracing and more effective securing of more interest; a continually more

---

[106]Ibid., p. 591-2

[107]Paton and Derham, *A Text-book of Jurisprudence*, p. 133.

[108]Allen, *Law in the Making*, p. 34. See also Pound, "Survey of Social Interests", p.1

> complete and effective elimination of waste and precluding of friction in human enjoyment of the goods of existence - in short, a continually more efficacious social engineering.[109]

Pound described the role of a jurist as that of a social engineer whose task is the "study of the actual social effects of legal institutions and legal doctrines, study of the means of making legal rules effective, sociological study in preparation for law-making, study of juridical method, a sociological legal history, and the importance of reasonable and just solutions of individual cases where the last generation was content with the abstract justice of abstract rules."[110]

Professor Duguit (1859-1928) also provides a meaningful contribution to sociological jurisprudence. Unlike Pound, he concentrated on social criterion of validity of law. Duguit criticised the traditional concepts of state, sovereignty and law, and sought to create a new approach to these matters from the angle of society. Social life, he insisted, should be as it is lived so as to be able to extract the most accurate generalisations. The outstanding fact about society is the interdependence of man. This has always existed and becomes more and more widespread as life grows more complex. People, Duguit maintained, have common needs, which require concerted effort; they also have dissimilar needs which require

---

[109]Quoted from Allen, *Law in the Making*, p. 35.

[110]Ibid., pp. 35-6. See also Paton and Derham, *A Text-book of Jurisprudence*, pp. 22-3, and 37-8. For a critique of the ideas of Pound on social interests, in particular, and those on sociological jurisprudence in general see Pierre Lepaulle, "The Function of Comparative Law with a critique of Sociological Jurisprudence", *Harvard Law Review* 35 (1921-22), 838.

mutual adjustment and accommodation.[111] Life cannot be lived today without depending on a network of services provided by various people. The supply of water, food, housing, clothing, recreation, entertainment are dependent on other people. The social interdependence was not a fiction but a stark inescapable fact of human existence. He acknowledged that the provision of services depends upon the legal order and the administration.[112] All organisations, Duguit argued, should be directed towards smoother and fuller cooperation between people, and described the proposition as the principle of social solidarity.[113] All institutions should be judged according to how they contribute towards social solidarity.

Sociological jurisprudence reflects an attempt by various legal scholars to examine the relationship between the law and its social milieu from every conceivable perspective. The outcome of the effort is a wealth of materials which a purely positivistic approach could not have revealed. It represents an effort beyond the formal examination of the legal rules: into the content, purpose and the functioning of the law in society. The main concern of sociologists is to enable and compel law making, its application and interpretation to take more intelligent

---

[111]Dias, *Jurisprudence*, p.605.
[112]Erwin N. Griswold, "Law and the State - Jurisprudence and Politics", *Harvard Law Review* 57 (1944), 1193.
[113]Ibid.: See also Paton and Derham, *A Text-book on Jurisprudence*, pp. 94-5

account of the social facts upon which law must proceed and to which it is to be applied.[114]

The sociological jurist pursues a comparative study of systems, legal doctrines and legal institutions as social phenomena, and criticises them with respect to their relation to social conditions and social progress. They differ with other jurists, to the extent that they look more to the working of the law than to its abstract content like the positivists. The law is seen as a social institution which may be improved by intelligent human effort, and hold it their duty to discover the best means of furthering and directing such effort. The sociologists lay emphasis upon the social purpose which law subserves rather than upon sanction. The legal precepts are regarded more as guide lines to results which are socially just and less as inflexible moulds. Within the sociological school there are diverse views .[115]

The welfare and socialist economic ideologies cohere very well with sociological jurisprudence. They all focus on the welfare of the society. Both the welfare and socialist economic ideas reject the hands-off approach of the government, characteristic of laissez faire economic concept, and acknowledge that greater economic, social and political good of the greater number of people requires the adoption of public measures directly and explicitly aimed at general economic betterment.[116] Matters such as

---

[114] Pound, "Scope and Purpose of Sociological Jurisprudence", pp. 512- 3.
[115] Ibid.
[116] Jones, "The Rule of Law and the Welfare State", p. 400.

health, welfare, education, economy, which initially were the responsibility of the individual are the concerns of the state. This entailed their regulation through the law, and legal theories had to adjust and take into account the new preoccupation of the state. Sociological jurisprudence resonates well with these new economic ideas as it focused on the study of the society, of which law is but a part.

Unlike analytical positivism, sociological jurisprudence is concerned with the content of the law, its purpose and functioning within a given social setting. As the state, using the law as an instrument of social change, began to address the many problems facing society, sociological jurisprudence provided the theoretical framework within which to carry out the exercise effectively. The economic ideas and the legal theories combined very well with another constitutional perspective: the anti-classical or instrumental perspective, which emerged. To the trilogy of analytical positivism, economic individualism and classical constitutional perspective there emerged another trinity of welfare and socialist economics, sociological jurisprudence and the instrumental constitutional perspective.

3. Basic Tenets of Anti-Classical Constitutional Perspective

The relationship between the socialist and welfare economic ideas on the one hand and sociological jurisprudence on the other, is obvious. Unlike economic individualism the welfare economic philosophy perceives the

market and profits as means to an end and not ends in themselves. The market must work to meet the basic needs of the people. This calls for the involvement of the state in the economy. The state is obliged to find ways of harmonising various interests in society and the best tool at its disposal is the law.

This in turn coheres with sociological jurisprudence which endorses that law has a social function to play. The law is part of the social formation and it is not an end in itself but a means to an end. It has to further and protect the interests of society. All sociological jurists endorse that law has a functional role to play in society. The anti-classical constitutional perspective on the other hand maintains that a constitution must be relevant to the society it is drafted for.

The anti-classical constitutional perspective does not oppose constitutions which limit government, but insists on designing a constitutional framework which also obliges and empowers the state to deal with other problems facing society. Whilst the need to deal with abuse of power is acknowledged, the state must not be so limited as to fail to address other pressing problems facing the country. The responsibility of the constitution-makers is to strike a balance between competing claims. The anti-classical perspective endorses the various constitutional devices, which ornament constitutions drafted according to the classical constitutional perspective, but insists on their refinement to make them more relevant in each society they are called to operate. The nature of these institutions

must be conditioned by the material circumstances present in each social setting. A constitution drafted according to this perspective more often than not has something to say on the economic and social problems facing the country. It does provide for the traditional bill of rights, but also prescribes aspirational clauses, which attempt to guarantee access to education, employment, health care and many other needs,[117] usually excluded from Westminster export or the American constitutional models.

The blind reproduction of institutions and practices without regard to their relevancy to the receiving society is strongly opposed.[118] Constitution-making must be preceded by inquiries into how well the institutions and practices performed in the social milieu they are imported from and how relevant they are to the new setting.

The constitution plays a functional role. The anti-classical constitutional perspective advocates for a sociological approach in constitution-making. The constitution is seen as a means to an end and not an end in itself. It has to serve the needs of society. Before

---

[117]Amankwah, "Constitutions and Bills of Rights in Third World Nations." In this article Amankwah has considered at length the arguments for and against the inclusion of economic and social rights in addition to civil and political rights. He has identified the origins of these rights with the Soviet Union and has illustrated how countries such as Japan, (with an American inspired constitution) India, Indonesia and Nigeria have employed the idea of socio-economic rights. The fact that many countries are adopting such Bills of Rights attests to the popularity the idea is gaining. To support his conclusion Amankwah has considered the relevance of economic and social rights to democracy.

[118]Seidman, "Perspectives in Constitution Making," p. 56. The anti-classical perspective thrives on the weaknesses of the classical perspective.

undertaking any constitution-making exercise, a deep knowledge of the society to be regulated is required. A constitution drafted according to this tradition is an instrument of social transformation. The anti-classical constitutional perspective does not prescribe a uniform constitution. Constitutional structures must differ from society to society and according to the needs of the time. The basic tenets of the instrumental constitution require further amplification to illustrate its connection with the welfare and socialist economic ideas and sociological jurisprudence.

4. Soviet Union and Namibian Constitutions and the Anti-classical Constitutional Perspective

(a) The Union of the Soviet Republics

The anti-classical perspective influenced the Soviet Union constitution of 1918 after the Bolsheviks revolution of 1917. It was the first country to transform Marx's ideas into reality. Marx perceived the creation of a communist society as the ultimate goal of human existence. However, before that objective can be realised, there has to be the overthrow of the minority capitalist class and the creation of the dictatorship of the proletariat immediately thereafter. He termed this period the creation of the socialist society and the law is to wipe out the remnants of capitalism. The problem having been determined, solution identified and the goal established, the next step was to design the relevant constitutional framework.[119] The

[119]After the Bolshevik Revolution, the constitution which was drafted defied, in many ways, the established western

constitution expressly provided that the economic foundation of the Union was the socialist system, with socialist ownership of the means of production.[120] Property existed as State property belonging to all the people in the form of co-operative and collective farm property.[121]

The State rather than the individual was the provider of all the needs of the polity, the land, its mineral wealth, waters, forests, factories and mines, rail, water and air transport facilities, banks, means of communication, the large state-organised agricultural enterprises as well as municipal enterprises and the bulk of the dwelling-houses in the cities and the industrial localities were state property for the benefit of the people.[122] Private ownership of the means of production was recognised only to a limited extent.[123] Otherwise from the cradle to the grave people were guaranteed to be cared for by the State. To carry out these responsibilities the constitution provided that the economic life was not to be guided by the laissez faire economic principles, but was to be planned.[124]

---

constitutional models. See Chapter 1: The Social Structure - Articles 1 to 12 , Revised Official Translation of the Constitution incorporating the amendments of 1965. See also Chapter x: Fundamental Human Rights and Duties of Citizens - Arts. 118-133. For an examination of the Constitution, see Borris M. Komar, "The Federal Constitution of the Soviet Union" *Columbia Law Review* (1925), 36: Nove, "Some Aspects of Soviet Constitutional Law Theory," p.13.

[120]Revised Official Translation of the Constitution incorporating the amendments of 1965 Art. 4

[121]Ibid., Art. 5.

[122]Ibid., Art. 6.

[123]Ibid., Arts. 9 and 10.

[124]Ibid., Art. 11.

The Bill of Rights was fundamentally different from the traditional Western bills in many respects. Apart from usual protection of civil and political rights, it included the socio-economic rights as well. Every citizen was guaranteed the right to work,[125] rest and leisure,[126] and free education.[127] Citizens were guaranteed to be taken care of by the State in case of old age, sickness, or disability.[128] These rights were, however, merely aspirational: no machinery for their enforcement was provided. Whilst the constitution guaranteed the rights to the citizens it also imposed certain duties on them toward the State. Every citizen was enjoined to abide by the Constitution of the Union and observe the law.[129] It was the duty of every citizen to safeguard and fortify public property, failure to do so was a crime.[130]

The traditional civil and political rights were also guaranteed, but they were amplified. Article 125 guaranteed the citizens of (a) freedom of speech, (b) freedom of the press, (c) freedom of assembly, including the holding of mass meetings, (d) freedom of street procession and demonstration. These rights are meaningful only if other ancillary provisions are made. In response to this point, the State was constitutionally obliged to place at the disposal of the citizens printing presses, stocks of paper, public buildings, communication facilities and other

---

[125]Ibid., Art. 118
[126]Ibid., Art. 119.
[127]Ibid., Art. 121.
[128]Ibid., Art. 120.
[129]Ibid., Art. 130.
[130]Ibid., Art. 131.

requirements. Whether these obligations were fulfilled or not is not really in issue; what is, however, important was the effort by the constitution-makers to draft a constitution which attempted to reflect the vision of the people and the ruling ideas of the time in the Soviet Union. It was not a blind reproduction of institutions and practices present in other countries.

That the USSR has now collapsed cannot be denied, and that social, economic and political reforms are under way cannot be ignored, but these adjustments do not vitiate the value of the constitutional framework. They do not weaken the basic tenets of the anti-classical perspective. From the sociological jurisprudence stand-point the failure of one constitution drafted according to the anti-classical perspective does not spell doom for all other constitutions. It cannot also be ignored that the Constitution of the USSR provided the framework of government, which ruled the country for over seventy years, transforming it from a post-feudal society into one of the super powers in the world. Furthermore, the anti-classical perspective unlike the classical does not insist on the permanence of the constitutional document. As an instrument of social transformation, it is subject to change at any time as dictated by the needs of the time.[131]

---

[131]The constitution of the Soviet Union has been given to illustrate the point that there is another way of looking at a constitution and constitution-making other than through the Western constitutional perspective. There are many reasons behind the collapse of the Soviet Union and some of these relate to its constitution. But the consideration of these issues is beyond the scope of this work. Nevertheless, that does not adulterate the argument that there is need to look at constitution-making from

(b) The Republic of Namibia

The Namibian Constitution of 1990 is a unique example in Africa of a constitution drafted according to the anti-classical perspective. It mirrors an effort to blend the basic tenets of the sociological jurisprudence and welfare and socialist economic ideas in a document that is to regulate life in a definite social setting. The constitution is designed to deal with the social, economic and political problems created by over a century of deprivation of the right to self-determination.[132] The constitution abounds with many original features not found in Whitehall models issued to Britain's African dependencies in the 1960s and in the one-party models which replaced them.[133] This is partly because Namibia had an advantage which other countries never had: it managed to learn from the successes and failures of the constitutions of the older independent countries.

Seidman in his commentary on the draft constitution of Namibia identifies seven major problems to be addressed by any constitution for Namibia[134], which history has placed

---

another perspective. The rights and freedoms may not have been justiciable in the western traditional sense, but hey acted as reminder to those in power as to their responsibilities to the people.

[132]There is limited material on the Namibian Constitution, however, see Jill Cottrell, "The Constitution of Namibia: an Overview," *Journal of African Law* 35 (1991), 56: John Hatchard and Peter Slinn, "Namibia: the Constitutional Path to Freedom, *Foreign Relations* 10 (November, 1990), 137. Cottrell merely undertakes an examination of the actual Constitution, whereas Hatchard and Slinn have presented the historical background of Namibia and the constitution-making process as well.

[133]Hatchard and Slinn, "Namibia: The Constitutional Path to Freedom," p. 138.

[134]The discussion here is not meant to be exhaustive, but merely illustrative.

on the people. These are: (1) Eradication of apartheid and its social consequences; (2) Changing Namibia's economic institutions in order to address the poverty of the people; (3) Prevent reactionary elements from using ethnic and cultural differences among Namibia's majority to frustrate the need for change; (4) Preventing the rise of bureaucratic bourgeoisie, the political elite from using state power to become the new ruling class; (5) Transforming the colonial state into a state likely to bring about development, especially ensuring popular control over government; (6) Maintaining legality and especially preventing corruption and finally; (7) Whilst these changes are going on to keep the machinery of government operating smoothly.[135] The final constitution addressed some of these issues.

Apartheid is expressly prohibited[136] so is any form of discrimination based on sex, race, colour, ethnic origin, religion, creed or social or economic status.[137] The Constitution places a burden upon the State to carry out changes in economic institutions to address the poverty of

---

[135]Seidman, "Commentary on the Proposed Draft Constitution of Namibia," p. 40. Seidman served on the Constitution Committee which drafted the draft constitution. The current constitution of Namibia came into force on independence day, 21 March 1990. The drafting process was preceded by the establishment of a constituent assembly. The South West Africa People's Organization (SWAPO) failed to capture the two-thirds majority, which would have allowed it free hand in implementing its constitutional policies, as presented in the draft. It received 41 of the 72 seats and was forced to seek the support of its opponents in return for some constitutional concessions. The discussions were centered on the draft constitution, which no doubt gave SWAPO an upper hand in the negotiations.

[136]Constitution of Namibia Art. 23.

[137]Ibid., Art. 10.

the people and promote their welfare. The aspirational clauses amplify this point. The State is enjoined to adopt policies to address a number of issues, in particular health and strength of the workers, formation of independent trade unions, ensuring that every citizen has a right to a fair access to public services and facilities, access to a pension scheme, free legal services, payment of a living wage to allow the maintenance of a decent standard of living, education and many others.[138]

In recognition of the task to be dealt with by the State in correcting the economic imbalances created by years of South African rule, the State is entrusted the task of planning the country's economy. The economic system of Namibia, the constitution provides, is a mixed economy.[139] The laissez faire approach cannot help resolve

---

[138]Ibid., Art. 95.

[139]Ibid., Art. 98(2). The economy is to be based on the following forms of ownership: public, joint public-private; co-operative; co-ownership and small scale. The advantage of such can be fully appreciated once considered in the Zambian context. By making a constitutional declaration as to the mode of economy to govern the country, Namibia has effectively avoided the uncertain situation obtaining in Zambia soon after the assumption of power by the MMD. The MMD Government wants to re-organize the economy by placing eighty per cent of the economic in private hands. This will entail government giving up control over key industries such as milling, copper mining, electricity, transport and many others. They are preaching about moving away from a planned economy to an economy controlled purely by market forces (an approach long abandoned in the place of its origin, more will be said later). Whilst it is agreed among all the political parties that the economy needs to be reformed, there is no agreement as to the time-table and the modalities of restructuring. UNIP, as the main opposition party, insists on government maintaining control of strategic industries and has promised if privatised, to re-nationalise them once the party comes back to power. This is sending wrong messages to prospective investors, which would have been avoided if the issue of the economic system had been treated as one above the party and popularly determined.

the problem facing the citizens. The goal is to secure economic growth, prosperity and human dignity for all Namibians.[140] The Constitution provides for the National Planning Commission, whose task is to plan the priorities and direction of national development, a feature unknown in constitutions of most of the African countries.

III. Evaluation of the Two Perspectives

The discourse presented in this Chapter would be incomplete if the two constitutional perspectives are not assessed. The identification of the two traditions and their being labeled classical and anti-classical does not enjoy universal support among scholars. Those who have noted the distinction have, however, dismissed it as one based purely on values and not on practical examination of the issues involved.[141] It is usually argued that the classical constitutional perspective reflects the values of an independent citizen. The anti-classical perspective on the other hand mirrors the values of the state. The choice between the two is merely determined by the values of the drafters.[142]

What has been discussed in this Chapter cannot support these conclusions. Each perspective has been discussed in terms of what is perceived as the problem the constitution must address, the end of the constitution and the strategy toward attaining that goal. These are not issues of values. The classical perspective identifies abuse of power as the

---

[140]Ibid., Art. 98(1).
[141]Seidman, "Perspectives and Constitution Making", p. 76.
[142]Ibid.

problem to be addressed and the realisation of constitutionalism as the ultimate objective of the constitution. The solution is to limit the power of government through a number of constitutional devices: bill of rights, democratic elections, judicial control and a value neutral state. The consequence of the combination of these devices is the creation of a non-interventionist attitude of the state in the economic and social affairs of its citizens. Flowing from this position is the practice whereby constitutional provisions float from one country to another without regard to the economic, social and political diversity between the social setting of their origin and where they are being transplanted.

The anti-classical perspective on the other hand, thrives on the criticisms of the classical tradition. It finds support in sociological jurisprudence and socialist and welfare economic ideas. The constitution is a means to an end and not an end in itself. It addresses the most pressing social, economic, political and any other problems facing the social milieu it is to regulate. It provides no constitutional blue-print for all societies. Each society must find its own unique solution to its problems. The validity and legitimacy of the constitution is not dependent on its longevity as is the case in the classical perspective. As a means to an end, it can be changed according to the changing needs of society. It is not a decor but an instrument of social transformation.

The choice between the two traditions is not one dependent on the values of the drafters but on pragmatic

assessment of what each perspective has to offer and its relevance to the needs of the polity. Some of the commentators opposed to the anti-classical perspective have not been practical in their criticism. Seidman in his article, *Perspectives and Constitution Making: Independent Constitution For Namibia and South Africa*, has illustrated that in view of the unique social, economic and political problems facing Namibia[143] and South Africa, the two countries would do well to pursue the anti-classical perspective. In response, Professor Robert Martin, writing long before the constitution of Namibia was drafted, sharply differed with Seidman. He accused Seidman of "advocating a fundamentally Stalinist strategy, albeit with a human face."[144] Martin maintains that the constitution for South Africa drafted according to the anti-classical perspective would violate two fundamental principles. Economic destruction would follow and render South Africa ungovernable. Secondly, Martin argues, the anti-classical perspective is undemocratic.[145] As a solution he suggests: "If a new constitution for South Africa is to be democratic and workable it must be practical and it must be pragmatic. It must address the reality of the post-apartheid South Africa and derive from the careful and concrete assessment of the possibilities which exist in that society."[146]

---

[143]Namibia did indeed follow the anti-classical perspective in the making of its constitution.
[144]Robert Martin, "Reconstructing South Africa's Constitution: How Not to Do It" *Lesotho Law Journal* 5 (1989), 189.
[145]Ibid.
[146]Ibid., p. 196.

Martin continues, "and it is proper and legitimate for a constitution to express aspirations about where a society should be seeking to go." Critically examined Martin does not advocate anything different from what Seidman does. A constitution drafted according to the anti-classical perspective would no doubt be democratic, workable and pragmatic. By virtue of the sociological jurisprudence influence it enjoys, it would not ignore to address the reality of the post-apartheid South Africa. Whilst Seidman and Martin may be saying the same thing as far as what the constitution for Namibia and South Africa should be, Martin, however, does not say how it can be realised. It is one thing for one to maintain that a constitution must be "democratic, workable, practical and pragmatic", it is another to say how this is to be achieved. Seidman squarely faces this issue and resolves it by providing a constitutional perspective to guide the drafting process. Seidman challenges constitution-makers to make up their minds on the perspective to guide them, before embarking on the exercise. Each perspective perceives a distinct role for the constitution, the goal and how it is to be achieved.

The anti-classical perspective on the other hand perceives a constitution as an instrument of social transformation: a means to an end, and not an end in itself. The task of the constitution is to address economic, social, political and any other difficulties history has placed upon society. Whilst it is recognised that state power needs to be checked, it is also acknowledged that the state must be sufficiently empowered and obligated to attend to the pressing needs of society. The usefulness of constitutional devices, indispensable in the classical tradition, is not doubted, but blind reproduction, without inquiry as to how well they have performed in their place of origin and relevance to the new social setting is objected to. It calls for modification and refinement of the devices so as to contribute to the realisation of the needs and aspirations of society. The anti-classical perspective does not recommend or provide a universally valid constitutional framework, but encourages each society to devise its own constitution as dictated by the needs of the time.

The classical perspective labours under the influence and support of laissez faire economic principles and analytical positivism. The anti-classical perspective finds support in sociological jurisprudence and welfare and socialist economic ideas. The distinction between the two perspectives, though opposed by some commentators, is real and the choice between them is not based on the values of constitutional drafters. It is one which must be made upon consideration of all the practical issues involved.

CHAPTER TWO

THE MAKING OF NORTHERN RHODESIA

Introduction

The impact of Western colonial rule is still indelibly imprinted on Zambia even decades after independence. The whole process of conquering and colonising the Territory was triggered off by various forces, among them the mere thrill of adventure, the desire to preach the Gospel and in some cases, sheer avarice. As the Europeans moved into the non-Western world, north of the Zambezi, as traders, merchants, missionaries and adventurers, they carried with them expectations that all societies must be properly organised as states possessing attributes of sovereignty and adhering to rules of law.[147] But this was not the case in the area which became known as Northern Rhodesia. After the establishment of settlements Europeans insisted that human relations, and more particularly the management of disputes, should fall under explicit and universally based laws.[148] To make life much more amiable they started building the state structures. The administrative structure which emerged was also the constitutional structure for the Territory.[149]

---

[147]Lucian W. Pye, "Law and the Dilemma of Stability and Change in the Modernization Process," *Vanderbilt Law Review* 17 (1963), 24-25.

[148]Ibid.

[149]See H.F. Morris and J.S. Read, "Indirect Rule and the Search for justice", (1972), 287, quoted in Filip Reyjents, "Authoritarianism in Francophone Africa from the Colonial to the Post Colonial State", *Third World legal Studies* - 1988, p. 59.

Every constitution is a product of the history of the country it regulates. It is influenced by the forces present in its social milieu and to ignore this is to tell only a half story. In chapter three we examine the evolution of the constitutional order for Northern Rhodesia starting from 1899, but in this chapter we focus on the various factors which precipitated the making of Northern Rhodesia and the making process itself.[150]

I. The Great Bantu Migrations

The ancestors of the present tribes of Zambia are immigrants from other parts of Africa. The Bantu found the early Iron Age people in the area, who lived largely in small village communities, except where there were strong economic and social incentives for greater concentration of population.[151] Some of these groupings migrated from the north during the time of the Luba-Lunda dispersal and others from the south to the north during the reign of terror waged by Shaka Zulu. They were forced to migrate by

---

[150]The value of such an approach is ably illustrated by Gordon R. Woodman, "Constitutions in a World of Powerful Semi-Autonomous Social Fields", *Third World Legal Studies - 1989*, 1-20. He observes at pp. 2-3.:

> Although the skills of a lawyer are useful in the study of non-state laws, an adequate appreciation requires some revision of the traditional approach of students of state law. It is necessary to discard the concepts and axioms induced by the tendency of state laws to deny the legitimacy of other laws.... An effective state constitutional order takes account of the social realities which affect its objects and functioning. In Africa, where the relative unimportance of state law is at least as marked as anywhere else, other social orderings cannot realistically be overlooked.

[151]Brian M. Fagan, "Zambia and Rhodesia", in *The African Iron Age* ed., P. L. Shinnie (Oxford: Clarendon Press, 1971), p. 217.

the desire for state formation and empire building, which was facilitated by more extended trading expeditions and increased military power and partly for their own safety.

The Bantu had a number of achievements to their credit after centuries struggling to tame and exploit nature. Various systems of agriculture were developed and they learnt how to use new crops such as maize and cassava introduced by the Portuguese from South America. They developed skills in smelting iron and making various implements. The improved agriculture and metallurgical technology improved their abilities to exploit nature to their own benefit, which in turn led to increase in population. These developments in turn necessitated adjustments in the sparse settlement pattern of the population.[152] The Bantu developed complex social organisations, and centralised powerful chieftainships. Among them were the Lozi of Barotseland in western Zambezi; the Ngoni in the south eastern part; the Bemba in the north-eastern plateau and the Lunda of Mwata Kazembe who settled in the area around Luapula River. This distribution of people later played a significant role in the penetration of the British in the area and the development of the government structures.

1. The Luba-Lunda Dispersal

The Lozi, Bemba and Lunda of Mwata Kazembe, and other smaller tribes trace their origins from the "Sudanic

---

[152]Andrew Roberts, "The Age of Tradition A.D. 1500 to 1850" in *A Short History Of Zambia* ed. Brian Fagan (Oxford: Oxford University Press, 1970), pp. 103 - 122.

by their military prowess. They remained a powerful force even after the establishment of British presence in the area and have remained so even after independence.

Conflicting arguments exist on the origins of the Lozi who occupy the sand plains of western Zambia. One view holds that they came from the south, from Zimbabwe. There seem to be more evidence to support the view that they came from the Congo. Unlike the Bemba the Lozi moved south, then south west and settled in the flood plains. They were given the name Luyi or Luyana (foreigners) by the earlier inhabitants of the area. The plains were suitable for habitation and capable of supporting a very well organized society. The pastures were good for cattle, and the yearly floods enriched the soil and provided fish from the Zambezi River. As a result of these favourable conditions and successful warfare and unusual administrative ability they established their rule over an area much wider than the present day Western Province.[155] Their advanced system of government was feudal in nature, and has survived the ravages associated with colonial rule. It was through the Lozis that British influence was extended to north of the Zambezi leading to the creation of Northern Rhodesia.

---

[155]For a general treatment of the Lozi kingdom see Mutumba Mainga, *Bulozi Under the Luyana Kings,* (London: Longman Group Ltd., 1973). Other works also exist on specific aspects of the Lozi kingdom and generally, but Mutumba's is unique in that she has attempted to establish the nature and development of the Lozi traditional structures and institutions from the time of the creation of the kingdom to the present. The writer has also attempted to show how external factors affected the structure, and the extent to which such external factors were themselves exploited by the Lozi.

The Lunda of Mwata Kazembe came from the Luba-Lunda empire in the Congo. They are believed to have left decades after the Bemba and the Lozi. They journeyed eastwards and crossed the Luapula about 1740 and settled there. They had no difficulties in subduing other tribes in the area with their superior fire power and highly disciplined army. They are believed to have obtained guns from the Arabs in exchange for ivory and slaves. The strength of the kingdom emanated from trade. The principal trade routes to the east and west coasts of Africa passed through their territory.[156] Kazembe settled near Kawambwa, where his dynastic descendant still lives today. His people settled throughout the Luapula Valley. Unlike the Bemba, they extended their possessions by assimilating other people into their culture and royal dynasty.

Until the 1800 these were the kingdoms of Northern Rhodesia. Other smaller tribes existed, the majority of which are believed to have come from the Luba-Lunda kingdom. The Tonga, who occupy the Southern Province of Zambia, are believed to be the first Bantu migrants into the Territory .[157] Also included are tribes of Luba origin: among them the Lala, southern Lunda, Kaonde, Lamba and Soli, who occupy the north-western and central Zambia. Their exact dates of arrival into the territory are unknown, but may probably lie between the seventeenth and the nineteenth centuries.

---

[156]Kazembe was the first chief in Northern Rhodesia to have had contact with Europeans: the Portuguese were the first to attempt to open an overland route from coast to coast through Kazembe's area.

[157]Fagan," Zambia and Rhodesia", p. 229.

2. The Dispersal of the Southern Bantu

The first invaders from the south were the Ngoni under Zwangendaba who were followed by the Makololo under Sebituane. Both ran away from Shaka's plunder. They could not flee to the south because other tribes were already piled up against the eastern frontier of Cape Colony inhabited by Europeans. To the east the limit was set by the Indian Ocean and to the west by the Drakensberg Mountains. The only option was to move up north.[158]

The Ngoni crossed the Zambezi river on 20 November, 1835 and by 1845 they reached Lake Nyasa, where Zwangendaba died. His followers split into two groups. One group journeyed further north and the other, under the leadership of the principal chief, and Zwangendaba's son Mpezeni, turned westwards into the country of the Bemba. After waging several wars with the Bemba they moved across the Luangwa river and settled in the area around Chipata, where they remained a superior military force until they were crushed and impoverished by adversaries of different colour and military tactics: the Europeans. British influence among the Ngonis was established through military conquest. Unlike the Bemba the Ngoni assimilated the people whom they defeated on the way.

Four years after Zwangendaba crossed the Zambezi, the Kololo under Sebituane did the same. They moved to the west where they attacked and overthrew the Lozi of Barotseland, who were at that time militarily weak due to internal rivalry. Under the leadership of Sebituane Bulozi was

---

[158]Hanna, *The Story of the Rhodesias and Nyasaland*, p. 28.

transformed. He consolidated his power and increased the Kololo-Barotse kingdom's wealth. Kololo became the *lingua franca*, and the old Luyana tongue became nearly extinct. Sebituane's reign was not trouble free; he repeatedly repelled attacks by other tribes among them the Matebele. The Lozi remained firmly under the Kololo reign until the death of Sebituane. His son Sekeletu who took over was an indecisive ruler. He died in 1863 and the following year the Lozi revolted and regained control of their kingdom.[159]

This was the pattern of distribution of people in the closing century of the Iron Age. In between these groups other smaller social groupings existed, but due to lack of proper organisation they remained negligible forces in the entire history of the Territory. The four tribes were - and are still - so powerful that they determined the course the country followed when British presence was established in the Territory.

Powerful kingdoms had their own system of government, which united and regulated people's lives. They were not similar to what Europeans had in mind; and were not uniform. Each system was a product of the people's history and conditioned by various economic, social and political forces inherent in their social setting. The Lozi had an advanced social formation largely because the area they occupied had the necessary requirements to sustain a large population. The soil was fertile for mass production of food crops and enough to support large grazing areas, and the Zambezi provided fish. Their position can be contrasted

---

[159]Fagan, *Southern Africa*, p.171.

with that of the Bemba. The area was not fertile and the *chitemene* system was not sufficient to produce enough food to feed a large population. In order to survive they developed militarily and depended on their military prowess to survive.

A number of factors hindered amalgamation of the principal kingdoms into one main kingdom. Serious inter-tribal conflicts often arose between stronger and weaker tribes and at times between major tribes. Following in the wake of these fights, defeated tribes were often taken and sold as slaves. The Arabs dominated the route between the interior and the east African coast. The Yao on the other hand were the principal dealers on the trade route crossing southern Nyasaland. The third group of traders was the Achikunda.

The social formations were homogeneous, bound together by language, origin and customary practices. Attempts by some tribes to impose their rulership on other tribes were resisted. The Kololo tried to establish their rule on the Lozi and unite the two peoples, but this was resisted until it collapsed.

The nineteenth century was marked by the invasion of the Territory by "warriors" from the south, who caused profound changes in the political, social and economic structures. Fagan observes that "when the first European missionaries and administrators arrived in our region they found the whole political situation in a state of fluidity. Slave raiding, tribal invasions and petty jealousies were changing the long established distribution of population.

The establishment of European rule led to peace and stability but initiated major revolutions in the history of South Central Africa."[160] Gann, after demonstrating the ravages of slave trade, also concluded: "The Bantu could only be saved by the imposition of a stable government. No indigenous power possessed the resources necessary for such a task; and salvation came from Europe."[161]

II. The Coming of Europeans and the Making of the British South African Company

1. The Coming of the Europeans

The Portuguese explorers and traders were the first Europeans to enter the Territory and Dr. F. De Lacerda, a Brazilian scholar and administrator is the most outstanding among them. He was convinced that British occupation of Cape Town in 1795 was a threat to Portuguese possessions of Angola on the west coast and Mozambique to the east, and future Portuguese advances into the interior. To frustrate this development he called for overland linking of the two settlements. This was not, however, implemented largely because of the poverty of Portugal, as a country, and that of the pioneers themselves.[162]

David Livingstone, on the other hand, was instrumental in opening the interior of Central Africa to British pioneers. He never established any mission stations or settled anywhere in the Africa, but his journeys were

---

[160]Idem., "Zambia and Rhodesia", p.242.
[161]Gann, *The Birth of a Plural Society* (Manchester: Manchester University Press, 1958), p.14.
[162]Ibid., p.15-16

significant in that they provided information about the continent which, until then, was largely unknown. He laid the foundation for other missionaries and traders to build on.[163] It was the missionaries who came after him who established mission stations. The European impression of the territory north of the Zambesi is aptly summed up by Hanna:

> But although it would be presumptuous to pass moral judgment upon the African themselves, it is both legitimate and necessary to make a historical assessment of the conditions under which they were living when the British pioneers came into their midst. And only by a willful disregard of abundant evidence is it possible to evade the conclusion that, on the whole, the picture was one of brutality, callousness, suffering and futility, and that the situation did not include any factors which offered hope of improvement in the future.[164]

Hanna goes on to say:

> No doubt it is wise to look with great scepticism at all claims, past or present, to a 'civilising mission', and to suspect those who have put forward such claims of being chiefly interested in gain for themselves or prestige for their own country, or in both combined. Nevertheless if it had not been for the coming of the British, or some other people capable of playing a similar historic role, there is every reason to suppose that the tribes of the Rhodesias and Nyasaland would have remained, for centuries or even perhaps millennia, sparsely scattered over a vast area, dominated by the immensity of the surrounding country and the capriciousness of nature, without the art of writing or the use of numbers, with scarcely the slightest idea of the relationship of cause and effect, with no ideals higher than the pride of bloodshed, with their whole environment and

---

[163]Ibid., p. 17, see n. 1. Among the missionaries, the most important were Dr. E. Holub who visited the Ila (Mashukulumbwe) and describes his experience in *Von der Kapstadt ins Land der Maschukulumbwe, Reisen im Suedlichen Africa 1883-7 (1890):* V. Girand who visited the Bemba and described his experience in *Les Lacs de L'Afrique Centrale:* and Major Serpa Pinto, who crossed the continent from east to west, describing the journey in *How I crossed Africa.*

[164]Hanna, The *Story of the Rhodesias and Nyasaland,* p. 40.

conditions of life promoting an attitude of apathy, improvidence, and fatalism.[165]

Such reasoning determined the mission of Europeans in Northern Rhodesia. Men like Livingstone helped formulate a policy calling for the civilising of Central Africa. He argued that the social institutions of the Bantu were generally incapable of dealing with the immense problems facing the interior of Africa. Europe should, therefore, move in. He believed that Europeans should help deal with the social evils of tribal societies - its poverty, ignorance and superstitions.[166]

Despite pleas by Livingstone and other pioneers after him, the British Government was not keen on direct involvement in the Territory. In May 1888 Lord Salisbury argued: "I feel that a consul represents a compromise between the desire of the missionaries to obtain protection and desire of the Home government not to be involved in extensive operations. To please the missionaries, we send a representative of the government: to spare the tax payers we make him understand that he will in no case be supported by an armed force. The only weapon left to him is bluster."[167] This was the policy of the British Government, which was in line with the ruling idea of laissez-faire. British involvement was possible only when the interests of its nationals were in danger of being violated by another imperial power. Apart from the cost involved it was not the

---

[165]Ibid.

[166]Gann, *The Birth of a Plural Society*, p. 17

[167]R. Robinson, J. Collagher and A. Deny, *African and the Victorians*, 1961, p. 224, quoted in Hall, *Zambia*, (London: Pall Mall Press Ltd., 1965), p.52.

British Government's policy at the time to acquire foreign territories. The British Consul in Lisbon categorically stated in 1888 : "...Her Majesty's Government would not object to recognise the territory north of the Zambezi as falling exclusively within the Portuguese sphere of influence."[168] The policy changed when it was possible to extend British influence into the interior of Africa without straining the tax payers, through the popular Victorian instrument: the chartered company.

2. The Origins of the British South Africa Company

Two factors led to creation of the British South African (BSA) Company as an institution through which to extend British influence in Central Africa. The first was the persistent belief that vast deposits of gold lay ready for the miner in Central and Southern Africa. The second was the impulse which came upon Englishmen in the latter part of the nineteenth century to acquire fresh pieces of land in Africa for future development and link the south of Africa with the north, and exclude all other European powers.[169]

The creation of the BSA Company was largely the work of John Cecil Rhodes. Advances by British entrepreneurs, such as Rhodes, into far away lands were precipitated by Britain's economic prosperity. By mid nineteenth century

---

[168]Ibid. p.53.

[169]Hugh Marshall Hole, *The Making of Rhodesia* (London: Frank Cass & Co. Ltd., 1967), p. 1. Hole was a senior administrator of the BSA Company and took part in the destruction of Lobengula and the subsequent establishment of the Company control in Southern Rhodesia. His account of certain events must be read with care.

she had established herself as an economic giant, and had money in excess of what was needed. With her advanced banking system, it was easy to invest overseas. Furthermore, countries such as France and Germany, who were dependent on Britain for economic help had become self-sustaining and no longer in need of British finance.[170] But the most immediate events which affected life north of the Zambezi occurred in South Africa. In 1867 diamonds were discovered and in 1886 gold was also found. Those who had taken the risk and invested in the mining of these minerals were well rewarded.

The industry was initially dominated by small miners. It was, therefore, difficult to maintain the prices of the minerals. But due to technical and operational reasons it was profitable for big concerns to work the mines and Rhodes brought nearly the entire mining of gold and diamond under one major conglomerate. These achievements only created greater need for wealth. Some of the earliest Europeans to travel far north from Cape Colony such as Karl Mauch and Thomas Baines brought reports that other deposits of gold existed in the north.[171] A further expansion to the north was no doubt justifiable, with labour readily available in South Central Africa.

The quest for wealth and the general desire to create a vast empire from Cape to Cairo lent force to the surge north-wards. The task had to be promptly accomplished as other European forces were also interested, in particular

---

[170]Gann, *The Birth of a Plural Society*, p. 44.
[171]Hanna, *The Story of the Rhodesias and Nyasaland*, p. 84-5

the Portuguese who had already secured the territories of Angola on the west coast and Mozambique to the east.

The prime area of interest for Rhodes was Matebeleland and Mashonaland, believed to possess vast quantities of diamond and gold, and good land for farming. The treaty signed by Lobengula on 30 October 1888, after nearly five weeks of protracted negotiations, gave Rhodes the right to prospect for minerals in the kingdom. Rhodes and his associates received all the mineral rights in exchange for one thousand Rifles and the promise of a gun boat on the Zambezi. This marked the beginning of British power in Central Africa. With these achievements, it became imperative for Rhodes to assume the power of governance over these territories.

This was in line with general Western thinking: economic, social and political activities were not possible unless pursued within an established legal order or administrative structure. However, due to the enormity of the responsibility and the cost involved, the British Government was unwilling to take charge. The solution came in the form of a chartered company, a scheme that had already been tried and proved successful elsewhere. Rhodes brought together other interested parties and petitioned for the grant of a royal charter establishing the BSA Company. The initial proposal to create a chartered company to assume the power of government was opposed by Reverend John Mackenzie who favoured direct Imperial Government's involvement. Through shrewd negotiations and placing bribes where it was to his advantage Rhodes obtained the royal

charter incorporating the British South Africa Company. The petition was formally presented to the Queen on 13 July, 1889 and read in part:

> Your Majesty's petitioners believe that if the said concessions, agreements, grants and treaties can be carried into effect, the condition of the natives inhabiting the said territories will be materially improved and their civilisation advanced, and an organisation established which would tend to the suppression of the slave trade in the said territories, and to the said territories being opened to the immigration of Europeans and to the lawful trade and commerce of Your Majesty's subjects and other nations.[172]

The Charter was publicly granted on October 29, 1889 with a share capital of £ 1,000,000. A number of factors worked to Rhodes' advantage. In 1888 the British Government had granted a Charter to the Imperial British East Africa Company and similar companies had been established in other parts of the world.[173] There was, therefore, no justification for not extending the same policy to Southern and Central Africa. The policy of indirect expansion into the interior of Africa through the Government established at Cape Colony had collapsed.[174] It was, consequently, difficult to deny Rhodes the charter. In fact Rhodes promised to achieve what the Cape Government had failed to do. The Company promised to relieve the Colonial Office of its commitments in the Bechuanaland Protectorate. Rhodes and his financial associates were to construct the much-needed railway through Bechuanaland into the interior, and

---

[172]Quoted from Hall, *Zambia*, pp. 59.

[173]On the role of the Imperial British East Africa Company in East Africa see Y. P. Ghai and J.P.W.B. McAuslan, *Public Law and Political Change in Kenya,* (London: Oxford University Press, 1970), pp. 6-12.

[174]Lewis Gann, *A history of Northern Rhodesia,* (London: Chatto & Windus, 1964), p.57-8.

promote European settlement.[175] The creation of the Imperial East Africa Company had proved that men such as Rhodes could, to some considerable degree, relieve Her Majesty's Government of diplomatic difficulties and heavy expenditure.

The extent of the Company's field of operation was vaguely defined as the region of South Africa lying immediately north of British Bechuanaland, and to the north and west of South Africa; and to the west of the Portuguese Dominions.[176] The Company was authorised and empowered to hold, use and retain concessions and agreements made before the granting of the Charter.[177] However, subject to the approval of the Secretary of State, the Company could secure new rights, interests, authorities, jurisdictions and power of any kind for purposes of government and preservation of public order in the territory.[178]

The Company was under obligation to preserve peace and order, and to achieve this goal, it was empowered, subject to the approval of the Secretary of State, to make laws for the Territory and establish and maintain a police force.[179] Customary civil law was to be respected and freedom of religion maintained. The Company was to maintain freedom of trade.[180] For the purposes of administering justice the

---

[175]It is however surprising that contrary to the traditional British sense of astuteness, little attention was directed at examining the practicability of this grandiose plan.

[176]Article 1 of the Charter of the British South Africa Company.

[177]Ibid., 2.

[178]Ibid., 3

[179]Ibid., 10.

[180]Ibid., 20.

Company was empowered to appoint all necessary officers to perform such duties and provide such courts as may be, from time to time, necessary for the administration of justice.[181] The British Government retained supervisory powers over the affairs of the Company.[182] A year later Rhodes sent a small privately paid armed force, known as the pioneer column, which successfully occupied Mashonaland.

II. Company's Occupation of the North of the Zambezi

1. Advances into North-West of the Zambezi

After the acquisition of Mashonaland, Rhodes' interest shifted north of the Zambezi. He gained his way by playing off principal chiefs in the area against each other. The whole process was a product of a combination of many forces and interests. On 8 January, 1889, Francois Coillard, a French missionary who had established his mission in Barotseland wrote, on instructions from king Lewanika, to Sir Sidney Shippard the Administrator of British Bechuanaland informing him of Lewanika's wishes to be placed under British protection. Coillard wrote:

> Many a Zambezian has found his way to the Diamond Fields and came back deeply impressed with the prestige of the British Government. The tale of what they have seen and heard, and of its dealings with the Native races naturally leads their chiefs and countrymen to yearn after the protection of Her Majesty the Queen's Government.[183]

---

[181] Ibid., 22.

[182] Ibid., 33, 34, and 35.

[183] Letter from F. Coillard to Sir F. Shippard, 8 January, 1889, quoted in Gann, *A History of Northern Rhodesia*, pp. 58-9.

Lewanika was also fearful of the Ndebele who had acquired rifles under the Rudd Concession. He wanted to know whether an attack by the Ndebele would be sanctioned by the British Government. The possible encroachment on his kingdom by the Portuguese from the west, and infiltration of white prospectors from the south presented another worry. His hold on power was shaky and he hoped that an alliance with Britain would strengthen his position. Coillard also had his own reasons for advocating British protection over Barotseland. He was convinced that

> ... the market economy of Western Europe with its free flow of capital and labour was the only rational mode of conducting the affairs of a civilized state. The Barotse kingdom with its monopolies, its tributes and raids, its 'distributor king' endowed with priestly powers, its caste distinctions and slavery, its bloody internal disturbances, was simply a savage empire held down by chains of abject and disgraceful servitude.[184]

He was appalled by the German occupation of South-West Africa and dreaded the expansion of the gold diggers who had transformed the terrain of South Africa. He was convinced that Barotseland needed protection from the invasion of European fortune seekers and adventurers. Britain was better placed than any other European power to provide protection for Barotseland. Coillard also believed that the British, once they had taken over the territory, would improve various infrastructure in the Territory, especially transport and postal communications. Improvements in transport and communication were necessary in his work.

---

[184]Ibid., 59.

These forces and interests gave Rhodes the opportunity to extend his influence north of the Zambezi. The British High Commissioner to South Africa, Sir Henry Brougham Loch recommended Barotseland to be placed under British sphere of interest. The Foreign Office, however, argued that it was not yet opportune for Britain to assume such responsibilities. This left the door open for Rhodes who sent his emissary to offer Lewanika the much needed 'protection'. On 27 June 1890 after negotiations, which began on June 22 1890, Lewanika signed a concession with Rhodes' emissary Frank Lochner. The arrival of a messenger from Khama with news that Lewanika should indeed place himself under British protection favoured Lochner and the Company.[185] Under the terms of the treaty the Company secured monopoly of mining rights. In return the Company promised to defend Lewanika from outside attacks, propagate Christianity, establish schools,[186] churches and trading stations. They promised to provide equipment for telegraph

---

[185]This was not the first treaty signed by Lewanika. Another was signed before the charter of the BSA Company was granted. This was between Harry Ware and Lewanika. Ware was instructed to secure a concession for mineral rights in Barotseland by a syndicate outside Rhodes' influence. Lewanika, being desperate for protection and the tempting gifts presented to him signed the concession granting the sole and exclusive right to dig, mine and quarry for precious stones, gold, silver, and all other minerals and metals of whatever description for a term of twenty years with an option of renewal. Lewanika was in return to receive the sum of 200 Pounds per year and a royalty of four per cent on all minerals or precious stones that were mined in the kingdom. Rhodes having acknowledged that he had been outwitted through a great deal of negotiations and persuasion managed to buy the concession for £9,000 and 10,000 shares in the BSA Company. See Hall, *Zambia*, p. 64-6.

[186]No schools were established by the Company throughout the period it had control over the Territory.

and institute regular postal services. A British Resident Representative was to be sent to Lewanika's capital.[187] The Company promised Lewanika an annuity of £2,000.

The events surrounding the signing of the Lochner treaty deserve closer examination as it had an impact on what transpired later. It is clear that Lewanika's interest was to place Barotseland under the protection of the British Government and not under that of a commercial enterprise. His letter to Khama lends support to this conclusion,

> I understand that you are now under the protection of the Great English Queen. I do not know what it means. But they say there are soldiers living at your place, and some headmen sent by the Queen to take care of you and protect you against the Matebele. Tell me as a friend. Are you happy and quite satisfied? Tell me all. I am anxious that you should tell me very plainly your friend, because I have great desire to be received like you under the protection of so great a ruler as the Queen of England.[188]

Lochner knew at the time of his representations that Lewanika wanted to place himself under the protection of the Queen and not under a commercial concern which he represented. One of the clauses in the treaty in fact read that the agreement was to be construed as a treaty between Barotseland as a nation and Her Majesty's Government: "this agreement shall be considered in the light of the treaty between my said Barotseland nation and the government of Her Britannic Majesty Queen Victoria."[189] Throughout the

---

[187]This did not come to fruition until seven years later when Major Robert Coryndon was sent to Barotseland.

[188]Quoted in Hall, *Zambia*, p. 63.

[189]Ibid., p. 71. Hanna has on the other hand argued, though feebly, that:

> Lochner, however, has asserted the contrary, believing that it was his only hope of success,

discussion Lochner evaded any express mention of the Company. Hall notes that although it was to be expected that Lochner would invoke the name of Queen Victoria, he went somewhat beyond his limits. He told Lewanika that he was an ambassador from the Queen sent to offer protection to Barotseland; he was not merely seeking a concession, but an alliance between the Barotse nation and the Government of Her Majesty the Queen.[190]

It later became apparent to Lewanika and Francois Coillard, a Frenchman with little understanding of British

---

> since it was hopeless to try to make clear to the chief and his councilors the precise character of a charter company. Because of this claim that he represented the royal authority he was afterwards accused of obtaining his ends by fraud, but although it is true that he did not directly represent the Crown, it is equally true and more relevant that he represented it indirectly, since the Company had been given the royal charter.

Hanna, *The Story of the Rhodesias and Nyasaland,* p. 131. It is difficult to discern the basis of Hanna's conclusion. The incorporation of a company by way of a charter does not make that company representative of the Crown. It is not different from a company incorporated under the Companies Act. The only difference being that a company created under the Companies Act is expected to comply with the provisions of the Companies Act and with any other subsequent amendments to the Act. But under a charter the company is expected to meet the provisions of the charter or any other directive, which may be issued from time to time by the Crown or amendments to the charter. Legally they are both entities separate and distinct from the Crown. The most significant difference between the two is that the Crown has greater control over a company incorporated by charter than that under the Companies Act: its constitution, objects and operations were directly subject to the control of Her Majesty's Government than if it were under the Companies Act. Furthermore, Article 24 (xiv) of the Charter empowered the Company to sue and be sued in its capacity and name. Nowhere in the Charter was there provision that the Company could bind the British Government. There is therefore no doubt that Lochner misled Lewanika. This was not accidental, but a deliberate and calculated scheme. As Hall has noted, "Wherever Lochner wrote to Lewanika from Coillard's house at Sefula, he used an envelope stamped 'OHMS'", Ibid., 68.

[190]Ibid.

politics, that the concession had been signed with a British commercial concern and not with the Government. Lewanika threatened to abrogate the concession. With the help of George Middleton, a missionary who had become a trader, Lewanika sent protest letters to the Prime Minister, Lord Salisbury. In one such letter Lewanika argued:

> What I wanted was not money but protection, not the protection of a mining mercantile company but the protection of Your Majesty and your Government, nothing else.... I bring my tears to you, great and gracious Queen, the mother of men. I earnestly pray that your Majesty may extend over me the cloak of your protection.[191]

The letters set off exchanges between the Colonial Office and Foreign Office; the Government had no choice but to validate the pronouncements by Lochner. On August 3, 1891, Lord Knutsford announced that Lewanika was indeed under the Queen's protection. The Foreign Office informed Lewanika that the BSA Company was acting on behalf of the Queen under the Royal Charter, but the Company was not allowed to exercise powers of government or administration in Barotseland.[192]

It must be noted that although Lord Knutsford directed that Lewanika be told that the company was acting on behalf of the Queen, there is no provision in the Charter to support that position. Though the Government had power under the Charter to protect any territory under the control of the Company whenever it was deemed fit and bring it within the British sphere of interest,[193] it had no

---

[191]Ibid., pp. 74-5
[192]Ibid., p. 75-6.
[193]See Article 34 of the Charter.

power to direct the Company to secure territories on its behalf. The BSA Company was a creation of a few individuals motivated primarily by avarice. It was a legal entity separate from the government. In fact Lord Knutsford himself noted when the petition for a royal charter of incorporation was presented:

> ... I am to observe that in consenting to consider this scheme in more detail Lord Knutsford has been influenced by the consideration that if such a company is incorporated by Royal Charter, its constitution, objects and operations will become more directly subject to the control by Her Majesty's Government than if it were left to those gentlemen to incorporate themselves under the Joint Stock Company's Act as they are entitled to do. In the latter case, Her Majesty's Government would be able to effectively prevent the company from taking its own line of policy which might possibly result in complications with native chiefs and others necessitating military operations....[194]

The British Government had the power to supervise the activities of the Company and lay down conditions, which had to be fulfilled, but how these activities were to be pursued was entirely the responsibility of the Company. There is no doubt that Lochner's actions embarrassed the British Government, precisely what the Government wanted to avoid by incorporating the Company under a royal charter. Besides, the assertion by Lord Knutsford that the BSA Company was acting on behalf of the Crown was contrary to what had been the established conduct of Britain. Her involvement overseas was not a deliberate and well-worked out long-term policy, but arose in support of the commercial interests of its citizens prompted by the

---

[194]Parliament Papers C. 5918 No. 88 of 16 May 1889: See also Articles 3 to 9, 15 to 18, of the Charter. They placed limitations on the operations of the Company.

exigencies of the time, and not out of concern or love of Africans.

Lewanika threatened to repudiate the Lochner Concession when it became evident that he represented a commercial establishment, and this posed a danger to the commercial interests of British citizens. Furnivall has observed that the involvement of the Imperial Government in the colonisation process was precipitated by commerce and not out of the need to civilise people in far away lands. "The flag has always followed the trade."[195] This was in line with the laissez faire ideas of the time. Furthermore, once a territory had been secured, whether direct or indirect rule was to apply was determined largely by commercial considerations. Furnival argues:

> The theory that the preference for direct or indirect rule depends on colonial policy in respect of native evolution does not cover all the facts.... The chief defect of the theory is that it does not sufficiently recognise the connections between colonial policy and economic circumstances.... Colonial relations are primarily economic and, although pronouncements on colonial policy will be framed in terms congenial to national traditions colonial practice is conditioned by the economic environment, and it is this rather than any rational philosophy of empire, which determines the choice between direct and indirect rule.[196]

The commercial value of the colonies was succinctly presented by the founders of the BSA Company. Rhodes observed:

> My cherished idea is a solution to the social problems. In order to save 40,000 inhabitants of

---

[195]J.S. Furnival, *Colonial Policy and Practice,* (London: Clarendon Press, 1948), p.4

[196]Quoted in Patrick E. Ollawa, *Participatory Democracy in Zambia: Political Economy of National Development,* (Devon: Arthur Stockwell Ltd., 1979), p. 73.

> the United Kingdom from bloody war, we colonial statesmen must provide new lands to settle the surplus population to provide new markets for the goods produced in the factories and mines. The empire... is a bread and butter question. If you want to avoid civil war you must become imperialists.[197]

Another founder member of the BSA Company, the Duke of Fife, observed: "Before many years are over, thousands of our countrymen who are too crowded here will take advantage of the enormous space, the healthful climate and immense resources which this territory (Northern Rhodesia) offers to those who will go in and possess the land."[198] These quotations reflect the ideas and motivations of a small but powerful group of private entrepreneurs. So profound were these ideas that they shaped the constitutional order for Northern Rhodesia. Institutions and practices were devised and implemented to give them effect.

Another notable reason which justified Government's intercession was that at that time there was a growing shift in the ruling economic ideas. The idea of chartered companies arose in the era when the influence of Adam Smith's theory of laissez faire was gradually declining. The general thinking, in Smith's time, was that if individuals were free to follow their own self-interest and engage in beneficial economic activities, not only the individuals but society as a whole would gain in the process. However, if government interfered, individual welfare along with that of society would suffer.[199] It was accepted that government involvement was necessary in

---

[197]Ibid.
[198]Ibid.
[199]Supra, pp. 2-3.

certain instances. The idea to charter the BSA Company was conceived by individuals who saw in it the possibility of increasing their own wealth and solve some of the economic and social problems Britain was facing.[200] Knowles has argued that the Company was conceived in the intermediate period of laissez faire economics, when government left everything to the unrestricted private enterprise, and one of constructive imperialism when the State itself assumed direct control in the acquisition of foreign territories.[201]

After pacifying Lewanika steps were taken to implement some of the terms of the Treaty. Late in 1897, Lewanika received the first British Resident Representative in Barotseland, Major Robert Coryndon. His arrival marked the beginning of Company rule and the genesis of the evolution of an administrative and constitutional framework for the Territory.

---

[200]Ollawa, *Participatory Democracy in Zambia: Political Economy of National Development*, p. 73: See the pronouncements of Rhodes and the Duke of Fife. They both perceived the BSA Company to be of benefit to, and a solution to the problems facing the United Kingdom and its people

[201]L.C.A. Knowles, "The Economic Development of the Overseas British Empire", *Studies in Economic and Political Science* ed. London School of Economics (London: Routledge, 1936), quoted in Gann, *The Birth of a Plural Society*, pp. 47-8.

2. Advances into North-Eastern Zambezi

Although that part of South Central Africa which became known as North-Eastern Rhodesia was brought under the control of the Company at an early stage, and its acquisition was marked by stirring acts of personal heroism and self sacrifice, it is to this day the least known of the areas Rhodes was instrumental in adding to the Empire.[202] This is attributed to a number of factors, in particular the climatic conditions and the impact of Arab presence, which did not apply to North-Western Rhodesia. These factors combined to limit the activities and population of Europeans, who came as gold diggers, merchants and adventurers and instrumental in opening North-Western Rhodesia.

The Arab influence left a distinctively Oriental impact on the tribes and the few Europeans who ventured in the area. They adopted many of the Anglo-Indian habits.[203] The presence of tsetse flies made the area unsuitable for the keeping of domesticated animals such as horses, which were a valuable mode of transport. Penetration into the area was difficult, and could only be undertaken by men prepared to risk their lives. These were mostly the missionaries. North-Western Rhodesia had no such difficulties.

The making of North-Eastern Rhodesia, unlike that of North-Western Rhodesia, was linked to imperial rivalry on

---

[202]Hole, *The Making of Rhodesia,* p. 225. Notable also is the fact that it has been treated to a limited extent by most scholars on Zambia.
[203]Ibid., p. 258.

the eastern coast of Africa. During his time in Africa Livingstone explored the Shire River and the Nyasa, Tanganyika, Mweru and Bangweulu lakes. On one of his trips with Dr. John Kirk he was joined by Bishop Mackenzie and his colleagues from the University Mission. They were the forerunners of the great missionary movement, which played an important role in bringing British influence to Nyasaland. In his address to undergraduate students at Cambridge University, Livingstone maintained, "I have opened the door, I leave it to you to see that no one closes it." These words became the clarion call of the Central African pioneers.

In 1875 a group of Scottish missionaries set out for Lake Nyasa; others followed in quick succession and the area was rapidly transformed. A small steamer was placed on Lake Nyasa; Blantyre and other towns were established; gardens were laid out and schools were set up for Africans. Traders, artisans and farmers followed in the wake of the missionaries. The territory was officially recognised as a British settlement in 1883 by the appointment of a British Consul at Blantyre.

The only means of access to the Nyasa region was through the Portuguese port of Quelimane, which was very arduous. In order to solve the problem and secure regular transportation of supplies from the coast and to organise trade in local produce, which was necessary for maintenance of missions, a limited liability concern - the African Lakes Company - was formed to carry out trading and transport business in conjunction with the missions. The

British Government's interest was that of ensuring that English and Scottish settlers in the area were allowed by the Portuguese to import goods, without hindrance, through Quelimane, on payment of a reasonable transit duty. They were, however, prepared to assume an active role in the area if forced by circumstances. This did not take long. In 1888 an expedition was sent from Lisbon, with the object of extending, consolidating and securing Portuguese occupation north and South of the Zambezi, under the command of Major Serpa Pinto. [204]

The presence of Harry Thompson who was, until then, Consul for Mozambique,[205] in the area and his subsequent maneuvers were successful in blocking Portuguese advances in Central Africa. On March 27, 1889 he wrote the British Government asking, "whether it would be convenient to Her Majesty's Government if I concluded preliminary treaties with the Native chiefs, of a character not necessarily committing the British Government to actually granting British Protection, but still forestalling and precluding any subsequent attempts on the part of Portuguese emissaries to bring the same districts by treaty under Portuguese sovereignty."[206] The treaties could be repudiated if the Government found them inconvenient or inoperative. Johnstone's request was granted and was appointed Her Majesty's Commissioner for Nyasaland in August 1889.

---

[204]Ibid., p. 234.
[205]Ibid.
[206]Hanna, *The Story of the Rhodesias and Nyasaland,* pp. 111-2

In order to check Pinto's movements, Johnstone arranged with Buchanan, the Acting Counsel for Nyasaland to declare British protection over the Makololo and the Shire district north of the Ruo River.[207] He later sent to Pinto a formal notification to that effect. By this move Johnstone forestalled Portuguese advances and committed the British Government to the representations made to Pinto. The area, thereafter, lay open for British expansion and Rhodes did not delay in taking advantage. His interest, however, lay in the area which became known as Belgium Congo, an area beyond Johnstone's commission. He wanted it under Company control.[208]

Johnstone being in the area was better placed to take greater strides in spreading British influence than Rhodes, whom he had met in London, while seeking support for the charter. In August, 1889 Johnstone asked Alfred Sharpe to undertake, on behalf of the British Government, the task of signing treaties with the chiefs in the country he was to traverse on his hunting and trading expedition towards the Luangwa River. He made two trips towards the Luangwa and on the second trip in 1890 he took it upon himself to declare the whole country west of the Luangwa and the north of Zambezi to be under British protection.[209] Though he

---

[207]The Protectorate status was officially announced in a public notice issued by Buchanan on September 21, 1889.

[208]Hole, *The Making of Rhodesia,* p.237.

[209]Sharpe first proceeded westwards from the Shire keeping close to the Portuguese border, until he reached Undi's town on longitude 32 degrees. He concluded treaties with all the chiefs *en-route* and brought the country, north of 15 degrees of latitude and between 32 to 35 degrees East longitude, under British influence. Some of the areas were, however, subsequently taken by the Portuguese. He returned to Blantyre then left again for Lake Nyasa at Bandawe and

managed to obtain treaties from some of the chiefs he failed to obtain one from Mpezeni of the Ngoni who was the principal chief in the area.

Later in the year Sharpe met Johnstone, who informed him of the formation of the British South Africa Company and Rhodes' plans to absorb the Lakes Company into the BSA Company. He was invited to carry out further treaties on behalf of the amalgamated concern. Sharpe was appointed Commissioner for the Lakes Company and given instructions to enter into treaties with the African chiefs. From each chief he was to obtain full mineral and commercial rights, and in return he was to pledge Company protection to the country and people from outside interference, place a British resident in the country, promote Christian missions and education, stamp out slavery and generally advance the civilisation of the African tribes. The treaties, Sharpe was advised, were also to include a clause to the effect that they were equivalent to a covenant of alliance with the British Government.[210]

On his return to Blantyre at the beginning of July 1890, Sharpe was instructed to undertake the most hazardous expedition ever. He was to travel to an area south of the Congo to sign a treaty with Msiri, a man who controlled a huge empire, rich in copper. Like Mpezeni, Msiri was under heavy influence from other Europeans who lived at his

---

struck southwards towards Mpezeni where he found a German, named Carl Wiese in Portuguese employ and a Portuguese officer who had completely influenced the Ngoni and their chief Mpezeni against the British. See Hole, *The Making of Rhodesia*, p. 287.

[210]Ibid. Furthermore, as a token the Union Jack was to be formally bestowed upon each chief who accepted.

palace who had warned him against signing any treaty with the British. Sharpe found Msiri very hostile and he was forced to return without a treaty. Unaware that Johnstone had sent Sharpe on an expedition to Msiri, Rhodes sent Joseph Thompson to secure a treaty with Msiri. He too, like Sharpe, failed in the undertaking. He returned to Nyasaland barely alive.

Although Thompson failed in the main task, he secured satisfactory treaties with chiefs between the three lakes, Nyasa, Tanganyika and Mweru. By the end of the treaty making exercise, Sharpe and Thompson, acting in conjunction with Commissioner Johnstone, signed treaties with all the chiefs in the region lying between Nyasaland, Luapula and Kafue Rivers, except Msiri, Mpezeni and Chitimukulu of the Bemba.[211]

In March 1891 the Chartered Company's field of operation was extended by agreement with the Foreign Office to cover the area which became known as North-Eastern Rhodesia, on the understanding that powers of government were for a while to be exercised on behalf of the Company by Her Majesty's Commissioner for Nyasaland, who was also to receive from the Company an annual contribution of £10,000 for the maintenance of a police force and such accounts as might be required for the expenses of government in the chartered sphere. The administration of justice was to be carried out by consular courts as

---

[211]Ibid., p. 381. Msiri's which country became known as Katanga, now Shaba, was annexed to the Congo Free State by Stairs, an Englishman in 1892. A treaty was signed with a Tabwa chief who was wrongly referred to as paramount chief or king of the Bemba.

stipulated in the Africa Order in Council, 1889. By the beginning of the 1890s the advances of other imperial forces in the area had been curtailed, and the cooperation of the local chiefs had been secured. The time was now opportune for the establishment of government structures.

Conclusion

Zambia is a product of greed and conquest by the powerful, and of the weak seeking a haven for peace and security. The dispersal from the north which involved the Lozi, Bemba, Lunda and other tribes was largely precipitated by smaller chieftaincies seeking independence. But the migration of the Ngoni and the Kololo from the south was for the search of a sanctuary. The impact of these tribal movements was limited to certain parts of Northern Rhodesia. The coming of Europeans brought another dimension to the history of the Territory. Their conquest of the Territory was for economic reasons: to find raw materials to keep the wheels of the factories in Europe turning and good land to settle the landless people of Europe.

The realisation of the economic objective was possible only if both internal and external threats to British presence in the area were taken care of. These were indeed addressed through the power of the pen, like in the case of the Litunga of Barotseland, and through the power of the sword as against the Ngoni. The motivating force was the greed of the private entrepreneurs. The role of the Imperial Government was merely that of protecting the

interests of its citizens when threatened by another imperial power or forces within the Territory.

Most of the tribes in Northern Rhodesia were influenced by their origins and the environment where they settled. This in turn had bearing on their relationship with the Europeans. The Lozi of Barotseland, due to the favourable agricultural conditions of the area in which they settled, developed a comparatively superior feudal social formation. It was, therefore, much easier for British presence to be established through treaties. This position can be contrasted with that of the Ngoni. They built a highly militarised kingdom and with the influence of the Portuguese, who dominated the eastern coast of Africa, they managed to resist British attempts to extend their influence in the area. British control was extended by force. The Ngoni resistance was crushed in a war which they themselves started.

The history of Northern Rhodesia is also a history of two competing cultures, one claiming superiority over the other. What was good or bad was determined according to the norms set by the culture of the invading Europeans. There is no doubt that if the aboriginal population found in the area which became known as Northern Rhodesia were enlightened to the level of the Europeans the history of Northern Rhodesia would have been a history of collaboration between the two cultures and not one of domination. The Europeans came with new ideas about social formations. All the existing tribal groupings were broken down and made part of one heterogeneous society curved out

of the entire continent without regard to history, customs and origins. The next step was to formulate a constitutional order which would harmonise the competing interests.

CHAPTER THREE

THE BUILDING OF THE FOUNDATION FOR CONSTITUTIONAL GOVERNMENT

Introduction

The last Chapter focused on the making of Northern Rhodesia, this Chapter and the next will centre on constitutional developments beginning 1890, when the first instrument of constitutional significance was issued, up to independence in 1964. Throughout this period the Government of Northern Rhodesia as a Crown dependency[212] was founded on two interdependent principles of subordination. The colonial legislature was subordinate to the executive and the Colonial Government was subordinate to the Imperial Government.[213]

The domination of the legislature by the executive was contingent on the status of the legislature within the dependency. The executive controlled the legislature as long as the Colonial Government was not yet an institution of a fully integrated and conscious territory.

The subordination of the Colonial Government to the Imperial Government was maintained in two ways. Within

---

[212] *Dependency* is the word which covers all kinds of political communities within the Dependent Empire. They are divided, in Constitutional law, into three classes: (1)Settled, Conquered and Ceded Colonies, (2) Protectorates and (3) Mandated territories. The classification is based on the mode of acquisition and determines the method by which the dependency is constituted. See Martin Wight, *The British Colonial Constitutions 1947* (London: Clarendon Press, 1947), p. 3; also pp. 5-17. The word *colony* is also used in certain instances loosely and interchangeably with *dependency*.

[213] Ibid., p. 17.

Northern Rhodesia, the Colonial Government was answerable to the Secretary of State for Colonies, and this was reflected in the relationship between the executive and the legislature. Externally the Imperial Government had powers to legislate directly for the Territory and determine its foreign affairs. The subordination of the Northern Rhodesia Government to the Imperial Government was maintained through various fetters which had to be eliminated before independence. Under such an arrangement, constitutional development meant the gradual elimination of these fetters, and only when they were completely eliminated did the Territory qualify for independent status as a member of the Commonwealth of Nations.[214]

The constitutional development in Northern Rhodesia can be traced in four phases influenced by the way in which the Territory was established as a British dependency, the imperial policy, the social formations, and competing claims between the Africans, the BSA Company, the settlers and the British Government. The first phase was a period of experiment with government (1899-1924). The second phase begun around 1911, before the first one ended. It was characterised by white settlers' efforts to assert their supremacy. It gained momentum after 1930 and lasted until 1945. The third stage involved the delicate process of incorporating the interests of Africans in the political process and encouraging multi-racial politics (1945-1962). The last phase is identified by the quest for political

---

[214]Wight, *The British Colonial Constitutions*, p. 39.

power by Africans and covered the period from 1962 up to independence in 1964.

The constitutional arrangements in the first three phases were authoritarian with the Governor and his predecessors wielding most powers. The traditional constitutional devices, which make up the foundation of Western Constitutionalism namely; separation of powers, checks and balances and the protection of individual human rights were missing. The last two years before independence were marked by attempts to develop a constitution guaranteeing constitutionalism. The outcome at independence was a "dual inheritance or legacy of colonial power: an authoritarian one (colonial practice), and one stressing participation and equity (the metropolitan values of the colonial power). The former was implanted during seventy-five years (and seventy-two for Northern Rhodesia) of imperial domination: the other was a last minute hypocritical legacy."[215] In this Chapter we examine the first phase while the other three will be examined in the next Chapter.

I. Constitutional Developments 1899 - 1911

Hall has observed that the inevitable consequence of colonial rule was a slow disintegration of traditional African way of life.[216] Tribes which lived in small

---

[215]T.M. Callaghy, *The State-Society Struggle: Zaire in Comparative Perspective* (1984), 219-20, quoted in Filip Reyntjens, "Authoritarianism in Francophone Africa from the Colonial to the Post Colonial State", *Third World Legal Studies - 1989*, p. 76.

[216]Hall, *Zambia*, p. 96. For some of the Zambian tribes the effect was gradual, so that even today they retain much of their ancient social structures. For others, such as the

homogeneous groups were broken down and made part of a plural society. This was the consequence of the process of complex interaction between Europeans and Africans. Gann has identified four main groups of people responsible for the change: the Africans, missionaries, administrators and settlers.[217] They contributed to the making of Northern Rhodesia and shaped the constitutional framework which emerged. The constitution granted at independence was the product of forces unleashed by these groups, from the very time of establishment of European influence. In fact in the Commonwealth "... the new constitutions did not represent an abrupt metamorphosis into state of freedom. On independence there was a new emperor, but his suit of clothes was far from new. The weavers in the Colonial Office had began work on the cloth, and taken out their tailoring shears long before. The final constitution was the last of a series providing for increasingly responsible government, so much so that at the end the tailoring was often largely a matter of scissors and paste - paste which, it was hoped (but often vainly) was 'pasted close.'"[218]

Attention was not directed at explicitly establishing a constitutional framework but an administrative structure. Morris and Read have observed: "The colonial territories

---

Ngoni, whose political formation was shattered by military conquest, or the Lamba whose tribal areas were swamped by white settlers, the change was overwhelming.

[217]Gann, *The Birth of a Plural Society*, see the Foreword by Max Gluckman, pp. xii - xiv. Some of the missionaries, administrators and settlers came in initially as concession hunters, fortune seekers and adventurers.

[218]William Dale, "The Making, Remaking of Commonwealth Constitutions", *International and Comparative Law Quarterly*, 42 (1993), 68.

might be termed administrative States: the structure of the administrative hierarchy was in fact the constitution."[219] The building of the constitutional order in Northern Rhodesia started when both external and internal forces were contained. However, due to the vastness of the Territory and poor communication system it was not possible to administer Northern Rhodesia as one. It was, therefore, administratively divided into North-Western and North-Eastern Rhodesia, and constitutional development was distinct in each sector. This was a unique development for Northern Rhodesia necessitated by the nature of the Territory itself and the level of development of the Africans. The story would have been different had the conditions been different.

1. North-Western Rhodesia

Although the Lochner Concession was signed in 1890 no steps were taken to implement its terms, until 1897. In that year Major Robert Coryndon[220] arrived in Barotseland as the first British Resident Representative answerable to the Foreign Office, and the Company had limited control over his activities. The primary interest of the British

---

[219]H.F. Morris and Read, *Indirect Rule and the Search for Justice* (1972), 287, quoted in Reyntjens "Authoritarianism in Francophone Africa from the Colonial to the Post-colonial State", 60.

[220]Robert Coryndon was an officer in the elite Bechuanaland Border Police. He was also part of Rhodes' Pioneer Column which occupied Matebeleland. Though he was only 27 when he took up his commission he was a well-suited man given his public school background. See Seidman *State, Law and Development*, pp. 39-49, on education in the colonial service. It was a generally held belief in the Colonial Service that good government depended not upon good laws but upon good men. The English public schools bred such men.

Government was to establish law and order before a formal system of government could be put in place.[221] Apart from taking measures to promote law and order Coryndon could do no more administratively. The Lochner Concession did not confer administrative powers on the Company and was never sanctioned by the British Government.[222] As a result of these difficulties on 25 June, 1898 a new treaty was signed between the Company and the Barotseland establishment. For some reasons, including the fact that the original document lacked Lewanika's signature, the British Government refused to sanction it. Another concession was prepared and signed on 17 October, 1900 at Victoria Falls which gave to the

---

[221]See for instance the Africa Order in Council, 1889, which applied to most British territories in Africa. It was a voluminous piece of legislation which attempted to transplant the British legal system to the colonies. Emphasis was placed on the establishment of laws and the dispute settling mechanisms: the courts. Coryndon was granted a warrant to establish courts (Consular Courts) in 1897 long before any administrative structure had been put in place. They were constituted according to the provision of the Africa Order in Council, 1889. For a general discussion of the evolution of the judicial system in Zambia, see Kanganja, *Courts and Judges in Zambia: The Evolution of the Modern Judicial System.* The value of this work lies in the fact that it is largely a compilation of the official materials on the judiciary. The work is essentially descriptive. See also the Foreign Jurisdiction Act, 1890, sections 4-9. The Act conferred jurisdiction on Her Majesty over all foreign territories acquired by treaty, grant, usage and placed more emphasis on establishing and regulating courts.

[222]See the preceding Chapter on the signing of the Treaty. Lochner obtained the Concession by posing as an officer of the Crown. Furthermore, Article 3 of the Charter expressly empowered the Company to sign new concessions provided prior consent of the Secretary of State was obtained. The signing of the Lochner treaty was without such prior consent, although, Lochner heavily committed the British Government. The granting of monopoly under the Concession to the Company in Barotseland contravened Art. 20 of the Charter.

Company among other things the mandate to administer the Territory.[223]

The vastness of the Territory presented serious administrative problems. The Company suggested to divide Northern Zambezia, into two regions, each under a Deputy Administrator. One sector was to be answerable to the Administrator of Matebeleland and the other to the Administrator for Mashonaland. It was envisaged that most of the settlers in Northern Rhodesia would come from Southern Rhodesia and South Africa, hence it was suggested that Roman-Dutch law should be introduced. The Foreign Office accepted the division in view of differences in the geographical access to the two areas, but the idea of extending Roman-Dutch law was rejected. It was argued, the area was much too unhealthy to absorb many white settlers. It was instead agreed that English law should be extended to Northern Rhodesia, just like in British Central Africa,[224] with which it had much more in common than Southern Rhodesia.[225] The matter was finally settled in 1899. The Territory north of the Zambezi was divided into two: North-Western and North-Eastern Rhodesia. The Kafue River was the natural divide.

---

[223]The new treaty was disadvantageous to Barotseland. The annual payment to the king was reduced to £850. In return the Company secured the right to make grants of land for farming in any portion of the Batoka country to whites, with the approval of the king. Within Barotseland the constitutional power of the Paramount Chief remained unchanged. The Company retained the mineral rights throughout the territory except in Barotseland Reserve where mineral prospecting was specifically prohibited.

[224]This was the name of the territory which became known as Nyasaland, see the Nyasaland Order in Council, 1907.

[225]See Gann, *A History of Northern Rhodesia,* p.80, n. 1.

Company among other things the mandate to administer the Territory.[223]

The vastness of the Territory presented serious administrative problems. The Company suggested to divide Northern Zambezia, into two regions, each under a Deputy Administrator. One sector was to be answerable to the Administrator of Matebeleland and the other to the Administrator for Mashonaland. It was envisaged that most of the settlers in Northern Rhodesia would come from Southern Rhodesia and South Africa, hence it was suggested that Roman-Dutch law should be introduced. The Foreign Office accepted the division in view of differences in the geographical access to the two areas, but the idea of extending Roman-Dutch law was rejected. It was argued, the area was much too unhealthy to absorb many white settlers. It was instead agreed that English law should be extended to Northern Rhodesia, just like in British Central Africa,[224] with which it had much more in common than Southern Rhodesia.[225] The matter was finally settled in 1899. The Territory north of the Zambezi was divided into two: North-Western and North-Eastern Rhodesia. The Kafue River was the natural divide.

---

[223]The new treaty was disadvantageous to Barotseland. The annual payment to the king was reduced to £850. In return the Company secured the right to make grants of land for farming in any portion of the Batoka country to whites, with the approval of the king. Within Barotseland the constitutional power of the Paramount Chief remained unchanged. The Company retained the mineral rights throughout the territory except in Barotseland Reserve where mineral prospecting was specifically prohibited.

[224]This was the name of the territory which became known as Nyasaland, see the Nyasaland Order in Council, 1907.

[225]See Gann, *A History of Northern Rhodesia*, p.80, n. 1.

population fully aware of what was going on, the constitutional start for Northern Rhodesia would have been different.

It was the duty of the High Commissioner as the chief executive to take or cause to be taken measures and do or cause to be done everything lawful which was in the interest of Her Majesty's service.[227] He was empowered to appoint the Administrator and bestow on him such powers and authorities as he deemed fit. The powers given to the Administrator could be overridden by subsequent directions and instructions. The Administrator served at the pleasure of the High Commissioner.[228] The appointment of Judges, Magistrates and other officers necessary for the administration of North-Western Rhodesia was also his responsibility.[229]

The High Commissioner was empowered to legislate for the Territory through Proclamations for the administration of justice, the raising of revenue, by the imposition of taxes including hut tax and customs duty, and generally for peace, order and good government of all persons, including the prohibition of acts tending to disturb public peace.[230]

---

[227]Art. 5.

[228]Ibid., 6.

[229]The discussion of the judiciary in Northern Rhodesia has been deliberately excluded in this study for two reasons. The descriptive and slightly analytical exposition of its development has already been ably done by other scholars. See generally, Kanganja, *Courts and Judges: The Evolution of Modern Judicial System.* The judiciary had very little influence on the constitutional developments and general political changes. In fact the development of the Judiciary came as a consequence of the economic, social and political changes within the territory.

[230]The listing of the areas in which legislation could be issued is redundant in view of the blanket provision: *generally for peace, order and good government.* It has been

The only limitation was the requirement that African customary laws should be respected, unless they were incompatible with the exercise of Her Majesty's power.[231] The High Commissioner was expected to have regard to suggestions made by the Company, but no Proclamation on the raising of, or appropriation of revenue was to come into force unless the consent of the Company was obtained.[232]

One aspect of subordination was evident in this crude constitutional arrangement. The Colonial Government was subordinate to the Imperial Government. The second aspect was not present because the legislative and executive powers were fused in one person. The High Commissioner as the principal officer in North-Western Rhodesia was subordinate to the Crown. Though the powers and jurisdiction of Her Majesty over Northern Rhodesia were vested in him, they were to be exercised subject to instructions directly from Her Majesty, or from Her Majesty through the Secretary of State.[233] The Crown retained the power to disallow any Proclamation either wholly or in part[234] and to revoke, alter, add to, and to amend or repeal the Order in Council, which prescribed the constitutional framework.[235]

The Order in Council merely set out the general administrative framework without being specific. This was

---

held that such a provision can cover any conceivable situation. See *Croft v Dumphy* [1933] AC 156; *Ibralebbe v R* [1946] AC 900.

[231]Art. 9.

[232]Ibid., 8.

[233]Ibid., 5

[234]Ibid., 11

[235]Ibid., 19.

deliberate and meant to confer greater discretion on the High Commissioner in dealing with the exigencies of the time. *The arrangement remained in place until 1911, when* the territory was joined with North-Eastern Rhodesia to form Northern Rhodesia. In the intervening years there were very few amendments of constitutional significance to the Order in Council.[236]

2. North-Eastern Rhodesia

Developments in North-Eastern Rhodesia proceeded differently from North-Western Rhodesia. Whereas in the latter British influence was established through peaceful means in the former an element of force was used. Mpezeni's continued refusal to sign a concession with the British frustrated their advances into the area and the establishment of an administrative machinery. His defeat in 1897 ended hostilities and paved the way for constitutional developments. The Northern-Eastern Rhodesia Order in Council, 1900 was consequently passed. Though there was only a year's difference with that of North-Western Rhodesia, it was much more comprehensive. The constitutional framework provided for a diffusion of power and differentiation between the officers to discharge the various functions of government. Unlike in North-Western Rhodesia, the legislative power was divided into two offices. The Administrator on his own, or with the

---

236See *North-Western Rhodesia Order in Council, 1902 and 1910*. The Order in Council of 1910 dealt with judicial matters. It provided for appeals to His Majesty in Council from the Administrator's Court of Barotziland - North-Western Rhodesia, and the High Court of North-Western Rhodesia.

concurrence of the Advisory Council once established, was to legislate.[237] The High Commissioner was also empowered to make Regulations called *Queen's Regulations*.[238]

The power to manage the general affairs within the Territory were conferred upon the Chartered Company, exercised by the Administrator, supported by other officers found necessary. He was appointed and paid by the Company, subject to the approval of the Secretary of State. The Advisory Council was to assist the Administrator in the running of the Territory. It was to be made up of the Administrator, a senior Judge as ex officio member, and not less than three other members appointed by the Company, subject to the approval of the Secretary of State. The constitution of the Advisory Council was dependent on the Company's Board of Directors resolving to create it.[239] The Administrator was to preside at all meetings, and all questions were to be decided on majority vote of those present. In case of equal votes the Administrator was to have a casting vote.[240]

The scope of the authority of the Council was limited. The Administrator was to take its advice on all matters of importance affecting the administration of the area. But in urgent cases he was at liberty to proceed as he deemed fit. He was, however, obliged to inform the Council of the

---

[237]The Advisory Council was never established. The legislative power in essence rested with the High Commissioner.
[238]The Administrator's Regulations could, however, amend or repeal a Queen's Regulations. See Art. 19.
[239]Ibid., 11.
[240]Ibid., 13.

action taken and the reasons.[241] The Council had another limitation. The Administrator was at liberty to act contrary to its advice. When he did so, he was obligated to inform the Company. Any member opposed the action taken was required to advance his reasons to the Company. Where and when appropriate the Company could reverse the decision of the Administrator.[242] The provision of the Advisory Council constituted a step ahead of the unsophisticated constitutional arrangement for North-Western Rhodesia. It was a phase mid-way towards the creation of the Legislative and Executive Councils. Both institutions trace their origin to the Advisory Council.

The autocracy of the High Commissioner, evident in North-Western Rhodesia was toned down on paper, especially in the exercise of the legislative functions. If the Council had been established during the subsistence of the Order in Council of 1900, it would have been lawful for the Administrator with its concurrence to make, alter and repeal Regulations. The power was, however, limited. No Regulation was to be made affecting the constitution, government or control of the military police forces. All Regulations made were to be of no effect unless at least two members of the Council, excluding the Administrator, voted in favour.[243] Notwithstanding conferment of legislative power on the Council and the Administrator, the territorial government was still subordinate to the Imperial Government. All the Regulations required the

---

[241]Ibid., 14.
[242]Ibid., 15.
[243]Ibid., 16.

assent of the High Commissioner.[244] Upon assent a copy of the Regulation was to be transmitted to the Secretary of State, who had the power to disallow it within one year of taking effect.

The High Commissioner, on the other hand, before issuing any Regulation was to have regard to suggestions or requests made to him in respect of the proposed Regulation by the Company. But where the Regulations concerned the raising of revenue the prior consent of the Company was needed. Her Majesty retained the power, through the Secretary of State, to disallow the Regulations made by the High Commissioner.[245] Both the Administrator in promulgating the Regulations and the High Commissioner, the *Queen's Regulations,* were expected to have regard to African laws or customs regulating civil relations of local chiefs and tribes, unless doing so was incompatible with the exercise of Her Majesty's power and jurisdiction.[246]

The Board of the Company never passed the resolution to establish the Advisory Council. The effect was that the Administrator remained the chief executive and the High Commissioner, the legislature. The position, in practical terms, was not different from that in North-Western Rhodesia. The marked difference was largely in the extent of subordination of the Colonial Government to the Imperial Government. It was much more pronounced in North-Western

---

[244]The High Commissioner for North-Eastern Rhodesia was the person exercising the jurisdiction of Her Majesty's Consul General and Commissioner for British Central African - Nyasaland as it was then called - Art. 3.
[245]Art. 17.
[246]Ibid.

Rhodesia than in North-Eastern Rhodesia. The Administrator for North-Eastern Rhodesia was appointed by the Company. The legislative power was exercised by the High Commissioner. In North-Western Rhodesia both the legislative and executive powers were vested in the High Commissioner appointed by the Crown. He had the power to appoint the Administrator and endow him with such powers as he determined to be necessary.

The Imperial Government had greater control over the affairs of North-Western Rhodesia than in North-Eastern Rhodesia. In North-Eastern Rhodesia, the Crown was much more withdrawn. The Order in Council of 1900 was amended several times before it was finally repealed by the Northern Rhodesia Order in Council, 1911.[247]

3. Northern Rhodesia

By 1911 the social and economic conditions in North-Western and North-Eastern Rhodesia had markedly improved. Movements into the interior became much easier. The railway line from Bulawayo reached Victoria Falls in 1904 and Broken Hill in 1906. The boundary dispute between North-Western Rhodesia and the Portuguese territory of Angola was

---

[247]See the *North-Eastern Order in Council, 1907*. This Order in Council was made following the conferment of protectorate status on British Central Africa and the promulgation of the *Nyasaland Order in Council, 1907*. According to this Order, British Central Africa changed to Nyasaland and in place of the High Commissioner there was the Governor. By the *North-Eastern Rhodesia Order in Council, 1909* the Orders of 1900 and 1907 were amended so that the powers of the High Commissioner in the area were transferred from the Governor for Nyasaland to Her Majesty's High Commissioner in South Africa. *Queen's Regulations* became the *High Commissioner's Proclamations*. The High Commissioner for South Africa assumed legislative authority over the entire Northern Rhodesia.

finally settled in 1905.[248] Following these developments, there was no cause to keep the two areas administratively apart. In 1911 His Majesty agreed to the amalgamation of the two administrations. This entailed putting in place a new constitutional arrangement for the entire Northern Rhodesia. The Northern Rhodesia Order in Council, 1911 was promulgated. It repealed all Orders in Council of constitutional significance in both areas.[249]

The new arrangement was not different from that created by the North-Eastern Rhodesia Order in Council, 1900.[250] Innovations were very few. The administration of the entire Territory was vested in the Chartered Company, exercised by the Administrator with the help of other officers deemed necessary.[251] The legislative powers were exclusively vested in the High Commissioner who was expected to consult with the Administrator, as the man physically present in the Territory, in the formulation of legislation. He was also to take into account any suggestions made by the Company. But where the Proclamation involved raising of revenue for the Territory the consent of the Company was needed.[252]

---

[248]See the *Award of His Majesty, the King of Italy Respecting the Boundaries of Barotse Kingdom (1905; Cmnd. 2584)*. See also J.W. Davidson, *The Northern Rhodesia Legislative Council*, (London: Faber & Faber, 1948), p. 17

[249]These were, *The Barotziland - North-Western Rhodesia Orders in Council, 1899, 1902* and *1909* and the *North-Eastern Rhodesia Orders in Council, 1900, 1907* and *1909*.

[250]For example, the creation of the Advisory Council by the resolution of the Company, with the same composition, was retained: See Art., 13.

[251]Ibid., 7 and 9.

[252]Ibid., 17.

The office of the Resident Commissioner was created to keep the High Commissioner, who was based in Pretoria, informed of the activities in the Territory.[253] He was a public officer appointed by the Secretary of State and paid from the revenue of the Territory. He was expected to report to the High Commissioner on every draft Proclamation and appointments submitted for approval by the Administrator, and generally on all matters of importance within the Territory. He was the second highest officer in Northern Rhodesia after the Administrator.[254] Though the legislative power was vested in the High Commissioner the Administrator played a greater role. All Proclamations were drafted on the instruction of the Administrator. The High Commissioner often assented to proposed Proclamations. At this stage the subordination of the legislature to the executive was not clear largely because the powers were vested in individuals, and not in groups of individuals. But the domination of the Colonial Government by the British Government was obvious.

A copy of every Proclamation had to be sent to the Secretary of State for Colonies, who had the power to disallow them within one year of their coming into force, either on his own initiative or at the request of the Company. The High Commissioner was appointed by, and answerable to His Majesty. He was not accountable to anyone within the Territory. The Administrator was appointed and paid by the Company subject to the approval of the

---

[253]Ibid., 8(1).
[254]Ibid., 8.

Secretary of State. Once appointed he could be removed or suspended by the Secretary of State. The Company could remove him subject to the approval of the Secretary of State.[255] The power to change the constitutional framework, one of the rights of a sovereign state, was still with the Crown. The constitutional changes which occurred after 1911 were largely precipitated by the economic, social and political developments both within and outside Northern Rhodesia, which in turn led to the growth of the settler community who begun demanding representation in the running of Northern Rhodesia.

The extension of the railway into Northern Rhodesia opened the way for Europeans of different vocations to settle in the area. Chief among them were farmers, miners, railway workers and traders. In 1903 Kalomo was established as the administrative centre for North-Western Rhodesia. The administrative centre moved to Livingstone in 1907, after the railway line from Bulawayo reached the town. After amalgamation in 1911 Livingstone became the capital of Northern Rhodesia. With the expansion of the administration the cost of running the Territory equally increased. New sources of revenue were needed. The Company could not shoulder the cost as it was already financially burdened. As one of the many measures to solve the problem, the taxing of Africans was introduced. The tax levied was used to support the administration.[256] Africans, unfamiliar

---

[255]Ibid., 9 to 12.

[256]Even then the Hut Tax collected was not enough to meet the expenditure. By 1911 when most Africans were paying tax, the deficit in the administration of the two areas was

with the cash economy were compelled to abandon their villages to look for employment, where they were paid in cash. The emerging farming, mining, and railway industries absorbed them to provide cheap labour. Those who were not willing to work were, sometimes, compelled to do so by burning their huts.[257]

Northern Rhodesia's real wealth lay in mineral resources. The discovery of copper and zinc brought a steady flow of miners. With the coming of Africans seeking employment new social formations emerged in the form of mine compounds. The two races were, however, kept apart by a rigid colour bar, skill and standard of living. The mining industry precipitated the coming of other economic activities. The most immediate was the establishment of the transport network. Both Africans and Europeans joined in the construction of the railway line. A community of railway workers emerged. In the wake of the miners and railway workers came the farmers who supplied them food. They became the first Europeans to compete with Africans for land. Following the farmers were traders of European and Asian origins. They initially dealt in ivory, guns and other European goods. After realising some profit some of them established shops along the line of rail. By 1910 Livingstone was the area most populated by settlers and most urbanised compared to the rest of Northern Rhodesia. It was here that the events which transformed Northern Rhodesia started.

£ 54,000 as against a combined revenue of £ 95,000. See Gann, *The History of Northern Rhodesia*, p. 103.

[257]Ibid., p. 102.

II. Constitutional Changes from 1911 to 1924.

The era of experiment ended in 1924, when the traditional colonial constitutional arrangement involving the Governor, Legislative Council and Executive Council was established. It also marked the end of Company rule and the beginning of direct imperial rule. The constitutional developments for the period 1911 to 1924 were in two stages. The first lasted until 1918, when the Advisory Council was established. The second phase ended when a new constitutional arrangement was put in place by the Northern Rhodesia Order in Council, 1924. Both phases were characterised by bitter struggles between the settlers and the Company for their respective interests. The Imperial Government assumed the position of an umpire.

1. The Creation of the Advisory Council

The first rousing of political interest occurred in Livingstone. One of the first people to develop interest in politics was Leopold Moore, a chemist who also established and owned the first newspaper in the Territory: *The Livingstone Mail*. Moore's political efforts gained strength with the increase in the white population and economic opportunities. The paper initially focused on local grievances such as the high prices of land. Attention later shifted to mining policies of the Company, which were believed to be blocking the full exploitation of the Territory's mineral resources. The Company's land rights

were questioned and demands were made for self-government.[258]

The major complaints of the settlers, whose number was steadily increasing,[259] was not on self-rule, as Moore had advocated, but on land prices and cost of living. They also demanded some degree of representation in government. The appointment of Lawrence Aubrey Wallance as Administrator in 1909 following the death of Codrington, worked in their favour. Wallance was better disposed to their demands than his predecessor. He recommended the creation of the Advisory Council to the Company.[260] The first world war, however, diverted attention on these issues; prominence was given to matters transcending the confines of Northern Rhodesia, such as the amalgamation with Southern Rhodesia.

The future of Southern Rhodesia, also under Company control, was uncertain. It wavered between two options: some form of closer association with the Union of South Africa, after the attainment of self-government or with Northern Rhodesia. Both suggestions were made by the Company in a bid to cut down the cost of administration of the two Rhodesias. Fears of Southern Rhodesia being submerged by South Africa brought anti-Union feelings, and the idea was discounted. The idea of amalgamation of the two Rhodesias had been entertained way back in 1909 and

---

[258]Ibid., 155,

[259]The number had grown from 1,500 in 1912 to 2,900 in 1910: See Davidson, *The Northern Rhodesia Legislative Council*, p. 18.

[260]Gann, *The History of Northern Rhodesia*, p. 156.

again in 1911.[261] Proposals had earlier on been made for the formation of a northern state consisting of Northern Rhodesia, Southern Rhodesia, Nyasaland and Bechuanaland.[262] In 1913 the President of the Company had put forward a suggestion for a greater Rhodesia stretching from Mafeking up to the Congo. In 1915 the Directors of the Company issued a statement seeking the amalgamation of the two Rhodesias. In Southern Rhodesia, where the proposal was submitted before the Legislative Council in 1917, the elected members voted against the idea,[263] and the scheme was abandoned.

In Northern Rhodesia, Moore led the Campaign against amalgamation. It was argued that if amalgamation was allowed, Livingstone would be reduced to a village, a possibility with serious consequences to those who had invested in the area. The only people who stood to gain were the Company Directors and Shareholders who were to spend less on the administration of Northern Rhodesia.[264] Amalgamation, it was argued, would cause Northern Rhodesia to lose the Congo market. The Northern Rhodesia representatives in the Common Legislature would be outnumbered, Company rule would continue and the Territory would greatly suffer from perpetual drain in African

---

[261]See Claire Palley, *The Constitutional History and Law of Southern Rhodesia* (London: Oxford University Press, 1965), p. 191.
[262]See African 948, No. 68 Encl., 19 May, 1911, *Relative to "a great British Community in the Heart of Africa Under its own Government."*
[263]Ibid., 195. See also Gann, *The History of Northern Rhodesia*, pp. 174-180.
[264]*Livingstone Mail*, 3 December, 1915.

labourers to Southern Rhodesia and South Africa.[265] The scheme failed to gain support in Northern Rhodesia.

When the idea of amalgamation finally collapsed the question of representation within Northern Rhodesia became much more urgent. Gann has noted that "had amalgamation gone through, the question of representation for the whites in Northern Rhodesia would have solved itself for delegates would have taken their seats in the Legislative Council."[266] The British Government, as a referee, stepped in, when it became obvious that the scheme was not workable. In 1917 a delegation from Northern Rhodesia traveled to London where it was agreed that if the Southern Rhodesian Legislative Council were to reject amalgamation, Northern Rhodesia was to get at least an Advisory Council.[267] Indeed the following year an Advisory Council was constituted.

It must, however, be noted that the creation of the Council was not a transformation of the constitutional document: the Northern Rhodesia Order in Council, 1911. It was an advancement in the implementation of the constitutional arrangement embodied in the 1911 Order in Council. The creation of the Advisory Council was already provided for.[268] In real terms the creation of the Advisory

---

[265]Ibid., 10 December, 1915.
[266]Gann, *The History of Northern Rhodesia*, p. 179.
[267]*Livingstone Mail*, 29 June, 1917.
[268]See Art. 13 of the *Northern Rhodesia Order in Council, 1911.* Its creation merely required the Board of the Company to pass a resolution to that effect. It was the first Advisory Council to be created for the Territory; though the *North-Western Rhodesia Order in Council, 1900*, Art. 12 provided for its creation it was never implemented.

Council was a major constitutional development since 1899. The Council was merely advisory to the Administrator. It had neither legislative nor executive powers of its own. Unlike the Advisory Council provided for under the North-Eastern Rhodesia Order in Council, 1900, which was to legislate together with the Administrator, that created under the Order in Council of 1911 had no such powers. The Administrator was not bound to act according to its advice.[269] During the first meeting of the Council the Administrator did not hesitate to emphasise the constitutional position of the Council:

> The Council has been instituted as you know as an Advisory Council to the Administrator, and though it has no legislative or executive powers, you will be able to advise on any proposed legislation affecting European interests and not of too urgent a nature and I shall be glad to consult you whenever possible and to have your advice on the more important regulations that may be needed under any Proclamation.[270]

Though constitutionally the Council could do nothing other than advise the Administrator, in reality it possessed some measure of control over the Administrator. The Administrator was often asked to account for his actions during the question and answer sessions and was obliged to give answers.

The Council represented the interest of the settlers. Apart from the Resident Commissioner, a senior Judge as ex officio member, the Company was empowered to appoint not less than three other members of the Council. When it came

---

[269]See the discussion of the Council in connection with North-Eastern Rhodesia above.

[270]See *Summary of the Proceedings of the First Legislative Council*, held at Livingstone on the 25 September, 1918; Northern Rhodesia Government Gazette 14 December, 1918.

to constitute its membership the Company opted to appoint persons nominated by the Farmers Association. The artisans and railway workers opposed the proposal. Finally members were elected by an electorate made up of all male British subjects of European descent over the age of twenty-one receiving a salary of £ 150 per annum or occupying premises worth £ 150. The Africans, who numbered well over a million, had no vote. This was the beginning of qualitative franchise.

2. Constitutional Developments: 1918 - 1924 and End of Company Rule.

The forces which propelled Northern Rhodesia from a position of being with an Advisory Council to a Legislative Council with an official majority, Executive Council and the Governor, largely emanated from Southern Rhodesia. The settlers were generally not in favour of the Company and its policies especially on land. They challenged, through the court, the Company's interests in land. The matter was decided by the Privy Council on appeal in 1918.[271] The Privy Council held that the land did not belong to the Company in its commercial role. The Company could, however, sell the land in its administrative capacity to make good the deficits incurred in the administration of Southern Rhodesia as an agent of the Crown. The land belonged to the Crown. The decision came as shock to the Company as it was contrary to the generally held belief. The Buxton Committee Report noted: "So long as the Company believed themselves

---

[271]See *In Re Southern Rhodesia* [1919] A.C. 211.

to be the owners of the land they were willing to spend their money liberally in carrying on the administration. But clearly, under the present circumstances the Company would be neither willing nor able to spend their shareholders' money on any project from which they could not be sure of reimbursement with interest or profit."[272] The events which precipitated the end of Company rule need consideration.

(a) The End of Company Rule: Options

The Company responded by stopping any further capital expenditure on behalf of the settlers and was willing to give up the administration of the territories, provided they received a good offer for their railway and mining interests, and a reasonable compensation to cover the administrative deficits. Another form of government to manage the territories was, therefore, urgently needed and various options were considered. The matter was settled in Southern Rhodesia through a referendum in 1922, where the settlers opted for responsible government. A solution had to be found for Northern Rhodesia as well. The Company was not willing to be tied to a territory north of the Zambezi running an annual deficit of £ 157,000 despite the imposition of Income Tax in 1921.[273] While the issue was being debated in Southern Rhodesia, the detest of the Company was growing in the north. The settler community looked to the Imperial Government for succour. Without the

---

[272] *The First Report of a Committee appointed by the Secretary of State for Colonies to consider certain Questions relating to Rhodesia (1920; Cmnd 1273)*

[273] Gann, *The History of Northern Rhodesia*, p. 190.

Company, the settlers could not finance their own expenditure. The settlers wanted greater representation; they felt that the Advisory Council was inadequate for this purpose. The issue of land rights also needed to be settled, like in Southern Rhodesia.

The Barotse aristocracy also joined in the call for an end to Company rule. They too, questioned the Company's rights over land and minerals in the Territory and argued that they were obtained under false pretences.[274] It was argued that the concessions should be canceled and replaced by new agreements based on the fact that the Company was a commercial body.[275] The British Government rejected the demands. The only solution was to establish a new constitutional arrangement bearing in mind the representations made by the settlers, the Barotse Royal Establishment and the Company's position. The British

---

[274]For a discussion on the legality of the concessions see David Aihe, *The Constitution of Zambia: a Historical and Comparative Study* (Ph.D. dissertation, University of London, 1968). Aihe's work must be read with care in that he has used the standards set in international law, constitutional and customary law to determine the validity of the treaties. But these are the ideas and laws developed by the colonial powers themselves as instruments of oppression.

[275]The demands from Barotseland were prompted by economic problems. Like the rest of the Territory, Barotseland, did not escape from the economic slump which followed immediately after the first world war. To improve their economic position and retain their strength to buy imported goods, they demanded that ten per cent of the tax money, which they were entitled to, should be paid to them without deducting money spent on Barotse educational purposes. It was also argued that the Company should itself finance the Barotse National School. They contended that the territories defined in the North Western Rhodesia Order in Council, 1899 should be put under direct Imperial Rule as a Protectorate Native State with a British Resident Commissioner to reside permanently with the Litunga. See Gann, *The History of Northern Rhodesia*, pp. 183-4.

Government was not immediately willing to assume the administration of Northern Rhodesia. The options advanced by the Company,[276] were examined by the Buxton Commission, headed by Viscount Buxton, whose recommendations were totally rejected by the Company. The long quest for an answer was fortunately settled by the referendum in Southern Rhodesia. Southern Rhodesia became a self governing colony in 1923.[277] As for Northern Rhodesia, the

---

[276]It was suggested that Northern Rhodesia should become part of the Union of South Africa and fulfill Rhodes' dream of a United Southern African community, in which the British would hold the balance of power. It was argued that Southern Rhodesia and at least part of North Western Rhodesia should become part of Southern Rhodesia and that North Eastern Rhodesia should be linked to Nyasaland together with German East Africa, Kenya and Uganda to form a British Central African Protectorate to be administered from Britain. The idea was opposed mostly by the railway workers and miners as it meant the extension of the Union's already notorious repressive laws. It was strongly argued that the Union did not have the money to develop Northern Rhodesia and if the Territory joined South Africa the settlers would be made to pay more tax to cover the cost of administration. Equally opposed was the link with the northern territories as none of them were self-supporting to manage a modern government. The company, however, forcefully pushed for the Union. It advanced another alternative: partition Northern Rhodesia, get rid of its expensive administrative headquarters, and place the eastern part under direct Imperial rule on the lines similar to Nyasaland and Tanganyika; Barotseland and the adjoining areas linked to the Bechuanaland Protectorate and the central part united with Southern Rhodesia. There was another alternative, that the entire Northern Rhodesia should be linked to the countries of the north, and this had been first suggested in 1917. What was being advocated was a Central African Confederation which was to include Northern Rhodesia, Nyasaland, German East Africa, Kenya, and Uganda.

[277]It was formally annexed to the Crown in the same year but the Company retained the mineral rights and received specific guarantees against confiscatory legislation with regard to its railway interests. On the constitutional developments in Southern Rhodesia, see Palley, *The Constitutional History and Law of Southern Rhodesia*.

Imperial Government promised to relieve the Company of the administration of the Territory as from 1 April 1924.[278]

What is notable about the events of the period immediately after the first world war and 1923 when the issues were settled is the interplay of the various interests: the settlers', Company's and those of the Imperial Government. The indigenous people except for the Barotse, to a limited extent, had no input whatsoever. They were still disorganised and did not understand what was going on, and nothing was done to involve them. The three players had little regard for the interests of the Africans. This was reflected in their efforts to link up Northern Rhodesia either in its entirety or in part with Southern Rhodesia and the Union of South Africa or with the northern territories. The proponents of the schemes were prepared to alter the territorial boundaries without regard to the impact of such action on the Africans. To them, the British sphere of interest was one big empty territory available to be redesigned or reorganised without restraint. The interaction of these interests shaped the constitutional arrangement for the Territory embodied in the Northern Rhodesia Order in Council, 1924.

---

[278]It was agreed that the Company was to be paid the actual realised administrative deficit for the year 1923 to 1924 subject to certain deductions. The Company handed over to the Imperial Government all public works and buildings as well as land rights. The Crown became completely free to administer the lands in a manner it deemed suitable. The Company retained all mineral rights in the territory.

(b) The constitutional Order of 1924

In 1924 the Imperial Government issued three documents which defined the constitutional framework for Northern Rhodesia: The Northern Rhodesia Order in Council, 1924; The Northern Rhodesia (Legislative Council) Order in Council, 1924 and the Royal Instructions to the Governor and Commander in Chief of 26 February 1924. The constitutional arrangement amplified the two aspects of subordination, characteristic of British colonial rule. We examine each position.

(i) The Legislative Council and the Executive Council Within the Territory

The constitutional arrangement of 1924 was a leap forward in the British colonial constitutional gradation. It was a move from the crude arrangement to a more complex arrangement where the Legislative and Executive Councils were created together with the office of the Governor. The Governor was the head of the executive government and President of the Legislative Council. By assuming both positions the Governor was the single most powerful person in the Territory and the Legislative Council was made subordinate to the Executive Council.

(a) The Governor and the Executive Council: The Governor replaced the Administrator as[279] chief executive. He was also the Commander in Chief and exercised all powers and jurisdiction of His Majesty within Northern Rhodesia on

---

[279]See Art. 6 of the *Northern Rhodesia Order in Council, 1924.*

His Majesty's behalf.[280] All the powers of the Administrator and any other power, authority or jurisdiction exercised by other officers under the constitutional arrangement in force before 1924, were passed over to the Governor, including those of the Resident Commissioner.[281]

The Executive Council was constituted to advise the Governor in his capacity as chief executive.[282] The composition of the Executive Council was prescribed in the Royal Instructions. The first Executive Council was composed of ex officio members, who were[283] persons carrying out the functions of Chief Secretary to the Government, Attorney General, Treasurer, Secretary for Native Affairs and Principal Medical Officer. On instructions from the Crown to the Governor, through the Secretary of State for Colonies, the Governor could appoint persons to be either Official or Unofficial members. The former were people holding office in the public service and the latter not holding any such office.[284]

Notwithstanding the existence of the Executive Council the Governor remained the principal officer in Northern Rhodesia. Though he was under obligation to inform the

---

[280]Ibid., Art. 7.
[281]Ibid., Arts. 48 and 49.
[282]Ibid., Art. 12.
[283] The inclusion of elected members as members of the Executive Council was a later development and is discussed in the next Chapter. It was part of the long process of transforming the Executive Council into a cabinet.
[284]*Royal Instructions*, dated February 26, 1924; see Instruction 4. In his subjective determination the Governor was at liberty to appoint any other person within the territory as an Extraordinary Member to advise on any matter of special interest.

Council of the instructions from the Crown to the Council, and consult in the exercise of his powers and authority, the Council had limited influence over him. Consultation with the Council was excepted where it was prejudicial to the interest of the Crown, where matters in issue were unimportant to involve the Council or too urgent to be passed over to the Council.[285] In all other situations he was obliged to inform the Council. Where the matter was presented for the advice of the Council, the Governor was at liberty to act contrary to such counsel. In such a situation he was mandated to submit a report to His Majesty stating the reasons for his action.[286] The Council could meet only when summoned by the Governor, and unless incapacitated by illness or other grave causes he presided at all meetings. The Governor decided the agenda, and was at liberty to decline to include any issue suggested by members of the Council.[287] The executive power in the Territory remained the sole preserve of the Governor. Under the arrangement the Governor in Council assumed a different meaning. It meant the Governor acting with the advice of the Council, but not necessarily in accordance with its advice nor in such Council assembled.[288] The Executive Council, therefore, in reality meant the Governor.

(b) The Governor and the Legislative Council: The strong position of the Governor in the Colonial Government was evident in his relationship with the Legislative

---

[285]Ibid., Instruction 12.
[286]Ibid., Instruction 14
[287]Ibid., Instruction 13.
[288]Wight, *British Colonial Constitutions* 1947, p. 16.

Council. The Governor, as the chief executive, by being President of the Legislative Council rendered the Legislative Council subordinate to the Executive Council. In reality, however, the Legislative Council was subordinate to the Governor. The Legislative Council was constituted by His Majesty. It was made up of the Governor, all ex officio members of the Executive Council, Nominated Official members not exceeding four in number and five Elected Unofficial members.[289] The first Legislative Council had an Official majority: ten Official members (five ex Officio members, four nominated Official members and the Governor) and five Elected Officials.

The composition of members is constitutionally significant on two counts. In place of a single legislature, in the person of the High Commissioner, there was a collective legislature, the Council. Secondly, in place of the High Commissioner's autocracy a more flexible institution, the official majority, was created. The majority of members of the Legislative Council were heads of government departments, who together with the Governor, formed the government of the colony. They were responsible to the Governor as the Governor was to the Crown through the Secretary of State for Colonies. This official bloc had an overriding voting power.

---

[289]The Elected members were elected according to the rules and regulations set out in Legislative Council Ordinance, 1925. But before the constitution of the Legislative Council to, among other things, enact the Ordinance to provide for the elections, in place of the Elected Unofficials, there were five Nominated Unofficial members. This was a temporary measure which lasted until the election of the five elected unofficial members.

The famous despatch of 1868 from the Duke of Buckingham provided guidelines on how various members of the Legislative Council were expected to vote.[290] The Governor was bound to obey the directions of the Crown whether in agreement with his views or not. Ex officio members were under the same obligations as the Governor. Nominated Official members, who got their seats by virtue of their offices in the public service, were expected to give a general and effective support to the government in the Legislative Council. In case they failed it was within the Governor's discretion to object to their continued occupation of their seats and offices. As for Nominated Unofficial members, whose existence in Northern Rhodesia in 1924 was merely an interim measure, but fully introduced in 1945,[291] the despatch noted, he "will naturally understand that holding his seat by nomination of the Crown, he has been selected for it in the expectation and confidence that he will co-operate with the Crown in its general policy, and not to oppose the Crown on any important question without strong and substantial reasons; but of the validity of the reasons he will be himself the judge."[292] The Elected Unofficial members on the other hand voted as they deemed fit.[293] By the official majority voting as directed by the Governor the Legislative Council was not an

---

[290]Wight, *The Development of the Legislative Council*, pp. 109-112. See also *the Correspondence Respecting the Case of the Ship Florence (Cmnd. 1882; Cmnd. 3453).*

[291]See *The Northern Rhodesia (Legislative Council) Order in Council, 1945* in particular Art., 8.

[292]Wight, *The Development of the Legislative Council*, pp. 109-112.

[293]Ibid.

independent institution; it was subordinate to the Executive Council. The introduction of the official majority did not negate autocracy but merely made it plural.[294]

Apart from being the chief executive commanding enormous discretionary powers, the Governor also enjoyed extreme powers and authority as President of the Legislative Council. The concentration of power in him subordinated the Legislative Council to the Executive Council, and the Colonial Government to the Imperial Government. The latter is discussed further below. Legislative powers were conferred upon all the members to be exercised collectively, subject to limitations set in the Orders in Council and Instructions from His Majesty, to enact such Ordinances as were necessary generally for peace, order and good government. The Governor, however, retained the power of veto.[295] Notwithstanding the existence of an official majority, which guaranteed that every Bill presented before the Council received the requisite support, the Governor had the power to assent to the Bill or not.[296] The power to initiate legislation was limited. Members of the Council were empowered, upon giving notice to the Governor, to propose a Bill, vote or resolution, provided it did not impose tax or charge any public revenue. In any other situation the express sanction of the Governor had to be obtained.

---

[294]Wight, *British Colonial Constitutions 1947*, p. 22.
[295] Art. 20, *Northern Rhodesia Order in Council, 1924.*
[296]Ibid., 24.

As a result of the strong position of the Governor, the Legislative Council suffered in many aspects as a legislative body. It was not a Parliament in British traditional sense. The first Governor of Northern Rhodesia pointed out: "It is hardly necessary to emphasise that a Council such as ours is not a Parliament in the generally accepted sense of that term."[297] He went on to say, "It is constituted on a different basis, which obviously places the government in a position to exercise effective control. But I desire to assure the Unofficial members that the Government will be very willing to meet any request of theirs for any information which can properly be given and very ready to consider any views or wishes of which they may express."[298] The role of Official members was to support the government; that of the Elected members was, the Governor maintained:

> The object of having Unofficial Members on this Council (the only members who had a choice in voting) is that they should ventilate the opinions and represent the views which are held in various parts of the country, and to bring before the government considerations which otherwise might escape the notice of the government.[299]

The role of the Legislative Council, because of the Official majority, was merely advisory to the Executive Council, in reality to the Governor, just as the Advisory Council was to the Administrator.[300] Though by the time of

---

[297]See the Speech delivered by the Governor at the opening of the first session of the Legislative Council on the 23 May, 1924.
[298]Ibid.
[299]Ibid., p. 3.
[300]See Davidson, *The Legislative Council in Northern Rhodesia*, p. 34; Wight, *The Development of the Legislative Councils*, pp. 100-101: See also Robert Martin, "Legislature

independence the subordination of the Legislative Council to the Governor had atrophied, post independence developments, such as the creation of One Party Rule indicate efforts to recreate this arrangement, which supports authoritarian rule.

This constitutional position, characterised by the subordination of the legislature to the executive, changed with the growing maturity of the people in the Territory. The development of an enlightened electorate usually unleashed two processes. The electorate tended to exercise pressure on the legislature: on the Elected members and they in turn tended to exercise pressure on the Official majority.[301] The degree of co-ordination between the two forces determined the pace of constitutional development. As a natural consequence of the interaction of these forces, the number of Elected members usually grew and that of the Officials declined. When half or more of the members of the Legislative Council were elected then the Legislative Council was constitutionally classed as a Representative Legislature. When the Legislative Council assumed control over the Executive Council by acquiring the power to appoint and dismiss members of government, then Responsible Government had been attained in that territory. The attainment of Responsible Government extinguished the first aspect of subordination of the Legislative Council to

---

and Economic Development in Commonwealth Africa" *Public Law* (Spring 1977), p.48.

[301]Wight, *British Colonial Constitutions*, p.29.

the Executive. These changes are considered in the next Chapter.

(ii) The Imperial Government and the Colonial Government

The second aspect of subordination is that of the Colonial Government to the Imperial Government. The two principles of subordination are interdependent. The subordination of the legislature to the executive through the official majority and the Governor's power of veto and assent also reflected the internal subordination of the Colonial Government to the Imperial Government. All the powers and authorities of the Crown within Northern Rhodesia were exercised on behalf of the Crown by the Governor, subject to such instructions as were issued from time to time by His Majesty.[302] Since His Majesty held the ultimate power and authority in Northern Rhodesia through the Governor, and His Majesty being part of the Imperial Government, through His Majesty the Colonial Government was made subordinate to the Imperial Government. How this worked internally has already been discussed in terms of the relationship between the Legislative and Executive Council. We are here concerned with the external subjection of the Colonial Government to the Imperial Government.

Under this constitutional arrangement the Crown retained the power to directly influence the government of Northern Rhodesia, notwithstanding the delegation of some of the powers and authorities to the Governor. This was the

---

[302]Art. 7, *Northern Rhodesia Order in Council, 1924.*

external subordination of the Colonial Government to the Imperial Government. Of the two forms of subordination the indirect or internal one was usually the first to go. Direct or external subordination atrophied when there were no more restrictions upon the colonial legislature. This became evident when control of foreign relations passed into the hands of the Colonial Government. The colony was no longer under any form of control by the United Kingdom.[303] The Crown reserved to itself certain powers, notwithstanding the bestowal of legislative powers upon the Legislative Council. His Majesty, with the advice of his Council, could make Ordinances necessary for the peace, order and good government.[304] No Ordinance could be made by the Colonial Legislature amending the principal constitutional documents: Orders in Council or the Royal Instructions. This was the exclusive preserve of His Majesty, His Heirs and Successors in Council.[305]

Apart from legislating directly for the colony, the Crown imposed limitations on the scope of the legislative authority of the Legislative Council. The Governor was not empowered to assent to certain Bills which tended to make Africans liable to conditions, disabilities or restrictions to which Europeans were not subjected. But such restrictions were permissible where the Ordinance dealt with the supply of arms, ammunitions or liquor to

---

[303]Wight, *British Colonial Constitutions*, p. 39. These changes are examined in detail in the next Chapter.
[304]Art. 23 *Northern Rhodesia Order in Council, 1924.*
[305]Ibid., 51 *Northern Rhodesia (Legislative Council) Order in Council, 1924.*

Africans.[306] Any Bill altering or amending the arrangements on the collection and allocation of mining revenues in force at the commencement of the Order in Council or imposing any special rate, tax or duty on minerals within the Territory; or dealing with the construction of new railways and railways generally within the Territory was reserved for His Majesty's signification.[307]

The Governor was further restrained to give assent to any Bill which dealt with certain activities unless prior instruction from the Crown was sought or unless there was provision suspending the operation of the Ordinance until after the signification of His Majesty's pleasure. The Governor could consent to such a Bill where in his opinion it was imperative and urgent that the Bill should come into force. In such a situation the Governor was obliged to transmit the Bill assented to His Majesty together with the reasons for the assent.[308] Perhaps the most important aspect of the subordination of the Colonial Government to the Imperial Government was the power of the latter to disallow Ordinances passed by the colonial Legislative Council.[309] The circumstances in which this power was exercised were not specified. It was entirely at the discretion of His Majesty.

The subordination of the Colonial Government to the Imperial Government, therefore, took three forms. First,

---

[306]Ibid., 25(1).
[307]Ibid., 25 *Northern Rhodesia Order in Council, 1924.*
[308]See Instruction 16, *Royal Instructions February 26, 1924.*
[309]Art., 23 *Northern Rhodesia Order in Council, 1924.*

the Crown had the power of general legislation and the power to amend or alter the constitution. Though not expressly stated in the Orders in Council and Instructions of 1924, the Crown retained the power to legislate on foreign affairs and defence. This can be inferred from the status of Northern Rhodesia as a British dependency. In any case the power of concluding treaties, control of foreign relations and acquisition of status in international law are the final tests of independence within the British Commonwealth.[310] Second, through limitations imposed by the Crown on the colonial legislature which rendered the Colonial Government ineffective vis-a-vis the Imperial Government; and third, through the Crown's negative power of direct disallowance of Ordinances enacted by the colonial legislature.

It must, however, be noted that the exercise of various negative powers conferred upon the Governor and those reserved to the Crown was rare.[311] The Crown seldom differed with the Governor as their man on the spot. Winston Churchill observed that in the colonial service the man on the spot must have the initiative and determination to make decisions: "it would not be possible to govern the British Empire from Downing Street and we do not try."[312] The British Government's position was later expounded in 1940 during the debate on the Colonial Development and Welfare Bill:

---

[310]Wight, *British colonial Constitutions*, p.38.
[311]Idem, *The Development of the Legislative Council*, 156-7.
[312]Speech at the eighteenth annual Dinner of the Corona Club, 16 June 1921, quoted from Ibid. p. 158.

> From London there will be assistance and guidance, but no spirit of dictation. The new policy of development will involve no derogation from the rights and principles of local legislatures, upon whom rests a large measure of responsibility for the improvement of conditions in their several territories and upon whose co-operation the Government count with confidence .... The whole effort will be one of collaboration between the authorities in the colonies and those at home; there must be ready recognition that conditions vary greatly from Colony to Colony and the Colonial Governments, who best know the needs of their own territories, should enjoy a wide latitude in the initiation of and execution of policies.[313]

III. The Theoretical Framework of the Colonial Constitutional Arrangement: 1899- 1924.

Behind every constitution there are ideas, theories and beliefs which influence the drafters. Bihari observes: "It goes without saying that the framers of the constitution may - even if the greatest caution is taken - be influenced by misunderstood theories, by the experiments that proved good elsewhere, by traditions or by momentary requirements, which as it were would not call for constitutional solutions and owing to their relatively minor importance need not be made permanent."[314] The examination of the ideas and forces underlying the colonial constitution order is indispensable if the constitutional arrangement is to be fully understood. This is not possible through mere examination of the constitutional text. A number of theories had and some continue to have a bearing on constitutional making in the post independence period. In other situations certain warnings were not heeded, and

---

[313]Quoted from Ibid. pp. 158-9.
[314]Otto Bihari, *Constitutional Models of Socialist State Organization* (Budapest: Akademiah Kiado, 1979), p. 12.

continue to be ignored with disastrous consequences. Three theories appear to have influenced colonial constitutional making: (1) the idea that good men and not good law make good government, (2) the theories associated with analytical positivism and (3) lack of observance of the law of non-transferability of laws, and institutions developed in a different social settings to another setting, without regard to the compatibility of the economic, social and political developments between the giving and receiving society.

1. Good Men and not Good Laws Make Good Government.

It is clear from the above exposition that British colonial rule was essentially authoritarian in nature. This is evident from the genesis of constitutional development. The North-Western Rhodesia Order in Council, 1889, bestowed the powers of His Majesty, under the Foreign Jurisdiction Act, 1890 on the British High Commissioner for South Africa. He exercised both legislative and executive functions. Under the North-Eastern Rhodesia Order in Council, 1900 the same position was repeated to some extent. The difference was that there was a division in the institutions to exercise the two powers. The powers of general administration of the area were given to the Chartered Company exercised by the Administrator appointed by the Company. The legislative powers rested with the High Commissioner for British Central Africa. After 1911 the position of the Administrator was strengthened with the amalgamation of North-Western and North-Eastern Rhodesia into Northern Rhodesia.

The move from the basic constitutional arrangement in the British colonial constitutional scheme, to the traditional order characterised by the Legislative and Executive Councils and the Office of the Governor, only helped to amplify the authoritarian nature of British colonial rule. Despite the existence of the Executive and Legislative Councils, giving a semblance of collective exercise of power, the position of the Governor was supreme.

This autocratic arrangement was founded on one fundamental belief: good men and not good law make good government. The structure reflects the tendency to trust the man on the spot. The person physically in the territory knew and understood the problems far much better than any other, least of all one in Downing Street, hence the bestowal of broad discretionary powers to enable him meet the exigencies of the time. The provision: "to make Ordinances for the administration of justice, the raising of revenue and generally for the peace, good order and good government", was embodied in most of the Orders in Council.[315] The power conferred was broad enough to cover every conceivable situation. Representative institutions and practices designed to limit the powers of government and ensure constitutionalism, the hallmark of Western classical constitutional arrangement, emphasised in independence and post-independence constitutions, were unknown.

---

[315]Seidman, *State, Law and Development*, pp. 39-49.

2. Impact of Analytical Positivism

Closely following the idea of trusting people in the territory was the influence of analytical positivists.[316] The impact of analytical positivism on the settlers in non-Western societies was ably summed up by Pye:

> As Europeans moved restlessly into the non-Western world - as traders, and merchants, missionaries and adventurers - they carried with them the expectation that all societies should be properly organized as states possessing attributes of sovereignty and adhering to rules of law. Wherever the European went, one of his first revealing queries was, "Who is in charge here ?" According to the logic of the European mind, every territory should fall under some sovereignty and all the people in the same geographical location should have a common loyalty and the same legal obligations. Also in these early clashes of culture the European response was to search for legal redress, and the absence of a recognizable legal order must have made life uncomfortable for these early Europeans.[317]

The Europeans were searching for a *modus vivendi* to regulate life in the social setting they considered primitive. It was generally believed that the essential pre-requisite to transforming traditional societies into totally different social arrangements, with all the trappings of a Western society, was to create a codified legal system.[318] Traditional societies had to go through the same experience as the Western societies. They claimed to have discovered a blue print for social transformation. The most pressing need was to establish the means of achieving order and predictability. Trubeck, writing years

---

316Some aspects of analytical positivism have already been discussed in Chapter One.
317Pye, "Law and the Dilemma of Stability and Change in the Modernization Process." pp. 26 - 7.
318Ibid., 18-9.

after most of the African countries had become independent, described the thinking as the *core conception of law*, and argued,

> If modern law contributes to economic growth only under these conditions as Marx Weber suggests the core conception's assumptions that Western history will repeat itself is probably wrong. Similarly, we know that Third World regimes are legitimized by many things, but that their adherence to the rule of law is not first among them. Thus, a conclusion that enhancing the effectiveness of the legal system of restraint on the State will enhance the effective power of Third World rulers is rather dubious.[319]

The reasoning is understandable in view of the overwhelming influence of the legal thinking of the time associated with analytical positivism. Both Austin and Bentham made efforts to define what the law was. The creation of the distinction between law and morality had a number of consequences. Morality, according to Austin, meant every conceivable standard by which the conduct may be judged which is not itself law.[320] One consequence is that other instruments, rules, regulations, customs and practices regulating social relations were not laws in the Austinian sense, hence not subjects of jurisprudential inquiry. This is a fundamental weakness in the positivist thinking as societies are held together and regulated by many other forces some of them not necessarily legal.

Analytical jurists perceived law as an aggregate of laws and a law as a rule of conduct.[321] Analytical positivism begun by looking at laws from the point of view

---

[319]David M. Trubeck, "Towards a Social Theory of Law", *The Yale Law Journal* 82 (November 1972),.8.
[320]Fuller "Positivism and Fidelity to Law - A Reply to Professor Hart," p. 635.
[321]Roscoe Pound, "Fifty Years of Jurisprudence," pp. 566-7.

of a law maker prescribing the rules of conduct. It ended up looking at them from the stand-point of the judge or administrative officer called upon to make a decision.[322] Analytical positivism was relevant only to developed societies with developed legal systems. This partly explains why traditional societies were labeled primitive and in need of civilisation. Law was perceived as something made consciously by law-givers, legislative or judicial, hence the notable question: "Who is in charge?" Every society was expected to have a sovereign, the law-giver.

The implications are obvious. By discarding morality as a subject of jurisprudential inquiry it meant that other social, economic and political variables, which are not legal in nature were excluded from consideration. A prescription is law provided it met the criteria of validity. Traditional societies, according to the inquiries of the British pioneers had no sovereign, the law giver. Customary laws and practices, which regulated these societies were not laws: they were not commands of a sovereign. A command whether morally acceptable or not was still law. By focusing on law as it *is* as opposed to what it *ought* to be, law was devoid of all moral trappings and influence of the social milieu it is called to regulate. It, therefore, meant that what was good law in one social setting was good law in any other society. The law which had helped transform Western societies was also essential

---

[322]Ibid., p. 568.

for economic, political and social development of backward and underdeveloped societies.[323]

That the constitutional order for Northern Rhodesia was influenced by analytical positivism is very evident. Dale observes that the Whitehall offices probably sought to establish the British system of government and legal thinking for a number of reasons: (1) it was the one they knew, and (2) they thought it was the best. [324] The pioneers expected to find the system of government they knew and understood best. They found no sovereign in terms of a monarch or collective body, or a set of laws to govern settlement of disputes. Using the reasoning advanced by analytical positivism they found no signs of statehood. They, therefore, assumed the role of transforming these societies.

The sovereign for Northern Rhodesia became His Majesty the King of England, who held both the executive and legislative powers. As for the constitutional framework, the institutions and practices developed in dependencies, which made up the Old Empire, were extended to Northern

---

[323]See Trubeck, " Towards a Social Theory of Law", p. 10.

[324]Dale, "The Making, Remaking of Commonwealth Constitutions", *International and Comparative Law Quarterly,* p. 68. The export of the British constitutional model was very obvious on granting independence. Most of the dependencies received what has become widely known as the Westminster Constitutions whose principal characteristics were: ministers were appointed from among members of Parliament; the Prime Minister was the head of government and the President, the head of state. For details see generally S.A. de Smith, *The New Commonwealth and its Constitutions.* Zambia was one of the countries in Commonwealth Africa to break the tradition. It became independent with a constitution providing for a Presidential system of government.

Rhodesia with some minor modifications.[325] The transplantation took place without constant regard to the level of economic, social and political development and complexity of Northern Rhodesia. Customary practices and laws, though provided a unique way of legitimising, and sustaining the cohesion and operation of traditional societies, enjoyed limited recognition. They were observed provided they were not in conflict with, or did not affect the exercise of His Majesty's jurisdiction in the territory.

3. Law of Non-transferability of Institutions and Practices

Analytical positivism ignored one basic tenet in constitutional making and law generally: the law of non-transferability. The constitutional arrangement, which Northern Rhodesia had from 1899 was adapted from the Old Empire. For Northern Rhodesia and the rest of the New Empire, constitutional development meant moving at least eight stages before attaining independence, spanning in all seventy years in most cases.[326] The difference between

---

[325] For a general discussion of constitutions of the Old Empire: See Wight, *The Development of the Legislative Council.*

[326] (1) The dependency was neither with a Legislative nor Executive Council; (2) dependency is given an Executive Council but no Legislative Council; (3) a Legislative Council with an Official majority and an Unofficial minority wholly nominated is created; (4) a Legislative Council with an Official majority and an Unofficial minority of which the smaller part was elected; (5) Legislative Council with an official majority and an unofficial minority mostly elected; (6) Legislative Council with an Unofficial but an Elected majority; (7) Representative legislature; and (8) dependency attains semi-responsible and responsible government. See Wight, The *Development of British Colonial Constitutions* 1947, p., 41.

dependencies was that some went through this gradation faster than others and others did not go through all the stages. Dependencies at the same level of economic, social and political development were often at the same level of constitutional development.[327]

All laws reflect culture in certain measure, to the point that within Western constitutionalism, for instance, there are differences in emphasis between English common law and continental European civil law derived institutional models. Even within Continental European constitutionalism, the French experience differs significantly from that of German. One can, therefore, talk of English, American, French, German and Italian constitutional models. These differences, McWhinney notes, are a result of peculiar national specialised legal and more general historical developments and differences in timing and degree of reception of the original foreign legal elements of Roman law.[328] This partly explains why these countries, which are perceived as the leading democracies of the world, have not aped other countries' constitutional arrangements. Each country has over the years developed its own distinct constitution determined largely by the economic, social and political forces

---

[327]For example on 1 January, 1947 there were eight dependencies under the Colonial Office and three under the Dominion Office who had neither an Executive nor Legislative Council. Seven dependencies had executive councils but no legislative council. Most of the dependencies, twelve in all, among them Northern Rhodesia, constituted a class of dependencies with an unofficial majority but with an elected minority.

[328]Edward McWhinney, *Constitutional-Making, Principles, Process, Practice*, (Toronto: University of Toronto Press, 1981) p. 129.

inherent within its own boundaries. But in dependencies these observations were largely ignored. Legal institutions and practices from one dependency were transplanted to other dependencies without regard as to whether or not there were any similarities between the giving and receiving dependency. More often than not the territories were at different levels of economic, social and political development. McWhinney warns:

> One should be at pains to avoid at all times that peculiarly barren and mechanical form of legal eclecticism ... of taking odd snippets from constitutional systems here and there and seeking to transplant them unaltered to other countries, without at least enquiring before hand whether the particular political, social and economic conditions under which those constitutional institutions or processes developed in the host country and which help them to make them politically viable and operational there are also present in the receiving country.[329]

Analytical positivism helped serve the interest of the settlers who were much more concerned with a dispute settling mechanism, than with legal prescriptions designed to transform the society. By blindly transplanting laws from the metropolis and other dependencies to Northern Rhodesia, a legal and constitutional order familiar to the settlers was created. The suitability of such transplants in the Territory was never of concern, a practice which has continued to this day.[330] Elected members of the Legislative Council condemned the practice, though they

---

[329]Ibid., Preface, pp. xi-xiii

[330]Seidman in his attempt to emphasis the law of non-transferability, ironically observes that Lesotho borrowed the Highway Traffic Act of South Africa, which included a provision forbidding lorries above a specified weight from traveling on Lesotho roads, when there was no weigh bridge in Lesotho: see Seidman, *The State, Law and Development*, p. 34.

were prompted by their own interest to control the Council. They saw the Imperial Government as a hindrance. The Governor defended the practice on account of policy. He argued:

> After all honourable members must remember that the membership of the empire involves certain obligations as well as privileges and rights and the Imperial Government must be concerned to see that the Territory takes its place in the general scheme of the Imperial dependencies in this part of the world and plays its part. Occasionally, for that purpose uniform legislation may be necessary, and I think honourable members are a little unduly sensitive when they are asked to pass legislation which has been accepted in other Central and Eastern African territories without any consideration of demur and which is thought to be very important for purposes of Imperial Policy.[331]

The writer is not, however, totally opposed to the transplant of institutions and practices from other countries. What is objected to is the idle reproduction of such institutions and practices, without regard to their suitability to the receiving society. This was never considered in the building of the constitutional order for Northern Rhodesia. Emphasis was more on promoting uniformity of the law in dependencies, within the framework of the imperial colonial policy. McWhinney attributed the constitutional problems facing most emergent States to

> the too - ready application to non-European societies of essentially European constitutional stereotypes without prior examination of whether the different communities concerned were at the same essential stages of political and economic development, and whether, in consequence, the socioeconomic infrastructure that inevitably condition the operation of positive law were the same. A certain minimum equivalence of identity of underlying basic societal conditions is a pre-

---

[331] *Northern Rhodesia Legislative Council Debates*, cols. 135-45 (July 29, 1927).

condition to the successful reception or transfer of the legal models from one system to another.[332]

4. National Consensus in Constitution-Making

As early as 1891 it was known that the British area of influence north of the Zambezi was under British protection. The Imperial Government had a duty to safeguard the interests of Africans until such a time that they were able to take part in the common affairs of the Territory. The ultimate objective was for the Africans to assume the reigns of power. Though this was the recognised policy of the British government, little was done to put it into effect. Efforts to promote the interests of Africans as wards of the British Government were made in Kenya, and outlined in the paper: "Indians in Kenya."[333] The paper was emphatic - "Primarily, Kenya is an Africa Territory, and His Majesty's Government think it is necessary definitely to record their considered opinion that the interests of the African natives must be paramount, and that if, and when these interests and the interests of the immigrant races should conflict, the former should prevail." Though the rights of the immigrant were not to be curtailed, "in the administration of Kenya His Majesty's Government regard themselves as exercising a trust on behalf of the African population, and they are unable to delegate or share this

---

[332]McWhinney, *Constitutional-Making, Principles, Process, Practice*, p. 4.
[333]See Cmnd 1922

trust, the object of which may be defined as the protection and advancement of native races."[334]

The position was repeated in the terms of reference of the ***Hilton Young Commission***,[335] appointed to advise on the prospects of a closer union between Kenya, Uganda and Tanganyika with an option for Zanzibar, Nyasaland and Northern Rhodesia to join, and in the famous ***Passfield Memorandum***. In reality the Imperial Government only feebly objected to the advancement of settlers' interests at the expense of those of Africans. The Hilton Young Commission observed:

> It is not inconceivable that in the distant future the black races may rise to such a high level of civilisation that their interests will be fused with those of the immigrant communities. If white and black can some day meet on equal terms intellectually, socially and economically, the racial and economic antagonisms may be merged in a country of interests which will admit some form of representative government. This is an ideal to which though many would consider it visionary would not close the door.[336]

Captain Thomas Murray, Member for Southern Electoral Area, argued: "I consider it extremely visionary. If we are to wait until that time, it may be certainly not less that 500 years. It is utterly fantastic to mind." He went on to say: "Also that statement about responsible government is opposed to all beliefs which we have held in this country especially that the man on the spot is the best judge of local requirements: that he is capable, and that he would,

---

[334]For a general discussion on constitutional development in Kenya see Ghai and McAuslan, *Public Law and Political Change in Kenya*, pp. 42 - 50.
[335]Cmnd 3234.
[336]Ibid. p. 84.

as has been done in the neighbouring territory of Southern Rhodesia govern the natives effectively and justly."[337]

The constitutional foundation of Northern Rhodesia lacked the contribution of Africans who outnumbered the settlers, and who save for the most pessimistic, were reasonably expected to assume the reigns of power at some point in not too distant a future. Admittedly, the Africans did not understand what was going on, but the graver wrong was that very little was done to involve them in government. In any case, other than being actively involved in the political process of the Territory, how were they to learn the European mode of government? This largely undermined the legitimacy of the constitutional arrangement, which evolved in the period 1890 to 1924. Nwabueze observes, "the legitimacy of the constitution is concerned with how to make it command the loyalty, obedience and confidence of the people." He went on to say:

> What this means is that a constitution should be generally understood by the people and be acceptable to them. A constitution cannot hope to command the loyalty, respect and confidence of the people otherwise. And to achieve this understanding and acceptance, a constitution needs to be put through a process of popularisation, with a view of generating public interest in it and an attitude that everybody has a stake in it, that it is the common property of all. The people must be made to identify themselves with the constitution. Without this sense of identification, of attachment and involvement, a constitution would always remain a remote artificial object, with no more real existence than the paper on which it is written."[338]

It cannot be discounted that the major cause of constitutions without constitutionalism in post-

---

[337] *Legislative Council Debates*, col. 345 (21 March, 1929)
[338] Nwabueze, *Constitutionalism in Emergent States*, pp. 24-5

independence period is largely the lack of respect and confidence in the constitution among the population. People's participation in constitution making is indispensable. This can be enlisted only at particular moments in the history of the country involved. "The successful acts of legal codification - whether of the private (civil) law or public (constitutional) law - almost invariably occur in or immediately or after a period of great public excitement and the resultant public euphoria, when it is relatively easy to build, and retain for a sufficient period of time to enable codification, or a certain climate of popular political consensus."[339]

The decisions to formulate new constitutional arrangements were made by the Imperial Government in response to pressures exerted by settlers. The constitutional developments for the period 1890 to 1924, in essence the constitutional foundation of Northern Rhodesia lacked legitimacy. Any improvement to such a constitutional order even decades after independence, is an exercise in futility. Unless remedial measures are taken, constitution-making in a social milieu with such a background is "something in the nature of a public relations exercise designed in considerable measure to impress governments and public opinion in foreign countries."[340] It may be deliberately designed for purposes of the local audience to herald a change in the basic policy imperatives such as from one-party rule to political pluralism.

---

[339]McWhinney, *Constitutional-Making*, p.16.
[340]Ibid. 22.

Conclusion

The Independence Constitution of Northern Rhodesia, as will be shown in the next Chapter, placed emphasis on constitutionalism.[341] What is evident from the constitutional development for the period 1899 to 1924 is the absence of constitutionalism, or attempts to implement the concept. The rule of men as opposed to the rule of law was the basis of government. Separation of powers, and the concomitant concept of checks and balances, protection of human rights and the idea of an executive accountable to the legislature, the hallmarks of Western Constitutionalism, were missing.

Before 1924 legislative powers and authorities were bestowed in the High Commissioner, and the executive powers in the Administrator. In 1924 executive powers were vested in the Executive Council headed by the Governor. Legislative powers were conferred on the Legislative Council presided by the Governor, who also determined the agenda. The constitution was conditioned by the belief that good men and not good law make good government. The law of non-transferability was ignored. Analytical positivism played its role and one major consequence of its precepts is that good law in one territory is good law in any other society, hence most of the constitutional provisions were lifted from other British dependencies.

The constitutional framework was shaped from time to time by the Imperial Government in response to pressures

---

[341]See de Smith, *The New Commonwealth and its Constitutions* p. 106: Nabweze, *Constitutionalism in Emergent States*, generally.

exerted by the settlers. The Africans who were in the majority were not involved and no efforts were made to involve them. It follows that the constitutional order had no significance or legitimacy in the eyes of Africans, although it affected their lives. Hence any further modifications were additions to a weak constitutional foundation.

CHAPTER FOUR

THE DUAL LEGACY OF COLONIAL POWER: AUTHORITARIANISM AND CONSTITUTIONALISM

Introduction

Chapter three focused on the first phase in the constitutional development of Northern Rhodesia, spanning from 1899 to 1924. In this chapter we will focus on the last three phases covering the period 1924 to 1964. The constitutional changes in this period were precipitated by settlers' efforts to eliminate Colonial Office's control over the Territory and establish internal self-rule, a status which their counterparts already enjoyed in Southern Rhodesia.

The settlers had two avenues open towards this goal. The first option was to amalgamate with Southern Rhodesia. Amalgamation would have entailed Northern Rhodesia losing its identity as a protectorate and made one with Southern Rhodesia. The laws, policies, especially those toward Africans, and system of government in Southern Rhodesia would have been extended throughout the new territory. The second alternative was to maintain Northern Rhodesia as a distinct Territory and obtain internal self-rule. Constitutional development in this period, therefore, meant moves towards the elimination of Her Majesty's internal and external control of the Territory.

I. The Fight For White Supremacy: 1924 - 1945

The making of Northern Rhodesia was an outcome of private initiative at the time when the United Kingdom was

experiencing serious economic and social problems. New lands were needed to settle the surplus population and provide new markets for goods produced in factories and mines.[342] The settlers in the Territory wanted internal self-rule, but the British Government viewed Northern Rhodesia as a protectorate and that the interests of Africans were to be managed on their behalf until such a time that they were competent to rule themselves. The internal affairs of the Territory could not, therefore, be left in the hands of a small settler community. But the settlers were determined to secure control of Northern Rhodesia by assuming command over the Legislative Council and later the Executive Council, alternatively through the amalgamation of the two Rhodesias.

1. The Quest for Amalgamation of Northern and Southern Rhodesia

Amalgamation or closer association were not new issues in Northern Rhodesia. They go back to the genesis of British influence in the area. Had it not been for the ill-fated Jameson Raid, Northern and Southern Rhodesia would have been governed under the Matebeleland Order in Council, 1894.[343] The existence of a Legislative Council with an official majority, meant that the white immigrants could

---

[342] Ollawa, *Participatory Democracy in Zambia: Political Economy of National Development*, p. 73.

[343] Gann observes: "Had the Order been made applicable beyond the Zambezi, the history of Northern Rhodesia might well have taken a very different course; a unified administration would probably have come into existence right from the start; and the Zambezi might not have become that political dividing line, which subsequently split the territories." See Gann, *A History of Northern Rhodesia*, p. 77.

not control or influence it. In 1926 unofficial members moved a motion urging His Majesty's Government to formally annex Northern Rhodesia to Crown Dominion.[344] It was argued that Northern Rhodesia was not yet technically a part of the Kingdom's Dominions, but a loose fragment capable of being acquired by any enterprising neighbouring state.[345] Once the Territory was part of the Dominion, it became a colony and the settlers hoped to assume control over its internal matters, as was the case in Southern Rhodesia.

The Secretary of State promised to consider the proposal, but it was overshadowed by demands for closer association between the British dependencies in East and Central Africa, and the appointment of the Hilton Young Commission to investigate the possibility of such an arrangement. The Imperial Government favoured closer association between Kenya, Uganda and Tanganyika with an option for Zanzibar, Nyasaland and Northern Rhodesia to join later.[346]

In 1929 the Hilton Young Report[347] was released and it received strong criticism from elected members of the Legislative Council. The Commission did not endorse closer association, but affirmed the paramountcy of African interests and the need for the Imperial Government to improve the conditions of Africans. But some settlers believed that "native development must be purely incidental

---

[344] *Legislative Council Debates*, cols. 178-80 (25 November, 1926)
[345] Ibid.
[346] Ibid., cols. 85 - 87 (20 November, 1926)
[347] See *The Report of the Commission on Closer Union of the Dependencies in Eastern and central Africa* (1929; Cmnd. 3234)

to the development of the country by the two races, or to whatever number of races there are in co-operation; that their development will be a by-product of the territorial development and expanding civilization. It is useless to work to turn this continent into a school for natives. That we cannot do."[348]

Other settlers were much more realistic. They came "to the conclusion that there can be no question of responsible government in these territories until the natives themselves can share in the responsibility, because until that stage is reached, the imperial government will be under obligations of trusteeship which cannot be discharged without reserving a right to intervene in all the business of the government."[349]

The position of the British Government towards the Africans was re-affirmed in June 1930, in the *Memorandum on Native Policy in East Africa,*[350] in which the Government formally declared its policy towards the aboriginal inhabitants of East and Central Africa and outlined the principles of governance to be followed by governments, including those of Northern Rhodesia and Nyasaland. "The interests of the African natives must be paramount, and

---

[348] *Legislative Council Debates,* cols. 330-331 (21 March, 1929)

[349] Ibid., cols. 345. The Hilton Young Commission was not unanimous in its conclusions on the future of Northern Rhodesia. As a result the British Government, after considering the recommendations, concluded that time had not yet come for taking any far-reaching steps in the direction of formal union of dependencies including Northern Rhodesia.

[350] (1930; Cmnd. 3573): Also popularly known as the ***Passfield Memorandum,*** named after the Secretary of Colonies at that time.

that if and when these interests of the immigrant races should conflict, the former should prevail."[351]

The elected members rejected the principle of paramountcy, and to protect their interests they called for amalgamation of Northern Rhodesia with Southern Rhodesia. The meeting called by the Governor to explain the idea of paramountcy failed to appease them and in the years which followed they intensified the campaign for amalgamation and increased representation in the Legislative Council.

In 1930 a motion was moved in the Legislative Council calling for a conference to investigate the possibilities of and difficulties likely to be faced in forming a greater Rhodesia.[352] The British Government responded through an official statement made in the House of Commons.

> His Majesty's Government in the United Kingdom are not prepared to agree to the amalgamation of Northern and Southern Rhodesia at the present time. They consider that a substantially greater advance should be made in the development of Northern Rhodesia before any final opinion can be formed as to its future.... At the present the European population is small and scattered over a wide extent of territory, while the problems of native development are in a stage which makes it inevitable that His Majesty's Government should hesitate to let them pass even partially out of their responsibility.[353]

In an effort to address the controversy raised over paramountcy of African interests the British Government

---

[351]The principle was a restatement of what had already been stated in Kenya in 1923. Its significance was in the fact that the Imperial Government openly committed itself to the policy of being a trustee of African interests.

[352]*Legislative Council Debates*, cols. 173 (8 November, 1930) The motion was withdrawn with leave, but further representations were made directly to the Secretary of State for Colonies seeking the Government's attitude towards the proposal of a conference.

[353]see the *Report of the Joint Select Committee on Closer Union in East Africa*, (1932; Cmnd. 4141)

attempted to redefine the idea of paramountcy: "Native Paramountcy meant that the interests of the overwhelming majority of the natives should not be subordinated to immigrants." The statement is ambiguous and did little to calm the colonists.

In 1933 amalgamation received further prominence. The settlers argued "there is evidence of an official nature from the imperial government in recent despatches which indicate very clearly that the policy of the imperial government at any rate is in the direction of the Africanisation of the services and in the general promotion of the ideas contained in the White Paper."[354] They pointed out:

> We white people have not come to this country solely and even mainly to raise the native in the scale of civilization. Our main object is to survive ourselves, to improve our conditions if we can and occasionally some of us...to raise a family and perpetuate our race. We are here...to raise ourselves to the scale of civilization. [355]

Whilst the demands were being made the African voice was beginning to take shape. The Ndola Native Welfare Association passed a resolution opposing amalgamation: Amalgamation would "be to the detriment of the interests and legitimate aspirations of the native population of this country, who number 1,000,000 to 10,000 (Europeans)."[356] After several meetings between the two Territories called to discuss amalgamation, the Victoria Falls Conference of 24 January 1936 finally endorsed amalgamation. In April

---

[354] *Legislative Council Debates* col. 62 (24 May, 1933)
[355] Ibid.
[356] Quoted from the *Rhodesia-Nyasaland Royal Commission Report*, (1939; Cmnd. 5949), p. 112.

1936 the Southern Rhodesia Legislative Assembly supported the motion for amalgamation. The resolutions of the Victoria Falls Conference together with the record of debates in the Legislative Assembly were communicated to the Secretary of State for Dominion Affairs, who in his despatch to the Governors of Northern and Southern Rhodesia replied:

> The suggestion has also been made that His Majesty's Government in the United Kingdom should convene a Conference to discuss the whole question of amalgamation. I have considered this suggestion but, after consultation with the Secretary of State for Colonies, I do not feel that any useful purpose would be served by such a conference at the present time. The decision with regard to amalgamation, which His Majesty's Government in the United Kingdom announced in 1931, was only taken after the most thorough examination of the whole problem and after consultation with Members of Parliamentary Parties then in opposition...His Majesty's Government...do not feel that during the period of five years which has elapsed there has been such a material change in conditions as would justify reconsideration of the decision reached after much thought in 1931.[357]

The despatch sparked off serious protests from elected members, who threatened to resign their positions in the Legislative Council. At a meeting in London, in 1937 attended by the Secretaries of State for Colonies and for Dominion Affairs, the Prime Minister of Southern Rhodesia, Governor for Nyasaland and the representatives from Northern Rhodesia, the issue was further considered. At the end of discussions it was agreed as a compromise that a commission should be appointed "to enquire and report whether any, and if so what, form of co-operation or association between Southern and Northern Rhodesia and

---

[357]Ibid., p. 114.

Nyasaland is desirable and feasible, with regard to the interests of all the inhabitants, irrespective of the race, of the Territories concerned and to the special responsibility of His Majesty's Government in the United Kingdom for the interests of the Native inhabitants".[358]

The Commission's Report was published in March 1939. In principle the Commission noted the advantages of closer co-operation of the three territories, especially economically, but recommended against its immediate implementation. The Commission concluded: "We find ourselves unable to accept this suggestion. Southern Rhodesia already enjoys responsible government. In the other two territories ultimate control still rests with the Secretary of State for the Colonies, and in our view the stage has not yet been reached in either where self-government can be confidently introduced."[359] The difference in policies towards Africans in the three Territories, which were still in experimental stages,[360] was a barrier towards amalgamation. The Imperial Government's commitment to Northern Rhodesia and Nyasaland as protectorates and Southern Rhodesia as a self-governing colony were endorsed.

The Report fell short of what most amalgamationists in the three territories had hoped for.[361] Davidson explains the Commission's failure in effectively addressing the question of amalgamation: "Amalgamation is a constitutional

---

[358]Ibid., p. 116.
[359]*The Rhodesia-Nyasaland Royal Commission Report*, p.213.
[360]Ibid., pp. 215 - 219.
[361]See Davidson, *The Northern Rhodesia Legislative Council*, pp. 102 - 109.

proposal advocated for non-constitutional reasons. It is desired to make the territories safe for the system of race relations which they considered essential for the survival of European settlement. The real issue lies in the divergent native policies and amalgamation is merely a means of securing the triumph of one of the two contending policies".[362] The elected members strongly condemned the Report and moved a motion that: "the Unofficial Members of the Northern Rhodesia Legislative Council deplore the indeterminate nature of the conclusion reached, and the recommendations made by the Rhodesia-Nyasaland Royal commission".[363]

2. Quest for Control of Legislative Council

The fight for control of both the Legislative and Executive Councils started out of settlers' concern over the status of the Territory in relation to Britain, and the constitutional arrangement. Whilst the Hilton Young Commission was touring the territories, the settlers advanced other demands and increased pressure on elected members in the Legislative Council, who in turn made representations to the Colonial Government. They demanded an increase in the number of elected members so as to be on par with official members.[364] The demand was of

---

[362] Ibid.

[363] *Legislative Council Debates*, col. 461 (6 June, 1939). To encourage cooperation between the territories, the Commission recommended the creation of an Inter-territorial Advisory Council tasked to carry out policy studies on the development of the three territories. For a brief exposition of the Council see Palley, *The Constitutional History and the Law of Southern Rhodesia*.

[364] *Legislative council Debates*, cols. 135-145 (20 July, 1927)

constitutional significance: increased unofficial representation meant a corresponding decline in the subordination of the Legislative Council to the Executive Council. It also meant control of the Legislative Council being transferred from the official to unofficial elected members. In relation to the Imperial Government, it meant the diminution of legislative subjection of the Colonial Government to the Imperial Government.

Leopold Moore, in an attempt to justify the demands, argued "we hold that the people of this territory who pay the piper should also call the tune. We hold that the people of this country should have a say in the spending of the revenue than they have hitherto been allowed".[365] The demands were also a protest against the authoritarian position of the Imperial Government. "The tendency is for the imperial government to hold its power over this Council, and we have an example in the way in which model Ordinances are submitted to us, and we are compelled to accept them without alteration of a comma or a syllable and they are carried by the Government's official majority".[366]

---

[365] Ibid.

[366] Ibid. To illustrate the strong position of the Governor and official majority in the Legislative Council, the Governor requested for the motion to be withdrawn in view of the fact that the issue of increasing membership of the Legislative Council was one of the terms of reference of the Young Commission. He did not want the discussion on the subject to be pre-empted or the Commission to find that it had already been debated in the Territory. The mover refused to withdraw the motion and the issue was put to a vote. All official members, by virtue of their position, voted for the motion to be withdrawn. The elected members voted in favour. The motion was defeated: 9 against to 5 in favour.

The Governor's position was that time for such a constitutional change had not yet come. Before the Imperial Government could transfer control to the colonists, it needed to be satisfied that power was being relinquished without any serious danger either to the Territory or to any section of the people in the Territory.[367] "A further question," the Governor maintained, "would be whether the attitude of the Council towards the natives would be such that the Imperial Government could relinquish some of the powers in the trusteeship and responsibilities without undue apprehension".

Pressure continued, the unofficial members demanded the presence of elected members on the Executive Council. They argued: "Yet we realize that if any advance is to be made towards self-government or even to wider participation in the existing form of representative government some of the unofficial members must participate, not merely so that they may have some say in what is being done between sessions, but in order that they may learn the principles on which the details of administration are conducted."[368] In another motion in April, 1928 elected members called for an increase in the number of unofficial members by four to equalise with the official membership of nine.[369]

---

[367]Ibid.
[368]*Legislative Council Debates*, cols. 145-147 (20 July, 1927)
[369]Ibid., cols. 63-68 (18 April, 1928)

The Africans did not politically count as they were not qualified to vote and they would not qualify for some time.[370]

> The natives for purposes of argument do not count at all. The 6,000 whites are the people who provide the whole of it (revenue) .... It is not fair that if we provide the revenue we should have so little say in its expenditure.. .. But we feel that the entire direction of the policy of the administration of the territory should be more under the control or affected by the voice of the representatives of those who sent us here, the 6,000 who contribute to the revenue.[371]

They grossly ignored that it was the Africans working in mines and farms who were the moving force behind the Territory's wealth. Without them providing cheap labour no industry and no farm would run.

In response to the mounting pressure the Crown, on the recommendation of the Governor, agreed to increase the number of elected members by two, bringing the total number of elected members to seven.[372] The amendment was of little constitutional significance, in terms of transfer of power to the elected representatives of the people. The official majority of nine members was maintained. Both the Governor and the Imperial Government continued to control Northern Rhodesia.

The settlers were far from being appeased. They pressed on with their demand for parity between elected and official members. They called for the increase of elected members, and a reduction of official members, to bring about parity between the two camps. In 1939 the Government

---

[370] Ibid.
[371] Ibid.
[372] See Art. 2 of the *Northern Rhodesia (Legislative Council) Order in Council, 1929.*

acceded to the demands for parity between elected and official members and used the opportunity to lay a foundation for the promotion of African interests in the Legislation Council.[373] The position of one nominated unofficial member to represent the interests of Africans was created.[374] The number of nominated official members was reduced from four to three, reducing the total official membership from nine to eight, excluding the Governor. The nominated unofficial member was part of the unofficial camp. The number of unofficial members, therefore, rose from seven to eight, to equalize with the official members. This change was a significant constitutional innovation in terms of recognition of African interests, but not in terms of devolution of power from the Imperial Government to the Colonial Government.

Of the eight unofficial members only seven were elected, representing less than half of the members of the Council. Secondly, the Government was still in a position to push through the legislature any measure, without the support of unofficial members. The Governor enjoyed both an original vote in common with other members and a casting vote in the event of an equal vote on any question.[375] Through the original vote he could ensure that every unofficial motion was defeated and official motions went

---

[373]See Art. 2 of the *Northern Rhodesia (Legislative Council) Order in Council, 1939.*

[374]The person qualified for appointment was one not holding any office of emolument in the service of the Crown in the Territory. He was appointed by His Majesty and held the office at his pleasure.

[375]Art. 23 *Northern Rhodesia (Legislative Council) Order in Council, 1924.*

through, a situation which existed prior to the 1939 constitutional amendment. The real value of the constitutional change was that there was a change in the attitude of the settlers and the Imperial Government towards Africans. On the part of the Imperial Government it was a positive, though belated, effort to implement the long standing policy of trustee of African interests.

The significance of appointment of an unofficial member to represent African interests cannot be exaggerated. No machinery was provided to bring the member into contact with the people. The new arrangement yielded positive results due to the industry of the first Member, Sir Stewart Gore-Browne. Initially, he communicated to the Government his personal opinion on matters involving Africans. But he later met organised groups of Africans whenever possible, to obtain their opinions for presentation to the Government and also to inform them of the general political situation in the Territory.[376]

The second world war, which broke out in 1939 diverted attention from territorial issues to matters facing the Empire at large, ushering in a lull in constitutional progress.[377] But pronouncements were made on matters which

---

[376]See *Legislative Council Debates*, col. 153 (17 September, 1942)

[377]There were, however, some sporadic demands for constitutional advancements within the period which were not pursed with vigour until after 1945. Mr. Page Member for the Eastern Electoral Area, moved a motion: "In the opinion of the unofficial members of this Council, constitutional progress will be materially assisted by their acceptance of the increase in the responsibility resulting from an elected majority on both Executive and Legislative Councils. See *Legislative Council Debates*, col. 182 (19 March, 1941). In the same session another motion was moved calling for the replacement of the Governor as

were to preoccupy the settlers in the years ahead. In a motion of thanks to the Governor's address in 1943, Colonel Gore-Browne called for the federation of the three territories as an alternative to amalgamation. "Another indication as regards the political future is that we are not likely to be expected to stand on our own. Federation of some kind or other is very much in the picture... the isolation of Northern Rhodesia is one of the principal obstacles to our prosperity, and I welcome the prospects of some kind of federation".[378] Gore-Browne also observed: "if trusteeship was to be discarded as inadequate and paramountcy as unsound the only right attitude of whites towards blacks in the country was partnership." He added, "I cannot see how this country can ever be adequately developed without the white man, and I am equally clear that it cannot be developed at all without the black man".[379]

> The black man is essential to us and we are necessary, if not essential to him. We could not live here without the black man though the black man can live here without us, it is only at a very heavy price to himself. If that is so the only sensible solution seems to me to be to accept him as a partner and not as someone to be exploited on the one hand, or treated as an object of misplaced sentiment on the other.[380]

These ideas showed the continued change in the attitude of the settlers towards the Africans.

President of the Legislative Council with the position of Speaker. The motion was opposed by both the unofficial and official members of the Council. See the *Legislative Council Debates*, col. 130 (13 March, 1941)

[378]Ibid., cols. 332-33 (27 May, 1943)

[379]Ibid., col. 144 (29 May, 1943)

[380]Ibid.

On the other hand the war influenced constitutional advances, within the existing order, to some degree. Unofficial members assumed some administrative functions.[381] Instruction 4 of the Northern Rhodesia Royal Instructions, 1924 made provision for unofficial members, elected or nominated to be members of the Executive Council. They were appointed by the Governor on instruction from the Crown. On 12 September 1942, in an address to the Council, the Governor announced the formation of a War Committee tasked with the responsibility of considering any urgent problems arising from the war.[382] The appointment of this Committee did not entail any constitutional change. The duties and functions of the Executive Council remained as previously.[383] From the constitutional perspective the practice was valuable, although, it was only for a short period to deal with an unusual situations. It gave unofficial members the taste of administrative power and responsibilities. The next most important constitutional developments occurred in 1945 after the end of the war,

---

[381] See Davidson, *The Legislative Council of Northern Rhodesia*, pp. 60-62. This was not a totally new development. In 1930 an Unofficial Member, Captain John Brown was appointed Member for the Agriculture Survey Commission, a position for which he was paid a salary. See *Legislative Council Debates*, col. 16 (21 November, 1929). Three years later Mr. Chad, another unofficial member was appointed Unemployment Commissioner.

[382] It was composed of the Governor as Chairman, Chief Secretary, Financial Secretary, Sir Gore-Browne, Member nominated to represent African interests, and Roy Welensky member for Broken Hill Electoral Area.

[383] See the Governor's Address to the Legislative Council: *Legislative Council Debates*, cols. 1 - 4 (12 September, 1942)

any question the votes shall be equally divided, he shall have a casting vote."

The constitutional significance of the changes was raised in the Council by Welensky.[388] The Chief Secretary in response explained that under the new constitution the Governor would not retain an original vote. A casting vote was to be used only in the case of an equality of votes. Apart from that, there was a majority of unofficial votes, it was, therefore, impossible for Government to force through the Council any measure against the will of unofficial members. Conversely the power which the new constitutional order conferred upon the unofficial members restrained the Government from taking any action which they disagreed with.[389] For the first time the unofficial members obtained control of the Council within defined limits.

The Governor, however, retained his reserve powers which he exercised whenever he determined,

> that it was expedient in the interests of public order, public faith or good government...that the Bill introduced, or motion, or resolution, or vote proposed for decision in the Council shall have effect, then if the Council fail to pass such a Bill, motion, resolution or vote within such time and in such form as the Governor may think reasonable and expedient, the Governor in his own time and in his discretion, may, notwithstanding any provisions of this Order... declare that such Bill, motion, resolution or vote shall have effect as if it had been passed by the Council, either in the form in which it was so introduced or proposed or with such amendments as the Governor shall think fit which have been moved or proposed in the Council or any Committee...."[390]

---

[388] *Legislative Council Debates*, cols. 188-1911 (6 June, 1945)
[389] Ibid.
[390] Art. 19.

These were broad powers, which negated the significance of the unofficial majority. The power of assent to legislation remained with the Governor. There was no alternative in the event of assent being withheld. On the other hand His Majesty retained the power to disallow any law assented to by the Governor.[391] The constitutional changes had value provided neither the Governor nor His Majesty exercised their respective extreme powers.

The move from a Legislative Council with an official majority, to a semi-representative legislature with an unofficial majority vote provided impetus for greater future advances. An early sign of the elected members' progress towards political control is the changing numerical balance between elected and nominated members within the unofficial majority camp. The proportion of elected to nominated unofficial members in the Legislative Council showed the degree of development of the local electorate and the relative political maturity of the Territory;[392] Northern Rhodesia was ready to enter the next constitutional phase.

II. Towards a Multi-Racial Constitutional Arrangement

After 1945 it was gradually being accepted that the development of the white settlers was closely linked with the advance of African interests. This called for policy changes as well. The demands of the settlers shifted from

---

[391]Ibid., 22.
[392]Wight, *British Colonial Constitutions*, p. 30.

amalgamation to federation and the existence of a multi-racial constitutional order was recognised.

1. From Amalgamation to Federation

In June 1945 an unprecedented motion was moved calling for the Council to recognise that the interests of Africans and Europeans in the Territory were interlocked and that the policy of subordinating the interests of either section of the community was destructive of the development of Northern Rhodesia.[393] It signaled the beginning of the end of the era of settler supremacy, and the beginning of another epoch of multi-racial cooperation. The motion was unanimously carried.

The shift in attitude can be attributed to the British Government's commitment as trustee of African interests and advancement and to the opposition presented by Africans. The settlers also came to recognise Africans as valuable for their own survival. Settler development was dependent upon the progress made by the Africans. The change in settlers' attitude was underscored in August 1945, when Welensky moved a motion calling for the amalgamation of Northern and Southern Rhodesia under a constitution similar to that of Southern Rhodesia, which subordinated the interests of Africans.[394] The motion was defeated despite the existence of an unofficial majority vote in the Legislative Council.

---

[393] *Legislative Council Debates*, cols. 459 - 50 (19 June, 1945)

[394] Ibid., col. 55 (28 August, 1945)

In 1947 Welensky moved another motion "that it is in the interests of both the European and African peoples that the Territories of Northern Rhodesia and Southern Rhodesia should be amalgamated as soon as it is reasonably possible."[395] He predicted that by 1958 there would be no European to represent African interests in the Council and that there would be an increase in the number of African representatives by that time. He argued, "If you say that it takes 19 European Elected Members to represent the views of the 15,000 to 20,000 Europeans, I do not see how one can logically contend that 1.5 million Africans should be represented by only two or four Africans. These are facts which have to be faced and the sooner the European community faced these facts the better it will be."[396] He acknowledged that the increase in the people to represent African interests was necessary and inevitable. "I say that by 1968, if the present policy continues, there will be an Elected African majority in this Chamber."[397] In order to stop this development he called for amalgamation of the two territories.[398] The motion was defeated. The motion was moved in an effort to frustrate the impending constitutional changes of 1948, which the British Government had endorsed after numerous representations by members of the Legislative Council.[399]

---

[395]Ibid., col. 275.
[396]Ibid.
[397]Ibid.
[398]Ibid.
[399]The changes were embodied in the *Northern Rhodesia (Legislative Council)(Amendment) Order in Council, 1948*: See Government Notice No. 38 of 1948.

The creation of the federation of Rhodesia and Nyasaland in 1953 was the industry of the settler community.[400] Welensky stated: "I am to-day, as I have always been a firm believer in amalgamation, and I would prefer amalgamation, but I am a realist and I have realised that with the opposition of the United Kingdom, and the opposition of the African people of this country, I was making progress slowly. As a matter of fact, it was extremely unlikely that we would ever achieve anything."[401]

The Bledisloe Commission had singled out the different policies towards Africans in the three territories, levels of development and constitutional status as some of the reasons against amalgamation. The British Government was not prepared to give up its obligations to the nascent population of Northern Rhodesia and Nyasaland. Federation was the only option which did not face these problems. Under such a system of government each territory was to maintain its constitutional arrangement, policies and laws. The Secretary of State declared:

> The question of amalgamation has been under discussion for many years. His Majesty's Government in the United Kingdom have, after a careful

---

[400]The purpose of this discussion is merely to illustrate how forces within Northern Rhodesia influenced moves towards federation and how the federation itself affected the Territory. The other reason is to provide the background to changes which followed after 1953 leading to independence in 1964. A detailed examination of steps leading to the federation and constitutional arrangements has been avoided partly because it has been ably undertaken by other scholars: See David Mulford, *Zambia The Politics of Independence 1957 - 1964,* (London: Oxford University Press, 1973): Palley, *The Constitutional History and the Law of Southern Rhodesia.* The other reason is, that the federal constitutional structure did not affect the constitution and status of Northern Rhodesia.

[401]*Legislative Council Debates* col. 55 (10 November, 1948)

> consideration, formed the conclusion that it is desirable that there should be a fresh examination of the problem, and they have accepted the suggestion of the Prime Minister of Southern Rhodesia that a conference of officials of the three Central African Governments, Central African Council and of the Commonwealth Relations Office and Colonial Office shall be held in London for this purpose.[402]

The Conference came to the definite conclusion that closer association between the three territories ought to be created and the need was urgent and the acceptable form of closer association was a true federal system. Amalgamation was discounted, it stood little chance of acceptance.[403] The Conference outlined the federal system appropriate under the circumstances, taking into account the special features of the Central African situation: the self-governing status of Southern Rhodesia and that Northern Rhodesia and Nyasaland Governments were to remain responsible to His Majesty.

The London Conference was followed by another conference held at Victoria Falls in September 1951. In the communiqué issued at the end of the Conference delegates unanimously approved the Report of the London Conference. On the question of the federation all delegates, except the African representatives, were in favour. The African representatives indicated their willingness to consider the federation, on the basis of the Report of the London

---

[402]Quoted from the *Central African Territories Report of the Conference on Closer Association* (1951; Cmnd. 8233) p. 5.

[403]Ibid., pp. 14 - 15.

Conference, after the policy of partnership had been defined and put into operation.[404]

The Victoria Falls Conference avoided some of the crucial issues which impeded the creation of amalgamation. The import of the recommendations was that, once federation was introduced the constitutions, internal arrangements, and future political advances of the three territories were to be determined as before. The federal authority was to have little to do with these matters. The federal scheme suggested was largely an economic grouping to address issues such as communications, research, defence, higher education and the planning of economic development between the territories. The territorial, constitutional and political advancements remained the responsibility of each territory.

The British Government fully endorsed the resolutions of the Conference and accepted the proposal to hold another meeting in London in mid 1952 to be preceded by informal talks in January. The Imperial Government concluded, after

---

[404]See para. 6 of the Communiqué published as Annex to the *Statement of the Secretary of State for Colonies on Closer Association in Central Africa* (1951; Cmnd. 8411) Paragraph 11 of the communiqué read:
The Conference agreed that in any further consideration of proposals for federation:-

> (i) The protection of the status of two northern territories would be accepted and preserved. This therefore excludes any consideration now or in future of amalgamation of the three territories unless the majority of the inhabitants of all three territories desired it.
> (iii) The political advancement of the peoples of Northern Rhodesia and Nyasaland, both in local and territorial governments, must remain as at present (subject to the ultimate authority of His Majesty's Government in the United Kingdom) the responsibility of the Government and Legislature of each territory, and not of any federal authority.

Conference, after the policy of partnership had been defined and put into operation.[404]

The Victoria Falls Conference avoided some of the crucial issues which impeded the creation of amalgamation. The import of the recommendations was that, once federation was introduced the constitutions, internal arrangements, and future political advances of the three territories were to be determined as before. The federal authority was to have little to do with these matters. The federal scheme suggested was largely an economic grouping to address issues such as communications, research, defence, higher education and the planning of economic development between the territories. The territorial, constitutional and political advancements remained the responsibility of each territory.

The British Government fully endorsed the resolutions of the Conference and accepted the proposal to hold another meeting in London in mid 1952 to be preceded by informal talks in January. The Imperial Government concluded, after

---

[404]See para. 6 of the Communiqué published as Annex to the *Statement of the Secretary of State for Colonies on Closer Association in Central Africa* (1951; Cmnd. 8411) Paragraph 11 of the communiqué read:
The Conference agreed that in any further consideration of proposals for federation:-

> (i) The protection of the status of two northern territories would be accepted and preserved. This therefore excludes any consideration now or in future of amalgamation of the three territories unless the majority of the inhabitants of all three territories desired it.
> (iii) The political advancement of the peoples of Northern Rhodesia and Nyasaland, both in local and territorial governments, must remain as at present (subject to the ultimate authority of His Majesty's Government in the United Kingdom) the responsibility of the Government and Legislature of each territory, and not of any federal authority.

the informal talks: "Southern Rhodesia is a self-governing colony. Northern Rhodesia and Nyasaland are protectorates. If the three territories were to be amalgamated, they would all become merged in the new self-governing State. Northern Rhodesia and Nyasaland would thus lose their separate identity (which they would retain in a federation) and this would mean that His Majesty's Government would have to disregard obligations, which by virtue of treaty and otherwise, they have assumed towards the two northern territories. This they cannot do."[405]

The reconvened Conference met in April and March and[406] came up with a draft federal scheme, which was presented to Parliament by the Secretaries of State for Commonwealth Relations and for Colonies on 18 June 1952. The final Conference was held in London in January 1953. Its purpose was to consider the draft federal scheme in the light of the reports of three Commissions, amendments suggested and reach agreement on a revised scheme for submission to legislatures of the four governments. The Federal Constitution was issued on 1 August, 1953 and published in Northern Rhodesia on 4 September, 1953.[407] The

---

[405] *Report of the Conference on Federation* (1953; Cmnd. 8753), pp. 9 - 10.

[406] It must, however, be noted that the Secretary of State for Colonies invited the African Representative Councils of Northern Rhodesia and Nyasaland to send delegates to London for informal talks with him and take part in the Conference. The Representatives travelled to London and had informal talks but declined to attend the Conference.

[407] See Government Notice No. 243 of 1953. The examination of the federal structure is beyond the scope of this, but it has been adequately examined by other scholars see: Palley, The *Constitutional History and the Law of Southern Rhodesia*: Hall, *Zambia*: Mulford, *Zambia the Politics of Independence 1957 - 1964*. What needs to be noted is that the final federal constitution did not deviate from the

federation came into force on 23 October, 1953. Its creation did not change the constitutional status of Northern Rhodesia. The Territory remained a protectorate and the political advancement of the people remained under the influence of the inhabitants and Her Majesty's Government.

2. Constitutional Changes of 1948 - 1958

(a) Northern Rhodesia (Legislative Council) Order in Council, 1948

Under the constitutional changes of 1948 the Governor was replaced as President of the Council by the Speaker appointed by either His Majesty or the Governor and held his office at the pleasure of the Crown. The constitution of the Legislative Council was radically changed. The number of ex-officio members increased from five to six; that of nominated official members was reduced from four to three. The number of nominated European members representing African interests came down to two from three, and the position of the two unofficial members with no specific interest to represent was abolished. The elected members increased from eight to ten. The most important change was the introduction of two African members appointed by the African Representative Council[408] from

---

spirit and intent of the reports submitted by the various conferences including the Victoria Falls Conference.

[408]The functions of the Council were outlined by the Governor in his address to the first session of the Council in November 1946:

> It is your responsibility to advise on matters directly affecting the African population of the Territory. It is not your function to make the laws of the land, that has to be done by the Legislative

among its members to represent their interests. It signaled that Africans had become of age and capable of pursuing their own interests.

On the colonial constitutional scale the amendment did not register a change. The legislature remained semi-representative: less than half of the members of the Legislative council were elected, and the unofficial majority vote introduced in 1945 was maintained.[409]

(b) Constitutional Changes of 1953

In 1948 the African National Congress (ANC.), the first African political party, was created out of the Federation of Welfare Societies established two years earlier.[410] The split within the ranks of the ANC in 1958, the creation of Zambia National Congress (ZANC), the

---

> Council, nor is it your function to administer these laws, that is done by the various Government departments and may I emphasize this through the Chiefs and their Councils and Native Courts; but you will have a hand in shaping of those laws which affect the Africans and it is for that reason that certain draft legislation will be submitted to you for your comments and advice you may give. Such advice will be carefully considered when the legislation is presented to the Legislative Council. The Governor is not bound to accept your advice but I wish to give you this assurance that any recommendation coming from this Council will always receive the full consideration which you, as superior representative body of the African community have the right to expect.

See the *Legislative Council Debates* cols. 190-191 (4 July, 1952)

409 *The Northern Rhodesia (Legislative Council) (Amendment No. 2) Order in Council, 1948* extended the life of the Legislative Council from three to five years.

410 It is not the intention here to exhaustively address this subject for two reasons. Doing so would be a deviation from the objective of this study. Secondly, the subject has already been ably dealt with by other scholars. The subject is considered here for the purposes of illustrating the extent to which the rise of African politics influenced constitutional changes in the Territory.

proscription of ZANC and the emergence of the United National Independence Party (UNIP) drastically changed the political power map of Northern Rhodesia. The events precipitated changes in both the Legislative Council and Executive Council.

(i) Legislative Council

After the constitutional changes of 1948, there was a constitutional lull. Progress was impeded by the complexity of the constitutional problem, which entailed harmonizing the political aspirations of both Europeans and Africans. The Secretary of State was pressed for a solution. The Africans were becoming increasingly aware of their position in Northern Rhodesia and were making demands for increased representation in the Legislative Council. The introduction of African members in the Legislative Council in 1948 complicated the situation to some extent. If any changes were to be made in the legislature it had to take into account the views of Africans.

The two African members made representations to the Secretary of State for constitutional changes. They argued that time had come for African membership in the Legislative Council to increase and provision made for an African member to sit on the Executive Council. They criticised the system of the African Representative Council selecting African members. They proposed eight African Members to sit in the Legislative Council one from each of the eight electoral areas elected by the provincial electoral teams. The demand was justified on the premise

that the Territory was very large, hence it was not possible for two members to tour the whole country.[411]

The elected members countered that time was not yet appropriate for such a major constitutional advance. Yamba, the African member, argued that "no one can advance in any form of industry or in any walk of life without handling the matter practically."[412] He went on to say, "If I can give a short example, Sir, which will be very common and simple to understand. If a child bought a bicycle from a store and we made that child put the bicycle in the house without attempting to ride it, it will never know how to use the bicycle at all."[413] The example, though very basic, effectively underscored the point. The settlers had themselves made the same presentations for increased representation in the Legislative Council, and seats on the Executive Council largely because they wanted to learn what the process of governing involved and gain the necessary experience before being granted self-rule, which they hoped to attain.

The simile was sadly distorted: elected members used it to argue against the political advancement of the Africans. Yamba used the bicycle to illustrate his point, and not that the bicycle, as the simplest mode of mobility, had any relationship with the stage of development attained by Africans. The members did not see it that way. To them Africans were still in the "bicycle stage." The Council with its complex procedures and problems it addressed was

---

[411]Ibid., cols. 78 - 79 (1 July 1952)
[412]Ibid.
[413]Ibid.

likened to a modern fast car. Beckett argued, "politics as in other spheres in this world is intricate and can cause harm, experience and reliability have to be learnt and cannot be bestowed."[414] Admittedly Yamba was not seeking to be bestowed with the experience but an opportunity to acquire it. The settlers argued that it had taken the colonists a long period of time to achieve what they had and Africans could not be expected to gain major constitutional advances within a short period of time. Africans had to go through the same process as whites. The African demands were in relation to the problems they were facing. Two Africans members could not be expected to adequately represent well over one million Africans sparsely distributed throughout the Territory. There is no doubt that political power should not be freely given as alms. Those who are to benefit are expected to fight for it and it is only in that way that they can value it. The problem lies in determining the point when people can be said to have adequately fought for their rights and needs to enable them appreciate their achievements. This line can at best only be drawn arbitrarily.

The Africans opposed these arguments. Sokota argued that Northern Rhodesia was a totally different country from other colonies. "We are living in a country where probably one race wants to get an advantage over the other and it would be wrong for the Colonial Office or British Government to treat our demands as they could have probably done in the East and West or in any other protectorates...

---

[414]Ibid., cols. 189 - 190 (4 July 1952)

."[415] The force of this argument cannot be overemphasised. One of the differences between analytical and sociological jurisprudence is that the latter perceives constitutional changes in relation to various forces inherent in a specific social milieu. Whereas the former believes that one legal innovation in one setting is good innovation wherever it may be transplanted, which proposition has long been discounted. From the sociological point of view Sokota's argument was no doubt sound.

In view of the different views between the elected members and the African representatives it was not surprising that the meeting called to discuss the next constitutional step in Northern Rhodesia ended in a deadlock. The African members asked for parity between African members and elected members, and an African member on the Executive Council. The elected members on the other hand called for an elected majority in the Legislative Council and parity in the Executive Council between official and unofficial members. The Imperial Government could not support either side, and a compromise proved difficult to establish. The Government instead imposed its own solution through the Order in Council of 1953.

The number of ex-officio members was reduced from six to four. Nominated members increased from three to four. Unofficial members appointed to represent African interests were maintained at two. The number of elected members increased from ten to twelve and African members rose from

---

[415]Ibid., col. 95 (13 November, 1952)

two to four.[416] The total membership of the Council increased from twenty-three to twenty-six. The number of official members was reduced, and less than half of the total members of the Legislative Council were elected. The African members were still chosen by the African Representative Council and appointed by the Governor. The Legislative Council merely underwent internal reorganisation whilst retaining the semi-representative status.

(ii) The Executive Council

Constitutional development for the Executive Council meant gradual transformation of the institution until it was controlled by the Legislative Council. As constituted under the 1924 constitutional order, the Executive Council was an all powerful institution enjoying complete control over the Legislative Council. The Royal Instructions of 1924 made provision for the appointment of unofficial members but no steps were taken to appoint any. Although some unofficial members were part of the Executive Council, these were temporary measures taken in special circumstances. Serious developments came in 1948. Four unofficial members were appointed to the Executive Council, in addition to four official members. Three of the unofficial members were elected and the fourth was one of the members appointed to represent African interests. Of

---

[416] *Northern Rhodesia (Legislative Council) (Amendment), 1953* to be read together with the *Northern Rhodesia (Legislative Council) Order in Council, 1945 to 1948,* collectively were known as *Northern Rhodesia (Legislative Council) Order in Council, 1945 to 1953.*

the three elected members one was given ministerial *responsibility whilst still maintaining his position in the* Legislative Council. This was the first step towards transforming the Executive Council into a Cabinet in the Westminster tradition.[417]

The unofficial members were out-numbered by official members who were six in all, but they held greater influence. In the Legislative Council the unofficial vote amounted to fourteen, whereas the official vote was nine. An informal arrangement was worked out between official and elected members that unofficial members would have the same voting power of fourteen votes in the Executive Council as they had in the Legislative Council.[418] This meant that for any Government decision to succeed in the Executive Council it had to obtain the support of the elected members. The Executive Council was gradually transferring its powers to the Legislative Council.

In an effort to transform the Executive Council further, representations were made to the Secretary of State for Colonies by elected members to change the composition of the Council. The settlers called for the reduction of members of the Executive Council from ten to eight: four official members and four elected. In addition the four elected members were to hold portfolios. A call was also made to change their titles from members to ministers. Welensky argued: "I think time is opportune for a change in the titles of Members who occupy executive

---

[417]See the Governor's Address, *Legislative Council Debates* cols. 4 - 5 (10 November, 1948)
[418]Ibid.

positions...time has come when members should be termed as Ministers, whether they are officials or non-officials. When you go to Southern Rhodesia or South Africa and talk of a Member or the Member for agriculture, nobody knows what you are talking about...."[419] That these demands were made was in itself a sign of the gradual shift in the balance of power from London to Northern Rhodesia. Welensky observed, "I am convinced that the centre of political gravity has shifted from London to Northern Rhodesia... we are only governed by the Colonial Office to that extent to which we are prepared to let them govern us. There are limits beyond which they cannot."[420]

In view of the deadlock between the African members and the elected members on the constitutional future of Northern Rhodesia, the Imperial Government proceeded to determine the next constitutional arrangement through the Royal Instructions, which radically altered the composition of the Executive Council. The number of members was reduced from ten, as established in 1948, made up of six official members and four unofficial members without portfolios, to nine. The number of official members dropped from six to five and that of unofficial members was maintained at four. The fundamental difference was that all the unofficial members were given portfolios of Health, Lands and Local Government; Commerce and Industry; Agriculture and Natural Resources and for African Interests. This was totally different from the just dissolved Council of four

---

[419]Ibid., cols. 52 - 3 (2 July, 1952)
[420]Ibid.

unofficial members with only two of the members holding portfolios.[421]

All the nine members were responsible to the Governor and to the Legislature for the administration of government departments within their portfolios. They formed the equivalent of a cabinet and the principle of collective responsibility applied to their decisions. All the members, both official and unofficial, sat on the same side of the Legislative Council and constituted the Government front bench.[422] Further advance in transforming the Executive Council into a Cabinet came on 5 July 1955. In an address to the Legislative Council the Governor informed members of the Imperial Government's acceptance of the proposal to change the title of members. Members who held portfolios in the Executive Council were to be called Ministers.[423]

(c) Constitutional Changes of 1959.

After the constitutional changes of 1954 it was agreed between the British Government and the Government of Northern that there were to be no constitutional changes during the five year term of the tenth Council, which started on 10 April 1954. Most unofficial members were agreed that the new constitutional order needed to be tested, but debate on the next constitutional step was to go ahead.

---

[421]See Governor's Address to the First Session of the Tenth Council, *Legislative Council Debates* cols. 1-4 (10 April, 1954)
[422]See *The Northern Rhodesia Proposals for Constitutional Change*, (1958; Cmnd. 530) pp. 16 - 7.
[423]Ibid., cols. 5 - 6 (5 July 1955)

The constitutional changes introduced five years later, in 1959 were significant in many respects. They marked the end to constitutional schemes based on separate representation for European and African interests, in favour of arrangements encouraging politics on non-racial lines.[424] For the first time Africans qualified to vote in the election of members of the Legislative Council. On the colonial constitutional scale Northern Rhodesia attained a full representative Legislative Council in which more than half the members were elected. Most importantly Northern Rhodesia attained the highest level of constitutional development within the Colonial Empire proper, short of internal self-rule.[425] These changes were initiated within Northern Rhodesia bearing in mind its history and level of development attained.

The architects took into account the fact that Northern Rhodesia was a complex plural society made of different races with diverse interests. The objective of the new constitutional order was to empower people of every race to take part in the governance of the Territory, in a manner and extent determined by their levels of development and interest in the country. The Chief Secretary to Government effectively captured the emerging spirit:

---

[424]See *The Northern Rhodesia Proposals for Constitutional Change*, (1958; Cmnd. 530), para. 5.

[425]Responsible government is not defined by any statute like representative government. It means a system of government in which there is a ministerial executive dependent upon the support of the legislature. It is defined by the degree of control exercised by the legislature over the executive. See Wight, *British Colonial Constitutions*, pp. 33 - 4 and 58.

> If we are to safeguard the future for ourselves and our children, our new constitution must create the conditions which will bring forward the day when all the peoples of Northern Rhodesia will come to regard themselves first and foremost as Northern Rhodesians and when race and colour are but an after-thought. It is upon the degree of our success or failure in the task that we shall stand judged at the bar of history.[426]

For the first time in the history of the Northern Rhodesia we see the influence of the anti-classical perspective in constitutional-making. The constitution was perceived as a means to an end and not an end in itself. Until 1954 change in the constitution reflected the Imperial Government's response to the pressures exerted by the colonists and the Africans. More often than not the changes were merely temporary solutions to the complex problems facing the Territory. The changes of 1959 were different. The Chief Secretary to the Government went on to say:

> We here have peculiar and complex problems of our own to face and to resolve and *it is right we should attempt to devise our own particular solution to those problems rather than to adopt blindly devices and methods which may not be successful and appropriate in countries with very different conditions and circumstances.* The aim and the firm intention of the Government of Northern Rhodesia is to bring about as soon as it can be managed in practice and in politics a state and an outlook which is not multi-racial but rather non-racial.(emphasis is mine)[427]

Before examining the specific aspects of the changes the background needs examination.

---

[426]See the speech of the Secretary of State in support of the motion to approve the constitutional changes, *Legislative Council Debates* col. 227 (4 July, 1958)
[427]Ibid.

(i) Background to Constitutional Changes

The foundation for the constitutional changes was laid down several years earlier. Both the Colonial and Imperial governments had through various policy statements expressed their desire to see constitutional progress made on non-racial lines. By the 1950s British Government's policy on Northern Rhodesia and other dependencies was settled. On 4 November, 1951 the Secretary of State Oliver Lyttleton outlined the two fundamental objectives of his Government in the House of Commons. First, to help colonial territories attain self-government within the British Commonwealth and rapidly build in each territory, institutions which the circumstances of each territory dictated. Second, to pursue economic and social development of the territories in line with their political advances.[428]

> Her Majesty's Government looked to the day when the part played by racial consideration in the affairs of the Territorial Government will become negligible. It should then be possible to move from the present system of racial representation in the territorial Legislature towards a system based on a wide franchise with no separate representation for the races.[429]

In Northern Rhodesia most settlers had come to acknowledge that their progress was linked to that of Africans. Racial statements which characterised the earlier years of the Legislative Council had long ceased. The new attitude was first clearly presented in the Moffat

---

[428]Ibid., cols. 186 - 190 (13 March, 1956), quoted from the speech made by the Mr. Unsworth in the Legislative Council.
[429]Ibid.