

A COMPARATIVE STUDY OF THE REPUBLICAN CONSTITUTIONS OF
ZAMBIA AND MALAWI

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Thesis submitted in part fulfilment of the requirements for the
degree of DOCTOR LEGUM in the Faculty of Law in the University of
South Africa after completion of the doctorate examination in
Constitutional Law, Public International Law and Labour Law.

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February, 1973.

VOLUME I

INTRODUCTION

and

THE HISTORICAL BACKGROUND

(Chapters One - Eight)

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SUMMARY

The purpose of this study was (a) to analyse the Constitutions of Zambia and Malawi; (b) to discover the similarities between the provisions of the two Constitutions and those of other countries, including non-Commonwealth countries. The treatment of the two Constitutions had, however, to be preceded by a historical background. This was found necessary to facilitate a full appreciation of the present Constitutions.¹⁾

The most important phenomenon observed in the historical background is the development of parliamentary representation.²⁾ At first the European settlers held the initiative regarding constitutional changes but this initiative was lost in the mid-fifties when African nationalism began to dominate the scene. This culminated in the break-up of the Federation and the independence of the two countries in 1964.³⁾

On analysis it becomes apparent that there are more similarities than differences between the two Constitutions and those of the other newer Commonwealth countries. The older Commonwealth countries have Constitutions which, although written, are more akin to that of the United Kingdom.

While Parliament in both countries is based on the Westminster model, the Executive is partly Westminster and partly American/...

1) See Chapter One and Chapters Two and Three.

2) See Chapters Four and Five.

3) See Chapters Six, Seven and Eight.

American in that the President is the real executive.⁴⁾ The Cabinet merely advises the President but the President is not bound to follow its advice. The Cabinet is not, however, as impotent and as insignificant as that of the United States of America. For instance, it is not alienated from the Legislature. It has the same role and powers in the Legislature as the British Cabinet.

The Judiciary is based on the British structure and principles but the qualifications for judgeship have been lowered because of the lack of advocates of long standing.⁵⁾ The magistrates' courts still exist as the most important of the lower courts,⁶⁾ but there is a system of native courts, styled local courts in Zambia and traditional courts in Malawi.⁷⁾ In Zambia the decisions of these courts are subject to the jurisdiction of the High Court. In Malawi these courts have been given independence, with the National Traditional Appeal Court as the highest court, equivalent to the Supreme Court of Malawi. Regional traditional courts can impose the death penalty.

The/...

4) See chapters Thirteen and Fourteen.

5) See chapters Fifteen, Sixteen and Seventeen.

6) See chapter Fifteen.

7) See chapter Sixteen.

The civil service is British in structure but Africanisation has compromised the principle of promotion on long experience.⁸⁾ Security of tenure of office is, in some cases, less safeguarded than it is in the United Kingdom.

The control of public revenues is also based on British principles.⁹⁾ The Auditor-General is the principal officer in checking Government expense.

The citizenship laws differ considerably from those of the United Kingdom but are very similar to those of the other newer Commonwealth countries.¹⁰⁾

In both countries the institution of chiefs is very strong.¹¹⁾ In Zambia but not in Malawi, the chiefs have a House of Chiefs which,¹²⁾ although not part of the Legislature, exercises legislative functions. Its powers are, however, weaker than those of similar Houses in West African countries.

The one-party system which seems to be gaining popularity in Africa, was introduced in Malawi in 1966.¹³⁾ At the time when/...

8) See Chapter Eighteen.

9) See Chapter Nineteen.

10) See Chapter Twenty.

11) See Chapter Twenty-Three.

12) See Chapters Eleven and Twelve.

13) See Chapter Twenty-Four.

when this thesis was written it had not been introduced in Zambia but was introduced in December, 1972. An examination of the system as it exists in Malawi and Tanzania shows that it could be democratic in that the voter is given a choice between two or more candidates, although they would be of the same party. The voter is likely to look at merit and not party affiliation when making his choice.

In conclusion it should be mentioned that the Westminster model as embodied in the Constitutions of the newer Commonwealth countries cannot remain unmodified. These modifications are increasing in both Zambia and Malawi but it would not be possible to discard the principles as a whole without at the same time obliterating the British influence which still greatly pervades the thinking of politicians and lawyers in these countries.

ABSTRACT

The thesis is divided into three parts. Part I is an introduction to the field of study and comprises only one chapter. This chapter includes short accounts of the geographical positions and the inhabitants of Zambia and Malawi.

Part II deals with the constitutional history of the two countries from the introduction of European administration in the last decade of the nineteenth century to their attainment of independence in 1964 - a period of seventy years. Zambia and Malawi are new States and a study of their Constitutions would not be properly appreciated if it were not to cover fairly fully the past that bore the present.

Part III, which is the main section of the study, deals with the provisions of the present Constitutions of the two countries. It is divided into sixteen chapters.

P R E F A C E

This study was carried out under most difficult conditions. Both the research and the writing were done while I was undergoing political detention in Salisbury Central Prison, Rhodesia. Without the unfailing help rendered by friends, charitable institutions, my promoter and the staffs of the various libraries and Government Printers, the work would not have been completed. All the information I wanted had to be sent or brought to prison because I was not allowed to go out of the prison walls for research.

It is not possible in this short preface to mention the names of all the persons who, and organizations which, helped me. I must, however, mention the names of a few who rendered the greatest help.

First, I am greatly indebted to my promoter, Prof. C.W.H. Schmidt, then head of the Department of Constitutional Law and International Law at the University of South Africa. Without his guidance this work would not have achieved whatever merit it may have. He worked through my draft chapters with a rare thoroughness. He is, however, not responsible for mistakes that may be found in this work.

Secondly, I wish to thank the Christian Care of Rhodesia and the Defence and Legal Aid Fund (London) who financed my whole study programme.

Thirdly, I wish to thank Miss Mary Todd (who acquired documents for me from Her Majesty's Stationery Shop, London), Mrs. Robertson of the Commonwealth Secretariat (who obtained for me Constitutions of the Commonwealth countries) and Mr. Guy Glutton-Brock (who gave me many documents regarding the Federation of Rhodesia and Nyasaland).

Finally, I wish to thank the typists and the person who mimeographed the work.

E.F.G. SITHOLE

February, 1973,
Salisbury,
RHODESIA.

GENERAL INTRODUCTION1. Geographical Position and Inhabitants

Zambia lies between eight and eighteen degrees south. In the west it is bordered by Angola and in the east by Mozambique and Malawi. In the north it is bounded by the Congo (Kinshasa) and Tanzania. The Zambezi River forms the southern boundary. A small portion in the south-west is bordered by the Caprivi Strip of South-West Africa and Botswana. The country is almost divided in two by the Congo Katanga "tongue" which runs deep into what should have been Zambian territory had it not been for the Colonial Powers' scant respect for geographical harmony in cutting territorial boundaries. In all Zambia has an area of about 290,000 square miles.

Malawi lies between nine and seventeen degrees south. It is bordered by Zambia in the west while Mozambique borders it both in the east and in the south. Tanzania forms the northern boundary. The country is a long and narrow strip of land (with the frontier never much more than fifty miles away) running from the south to the north. In all it has an area of about 37,000 square miles - about an eighth of that of Zambia.

It is not known when man first settled in Central Africa. Some archaeologists put the period at a million years⁽¹⁾ while others think that Central Africa is, in fact, "one of the cradles of the human race".⁽²⁾ Today, however, both Zambia and Malawi

(1) - See Clark, Dr. Desmond "Early Man and the Stone Age" (in Brelsford, N.V. (edited) Handbook to the Federation of Rhodesia and Nyasaland (London, Cassell, 1960) p.30.

(2) - Gann, L.H. A History of Northern Rhodesia - Early Days to 1953 (London, Chatto and Windus, 1964) p.1. For the coming of the Bantu races into Central Africa, see Summers, Roger "The Iron Age Cultures and Early Bantu Movements" (in Brelsford, op.cit., pp. 43-56); Mitchell, Prof. Clyde "The African Peoples" (in ibid., pp. 117-123); Pike, G. Malawi: A Political and Economic History (London Pall Mall, 1968) pp. 21-61; and Gann, pp.1 et seq.

are populated predominantly by Africans. Non-Africans form a minor portion of the about 4,000,000 population in each of the two countries. Malawi's population is slightly larger than that of Zambia despite the latter's greater area. The African population in both countries, as elsewhere in black Africa, is divided into tribes. The major tribes of Zambia are the Ba ba, the Lozi, the Tonga and the Ila, the Lunda, the Ngoni, the Lamba, the Nsenga and the Chewa.⁽³⁾ In Malawi the major tribes are the Mang'anja, the Nyanja, the Chewa, the Tumbuka, the Tonga, the Ngoni and the Yao.⁽⁴⁾ It can be seen that a number of tribes are found on both sides of the Zambia-Malawi border.

(3) - For accounts of the origin of these tribes, see Gann, ibid.; Gann, The Birth of a Plural Society (Manchester, University Press, 1958); Gluckman and Colson (edited), Seven Tribes of British Central Africa: Lane-Poole, The Native Tribes of the Eastern Province of Northern Rhodesia (Lusaka, Govt. Printer, 1938); Smith and Dale, The Ila Speaking Peoples of Northern Rhodesia (1920); Elmslie, Among the Wild Ngoni (London, Edinburgh Oliphant, etc., 1901); and contributions by Tweede, Mutumba, Cunnison and Lennie in Stokes and Brown (edited), The Zambesian Past (Manchester, University Press, 1966).

(4) - For accounts of the origin of these tribes, see Pike, op.cit.; Gann, A History of Northern Rhodesia, p.14; Lane-Poole, op. cit.

2. Historical Background

Between about 1890 (when European administration was introduced) and 1964 (when the two countries attained independence) Northern Rhodesia (Zambia) and Nyasaland (Malawi), particularly the former, went through many constitutional phases. Northern Rhodesia was first ruled by the British South Africa Company which also ruled Southern Rhodesia.⁽⁵⁾ Company rule, however soon fell into disfavour with the European settlers. Agitation for its abolition resulted in the attainment of self-government by Southern Rhodesia in 1923 and in the declaration of a protectorate over Northern Rhodesia in 1924. The British Government assumed the administration of Northern Rhodesia.⁽⁶⁾ The settlers, who had had very little constitutional advancement under Company rule were granted five elected representatives in a Legislative Council that also included nine Officials.⁽⁷⁾ From then onwards the settlers fought hard to control the Legislative Council and to gain representation in, and control of, the Executive Council.⁽⁸⁾ Although they succeeded in obtaining a majority in the Legislative Council in 1938, it was not until 1948 that the Constitution was amended to provide for the appointment of Unofficial Members of the Legislative Council to the Executive Council.⁽⁹⁾ Prior to 1948 Unofficial Members had served on the Executive Council without a constitutional provision authorizing such an arrangement.⁽¹⁰⁾

Nyasaland, on the other hand, started under direct Imperial rule. A Legislative Council was established as early as 1907. For many years, however, no major changes were made to the Constitution of 1907. Unlike the Northern Rhodesian settlers, the Nyasaland settlers made few demands for constitutional reforms. This was perhaps because of two main factors. First, they had not struggled to have a Legislative Council. It had been thrust upon them in 1907, with

(5) - See Chapter 2.

(6) - Ibid.

(7) - See Chapter 4.

(8) - Ibid.

(9) - Ibid.

(10)- Ibid.

a representation of three settlers to four officials (including the Governor). Second, they were never under any illusions as to the fact that Nyasaland was an African country where settler interests were subordinate to those of the Africans. The Northern Rhodesian settlers, on the other hand, saw their position differently. They ignored the fact that the territory was a protectorate and made frequent demands for self-government as obtained in Southern Rhodesia. The British Government, however, resisted these demands although it granted many others which were less far-reaching.⁽¹¹⁾

Africans did not actively influence constitutional developments in Northern Rhodesia and Nyasaland until the fifties, when African nationalism built up in both territories. The Legislative Council established in Nyasaland in 1907 and that established in Northern Rhodesia in 1924 had no African Members. The first Africans to enter the Northern Rhodesian and Nyasaland Legislative Councils did so after the constitutional reforms of 1948 and 1949 respectively.⁽¹²⁾ During the late fifties, however, the settler leaders lost to the African nationalist leaders the initiative to bring about constitutional reforms. This resulted in African controlled governments in Nyasaland in 1961 and in Northern Rhodesia in 1962 and in the independence of the two territories in 1964.⁽¹³⁾

The period under consideration also saw the establishment and dissolution of the Federation of Rhodesia and Nyasaland.⁽¹⁴⁾ The consummation of the Federation on October 23, 1953, was the culmination of an arduous campaign for closer association which had been started during the days of Company rule. Numerous unofficial and official conferences were held and two Royal Commissions were appointed to investigate

(11) - Ibid.

(12) - See Chapters 4 and 5.

(13) - See Chapter 8.

(14) - For the closer association campaign see Chapter 6; for the constitution, life and dissolution of the Federation, see Chapter 7.

the matter. While at first the settler leaders advocated closer association in order to establish a strong bloc of British territories to counter the spread in Central Africa, particularly in Southern Rhodesia, of the influence of the Afrikaner - dominated Union of South Africa, later, they intended the scheme to prevent Northern Rhodesia and Nyasaland, particularly the former, from falling under African rule as the Gold Coast and Nigeria had done.⁽¹⁵⁾

Closer association was bitterly opposed by Africans in Northern Rhodesia and Nyasaland and by a large section of the British public. Its establishment in the face of this opposition made its existence difficult and consequently it was dissolved in 1963.

The termination of the Federation removed the obstacles the Federal Government had directly or indirectly placed in the way to independence of Northern Rhodesia and Nyasaland.

It will be found that the chapters under Part Two contain considerable material that is of a political rather than a constitutional law nature. The inclusion of such material could not be avoided in view of the fact that constitutional reforms were often preceded by political contentions between the parties concerned. In fact, as Palley says, "political issues cannot entirely be avoided when dealing with constitutional questions."⁽¹⁶⁾

(15) - Although the Gold Coast and Nigeria had not yet become independent by 1951, their Legislatures and Governments were already dominated by Africans. - see Chapter 5.

(16) Claire Palley, The Constitutional History and Law of and Law of Southern Rhodesia 1888-1965 (Clarendon Press, Oxford, 1966) preface.

3. Present Constitutions

The analysis of the two Constitutions is approached in three ways. The first is a comparison of the provisions of the two Constitutions. The second is a comparison of the provisions of the two Constitutions with the provisions of the Constitutions of other Commonwealth countries. The third is a comparison of the provisions of the two Constitutions with those of the Constitutions of foreign (i.e. non-Commonwealth) countries. The three approaches do not, however, appear in the text in the order given. While the provisions of the Constitutions of Zambia and Malawi (which are the subject matter of the thesis) are compared at all stages, those of the Constitutions of the other countries (Commonwealth and non-Commonwealth) appear only where they were considered appropriate for inclusion. It seemed preferable not to limit the comparative study to a selected number of Constitutions of Commonwealth or non-Commonwealth countries. Such an approach would have had the disadvantage that important material might have been omitted merely because it was contained in a Constitution outside the selection.

Apart from such subjects as the House of Chiefs and the Declaration of Fundamental Human Rights which are contained only in the Constitution of Zambia, it will be seen that a great deal of similarity exists between the provisions of the Zambian and the Malawian Constitutions. In some cases the wording is identical. It will also be seen that there are many similarities between the provisions of the two Constitutions and those of the Constitutions of the other newer Commonwealth States. The explanation for this is simple. The independence Constitutions of these States originated from the same source - the British Colonial Office. The mass granting of independence to British possessions from 1960 did not, it appears, leave the Colonial Office's draftsmen with sufficient time to work out Constitutions substantially different in content. Another explanation is that most of the territories that obtained independence from 1960 shared common problems and aspirations which required a certain type of Constitution substantially applicable to all.

Embedded in the similarities between the two Constitutions (Zambian and Malawian), however, are

differences dictated by circumstances peculiar to each country. Such dissimilarities are also found when the two Constitutions are compared with those of the other Commonwealth countries. The differences are more pronounced when the two Constitutions are compared with those of the older Commonwealth countries - i.e. Canada, Australia and New Zealand. The Constitutions of the older Commonwealth States are short and contain only the most important aspects of government. The other matters are, as in the United Kingdom, left to ordinary statutory law and to convention. On the other hand, the Constitutions of Zambia and Malawi and of the other newer States of the Commonwealth are detailed and contain subjects which in Canada, Australia and New Zealand are governed either by ordinary statutory law or by convention.

CHAPTER TWO

NORTHERN RHODESIA -TREATIES AND EARLY ADMINISTRATION 1890-1924

Although Zambia and Malawi are contiguous, their acquisition by Britain did not take the same form. European administration entered Northern Rhodesia(1) from South Africa through the agency of the British South Africa Company. On the other hand, it entered Nyasaland from Britain through the agency of the Foreign Office(2). The first missionaries, who played such an important role in bringing about European administration, also entered the two territories from South Africa and Britain respectively(3). Because of the differences in the ways European administration was introduced in the two territories and the forms it took during the early stages, it will be better, in relation to the period under consideration (1890-1924), to treat the two territories separately. This chapter will therefore deal only with Northern Rhodesia. Nyasaland will be dealt with in the next chapter.

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1. In this and the other chapters in this Part (Part II) Zambia and Malawi will be referred to by their former names (Northern Rhodesia for Zambia and Nyasaland for Malawi) to avoid confusion in regard to constitutional development.
 2. The two agencies, the British South Africa Company and the Foreign Office, however, worked together to establish administration in the two territories, although the partnership did not last long - see below in this and the next chapters.
 3. The first missionaries to establish themselves in Northern Rhodesia came from Lesotho and were members of the Paris Missionary Society. Those who did the same in Nyasaland came from Britain and were members of the Church of Scotland and the Free Church of Scotland. "The slogan that trade follows the flag", was reversed in Central Africa" - Taylor & Dvorin, "Political Development in Central Africa 1890-1956" (*Race*, Vol. 1, No.1, 1959) pp.61-78, at p.63. The flag and trade followed missionaries in Central Africa. For a discussion of the development from missionaries to the flag and businessmen, see Debenham, F. Nyasaland: The Land of the Lake (H.M.S.O., 1955).

BACKGROUND EVENTS

The events that led to the introduction of European administration in Northern Rhodesia took the following sequence. In 1881 the Boers regained their independence in the Transvaal and immediately wanted to expand their territory towards the North. They established two states in Bechuanaland - Stellaland and Goshen(4). In 1882 they sent an emissary to Lobengula, the King of Matabeleland(5) to seek a treaty with him. Lobengula declined(6). In 1883 the Germans occupied Angra Pequena in South West Africa and planned to extend their territory into the interior(7). In the meantime the Portuguese, who had settled in the coastal regions of Mocambique and Angola, also began pushing into the interior(8). These advances by the Boers, the Germans and the Portuguese frightened the British, particularly the Cape Colony Government. In 1884 the British and the Boers concluded a convention which defined the boundaries of the Transvaal in the North.

-
4. The states were later taken by the British.
 5. Rhodesia is today divided into three large regions - Matabeleland, Mashonaland and Manicaland.
 6. President Paul Kruger of the Transvaal, however, claimed in 1884 that a treaty had been concluded with Lobengula - see An Imperialist (pseudonym), The Pioneers of the Empire (London, Methuen, 1896) p.83.
 7. Their plan was eventually to span the peninsula of Southern Africa with Boer republics.
 8. They were pushing into Nyasaland and Southern Rhodesia from Mocambique and into Northern Rhodesia from Angola.

In the following year, in an effort to halt the Boer advance, Britain declared a protectorate over Bechuanaland(9). This was done at the instigation of Rhodes who considered Bechuanaland the "Suez Canal into the Interior"(10). The convention and the declaration of a protectorate over Bechuanaland did not, however, stop the territorial machinations of the Boers. When it became clear that Mashonaland might fall into Boer, Portuguese or German hands, Rhodes, a fervent Empire builder and the most concerned about the possibility of all Central Africa falling into foreign hands, sent Rudd, Rochefort, Maguire and Thompson (members of a Syndicate - United Concessions Company, of which Rhodes was a member) in 1888 to seek a concession from Lobengula. Earlier in the year, John Smith Moffat, the Assistant Commissioner for Bechuanaland, had rushed to Lobengula to prevent him from signing a treaty with the Transvaal Republic which had, in a second bid for a treaty with Lobengula, sent a consul to the King. Moffat had extracted a treaty from Lobengula preventing the King from concluding any treaty with foreign powers without the sanction of the British High Commissioner for South Africa.

Footnotes on page 11.

9. The proclamation was made on 30th September, 1885. For a summary of the proclamation which established British administration in Bechuanaland, see Hertslet, Sir E. The Map of Africa by Treaty (London, Frank Cass & Co., 1967) Vol. I, pp.190-193. For a short account of the strategic position of Bechuanaland, see Fripp, Constance E. "Bechuanaland and 'The North'" (Transactions of the Rhodesia Scientific Association, March, 1949); Agar-Hamilton, The Road to the North: South Africa 1852-1886 (London Longmans, 1937); and Sillory, A. The Bechuanaland Protectorate (Oxford, O.U.P., 1952), which traces the history of Bechuanaland from the 19th century. For the part played by Rhodes in having Bechuanaland declared a protectorate and the events leading to it, see Basil Williams, Cecil Rhodes (London, Constable & Co., 1926) pp69-90. The land south of the Malopo River later became a Crown Colony while the North (including Khama's lands) became a permanent protectorate.
10. For the part played by Rhodes, see Basil Williams, op. cit., pp. 69-90. Rhodes was not, however, the first to think of a protectorate over Bechuanaland as the only way to stop the Boers. In 1871, Rev. Mackenzie, a missionary, had advocated such a course and so did Sir Bartle Frere in 1878 - ibid. p.70. Long before this Livingstone had stated: "The Boers resolved to shut up the interior and I determined to open the country; and we shall see who have been most successful in resolution, they or I" - ibid. All that Rhodes did was to tackle the problem with more determination.

The Mission of Rudd and his friends to Lobengula resulted in the conclusion of the Rudd Concession.⁽¹¹⁾

CHARTER OF THE BRITISH SOUTH AFRICA COMPANY

After obtaining the Rudd Concession Rhodes submitted proposals for a Chartered Company to the Colonial office on April 30, 1889⁽¹²⁾ to develop the Bechuanaland Protectorate and territories to the North of this region. The objects of the Company were: to extend the railway and telegraph lines to the north; to encourage emigration and colonization; to promote trade and commerce; to develop and work minerals and other concessions under the management of a single powerful organization, avoiding thereby conflicts and complications between the various interests that had been acquired in the region; and to secure to the native chiefs and their subjects the rights reserved to them under the concessions. Rhodes also made several other promises which interested the Imperial Government in his scheme. These promises included the building of a railway line through Bechuanaland; relieving the Imperial Government of its commitments in the same country; containing the Transvaal's advance to the North, thereby relieving the Imperial Government of the task of maintaining law and order on this rather troublesome border; promoting White Settlement in the interior; opening a second Rand which would balance the Transvaal's wealth; creating a strong British community which would build a future South African Confederation; and keeping the vast African territories north of the Zambezi open for British occupation.⁽¹³⁾ All this was very attractive to the Imperial Government, particularly since the proposals were made at a time when Parliament was not willing to grant funds to the Government for such expansion. ^(14.)

11. The Concession was signed on October 30, 1888. For its text see C.5918, No.38, Encl., p. 139. See also Basil Williams, op.cit., pp. 69-130, for negotiations and the granting of the concession. The Concessionaires and their assigns obtained "the exclusive charge over all metals and minerals situated and contained in my Kingdoms, principalities and dominions together with full power to do all things they may deem necessary to win and procure the same." In return for the Concession the Concessionaires promised to pay the King £100 per lunar month, 1,000 breech-loading rifles, 100,000 suitable ball cartridges, and an armed steamboat for use on the Zambezi. Lobengula's consent seems to have been obtained unscrupulously for immediately after the signing of the document, Thompson and Maguire fled from Matabeleland. Lobengula was infuriated by the document he was said to have signed and immediately repudiated it. In January, 1889, perhaps with the influence of rival concessionaires, a newspaper notice repudiating the Concession was published - see Mason, Philip The Birth of A Dilemma (Oxford, O.U.P. 1958) pp. 129-130. On April 23, 1889, Lobengula wrote to the Queen informing her that his indunas would not recognise the Concession - See Basil Williams, op.cit., p.128. Lobengula was legally entitled to cancel such concession since in his territory - Estate of Doms V. Leyds and Weeber N.O. 3 S.A.R. 206 at p.210, per Kotze C.J., referring to land grants. See also Cook Brothers v. The Colonial Government (1895) 12 S.C. 86, at p. 97, where de Villiers C.J. in discussing concessions given by the Pondo Paramount Chief, Sigcan, held that such concessions "created no legal obligations because their execution depended solely upon the will of the Paramount Chief, and there existed no possible means of enforcing it". When the Privy Council heard this case on appeal, it refused to rule on the point raised by Chief Justice de Villiers - Cook V. Sprigg (1899) A.C. 572. Lobengula could not have been amenable to any court for breach of the Concession. In Correspondence Relating to the Question of Ownership of Mineral Rights in Southern Rhodesia (Salisbury, Government Printer, 1933 - CSR 18-1933) counsel took the view that the Concession was a revocable licence and that it was, in fact, so revoked in 1889 by Lobengula's letter to the Queen on April 23. Lobengula, however, although he on several occasions repudiated the Concession, continued to receive the £100 per lunar month until 1893 when the payments were suspended because of the impending war between the Matabele and the Company. The suspension perhaps extinguished the Concession since a clause in it provided that if payments were in arrears for three months the Concession would be extinguished. One condition of the Concession was never met. No steamboat was ever delivered to Lobengula. It should however be noted that after the war in

1893 jurisdiction of the Company became based on conquest.
12. See African 372, p.65, Gifford and Consolidated Goldfields to Colonial Office, 30 April, 1889. In applying for the Charter Rhodes also sought for "an assurance that such rights and interests as have been legally acquired in these territories shall be recognised and receive the sanction and moral support of Her Majesty's Government" - Vide: Rhodes was apprehensive about the possibility of Lobengula effectively repudiating the Concession. He, therefore, wanted the backing of the Imperial Government for his Concession.

13. See Robinson, R.E. "Imperial Problems in British Politics, 1880 - 1895", in The Cambridge History of the British Empire (Cambridge, C.U.P., 1959) Vol.3, pp. 166-167 and 173-174; Gann, L.H. A History of Northern Rhodesia (London, Chatto and Windus, 1964) p. 58; Knutsford to Loch, 28 June and 9 July, 1891, C.O. 806/352, pp. 10 and 18.

14. Ibid.

Despite opposition from some quarters in Britain the Charter was granted without much difficulty on October 29, 1889. (15)

15. The text of the charter is reproduced in C.5918, No.128, Encl., pp.227-32 and in an abridged form (only the important articles being produced in full) in Hertslet, op.cit., Vol.1, pp.271-277. The grant of the Charter appeared in the London Gazette of 20 December, 1889. For the negotiations for the charter and opposition met, see Basil Williams, op.cit., pp. 130-139. When the Charter was granted Lobengula was still disputing the Concession. He had at the time written a letter (dictated to Moffat) repudiating the Concession and the suggestion that he had requested a Resident to be sent to his court. The letter arrived three weeks after the grant of the Charter and three days after Lord Knutsford had despatched a letter to him - See C.5918, No.130. Encl., p.235, Lobengula to Sir Sidney Shippard, 10 August, 1889. Lord Knutsford had told Lobengula in his letter that Queen Victoria had approved the Rudd Concession; that she had granted a Charter so that the Whites could settle their own disputes and keep peace among themselves; and that Mr. Moffat, then Assistant Commissioner for Bechuanaland, had been appointed Resident - C.5918, No. 129, Encl., p.233, Knutsford to Lobengula 15 Nov. 1889. African 392, No.77 Encl. p.100, Moffat to Shippard, shows that the Resident did not dare to reveal the full contents of Lord Knutsford's letter to Lobengula. He modified the letter to omit that Lobengula had requested a Resident and that some jurisdiction in Lobengula's land would be exercised by a body of Whites. Jameson, Rhodes's personal delegate to Lobengula is said to have been responsible for improving Knutsford's letter. He is, in fact, alleged to have torn up Knutsford's letter and substituted another - Lockart, J.G. and Woodhouse, C.M. Rhodes (Hodder & Stoughton, 1963) pp. 156. Even with the limited information that reached him, Lobengula protested and raised objections but these were dismissed diplomatically -- C. 5918, No. 136, p. 239, Knutsford to Loch, 5 Dec. 1889.

The Company was chartered under the name "British South Africa Company" (16) and the other persons included in the Charter, apart from Rhodes, were the Duke of Abercorn, the Duke of Fife, Lord Gifford, Alfred Beit, Albert Grey and George Cawston. Article 1 of the Charter defined the Company's field of operations as the region of South Africa "lying immediately to the north of British Bechuanaland, and to the north and west of the South African Republic, and to the west of the Portuguese Dominions." The Company was to retain concessions and agreements already made provided they were valid. (17) Article 3 authorized and empowered the company to acquire (subject to the approval of the Secretary of State) by concession agreement, grant or treaty rights, interests, authorities, jurisdictions and powers "of any kind or nature whatever, including powers necessary for the purposes of government, and the preservation of public order in or for the protection of territories, lands, or property comprised or referred to in the concessions and agreements as aforesaid or affecting other territories, lands or property in Africa, or the inhabitants thereof, and to hold, use, and exercise such territories, lands, property, rights, interests, authorities, jurisdictions, and powers respectively for the purposes of the Company...." No powers of government and administration were, however, to be exercised under any concession, grant, agreement or treaty until a copy of such document with particulars as might be required by the Secretary of State had been transmitted to him and he had signified his approval either absolutely or subject to conditions or reservations. (18)

Please see footnotes 16, 17, 18, overpage.

16. Although the Company was to operate on the strength of the Rudd Concession, the Concession was not then its property but that of the United Concessions Company. The British Government on granting the Charter must have assumed that the Concession would be transferred to the new Company. They only discovered in 1891 that it was still the property of the United Concessions Company, which by agreement became entitled to half the net profits of the B.S.A. Co. for the latter's exploitation of the Concession - (African 426, No. 272, p. 306, Colonial Office to British South Africa Company, 10 October, 1892; African 439, p. 11, Knutsford to Herbert. See also H.C. Deb., 4th Ser., Vol. 18, Col. 587, 9 Nov. 1893, where the Under-Secretary of State for the colonies, Buxton is reported to have said: "I believe if the Colonial Office possessed the information at that time, while it would not have prevented the Charter being granted, it would have considerably modified the terms which the Charter was given." In 1893, however, it was agreed that the Concession should be sold to the Chartered Company in return for 1,000,000 paid up shares of £1 - (African 459, No. 38, p. 42-54.

17. Article 2 of the Charter.

18. Before the Charter was despatched it was discovered by the British Government that the Concession did not, in fact, confer administrative and legislative powers. Lobengula had not conferred such powers on the concessionaires. The British Government, therefore, pointed out to the Company that before they exercised the powers conferred by Articles 3 and 4 of the Charter they should be obtained from Lobengula "Whenever a proper and favourable time for approach to Lobengula on the subject arrives." - (C. 5918, No. 127, p. 224, Colonial Office to British South Africa Company, 6 November 1889). See also In Re Southern Rhodesia (1919) A.C. 211, at p. 218, where it was pointed out that the Concession did not grant administrative and legislative powers.

Later the Colonial Office also became concerned about the legality of the land grants which the Company was making without such powers being found in the Concession (see C. 7171, p. 7) and the exercise of jurisdiction over Whites without having obtained an agreement from Lobengula to do so - (African 444, No. 1, Loch to Knutsford, 20 November, 1890.).

The Imperial Government, through the Secretary of State, retained, at least on paper, vast powers over the Company. In addition to sanctioning the acquisition of concessions, agreements, treaties, etc. and the initial assumption of powers of government and administration, the Secretary of State could object or dissent to the Company's administration of justice, administration in general, restriction of religion or any other matter regarding natives.⁽¹⁹⁾ He could also object or dissent to dealings of the Company with foreign powers or make suggestions which the Company was bound to follow.⁽²⁰⁾ Disputes with natives were to be submitted to him if he so required and the Company was bound by his decisions in such matters.⁽²¹⁾ At the end of twenty-five years and thereafter after every ten years, the Crown could alter, add to or repeal any provisions of the Charter concerning administrative or public matters.⁽²²⁾ Article 34 provided "that nothing in this...Charter shall be deemed or taken in anywise to limit or restrict the exercise of any of Our rights or powers with reference to the protection of any territories or with reference to the Government thereof should we see fit to include the same within Our dominions."⁽²³⁾

19. Article 15.

20. Article 8.

21. Article 7.

22. Article 33.

23. See also Despatch of Colonial Secretary dated 14 November, 1889, to the Company, drawing the attention of the Company to its Security of tenure in the absence of paramount necessity for...annexation or protectorate" and subject "to the Queen's right at any time to declare a protectorate" (Despatch quoted in Fox, H. Wilson, Memorandum on Constitutional, Political, Financial and Other Questions Concerning Rhodesia, printed for information of the B.S.A. Co. Board, (London, 1912). Article 33 reserved the right to the Crown to take buildings or works belonging to the Company and used exclusively for administrative and public purposes on payment of reasonable compensation.

Article 35 empowered the Crown to revoke the Charter if the Company failed to carry out its provisions, including the governing of the territory. ⁽²⁴⁾

A close study of the Charter reveals the Imperial Government's desire to reconcile its lack of funds to undertake on its own the venture it was now authorising the Company to carry out and "the need to control the Company so as to protect British foreign relations and to preclude disputes with native chiefs that might lead to military involvement." ⁽²⁵⁾ It was necessary to give as much power as possible to the Company since it was going to shoulder the whole financial burden of the venture. At the same time, however, it was equally necessary to see that the powers so given were subject to effective restraint if the Imperial Government should choose to impose it. The control was, however, more apparent than real since the Charter did not provide for the appointment of Imperial officers on the spot who could either report on or intervene in its activities.

LEWANIKA'S REQUEST FOR PROTECTORATE STATUS

The news of the events which had taken place in Bechuanaland (the declaration of the protectorate) and in Matabeleland (the conclusion of the Rudd Concession) reached Lewanika, the King of the Lozi, on the northern side of the Zambezi River. The King wrote to Khama of Bechuanaland, who was favourably disposed towards him, to enquire:

"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 Matabele. Tell me all as a friend. Are you happy and quite satisfied. Tell me all. I am anxious that you should tell me plainly, your friend, because I have a great desire to be received like you under the protection of so great a ruler as the Queen of England." ⁽²⁶⁾

Lewanika also sought the advice of Francois Coillard,⁽²⁷⁾ a missionary of the Paris Missionary Society, who had become his confidant in many matters. Coillard agreed with him on the desirability of a protectorate over Barotseland. The two of them had, of course, different reasons for wanting a protectorate. Lewanika's reasons were mainly three. First, he feared a Matebele invasion of his country and since the Matebele had made friends with the British he wondered whether the invasion would be carried out with British help. Secondly, he was becoming apprehensive about Portuguese encroachment into his land and the infiltration of mineral prospectors from the South. Thirdly, he believed that an alliance with the British would strengthen his shaky position. ⁽²⁸⁾

24. Article 5 of the Charter bound the Company to fulfil "all or singular the stipulations on its part contained in any concession, agreement, grant, treaty, etc., subject to any subsequent changes approved by the Secretary of State."

25. Palley Claire, The Constitutional History and Law of Southern Rhodesia 1888-1965 (Oxford, At the Clarendon Press, 1966) p.3.

26. As quoted in Hole, H. Marshall, The Making of Rhodesia (London, Macmillan & Co., 1926) p.213.

27. For Coillard's twenty years among the Lozis, see Coillard, Francois On the Threshold of Central Africa (London, Hodder & Stoughton, 1897) which is almost a day to day record of his work and of the political and social life of the Lozis.

28. During a heated meeting of Lozi Chiefs on the question of a protectorate, Lewanika, while addressing them, turned to Coillard and told him: "It is to protect myself against those Barotsi. You do not know them; they are plotting against my life" - ibid., p. 332.

Coillard, on the other hand, wanted a protectorate because first and foremost he wanted Barotseland to be run by a European Administration, particularly a British one. He did not like the existing state of affairs which he considered savage.⁽²⁹⁾ Secondly, he was apprehensive that an annexation of South West Africa by Germany would threaten Barotseland. Thirdly, he thought the threat of gold seekers and adventurers could only be checked effectively by a non-native government.⁽³⁰⁾ Fourthly, his mission was going to benefit. Its transport and communications problem would be removed.⁽³¹⁾

On January 8, 1889, Lewanika asked Coillard to write to Sir Sidney Shippard, the Administrator of Bechuanaland, to inform him that the King wanted to be placed under British protection. Part of Coillard's letter read:-

"The King Lewanika is most anxious to solicit that the protectorate of the British Government should soon be extended to him and to his people..."

Many a Zambesian 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 their countrymen to yearn after protection of Her Majesty the Queen's Government⁽³²⁾

29. Coillard felt that the Barotse needed protection against themselves and their own depraved feudalism as well as from the depredations of Europeans and that the best people to protect them were his wife's people (the British) - Gann, A History of Northern Rhodesia, p.59; The Birth of A Plural Society (Manchester, U.P., 1958) p. 55; Coillard, op.cit., p.184.

30. Coillard had been told in 1888 of the South African interest to invest in the Zambezi, see J. Smith to F. Coillard, 22 Nov. 1889. (C.05/1/1/1 1886 - 889 Nat. Arch MB.)

31. See Gann, A History Northern Rhodesia for a summary of these reasons.

32. F. Coillard to Sir F. Shippard: 8 Jan. 1889 (Encl. in H. A. Smith to Lord Knutsford, 26 July, 1889, C.59/18 (1890). Letter is also reproduced in Hole, op.cit., p.213. Coillard's claim that the chiefs and their people yearned for British protection was not wholly true in view of the opposition the idea later encountered from the chiefs. Coillard, who later attended meetings of the Chiefs to discuss the ideas records violent scenes against protection - Coillard, op.cit., pp. 329-333.

The High Commissioner for South Africa, Sir Henry Brougham Loch, was also of the opinion that Barotseland should be included under British influence and that there should be a continuous link between Lake Nyasa and Lake Tanganyika.⁽³³⁾ Lewanika's letter did not, however, reach the Colonial Office until August. The British Government did not respond to the letter. The Foreign Office was at the time engaged in negotiations with Portugal on areas in Central Africa. This made it inopportune at the time to include Barotseland, which lay in the still unsettled regions of the British sphere of influence. The Government was, however, later prepared to honour treaties made with the Barotse and other chiefs by a recognized body.⁽³⁴⁾

THE LOCHNER CONCESSION

The news that Lewanika wanted British protection reached Rhodes while he was negotiating for his Charter in Britain. The disinterest of the British Government presented him with an opportunity to expand his Company's domains. Shippard encouraged Rhodes to do just that. He informed Coillard that Rhodes would do what the British Government was unable to do at the time. Rhodes soon despatched Frank Elliot Lochner, an ex-member of the Bechuanaland Border Police, to negotiate for a concession with Lewanika. He became more determined to place Barotseland under his Company because a Concession which had been granted by Lewanika to Ware in 1889⁽³⁵⁾ had been bought by a rival Kimberley group of speculators led by H.T. King and C. E. Rind.

33. Sir H. B. Loch to Lord Knutsford: 7 April, 1890 and Col. Office to Foreign Office: 12 April, 1890 (in Further Correspondence Respecting the Affairs of Bechuanaland and Adjacent Territories -- African (South) No. 392).

34. Foreign Office to Colonial Office: 5 May, 1890 (in Further Correspondence Respecting the Affairs of Bechuanaland and Adjacent Territories -- African (South) 392).

35. The granting of this Concession was also heavily opposed by some chiefs--see Coillard, op.cit., pp. 356-357. The Concession was granted for twenty years.

Rhodes feared that the continuance of that concession would put obstacles in the way of his plans. It was, therefore, necessary not only to place Barotseland under his Company but also to buy the Ware Concession. (36)

Negotiation of the Concession

In Barotseland Lochner enlisted the services of Coillard. The negotiations dragged on for three months (April to June) This was partly due to Lochner's undiplomatic handling of the situation (37) and partly to Barotse opposition, piloted by a solid block of chiefs who resented a surrender of sovereignty. Part of the opposition expressed by the chiefs emanated from European traders who feared Company rule would interfere with their trade.

36. Hole, op.cit., p.214. The Concession was finally bought.

37. Coillard developed an unfavourable impression of Lochner and had this to say about him:

"Mr. Lochner is, I believe, an officer of the Mounted Police, probably better adapted for camp life than for diplomacy. His arrival in the country was the signal, or the occasion for inconceivable conspiracies and intrigues. Evilily disposed persons sent about a report in the Sesheke Province that the missionaries - and that was aimed at we - had already induced Lewanika to sell the rest (i.e. the remainder from the Ware concession) This spread like a prairie fire"-

Coillard, op.cit., p.385. See further Coillard to Smith, 20 June, 1890 (Salisbury) Archives CO 5/1/1/1).

Lochner, on the other hand, had also developed an unfavourable impression of Lewanika and his people, which made his task more difficult - See Lochner to Harris, 10 June, 1890 (LO 5/2/3). He partly wrote in this despatch: "The King is wretchedly weak, in fact the country is a republic and if one wants to be successful in a mission like mine the chiefs are the people to gain over, they don't care twopence for the King and the King is in mortal dread of going against them."

Conclusion and the Terms of the Concession

The Concession was finally signed on June 27, 1890, after the Grand National Assembly had deliberated over it for five days.⁽³⁸⁾ Lewanika signed it on the understanding that the Company was synonymous with the Crown and that a protectorate concluded with the Company was actually concluded with the Crown.⁽³⁹⁾ The Concession, in fact, contained a clause which stated that any agreement with the Company was to be considered in the light of a treaty or alliance made between the nation (the Barotse) and the Government of Her Britannic Majesty Queen Victoria. The Company obtained a monopoly of mining rights in the Barotse territory. It was, however, not to mine in the country between the waggon road and the river from Sesheke and Lealui without the King's consent. Existing iron mines which were being worked by natives were to remain their property. The Company undertook to defend Lewanika from all external attack and not to interfere with the authority of the King in Barotse land's internal affairs. It further agreed that the country would not be thrown open to White immigration without the King's consent and that its personnel and goods would not enter the territory except only through the Kazungula Drift unless permission was sought first from the King to use a different route. This was to enable the King to control the vital route of entry. Regarding advancement of the people of Barotse land, the Company undertook to propagate christianity, establish schools and churches, trading stations, telegraphic and postal facilities, and that a British Resident would be sent to reside with the King. For all the rights granted under the Concession the Company was to pay an annuity of £2,000 to the King. Legally the Concession did not alter the sovereignty of the Barotse nation. Like the Rudd Concession, it did not confer on the concessionaires administrative or legislative powers.

Conclusion of other Concessions

The conclusion of the Lochner Treaty was not immediately followed by the establishment of administration or mining activities by the Company. The mere granting of the Concession had achieved what Rhodes had wanted most - a stake in Barotseland to the exclusion of other traders and foreign powers. Instead of paying attention to the setting up of administration in Barotseland, the Company sought to expand its claims by securing more concessions from other chiefs, particularly in the territory that later became North - Eastern Rhodesia. The Lochner Concession only covered the territory under Lewanika's jurisdiction and this did not include the lands east of the Kafue and the present Copperbelt.⁽⁴⁰⁾ Rhodes despatched J. Thompson from South Africa while Johnston the Commissioner for British Central Africa (Nyasaland), who had been given money by Rhodes for treaty-making, despatched A. Sharpe from Nyasaland. The two men secured treaties in North - Eastern Rhodesia. While the two men were able to secure a concession from the powerful Chief Kazembe, they were unable to secure concessions from two other powerful Chiefs - Mpezeni of the Ngoni and Chitimukulu of the Bemba.⁽⁴¹⁾ The Concession acquired by Thompson and Sharpe granted mineral rights to the Company.⁽⁴²⁾ The Lochner Concession and these other Concessions enabled the Company later to possess mineral rights over the length and breadth of Northern Rhodesia.

Please see notes 40, 41 and 42 over page.

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40. For the extent of Levanika's lands, see map in Oudillard, op.cit., facing p.646 and also map in De la Roche, op.cit. to B.S.A. 7: 13 Dec. 1890, No. 89 (Africa: S.697).

41. For Thomson's journeys, see Thomson J. "To Lake Bangweolo and the Unexplored Regions of British Central Africa." (Geographical Journal, No. 2., Feb., 1893) pp. 77-121; Thomson, Rev. J.B. (his brother) Joseph Thomson: An African Explorer: A Biography by His Brother (1896) pp. 250-63. For Sharpe's journeys, see Johnston to F.O., 1 Feb. 1890, No. 6 (FO 84/2051); (FO 84/2052); Encl. in Johnston to FO, 3 May, 1891 Confid. (FO 84/2114). See also CT 1/11/1/11; CT 1/16/6; CT 1/16/5 (Southern Rhodesia Public Records) for reports by Sharpe and Thomson to the British South Africa Company. For a map showing the journey of the two men, see Hole, op.cit., facing p. 240. For copies of the treaties obtained on these journeys, see CT 1/16/6 above.

42. See Fox, H. Wilson Memorandum on Constitutional, Political, Financial and other Questions Concerning Rhodesia Appendix 1, FO Print (6337) Correspondence Respecting Affairs North of the Zambezi, Confid., printed by the Foreign Office for its own use.

Repudiation of the Lochner Concession by Lewanika

A few months after the signing of the Lochner Concession, Lewanika, like Lobengula, sought to repudiate it. He requested Middleton, an ex-missionary of the Paris Missionary Society who had become a trader, to write to Lord Knutsford, stating that the King had repudiated the Concession.⁽⁴³⁾ Lewanika advanced two reasons for this course of action. The first was that the Concession had been obtained fraudulently by Lochner posing as Her Majesty's direct envoy. The second was that he had granted more in the Concession than he intended.⁽⁴⁴⁾ Lewanika was also annoyed with Coillard whom he suspected of playing a part in the deception. He insisted that Coillard should write to the Company repudiating the Concession.⁽⁴⁵⁾ Although at first Coillard resisted doing so, he finally succumbed to the King's insistence and wrote to Harris, the Secretary of the Company in South Africa, returning the £200 which had been paid by Lochner as the first instalment of the Ware Concession subsidy. He told Harris in the letter that the Concession had been agreed to because of the clause it contained which implied the Queen's protection.⁽⁴⁶⁾

There is no doubt that legally at this stage (regardless of what happened subsequently) Lewanika's messages to Lord Knutsford and to Harris were an effective repudiation of the Concession. As sovereign of an independent state Lewanika could abrogate grants operative in his territory⁽⁴⁷⁾ and for this no just cause was required.

43. Hole says there is no reason to doubt that Middleton was actually asked to write that letter by Lewanika op.cit., p.221.

44. G.W. Middleton to Lord Knutsford: 27 October, 1890 (in Further Correspondence Respecting Affairs of Bechuanaland and Adjacent Territories - African (South) No. 414.

45. By October, 1890, the King's attitude was such that Coillard wrote to Rhodes as follows: "The King himself is in the greatest state of agitation. He pretends not to have fully understood the bearings of the question and to have been taken advantage of. Indeed he even answers that he has been wilfully deceived. He says that what he wanted and still wants is to be under the Protectorate of the Queen, and not to be at the mercy of a Gold Mining Company. It is contended by him and his advisers that the annuity of £2,000 without any royalty is a cheat and a mockery and that the Concession must be broken at any risk." - Coillard to Rhodes, 27 Oct., 1890. Salisbury Archives CT/1/4/3). See also G.W. Middleton to B.S.A. Co., 27 Oct. 1890 (LO 5/2/12).

46. Coillard to Harris, 5 June, 1891 (LO 5/2/12)

47. See the cases cited under N.11 above.

53. See above in this Chapter.

THE 1891 AGREEMENT

The negotiations between the Company and the Secretary of State resulted in an agreement in February 1891⁽⁵⁴⁾ on the conditions under which the Company's operations were to be extended to the north of the Zambezi. The preamble to the Agreement provided: "The charter of the British South Africa Company shall extend over the territory under British influence north of the Zambezi and South of the territories of the Congo Free State and the German sphere, and accordingly the company is hereby granted powers necessary for the purposes of good government and the preservation of public order in and for the protection of the said territory under British influence but subject to the following conditions:-"

Article 1 excluded Nyasaland from the field of operations and defined that territory's boundaries. Article 2 granted powers of government and administration and provided that until 1st January, 1894, or an earlier date which might be directed by the Secretary of State, the powers of the Company were to be exercised by Her Majesty's Commissioner for Nyasaland in consultation with the Company, and that the Company's offices were to be responsible to the Commissioner. The powers exercised under this Article were to be subject to the powers reserved to the Secretary of State by Article 4 of the Charter.⁽⁵⁵⁾ After 1st January, 1894, the arrangement was to be renewable at the discretion of Her Majesty's Government for a further period not exceeding two years.⁽⁵⁶⁾ Powers of preserving peace and order were to devolve on the Commissioner as long as Article 2 was in force.⁽⁵⁷⁾ He was to have the control of the police force with discretionary power to employ it in the Company's sphere or Nyasaland.⁽⁵⁸⁾ The Company was, however, to raise,⁽⁵⁹⁾ equip and maintain the police force and defray expenses connected with its employment.⁽⁶⁰⁾

54. For the text of the agreement, see Cmd. 7636 (1895). See also Hertslet, *op.cit.* Vol. 1., pp. 277-9, where it is reproduced. The agreement was reached in February, but was formally accepted by the Company on March 5 and formally sanctioned by the Secretary of State on 2nd April. See also F.O. 84/21/4 Johnston to Currie, 9 Feb. 1891; and FO to Johnston, 14 Feb. 1891.

55. Art. 2. For powers reserved under Art. 4 of the Charter see above in this chapter.

56. Art. 2. It was renewed on 24 November for two years, see below in this chapter.

57. Art. 3. . 58. Art. 3.

59. But the Commissioner was to be consulted on the organisation of the force, particularly in regard to the appointment of its officers - Art. 3 of the Agreements.

60 Article 3.

For the maintenance of the force and other administrative expenses the Company was to pay £10,000 annually.⁽⁶¹⁾ Administrative expenses beyond the £10,000, unless they were travelling expenses, were not to be incurred without the sanction of the Company.⁽⁶²⁾ Article 4 empowered the Commissioner to administer justice as long as Article 2 was in force. Administration of justice was to be in accordance with the Africa Order in Council 1889.⁽⁶³⁾ The Secretary of State could appoint Company officers to dispense justice.⁽⁶⁴⁾

It will be seen that the Company was to shoulder all the administrative expenses of its sphere and also partly those of Nyasaland, since the £10,000 could be used in both the Company's sphere and in Nyasaland. Two reasons influenced the Company to accept this arrangement in which it had little say. The first was that the Company did not at the time have an administrator of calibre to run affairs in its sphere. Having the services of an experienced Imperial administrator like Johnston to lay the foundations of a new administration was decidedly to its benefit. Secondly, the company intended finally to include Nyasaland under its domains and involvement in the administration of that territory appeared the best way to create a favourable atmosphere with the Imperial Government before making a second bid to take it.

It should be noted that while the extension of the Company's field of operations by the Agreement applied to the whole of Northern Rhodesia, the Commissioner's administrative powers never went beyond North-Eastern Rhodesia. Nothing was done to establish administration in North-Western Rhodesia at the time. Coillard acted as a semi-representative of the company⁽⁶⁵⁾ in North Western Rhodesia but when offered an appointment by Rhodes to become a Resident he declined.⁽⁶⁶⁾

61. Art. 3.

62. Art. 7.

63. Art. 5.

64. Ibid. Article 6 provided that goods passing through Nyasaland to or from the Chartered Territory would be treated as goods in transit and, therefore, free from duty. Article 8 authorised the Commissioner to use material of war belonging to the African Lakes Company in case of war, etc. and to use steamers belonging to that Company on Lake Nyasa at the expense of the British South Africa Company.

65. See e.g. Coillard to High Commissioner: 12 April 1892, Encl. in No. 242 (African S. 426).

66. See Coillard to Rhodes: 8 April 1890 as quoted in Coillard, op.cit., pp. 383-4.

Friction Between Johnston and Rhodes

The arrangement for North - Eastern Rhodesia did not work. Two strong - willed men - Rhodes and Johnston - were required to work together and it was inevitable that they would soon clash. Johnston wanted to run the Company's territory his way but Rhodes would not have him do that. Rhodes, on the other hand, wanted to have a say in the administration of Nyasaland since Company money was being used there to establish effective administration. The Company also wanted to acquire vast stretches of land in Nyasaland. Johnston would not, however, have Rhodes run things in Nyasaland, or dominate him.⁽⁶⁷⁾ Rhodes again was of the view that to leave Johnston alone would be creating "an independent King Johnston over the Zambezi,⁽⁶⁸⁾ with the Company's funds.

The 1891 agreement was to run until January, 1894. In 1893 Johnston went to Cape Town to discuss a new agreement with Rhodes. They agreed on a draft which was to form the basis of the new agreement.⁽⁶⁸⁾ The draft agreement required the Company to increase its subsidy to £17,500 per year for five years from April, 1893 to April, 1898. The Company was to provide two steamers - one for use on Lake Nyasa and the other for use on Lake Tanganyika. The Crown was to transfer to the Company all its land in Nyasaland and all its right of pre-emption. The Commissioner was to spend no more than £10,000 in Nyasaland alone. The draft agreement was sent to the Foreign Office and there, without consultation with Johnston or Rhodes, its terms were altered. The five - year period was altered to ten and all the money was to be used in the protectorate. It was in this form that it was presented to the Company for signature on August 24, 1893.⁽⁶⁴⁾ The alterations caused a row between Rhodes on the one hand and Johnston and the Foreign Office on the other.⁽⁷⁰⁾ Rhodes thought it was Johnston who had caused the alterations: " it is clear that you must have written privately, and in a perfectly different style to the basis agreed between us at Cape Town."⁽⁷¹⁾

The quarrel made it difficult to continue the North Eastern Rhodesia arrangement. Relations between Rhodes and Johnston became untenable. For instance in December, 1893, Johnston wrote to Harris that he was "increasingly of opinion that a further personal connection between myself and the Company is rendered difficult"⁽⁷²⁾

67. See Johnston to F.O.: 8 October, 1893 and Encl.
Johnston to Rhodes: 8 October, 1893 and Rhodes to Johnston:
16 September, 1893, No. 52 (FO 2/55).

68. Telegram: Rhodes to Harris: B.S.A.C. Cape Town Papers,
quoted at p. 236, Oliver, Roland Sir Harry Johnston (London,
Chatto and Windus, 1959).

69. F.O. to B.S.A.C.: 24 August, 1893, F.O. 83/1242 cf .
F.O. to C.O.: 4 August, 1893, F.O. 83/1241. See also
Oliver, op.cit., p.233. The increase of years was urged
to the Foreign Office by the Colonial Office on the grounds
that as the draft Agreement stood it would give all the
Crown land to the B.S.A.C. for only £87,500 and the Crown
at the end of five years would have no land to administer;
and that this would mean either abandoning the land or
giving it all to the Company at the end of five years.
The Colonial Office wound up by saying if Britain were to
have a reversionary interest then the period should be
increased to ten years - see C.O. to F.O; 24 June 1893,
F.O. 83/1240. Portions of this correspondence are also
quoted at pp. 233-4, Oliver, op.cit.

70. See Johnston to Rhodes: 8 October, 1893, enclosed in
Johnston to Rosebery: 8 October, 1893, F.O. 2/55;
Harris (Cape Town to Rhodes (Salisbury): 14 October, 1893;
Rhodes to Harris: 16 October, 1893 (all in B.S.A.C. papers,
Cape Town but quoted here as quoted in Oliver, op.cit.,
pp. 232, 233, 234, 235, 236, 237 and 238, giving portions
of correspondence relating to this row). See also Hanna,
A.J. The Beginnings of Nyasaland and North-Eastern Rhodesia
(Oxford, Clarendon, 1956) pp. 249-265.

71. See Johnston to Rhodes: 8 October, 1893 enclosed in
Johnston to Rosebery; 8 October, 1893, F.O. 2/55, where
copies of Rhodes' letter and Harris' telegram are included
Johnston was greatly angered by Rhodes' allegation and
wrote him a strongly worded letter suggesting that he
should make enquiries at the Foreign Office and that
after he had obtained the correct information he should
apologise. Johnston added that if Rhodes did not apologise
he (Johnston) would tell the Secretary of State that he
could no longer work for the Company. In the meantime,
Johnston further said, Rhodes was bound by the draft
agreement concluded in Cape Town. See also Oliver, op.cit.,
pp. 233, 235-6.

72. Johnston to Harris: 9 December, 1893, B.S. A.Co Papers,
Cape Town. See also Hanna, op.cit., p. 255.

Rhodes, on the other hand, wrote in the letter, part of which has just been quoted above: "I have just received... the enclosed telegram...It speaks for itself. I have of course stopped at once your extra amount, and shall arrange as soon as possible to spend the whole of our subsidy north of the Zambezi in our own territories by someone in whom I can place confidence. What I feel deeply is your disloyalty though it was not all together (sic) unexpected."⁽⁷³⁾ To Harris, Rhodes telegraphed: "Of course, the difficulty is that Johnston, as Imperial Officer and paid by the Imperial Government, should be a servant of the Company. Up to the present he has been a servant of the Home Government in the Protectorate, and a servant of ours in the sphere north of the Zambezi. In the proposed settlement I see he tried to get the sphere added to the Protectorate and to be independent of us in both."⁽⁷⁴⁾ At the Foreign Office, the Assistant Secretary, H.P. Anderson, agreed with Johnston that Nyasaland should be severed from the financial subsidies of the Company. In February, 1894, he wrote to the Cabinet about the untenable position in which Johnston was and urging for alteration. "At present he (Johnston) takes his orders from Mr. Rhodes when he takes any orders. He reports to the Foreign Office, but chiefly complains of our dilatoriness and obstructiveness and of the niggardliness of the Treasury. He is nominally serving two masters, in practice scarcely serving either.. Financial help will entail an alteration in the Commissioner's position. He must be in fact, and not in name only, a servant of the Government."⁽⁷⁵⁾

73. Rhodes' letter to Johnston copy of which is included in Johnston to Rosebery: 8 October, 1893, F.O. 2/55. See also Note 71 above.

74. Telegraphic conversation between Rhodes and Harris, 16 October, 1893, B.S.A.C. Papers, Cape Town, as quoted at p.237, Oliver, op.cit..

75. Memorandum by H. P. Anderson to Cabinet: 26 Feb, 1894, F.O. 2/66, See also Oliver, op.cit., pp. 245 - 6.

The 1894 Agreement

Rhodes finally agreed to pay a total of £27,500 for the year 1893 - 1894, pending conclusion of an agreement. Before the end of 1894 an agreement was signed between the Company and the Foreign Office.⁽⁷⁶⁾ Article 1 of the Agreement provided that the Company would assume administration in its sphere not later than 30th June, 1895. Payments to the Commissioner were then to cease after payment of the £10,000 for the year 1895-1896.⁽⁷⁷⁾ The Company also undertook to pay £1,000 in liquidation of expenses for the Commissioner's use of steamers of the African Lakes Company in terms of Article 8 of the

1891 Agreement.⁽⁷⁸⁾ Treaties made on behalf of the Company in chartered territory were to be sanctioned save that no provisions in violation of Article 20 of the Charter (prohibiting monopolies) in such treaties were to be confirmed.⁽⁷⁹⁾ The Company's mining rights were to be confirmed.⁽⁸⁰⁾

ASSUMPTION OF THE ADMINISTRATION BY THE COMPANY

On June 23, 1895, Major Forbes arrived at Zomba, the Capital of Nyasaland, to take over the administration of North - Eastern Rhodesia from Johnston. He was to work from Zomba until he was able to settle in the Company's sphere.⁽⁸¹⁾ Administration was, however, not at the same time established in North-Western Rhodesia. At the end of 1895 the Company proposed to the Colonial Office that it wanted to send Hubert John Harvey as Resident to Barotseland,⁽⁸²⁾ but he was killed during the 1896 to 1897 rebellion in Southern Rhodesia. No steps were thereafter taken until 1897.

76. The Agreement was made on November 24, 1894. For text of the Agreement, see Hertslet, op.cit., pp. 280-282.

77. Article 1.

78. Article 2. For the provisions of Art. 8 of the 1891 Agreement, see Note 64 above.

79. Article 5.

80. Articles 5, 6 and 7. In Article 8 the Company undertook to guard lands on the border with German territory to the North against aggression. Article 9 concerned customs arrangements.

81. The administration moved to Fort Jameson in North Eastern Rhodesia in 1899.

82. See F.O. to C.O: 25 November, 1895 (in Further : Correspondence Relative to Affairs in Mashonaland, Matebeleland and the Bechuanaland Protectorate - - African (South) No. 498.

Powers Which the Company Would Have Had in Northern Rhodesia

At the time when it transferred the administration of North-Eastern Rhodesia to the Company, the British Government was prepared to give the Company in Northern Rhodesia the same powers as it had in Southern Rhodesia. In Southern Rhodesia the Company enjoyed administrative and legislative powers in terms of the Matabeleland Order in Council, 1894,⁽⁸³⁾ enacted after the defeat of the Matabele in the 1893 war. The Company's legislative power in Southern Rhodesia was vested in the London Board of Directors, which enacted ordinances, and in the Administrator and his Advisory Council in the territory, which enacted regulations.⁽⁸⁴⁾ Such ordinances and regulations covered a wide range of subjects. Real executive power was vested in the Administrator and his Council.⁽⁸⁵⁾ The Imperial Government retained a great deal of control (through the Secretary of State⁽⁸⁶⁾ and the High Commissioner for South Africa⁽⁸⁷⁾) on the legislative and executive powers of the Company and on African affairs.⁽⁸⁸⁾ These powers were, however, to be exercised with discretion. The High Commissioner for South Africa was informed by the Colonial Office that it was 'not intended' that he should use his supervisory powers, so as to oust or interfere with the Company's management of the internal affairs of the territory. "The (Company) has been given very full powers of legislation, and it would be well as a rule to leave (it) to exercise these powers, except where, as in the latter part of Article 3 (sittings of the High Court to be determined by High Commissioner's Proclamation), the intervention of the High Commissioner is required by the Order in Council, or unless in particular cases there is some special reason for desiring to proceed by High Commissioner's Proclamation."⁽⁸⁹⁾ These are the powers which would have been extended to Northern Rhodesia had other events not overtaken the plans. A draft Northern Zambesia Order in Council had been prepared to extend the provisions of the Matabeleland Order in Council to the North of the Zambezi.^(89a.) Had the extension taken place it would have had serious implications for the future course of the country's constitutional development. As Gann says: "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 the political dividing line which subsequently split the two territories."⁽⁹⁰⁾ The long-drawn campaign for amalgamation of the two territories that later developed would not have arisen. It was possible that a single administration would have been maintained even after the departure of the Company as the governing institution.

83. For its text, see African 461, No. 265, Encl., pp. 376 - 82: 18 July, 1894. Although entitled "Matebeleland Order in Council," it, in fact, applied to Matebeleland, Mashonaland and Manicaland. The Order was based on an agreement reached between the Company and Her Majesty's Government earlier (For text of that agreement, see African 461, No. 195, Encl., 23 May, 1895). It had been signed on 24 May, 1894. For an analysis of the provisions of the Order in Council, see Falley, op.cit., pp.113 -119.

84. See Ss.17, 18 and 19 of the Order. The Administrator required the consent of at least two of the four members of the Council to legislate (S.7). The Board could disallow regulations made by the Administrator and his Council, (S. 18). Regulations could, however, suspend ordinances in part or in whole while ordinances could repeat or amend regulations (S.19).

85. Although the Administrator was to consult the Council in all matters, where a matter was urgent he could act alone and then summon the Council to give it reasons for his action (s.15). The Administrator could disregard the Council's advice but in such cases he was required to explain his action to the Board of Directors. The Board could reverse such decision if it found it necessary (s.16).

86. The Secretary of State's consent was required in the case of Ordinances and in respect of those Regulations which discriminated against Africans. The Administrator and the members of the Council were to be appointed with his approval (Ss. 8 and 12). The removal of the Administrator was also to be consented to by the Secretary but not that of non-official members of the Council (S.8). The appointment of the judge was to be approved by the Secretary and his tenure of office was at the Secretary's pleasure (S.29). Clause 35 of the 1894 Agreement (African 461, No. 195, Encl.) stated that the military forces of the Company could not be used outside the territory without the consent of the British Government. The right to amend or repeal the Order in Council was preserved (S.57).

87. Some Regulations required the consent of the High Commissioner but such regulations consented to by the High Commissioner could be disallowed by the Secretary of State within one year (S.18). Regulations or ordinances repugnant to Orders in Council or High Commissioner's proclamations were void unless the High Commissioner gave prior consent (S. 20.). The High Commissioner could legislate by proclamation (s.6) and no ordinance or regulation could amend or repeal a proclamation unless the High Commissioner consented (S.19). The appointment and suspension of magistrates and the suspension of the judge was in the hands of the High Commissioner subject to confirmation by the Secretary of State (Ss. 41 and 42). He also exercised the powers of remission of sentences and had to confirm death sentences (Ss.32 and 33). Powers of the High Commissioner under the Charter to give directions to the Company were retained. Rhodes had wanted this supervisory power terminated and had also suggested that the High Commissioner should correspond with the Company through the Managing Director in South Africa (himself) and not direct with the Administrator - African 461, No. 40, Loch to Rippon, 10 Jan., 1894. This was rejected.

88. African land interests were protected by a Land Commission (for Matebeleland only) comprising the judge and two other members who appointed by the High Commissioner, one on the nomination of the Company and the other on the nomination of the Secretary of State. The Commission's work was to assign sufficient land to Africans for agricultural and pastoral purposes. (Ss. 46-49). Decisions of Commission were subject to review, alteration or reversal by the Secretary of State, within one year.

89. African 461, No. 309, Rippon to Cameron, 7 Sept. 1894.
89a. See African 517, Nos.1, 92 & 117A, which show that the Matebeleland Order as such was to be extended.

Reasons Why the Powers Were not Extended

Two events prevented the promulgation of the Northern Rhodesia Order in Council. The first was the ill-fated Jameson Raid into the Transvaal in 1895-1896. The Raid threw the Imperial Government into a diplomatic mess⁽⁹²⁾ and greatly affected its attitude towards the Company. The second event was the uprising of the Matebele and the Mashona in 1896 and 1897.⁽⁹³⁾ The Imperial Government reacted sharply to the Raid.^(93a.) The Company's autonomy was drastically curtailed. It was no longer to maintain a military police force of its own.⁽⁹⁴⁾ An Imperial Deputy Commissioner was appointed to represent the High Commissioner for South Africa in Southern Rhodesia and to command the territory's forces.⁽⁹⁵⁾ The Company was to submit its resolutions, minutes and orders relating to the administration of the territories to the Colonial Office. The Secretary of State was to have access to the Company's records.⁽⁹⁶⁾

90. Gann, A History of Northern Rhodesia, p.77.

91. For an account of the Raid, see van der Poel J. The Jameson Raid (Oxford, O.U.P., 1951). Although the Imperial Government appeared to have been taken by surprise it is thought that Chamberlain, the Colonial Secretary, was deeply implicated or at least knew about the preparation for the Raid - see Madden, A.F. "Changing Attitudes and Widening Responsibilities, 1895 - 1914" (in The Cambridge History of the British Empire, Vol. 3, p. 358. See also same, pp. 357-361 for a short and informative account on responsibility for the Raid. See further Pakenham, E. Jameson's Raid (London, Widdienfield & Nicholson, 1960).

92. After sorting out its mess, the Imperial Government found scapegoats in some officials in South Africa. F.J. Newtson, Resident Commissioner in Bechuanaland, was transferred to British Honduras. He later returned to Southern Rhodesia and became a champion of self-government. Sir Graham Bower, the Imperial Secretary to South Africa, was transferred to Mauritius. In addition six of the leaders of the Raid were prosecuted for an infringement of the Foreign Enlistment Act, 1870, and eventually sentenced to various terms of imprisonment - Regina v. Jameson and Others (1895-6) 12 T.L.R.

93. For an account of the uprisings, see Hole, op.cit., pp. 299-328.

93a. For these reactions, see C.7933 of 1896; C.8390 of 1897; and House of Commons Committee of Enquiry Report H.C. 311 of 1898.

94. See C.O. to B.S.A.C., 7 Feb., 1896, No. 19 (African S.517)

95. See Instructions to Sir R. Martin, April 1896 - (C.3060 of 1896).

96. Although seemingly effective, in practice it was not an effective measure since the Company could file elsewhere records it did not want seen.

From non-Government quarters came calls for revocation of the Company's charter⁽⁹⁷⁾ and for stringent control of the Company's activities.⁽⁹⁸⁾ The Imperial Government was not, however, prepared to take the drastic action of revoking the Charter as it was not in a position to shoulder the financial responsibilities that would result from such action.⁽⁹⁹⁾

The Administration in general in Southern Rhodesia was, however, left in the hands of the Company but with closer supervision by officers of the Imperial Government.⁽¹⁰⁰⁾

97. These calls came mainly from the Radical Little Englanders, the South Africa Committee, humanitarians and advocates of direct rule. Stories that the Company looked cattle from the Africans and ill-treated them spread fast - - For these criticisms, see Robinson, R.E. "Imperial Problems in British Politics 1800-1895" (in The Cambridge History of the British Empire, Vol. 3, p.175) and "The South African Questions", a summary of Press and other opinions in favour of direct imperial responsibility in South Africa (this included Central Africa) issued by the South Africa Committee (in Carnarvon Papers, P.R.O. 30-6/131).

98. For instance, Sir John Gorst, a Tory imperialist, had accused the Government of having little control over the various Chartered Companies to prevent them from quarrelling with native Chiefs and stated that while the Government had little control over them the Companies had much influence over the Government to force it to come to the aid of their aggressive native policies (precautionary measures in Bechuanaland Protectorate in 1893 - 4 had cost the Treasury £80,000). Sir John, warned that the policy of Chartered Companies "seemed to be one of drifting into national responsibilities "which would lead to "some national disaster" - House of Commons, 8th September, 1893, Hansard 4th Ser., XVIII, 678. Henry Labouchere had equally accused the Company of seizing Matabeleland in order to bolster its falling credit. Rippon denied this charge - House of Commons, 9 Nov. 1893, Hansard, 4th Ser., XVIII, 554.

99. Robinson, R. E., op.cit., p.175; C.7933, No. 13, Colonial Office to B.S.A. Co., 31 December, 1895, gives the impression that the Imperial Government would have revoked the Charter if the Company were privy to the raids, but African 517, No.13 Telegraph Chamberlain to Robinson, 1 Feb. 1896, shows that Chamberlain was "anxious to avoid injuring commercial interests of shareholders". The main reason was, however that the Government had no money to take over the territory. Milner, the High Commissioner for South Africa, agreed that "Treasury principles would starve Rhodesia - that is one great reason for keeping the Company up" - - Headlam C.K. The Milner Papers 1897-1905 (London Carsell, 1931, 1933) 2 Vols. Lord Selborne, the under-Secretary of State for the Colonies insisted that in any arrangements "We must at all costs steer clear of saddling on Her Majesty's Government any responsibility in the public mind, direct or indirect, for the finances of the B.S.A. Company" ibid., p.122, Selborne to Milner, 11 November, 1897.

100. For a reconstruction of administration in the territory between 1896 - 1898, see Palley, op.cit., pp. 128-155.

Even when, in 1898, the constitutional position of Southern Rhodesia was enhanced by the Southern Rhodesia Order in Council, 1898,⁽¹⁰¹⁾ the Imperial Government appointed a Resident Commissioner as an Imperial watchdog over the Company's Administration. He sat in the Government, but without a vote.

The Jameson Raid doomed the Company's chances to gain more powers. The African uprising (in Southern Rhodesia) made the British Government unwilling to entrust the company with power over another large African population on the pattern of the powers it enjoyed in Southern Rhodesia. Accordingly the claims which the Company had lodged to take over the administration of Bechuanaland were first postponed and then dismissed.⁽¹⁰²⁾ The North Zambesian Order in Council was shelved and then abandoned.⁽¹⁰³⁾ In January, 1897, the Colonial Office wrote to the Foreign Office: "In consequence of the Jameson Raid and the decision of Her Majesty's Government to suspend the assumption by the B.S.A. Company of further administrative responsibilities for the present the Company cannot now be invited to send up a British Resident with a view to negotiating a treaty with Lewanika for administrative purposes."⁽¹⁰⁴⁾ In fact, the Colonial Office had even begun to doubt the validity of the Lochner Concession and whether, even if it were valid, it conferred any administrative powers at all. The Concession had not been ratified by the Foreign Office. The sweeping trading monopoly it conferred was in conflict with the provisions of the Charter. The £2,000 annuities to Lewanika had not been paid. The Company had, in fact, up to then not carried out any provisions of the Concession. Its only value had been to keep the Portuguese out.

With all this background taken into consideration, it was decided that the area north of the Zambezi should have a different constitutional arrangement. Administration of the territory by the Company under supervision of an Imperial officer wielding more powers than those exercised in Southern Rhodesia, was considered the most appropriate course to take.

Footnotes are on page 41.

101. See *ibid.*, for analysis of this Order.

102. Rhodes had in 1894 claimed that by right of conquest the borders of Matabeleland should be extended to cover the dispute areas between Khama and Lobengula. The Colonial Office at that time had rejected the idea (African, 484, 44, and 45) Rippon to Loch, 13 Nov. 1894) but later changed in favour of the idea provided certain guarantees were given (African 484, No. 55, 30 Nov. 1894). By end of that year the Company had persuaded the High Commissioner to delegate to it his powers in the disputed territory, see (African 484, No. 73, 11 December, 1894). In fact, the Company wanted all Bechuanaland. For the Imperial Government's attitude after the Jameson Raid, see African 498, No. 255, Colonial Office to B.S.A. Co., 18 Jan. 1896; African 517, No. 67, 14 March, 1896; African 559, No. 294 Colonial Office to B.S.A. Co., 10 August, 1898. The High Commissioner's proclamation transferring Montsioa's and J. Kanning's lands to the Company was revoked - see High Commissioner's Proclamation, 3 Feb. 1896. The Company was, however, later given title to the Railway Strip - see Bechuanaland Protectorate (Lands) Order in Council of 16 May, 1904 and the High Commissioner's proclamations of 7 Feb. 1905, 7 June, 1905 and 30 June, 1905. In 1909 when the South Africa Act was enacted it contained a provision for the transfer of the Protectorate to the Union of South Africa and the Company was told it could not be transferred to Rhodesia - African 1003, No. 7, 28 April, 1913.

103. See e.g. F.O. Conf. 6851, Colonial Office to Foreign Office, 4 April, 1896 and No. 356, Encl. 1, p. 362, Colonial Office to Foreign Office, 16 Jan. 1897.

104. No. 356, Encl. 1, p. 362, at p. 366, Colonial Office to Foreign Office, 16 January, 1897.

Lewanika became impatient about the failure of the Company to send a Resident. The King was worried about Portuguese penetration of his territory and about his undefined and, therefore, uncertain position vis - a-vis the British Queen. The British Government sent an officer, Major Gool-Adams, in 1896 to reassure the King that he was indeed under British protection. Lewanika, despite his discontent with the Company, confirmed the Lochner Concession. (105)

Towards the end of 1897 the Company sent 27 year old Coryndon (Rhodes' Secretary in 1896) as Administrator in North-Western Rhodesia. (106) He was to be responsible to the Foreign Office. The Company was to have little to do with him. Coryndon immediately sought to assure Lewanika that he was indeed under British protection. He wrote to Lewanika: "You are definitely under British protection. You gave a concession to the British South Africa Company. Afterwards you were afraid you had sold your country. Do not believe this: You have not sold your country". (107)

105. Gool-Adams to H.C., 13 April, 1897: C.O. Conf. Print - African (South) 686, Encl. in. No. 85.

106. He was accompanied by a Secretary (Frank Vigers Worthington) and an escort of only five policemen - too small a contingent to impress Lewanika and his people.

107. R. T. Coryndon to Secretary of State, Foreign Affairs, 25 November, 1897 - African (South) 686, Encl. in No. 101, cited also in Stokes and Brown, op.cit., p. 269.

Negotiations on the Administration of Northern Rhodesia

In May, 1898, the Company suggested to the Foreign Office that its territory north of the Zambezi should be divided into two - North Western Rhodesia and North - Eastern Rhodesia. (108) Each territory was to be under a deputy administrator. The Deputy Administrator in North-Western Rhodesia was to be responsible to the Administrator of Matabeleland while the Deputy Administrator in North - Eastern Rhodesia was to be answerable to the Administrator of Mashonaland. The Company also suggested that Roman Dutch Law should apply in both territories as was the case in Southern Rhodesia. The Foreign Office was not opposed to splitting of the territory but it objected to the argument that Northern Rhodesia should become the furthestmost South African frontier. It also rejected the introduction of Roman Dutch law on the grounds that the region was not healthy for White settlement and that consequently, as in Nyasaland, English law should apply. The region was considered to have much more in common with Nyasaland than with Southern Rhodesia (109). The negotiations dragged on until 1899. In the meantime, towards the end of 1898, the constitutional position of Southern Rhodesia was settled by the Southern Rhodesia Order in Council 1898. (110) The Order provided for a Legislative Council of four elected members and five members nominated by the Company. The Administrator (111) was to be the chairman and was to have a deliberative and a casting vote. There was also to be a non-voting Imperial representative (the Resident Commissioner) in the Council. There was to be an Executive Council and this was to be the old Advisory Council. Its membership was to comprise the Administrator (as President), any other Administrator, the Resident Commissioner and four members appointed for three years and removable by the Company, with the consent of the Secretary of State. The elected members of the Legislative Council were to be elected under a franchise admitting only male persons over the age of twenty-one years who were British subjects by birth or by naturalization or who had taken an oath of allegiance. In addition an applicant was required for the six months preceding the application for registration to have either occupied a building (112) in the electoral district of the value of £75 or owned a mining claim or received wages at the rate of not less than £50 per year. He was also required to be able to write his name, address and occupation.

The Legislative Council was empowered to make laws "for the peace, order and good government of Southern Rhodesia". This conferred wide legislative powers upon the Council. In R. v. McChlery (114) Innes J.A. said of the provision: "The words are very wide and confer the amplest powers of legislation, for they cover the entire conceivable area of political action. (114a.)"

See over page for footnotes 100 to 114 a.

108. B.S.A.C. to F.O. : 6 May, 1898 - African (South) 559, Encl. in No. 172.

109. F.O. to C.O. 14 May, 1898 and F.O. to C.O.: 22 December, 1898 (in Further Correspondence ... African (South), No. 559.

110. For an account of the reconstruction of the constitutional position of Southern Rhodesia including an analysis of the Order in Council, see Palley, op.cit., pp.123 - 155.

111. There was now to be one Administrator for the whole territory.

112. Communally or tribally held property was not included in this qualification. Where, however, a building had the value of £75, excluding communal land, it satisfied the requirement - see High Commissioner's Proclamation 17 of 25 November, 1898. Sections 3, 4 and 5. Africans were not barred from registering as voters provided they had the qualifications. The Chief Secretary informed the Imperial Secretary on February 26, 1903, that after examination of the voters' lists in 1904 it was calculated that about 50 voters were Africans - their names being the only guide - Palley, op.cit., p.136, Note 2.

113. The franchise remained the same until 1912 when the property and income qualifications were raised to £150 and £100 respectively.

114. 1912 A.D. 199 (S.R.) 1912. 5. R. 58.

114a. At 220 (A.D.)

There were, however, some limitations on the power of the Council. First, it could not enact a law repugnant to the Order in Council. Secondly, it could not impose customs duties above a laid down scale. Thirdly, it could not enact a law imposing conditions or disabilities on Africans which were not equally applicable to Europeans except with the consent of the Secretary of State. (114 b.) In R.v. McChlery, Vincent J. held that such consent must in "the absence of proof to the contrary be assumed." This view was upheld on appeal. (114 c)

The Legislative Council was, however, not given the power to legislate for the north of the Zambezi. Milner, the new High Commissioner for South Africa, was a strong believer in the maintenance of the Imperial factor in territories. While he was prepared to see the Company act as an agency of administration in Northern Rhodesia, he strongly believed that the Zambezi was "the natural northern boundary of what will some day be self-governing British South Africa." (115) He felt that the ultimate goal for the north could not be white settler rule but a Crown dependency on "the line of development of Uganda and the Niger Protectorate rather than of Zululand or the Transkei." (116) He urged that the source of legislation for Northern Rhodesia should be the High Commissioner for South Africa and not the Southern Rhodesia Legislative Council. (117)

114 b. The Order in Council, however, permitted certain types of legislation imposing disabilities and conditions on Africans not applying to Europeans - e.g. legislation preventing Africans from possessing firearms or consuming European liquor.

114 c. At 204 (A.D.)

115. Milner to Chamberlain: 5 April, 1899, African (South) 574, No. 114.

116. Ibid.

117. Ibid. See also Chamberlain to Milner: 1 July, 1899, African (South) 574, No. 203, where Chamberlain expressed the opinion that since the boundary with Portugal was not yet settled, it would be undesirable to entrust the Company with the administration of Barotseland.

The Lawley Concession

Milner was of the opinion that the Company would exercise in North-Western Rhodesia only those powers granted to it by Lewanika. The Company, on that assumption too, had renegotiated the Lochner Concession with Lewanika, at the Victoria Falls in June, 1898. A new concession - the Lawley Concession - resulted.⁽¹¹⁸⁾ The New Concession repeated the clause in the Lochner Concession that nothing in the agreement was to affect the constitutional position of the King - his power and authority. The Company, however, gained new rights. It was now able to make land grants to white farmers "in any portion of the Batoka or Mashukubumbwe country.". The farmers were, however, first to be approved by the King. Secondly, the Company acquired administrative powers to deal with "all cases between white men and between white men and natives, it being clearly understood that all cases between natives shall be left to the King to deal with and dispose of".⁽¹¹⁹⁾

Split of the Territory

At the end of 1899 - nearly ten years after the signing of the Lochner concession - the area North of the Zambezi was now in a position to have a firm constitutional set-up. The territory was split into two - North-Western Rhodesia and North Eastern Rhodesia. It is perhaps necessary here to relate briefly how the name Northern Rhodesia originated. The rather vague term "the British sphere north of the Zambezi" was replaced by the name "Northern Zambezia". On May, 1895, the Company's Administrator at Salisbury had issued a proclamation stating that the Company's territories should be collectively known as "Rhodesia"⁽¹²⁰⁾ and divided into three provinces - Matabeleland, Mashonaland and Northern Zambezia. This proclamation was subsequently disallowed but at the end of 1895 the use of the name "Rhodesia" was sanctioned for postal purposes. Two years later the public was informed in a Government notice,⁽¹²¹⁾ that the Secretary of State had approved the use of the name "Rhodesia" to denote the chartered territories. On July 19, 1897, the Foreign Office agreed to the Company's suggestion that the territories in the North of the Zambezi should be known collectively as "Northern Rhodesia." It was from that date that the official use of the name started.

118. Encl. in B.S.A. Co. to Col. Office: 9 April 1900 (in Further Correspondence - African (South) 656.

119. See African (South) 686, Encl. in No. 116.

120. The name was coined by adding "i" and "a" to "Rhodes", crowned as the founder of the Company's territories.

121. G/N, No. 32 of 1897 in B.S.A. company Govt. Gazette, No. 140 2 June, 1897, p.1.

The Orders in Council of 1899 and 1900

After the territory had been split into North-Western Rhodesia and North-Eastern Rhodesia, two Orders in Council - the Barotseland North-Western Rhodesia Order in Council and the North Eastern Rhodesia Order in Council - were enacted on 28 November, 1899 and 29 January, 1900 respectively. The two Orders provided for the machinery of government in their respective regions.

Powers of the Company in North-Western Rhodesia

In North-Western Rhodesia the Administration was to be vested in an administrator nominated by the Company and appointed by the High Commissioner. Judges and magistrates were to be appointed in the same way. The High Commissioner was empowered to make proclamations for the administration of justice and the raising of revenue (including imposition of taxes and customs duties). In issuing such proclamations the High Commissioner was to take into account suggestions or requests made by the Company but he was not to be under any obligation to accede to such suggestions or requests. The Company was, however, to have effective power of legislation concerning revenue. No proclamation concerning the raising of revenue was to be issued without the previous approval of the Company. Customs duties were not to exceed those of the South African Customs Union. English law and not Roman Dutch Law was to be the law of the two territories. An analysis of the Order shows that the High Commissioner was the real legislator for the territory. The Company had very little legislative authority. The Administrator had no Advisory Council. Much of his legislative work was to issue notices putting provisions of proclamations into effect. Under the new arrangement, however, Coryndon was promoted to full administrator as from September 15, 1900. He was to be responsible to the High Commissioner and not to the Administrator in Southern Rhodesia as had been previously intended by the Company.

The new constitutional position affected the efficiency of the Lawley Concession. In so far as Administrative and governmental powers were concerned, the Concession had been to all intents and purposes superseded. In May, 1900, the Colonial Office informed the Company: "In fact for many of the purposes of the concession, the Queen's authority has already taken the place of that of Lewanika, and the grants to be made by him will only be operative so far as they are ratified by Her Majesty or are not inconsistent with the Order in Council."⁽¹²²⁾ This meant that Lewanika could no longer freely grant administrative powers to the Company as had been envisaged by Milner and the Company when it concluded the Lawley Concession. The Company could no longer look to Lewanika or to the Concession for powers.

41. Both the Company's and Lewanika's powers had to be in conformity with the Order in Council. As Eric Stokes puts it: "Henceforth Lewanika's authority rested formally speaking, on sufferance and not autochthonous right"⁽¹²³⁾ In fact, the Imperial Government had refused to approve the Lawley Concession on the grounds that the original document did not have Lewanika's signature. There were also other technical reasons in addition to the absence of Lewanika's signature which influenced the Government not to sanction the concession.

The Lewanika Concession of 1900

The Government's refusal to sanction the Lawley Concession made it necessary that the Company should negotiate with Lewanika for a new concession which would be fully in conformity with the Order in Council. Accordingly, a new concession - the Lewanika Concession - was concluded on October 17, 1900 at the Victoria Falls.⁽¹²⁴⁾ The new concession was very unfavourable to Lewanika, particularly in respect to the subsidy to be paid to him. It came down to £350 from £2,000. The Company obtained "the right to make grants of land for farming purposes in any portion of the Batoka or Mashukulumbwe country to white men approved by the King" but the existing native gardens and cattle posts were not to be interfered with. The mineral rights of the Company were to be exercised subject to non-interference with the mines already being worked by the natives. Coillard, who had taken active part in all the three Concessions, refused to sign the new concession on the grounds that it was unfavourable to the Barotse.⁽¹²⁵⁾ On November 23, 1901, the Imperial Government approved the new concession with stringent conditions.⁽¹²⁶⁾ First, the concession was not to be deemed as conferring upon the British South Africa Company any rights inconsistent with the provisions of the North-Western Rhodesia Order in Council, 1899, or with any legislation which had been enacted or was to be enacted by the High Commissioner in terms of the Order in Council, or with the charter of the Company or with any supplementary charter which had been or might thereafter be granted to the Company. Secondly, nothing in the Concession was to be held as curtailing the exercise by or on behalf of His Majesty's Government of any rights and powers for the administration of Barotse land for the time being enforced. Thirdly, none of the privileges purported to be conferred by the Concession was to be alienated by the Company without the consent of His Majesty's Government signified in writing by a Secretary of State. This did not, however, apply to the right to search for, dig, win and keep minerals. There were two other minor conditions.

^{122.} G.O. to B.S.A. Co., 3 May, 1900, para. 4 - African (South) 656, No. 65.

^{123.} Stokes and Brown (ed.), *op.cit.*, p.271.

^{124.} The Concession is printed as an Appendix in Gann, *The Birth of a Plural Society*, pp.215-220.

^{125.} F. Coillard to K. Mackintosh: 20 October, 1900 (in CO5/1/1/1, f 1814-1819, Nat. Arch. MS.).

^{126.} The approval is printed as an Appendix below the Appendix mentioned in n. 124 above.

The Powers of the Company in North-Eastern Rhodesia

In North-Eastern Rhodesia the administration was also placed in the hands of an Administrator--"the Lord High Everything"⁽¹²⁷⁾ as the settlers later used to call him. Unlike the Administrator of North-Western Rhodesia, the Administrator of North-Eastern Rhodesia was appointed by the Company and approved by the Secretary of State. Provision was included in the Order in Council for the establishment of an Administrator's Council when the Company's Board desired to do so. This provision was never utilised. The Administrator was empowered to make regulations for "the administration of justice, the raising of revenue and generally for...peace, order and good government" but not for anything connected with the raising of a military police force. The regulations were to be subject to the approval of Her Majesty's Commissioner for British Central Africa (Nyasaland) and to disallowance by the Secretary of State. The Commissioner could initiate legislation by means of instruments called "Queen's Regulations" which the Queen could disallow. The Commissioner was responsible for the control of the military police force. The Order in Council also provided for the establishment of a High Court which was to administer English common law save where it was modified by local legislation. The judges were to be appointed by the Company subject to the approval of the Secretary of State. Magistrates, on the other hand, were to be appointed by the Administrator and such appointments had to be consented to by the Commissioner. The Administrator was also to appoint Native Commissioners and assistant native commissioners.

The Company was required by the Order in Council to assign sufficient land to the natives for their use, suitable for agricultural and pastoral needs, together with a fair and equitable proportion of springs and permanent water. Africans were to acquire and sell land on the same basis as Europeans, but sales by Africans were not to be recognised unless sanctioned by a magistrate who had to satisfy himself that the African understood the nature of the transaction and that he obtained a fair price for his land. Regulations made in the territory were to apply to all races except in a few stipulated cases or where the Secretary of State approved it. The Order's provision in this respect read: "No conditions (or) restrictions shall without the previous consent of the Secretary of State be imposed upon natives by regulations which do not equally apply to persons other than natives save in respect of firearms, ammunition, liquor or any other matter in respect of which a Secretary of State, upon the recommendation of the administrator thinks fit to authorize by regulation." African customary law was recognised by the Order.

127. Cam. A History of Northern Rhodesia, p. 93.

Where a civil case was between Africans the High Court and the magistrates courts were to be guided by native law as long as it was not repugnant to natural justice and morality or to any recognised legislation. Polygamous marriages according to native law were to be regarded as valid. All legislation enacted for the territory was to respect native law and custom provided such law and custom was not incompatible with the due exercise of Her Majesty's power and jurisdiction. African chiefs did not receive official recognition in the Order. They were, however, left to rule without much interference. The Order also contained economic provisions. Customs duties could be levied but, like in North - Western Rhodesia, they were not to exceed the tariffs in force in the South African Customs Union. The mineral rights of the Company were recognised.

Reasons for Granting the Company Less Power in North-Western Rhodesia

It can be seen from the above accounts that the Company enjoyed more power in North-Eastern Rhodesia than it did in North-Western Rhodesia. Two reasons accounted for the severe limitations of the Company's power in North-Western Rhodesia. The first reason was that the boundary question with Portugal was still a fluid matter.⁽¹²⁸⁾ In July, 1899, while negotiations with the Company were still in progress, Chamberlain had written to Milner that while the Portuguese boundary remained unsettled, it was not desirable to entrust the Company with the administration of Barotseland.⁽¹²⁹⁾ When the Imperial Government, therefore, finally agreed to have the Company administer Barotseland, it thought it necessary not only to apply close control, but also to limit the administrative and legislative powers of the Company. The second reason was that Barotseland was being ruled by a powerful King and it was important to see that the King and the Company did not have serious conflicts. These two reasons were not present in North-Eastern Rhodesia. That territory largely bordered British Central Africa (Nyasaland) and for very short distance Portuguese East Africa and German East Africa. No chief in this territory had the status and power of Lewanika both in authority over his people and in treaty relations with the Company and the British Government.

128. For literature on the boundary question, see Award of H.M. the King of Italy Respecting the Western Boundary of the Barotse Kingdom, 1905 (Col.2584); A greement Between Great Britain and Portugal; Prolonging the Modus Vivendi of 1893 Respecting the Boundaries of the Respective Spheres of Influence North of the Zambezi 1896 (C.7971); Agreement Between Great Britain and Portugal Relative to Spheres of Influence North of the Zambezi 1893 (C.7032); Declaration Between the United Kingdom and Portugal Regarding Boundaries in Central Africa (Barotseland) 1908 (cd.3731); Notes Exchanged Between the United Kingdom and Portugal Confirming the Protocol Signed at Cape Town, March 5, 1915, Defining a Section of the Frontier Line Between the Portuguese Colony of Angola and Rhodesia. (Lisbon, Nov.3,1925)(Cond.2568)

129. Chamberlain to Milner, 1 July, 1899 - African (South) 574, No. 203.

Powers of the Imperial Government

On paper the Imperial Government retained vast powers in both territories, more so in North-Western Rhodesia. "In practice, however, it exerted only very limited influence, and the elaborate differences between North-Eastern and North-Western Rhodesia proved to be of no importance."⁽¹³⁰⁾ The Imperial Government rarely initiated any administrative action in both territories. Whenever it did initiate anything, it always did so with the consent of the Company. Its role became more and more "a negative one: that of stepping serious abuses."⁽¹³¹⁾ The Imperial Government's failure to use its powers stemmed from two reasons. The first reason was the British constitutional tradition of allowing express powers to be supplanted by practice. The second reason was the absence of representatives of the Imperial Government in the two territories. The Imperial Government depended on information from the High Commissioner for South Africa (in the case of North-Western Rhodesia) and the Commissioner for British Central Africa (in the case of North - Eastern Rhodesia). The Commissioners, in turn depended on information from the administrators, who were, despite their mode of appointment, Company employees.⁽¹³²⁾

THE ADMINISTRATIVE APPARATUS

While it would be outside the context of this study to give details of the administrative and judicial machinery established after the coming into operation of the Orders in Council, a brief review of such machinery would be appropriate. A civil service was established in both territories.⁽¹³³⁾ Among the officials immediately appointed were Native Commissioners or District Commissioners - the most important officers of the time in the task of extending European administration to the Africans. The North-Western Rhodesia civil service was modelled on the Cape Colony system and most of the early officers came from the South. In North-Eastern Rhodesia the service was patterned on that of British Central Africa (Nyasaland) and Codrington, the Administrator, preferred officers from England to local or South African personnel. Codrington had acquired a dislike of South Africans from his former chief - Johnston - who strongly felt that South Africans were "without any concept of justice where natives are concerned."⁽¹³⁴⁾

130. Gann, The Birth of a Plural Society, p.64.

131. Ibid.

132. Ibid.

133. For the establishment of the civil service in both territories, see Gann, A History of Northern Rhodesia, pp. 96-97.

134. See Sir H. Johnston to Lord Salisbury, encl. in Sir. H. Johnston to Foreign Office: 31 May, 1897, (in F.O. 2/128).

A High Court was established in each of the two territories. Below the High Court were magistrates courts. District Commissioners were also empowered to hold court. A police force was constituted in both territories. In North-Western Rhodesia, Coryndon (the Administrator) at first maintained only a White Police Force composed of members of the British South Africa Police -- the Company's Police Force in Southern Rhodesia. However, as problems of law and order increased, more policemen were required. Consequently, in 1901, the Barotse Native Police was established under the command of Colin Harding.⁽¹³⁵⁾ In North-Eastern Rhodesia the North-Eastern Rhodesia Constabulary was constituted and comprised African non-commissioned officers, a European Commandant and a Quartermaster. In 1904 the Constabulary had 500 policemen. In both territories the Police Force did not do only normal police work but also military duties. In fact, they were more in the nature of military than civil police forces. They performed numerous military functions, including campaigns against the still unsubdued chiefs.⁽¹³⁶⁾

African chiefs were not officially recognised. In theory the Company exercised direct rule in both territories. The district commissioner was responsible for his district. In practice, however, the chiefs became part of the administration. They continued to rule their people and dispense justice as before. The Company found it cheaper to use them. There was also the question of a dearth of persons of administrative experience in the small European community of the country. The use of the chiefs filled this need. The Company later empowered them to collect taxes from their people, paying⁽¹³⁷⁾ them a small reward of seven shillings and sixpence per month. African taxation -- the hut tax as it was called -- was introduced at a very early stage. In North-Eastern Rhodesia it was introduced in 1900 (soon after the coming into force of the Order) and enforced at once. In North-Western Rhodesia it was authorized a year later but collection was deferred until 1904 in order to allow the administration to get firmly established first. When collection began in 1904 it was not extended to all areas but by 1913 this had been achieved.⁽¹³⁸⁾

135. See High Commissioners Proclamation No.19 of 1901, dated August 31, 1901, providing for the establishment of the police force. See Also High Commissioner's Notice No.15 of 1901 of 7th September 1901, providing for regulations for maintenance of discipline in the force and notice No.16 of 1901 of the same date appointing Colin Harding as Commandant. T.Harris and F.C. Macaulay as Sub-Inspectors.

136. For short accounts of the establishment of the police forces of the two territories, see Gann, A History of Northern Rhodesia, pp. 97-98; Bretsford, op.cit., pp.660 et. seq. 137; Gann, A History of Northern Rhodesia, p. 153.

138. For an account on taxation, see Gann, ibid., pp. 101-105, The Birth of A Plural Society, pp.76-71. See same for reasons why taxation was introduced. Apart from reasons of revenue, it was to force Africans to work for European farmers.

From these humble beginnings the administrative machinery expanded rapidly. North-Western Rhodesia and North-Eastern Rhodesia remained separate until 1911. During that time more missionaries entered Northern Rhodesia.⁽¹³⁹⁾ The railway line reached North-Western Rhodesia.⁽¹⁴⁰⁾ Farmers and traders increased.⁽¹⁴¹⁾ Miners began coming in.⁽¹⁴²⁾ Urban life started.⁽¹⁴³⁾ All this meant increased administrative problems and the problems were made more acute by the separation of the territories, which tended to duplicate officers.

AMALGAMATION OF NORTH-WESTERN AND NORTH-EASTERN RHODESIA

As a result of the increasing administrative problems, the Company began negotiations with the Imperial Government to have the separation which it had asked for in 1893 ended. The separation came to an end in 1911 and the two territories were amalgamated. The amalgamation was effected by the Northern Rhodesia Order in Council 1911.⁽¹⁴⁴⁾ The Order resembled the North Eastern Rhodesia Order in Council, 1900, in its provisions. It provided for a single Administrator⁽¹⁴⁵⁾ for the whole territory, a High Court and most of the features in the North-Western and North-Eastern Rhodesia Orders in Council. The High Commissioner for South Africa became the only Commissioner responsible for the amalgamated territory. A Resident Commissioner to be stationed in Barotseland was appointed. He became the Imperial Government's man on the spot in Northern Rhodesia as a whole. The Company Government's legislative, administrative and judicial powers, save for a few modifications, remained the same. The High Commissioner for South Africa continued to be responsible for the enactment of major legislation. He could also disallow legislation enacted by the Company.^(145a.) His consent was required before appointments to, or dismissals from, certain offices. Appeals from the High Court were to go to the Judicial Committee of the Privy Council and not to the Appellate Division of the Supreme Court of South Africa as did those from the High Court of Southern Rhodesia.⁽¹⁴⁶⁾

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139. Gann, A History of Northern Rhodesia, pp.111-117.
140. See ibid., pp.125-127; The Birth of A Plural Society, pp. 127-33.
141. Ibid., pp.127-130; pp.133-158 respectively.
142. Ibid., p.117; 117-127 respectively.
143. A History of Northern Rhodesia, pp. 138-148
144. See Proclamation No.1 of 1911 which brought it into effect.
145. Lawrence Aubrey Wallace (later knighted) was the first Administrator and held the position until March, 1921.
- 145a. Legislation, consented to or enacted by the High Commissioner could be disallowed by the Secretary of State.
146. For an account of the judiciary set up by the 1911 Order in Council, see Gann, The Birth of A Plural Society, pp.95-100.

SETTLER REPRESENTATION IN THE GOVERNMENT OF THE TERRITORY

The Northern Rhodesia Order in Council, 1911, vested all legislative and executive powers in the High Commissioner for South Africa and in the Company. Although the Order in Council, permitted the establishment of an Advisory Council of the type established in Southern Rhodesia by the Matebeleland Order in Council, 1894, no such Institution was established in the territory until 1918. Until then the settlers had no representation of any form in the government of the territory although they paid taxes. The establishment and the powers of the Advisory Council and the constitutional developments that followed will be fully discussed under Chapter Four.

EVENTS LEADING TO THE TERMINATION OF COMPANY RULE

The coming of increased numbers of white farmers, traders and miners into Southern Rhodesia and Northern Rhodesia was the beginning of the Company's troubles in its administrative relations with the settlers. The settlers soon took to politics. In Southern Rhodesia the establishment of the Legislative Council by the Order in Council of 1898 had given impetus to settler political activity. In Northern Rhodesia settler political activity did not begin until after the amalgamation of North-Western and North-Eastern Rhodesia.⁽¹⁴⁷⁾ One of the issues that generated settler hostility against the Company was land. The Company claimed that it had the right to dispose of any unalienated land for its own commercial purposes. Settler leaders contended that it had not that right. In Southern Rhodesia the dispute was taken to the courts and was only resolved, finally, by a decision of the Judicial Committee of the Privy Council in 1918.⁽¹⁴⁸⁾ The Judicial Committee held that the Company could only dispose of the land in its administrative capacity and for the purposes of making good deficits incurred as a result of administrative expenditures.

147. The man responsible for starting political activity in Northern Rhodesia was Leopold Frank Moore (later knighted), described by Gann as a man who was "honest, but narrow minded, sometimes 'woolly' in thought and full of prejudice" - A History of Northern Rhodesia, p.154. Moore "hated the Chartered Company with all his might". To him the Company represented an "unholy combination of financial monopoly, social privilege and political absolutism" - ibid., Moore traded at Livingstone, the territory's capital, and published a newspaper, the Livingstone Mail. He frequently used the columns of the newspaper to criticise the Company.

148. In re Southern Rhodesia, (1919) A.C. 211.

It will be recollected that the Charter granted to the Company in 1889 was to run for twenty-five years. The twenty-five years were to come to an end in 1914. Preparation for the review of the Charter began early. The Company charged its Manager, H.W. Wilson Fox, to prepare a series of memoranda on various topics which would be raised at the review.⁽¹⁴⁹⁾ The pending review of the Charter gave momentum to elements opposed to Company rule.⁽¹⁵⁰⁾

Despite strong opposition from the settlers, the Charter was renewed for another ten years. This and the outbreak of the First World War slowed down political activity both in Northern and Southern Rhodesia.

The end of the war brought with it economic problems throughout the world. Faced with an economic slump, the Company became more concerned with the fate of its shareholders than with that of the people under its control. It was prepared to relinquish its powers of government if its deficits could be made good by, and if it could get adequate payment for its property from, the new governments in Northern and Southern Rhodesia.

The willingness of the Company to hand over the Administration provided it obtained a fair price for its property, shifted the emphasis of settler politics from wresting the government from the Company to what form of government should replace that of the Company.

149. The most important of the memoranda produced by Wilson Fox was: - Memorandum on Constitutional, Political, Financial and Other Questions Concerning Rhodesia (printed for information of the Board of the British South Africa Company, 1912). The Memorandum contained a history of the Company's territories and the relevant documents were included as appendices. For the political structure of Rhodesia at this time, see Rolin, H. Les Lois et l'Administration de la Rhodesie (Establishments, Emile Bruylant, 1913). Unfortunately this excellent work has no English translation. See also Hone, P.F. Southern Rhodesia (London, George Bell and Sons, 1909).

150. An organisation called the Rhodesia League was formed in Southern Rhodesia to oppose the renewal of the Charter. It launched a vigorous campaign for the introduction of popular government in the territory. Some of the publications issued by the League are:- Rayner, A.C. Should Charter Administration be Abolished? (1914); Manifesto Issued By The Executive Committee Of The Rhodesian League (1912); and Report of the Meeting Held At Salisbury By Members of The Bulawayo Branch Of The Rhodesian League (1912).

In Northern Rhodesia agitation against the renewal of the Charter was confined to a small number of settlers led by Moore. In 1913 the Farmers' Association was formed but it was not formed to fight against the renewal of the Charter.

49. Several courses were open: (1) Southern and Northern Rhodesia could become a Crown Colony under Imperial rule; (2) the two territories could join the Union of South Africa; (3) Southern Rhodesia alone could join the Union of South Africa while Northern Rhodesia joined Nyasaland; (4) responsible government could be introduced in both territories or in^{an} amalgamated territory; and (5) Southern Rhodesia could be granted self-government while Northern Rhodesia became a protectorate.

Settler opinion in both Southern and Northern Rhodesia was sharply divided. Three schools of opinion existed in Southern Rhodesia. The first supported joining the Union of South Africa;⁽¹⁵¹⁾ the second supported crown colony government⁽¹⁵²⁾ while the third supported self-government for the territory.⁽¹⁵³⁾ In Northern Rhodesia five schools of opinion existed. They supported respectively joining the Union of South Africa;⁽¹⁵⁴⁾ amalgamation with Southern Rhodesia;⁽¹⁵⁵⁾ self-government;⁽¹⁵⁶⁾ direct Imperial rule;⁽¹⁵⁷⁾ and a link with other territories north of the Zambezi, particularly Nyasaland.⁽¹⁵⁸⁾

The Company's views were that Southern Rhodesia should join the Union and that Northern Rhodesia should be split into three parts -- the Railway Belt, the East, formerly known as North-Eastern Rhodesia and Barotseland and the adjoining native reserves. The Railway Belt would join Southern Rhodesia. North-Eastern Rhodesia would join Nyasaland while Barotseland and the adjoining native reserves would join the Bechuanaland Protectorate. It considered self-government for Southern Rhodesia not financially feasible.⁽¹⁵⁹⁾

151. The low class European and practically the entire Afrikaner community supported this school. The low class European was attracted by the labour policies in the Union of South Africa which safeguarded whites from blacks. See, however, a warning by J.W. Keller to the railwaymen, to reject joining the Union of South Africa because wages for railwaymen were low there, and because strikers were punishable -- "Responsible Government or Union" (Rhodesia Railways Review, October, 1921) pp.1-5. For the Afrikaners there were obvious advantages in linking up with the Union which was beginning to be dominated by their brethren. Well-to-do whites supported this school for various reasons. Some felt that the economic life of Southern Rhodesia was tied up with that of the Union. Others disliked Imperial rule and thought the only way to escape it was by joining the Union. Yet others saw joining the Union as the only way to ensure overall white security in the territory.

It should be noted that the South Africa Act, 1909, provided for the future incorporation of Southern Rhodesia.

The Rhodesia Union Association was formed to propagate the views of this school. For the publications of this organisation, see Reflections on the Constitutional Issue (1922); Die Afrikaner Stem (1922); The Case for Union (1922); Fletcher, T. Rhodesia and the Union (1922).

50.

152.

The Rhodosia League, which had been formed to oppose the renewal of the Charter but continued in existence after the Charter had been renewed, supported this school of opinion. This school was not, however, very popular and it died before the referendum in 1922.

153. This was the most popular school of opinion and was supported by the leading politicians in the territory. The Responsible Government Association was formed to campaign for the views of this school. For the literature it published, see Cripps, L. Responsible Government: Facts and Figures (1919); Coghlan, Sir Charles Responsible Government: Two Addresses (1919); Silburn, P.A. Responsible Government or Absorption (1922); Manifesto to the People Of Rhodesia by the Responsible Government Association.

154. As in Southern Rhodesia this school of opinion comprised mainly the poorer whites and as in Southern Rhodesia it was opposed by the more affluent whites, particularly the English speaking, on the ground that the Union would soon be dominated by the Afrikaners to the detriment of the English people.

155. This view had considerable support, particularly in the former North - Western Rhodesia. It was however, opposed by some settlers who feared that such a union would place the territory at the mercy of the more politically and economically advanced Southern Rhodesia. In Southern Rhodesia the idea had no support. The Southern Rhodesians thought that such a union would delay self-government.

156. This view was unrealistic in that the European population was too small to shoulder the responsibilities of self-government. It had also no chance of acceptance by the Imperial Government.

157. Many farmers supported this school of opinion. They pointed at the advantages Europeans, particularly farmers, were having in Nyasaland to support their argument.

158. For the views of this school of opinion, see Hetherwick, A. "Nyasaland Today and Tomorrow" (Journal of the African Society, Vol. 17, No. 65, 1917) pp.11-19; Gann, A History of Northern Rhodesia, pp. 187-188; "Africanus (pseudonym for Melland) "Central African Confederation" (Journal of the African Society, 1918) pp.276-306. For a summary of the views of all schools, see Gann, pp. 181-183.

159. For the views of the Company, see P.D. Chaplin to Smartt: 28 Feb., 1921 (CH 8/2/1, f, 2433 - 2445, Nat. Arch Ms.). See also Gann, ibid., p. 185.

The Imperial Government's view was reflected by the new Secretary of State for the Colonies, Milner, formerly High Commissioner for South Africa and in that capacity responsible for Northern Rhodesian affairs. He had no objection to Southern Rhodesia joining the Union without Northern Rhodesia. If Southern Rhodesia did not join the Union he would favour its amalgamation with North-Western Rhodesia⁽¹⁶⁰⁾ while North-Eastern Rhodesia linked with Nyasaland, Kenya, Uganda and German East Africa to form a British Central African Protectorate administered by Britain. Milner thought self-government for Southern Rhodesia was not feasible for financial reasons⁽¹⁶⁰⁾ and as Colonial Secretary, he was personally not in favour of setting up a Crown Colony Administration in the territory.⁽¹⁶¹⁾

Although the controversy about the termination of Company rule and its replacement with a new form of administration was too complex an issue for most Africans, the Africans of Barotseland advocated the removal of Company rule from their territory.⁽¹⁶²⁾

160. This arrangement was considered in some quarters as not financially feasible. For instance, the Imperial Secretary for South Africa, Herbert James Stanley, thought that a self-governing Southern Rhodesia would be too poverty-stricken to be able to take over the additional responsibility of the Railway Belt - Gann, *ibid*, p. 188. The Company had earlier asked the Imperial Government whether it would be possible to raise native taxation in the Railway Belt to the level in Southern Rhodesia so that the region would not be a burden to any other territory to which it might be joined - p.187. The Imperial Government replied in the negative.

160. In 1919 the elected Members of the Southern Rhodesia Legislative Council asked the Colonial Secretary for a statement as to what proof of fitness in respect of finances and other material factors would be considered sufficient for self-government. Milner replied that apart from the smallness of the European population, he did not think the country could carry the burden of responsible government - see Cmd. 5949 of 1939 (the report of the Bledisloe Commission - see Chapter 7).

161. See D. Malcolm to P.D. Chaplin: 16 April 1919 (CHS/2/11, f387-395, Nat. Arch. Ms.)

162. The Barotse accused the Company of not having kept its promises to establish schools, industries and transport services in the territory (Barotseland). They also questioned the Company's land claims and its assertion that the Paramount Chief of Barotseland had no authority over people outside the area covered by the Lewanika Concession.

They demanded that the territories defined in the Order in Council of 1899 as Barotseland-North-Western Rhodesia should be placed under His Majesty the King and the Imperial Government as a Protectorate Native State with a British Resident Commissioner permanently residing at the Paramount Chief's Court.⁽¹⁶³⁾

In March, 1921,⁽¹⁶⁴⁾ the Colonial Secretary referred the whole question of constitutional changes in Southern and Northern Rhodesia to a Committee headed by Earl Buxton (a former High Commissioner for South Africa and, therefore, fully acquainted with Central African affairs.)⁽¹⁶⁵⁾ The Committee issued two reports, one concerning Southern Rhodesia⁽¹⁶⁶⁾ and the other Northern Rhodesia.⁽¹⁶⁷⁾

163. Demands that Barotseland should be placed under direct Imperial rule had been made from as early as 1907. For a summary of the arguments of the Barotse, see Gann, A History of Northern Rhodesia, p. 183-184.

164. In April, 1920, an election had been held in Southern Rhodesia and won by those advocating self-government.

165. The terms of the Committee were:-

- (1) "When and with what limitations (if any) responsible government should be granted to Southern Rhodesia.
- (2) What procedure should be adopted with a view to working out the future Constitution.
- (3) Pending the coming into effect of responsible Government what measures would be required to enable the British South Africa Company to carry on the Administration.

It is also desired that the Committee should consider the future of Northern Rhodesia generally and the nature of the reply to be returned to the petition; and in particular advise:

- (1) Whether the question of the British South Africa Company's claim to the land and minerals, and to the administrative deficits should be referred to the Privy Council for settlement, or alternatively,
- (2) Whether the claim should, if possible, be settled by agreement, between the Crown and the Company.
- (3) Whether it is possible to terminate Chartered Government pending the settlement of these questions, and if not, what further constitutional development is possible in the meantime.
- (4) Whether a commission should be sent to Northern Rhodesia to take evidence as to the views of the White Settlers on the Company's claim, and on an alteration of the form of Government, and on the measures to be taken in the event of an alteration, to ensure insolvency of the territory.
- (5) What steps should be taken in the event of a termination of Chartered Government to safe-guard the interests of the natives."

166. First Report of the Committee Appointed by the Secretary of State for the Colonies to Consider certain Questions Relating to Rhodesia (Cmd. 1273 of 1921).

167. Second.....(Cmd. 1471 of 1921).

It recommended self-government for Southern Rhodesia at the earliest moment but felt that a referendum should first be held on the issue. In regard to Northern Rhodesia, the Committee did not recommend the immediate termination of Company rule. It recommended instead that the Company should be asked to consider the establishment of a Legislative Council for the territory in which the Company would have an official majority over the elected representatives of the settlers. Its recommendations on possible partition of the territory were not very different from those put forward by the Company but it did not express a final opinion on the matter. On the question of the Company's claims to lands and minerals in the territory, the Committee recommended that where these were doubtful, they should be referred to the Judicial Committee of the Privy Council.

Self-government for Northern Rhodesia was ruled out on two main reasons. First, the European population was too small to be granted the responsibilities that self-government entailed. Secondly, even if it were large enough to shoulder the responsibilities of self-government, such a constitutional arrangement would not be in conformity with the policy of regarding the Zambezi as the furthest frontier of the white-ruled South. Either Company rule would continue or the Imperial Government would take over the Administration.

The report on Northern Rhodesia was denounced by the Company. It was not prepared to establish a Legislative Council which it considered unnecessary and a waste of money. The Colonial Office, on the other hand, did not want the land and mineral rights issues taken to court but it insisted that if the British Government should take over the administration of Northern Rhodesia then the Company should surrender its land and mineral rights. The Company did not accept this.

The recommendations of the Committee, particularly those concerning Northern Rhodesia, were not acted upon by the British Government. Instead negotiations continued on how best the Company could hand over the Administration. The Company had informed the British Government that it was no longer interested in administering territories. Its handing over of the government in both territories was, however, subject to acceptable terms of transfer of its assets to the new Administrations and retaining its land and mineral rights.

The negotiations culminated in the conclusion of the Rhodesia Agreement Between the Secretary of State for the Colonies and the British South Africa Company (better known as the Devonshire Agreement) on September 29, 1923.

Under the Agreement Southern Rhodesia was to become self-governing.⁽¹⁶⁸⁾ In regard to Northern Rhodesia the Agreement provided that the Imperial Government would assume the government of the territory on April 1, 1924. The Imperial Government agreed to pay half the administrative deficit for the year 1923-1924 subject to certain deductions. The Company was to hand over all the buildings and public works to the Crown together with its land rights. The Crown was to be free to administer the lands "in such a manner as the Crown may in its discretion deem best in the interests of the native population and the public interest generally." It, however, agreed to pay half of the proceeds of land sales to the Company until 1965 after making provision for the costs of management. The Company retained three big freehold areas which it held by virtue of "certificate of claim" granted by Johnston (while he was Commissioner for British Central Africa)⁽¹⁶⁹⁾ The Crown, however, reserved the right to establish native reserves in the lands granted to the North Charterland Company.⁽¹⁷⁰⁾ Existing land alienations were recognised. The Company retained mineral rights but, unlike in Southern Rhodesia, these rights meant little at the time as the wealth of the Copperbelt had not yet been fully appreciated.

168. The Company was to retain its mineral rights. It received guarantees that its railway interests would not be confiscated. The Crown agreed to pay £3,750,000 in quit-ance to the amount due under the Cave Award (the Cave Award was made to the Company in terms of the 1918 Privy Council judgment which had held that although unalienated land belonged to the Crown, the Company could look to the Crown for the re-imbusement of its accumulated administrative deficits.) The unalienated land and the Company's public works were to pass to the new Government for £2,300,000. The Crown relinquished its claim of £2,000,000 against the Company for the expenditure relating to World War -I.

169. For a reproduced "Certificate of Claim", see Gann, The Birth of A Plural Society, Appendix II.

170. This was a subsidiary of the British South Africa Company.

(171)

On September 12, 1923, the Crown annexed Southern Rhodesia. On October 1, the Colony became self-governing. On April 1, 1924, Northern Rhodesia was declared a protectorate and the British Government assumed the government of the territory in terms of the Northern Rhodesia Order in Council, 1924. The Order in Council provided for a Governor, a Legislative Council, partly elected and partly nominated, an Executive Council of Officials only, a High Court and many other matters of administration. The structure and powers of the Legislative Council will be discussed in Chapter Four.

Herbert James Stanley, a former Imperial Secretary for South Africa and Resident Commissioner at Salisbury during the war, was appointed Governor. The new Government inherited the Company's civil service. Although the administrative machinery had to be remodelled and run on the Colonial Office style, most of the personnel under the Company remained in the same or modified departments. District Commissioners,⁽¹⁷³⁾ for instance, continued to operate as they had done under the Company. The territory was divided into nine provinces, each under a Provincial Commissioner (an office which did not exist under Company rule). The Provincial Commissioners were given charge of the District Commissioners in their respective provinces. While under Company rule the Administrator was the co-ordinator of the administrative machinery, the new Government established a Secretariat headed by a Chief Secretary. The Chief Secretary was the head of the civil service and principal advisor to the Governor.

Chiefs, who were under the Company nothing more than constables of the District Commissioners, were accorded recognition and respect by the new Administration. The policy of direct rule was soon replaced by that of indirect rule.⁽¹⁷³⁾

171. A referendum had been held in 1922, 8,744 voted for self-government and 5,989 for joining the Union. For a comprehensive account of the events leading to this overwhelming vote in favour of self-government, see an unpublished thesis for the Doctor of Philosophy degree of the University of Cambridge, The Achievement of Self - Government in Southern Rhodesia, by J. D. Foge.

172. Under Company rule they were called Native Commissioners.

173. The policy of indirect rule was formulated by Lord Lugard while he was Governor in Nigeria. The Colonial Office adopted it in all the territories under it. For an analysis of the policy, see Lugard, The Dual Mandate in Tropical Africa (London, Frank Cass & Co., 1965) Chapters X and XI (the book was first published in 1922). See also below, Chapter 5.

CHAPTER THREENYASALAND - TREATIES AND EARLY ADMINISTRATION 1875-1924

While Coillard⁽¹⁾ undoubtedly played an important role in bringing British rule to Northern Rhodesia, it was not as important as that played by the Scottish missionaries in doing the same in Nyasaland. It was not Coillard who prevented Northern Rhodesia from falling under Portuguese sovereignty. It was Rhodes's British South Africa Company which, when the Imperial Government was not willing to assume responsibility, stepped in and planted the Union Jack. The Portuguese were effectively excluded from Northern Rhodesia by the Lochner Concession although the question of boundaries continued to be a vexing one for several years. In Nyasaland it was the missionaries who championed for protectorate status. Unlike Coillard who was a mere adviser to Lewanika when he requested British protection, the Scottish missionaries were not advisers to any particular chief. There was no Lewanika - like chief in Nyasaland. The country was being ruled by dozens of chiefs who were independent of each other. Ravaged by slave traders, some tribes did not even have chiefs. In, therefore, seeking protectorate status for the country, the missionaries were not acting on instructions from the chiefs. They were acting on their own in the belief that protectorate status was the best arrangement for the people of the country and for their missionary work.

When the British Government entertained ideas of letting the Portuguese have the territory in exchange for territory elsewhere, the missionaries stoutly opposed the scheme. In this opposition they were supported by the powerful Scottish Lobby at Westminster. The missionaries finally won when a protectorate was declared in May, 1891. It was not, therefore, surprising that in later years the Scottish missionaries looked at Nyasaland as their country and fought together with the Africans for self-government. In fact, as will be seen below, the missionaries had, before the Imperial Government stepped in, established an administration of their own which, unfortunately, ended up in discredit.

1. See Chapter Two.

2. See below in this Chapter.

Apart from the missionaries, Rhodes also was instrumental in the establishment of British administration in Nyasaland. Without the £2,000 he gave to Johnston, treaty-making with the Chiefs in Nyasaland and what later became North-Eastern Rhodesia would not have been undertaken so easily and perhaps the Portuguese (who had already established themselves in Mozambique) would have had the opportunity to acquire large portions of present-day Malawi. In fact, had it not been for Rhodes's hatred of the Portuguese, his insatiable zeal for empire-building and his vigorous resistance to manoeuvres of the Imperial Government to placate and appease Portuguese territorial ambitions, the present boundaries of Malawi, Zambia and (3) Rhodesia would not have been as extensive as they now are.

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3. Even when the final boundaries between Portuguese East Africa and the British interior territories were settled on August 20, 1890 (See A & P 1890 - 1, vii, pp. 588 - 96, for text) Rhodes was so infuriated with the arrangement that he not only took the Imperial Government to task but threatened to resign from the British South Africa Company because his fellow Directors were less bellicose in the matter. A day before the Agreement was signed Sir Philip Currie had written to Cawston: "It is a pity that Rhodes is so exacting, but it is now too late to draw back...I am quite unable to understand Rhodes's policy unless he proposes to make war on Portugal, seize her territories, and occupy her ports. The arrangement we have proposed is a vast improvement on the present state of things, and the utmost that there is any chance of obtaining without the use of force." Cawston Papers, Vol. 11, Currie to Cawston, 19 August, 1890 as quoted in Hanna, op.cit., p. 168.

The origin of European administration in Nyasaland can be traced back to 1875 when two Scottish Churches - the Church of Scotland and the Free church of Scotland⁽⁴⁾ - sent missionaries to establish stations in the territory. The Church of Scotland team (named the Church of Scotland Industrial Mission and led by Henry Henderson) settled in the Shire Highlands and named their station Blantyre⁽⁵⁾ in memory of the birthplace of Livingstone. The Free church of Scotland team (named the Livingstonia Mission of the Free Church of Scotland and led by Young and Laws)⁽⁶⁾ settled at a lakeside promontory called Cape Maclear. The year 1875, was not, however, the first time missionaries had come to Nyasaland. After listening to appeals by David Livingstone for missionary work in the territories he had explored, the Universities of Cambridge, Durham and Dublin had constituted a body called the Universities Mission to Central Africa. This body, which was of the Anglican church, sent missionaries to Nyasaland in 1861 but the mission withdrew in 1862 owing to hardships.⁽⁷⁾ No further missionary attempts were made thereafter until 1875.

When the missionaries arrived in 1875 they found a country ravaged by the Ayao slave traders. Among several tribes administration had completely broken down. The missionaries soon found themselves cast into the role of administrators. They sought clearance with their headquarters in Scotland to establish some form of administration among the people they served. Permission was granted and the missionaries soon wore "robes of administration" in addition to "those of religion." This happened at both stations, but it was at the Blantyre station that administrative tasks were undertaken with excessive enthusiasm.

4. The Free Church of Scotland had broken away from the Church of Scotland in 1843. It rejoined in 1929.

5. For the history of Blantyre, see W. Robertson, The Martyrs of Blantyre (London, Nisbet, 1892); and Hetherwick, A., The Romance of Blantyre (London, J. Clark, 1931)

6. For the history of the Livingstonia Mission, see Laws, R., Reminiscences of Livingstonia (Edinburgh & London, Oliver & Boyd, 1934); Livingstone W.P., Laws of Livingstonia (London, Hodder & Stoughton, 1931); Jack, J.W., Daybreak in Livingstonia (Edinburgh, Oliphant & Co., 1901); and Young, E.D., Nyassa (London, 1877)

7. The Mission later returned. For the history of the U.M.C.A., see Wilson, G.H., History of the U.M.C.A. (London, U.M.C.A., 1936).

4. Although proficient in the scriptures, the missionaries lacked administrative experience. Their main administrative activity was in the field of justice - criminal and civil, but mainly the former. With no prisons for persons convicted of criminal offences the missionaries resorted to flogging as the most appropriate punishment. Not conversant with judicial punishments, they did not know how much flogging they should inflict for particular offences. Dr. Laws of Livingstonia used his Bible and adopted the forty lashes given in Deuteronomy 25: 3 as the limit.⁽⁸⁾ Missionaries at Blantyre, however, observed no limits and sixty lashes or more could be inflicted. It should be noted that in inflicting these floggings the missionaries, in fact, thought they were administering punishments less severe than those given by some of the Chiefs.⁽⁹⁾

When the missionaries at Blantyre executed one Manga by a firing squad for murder of a woman, their administrative activities became exposed to public opinion in Britain. Manga had not been given a formal trial as understood under English or Scottish law. In 1830, Andrew Chirnside, a Fellow of the Royal Geographical Society, who had visited Nyasaland in 1879, published shocking disclosures of the administrative activities of the Scottish missionaries in the territory.⁽¹⁰⁾ The disclosures caused a stir in Britain. The Scottish Churches and the Government were embarrassed. The Church of Scotland Foreign Mission Committee sent Dr. Rankin and a lawyer called Pringle to investigate the incidents at Blantyre.⁽¹¹⁾ As a result of the investigations the entire missionary personnel at Blantyre was withdrawn and replaced by a new team. The new missionaries were given strict instructions on administrative matters. They were told, among other things: "You must always keep in view the fact that you are labouring to found and build up a Christian Church and not laying the foundations of a British Colony or of a small state... Carefully avoid any temptation to act as judges or rulers in the land. Let it be perfectly and extensively understood that you will take no part in native quarrels."⁽¹²⁾ If they caught offenders they were to hand them to the Chief concerned.

8. Livingstone, W.P. *op.cit.*, p.136.

9. For punishments inflicted by some chiefs, see *ibid.*, p.191, Ernsly, W.A. *Among the Wild Angoni*, p.247

10. Chirnside, Andrew *The Blantyre Missionaries: Discreditable Disclosures* (London, W. Ridgeway, 1880). See also Hanna, *op.cit.*, pp.26-30 and Note 11 below. For a rather poor rebuttal of the disclosures by Chirnside, see Riddell, A.

A Reply to 'The Blantyre Missionaries: Discreditable Disclosures by Andrew Chirnside, F.R.G.S.' (Edinburgh, Blackwood, 1880).

11. For literature on the incidents and the investigation, see F.O. 84/1565: Depositions to Dr. Rankin; F.O. 84/1565: O'Neill to Granville, Consular No.15, 5 Dec. 1880; F.O. 84/1564 O'Neill to Salisbury, No.11 S.T., 3 Feb. 1880; F.O. 84/1564: O'Neill to Granville, No.34, S.T., Conf. 28 April, 1880; F.O. 84/1564: O'Neill to Granville, No.13 Consular, 18 Nov. 1880. See also Hanna, *op.cit.*, pp.30. *et seq.* 12. As quoted by Hanna, *op.cit.*, p.41.

During the enquiry by Dr. Rankin, the missionaries had argued that as long as they were their own protectors, such incidents were bound to occur and that the only satisfactory arrangement would be for the Imperial Government to appoint an official to reside in Nyasaland. They wanted some form of administration to be established to look after the law and order problems which were pressing in the country. The Livingstonia Mission "which had escaped the scandals of the Blantyre Mission" had, as early as 1876 requested the Imperial Government to appoint one of its missionaries, E. D. Young, consul so that he could report directly to Dr. Kirk, the British representative at Zanzibar, on the movement of Arab slave dealers. (13) When this was not acceded to, the Mission had in 1877 asked the Imperial Government to appoint "a consul of their own at Lake Nyasa in order that residents there may be under a kind of British protectorate." (14)

THE FIRST IMPERIAL OFFICERS

It was not until 1883 that the Imperial Government appointed Captain Foot "to be Her Majesty's Consul in the territories of the African kings and chiefs in the Districts adjacent to Lake Nyasa." The duties of the consul were to be, *inter alia*, to develop civilization and commerce in the country and to suppress the slave trade. (15) Calling this officer "consul" was rather anomalous. A consul must be accredited to a definite authority and that authority must accept the appointment. Consul Foot was accredited to no one in particular. The assumption must have been that he was accredited to the kings and chiefs referred to in the appointment. These kings and chiefs, however, had not accepted his appointment and he did not present his credentials to them to have his status in the territory recognised. Legally, therefore, the consul had no validity in relation to the kings and chiefs of the territory. He had also no legal jurisdiction over the settlers and missionaries in the territory. The Portuguese had, of course, accepted his appointment and promised to co-operate with him. (16) This Portuguese acceptance contributed nothing to the legal status of Foot since he was not accredited to the Portuguese.

13. Hanna, *op. cit.*, p.64, citing Mins. F.C. of S., For. Miss. Comm. 22 February, 1876.

14. *Ibid.*, citing *ibid.*, 17 April, 1877.

15. A & P 1, 1884, lxxv, p.370: Lister to Foot, 1 October, 1883.

16. *Ibid.*, p.373: Granville to Baring, 23 October, 1883; Draft in F.O. 84/1639, No. 41 Africa.

6. Captain Foot died in August, 1834. His duties were, for a short time, carried out by an acting consul, Goodrich.⁽¹⁷⁾ In 1835, Foot was succeeded by Hawes. During Captain Foot's short life in the territory he had not made any efforts to secure treaties with the African chiefs. In August, 1835, however, John Moir, a Director of the African Lakes Company, informed the Acting Consul (Goodrich) that he had been able to induce many chiefs of the Nyasa District to put their marks on two memorials - one praying Her Majesty's Government to declare a protectorate over their territory and the other asking the African Lakes Company to grant them protection should Her Majesty's Government refuse their petition.⁽¹⁸⁾ The African Lakes Company had been formed in 1878 by two brothers - John and Frederick Moir - sons of an Edinburgh doctor. This was after an appeal by the missionaries in Nyasaland for a commercial undertaking to provide them with food, transport and postal facilities. The Company had originally been formed under the name "Livingstonia Central Africa Company." It was not a chartered Company like the British South Africa Company.

John Moir sent eight copies of the memorials to Hawes when the latter took over from Goodrich and informed him at the same time that copies had also been sent to England and that he (Moir) would be going to England to present other petitions and treaties entered into by seventeen Yao chiefs, fourteen chiefs on the shore of the Lake and two chiefs on the Stevenson Road.⁽¹⁹⁾ Goodrich and Hawes were sceptical about these treaties.⁽²⁰⁾ The Foreign Office, on the other hand, was not opposed to such treaties. Its only concern was whether the Company was responsible and competent enough to conclude the treaties and establish administration if necessary. Hawes was asked to give his opinion of the Company. His opinion was that the Company was not competent to carry out the tasks of administration.⁽²¹⁾ The Company lacked staff and capital. "For the British Government to have conferred powers on such a body would have been irresponsible and inexcusable."⁽²²⁾ The missionaries, however, supported the Company's bid to assume administration. This was no doubt motivated more by the fact that the Company was Scottish than by conviction that it could competently discharge administrative functions. There was also the fact that the missionaries and the Company regarded themselves as the pilots of European civilisation in Nyasaland and wanted to determine the course of the country's absorption of that civilisation.

See end of page 68 for footnotes 17-22.

7. The Imperial Government did not give a categorical refusal to the Company's request. There was need to wait and see the course events would take. The missionaries, particularly those at Blantyre, also agreed that the treaties with the Makololo Chiefs, should not be put into operation immediately.⁽²³⁾ What made the Foreign Office hesitate about the matter was that it had not yet decided whether to declare the territory a protectorate or to let the Portuguese occupy it. In 1881 a Foreign Office minute had stated that there was no objection to the Portuguese occupying Blantyre. That view was still current as late as 1888. In October of that year, as the Portuguese were biding their time for penetration of Nyasaland, the British ambassador in Lisbon, Petre, repeated the suggestion he had made to the Foreign Office before that Britain should recognise Portuguese sovereignty over Nyasaland.⁽²⁴⁾ In November of the same year Johnston was appointed consul to Mozambique. Before taking up his appointment he visited Lisbon on an assignment by Lord Salisbury to negotiate an understanding about frontiers which would keep the Portuguese out of the Shire Highlands.⁽²⁵⁾ During the negotiations, the Portuguese Foreign Minister, Gomes, insisted that the Portuguese boundary should include the Shire Highlands and the Southern half of Lake Nyasa. Johnston was in favour of this on condition that Portugal accept a limitation of her territory to the West - i.e. in the Angola - North-Western Rhodesia boundary. In a private letter to Lister,⁽²⁶⁾ Johnston urged the Foreign Office to accept the Portuguese bargain. He argued that Nyasaland was dependent and would be dependent for all time on Portuguese territory for communications and transit and that any guarantees obtained by treaty would not be a solution.

17. For authorisation of Goodrich to carry out the duties, see ibid., 1884-5, lxxdlii, p.462: Kirk to Granville, 23 Octo. 1884. See also Hanna, op.cit., p.67.

18. F.O. 84/1702: Goodrich to Salisbury, No. 8, Africa, 9 Aug. 1885.

19. F.O. 84/1702: Hawes to Salisbury, No.1, Africa, 17 Sept. 1885.

20. Some were later questioned by the Chiefs who were said to have signed them. For instance, Ramukakan, a Makololo chief, later alleged that the document he had put his mark on, he was told, contained "a statement that he was the paramount chief of the Makololo tribes, that there were so many chiefs under him, and that he would be friendly to any English man who might come to his country" - F.O. 84/1702: Hawes to Salisbury, No.5, Africa, 1 Dec. 1885: See also ibid.: Goodrich to Salisbury, No.8 Africa, 9 August, 1885.

21. F.O. 84/1751: Hawes to Rosebery, No. 13, C.A., 30 March, 1886.

22. Hanna op.cit., p.88.

23. See F.O. 84/1751: F.O. to Hawes, No.11 Conf, 24 July, 1886: cf. F.O. 84/1751: Hawes to Rosebery, No.13, C.A. 30 March, 1886, with enclosure from Hetherwick.

24. A & P. 1890, li, p.152: Petre to Salisbury, 30 Oct. 1888.

25. F.O. 84/1968: F.O. to Johnston, 16 March, 1889.

26. F.O. 84/1969: Johnston to Lister, 5 April, 1889.

3. He pointed out that it would be better to have British territory stretching from Tanganyika to the Zambezi and give the Portuguese the south-east and the south-west of Nyasa as well as the Zambezi as far as Luangwa. Johnston strongly felt that it was more important to keep and safeguard the right of the British colonists at the Cape to expand northwards beyond the Zambezi to Tanganyika than to keep Blantyre out of Portuguese hands. He mentioned that he had secured two agreements from Gomes: (1) for a treaty to be concluded guaranteeing freedom of religion, navigation on the Zambezi, transit and import of war materials; and (2) on matters of trade. Johnston thought if the missionaries did not want working in Portuguese territory they could go to British territory in Western Nyasa. Petre agreed with the bargains⁽²⁷⁾ and Lister thought it would be foolish to reject such bargains in order to safeguard the interests of a Company and a few missionaries.

When Johnston arrived back in London in April, 1839, he applied pressure to have his bargain accepted. Writing to Lord Salisbury he stated: "The sentiments of our missionaries in the Shire district are not the only element for consideration in an arrangement with Portugal. There are also the interests and expectations of the numerous British subjects who have just obtained or are awaiting concessions from the Portuguese Government for the opening up of the mining and agricultural wealth of the Sofala territories south of the Zambezi and whose prospects of commercial success will be seriously jeopardised if we fail to come to terms with Portugal for the settlement of our respective spheres of political influence in South East Africa!"⁽²⁸⁾ There was no doubt that Johnston's views would meet strong opposition from the missionaries. The Foreign Office gave Johnston the task of winning the missionaries to his way of thinking. The Free church of Scotland reluctantly accepted the idea, no doubt because it had not much to lose since its stations would have been in the British sphere.⁽²⁹⁾ The Church of Scotland, on the other hand, opposed the plan and launched a fierce campaign against it. A petition against the plan and signed by 11,000 people was presented to Lord Salisbury by the Convenor of the Foreign Mission Committee, Dr. Archbald Scott.⁽³⁰⁾

27, F.O. 84/1965: Petre to Salisbury, No. 39, Africa, 9 April, 1839.

28, F.O. 84/1969: Johnston to Salisbury, 22 April, 1839.

29, Hanna, *op.cit.*, p. 138, citing Minutes of Free Church of Scotland Foreign Mission Committee, 14 May, 1839.

30, Livingston, W.P., A Prince of Missionaries (London, J. Clarke, 1931) pp. 51-52.

Lord Salisbury; it appears, did not personally like the plan.⁽³¹⁾ The Foreign Office consequently rejected it and on May 31, 1889, Johnston left to take up his post in Mozambique. Before he left he had, however, met Rhodes who was in London negotiating for his Charter. It was this meeting that changed the course of events in Nyasaland and which revolutionised Johnston's thinking on Nyasaland. Rhodes wanted Nyasaland to come under his proposed Chartered Company. He consequently wanted someone to obtain treaties for him from the African chiefs of the territory. After an all night discussion on the subject Rhodes gave Johnston a cheque for two thousand pounds. This amount was to be expended on treaty-making. Rhodes had agreed that his Company would pay for the administration of Nyasaland if it finally came under the Company. This deal with Rhodes was a private one but Johnston thought it necessary to sound the opinion of the Foreign Office on treaty-making. He wanted to know "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."⁽³²⁾ He explained that the treaties would remain secret and could be repudiated if the Government found it necessary to do so.⁽³³⁾

The deal with Rhodes was not, however, as secret as Johnston thought. The Foreign Office knew that Rhodes had become interested in Nyasaland and it was interested in that interest because if the proposed company could take up the burden of running Nyasaland then the declaration of a protectorate over the territory would not be a burden to the Treasury. It should be noted that at this time opinion at the Foreign Office had changed in favour of retaining Nyasaland although it had not yet become clear under what status it would be retained. Lord Salisbury agreed to Johnston concluding treaties but he did so with a reservation on the propriety of Johnston's expenses being paid by Rhodes. "It would be preferable that the Foreign Office should pay your travelling and treaty-making expenses in Nyasaland, as we do not want to commit ourselves to handing over that region to a Chartered Company. Outside, its limits I see no objection to Mr. Rhodes paying your expenses and meeting the cost of negotiations."⁽³⁴⁾

31. Ibid., p. 51-52.

32. F.O. 84/1969.

33. Ibid.

34. Oliver, op. cit., p. 155, quoting. Passage also quoted at p. 45, Jones, Griff Britain and Nyasaland (London, George Allen & Unwin, 1964).

When Johnston arrived in Mozambique in July, 1889, the Portuguese expedition into Nyasaland had not yet advanced but the situation was daily menacing the Shire Highlands. Johnston resolved to declare a protectorate over the territory if things appeared to be getting worse. If the position remained as it was, he was going to keep secret whatever treaties he would conclude until his Government declared the area a sphere of influence. He was even prepared to see the territory run by the African Lakes Company if Her Majesty's Government was not in a position to do so immediately. Writing to the Foreign Office on this he stated: "With its recently increased resources, the African Lakes Company will soon be in a position to successfully maintain order in the Southern Nyasa territories, especially if strengthened by a charter from Her Majesty's Government."⁽³⁵⁾

DECLARATION OF PROTECTORATE STATUS

Soon after the arrival of Johnston in Nyasaland, Buchanan, the Acting Consul, sent a protest note to the Portuguese about their intended advance into Makololo land and the Shire Highlands. In the protest note Buchanan intimated "that the Makololo country and the Shire Hills, commencing at the Ruo River had been placed under protection of Her Majesty's Government"⁽³⁶⁾ No such protectorate had, however, been declared. The claim was intended to keep the Portuguese out of the Makololo country and the Shire Highlands. It was perhaps Johnston who suggested this to Buchanan for at the same time he instructed Buchanan to conclude treaties with the Makololo chiefs.⁽³⁷⁾ Treaties were hurriedly signed with Makololo chiefs Masea, Katunga and Mililima on August 14, 1889,⁽³⁸⁾ and Kampata on August 15⁽³⁹⁾ and with the Yao chiefs of Mudi, Blantyre, Soche and Ndiland on August 24.⁽⁴⁰⁾

35. See F.O. 84/1969: Johnston to Salisbury, No. 8, Africa, Conf. 9, Aug. 1889.

36. A & F., 1890, li, p.215: Buchanan to Salisbury, No. 8, Africa, Conf. 9 Aug. 1889, with enclosures for Portuguese reaction to the protest see F.O. 84/1942: Buchanan to Salisbury, No. 30, C.A. Conf., 10 Sept. 1889, with enclosures.

37. See F.O. 84/1969: Johnston to Salisbury, No. 9, Africa, 26 Aug. 1889.

38. For reproduction of the treaty with these three chiefs, see Hertslet, Vol. 1, op. cit., p.289.

39. Ibid.

40. Ibid.

11. On September 21, 1889, Buchanan declared "that the Makololo, Yao and Machinga countries...are, with the consent and at the desire of the Chiefs and People, placed under the protection of Her Most Gracious Majesty the Queen of Great Britain and Ireland...."⁽⁴¹⁾ This declaration covered only a small portion of the country it included but that which was most seriously threatened by Portuguese invasion. It was hurriedly done to keep the Portuguese out of the area. Its legal effect on the relationship between the chiefs and the Imperial Government was another matter, to be sorted out later. Overwhelmed with delight at the step taken, a missionary wrote:-

"This month there has dawned a new life upon this land. British protection was what we had hardly dared to hope for; the utmost we had been taught to expect was that we would not be driven out of the country by the Portuguese...Nothing could exceed the heartiness with which we welcome what has been done."⁽⁴²⁾

Having temporarily left the Portuguese pondering over the situation in the light of the declaration of September 21, it became necessary to conclude more treaties with various chiefs in preparation for the extension of protectorate status over the whole country. Buchanan further secured treaties with Makololo chiefs Mlanti,⁽⁴³⁾ Chipatala's sons⁽⁴⁴⁾ and Waryasa.⁽⁴⁵⁾ Johnston also instructed Alfred Sharpe to secure treaties from chiefs in the area extending to as far as the Luangwa.⁽⁴⁶⁾ On this first journey Sharpe managed to conclude treaties only with minor chiefs. He, however, hoisted the Union Jack, fired a salute and declared the whole country west of the Luangwa and north of the Zambezi to be under British protection.⁽⁴⁷⁾ He was not authorised to do that but he felt he had a duty to act in order to prevent the Portuguese from taking over the territory. This was what Buchanan had done when he informed the Portuguese that the Makololo country was under British protection.

41. Ibid.

42. Waller, Horace Nyasaland: Great Britain's Case Against Portugal (London, Stanford, 1890) pp. 36-38 as quoted by Hanna, op.cit., p.145.

43. Signed on 24 Sept. 1889. See Hertslet, op.cit., Vol. 1, p. 290 for a reproduction of the Treaty.

44. Signed 26 Sept. 1889. See ibid. for a reproduction of the treaty.

45. Signed 13 Aug. 1890. See ibid., for a reproduction of the treaty.

46. See Chapter Two. This was the area that later became North-Eastern Rhodesia.

47. See F.O. 84/2052: Sharpe to Johnston (Correspondence written between March and June, 1890.)

The term "protection" in this sense meant nothing more than the exclusion of other European powers,⁽⁴⁸⁾ particularly Portugal. Sharpe later concluded treaties with two important chiefs - Kazembe⁽⁴⁹⁾ and Nsama.⁽⁵⁰⁾ Johnston himself also went treaty-making in the north of the country. He secured treaties from Jumbe,⁽⁵¹⁾ twenty-three Tonga Chiefs,⁽⁵²⁾ Mlozi⁽⁵³⁾ and other minor Chiefs.⁽⁵⁴⁾ More treaties were concluded after protectorate status had been extended over the whole country. Buchanan concluded treaties with Chief Kawinga,⁽⁵⁵⁾ Chief Kampama,⁽⁵⁶⁾ the Blantyre Chiefs and Headmen,⁽⁵⁷⁾ the Makololo Chiefs,⁽⁵⁸⁾ Chief Malemia,⁽⁵⁹⁾ and Chief Tshe-Mulumbo.⁽⁶⁰⁾ Sharpe obtained a treaty from Chief Mkula.⁽⁶¹⁾ Johnston also obtained treaties from Makanga and Machinjiri Chiefs and Headmen,⁽⁶²⁾ Chief Tshingamanji,⁽⁶³⁾ Chief Mponda,⁽⁶⁴⁾ Chief Kazembe (Sultan of Rifu),⁽⁶⁵⁾ Chiefs Zarafi and⁽⁶⁹⁾ Tshindamba,⁽⁶⁶⁾ Chief Liwande,⁽⁶⁷⁾ Chief Msmara,⁽⁶⁸⁾ Chief Makwira, Makololo Chiefs,⁽⁷⁰⁾ Chief Mukumba,⁽⁷¹⁾ Chief Kanga⁽⁷²⁾ and Chiefs Kaduya M'kanda and M'Kamula.⁽⁷³⁾

After the securing of treaties in 1889, 1890 and early 1891, the Imperial Government found itself committed to the assumption of responsibility in Nyasaland. Accordingly, on May 14, 1891, a protectorate was declared over the whole of Nyasaland. The notification⁽⁷⁴⁾ of the declaration read:

It is hereby notified for public information that, under and by virtue of agreements with the Native Chiefs, and by other lawful means, the territories in Africa, hereinafter referred to as the Nyasaland Districts, are under the Protectorate of Her Majesty the Queen."

The notification then went on to define the boundaries of the territory covered and wound up by stating that measures were "in course of preparation for the administration of justice and the maintenance of peace and good order" in the territory. By a further notification dated February 22, 1893⁽⁷⁵⁾ the territory was officially named the "British Central Africa Protectorate". The name was chosen by Johnston himself. He rejected "Livingstonia" which had been given by the Free Church of Scotland missionaries and "Northern Zambesia" which for some time had been used to refer to the British sphere north of the Zambezi. When Johnston recommended the name to Lord Salisbury, His Lordship wrote: "I have no objection whatever to the name. It is cumbersome but not nearly as cumbersome as the 'short titles' of Acts of Parliament. The region it indicates is anywhere but in the Centre of Africa; but that again is a British habit. The Middle Temple is not in the middle."⁽⁷⁶⁾ In 1907, however, the name of the Protectorate was changed to Nyasaland.⁽⁷⁷⁾

13. 48. Hanna, op.cit., p.173. Lord Salisbury commenting on these declarations later said: "It is comical that all this should have been declared to be under our influence" - ibid.
49. Signed on Sept. 30, 1890. See Hertslet, op.cit., Vol. 1, p. 290, for a reproduction of the treaty.
50. Signed on October, 16, 1890. See ibid. for reproduction of the treaty.
51. See F.O. 84/1969. Johnston to Salisbury 16 Oct., 1889. With Enclosures.
52. Ibid.
53. Ibid. 26 October, 1889, with enclosures. Also F.O. 84/2051: Enclosures in Johnston to Salisbury No. 14, Africa, 17 Mar. 1890.
54. See F.O. 84/2051: Johnston to Salisbury, No. 6, Africa, 1 Feb. 1890.
55. Signed on 15 June, 1891. See Hertslet, op.cit., Vol. 1, p. 290, for a reproduction of the treaty.
56. Signed on 15 Dec. 1891.
57. Signed on 21 Dec. 1891. The Chiefs and headmen who signed the treaty were Kabeni, Maleli, Cheluchere, Machinjiri, Mangombe, Chelutambe, Chelusamba, Chechirebwe, Kuchikwamba, Kuchingombo, Chemakata, Chelusonga, Malunga, Makwerani, Mlenga, Kuchotungwe, Mponda.
58. Signed on 26 March, 1892. The Chiefs who signed the treaty were Masea, Mulilima, Katunga, John, Dadwalu, Chibalangende, Kahulikira, Mukuato, Katemalinga, Nudzikambo, Mataya, Tonali, Mirambo, Chiholopopo, Chikungu, Mangani, Kaluhya, Namela, Kamuti, Katimbanyo, Galuakadwala, Mtwana, Chitozi, Zousosi, Kavina, Chikunto, and Njerenga. Note that this was a second treaty Chiefs Masea, Katunga and Mulilima were signing having signed another on 14 August, 1889.
59. Signed on 26 March, 1892. This was a second treaty signed by Malemia. See note 62 below.
60. Signed on 28 March, 1892.
61. Signed on 18 Nov., 1892.
62. Signed on 21 July, 1891. The chiefs and sub-chiefs who signed were Mpamba, Malemia, Ntumba, Nantumbi, Mbangombo, Mfona, Inyekisa, Kotamo, Tshipangula, Ntshantsha, Tongani, Domingo, Tshata-Iko, Beta, Tshikao, Nkabo, Tshipembwe, Tshasaka. See Hertslet, op.cit., Vol. 2., p. 290, for a reproduction of the treaty.
63. Signed on August, 22 1891.
64. Signed on 24 Oct., 1891 and 8 Nov., 1891 (two treaties)
65. Signed on 31 October, 1891.
66. Signed on 7 Nov., 1891.
67. Signed on 13 Nov., 1891.
68. Signed on 14 Nov., 1891.9
69. Signed on 11 May, 1892.
70. Signed on 29 Dec., 1892. This was a second or third treaty some of the chiefs were signing - i.e. Chiefs Masea, Mulilima, Ganamadzi, Katunga, Mbola, Mwituu, Makwira and Mbengwa.
71. Signed on 10th July, 1893.
72. Signed on 12th July, 1893.
73. Signed on 12th July, 1893. Texts of treaties from Note 49 - Note 73, also found in a mimeographed publication of the Nyasaland African National Congress with no date of publication given.
74. See London Gazette of May 15, 1891, for the Notice. It is also reproduced in full in Hertslet, op.cit., Vol. 1, p. 286, and in publication referred to in Note 73. The portion produced here is also reproduced in Hanna, op.cit., p. 183.
75. Notice appears in Hertslet, op.cit., Vol. 1., p. 287.
76. F.O. 84/2197: Johnston to Salisbury, No. 19, C.A., 11 May 1892, with minutes.
77. See Nyasaland Order in Council 1907 (S.R. & O. 1907/1041) The paragraph of the Ordo changing the name also appears in Hertslet, op.cit., Vol. 1, p. 287.

Protectorates as an institution had been in existence for centuries. They had existed in Greece as early as the sixth century.⁽⁷⁸⁾ Rome had also assumed protection of weaker states and cities. When modern international law started, it recognised such relationship between States. The weaker state surrendered part of its sovereignty, particularly that in relation to external affairs, but normally retained its internal autonomy.⁽⁷⁹⁾ It remained an international person,⁽⁸⁰⁾ liable for its obligations to other states.⁽⁸²⁾ The relationship was created by treaty⁽⁸¹⁾ and it was to the treaty that reference had to be made to ascertain the powers of the protecting state and those of the protected state. The Nyasaland protectorate, however, differed substantially from the type defined above. It belonged to the new type of protectorate that began to appear in Africa and Asia during the nineteenth century. The former protectorate arose from two international persons entering into an agreement of protection. The later protectorate arose from documents signed between European powers whose states were recognised as international persons and African or Asian rulers whose states were not recognised as international persons. The status created under these new protectorates was something between that of a protected state (in the former sense) and a colony, but more akin to that of a colony than a protected state. This prompted jurists to name them 'colonial protectorates'.

Four questions arise in relation to these protectorates:

(1) were the documents signed between the European power and the Chiefs treaties? (2) if not treaties, what was their international status? (3) what status did the territory and its native inhabitants have under municipal law? The first three questions will be answered generally- i.e. the general position of all such treaties and territories and their native inhabitants will be given. The fourth question will be answered with reference to English municipal law.

78. See Engelhardt, E. Les Protectorats Ancien et Moderns (Paris, 1896). See also, Glotz, G. The Greek State and Its Institutions (London Routledge & Kegan Paul, 1929) pp. 272-294.

79. See Oppenheim, L. International Law: A Treatise, 8th Ed. by H. Lauterpacht (London, Longmans, 1955) Vol. 1., p. 192.

80. Ibid. In the case of Rights of United States Nationals in Morocco, (1952) I.C.J. Reports, 1952 p. 35, the Court seems to have assumed without argument that Morocco as a protectorate retained its international personality. The protectorate did not become part of the protecting State (See Nationality Decrees in Morocco and Tunis, P.C.I.J. Reports, Series No. 4) and, therefore, did not automatically, become party to a war of the protecting state (see Ionian Ships case, 2 Spinks 212) or to treaties concluded by the protecting state (See Oppenheim, op. cit., p. 193). See, however, H.C. Van Hoogstraten v. Low LumSeng, Annual Digest 1939-40, case, No. 16, where the Supreme Court of Federal Malaya States held that the Federal States were at war with Germany because of the unequivocal acts of the British High Commissioner placing them in a state of war.

81. Oppenheim, op. cit., p. 192.

82. Ibid.

15. With regard to the first question: although these documents are usually referred to as treaties, they were, in fact, not treaties. A treaty could only be concluded between two international persons. An international person may be a state or an organisation like the United Nations (which has acquired international personality from its members)⁽⁸³⁾ As the Chiefs were not heads of states with international personality, they could not conclude treaties. The answer to the second question is interwoven with that to the first question. If these documents were not treaties then they were not governed by international law. They were agreements between international persons and individuals and, therefore, outside the orbit of international law. As Wight says: "These treaties are not considered treaties in international law, in as much as the native rulers did not enjoy sovereignty in international law..."⁽⁸⁴⁾ With regard to the third question, a colonial protectorate had no distinct status other than that of a dependency, at international law. The distinction between it and other dependencies of the administering power fell under municipal and not international law. The inhabitants of the territory had no nationality of their own. The administering power was responsible for them just as it was responsible for the international obligations of the territory.

As already mentioned, the fourth question will be answered in accordance with English municipal law. The "treaties" created no international legal obligations between the Crown and the Chief. They did not even create a contractual relationship. Wight continues from the quotation above: "...neither have the treaties any validity in the Constitutional law of the Empire. The obligations they impose are of a moral, not a legal order; and if the Crown disregards them there is no redress"⁽⁸⁵⁾ In fact, in the course of administratively assimilating these protectorates to colonies, some of these treaties were disregarded as obsolete and without legal consequences.⁽⁸⁶⁾

83. See Reparation for Injuries Suffered in the Service of the United Nations (on Advisory Opinion) 1949 I.C.J. 174.

84. Wight, M. British Colonial Constitutions (Oxford, 1952).

85. Ibid.

86. Ibid., p.9; Sobhuza ll v. Miller (1926) A.C. 510; Jennings and Young, Constitutional Laws of the British Empire (Oxford, At the Clarendon Press, 1938) pp.6-7; Keith A.B. The Government of the British Empire (London, Macmillan, 1955) p.500.

They were, however, not wholly ineffective. Sometimes they were mentioned in constitutional instruments. For instance, Section 8 of the Aden Protectorate Royal Instructions to the Governor of March 24, 1937, stated: "In the exercise of the powers conferred on him the Governor shall respect existing native laws and customs except so far as the same may be opposed to Justice and morality and shall in all things observe the Treaties concluded with the chiefs of the protectorate."⁽⁸⁷⁾ Politically the treaties were of great significance. In Malawi and Barotseland, for instance, the nationalists often cited them as binding Britain to follow a certain constitutional course. As for the territory and its inhabitants, they were granted status similar to that of a protected state and its inhabitants. The colonial protectorate was technically foreign land. It was not part of Her Majesty's dominions, as colonies were.⁽⁸⁸⁾ The inhabitants were not British subjects but technically aliens. If they wanted to become British subjects they had to be naturalised like any other alien, but the process was of course, simpler in their case than in the case of other aliens. However, although technically aliens, they were not referred to as such. They were constitutionally designated "British protected persons" and were entitled to Britain's protection abroad and to British passports.

Judicial opinion also recognised that colonial protectorates were not part of Her Majesty's dominions - and that the inhabitants were not British subjects.⁽⁸⁹⁾ A judge of the Mombasa High Court, in East Africa, defined a protectorate as territory "which has never been acquired by settlement, or ceded to, or conquered, or annexed by His Majesty, or recognised by His Majesty as part of his dominions." On the status of the inhabitants he stated: "East Africa being a protectorate in which the Crown has jurisdiction, is in relation to the Crown a foreign country under its protection, and its native inhabitants are not subjects owing allegiance to the Crown, but protected foreigners, who, in return for that protection, owe obedience."⁽⁹⁰⁾

87. Cited by Wight in op.cit., p.160. Underlining supplied.
88. Internationally, however, there was no distinction between the two. Britain assumed international responsibility for the territory's wrongs since it had no personality of its own. The position was, therefore, as Ilbert put it, "For purposes of municipal law an African protectorate is not, but for purposes of international law must be treated as if it were a part of British dominions." Ilbert, Sir C, The Government of India (Oxford, 1893) p.431.

89. See the leading case of The King v. The Earl of Grewe, Ex parte Sekgome, (1910) 2 K.B. 576.

90. Cmd. 6939 of 1913, p.5.

17. In governing colonial protectorates Britain used the Foreign Jurisdiction Act, first enacted in 1843 and consolidated in 1890.⁽⁹¹⁾ The main purpose of the original Act was to regulate the jurisdiction of the Crown over British subjects who lived outside the British dominions but who were not subject in whole or in part to the laws of the country in which they lived. The Act was, however, framed in such a manner as to cover other matters than the main purpose. It also empowered the Crown to exercise jurisdiction wherever "by treaty, capitulation, grant, usage, sufferance and other lawful means" it was entitled to do so. Through interpretation and amendments the Act finally became the basis of Crown government in the colonial protectorate. The Act was first applied in Africa in the Gold Coast by an Order in Council of 1844. The Gold Coast chiefs had signed a treaty on March 6, 1844, known as the "Bond" in which they acknowledged that power and jurisdiction had been exercised on behalf of the Crown "within divers places adjacent to H.M. Forts and settlements on the Gold Coast" and that "the chiefs of countries and places so referred to, ...do hereby acknowledge that power and jurisdiction"⁽⁹²⁾ When this extension to the Gold Coast was made, the Act was interpreted as empowering the Queen to exercise jurisdiction not only over her own subjects but also over the subjects of a foreign power in the area to which the Act had been extended. This was forty years before the Berlin Act. The Berlin Act, as already mentioned in Chapter One, laid down the mode of acquiring territories in Africa and the jurisdiction to be exercised therein. In interpreting the Act Britain at first maintained that the declaration of a protectorate did not confer power or impose obligations on her except in respect of own subjects.⁽⁹³⁾ This was, however, not the interpretation given by the other signatories to the Act. They maintained that the Act conferred jurisdiction not only over the subjects of the protecting power but also over subjects of other states and over the natives of the protectorate. This appeared the correct interpretation in view of Articles 30-32 which contemplated assumption of extensive internal sovereignty by the protecting power.⁽⁹⁴⁾

91. 1890 C.94.

92. Palley, *op.cit.*, p. 47, quoting from Metcalfe, G.E. *Maclean of the Gold Coast* (Oxford, 1962) p.292. Text of the Bond appears in *H.C. Sessional Papers, 1865*. Vol.V, p. 419 and Hertslet, *op.cit.* Vol. 1, pp.66-67.

93. Lugard, *The Dual Mandate in Tropical Africa*, *op.cit.*, p.33.

94. *Ibid.*

18. The Berlin Act was of course, intended to apply to coastal possessions but this limitation was never adhered to. Its principles were extended to the interior protectorates. The Brussels Act later empowered a protecting power to establish progressive administration and judicial organisation as a duty where necessary.

Britain took steps to regularise her administration in Africa by enacting the Africa Order in Council in 1889. The Order conferred jurisdiction of administration (including judicial administration) over foreigners and natives alike in areas where it applied. In 1891 the Order was supplemented by the Bechuanaland Order in Council of 1891, which gave the Crown fullest powers to govern the protectorate. The powers conferred by this Order, according to Anson, went beyond any powers conferred by the Foreign Jurisdiction Act.⁽⁹⁵⁾ The Law Officers of the Crown had, however, found nothing inconsistent in the Order.⁽⁹⁶⁾ In 1893 the Pacific Order in Council asserted jurisdiction over all classes of people regardless of their consent. The Matabeleland Order in Council, the Barotseland - North Western Rhodesia Order in Council and the North-Eastern Rhodesia Order in Council followed in 1894, 1899 and 1900 respectively, each granting full powers of administration to the Crown.⁽⁹⁷⁾

The Government and its Law Officers were, however, not certain of the legality of this wholesale assumption of power. In 1894 the Law Officers ruled that where a protectorate was granted it carried with it "an acknowledgment of the right of Her Majesty to make such regulations as may be necessary for the maintenance of order and good government within the territories affected."⁽⁹⁸⁾ The following year (1895) the Law Officers gave another ruling that "the existence of a protectorate in an uncivilized country imports the right to assume whatever jurisdiction over all persons may be needed for its effectual exercise."⁽⁹⁹⁾ The confusion was made more pronounced by the fact that the Colonial Office and the Foreign Office differed in their interpretation of the powers that should be assumed in a colonial protectorate. Both Offices administered protectorates.

95. Anson, W.R. Law and Custom of the Constitution (Oxford, 1908) Vol. II, p.94. On the wider significance of the Order, see Hailey, Native Administration in the British African Territories, Part V, (London, 1953), pp.202-204 and 217-218.

96. F.O. Conf. 6207, pp. 10-11.

97. See Hailey, Native Administration ... Part V, pp.202-204, for the fact that the giving of fullest powers to the Crown became the pattern of later orders.

98. F.O. Conf. Print 6613, No. 71: C.O. to F.O. 13 Aug, 1894.

99. F.O. Conf. 6796: Reid and Lockwood to Ripon, 14 Feb. 1895.

19. Nyasaland was, for instance, a Foreign Office protectorate (until 1904 when it was placed under the Colonial Office) while Bechuanaland was a Colonial Office one. The Colonial Office assumed full powers in its protectorates.⁽¹⁰⁰⁾ All the Orders in Council mentioned above applied in Colonial Office protectorates. On the other hand, the Foreign Office was of the opinion that jurisdiction over the natives of a protectorate depended on their consent and that the Africa Order in Council of 1889 did not confer power to legislate over them without their consent.⁽¹⁰¹⁾ As will be seen below, when Johnston tried to exercise legislative and judicial powers over the natives in Nyasaland, doubts arose at the Foreign Office about his competence to do so. Instructions were given with regard to his judicial powers over the natives while the law was being modified to enable him to exercise legislative powers. Even as late as 1898, the Foreign Office was still convinced that it did not have "jurisdiction over the subjects of chiefs whose territories lie within the limits of any jurisdiction constituted under the Order (the 1889 Order) and that the Order did not give power to make regulations binding on such native."⁽¹⁰²⁾ It met its administrative difficulties by using, when necessary, Section 10 of the Order which empowered the Crown to assume jurisdiction over people whose government had by treaty agreed to the exercise of such authority. Whenever Foreign Office officials, therefore, exercised jurisdiction over natives, it was always on the assumption that they were acting on behalf of the chief.

100. The term "protectorate" here includes territories where no formal declaration had been made but where legislative and administrative powers were being exercised, either, directly or by agency - e.g. the British South Africa Company territories.

101. See F.O. Conf. Print 7143, No. 70, on Regulations made by Johnston in British Central Africa. See also below in this Chapter.

102. F.O. Conf. Print. 7143, No. 70, Memo by Farnall (on Colonial Office letter dated 23 Sept. 1898) dated 8 Oct., 1898.

It was clear, despite its reluctance, that the Foreign Office could not for long maintain its interpretation of the Africa Order in Council. In 1899, therefore, it changed its mind and agreed, in accordance with the view of the Colonial Office, to assume full administrative powers, particularly where the natives of the territory had a backward administration.⁽¹⁰³⁾ From then onwards assumption of full power in protectorates became the general British pattern. In 1910, in the leading case of R. v. The Earl of Crewe, Ex Parte Sokgome⁽¹⁰⁴⁾, the Crown's powers in a colonial protectorate received judicial confirmation. The Court of Appeal held that the Crown had the power "to subject to administration all persons upon the protected soil..." and to "legislate for all inhabitants".⁽¹⁰⁵⁾

Later, the administrative position of colonial protectorates became progressively more closely assimilated to that of colonies until it became unavoidable to describe them as "dependencies which are colonies in everything but legal status".⁽¹⁰⁶⁾ Describing their administration in 1952, Wight wrote: "Their administration is that of Crown colony government; in many cases they are administered as one with a contiguous Colony; the only difference is that their Administration derives probably from the Foreign Jurisdiction Act instead of from the prerogative the British Settlements Act or the other sources...."⁽¹⁰⁷⁾ In 1926, Lord Haldane in Sobhuza ll v. Miller,⁽¹⁰⁸⁾ said: "The Foreign Jurisdiction Act thus appears to make the jurisdiction, acquired by the Crown in a protected country, indistinguishable in legal effect from what might be acquired by conquest."

103. F.O. 834/19: Foreign Office to Law Officers, 18 Nov. 1899.

104. (1910) 2 K.B. 576.

105. At p. 626, per Kennedy L.J.

106. Wight, op.cit., p.8.

107. Ibid.

108. (1926) A.C. 518.

It has been mentioned above that although the Imperial Government finally changed its mind in favour of retaining Nyasaland, it was not clear who would shoulder the financial burden of running the country. The Treasury had no funds for Nyasaland. Consequently Johnston had to look elsewhere for funds to set up his administration. For a year, before the declaration of protectorate status in 1891, Johnston had been engaged in negotiations for funds with the only alternative to the Treasury - the British South Africa Company. It is essential to give this background briefly before dealing with the actual setting-up of administration.

It will be recollected that Rhodes had in 1889 given Johnston £2,000 for treaty-making in Nyasaland.⁽¹⁰⁹⁾ By 1890 Rhodes was already busy mapping out his Company's possible dominions North of the Zambezi. Johnston seized on this opportunity and sought to interest the Company in having their charter extended to cover Nyasaland. He drew up a scheme for the Company's Board of Directors in London to exploit the whole region north of the Zambezi through a supreme administrator with 42 assistants, 150 Indian troops and other personnel. The scheme, if put into operation, he estimated, would cost £32,000 a year.⁽¹¹⁰⁾ On receiving the scheme Rhodes cabled his London Office offering to spend £25,000 provided Nyasaland was included within the Company's sphere. The London Office was, however, uncertain whether the Company could get that amount every year for a guaranteed number of years.⁽¹¹¹⁾

109. See above.

110. Johnston to British South Africa Company: 17 July, 1890 (printed copies found in F.O. 84/2052). In an accompanying letter to Cawston, Johnston wrote: "What I feel earnestly is that the matter should soon be brought to a decisive issue; that you should make up your minds speedily as to your willingness and power to administer British Central Africa, and then apply to the Government for powers to do so". Johnston to Cawston: 18 July, 1890, Cawston Papers, Vol. 11, as quoted by Oliver, op.cit., p. 182. See also Hanna, op.cit., p. 176. For a summary of the Scheme by Johnston, see Oliver, op.cit., pp. 161-2.

111. See Memorandum by Cawston dated 3 Nov., 1890, Cawston Papers, Vol. 11, as cited by Oliver, op.cit., p. 182.

At the time Johnston started negotiations with the British South Africa Company on Nyasaland the Company also opened negotiations with the African Lakes Company for a merger with that Company. As the first step towards absorbing the Lakes Company, the British South Africa Company, had bought £20,000 worth of shares. By an agreement between the two Companies signed on April 29, 1890, amalgamation was postponed until such time when it would be acceptable to the majority of the shareholders of the African Lakes Company. The Agreement provided, however, that in the meantime the British South Africa Company would give £9,000 per year to the African Lakes Company to maintain law and order and that when amalgamation finally took place the Chartered Company's policy in Nyasaland would be placed in the hands of a Glasgow Board to be chosen from the former shareholders of the African Lakes Company. (112)

Johnston did not know about the negotiations between the two companies until they were completed. When he knew he immediately wrote Cawston that he was prepared to work under the British South Africa Company but not under the African Lakes Company, which he lowly thought of as "a miserly, fanatical, uncultured set of Glasgow merchants" with a capital outlay in Nyasaland of only £30,000 and whose reputation in Government circles was bad. (113) Johnston warned Cawston that the Glasgow Board was not capable of administering the territory. (114)

Johnston wanted the Chartered Company to assume administration of the territory and to absorb the African Lakes Company immediately. The Company, however, appeared undecided on what course to take. In August Johnston wrote Cawston warning him that land was being bought by land speculators at an alarming rate:

"Now are you going to let Nyasaland slip through your hands? It looks like it. After all our worry and trouble in making the arrangements with Germany and Portugal we shall find nearly all the soil of Nyasaland bought up by Sharer and Bowler and others of that sort. And this is mainly because you are content to leave the management of these parts in the hands of the Glasgow people". (115)

112. For copies of the correspondence between the two Companies, see Ewing to Salisbury: 14 April, 1890 (F.O. 84/2079). A copy of the Agreement is in a Memorandum of Anderson, dated 1 Nov., 1890 (F.O. 84/2094). See also Oliver, *op.cit.*, p. 183. See further B.S.A. Co. Directors Report and Accounts, 31 March 1891, p. 16.

113. Johnston to Cawston: 18 July, 1890, Cawston Papers, Vol. 11, as cited by Oliver, *op.cit.*, p. 183

114. Ibid.

115. Ibid. 5 Aug., 1890, as cited by Oliver, *op.cit.*, p. 184. See also Hanna, *op.cit.*, p. 176.

23. By October Johnston had become so impatient with the Chartered Company that he wrote in this vein:

"Why don't you make haste and swallow up, digest, and deglute the African Lakes Company?..As long as from scruples of over-kindly good nature or from the dread of spending more you allow the A.L.Co. to maintain an independt existence you have no claim to be consulted in Nyasaland matters. I judge the A. L. Co. utterly unfitted to be entrusted with governing powers, so unless and until The South Africa Company has followed it up, and has sat in its place and calls to me from Nyasaland. 'There I am where once the A.L.Co. was,' I shall devote my attention wholly to seeing in what way this country can be rescued from anarchy and its affairs controlled by the Imperial Government!"(116)

Apparently the agreement between the two companies had not been communicated to the Foreign Office. When Hawkesley, Rhodes' solicitor, produced its copy at the Foreign Office while negotiating for the extension of the Charter to the North, Sir Percy Anderson pointed out to him that the subsidy of £9,000 the British South Africa Company was paying to the African Lakes Company was illegal since the latter Company was not a chartered company and, therefore, not legally competent to administer Nyasaland. He also added that both settlers and the natives of the territory had persistently objected to the Company assuming such powers. (117)

Before the interview with Hawkesley, Sir Percy Anderson had been requested by Johnston to secure for him £10,000 from the Treasury for the purposes of setting up administration in Nyasaland. After the interview Sir Percy approached the Company with a suggestion that instead of the Company giving £9,000 to the African Lakes Company for maintenance of law and order, they should rather pay the money to the Imperial Government's administrator in Nyasaland. (118) The suggestion was attractive to the Company. Apart from its other advantages the Company saw in it the easiest way out of their difficulties with the African Lakes Company. (119) In fact previously the Company had sounded Johnston's opinion on whether he would be prepared, while an Imperial administrator, to be also its administrator north of the Zambezi. Johnston had agreed provided the Foreign office had no objection and would permit him to retain his position as consul. Lord Salisbury had at the time shown dislike of the arrangement. He had, in fact, thought the suggestion premature on the part of the Company as its Charter had not yet been extended to Nyasaland and, for political reasons, it was not possible at the time to make the extension unless the Company resolved its difficulties with the African Lakes Company. Until the difficulties were resolved neither Johnston nor anyone else could act as an administrator of the Company in Nyasaland. (120)

24. The African Lakes Company was not the only obstacle the Chartered Company encountered in trying to extend its rule to Nyasaland. The Scottish missionaries were violently against Company rule. They would not have minded (in fact, they desired it) if the Company concerned were the African Lakes Company. Most of the shareholders of the latter Company were strong members of the Church and the Company had been formed at the instigation of the Church. They could not, however, reconcile themselves to being under the rule of a South African oriented Company, not connected with the Church at all and only concerned with making as much money as it could. The missionaries' opposition was supported by a large section of the Scottish Lobby at Westminster. This was difficult for the Imperial Government to ignore. Doing so would have meant political troubles.

The intensity of the missionary opposition left the Chartered Company in no doubt that, at least for the time being, it would not be possible to have the Charter extended to Nyasaland,⁽¹²¹⁾ consequently it finally agreed to a partition of the country into two territories - one under the Company and the other under the Imperial Government. The Company's sphere later became North-Eastern Rhodesia.⁽¹²²⁾ The partition and the terms of administration of the Company's sphere were embodied in an agreement between the Foreign Office and the Company.⁽¹²³⁾

116. Ibid., 5 Aug., 1890, as cited by Oliver, op.cit., p. 184. See also Hanna, op.cit. p. 176

117. See Memorandum by H.P. Anderson: 1 Nov., 1890 (F.O. 84/2094). See also Oliver, op.cit., pp. 184-5

118. Anderson to Cawston: 17 Dec. 1890, Cawston Papers, Vol. 11, as cited by Oliver, op.cit., p. 187

119. Albert Grey to Cawston: 29 Nov. 1890, Cawston Papers Vol. 11, as cited by Oliver, op.cit., p. 187.

120. Cawston to Johnston: 3 Nov. 1890: Johnston to Cawston 3 Nov. 1890: Cawston Papers, Vol. 11, as cited by Oliver, op.cit., p. 187.

121. See Albert Grey to Cawston: 29 Nov. 1890, Cawston Papers Vol. 11, in which Albert Grey emphasizes that due to the difficulties the Company should facilitate the Imperial Government taking over Nyasaland by paying it the £9,000 which the company was paying the African Lakes Company. Letter quoted in Oliver, op.cit., 187.

122. See Chapter 2.

123. See Chapter 2. For literature on the Agreement, see Cmd. 7637 Johnston to Curries: 9 Feb. 1891 (F.O. 84/2114): Memo by H.P. Anderson 12 Feb. 1891 (F.O. 84/2156) F.O. to B.S.A.C.: 11 Feb. 1891 (F.O. 84/2156) Memo by Currie: 26 Feb. 1891 (F.O. 84/2157): F.O. to B.S.A.C.: 3 March 1891 (F.O. 84/2/58): B.S.A.C. to F.O. : 5 March, 1891 (F.O. 84/2158): B.S.A.C. to F.O. 13 Feb. 1891 (F.O. 84/84/2156): Oliver, op.cit. pp. 188 et. seq: Hanna, op.cit. pp. 181 et. seq.

25. The terms of the Agreement have already been discussed in Chapter Two and it is not necessary to repeat them here.

The Company accepted the arrangement for what it thought it would gain out of it. Although it was disappointed not to be able to extend its Charter to Nyasaland immediately, the partition had made it easier to extend the Charter to the rest of the territories. The subsidy to Nyasaland would mean stable administration in that territory and the Company would not be worried by its eastern border. The Company was convinced that the partition was temporary and that it would soon go. The use of Johnston in its own sphere meant having the services of an experienced administrator at a time when such a man was most needed.

On February 14, 1891, Johnston (who was in London at the time) had been formally appointed as "Commissioner and Consul-General for the territories under British influence to the North of the Zambezi."⁽¹²⁴⁾ He was also to retain his post as Consul for Mozambique.⁽¹²⁵⁾ His main instructions were: to supervise the organization of the administration of justice regarding foreigners (including British subjects); to consolidate the protectorate over the native chiefs: to advise chiefs on their external relations with each other and with foreigners but not interfering with their internal administration; to secure peace and order; and to check the slave trade.⁽¹²⁶⁾ He was to scrupulously observe the provisions of the Berlin and the Brussels Acts.⁽¹²⁷⁾

It will not be necessary to repeat in this chapter the circumstances that finally forced the Company's sphere to be separated from Nyasaland. The events that led to the breakup of the arrangement have already been dealt with in Chapter Two.

ESTABLISHMENT OF ADMINISTRATION.

On May 14, 1891, as already mentioned above, a protectorate was declared over Nyasaland. Johnston immediately began the task of setting up the apparatus of administration. His work was made more difficult by several uprisings staged by Yao Chiefs.⁽¹²⁸⁾

^{124.} F.O. to Johnston: 14 Feb., 1891 (F.O. 84/2118). His salary was raised from £300 to £1,200 per year and his allowances from £200 to £600.

^{125.} Johnston requested to retain this post - See F.O. 84/2052: Memorandum on the Administration of Nyasaland (Confidential) 7 Oct; 1890.

^{126.} For these instructions, see F.O. 84/2113: F.O. to Johnston, 24 March, 1891.

^{127.} Ibid.

^{128.} See Oliver, op.cit., pp. 200-209 and 213*215; Hanna, op.cit., pp. 194-201.

At first Johnston did his own secretarial work and accounting. In 1892, however, an accountant was appointed from England. By 1896 there had been appointed a chief accountant and three assistants, an auditor and a storekeeper with two assistants. A private secretary for Johnston was provided in 1893. In 1894 the Secretary was promoted to Secretary to the Administration - and in 1896 was given an assistant and two clerks. This became the nucleus of the Nyasaland Secretariat. More personnel was appointed later including a doctor.

The maintenance of law and order was the biggest problem Johnston faced. Immediately after assuming office in 1891, he established a police force of seventy volunteers from the Indian Army under the command of Captain C.M. Maguire. This force was later replaced by a stronger detachment of Jat Sikhs supported by 150 Zanzibaris under non-commissioned Sikh officers. The force was partly financed by the £10,000 subsidy from the British South Africa Company. The duties of the police force were mainly military in nature. It had to suppress slavery and uprisings by certain chiefs as well as watch any attempts by the Portuguese to seize territory. In 1896 the force was reconstituted into a regiment and became known as the "British Central Africa Rifles". Later the name was changed to "King's African Rifles". The African irregulars of the force were, however, when the force was turned into a regiment, removed from military duties to purely civil ones and became the nucleus of a civil police force. From 1897 each district was provided with a detachment of the civil police under the control of the Resident of the district. In 1909 a Civil Police Ordinance⁽¹³³⁾ was enacted to define, for the first time, the powers of the civil police force. In 1928 the force was re-organised and placed under a commissioner, severing it from the district commissioners.⁽¹³⁴⁾

One of the instructions given to Johnston on appointment was to advise the chiefs of Nyasaland on their external relations with each other and with foreigners but not to interfere with their internal administration. This instruction was impossible to follow to the letter because of the position existing in Nyasaland when Johnston assumed administration. Among some tribes chieftainship had been decimated by slavery. Such tribes had no chiefs to be advised. In those tribes where chiefs existed, some of them so maladministered their people that intervention by Johnston's officials was necessary. Above all there was also the question of possible conflict between the new administration and that of the chiefs if the latter were let to be too powerful.

(Footnotes over bottom page 89.)

28. Johnston, therefore, adopted a middle course between destroying the powers of the chiefs and leaving them alone. He adopted convenience as his guide, interfering where necessary and leaving matters as they were if it suited his administration. In those tribes where chieftainship was strong, e.g., among the Ngoni, Johnston left them alone. Explaining to Fraser (a missionary) in 1896 why he had not interfered with the Ngoni, Johnston wrote: "Hitherto the Angoni have shown themselves capable of managing the affairs of their own country without compelling the interference of the Administration of the Protectorate. They have maintained a friendly attitude towards the English and have allowed them to travel and settle unhindered in and through their country." (135)

The change of policy at the Foreign Office in 1898 in the government of protectorates jettisoned whatever still remained of the policy of advising chiefs in their external affairs and not interfering with their internal administration. In Nyasaland the policy moved rapidly from a mixture of indirect and direct rule (depending on the chief's authority over his tribe) to one of direct rule everywhere. The chiefs remained but they no longer commanded much power. By the turn of the century Duff was able to write on the position as follows:

".....in nine cases out of ten throughout British Central Africa today the word "Chief" means rather what the Portuguese call "capitao" -- a sort of overseer under Govt. surveillance: while the word "tribe" has ceased to have any political significance at all..the (chiefs) have grown accustomed to the loss of power balanced as it is by the advantages of diminished responsibility and of efficient protection from tribal enemies, while the people are keenly appreciative of the more even-handed justice of European courts...."(136)

The policy of direct rule had, however, adverse effects on the orderliness of the Africans. By 1910 the position had become serious. A change of policy was needed if things were not to deteriorate.

133. No. 7 of 1909.

134. For a short account of the formation of the Nyasaland Police and Armed Forces, See Bretsford, op.cit., pp.662-3 and 668-9.

135. Fraser, D. Winning a Primitive People, (London, Seeley, 1912) p.239. It was not until 1904 that British rule was introduced among the Angoni. Even then Sharpe insisted that the magistrates should just advise and guide the existing authorities.

136. Duff, M. Nyasaland Under the Foreign Office (London, George Bell, 1903) p. 97.

Johnston faced a difficult task in setting up his civil service and general administration. Personnel and money were difficult to obtain. At the head of the administration was Johnston himself. Alfred Sharpe (whom Johnston had appointed Vice-Consul and who replaced him in 1896) was second in command. Third in command was Buchanan who had been appointed by Johnston as an unpaid second Vice-Consul. He received a salary of £350 per year from the Nyasaland Revenues for his position as a magistrate and local official.⁽¹²⁹⁾ He was unpaid in the sense that he did not receive a salary from the Imperial Treasury for his post as Vice-Consul. In fact, apart from Johnston and Sharpe, no other official was paid by the Imperial Treasury. All locally appointed officials - called by Johnston "the 'uncovenanted civil service' of Nyasaland" - received their pay from the Nyasaland Revenues.

Johnston appointed as a nucleus of his district administration officials designated "Collectors of Revenues and Residents". The designation was rather misleading as they did not collect revenues only. They were full-fledged administrators of their respective areas. They were, in fact, performing the duties of district commissioners.⁽¹³⁰⁾ In October, 1892, Johnston divided the country into four districts - Shire, South Nyasaland, West Nyasaland, and North Nyasaland.⁽¹³¹⁾ In 1896 he re-divided the territory into twelve districts and appointed a Collector of Revenue and Resident for each.⁽¹³²⁾

129. For Johnston's praise of Buchanan, See F.O. 84/2114: Johnston to Salisbury, No. 18, C.A., 20 Nov., 1891, and No. 23, C.A., 5 Dec., 1891; F.O. 84/2197, No. 15, 29 March, 1892. Buchanan's terms of appointment are found in F.O. to Johnston, No. 9, 24 Feb., 1892.

130. Hanna, *op.cit.*, p. 205.

131. The Company's sphere he divided into two districts - Tanganyika and Mworu.

132. See F.O. 84/211/4: Johnston to Salisbury, No. 12, C.A., 29 July, 1891, and No. 23, C.A., 5 Dec., 1891., F.O. 84/2196: F.O. Johnston, No. 368 June, 1892; F.O. 84/2197: J. to S., No. 15, 29 March, 1892, and No. 35, C.A., 11 Oct., 1892; F.O. 2/53: F.O. to J., No. 15, 23 Feb. 1893, *Ibid.*, Davidson to J., 7 June 1893; F.O. 2/54: J to Davidson, 10 May, 1893 and 24 Aug. 1893; F.O. 2/65: F.O. to J., No. 10, 9 Feb., 1894 and No. 14, 14 Feb. 1894. See also Cordens, C.A. "Nyasaland in 1894-5" (Nyasaland Journal, Vol. 1.No. 1, Jan, 1948) p.52.

29. The Protectorate's Annual Report of 1911-1912 stressed the need for the appointment of native authorities who would assist District Residents in the maintenance of Order. Consequently legislation was introduced in 1912⁽¹³⁷⁾ "to supply a salutary measure of discipline and control in order to replace the old system of tribal rule of chiefs which had fallen into decay"⁽¹³⁸⁾. This legislation marked the beginning of constitutionally recognised indirect rule. The subject of indirect rule will be dealt with fully when discussing African constitutional advancement below.⁽¹³⁹⁾

Johnston introduced taxation of Africans (the hut tax as it was called) early in his administration and earlier than it was introduced in Northern Rhodesia.⁽¹⁴⁰⁾ The Collectors of Revenue who were at first concerned with taxation on trade were also charged with the collection of African taxes. Johnston was of the view that the financial salvation of Nyasaland lay in the taxation of Africans within moderate bounds. The Foreign Office agreed to his taxation of Africans but added that if it caused discontent it should be withdrawn. To avoid causing conflict between himself and the chiefs, Johnston made payment at first voluntary. If a chief required assistance of the Administration in governing his people then his people had to pay taxes. If a chief did not require such assistance then his people were not under an obligation to pay taxes. The tax was put at 6/- at first but was reduced to 3/- in 1893 when it became apparent that 6/- was too high. At first the collection was in both cash and kind but later the Administration insisted on cash. It was, however, not until 1904 that Africans paid tax throughout the Protectorate.⁽¹⁴¹⁾

¹³⁷. District Administration (Native) Ordinance, (No. 13 of 1912).

¹³⁸. See the Protectorate's Annual Report for 1912-1913: See also C.O. 626: 6th Session of the Nyasaland Legislative Council.

¹³⁹. Chapter 5.

¹⁴⁰. See above Chapter 2.

¹⁴¹. For correspondence concerning the introduction of taxation and immediately after, see F.O. 84/2114: Johnston to Salisbury, No. 25, C.A. 10 Dec., 1891: F.O. 84/2197: J. to S., No. 11, C.A. 10 Mar., 1892: F.O. 84/2196: F.O. to J., No. 35, 4 June, 1892 and No. 63, 21 Sept., 1892, F.O. 84/2198: F.O. to J., tel. No. 18, 21 Sept., 1892: J to Rosebery, tel. No. 16, 25 Aug., 1892: F.O. 84/2197: J. to R., No. 32, 6 Sept., 1892: F.O. 2/54: J to R., No. 21, C.A., 12 June, 1893, F.O. 2/65: F.O. to J. No. 21, 1 May, 1894: F.O. 2/66: J to Ganning, 10 Mar., 1894, and to Kimberley, No. 27, C.A. 14 Mar., 1894: C. 8430, pp.7-8. For a short account on the subject, see Hanna, op.cit., pp. 241-245.

Like administrators of other protectorates elsewhere in Africa where no separate legislation had been enacted for that purpose, Johnston derived his legislative powers from the Africa Order in Council 1889. The Order empowered Consuls to make regulations called "Queen's Regulations" for the promotion of "peace, order and good government" and to enforce the treaties concluded with the chiefs. It should be noted that there was no Legislative Council in Nyasaland until 1907. Johnston was, therefore, the sole legislator but his legislation was subject to the approval of the Secretary of State.

As already seen above, the Foreign Office at first was of the opinion that the Africa Order in Council of 1889 did not confer jurisdiction on the Crown to legislate over the natives without their consent.⁽¹⁴²⁾ The legislative powers conferred on Johnston were not only limited in regard to the natives of the territory but also in regard to non-natives in certain cases. When he made regulations purporting to impose customs duties and to make any breach of them an offence, there was doubt at the Foreign Office whether he was competent to make such regulations. The doubt resulted in an amendment⁽¹⁴³⁾ to the 1889 Order in Council. Explaining the amendment, Davidson, a legal adviser of the Africa Department at the Foreign Office, stated: "I don't say that it is clear that the Regulations are not "Queen's Regulations" even under the existing Order in Council, but rather that there is no doubt that they will be Queen's Regulations under a new Order in Council which has been drafted amongst other things to remove this very doubt which now exists."⁽¹⁴⁴⁾

The Secretary of State occasionally disallowed or amended legislation by Johnston. For instance, when Johnston, in an attempt to prevent usurious loans to Africans by Europeans, issued a circular stating that Europeans who lent money to Africans would not be able to recover it in consular courts, the Secretary of State told him that he was depriving British subjects of a right and that the regulation should, therefore, be withdrawn.⁽¹⁴⁵⁾

Similarly, the Secretary of State altered a regulation imposing a fine of £100 for smuggling by reducing the fine to £10⁽¹⁴⁶⁾ and a regulation providing that a native person not paying his tax by the date it was due would forfeit his hut the day after by increasing the period to two months.⁽¹⁴⁹⁾

See footnotes 142-149 at bottom of page 93.

31.

In 1902 the British Central Africa Order in Council was enacted. The Order provided for the territory's constitution and set out the main organs of government. It repealed, with certain provisos, the Africa Order in Council, 1889, the Africa Order in Council, 1892, and the Africa Order in Council, 1893. The territory's governmental powers were, therefore, now based on the new Order and applied to all person native and non-native. This included legislative powers. The position of Commissioner and Consul-General continued. No Legislative Council was provided for. The Commissioner continued to be the source of legislation. In 1907, however, the Order was amended by the Nyasaland Order in Council. This Order provided for a Legislative Council, bringing to an end sixteen years of a "one-man legislature."⁽¹⁴⁸⁾

142. See under "The Legal Status of the Territory After the Declaration".

143. The Africa Order in Council 1893.

144. F.O. 2/54: Johnston to Rosebery, No. 12, C.A., 31 March, 1893, Minutes Cf. Minutes on No. 30. C.A., 18 Aug., 1892, in F.O. 84/2197.

145. Hanna, op.cit., p.225

146. Ibid.

147. Ibid., p. 226.

148. See Chapter 4 for a fuller discussion of the 1902 and 1907 Orders in Council.

Johnston at first derived his judicial powers as he did his legislative powers, from the Africa Order in Council, 1889, as amended. The Order provided for the administration of justice through Consular Courts established in local jurisdiction created by the Secretary of State. The British sphere north of the Zambezi was established such a local jurisdiction.⁽¹⁴⁹⁾ Magistrates of consular courts received their commissions from the Secretary of State.

The jurisdiction of the courts was clear as far as British subjects and other non-natives were concerned. The Courts could try such persons in regard to both criminal and civil matters. But, as in the case of legislative powers, it was uncertain whether the courts had jurisdiction over the natives of the Protectorate. The Foreign Office, as has already been seen, was of the view that the 1889 Africa Order in Council did not confer jurisdiction over the natives save with their consent. Davidson, giving the opinion of the Foreign Office, stated that whatever jurisdiction Johnston was exercising over the natives derived from the fact that they wanted it and had by implication requested him to do so.⁽¹⁵⁰⁾

Johnston, however, thought his powers were not limited to that extent. It should be noted that Johnston's deputy, Sharpe, was a solicitor of the Supreme Court of England and he no doubt very often interpreted Johnston's powers under the Order. For instance, in 1894, he advised Johnston that he could under the Order deport Chief Kazembe to any area directed by the Secretary of State. Sharpe, while acting for Johnston, had signed a warrant for the chief's deportation. However, when he informed the Foreign Office of his intention, before executing the warrant, it replied by telegram as follows:-

"Natives of the Protectorate are not justiciable under (the) Africa Order in Council and cannot be deported under its provisions. They should be dealt with according to Native Law as maintenance of peace and order may require."⁽¹⁵¹⁾

Johnston had to accommodate himself to the Foreign Office's interpretation of his powers. As in general administration, he came to be guided by convenience. Generally he left the chiefs alone, but he did not hesitate to interfere where he thought such interference was justified. In 1896 he summed up the position as follows:

"In reality the native courts are practically held by British magistrates in the name of the local chief or as his representative. Still, in some districts, native chiefs are encouraged to settle all minor cases themselves, and the natives are not allowed to go to the European magistrate except where the native chief cannot be relied on for fairness. No native chief or British magistrate, however, is allowed to carry out a death sentence on a native with out first referring the case to the Commissioner, and obtaining his sanction to the verdict and sentence."⁽¹⁵²⁾

Footnotes at the end of page 95, (Nos. 149 - 152).

In order to improve the judicial machinery of the country, Johnston asked the Imperial Government to appoint a barrister to look after the administration of justice in the territory, supervise magistrates and review their decisions and advise the Administration. The man he wanted, Johnston pointed out, was one who could be Chief Justice of Nyasaland. The Foreign Office could not accede to the request as the Treasury had no funds for such an appointment. (153)

The judicial powers of European magistrates over natives were not settled until the enactment of the British Central Africa Order in Council in 1902. The Order provided for the establishment of a High Court (154) with jurisdiction to hear criminal and civil cases and to try all persons - Africans and Europeans. The Court was to administer the Common Law, equity and statutes in force in England on August 11, 1902, as modified by Orders in Council and Ordinances in force in the Protectorate. In cases concerning Africans only African customary law was to prevail as long as it was not contrary to natural justice. (155) Below the High Court were to be subordinate courts (156) - e.g. magistratres courts. These too were to try both Africans and Europeans. Chiefs were not accorded judicial powers under the Order although they continued unofficially to try cases. (157)

149. F.O. 84/2197: Johnston to Rosebery, No. 35, C.A., 11 Oct., 1892: Minutes.

150. F.O. 2/55. Johnston to Roseberry, No. 57, C.A., 18 Oct. 1893: Minutes.

151. F.O. 2/69: F.O. to Sharpe, tel. No. 9, 25 June, 1894, in reply to Sharpe to Kimberley, No. 32, C.A., 20 April, 1894 (F.O. 2/66). In 1909 the Political Removal and Detention of Natives Ord. (No. 1 of 1909) was passed.

152. Johnston, British Central Africa (London, Methuen, 1897) p. 114.

153. F.O. 84/2197: Johnston to Salisbury, No. 15, 29 Mar., 1892: F.O. 84/2196: F.O. to Johnston, 8 June, 1892: F.O. 2/54: Johnston to Davidson, 10 May, 1893: F.O. 2/53: Davidson to Johnston, 7 June, 1893: F.O. 2/54: Johnston to Davidson, 24 Aug., 1893.

154. For a short account of the judiciary, See Brelsford, op.cit., pp. 655-6.

155. High Court Ordinance (No. 3 of 1906)

156. See subordinate Courts Ordinance (No. 5 of 1906).

157. They were later given powers by statute to hold courts.

Johnston's administration was not welcome to the missionaries, particularly the Church of Scotland missionaries at Blantyre, and to the settlers. The missionaries had been in the territory since 1875. They had lived and worked without governmental authority for fifteen years. The settlers, too, had been there for an equally long time. They too had traded and farmed without control from any authority. During that time both the missionaries and the settlers had been governed by their own consciences only in dealing with Africans and in running their affairs. The missionaries had, even after the Blantyre scandals, continued to play some role in the administration of the areas around their stations. The settlers, on the other hand, had administered justice to their employees without interference and in some cases had become confidants of chiefs, thereby playing an important role in administration. The missionaries looked upon the Africans as their wards for whose welfare they were responsible. The settlers were apprehensive about their land claims which the new Administration was going to investigate and either confirm or reject.

With this background the missionaries and the settlers had every reason to resent the new administration. The missionaries became very critical of it.⁽¹⁵⁸⁾ In some instances, they did not even hesitate to defy it. For instance, after Johnston had established the regular courts, the missionaries at Blantyre continued to administer justice at the Mission.⁽¹⁵⁹⁾ Relations became more strained when Johnston introduced taxation of the African. Hetherwick, a missionary at Blantyre, attacked the taxation of so impoverished a people as iniquitous and enforcement of the payment by soldiers and police as scandalous. He angrily wrote to his headquarters:

"I cannot see how Johnston has authority to force the people and chiefs to pay taxes. Is the native to pay taxes or is he not? Kindly find from the Government and let us know the answer. The native comes to us to ask. What he is to do. What answer are we to give? The demand is most unjust and fated to do much harm. Are we to advise (natives) to comply with it." (160).

Hetherwick's opposition became so fierce that negotiations had to be conducted in Britain between the Church of Scotland Headquarters and the Foreign Office to bring peace between the missionaries and Johnston. That Hetherwick had become a spanner in Johnston's administration is shown by Johnston's own words to the Foreign Office:

"We have never had any difficulty in the matter of (taxation) with the natives except in those few places where Mr. Hetherwick and his colleagues directly intervened and advised the natives not to pay taxes" (161)

See over page for above footnotes.

35. The settlers' opposition was less open and violent than that of the missionaries. Their attitude to the new administration was reflected by an incident at a function of the settlers described by Maugham, one of Johnston's subordinates:

"The toast of "The Queen" was drunk with enthusiasm, then came that of the "Administration" which was received with coolness. To this I replied briefly, my remarks receiving an indulgent rather than a wholly favourable reception. Then came "the Planters Association, proposed from the Chair. It was drunk in the midst of a wild uproar, some making vain attempts to stand on their feet to honour it". (162)

When Johnston first encountered the opposition he understood it and observed: "...it is very hard for the Europeans who have hitherto been a law unto themselves to understand that they must now submit to authority." (163) However, when the opposition continued he misunderstood it and took it as outright resentment of him and his administration. He henceforth took a non-conciliatory attitude. It was this attitude which inflamed the situation and prevented Johnston from appreciating the fact that he was dealing with a people who had been an administration unto themselves and who would have to be slowly brought to recognize the new authority. As Dr. Shepperson says, Johnston "read the situation as one of resentful disappointment on the part of proud priests. It did not occur to him to think of it as a change of government without an election, or to suppose that the missionary opposition was an Opposition almost in the parliamentary sense." (144)

The opposition of the missionaries is apply portrayed by Oliver in these words:

"The Scottish missionaries had learned the habit of command and it is understandable that they did not find it easy to surrender it overnight in favour of an upstart Administration directed by a notorious and outspoken unbeliever, who was known to have been prepared two years previously to abandon the Shire Highlands to the Portuguese and who was now suspected of wishing to sell, the whole region into bondage under the British South Africa Company." (165)

158. See cf. Duff, op.cit., p.379.

159. See Hanna, op.cit., p.42

160. As quoted in Oliver, op.cit. pp. 210 and 212.

161. F.O. 2/54

162. Maugham, R.C.F. Nyasaland in the Nineties (London, Williams, 1935.) p. 79.

163. F.O. 2/54

164. Shepperson and Price, Independent African (Edinburgh, Edin, U.P., 1960) p. 14.

165. Oliver, op.cit., p. 210

After the enactment of the British Central Africa Order in Council in 1902 and the Nyasaland Order in Council, 1907, which introduced a Legislative Council for the territory, very little happened in Nyasaland until 1931 when the composition of the Legislative Council was altered.⁽¹⁶⁶⁾ The Chilimbwe uprising in 1915⁽¹⁶⁷⁾ was the only event of consequence which happened before 1931. While, therefore, the settlers in Northern Rhodesia and Southern Rhodesia were embattled in political and constitutional wrangles with the British South Africa Company and the Imperial Government,⁽¹⁶⁸⁾ the Nyasaland settlers were busy improving their tea plantations and businesses in an atmosphere free of political agitation. There was no Company to be deposed. The missionaries had prevented the introduction of company rule in the territory between 1890 - 1895.⁽¹⁶⁹⁾ The settlers had more than adequate representation in the Legislature although some criticised the method of nomination through which their representatives entered the Council. In this atmosphere of tranquility the Government concentrated on consolidating its administration. The civil service, the police force and the army were improved. The Legislative Council was kept busy although not as busy as that of Southern Rhodesia.⁽¹⁷⁰⁾ Unlike the position in Southern Rhodesia and Northern Rhodesia, where settler representatives in the Legislative Council and Advisory Council respectively were effective oppositions to the official members (i.e. the Company officials), in Nyasaland there was an atmosphere of cordiality and cooperation.

166. See below, Chapter 4.

167. See below, Chapter 5.

168. See above, Chapter 2.

169. See above in this Chapter and also Chapter 2.

170. Northern Rhodesia did not have a Legislative Council until 1924.

EUROPEAN CONSTITUTIONAL ADVANCEMENT 1900-1953

European constitutional advancement in Northern Rhodesia differed remarkably from that in Nyasaland during the period 1900-1953. The differences, it appears, were due to three factors. The first factor was that the two territories entered their modern constitutional history under different systems of administration. Nyasaland did so under the Imperial Government and shared with other dependencies elsewhere the Foreign Office's, and later, the Colonial office's, style of government. Northern Rhodesia, on the other hand, started under Company administration - a form of administration not based on settled principles or tradition - and remained under it for nearly thirty years (1895-1924).⁽¹⁾ The second factor was the type of European who settled in the two territories. The Europeans who settled in Nyasaland were mostly of British stock, coming directly from home. Those who settled in Northern Rhodesia were a mixture of Britons, English-speaking South Africans and Southern Rhodesians, Afrikaners and a sprinkling of other races. English-speaking South African and Southern Rhodesians and Afrikaners formed the bulk of the European population. The third factor was that while Nyasaland was launched as a no whiteman's country, the policy was not so clear in Northern Rhodesia. Although Milner had seen the Zambezi as the boundary of self-governing white British South Africa,⁽²⁾ the influx of white settlers into the country and the country's ties with Southern Rhodesia shrouded this policy to a point when it became no longer clear whether the territory would follow the constitutional course of Southern Rhodesia or that of Nyasaland. In Nyasaland, Johnston had, from the outset, envisaged the creation "of a multi-racial society which would be harmoniously interdependent, each race contributing of its best to the common good of all"⁽³⁾ To achieve this Johnston was of the idea that the territory should be ruled by Whites, developed by Indians, and worked by Blacks.⁽⁴⁾ His thinking was that because Indians were nearer in blood to Africans they would not only be able to stand the climate better but would also receive more co-operation from the Africans than would the Europeans.

1. See Chapter 2.

2. Milner to Chamberlain, 5 April, 1899, African (South) 574. No. 114. See also Chapter 2.

3. Hanna, *op.cit.*, p.226.

4. F.O.2/55: Johnston to Anderson, 10 Oct. 1893. It is not clear whether this is what Johnston wanted for all time or only until such time as it became conceivable that Africans could participate in modern government. Johnston became so obsessed with his three race multi-racialism that he coloured things he used, .e.g. paper, his hat-band, the flag-borders with black, white and yellow. He similarly coloured his book, British Central Africa - Hanna p.225.

2. Canvassing for Indian immigrants, therefore, he wrote to the Foreign Office:

"I have come to the conclusion that we shall confer a great benefit on India in inducing the stream of its emigrants to set their faces in this direction, and we shall confer an even greater benefit on British Central Africa by locating Indian families in these territories to a prudent and reasonable extent" (5)

The third factor was the most important. It explains the political vociferousness and agitation of the Northern Rhodesian Europeans and the lack of the same among the Nyasaland Europeans. Europeans in Northern Rhodesia very often demanded self-government - an issue that never arose in Nyasaland. While Northern Rhodesian Europeans felt that the territory belonged to the Southern Rhodesia - South Africa bloc, those of Nyasaland thought the country had more in common with East Africa than with Southern Rhodesia. They, therefore, unlike the Northern Rhodesian Europeans, never campaigned for amalgamation with Southern Rhodesia until as lukewarm participants they were drawn into campaigning for a Central African federation.

It was with these different backgrounds that Europeans in the two territories sought constitutional advancement. Nyasaland Europeans had had an advantage over those of Northern Rhodesia. They had not fought to get a Legislative Council. It had been thrust upon them before they were even ready for it. This, perhaps, explains why no changes were made to the Legislative Council for over twenty years. On the other hand, Europeans in Northern Rhodesia had to fight for representation in the territory's government. Under the Company administration they were only able to get an Advisory Council in 1913. It was not until 1924 - nearly seventeen years after Nyasaland had had one - that Northern Rhodesia was granted a Legislative Council. However, once Northern Rhodesia had a Legislative Council, constitutional changes occurred more rapidly than in Nyasaland.

5. F.O. 2/68: Johnston to Kimberley, No. 68, C.A. June, 1895. See also F.O. 2/68: Johnston to Kimberley, 17 Nov, 1894. See further The Times (London), 7 November, 1894, Report of a Speech by Johnston to the Liverpool Chamber of Commerce; Johnston, British Central Africa, pp. 403 and 472.

Nyasaland's constitutional position was put on a proper footing by the British Central Africa Order in Council of 1902. While the Order provided for the establishment of a High Court and subordinate courts, it did not provide for a Legislative Council. The Commissioner and Consul-General continued to act not only as the Executive but as the Legislature too. The Order, however, gave him powers to enact ordinances - a more advanced type of legislation than Queen's Regulations. The office of Commissioner and Consul-General and his legislative powers lasted only up to 1907 when the Nyasaland Order in Council, 1907, was enacted.⁽⁶⁾ The new Order, together with the Royal Instructions to the Governor, provided for the establishment of a Legislative Council comprising the Governor as President, three ex-officio members and such other official and unofficial members as might from time to time be appointed by the Sovereign. The three ex-officio members were to be the Government Secretary (later called Chief Secretary), the Treasurer (later called Financial Secretary) and the Attorney - General. Three unofficials were appointed⁽⁷⁾ by the Governor but no other officials were appointed in addition to those who were to be ex-officio members.⁽⁸⁾ The Legislative Council had, therefore, a total membership of seven four officials (including the Governor) and three non-officials.⁽⁹⁾ There was no franchise provided for and the Governor appointed the non-Official Members not on the basis of their representation of settler opinion, but because they were "persons most likely to be of assistance to him in the discharge of his duties."⁽¹⁰⁾

The Legislative Council had in theory very little power. It legislated on instructions from the Governor. The Governor had outright veto powers over legislation passed by the Council. His powers were so wide as to make the Legislative Council more of an advisory council⁽¹¹⁾ than a legislative body. There was, however, nothing unusual about the Council having so little power. It was the position with Legislative Councils elsewhere. The same limitations were imposed upon Legislative Councils of later years. Legislative Councils were not intended to be as powerful as a Parliament.⁽¹²⁾ The main purpose of establishing them was not their legislative functions as these could be discharged by the Governor alone. They were intended to enable the Governor to get the grievances of the settlers in an organised form.

The Nyasaland Legislative Council was not, however, as impotent as the written word indicated. In practice the Governor rarely overruled it. Even the position of the non-Official Members was not as hopeless as it seemed from the fact that they were handpicked men of the Governor. . . .

See over next page for footnotes.

4. He respected their opinions and regarded them to all intents and purposes as if they were popularly elected. Sometimes when it happened that the non-Officials voted against the Officials and the Governor was required to exercise his casting vote, he did so in support of the non-Officials.⁽¹³⁾

The first Legislative Council had a lifetime of five years. Later it was reduced to three but in 1955 it was raised to four. A new Legislative Council merely meant a fresh appointment of non-Official Members. The Official Members were permanent. An Official disappeared from the Council only if he no longer held the position entitling him to a seat. The new holder of the Office would then take the seat. The composition of the Legislative Council did not change for over twenty years. The non-official Members continued to be appointed by the Governor although in later years the appointments were made from nominations made by the Convention of Associations - a body formed by various organizations in the territory.

It was not until 1955 that popular elections were introduced in Nyasaland. This was done only among non-Africans. The constitutional changes made between 1930 and 1953 will, however, be dealt with later in this Chapter.

In addition to providing for a Legislative Council, the 1907 Order in Council and Royal Instructions provided for an Executive Council. The Royal Instructions stated that the Executive Council should comprise the Governor, the Government Secretary, the Treasurer and the Attorney - General as ex-officio members and such other persons as might from time to time be appointed by the Sovereign. This meant that all the four officials in the Legislative Council also became members of the Executive Council. No non-Officials were appointed to the Executive Council.

6. The Office of Commissioner and Consul-General was replaced by that of Governor. The legislative powers of the Commissioner passed to the Legislative Council and to the Governor.

7. For the notice appointing these first Unofficial Members. See Orders in Council, Ordinances, Regulations, Proclamations, Orders and rules, Promulgated in the Nyasaland Protectorate, 1908, p.D. 12.

8. Ibid.

9. This was almost parity since the Governor in practice became more of a neutral official, exercising his casting vote rarely.

10. Brelsford, op.cit., p. 640.

11. See Jones, op.cit., p. 191.

12. See below in this Chapter the Governor of Northern Rhodesia reminded members that the Legislative Council was not a Parliament.

13. E.g. see Nyasaland Legislative Council Proceedings, 25th Session, 1910 (C.O. 626/6) when the Governor cast his vote in favour of the non-officials against the Native Villages Regulation Ordinance.

As mentioned above, the Legislative Council was thrust upon the settlers of Nyasaland before they were ready for it. This neutralized European political activity in the country for many years. There was nothing to agitate for. This position was the opposite of that in Northern Rhodesia where settlers had to fight for representation in the government of the country. The fight for representation did not begin until after the amalgamation of North-Eastern and North-Western Rhodesia in 1911. Before then the settlers had not shown much inclination for politics. The man responsible for initiating political activity in the territory was Leopold Frank Moore (later knighted), a chemist at Livingstone. Moore was a man filled with a hatred of much that existed in the territory. He disliked the Company which he called "that unholy combination of (13) financial monopoly, social privilege and political absolutism!" He believed it "was holding up the country's development."⁽¹⁴⁾ Further, Moore disliked Christianity,⁽¹⁵⁾ capitalism,⁽¹⁶⁾ and educated persons,⁽¹⁷⁾ particularly the young Oxford and Cambridge graduates who were being recruited as officials in the territory. He thought that although highly educated, these young men lacked local knowledge. Moore was, however, despite his weaknesses, "a man of great drive and force of character.. genuinely and deeply attached to his adopted country and...willing to spend a great deal of time and money to fight for the policies in which he believed."⁽¹⁸⁾

Moore's task was not an easy one. Europeans were still lukewarm on politics. Ownership of the Livingstone Mail, the only paper in the country, however, greatly assisted him in arousing political interest. He published long articles in the newspaper denouncing everyone except himself and the people whose cause he claimed to champion. At first the paper dealt with grievances like high prices of land and restrictions on the export of breeding cattle.⁽¹⁹⁾ Later it tackled bigger issues like the Company's mining policy⁽²⁰⁾ and land rights⁽²¹⁾ and self-government for the territory.⁽²²⁾

13. Gann, A History of Northern Rhodesia, p. 154.

14. Ibid.

15. See, e.g., his speech in N.R. Legco Debates, 21 Dec. 1932, p. 310.

16. See e.g. Livingstone Mail, 23 Feb. and 4 April, 1934.

17. See e.g. N.R. Legco Debates, 23 Nov. 1931, p.120; 6 April 1933, p. 432, for his references to academics.

18. Gann, pp. 154-5.

19. Ibid., p. 155.

20. Ibid., Gann, The Birth of a Plural Society, p.166

21. See Livingstone Mail, 7 March, 1907.

21. Ibid., 7 Sept. 1907.

22. Ibid., 1 Aug., 1908.

6. By 1912 the campaign had begun to show results. Farmers' meetings were becoming more political. A Farmers' Association was formed to look after the interests of farmers and to make representations to the Administration. A farmers meeting held that year (with a record attendance) demanded the establishment (23) of an Administrator's Council with settler representation. The farmers' case was strengthened in 1913 by the formation in England by Lord Winterton, the Duke of Westminster, and Lord Welverton (wealthy absentee land owners) of an (24) association of Northern Rhodesia farmers resident in Britain. The settlers' cause was also helped by the sympathetic attitude of the new administrator, Wallace. Lawrence Aubrey Wallace had succeeded Codrington (who had died in 1908) in 1909. He was more conciliatory to the settlers than his predecessor. (25) When the farmers put forward their demands for an Administrator's Council, Wallace agreed to see a delegation of the Farmers' Association to discuss the matter and other problems faced by the farmers. (26) His conciliatory attitude helped reduce the tension between the settlers and the Company. In 1914 he was able to write to the Company's Directors in London that animosity towards the Company had died down and that he was personally in favour of the establishment of an Administrator's Council under the circumstances. (27)

23. The meeting also attacked the recruitment of labour by the Southern Rhodesia Native Labour Bureau and demanded exemption from paying tax of Africans who had worked for European farmers during the year as was the case in Nyasaland (See Queen's Regulations, No. 5 of 1901, British Central Africa Gazette) where the Government reduced by half the tax payment of Africans who had worked for a European for at least a month. The meeting further demanded the introduction of a system of registration, for Africans. For a report of the meeting, see Livingstone Mail, 18 May, 1912.

24. This support from three peers whose political influence in Britain was immense, made the Northern Rhodesian farmers "one of the best represented communities in the British Empire." - Gann, A History of Northern Rhodesia, p.155. For a report on the Association, see Livingstone Mail, 8 Sept., 1913.

25. For instance he granted Village Management Boards to Livingstone (1911), Lusaka (1913) and Broken Hill (1915)

26. See L.A. Wallace to The North-Western Rhodesia Farmers Association, Dec. 23, 1912. For report of the meeting, see Livingstone Mail, 4 Jan., 1913.

27. L.A. Wallace to B.S.A. Company: 5 Sept., 1914, Annex 1 to B.S.A. Co.; Minutes: 29 October, 1914 (in LC 1/2/60, Nat. Arch. S.R.)

7.

The outbreak of the First World War in 1914 slowed down political activity in the territory but did not stop it altogether. In 1916 and 1917 political activity was stimulated by a scheme, proposed by the Company, to amalgamate Southern and Northern Rhodesia. The scheme, which will be fully discussed under Chapter Six, sought to have the two territories administered as one unit²⁸ under one Administrator. There was to be one Legislative Council making laws for the two territories, excluding, however, Barotseland. Northern Rhodesia was to be represented in the Legislative Council by three elected members and two nominated members representing African interests. The total membership of the Legislative Council was to be fifteen elected members and eight nominated members. The Company's reasons for the scheme were administrative, financial and political.

The scheme received opposition as well as support in both Southern and Northern Rhodesia. A detailed account of the scheme will be given under Chapter Six. In the meantime it must be mentioned that the scheme made the Northern Rhodesian settlers anxious about their constitutional position. Two representatives of the settlers - Little and Burkitt - went to London to present constitutional demands to the Colonial Secretary. They demanded, rather contradictorily, both self-government and an Advisory Council. The Colonial Secretary rejected their self-government demands but accepted the idea of an Advisory Council in the event of Southern Rhodesia rejecting the amalgamation scheme proposed by the Company.⁽²⁹⁾

The Southern Rhodesia Legislative Council accepted the scheme but all the elected members voted against it.⁽²⁹⁾ The rejection of the scheme by the elected members made the Colonial Office, which was not keen on the scheme, reject it on the grounds that it could not be put into operation against the unanimous opposition of the elected Members.⁽³⁰⁾ The acceptance of the scheme by Southern Rhodesia and its subsequent implementation would have solved the problem of settler representation in Northern Rhodesia, as the territory's representatives would have sat in the united Legislative Council at Salisbury. The rejection of the scheme meant separate arrangements had to be made for Northern Rhodesia.

28. For a reproduction of the correspondence between the Colonial Office and the two settler delegates on the subject, see Livingstone Mail, 22 June, 1917.

29. See Legislative Council Debates, April - May, 1917.

30. See Chapter 6.

THE ADVISORY COUNCIL

As indicated above, the Colonial Secretary had accepted the idea of an advisory Council in the event of Southern Rhodesia rejecting the Company's scheme. The Company was not opposed to the establishment of such a Council. The only remaining question was how it should be constituted. The Company wanted the Council to be composed of members nominated by the Farmers' Association. The Association had the most responsible and most well-informed persons in the country. The Company considered the traders, railwaymen and artisans incapable of being entrusted with the important task of electing representatives. The non-farmer settlers, led by Moore, opposed the idea of (31) nominated representatives. They wanted them elected. Moore ultimately won the battle when it was agreed that the representatives should be elected and not nominated.

The franchise agreed upon laid down that every literate male British subject of European descent over twenty-one years of age and receiving a salary of £150 per annum or occupying property to the same value should be eligible as a voter. (32) This franchise was unjust for two reasons. First, it excluded Africans who, although Northern Rhodesia had not been formally declared a protectorate, were, in fact, regarded as British protected persons. Secondly, it excluded British subjects who were not of European descent, for instance, Indians. This was tantamount to classifying British subjects into superior and inferior ones.

The Council comprised five elected members -- four from the area formerly known as North-Western Rhodesia and one from the area formerly known as North-Eastern Rhodesia -- and officials of the Company, with the Administrator as President. After the franchise had been published the registration of voters began and an election was soon held. The farmers lost heavily in the election. None of their candidates was elected. Only representatives of Companies and small traders were elected. Gann attributes the defeat to the fact, that out of a total of 532 voters only 56 were members of the Farmers' Association. (33)

31. See Livingstone Mail, 10 Aug, 1917, for a report of a public meeting at Kafue where the nomination idea was rejected.

32. See Livingstone Mail, 1 March, 1913.

33. Gann, op.cit., p. 100, p.1. Those elected were Moore; the Manager of the Charterland Company; the Manager of the Rhodesia and Katanga Railway and Mining Company; an ex-civil servant who had become a trader; and an auctioneer.

(9)

The facts that most farmers were well to do and that they were isolated from the main centres of European settlement, must have also contributed to the defeat. The artisan and the small trader tend always to resent the big businessman. The success of some Company managers must be attributed to the popularity they sometimes enjoy with their workers. Perhaps the biggest single factor that worked against the farmers was that the Company had wanted their association to nominate the representatives to the exclusion of the majority of the Europeans. This must have made the farmers appear to be tools of the Company.

The Council, as its name indicates, was strictly advisory. It had no legislative or executive powers. The Administrator was under no obligation to accept its advice. Its subject jurisdiction was limited to matters affecting European settlement.⁽³⁴⁾ This made it weaker than the Administrator's Advisory Council established in Southern Rhodesia by the Matabeleland Order in Council, 1894.⁽³⁵⁾ In all, the Council was no more than a "talking shop".⁽³⁶⁾ It was, however, not devoid of all usefulness. First, it gave the settlers, for the first time, some voice, although advisory, in the government of the country. Secondly, it provided a platform for the settlers to air their grievances against the Administration. Thirdly, it helped the Administration to know the feelings of the settlers.

The period between the establishment of the Advisory Council and the end of Company rule in 1924 was occupied by political and constitutional arguments against Company rule and on whether after Company rule Northern Rhodesia should amalgamate with Southern Rhodesia or with Nyasaland or have self-government or come under Imperial rule. The political and constitutional wrangles of this period have been fully discussed under Chapter Two and it is unnecessary to repeat them here.

34. Livingstone Mail, 22 March, 1918.

35. See Chapter 2.

36. Gann, op.cit., p. 179.

NORTHERN RHODESIA: 1924-1930The Legislative Council.

Had Company administration remained, it is difficult to say what constitutional course Northern Rhodesia would have taken after the Advisory Council had worked for some time. The Buxter Committee had recommended that the Company should establish a Legislative Council for the territory pending settlement of the constitutional position.⁽³⁷⁾ The Company had rejected this as a waste of money.⁽³⁸⁾ This indicates that had Company rule remained the settlers would have had a difficult task to obtain a Legislative Council. They were, however, saved from such a struggle by the termination of Company rule. The Northern Rhodesia Order in Council, 1924,⁴ which declared the territory a protectorate on April 1 of that year was enacted in conjunction with the Northern Rhodesia (Legislative Council) Order in Council which provided for a Legislative Council - an organ far superior to the Advisory Council. The creation of the Legislative Council brought Northern Rhodesia to the stage which Nyasaland had reached in 1907.

The Composition of the Legislative Council was to be nine officials and five non-Officials. Five of the officials were to serve ex-officio and these were to be the Chief Secretary, the Secretary for Native Affairs, the Attorney - General, the Treasurer and the Medical Officer. The Governor was to be President of the Council. Since there was no electoral law yet, the first non-officials were appointed to the Council by the Governor so as to allow it to be constituted and to enact a future electoral law.

The electoral law subsequently enacted⁽³⁹⁾ laid down stiff qualifications - stiffer than those in Southern Rhodesia, which was self-governing.⁽⁴⁰⁾ The vote was made open to every British subject of twenty-one years of age who received an annual income of £200 or occupied property worth £250 or owned a mining claim of the value of £250 and was literate. persons in receipt of poor relief, undischarged bankrupts and persons with recent criminal convictions of a specified period of sentence were disqualified. In theory the franchise was not racial. Anyone with the qualifications could be registered as a voter. In practice, however, it was racial.

37. See Chapter 2.

38. Ibid.

39. Legislative Council Ordinance (No. 25 of 1925)

40. See both notes 112 and 113 of Chapter Two.

Because Africans were not British subjects but British protected persons, they could not acquire the vote or stand for election to the Legislative Council since one had to be a voter to qualify for election. An African could, of course, become a British subject by naturalization but that alone was not sufficient. He had to have the required income or property qualifications. African wages were so low at the time that no African could have qualified. Most Africans lived on communal lands, and communal property did not satisfy the qualifications. Those who lived in urban areas owned no property there. They lived in compounds or locations owned by local authorities or employers. The franchise also excluded the majority of the Coloureds on the technicality that illegitimate children (and most Coloureds were illegitimate) of British fathers born outside His Majesty's dominions⁽⁴¹⁾ were not British subjects. Those whose parents were legally married could, of course, acquire the vote if they had the other qualifications. Well to do Indians qualified. The new electoral law differed materially from that governing elections to the Advisory Council in that it did not confine the franchise to persons of European descent.

Elections were held in 1926. This time the farmers swept the board by winning four of the five seats. The fifth seat was won by Moore, a shopkeeper. Some of the men elected were of high standing. For instance, Captain Thomas Henderson Murray, a rancher at Kalomo, had an Eton and Sandhurst background.⁽⁴²⁾ Most of the official members were former Company officials.

In terms of powers the Legislative Council could not be compared with the impotent Advisory Council. It had the power to legislate for peace, order and good government. It could make any law (including the voting of supplies) which was consistent with the powers granted by the Order in Council. Certain restrictions were, however, contained in the Order in Council. Ordinances were to respect African customary law as long as it was not incompatible with public safety, natural justice and public morality. Bills discriminating against Africans (except those dealing with firearms, ammunition and liquor) were to be reserved for the signification of the King's pleasure.

This also applied to Bills relating to mining revenue and railways, currency, banking, customs duties, treaties and foreign policy. Members were not to introduce money bills except with the Governor's sanction. All bills which were not compulsorily to be reserved for the signification of the King's pleasure required the Governor's assent before becoming law. The Governor could refuse such assent or reserve the bill for the signification of the King's pleasure.

At the opening of the first session of the Legislative Council, the Governor, Sir Herbert Stanley, thought it necessary to remind the members that the Legislative Council was not a Parliament: "It is hardly necessary for me to emphasize that a council such as ours is not a Parliament in the general accepted sense of that term. It is constituted on a different basis, which obviously places the Government in a position to exercise effective control."⁽⁴³⁾

During the same session he again told the members that "the object of having Unofficial Members on this Council is that they should ventilate the opinions and represent the views which are held in various parts of the country, and bring before the Government considerations which otherwise might escape the notice of the Government"⁽⁴⁴⁾

The Unofficial Members did not, however, agree with the Governor's views on the role of the Council. Their view of the Council was put by Moore as follows: "The differences between a Parliament and this Council are small and ... should not be emphasized. It is more like a Parliament than it is unlike a Parliament. We are to all intents and purposes, a Parliament and likely to become a Parliament."⁽⁴⁵⁾ Moore called those who were to be elected to the forthcoming election a "Parliamentary elected minority."

For a people who had had no Legislative Council for thirty years of Company rule, Moore's elevation of the Council to a near-Parliament is understandable. However, if he sincerely believed the Council was like a Parliament, then he was mistaken. The Council, together with Councils in other dependencies, had the appearance of a Parliament without being one. To use Sir Donald Cameron's words, such Councils had "Parliamentary savour and tendencies"⁽⁴⁶⁾ while in reality they were more akin to an advisory body than to a responsible Parliament. Sir Everard in Thurn, Governor of the Fiji Islands during 1904-1910, found it necessary, as did Sir Herbert Stanley, to remind the elected members of the Council of the status of the Council: "Not unnaturally, the six representatives of the people have constituted themselves into an "opposition", generally good humoured enough to the Government of officials. This is partly due to their having lived in the neighbourhood of Australia, where responsible government has long prevailed, and partly to their failure to recognise that their proper functions are those of advisory and not a "responsible" body"⁽⁴⁷⁾.

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41. Northern Rhodesia being a protectorate was not part of His Majesty's dominions - see Chapter 3 for a discussion of protectorate status.
42. Gann, *op. cit.*, p. 23.
43. N.R. Legco Debates, 23 May, 1924, p. 3.
44. *Ibid.*
45. *Ibid.*, 20 May, 1925, p. 102.
46. Cameron, Sir Donald, *My Tanganyika Service* (London, 1939), p. 207. Sir Donald was Governor of Tanganyika.
47. Thurn, E.: "Fiji as a Crown Colony" (*The Quarterly Review*, Vol. CCXVI, 1912) p. 72.

In addition to the Legislative Council an Executive Council was provided for. The Executive Council was composed of officials only and remained so for many years. It was not until 1939 when the Second World War broke out that Unofficial Members, as an emergency measure, sat on the Executive Council, though without a constitutional basis. This was fifteen years after the establishment of the Legislative Council but the position did not become constitutionally regularized until after the 1948 constitutional changes. (48)

Demands for Increased Representation and Self-Government

The demise of the Company's administration and the introduction of Imperial rule, with a Legislative Council, was an overwhelming triumph for the settlers over their enemy - the Company. The settlers strongly felt that the Company had treated them contemptuously and had stood in the way of their constitutional advancement. This sentiment was borne out by Moore in these words: "It is well known in the past that representations of the taxpayers were flouted and treated with ridicule. Later on they were treated with more courtesy, and at a later stage when the Imperial Government took over they were treated with certain amount of consideration." (49) In another passage of his speech Moore strongly defended the Government from the criticism that it was not paying attention to the views of the people's representatives. "... I know that the people's representations have been conceded or adopted, and that the demands or recommendations have often been set right so much so that at one time we had only two small items which were left on the list and not decided or the point conceded. Last session for instance, there was a Bill introduced conceding something we had asked for, an amendment to the Income Tax Law..." (50)

However, although the establishment of the Legislative Council was a big constitutional leap forward by the settlers, the "honeymoon" between the settlers and the Imperial Government did not last long. By 1927 the Unofficial Members were already making demands for increased representation as well as self-government. Moore introduced two motions in the Legislative Council in 1927 and 1928 respectively, demanding constitutional changes. (51) The two passages cited above were, in fact, spoken during Moore's 1928 motion debate. The speeches were still of a moderate tone - partly demanding and partly praising.

48. See below, in this Chapter.

49. N. R. Leago Debates, 18 April, 1928, p. 63.

50. Ibid., p. 65.

51. See N. R. Leago Debates, 20 July, 1927, pp. 136-145, 145-146; and 18 April, 1928, pp. 63-66.

14. The settlers' two-pronged demands - i.e. for increased representation and self-government - were no doubt made for tactical reasons. By demanding a radical constitutional arrangement like self-government they hoped the Imperial Government would find a compromise in increased representation. Apparently, the non-Officials, or at least some of them, believed, even at this early stage, that self-government would be achieved as soon as Europeans were ready for it. Moore, for instance, told the Legislative Council during the debate on his 1928 motion: "As soon as we are financially and in other respects suited for responsible government the will of the people will not be denied!"⁽⁵²⁾ The Imperial Government, he told the Council, would grant Northern Rhodesia self-government as they did Southern Rhodesia.⁽⁵³⁾ The pro-self government settlers were, of course at this time not yet unanimous on how it should be attained. There were differing views on whether the territory should achieve it separately or by joining Southern Rhodesia.⁽⁵⁴⁾

The settlers were perhaps not to blame for entertaining these lofty hopes on self-government. The first two Governors, Sir Herbert Stanley and Sir James Maxwell, had partly misled them to these hopes. Sir Herbert Stanley had said in 1927 that the time would "come very soon (when) the people of the territory should be admitted to a larger share of the Government and the Legislature."⁽⁵⁵⁾ These views were also held by Sir James Maxwell.⁽⁵⁶⁾ In 1929 the Chief Secretary told the Legislative Council that "in all reasonable probability, this territory will in the course of a few years, obtain self government!"⁽⁵⁷⁾

Although the settlers did not get even a promise of self-government from the Imperial Government, their demands resulted in increased representation. The Governor (Sir James Maxwell) thought the demands were reasonable and agreed to an increase of two unofficial members in 1929,⁽⁵⁸⁾ bringing the total number to seven. The following year he appointed a non-official, Captain John Browne, a prosperous farmer, as Agricultural Surveys Commissioner. He was the first Unofficial Member to hold an administrative position and this could be regarded as the beginning of the long road that finally took the Unofficial Members into the Executive Council. Moore, who disliked farmers⁽⁵⁹⁾ and paid non-Officials, disapproved of the appointment. The Governor further introduced a system of Select Committees in which non-Officials participated and to which Estimates and Expenditure were referred at intervals. This acquainted the non-Officials with the financial policies of the Government.

15.

The Passfield Memorandum

Soon after the non-Officials had gained an increase in number and after relations between them and the Officials had become cordial, that cordiality was shattered by the Passfield Memorandum.⁽⁶⁰⁾ In 1923 the Duke of Devonshire, as Colonial Secretary, had issued a White Paper⁽⁶¹⁾ on Colonial policy in East Africa. The White Paper had explained the position of Indians in Kenya and stated that Kenya should be regarded as an African country and that African interests should, therefore, be paramount over those of the migrant races. Another policy statement⁽⁶²⁾ had been made in 1927, again on East Africa, stating that migrant races had the right to participate together with the indigenous people in the political and economic development of East Africa and that black and white development were complimentary.⁽⁶⁴⁾ In 1929 the Hilton Young Commission⁽⁶³⁾ had supported the 1923 and 1927 policy statements. It was to this background that the Passfield Memorandum was issued. In the Memorandum the Colonial Secretary re-iterated the policy of British trusteeship of the underdeveloped native races of East Africa and stated that even after unofficial majorities had been achieved in the Legislatures concerned, United Kingdom control would remain. The Memorandum re-affirmed (and this was the most controversial part of it) the 1923 White Paper's paramount of African interests doctrine, i.e. that where the interests of the natives and the migrant races clashed those of the natives should prevail.

52. Ibid., 23 April, 1928, p. 129.

53. Ibid.

54. See Chapter Six for arguments for and against amalgamation with Southern Rhodesia.

55. N. R. Leroco Debates, 20 July, 1927, p. 137.

56. See & C. Ibid., 21 Nov., 1929, p. 162.

57. Ibid., 21 Nov. 1929, p. 162.

58. See Legislative Council (Amendment) Ordinance (No. 37 of 1929).

59. Moore at one time feared introduction of self-government because he thought it would put more powers into the hands of farmers - see Livingstone Mail, 3 Feb., 1927

60. Memorandum on Native Policy in East Africa (c. md. 3573).

See also Statement of the Conclusions of His Majesty's Government in the United Kingdom, As Regards Closer Union in East Africa (c. md. 3574 of 1930). The latter Command Paper was issued as a result of the findings of the Hilton Young Commission.

61. Memorandum Relating to Indians in Kenya (c. md. 1922 of 1923)

62. Future Policy in regard to East Africa (Cmd 2904 of 1927)

62. See Chapter 6.

63. See N. R. Leroco Debates, 13 Nov., 1930. See also An Address Delivered by His Excellency the Governor at a Meeting Held in the Governor's Office at Livingstone on the 27th October, 1930, printed as an appendix in N. R. Leroco Debates, 1930, pp. 217 - 234.

64. Report of the Joint Select Committee on Closer Union in East Africa (C. md. 4142 of 1932).

The reiteration of the paramountcy doctrine caused a storm among East African and Northern Rhodesian settlers. The Northern Rhodesian settlers had not taken issue with the 1923 and 1927 White Papers because they thought these were of East African concern. The 1930 White Paper showed clearly that this would be the policy in all dependencies where the natives were predominant over the migrant races. The Northern Rhodesian settlers realised full well that implementation of the doctrine would completely destroy their hopes for self-government. The Governor tried to explain the White Paper as best he could, putting his own interpretations on it where necessary, in an attempt to mollify the feelings of the settlers.⁽⁶³⁾ The storm did not die down until after the publication of the report⁽⁶⁴⁾ of a Joint Select Committee of Parliament, which had been appointed by the United Kingdom Government to interpret the Passfield Memorandum. The Select Committee's interpretation was that the paramountcy of native interests did not mean the subordination of the interests of the migrant races to those of the natives but that the interests of the overwhelming majority of the indigenous people should not be subordinated to those of a minority belonging to another race, however, important that race might be in the territory.

The storm over the Memorandum left the majority of the Northern Rhodesian settlers convinced of one thing - that their salvation lay in amalgamation with Southern Rhodesia. Even Moore, who had changed his mind after the Select Committee's Report, swung back to amalgamation in 1933. By the end of that year all the Unofficial Members had agreed on amalgamation with Southern Rhodesia.⁽⁶⁵⁾ It should be noted that the Memorandum did not cause a storm in Nyasaland. The Nyasaland settlers had become conditioned to accepting the paramountcy of African interest. The first Administration of Nyasaland had followed the policy of upholding of African interests where they clashed with European interests to the extent that Europeans thought Johnston hated them.⁽⁶⁶⁾

63. See N.R. Lerco Debates, 13 Nov., 1930. See also An Address Delivered by His Excellency the Governor at a Meeting Held in the Governor's Office at Livingstone on the 27th October, 1930, printed as an Appendix in N.R. Lerco Debates, 1930, pp.217-234.

64. Report of the Joint Select Committee on Closer Union in East Africa (Cmd. 4142 of 1932).

65. N. R. Lerco Debates, 27 Nov., 1933, pp. 577-8.

66. Hanna, op.cit., p. 223. For Johnston's racial policies, see ibid., pp. 226 et seq.

As already indicated in the last Chapter no real changes were made to the constitutional position created in 1907 until 1931. The composition of the Legislative Council and the Executive Council remained the same. Unofficial Members of the Legislative Council continued to be appointed by the Governor. In 1931, however, the composition of the Council was increased to four Unofficial and four Official Members excluding the Governor. In the meantime, in 1920, a Convention of Associations had been formed by a number of non-African associations.⁽⁶⁷⁾ The Convention was not a political party but it expressed political views. There had also been formed a Chamber of Agriculture and Commerce which although not a political organization also expressed political views. Both these organizations, while satisfied with representation in the Legislative Council, were dissatisfied with the manner in which the representatives were being chosen. Although dissatisfaction had existed earlier, it was not until about 1920 that demands for an electoral system were made. In 1922 the Imperial Government in response to such a demand had told the settlers "that in the existing circumstances of Nyasaland, the system of nomination which obtains, should adequately meet all requirements."⁽⁶⁸⁾ The settlers, however, continued their demand although without the agitation obtaining in Northern Rhodesia. In 1943, Tait-Bowie urged in the Legislative Council that election be introduced. He was strongly opposed by Bishop Thorne, representing African Interests, who thought there was nothing to be gained by granting so small a European community an electoral system.⁽⁶⁹⁾

Although the settlers did not succeed in having an electoral system introduced, a concession was made to them when the Government noted the fact that the Convention of Associations represented the majority of European opinion in the country. The Convention was invested with the power to submit names to the Governor for nomination by him. This meant that the Convention had to conduct an election and that those who wanted to be nominated to the Legislative Council had to seek election by the Convention. This was a form of indirect election. The new arrangement worked very well but did not satisfy the settlers as a substitute for an electoral system.

67. See Leys, C. "An Election in Nyasaland" (Political Studies Vol. V., No. 3) p. 262.

68. Nyasaland, Legco Proceedings, 25th Session, 1922.

69. Ibid., 59th Session, 1943.

18. The feelings of the Settlers were summed up by an ex-President ¹¹⁶ of the Convention in these words:-

"I was privileged to be president of the Convention of Associations in 1951 and 1952...I came up against a body calling themselves "men in the street" and consisting of whitemen who felt aggrieved because they had to join an association in order to vote. They demanded "one man one vote" for whites....I fought this movement but received little support. Even among members of the Convention and its constituent bodies the lure of "one man one vote" proved too strong for those of us who believed the Association franchise to be the sole workable solution." (70)

The new arrangement was first used in 1940 when the composition of the Legislative Council was again altered ⁽⁷¹⁾ to six officials excluding the Governor and six non-Officials. Four of the non-Officials were nominated from a list submitted by the Convention of Association. One of the remaining two was nominated from a list submitted by the Northern Provinces Association while the other was selected from one of the societies to represent African interests. It became the practice to give this latter seat to a missionary. ⁽⁷²⁾ Although previously a missionary had been included among the non-Officials and some members had vigorously championed African interests, it was not until the above changes that the position of an European non-Official representing African interests became a constitutional entrenchment. ⁽⁷³⁾

The Legislative Council was further enlarged in 1949 and for the first time group representation was introduced. Two Africans and one Asian joined the Council - bringing to an end its all-white complexion. ⁽⁷⁴⁾ The Africans were nominated by the Governor from a panel of five names submitted by the African Protectorate Council. ⁽⁷⁵⁾ The Asian Member was selected from three names submitted by the Indian Chamber of Commerce. In order to maintain parity (excluding the Governor) the number of officials was raised by three. This brought the total membership of the Council to nine Officials excluding the Governor and nine non-Officials. The European member for African Interests remained despite the appointment of the two Africans.

The changes of 1949 did not last for very long. They had been introduced as a temporary measure to be reconsidered after seeing how they worked. In 1951, Mr. Dugdale had told the House of Commons: "When two African Unofficial Members were appointed to the Nyasaland Legislative Council in 1949 it was agreed that the introduction of a new Constitution would further be considered after experience of working of the enlarged Council." ⁽⁷⁶⁾

Please see overpage for footnotes.

Accordingly in 1953 further changes were made to the composition of the Legislative Council.. An African unofficial and an Official were added, bringing the total membership to ten Officials excluding the Governor and ten non-Officials, consisting of three Africans, six Europeans and one Asian. It should be noted that all these changes were mainly in relation to the Legislative Council. The Executive Council remained an Officials' citadel for a long time. In 1953 there were only two non-Officials as compared with five Officials, excluding the Governor. It was not until 1959 that no more Unofficial Members (Africans this time) were added to the Executive Council. (77)

70. Jones, op.cit., p.193, quoting a letter by Shelford in the Daily Telegraph of December, 1959 (day of month not given).

71. See the Nyasaland Order in Council 1939 (S.L. & O. No. 291 of 1939)

72. See House of Commons Debates, Vol. 396, Col.178, 19 Jan. 1944, where it was stated: "In Nyasaland representation of the African community among the non-official members is normally entrusted to the missionary Member." See also cf. Vol. 403 Col. 235, 14 Feb., 1945.

73. The Nyasaland Order in Council 1949 (S.L. No. 1051 of 1949).

74. In Northern Rhodesia two Africans had been included by the 1948 changes - see below in this Chapter. In other territories, however, Africans had been included far much earlier - see Chapter 5, Section 4.

75. See Chapter 5 for the formation, composition and functions of this organization and its counterpart in Northern Rhodesia -- the African Representative Council.

76. House of Commons Debates, Vol.409, Col. 48, 20 June, 1951.

77. See below; Chapter 8.

After the constitutional changes of 1929 no changes were again made until 1933. The decade between was, however, filled with political activity. An election took place in 1935, bringing into the Legislative Council new faces and a new brand of politics. The attitude of the Unofficial Members hardened. A new Governor came on to the scene. Organized politics began to appear. And perhaps the most notable person to appear on the political scene was Roland (Roy) Welensky, an engine driver and trade union leader of Jewish-Afrikaner parentage. Welensky was later to become the dominant leader in Northern Rhodesian European politics and the second and last Prime Minister of the ill-fated Central African Federation.⁽⁷⁰⁾

The 1935 election was a lively one. For the first time candidates championing the cause of the workers sought election. Welensky had wanted to stand in the 1935 election in opposition to Gore-Browne (later knighted) but had withdrawn in favour of the Colonel. Thus began one of the strangest political partnerships in Rhodesian history. It was strange in that the two men were of different backgrounds and different outlook. Welensky, ill-educated and brought up in a poverty-stricken family, had the coarseness and aggressiveness of a trade union leader. Stewart Gore-Browne, a land-owner, with a good military background and a family background the opposite of Welensky's, had all the appearance of an English squire. In addition to Gore-Browne, another notable new-comer was Mrs. Catherine Olds, wife of an official of the Mineworkers Union, who was elected to represent the mineworkers. She was the first woman to sit in the Legislative Council. The new members gave a new complexion to the Council and a new tone to its debates. Moore remarked at the closing of the first session of that Council: "This session is the most remarkable session I have ever attended.... a different atmosphere has prevailed."⁽⁹⁹⁾

70. For Welensky's life story, see Taylor, Don The Rhodesian: The Life of Sir Roy Welensky (London, Museum Press, 1955). For his days in Federal politics, see Welensky, Sir Roy Welensky's 4000 Days (London, Collins, 1964).

79. N. R. Legco Debates, 9 Dec., 1935, p. 485.

In the meantime Sir James Maxwell had been replaced by Sir Ronald Storrs as Governor in 1932. Sir Ronald did not stay long. He was replaced by Sir Hubert Winthrop Young in 1934. Sir Hubert was sympathetic to the cause of the settlers. In his first speech to the Council he told the elected members:-

"I regard the Hon. Elected Members as the permanent element in such a Council as this. Individually they may change, but as a corporate body they represent those who intend to spend the whole of their lives in the territory. They represent permanent local interests in a way that no official can claim to do, least of all a Governor who has only just arrived in the Territory and has only a few short years to look forward to in which to learn what those interests are. I look, to Hon. Elected Members for advice upon all local matters, not only upon matters affecting their own community but also upon matters affecting that larger and less articulate community of native Africans upon whose co-operation depend their own prosperity and the prosperity of the territory as a whole...Hon. Elected Members should in my opinion be consulted not merely upon the application of policy after necessary legislation has been drafted but, wherever practicable, upon the policy itself, before it is initiated."(30)

These words would have been acclaimed and Sir Hubert would have emerged as a great Governor in the eyes of the non-Officials had he arrived in earlier years. But when these words were spoken the settlers were no longer prepared to relax their hardened attitude on the subject of constitutional changes. In 1936 they threatened to resign en bloc on the grounds that they saw no hope for constitutional advance. The Governor, fearing a crisis that was likely to follow such action, persuaded them not to resign. In the meantime, he wrote to the Colonial Secretary advising him to concede to parity in the Legislative Council between the Officials and the non-Officials. The Governor's quick action in handling the situation averted the crisis.

30. Ibid., 1 Dec., 1934, p.3.

Demands for Constitutional Reforms

In 1937 the non-Officials sent a delegation to London to put their constitutional demands to the Colonial Secretary. Gore-Browne and Moore formed the delegation. The two men presented proposals for parity in the Legislative and Executive Councils. They demanded an Executive Council of nine - four Officials, excluding the Governor, and four non-Officials. One of the non-Officials was to represent African interests. In the Legislative Council, in addition to parity, they demanded that the Governor should exercise his casting vote only on reserved matters and that Officials should, except on specified matters of major importance, be allowed to vote according to their conscience. The proposals also urged the introduction of a policy of parallel development between Africans and Europeans. Africans were to have separate representative institutions developed for them and the two races were not to meet in the same Council. This was an unwise proposal in that it was bound to raise serious doubts in the mind of the British Government on the propriety of granting increased power to a minority community that had such racialist ideas. The British Government was already embarrassed by the racial situation it had helped to create in the Union of South Africa. It was also becoming uneasy about the course of African policy in Southern Rhodesia. It was unlikely, therefore, that any British Government - Tory, Socialist or Liberal - could agree to creating another racial situation in Northern Rhodesia.

Achievement of Parity in the Legislative Council

The Colonial Secretary rejected the other demands but agreed to parity in the Legislative Council but made it clear that no changes could be made to the territory's constitutional position without safeguarding the interests of Africans. Consequently the only changes made were the addition of a nominated non-Official to represent African interests (bringing the number of non-Officials to eight) and a reduction of Officials from nine to eight.^(30a.) The new Legislative Council elected in 1938 had, therefore, seven elected non-Officials, one nominated non-Official to represent African interests and eight Officials. Gore-Browne was nominated to represent African interest. Roy Welensky this time joined the Council as an elected Unofficial Member. The Governor promised that since there was now parity he would not use his casting vote where all the non-Officials voted against a measure without first referring the matter to the Secretary of State.

^{30a.} Legislative Council (Amendment) Ordinance, (No. 24 of 1937.

Two developments must be dealt with here before proceeding to the constitutional changes that came about after 1938. These are the appointment of the Bledisloe Commission and the emergence of the first European political party in the country. In March, 1938, a Royal Commission, under the chairmanship of Viscount Bledisloe was appointed to enquire into whether there was a need for closer association between Southern Rhodesia, Northern Rhodesia and Nyasaland and if so what form the association should take, with due regard to the interests of all races. The full details of this Commission will be given when discussing the closer association movement under Chapter Six. The Commission reported in 1939. It rejected amalgamation and federation for the three territories, but recommended co-operation in specified services. The Commissioners, however, made recommendations regarding constitutional changes in Northern Rhodesia and Nyasaland. Before making the recommendations the commission made the following observations:

(a) that although there was parity in both territories between Officials and non-Officials, the fact that the Governor had a casting vote gave the Officials a majority of votes:

(b) that because the Executive Councils were composed entirely of Officials, the non-Officials had had little inducement to exercise initiative or to shoulder responsibility and were inclined to dwell only on criticism of the Government, this being more evident in Northern Rhodesia than in Nyasaland:

(c) that the time was not yet ripe for self-government in the two territories because the electorate in Northern Rhodesia was only 3,580 and in Nyasaland, if any electoral system were to be introduced, would be below 1,000; and

(d) that constitutional changes were necessary but should not, in the Legislative Council, deprive the officials of their only vote (i.e. the Governor's casting vote) that could constitute a majority. "... (a)ny proposal to alter the composition of the Councils so as to abolish the official majority," the Commission observed, "must obviously call for careful consideration"⁽³¹⁾

31. To illustrate the danger of depriving the officials of even a casting vote majority, the Commission referred to the Report of a Commission on British Guiana in 1927 (Cmd. 284 of 1927) which pointed out the difficulties which were being experienced by what that commission called a "Ministry without a majority". The position in Guiana then was 14 elected and 5 nominated non-Officials as against 11 Officials. The Governor had power to act against the majority but this had always placed him in an embarrassing situation.

The Commissioners recommended that there should be equality between the non-Officials (excluding the Unofficial Member or Members representing African interests) and the Officials but that the Governor should retain power to effect legislation if he found it necessary for the purposes of public order, public faith or good government, notwithstanding rejection of such legislation by the Legislative Council. The Commissioners also urged adequate representation for Africans through nominated European non-Officials and greater association of the European population with the Government of the territory. In relation to the Executive Council, the Commission urged the inclusion of non-Officials to prevent them from acting as an opposition to the Government. It suggested for each territory an Executive Council of six members (excluding the Governor) - three officials and three non-Officials (including one representing African interests). The Commissioners made other recommendations including devaluation of executive power between London and the Protectorate Governments and amalgamation of the two territories, which they thought could be done without delay.⁽³²⁾ Some of these recommendations were later used by the Secretary of State in making changes to the Constitutions of the two territories while others were left to be appreciated by historians and constitutional writers in later years.

The Mledisloe Commission Report had a hostile reception in Northern Rhodesia and Southern Rhodesia.⁽³³⁾ Moore, who had by then become leader of the non-Officials in The Legislative Council, resigned over the Report but was re-elected unopposed at the ensuing by-election. Gore-Browne who had assumed leadership of the non-Officials when Moore resigned introduced a motion in the Legislative Council on behalf of all the non-officials except Moore (who was at the time unco-operative because of his loss of leadership) stating "that this Council takes note (that) the Unofficial Members of the Northern Rhodesia Legislative Council deplore the indeterminate nature of the conclusions reached, and the recommendations made, by the Rhodesia-Nyasaland Royal Commission."⁽³⁴⁾ The debate was heated⁽³⁵⁾ but achieved nothing.

32. For all the recommendations made by the Commission on the two territories, see Report, paras. 440-537.

33. See, for instance, "Southern Rhodesia and the Mledisloe Report" (The African World, July 29, 1939) p. 120, an address by Huggins, the Prime Minister of Southern Rhodesia. See also Chapter Six.

34. N. R. Leeco Debates, 6, June, 1939, p. 461.

35. See, for instance, Moore's speech in same issue of proceedings.

25.

In the meantime Europeans in Northern Rhodesia were beginning to organize themselves into political or politically inclined groups. A Railway Workers Union had been formed in 1916⁽³⁶⁾ in Southern Rhodesia and soon its work had been spread to Northern Rhodesia. When Welensky was transferred to Northern Rhodesia he had vigorously organized the Union. In 1936 a Mineworkers Union had been formed⁽³⁷⁾ as a result of the efforts of Richards Olds, the husband of Catherine Olds, the first woman Member of the Legislative Council. The Railway Workers Union and the Mineworkers Union became the chief mouthpieces of the common European. The two organizations gave Welensky the springboard he required to launch a political party. Accordingly in 1941 he formed the Northern Rhodesia Labour Party and led it himself. Although the party bore the name "Labour Party," it was not intended to cater only for workers but for all Europeans in the territory. It supported amalgamation with Southern Rhodesia. It called for the return of the British South Africa Company mineral rights to the Territory and increased social services like education, pensions and workmen's compensation.⁽³⁷⁾ These were issues which appealed to most Europeans.

At about the time when the Labour Party was formed, an increase was made to the composition of the Legislative Council non-Officials were increased to eight elected and one nominated. To maintain parity, officials were also increased to nine - their previous number before the 1938 changes. An election was held the same year (1941) and the Labour Party contested it. This was the first time that party politics had been introduced into elections. The Party contested five of the eight seats and won all of them. Welensky was elected unopposed for Broken Hill.⁽³⁸⁾

36. See Hall, J.H. "Reminiscences of A Rhodesian Railwayman" (*Rhodesia Railway Review*, May, 1923) p. 4 - 5.

37. Its membership was only open to Europeans - See the Constitution, 1936

37. For the formation of the party, summary of its programmes, etc, see Gann, op.cit., p. 344. et seq.

38. The other four Members were J. F. Sinclair (a railwayman) M. S. Visagio (a miner), M. P. McGann (Clerical employee of a mining Company) and F. S. Roberts (former railwayman who had become a business man.)

Moore was defeated by Sinclair at Livingstone.⁽⁸⁹⁾ Gore-Browne was re-nominated to represent African interest. The Labour Party's success was resounding and marked the beginning of a new era in European politics in the territory. Moore, driven out of politics for the first time since the days of the Advisory Council, was greatly disappointed. He died four years later. The Labour Party did not, however, grow, in spite of its successes at the elections. It lacked funds and proper organization.⁽⁹⁰⁾ There were quarrels in its ranks and its deteriorating stature was made clear when its candidates were heavily defeated in the 1944 election. Welonsky was, however, again elected unopposed.

The success of the Labour Party at the 1941 elections did not introduce party politics in the Legislative Council itself. All the Unofficial Members continued to identify themselves as unofficial and not as Labour Party or independent Members. Until 1939 when he resigned from the Legislative Council over the Blodisloe Report, Moore had acted as leader of the Unofficial Members. On his resignation the role was assumed by Gore-Browne. After the 1941 elections the non-officials formed the Unofficial Members' Committee which Gore-Browne led as Chairman. This Committee was replaced in 1945 by the Unofficial Members Organization. Welonsky declined to take up the leadership of the Organization and Gore - Browne was consequently elected its Chairman.⁽⁹¹⁾ The Organization became a sort of "Parliamentary Party". The Governor gave it due respect. It was given Bills to discuss before they were introduced and was accorded the privilege of inviting officials, including the Governor to come and explain unclear points.

89. Col. Stephenson was defeated by Roberts at Ndola while Visagie defeated Capt. A.A. Smith at Nkana. The only independent who won were Page, Campbell and McKee. These continued to represent the farmers.

90. See for instance, a letter by J. F. Sinclair in the Livingstone Mail, 1 Sept., 1941.

91. See Crown Colonist, Vol. XV, p. 577; Davidson, J.W. The Northern Rhodesia Legislative Council (London, Faber & Faber, 1947), p. 44, N. R. Legco Debates, 7 Feb., 1945, pp. 550 - 551.

Demands for Constitutional Reforms

The Unofficial Members never relaxed their pressure for further changes. Soon after the 1941 elections they launched a new offensive. They demanded an unofficial majority in the Legislative Council and the inclusion of three Unofficial Members in the Executive Council which was to comprise seven members - four officials (including the Governor) and three non-Officials. The Unofficial Ministers were to be given departmental responsibilities. They were to support the Government on all issues except where they had major differences with their Official colleagues in which case they would resign. Such resignation was to be followed by a general election. The Colonial Secretary was to retain ultimate legislative responsibility, with the Governor able to overrule adverse Legislative Council votes on reserved subjects like finance and African Affairs.

The Colonial Secretary found the demands unacceptable for several reasons. First, he was of the opinion that such a constitutional arrangement would not work well. Second, he felt that much power like that in the hands of the non-Officials would work in favour of amalgamation with Southern Rhodesia. Third, that granting such demands would certainly be followed by similar demands from the settlers of Kenya. Fourth, that such a set-up would tilt the balance against the Africans. Such a tilting of the balance against the Africans, the Colonial Secretary was convinced, would create a serious racial situation in view of the ascendancy of the Labour Party. It should be noted that the Labour Party's support was partly due to its stand against African competition in jobs - a policy which was unacceptable, to the Colonial Office.

The Colonial Office's rejection of the above demands did not deter the Unofficial Members. In 1943 Page moved a motion in the Legislative Council "that this Council considers that the Constitution of this Territory should be revised so as to give the Unofficial representatives a greater share in the responsibility of government" (92) Speaking on the motion, Page said: "I think we can say that we have taken quite a considerable number of steps in the direction of increased responsibility, but I do not think we have by any means got to the end...I am one of those who consider that we are still not ready to have complete responsible government in Northern Rhodesia. (93) He went on to say it was something to be worked for however, but that the immediate thing was an unofficial majority in the Legislative Council. Major McKee revealed during the debate why the officials were pressing for changes so hurriedly.

92. N. R. Legco Debates, 30 Nov., 1943, p. 307.
93. Ibid.

28. He told the Council that the existing form of government was 126 adequate but that it was because of the Unofficial Members' fear of the policy of paramountcy that they were in such a hurry for changes. He pointed out that if the Imperial Government could assure the settlers that their interests would be safeguarded in the same manner as those of Africans, the clamour for changes would die down⁽⁹⁴⁾

Attainment of an Unofficial Majority in the Legislative Council

A report of the debate was sent to the Colonial Secretary by the Governor. The Governor, Sir Eubule Waddington (who had succeeded Sir John Alexander Maybin in 1941), pleased with the co-operation the non-Officials had shown in aiding the war effort, supported an unofficial majority in the Legislative Council. In 1944, both the Governor and Gore-Browne saw the Colonial Secretary in London. In October of the same year the Colonial Secretary announced intended changes. The officials were to relinquish their majority in the Legislative Council. This was to be done by adding two more nominated members to represent African interests and another two nominated members to speak for special economic interests. The Council's composition was a result going to be nine officials (excluding the Governor) and five nominated and eight elected non-Officials. The changes were brought into effect in 1945.⁽⁹⁵⁾ Dr. Alfred Charles Fisher and Anglican Bishop Robert Selby Taylor were nominated to represent African interests. Alfred Royden Harrison, the Managing Director of Rhokana Corporation, was nominated to represent the mining industry while Geoffrey Bernard Dockett, a rancher, was nominated to speak for the farmers.

94. Ibid., p. 316. For speeches of other Members, see same record of proceedings.

95. See Legislative Council (Amendment) Ordinance and Legislative Council (Amendment)(No.2.) Ordinance (No. 13 of 1945 and No. 20 of 1945 respectively).

29. . . . The non-Officials had gained a majority of four, but in order to be effective there would, of course, have to be a substantial measure of unanimity in their ranks. Of the five nominated Members, the non-Officials of the Labour Party branch of politics could only count on Eckett to support them. The rest were likely to toe the official line,⁽⁹⁶⁾ or the middle of the course line. In fact, some of the nominated members were likely to be to the left of both the elected non-Officials and the Officials. The arrangement placed the Officials in a far stronger position than under the previous Constitution. However, if it happened that all the non-Officials supported an issue, the Officials were no longer in a position to steamroller measures against the voice of the non-Officials. The issues on which non-Officials could be united were, however, going to be rare.

When the changes were announced, the non-Officials, who had expected a better deal, were disappointed. Welensky moved a motion in the Legislative Council that "this Council wishes to express disappointment with the Constitution as announced as it involves an undue proportion of nominated members."⁽⁹⁷⁾ Although hard words were said during the debate against the Colonial Office and His Majesty's Government in general no alterations were made to the proposals. Infuriated, the non-Officials launched another offensive before the dust had even settled. In the meantime the Labour Party had assumed government in Britain. The Labour Party was no friend of the settlers in Northern Rhodesia or elsewhere in Africa. In the past, while in opposition, it had opposed self-government for Northern Rhodesia and amalgamation of the two Rhodesias. "The entire political and social structure of settler Africa was an anathema"⁽⁹⁷⁾ to the Party. It was, therefore, with a Government of this thinking that the settlers had to deal.

96. For instance, in August 1945, in a motion on amalgamation, four of the nominated Members voted with the Officials against the motion. N. R. Legco Debates, 28 Aug., 1945, p. 109. Welensky, foreseeing the result had earlier said in the debate: "The Government in Britain have achieved their aim.... the case for amalgamation as far as Unofficial Members are concerned has been weakened" - Ibid., p. 56. The voting was 13 against and 9 in favour.

97. Gann, op.cit., p. 309.

In 1946 Gore-Browne and Welonsky went to London to present constitutional demands to the Secretary of State. The Secretary of State was not as intractable as Gore-Browne and Welonsky had expected. He was, in fact, very impressed by the two men. He agreed to make changes at the end of the existing Legislative Council. The changes the Secretary of State had in mind were not, however, what Welonsky and Gore-Browne had demanded. In 1948 the Secretary of State announced the intended changes. Elected Members were to be increased from eight to ten and Members representing African interests were to be raised to four - two of them being Africans. The number of Officials was to be raised to ten - bringing the total membership to fourteen Unofficial and the Official Members. The elected Unofficials and the settlers in general opposed the new changes as rocketing African representation 400% since 1930. Welonsky's Northern News⁽⁹⁸⁾ denounced the changes as part of a process towards handing over the country to the Africans.

As far as Africans were concerned, the changes had started a new era. For the first time they would be represented by persons of their own colour and not by Europeans who the Governor thought understood African problems. The two Africans would be popularly elected. They were to be elected by the African Representative Council.⁽⁹⁹⁾ The inclusion of the Africans was a breakthrough into what had been hitherto an all-white body. As already seen above, the following year (1949) two Africans were also included in the Nyasaland Legislative Council. The year 1948 also saw the formation of the Northern Rhodesia African National Congress which was ~~later~~⁽¹⁰⁰⁾ to shape African constitutional progress in the country. A similar organization had been formed in Nyasaland in 1944.⁽¹⁰¹⁾

The non-Officials did not lose heart because of the unfavourable changes that had been made. They thought they had lost a battle but not the war. Gore-Browne, who had in 1946 resigned his leadership of the Unofficial Members Organization because it was incompatible with his position as an African representative, introduced a motion in the Legislative Council demanding for self-government for the territory. Gore-Browne, like the elected non-Officials, was not satisfied by the changes that had been made. In introducing the motion he intended to achieve two things - a "hammering at the Colonial Office and a re-assertion of his leadership of the non-Officials. Surprisingly enough, he thought that in demanding self-government he was expressing the sentiments of both Europeans and Africans in the country. Rather recklessly, he wound up his speech with a threat that if the demands were not met the non-Officials would, if they found it necessary paralyse the Government.⁽¹⁰²⁾

See over page for footnotes.

31. He received bitter criticism from the Africans.⁽¹⁰³⁾ They forced him to promise that in future he would not say things that were contrary to African views if he wanted their continued confidence.⁽¹⁰⁴⁾

The Constitutional Reforms of 1953

Another round of constitutional talks began in 1953 but this will be discussed under Chapter Eight, dealing with constitutional changes from 1953 to independence.⁽¹⁰⁵⁾

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98. Welensky had bought the newspaper a few years earlier for £4,00 to put across his views. He sold it to the Rhodesian Printing and Publishing Company in 1950.
99. See Chapter Five.
100. See Chapter Five.
101. See Chapter Five.
102. N. R. Legco Debates 12 Jan., 1948, pp. 229 - 231.
103. See, for instance, Northern Rhodesia African Representatives Council Proceedings, 5 July, 1948, pp. 3 - 66.
104. Gore-Browne after this found himself in a position where he was not fully trusted either by Africans or Europeans. Perhaps this contributed to his quitting politics in 1951. He later, during the closing days of his life, aligned himself with the African Nationalists and went to petition the United Nations with Dr. Kaunda on the political position in Northern Rhodesia.
105. For a detailed history of the Northern Rhodesia Legislative Council up to 1947, See Davidson, op.cit., pp. 632 - 40: Northern Rhodesia Proposals for Constitutional Change (C mnd. 530 of 1953 (London, H.M.S.O., 1953) paras. 2 - 5; Milford, David C., The Northern Rhodesia General Election 1962 (Nairobi, O.U.P., 1964). See also Gann which gives an excellent account only second to that given by Davidson.

The Struggle of the Unofficial Members
to Gain Representation in the Executive Council

It has been indicated above that when the Legislative Council and the Executive Council were established in 1924, the Executive Council was made entirely a body of officials. From the very beginning the non-Officials fought for both increased representation in the Legislative Council and entry into the Executive Council.⁽¹⁰⁶⁾ The struggle for the latter was, however, more long-drawn and more frustrating. Entry into the Executive Council was necessary and important for the non-Officials since it was the body that mattered in the formulation of policy. It was the Government of the country. Remaining outside it placed the non-Officials in a worse position than that of the Opposition under a responsible parliamentary system. While an Opposition under such a system has the chance of becoming the Government if the ruling party became unpopular, the Officials in the Executive Council were a permanent Government, not subject to election. Sir James Maxwell had said in 1929 that the first step towards the granting of self-government would be the creation of a mixed system with Officials and non-Officials sitting together on the Executive Council and the non-Officials taking up the leadership in certain matters.⁽¹⁰⁶⁾ This promising statement did not materialise as a constitutional provision until 1948 - nearly twenty years later.

This does not mean, however, that until 1948 no non-Official had sat on the Executive Council. They had done so for nearly a decade before 1948 without any constitutional provision to that effect. Soon after the outbreak of the Second World War four non-Officials, Stephenson, Gore-Browne, Wolensky and Moore, were included in the Executive Council to help the Officials. Moore, however, resigned in 1941 when he was defeated in a general election. Gore-Browne was appointed Commissioner of Civil Defence⁽¹⁰⁷⁾ and Director of War Evacuees.⁽¹⁰⁸⁾ Stephenson was appointed sub-Area Commandant while Wolensky was made Director of Manpower.⁽¹⁰⁷⁾ These positions were not regarded as Executive Council portfolios. Accordingly the non-Officials were not members of the Government. They were, for instance, free to criticise the Government in the Legislative Council.

After the war non-officials did not continue to sit on the Executive Council. They had co-operated because of the war and now that it was over they did not see the point of continuing their membership without constitutional backing.

106. N. R. Lerco Debates, 21 Nov. 1929, p. 162.

107. Ibid., 7 Sept., 1940, p. 11; Crown Colonist, Vol. X., p. 435 (Sept. 1940).

33. It should be noted that shortly before the outbreak of the war the non-Officials had expressed doubts on the wisdom of joining the Executive Council on terms less than those recommended by the Bledisloe Commission - i.e. parity between Officials and non-Officials.⁽¹¹⁰⁾ Gore-Drowne and Stephenson had, however, thought it would be advantageous to do so even under less favourable terms.⁽¹¹¹⁾ 131

In 1948, Sir Gilbert Rennie, who had succeeded Sir Hubert John Waddington as Governor, wrote to the Colonial Secretary supporting the non-Officials demand to be included in the Executive Council on a constitutional basis. As a result the 1948 constitutional changes provided that non-Officials should hold seats on the Executive Council. One of the seats was to be held by a Member representing African interests. The number of seats was not strictly laid down. Four Members were, however, appointed but at one time the number rose to five.⁽¹¹²⁾ The provision granting seats to the non-Officials did not state that they should be given departmental responsibilities. They could, therefore, have been appointed Members without portfolios. The Governor, however, agreed that he would give one or two of the non-Officials executive responsibility. In accordance with this promise Deckett was made responsible for Agriculture, Veterinary Services, Forestry, Game and Tsetse Control as well as Water Development and Irrigation while Murray was made responsible for Health and Local Government. Welensky, who was leader of the non-Officials, kept out of the Executive Council, no doubt for tactical reasons as that left him free to criticise the Government.

The Officials maintained a majority of one in the Council. Two conventions were, however, accepted by the Secretary of State. The first was that where all the Unofficial Members (including the Member representing African interests) unanimously advised the Governor, he was to be bound to take that advice as the advice of the Executive Council even if all the Officials held a contrary view.⁽¹¹³⁾ The Governor could, of course, reject that advice but in that case he was to refer his decision to the Secretary of State.⁽¹¹⁴⁾ The second convention was that in making appointments to the Executive, the Governor was to take into account the views of the Unofficial Members Organization and that a Member who had lost the confidence of the Organization was to resign.⁽¹¹⁵⁾

The non-Officials had at last partially achieved their object of entering the Executive Council. Those of them who held portfolios had as much responsibility as the officials. Those who did not hold portfolios did not, however, regard themselves as members of the Government and did not, therefore, hesitate to question Ministers on matters of policy. Occasionally the non-Officials with portfolios also acted in this manner.⁽¹¹⁶⁾ The principle of collective responsibility did not yet apply. This came about after the 1954 general election when members of the Executive Council were styled as Ministers - all with portfolios. The events from 1953 will, however, be dealt with under Chapter Eight.⁽¹¹⁷⁾

108. N. R. Legco Debates, 28 March, 1942, p.8.

109. Other non-Officials who did not sit in the Executive Council were also appointed to certain responsibilities. Major McKee was appointed Director of Civil Supplies (N.R. Legco Debates, 28 March, 1942, p.6) while Page was made Price Controller.

110. N. R. Legco Debates. 6 June, 1939, p. 456.

111. See, e.g., Ibid., 21 Dec., 1938, pp. 648 - 9.

112. Advisory Commission on the Review of the Constitution of the Federation of Rhodesia and Nyasaland Report - Appendix V.I - Survey of Developments Since 1953 (Report by Committee of Officials) (Cmd. 1149 of 1960) (London, H.M.S.O., 1960) para. 52.

113. Ibid.

114. Ibid.

115. Ibid.

116. Ibid.

117. For a short history of the development of the Executive Council, see ibid., paras. 51-54; Mulford, op.cit., pp. 2-3; Northern Rhodesia Proposals for Constitutional Change (Cmd. 53) para. 6. For a detailed account of the period up to 1947, see Davidson, op.cit. See also Gann, op.cit.

AFRICAN CONSTITUTIONAL ADVANCEMENT 1870-1953.

Unlike European constitutional advancement, African constitutional advancement in Northern Rhodesia before 1948 and in Nyasaland before 1949 cannot be studied solely from the viewpoint of African participation in the Legislative and Executive Councils of the two territories. As already seen in the previous Chapter, Africans did not enter the Northern Rhodesia Legislative Council and the Nyasaland Legislative Council until 1948 and 1949 respectively. Before then what should be referred to as African constitutional advancement took two forms - (1) the development of African local government institutions; (2) representation of African interests in the Legislative and Executive Councils by Europeans. This Chapter will, therefore, be treated under three sections. The third section will deal with the period 1948 - 1953 - i.e. the entry of the first Africans into the Legislative Councils of the two territories.

DEVELOPMENT OF AFRICAN LOCAL GOVERNMENT INSTITUTIONS

It has already been mentioned above⁽¹⁾ that when Northern Rhodesia was under Company rule the policy of direct rule was employed in the administration of Africans (except in Barotse-land) and that this was replaced by the policy of indirect rule when the Imperial Government took over the administration of the territory. The indirect rule introduced by the Imperial Government immediately after the assumption of the administration was not based on statute. It was not until 1929 that the policy was translated into legislation.

In Nyasaland Johnston also began with the policy of direct rule, although not of the same pattern as that existing in Northern Rhodesia. Two factors contributed to the introduction of direct rule in Nyasaland.⁽²⁾ First, the Administration wanted to consolidate itself in all parts of the country as quickly as possible. Secondly, the institution of chieftainship had been completely destroyed among some tribes (particularly in the South) due to slavery.⁽³⁾ By 1910, however, direct rule was beginning to cause alarm to the Administration. The Protectorate's Annual Report of 1911-1912 stressed the need to introduce native authorities to assist District Residents in the maintenance of law and order. Order was collapsing and lawlessness was on the increase. The loss of authority by the chiefs and the absence of chiefs in some areas left the population adrift. The white man's administration was still too remote from the centre of African life. Its impact was still too superficial to check disorderliness and lawlessness in the villages.

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1. See Chapter 2.
 2. Note that at first there was doubt on what powers of Chiefs Johnston could exercise - see Chapter 3 above.
 3. See Protectorate's Annual Report for 1903-4.

In 1912 the Government took steps to remedy the situation created by direct rule. It enacted the District Administration (Native) Ordinance.⁽⁴⁾ The Ordinance was intended "to supply a salutary measure of discipline and control in order to replace the old system of tribal rule of chiefs which has fallen into decay." It required District Residents to demarcate their districts into sections (about seven in each district). These sections were to be placed under principal headmen. The sections were not necessarily to coincide with areas under particular chiefs. The principal headmen were to be either chiefs or non-chiefs. The appointments were to be based purely on whether a person was of good standing and on the administrative assistance he had given to the District Resident. In most of the cases, however, chiefs were appointed principal headmen.⁽⁵⁾ The sections under principal headmen were to be divided into villages and each village was to be placed under a village headman. The functions of the principal headman and village headmen were to be to assist the District Resident in the maintenance of law and order, building of village roads, reporting deaths, etc. They were not, however, permitted to hold court proceedings. In all, the headmen had very little executive power of their own. They were just agents of the District Resident. To co-ordinate the work of the headmen, each section was to have a council comprising all the principal headmen and two village headmen appointed by the District Resident.

While the new system was a big step towards improving the existing position, it suffered from two defects. The first defect was that the appointment of principal headmen and village headmen was not restricted to traditional rulers. Persons who were not chiefs were sometimes appointed to operate in an area where a chief existed. The duties of the principal headman in such an area ran counter to those of the chiefs. The chief belonged to the people and the people recognized him as their ruler. The principal headman belonged to the white man's administration and the people took him as the white man's servant installed to usurp the powers of their chief. In such areas the principal headman often received little or no co-operation, unless the chief was not popular among his people. It was one thing for the people to defy their chief in favour of the District Resident and another for them to be made to submit to a principal headman who was not also their chief. The second defect was that the system did not establish actual indirect rule. It was something between the direct rule prevailing in Northern Rhodesia and the indirect rule operating in Nigeria. The system, as a result, failed to give enough responsibility to the principal headmen and their people. The headmen appeared to be messengers of the Administration rather than executive officers.

4. No. 13 of 1912.

Further Reforms in Nyasaland

The defects mentioned in the last paragraph made it necessary to effect changes to the system. The Government's policy by 1924 was, in the words of the Governor that year, to bring about measures which would amount to "a more serious attempt to introduce in Nyasaland a system of government of the population through or with the assistance of natives themselves."⁽⁶⁾ The Governor added, however, that the system would not be "intended to revivify or perpetuate governance by native chiefs."⁽⁷⁾ These words were spoken while the Governor was explaining measures that were coming into effect that year. District Administration (Native) Ordinances were enacted in 1924,⁽⁸⁾ 1926⁽⁹⁾ and 1929⁽¹⁰⁾ to effect the necessary changes. The successive Ordinances granted more power to the principal headmen. Section, village and district councils were set up to advise the District Residents who were now called District Commissioners. The 1929 Ordinance granted judicial powers to principal headmen, they were to preside over section courts.

Although the principal headmen had now more power, the defects pointed out above continued to exist in, of course modified forms. Further changes were, therefore, necessary and these took place in 1933. They will be dealt with later.

Reforms in Northern Rhodesia

As pointed out at the beginning of this section, the indirect rule introduced in Northern Rhodesia by the Imperial Government when it took over the administration was not based on statute. In 1927, Sir James Maxwell, who had succeeded Sir Herbert Stanley as Governor, thought it necessary to place African administration in the territory on a firmer basis. Sir James had worked in West Africa, where indirect rule was the mode of administration, before coming to Northern Rhodesia. He convened a conference of administrative officers in the same year to discuss African administration and to formulate the basis on which legislation in that regard should be made. The conference recommended that chiefs should be given administrative and judicial powers and that legislation to that effect, based on that which had been enacted in Tanganyika the previous year, should be enacted.

In pursuance of the recommendations the Government enacted two Ordinances in 1929 - the Native Authority Ordinance⁽¹¹⁾ and the Native Courts Ordinance.⁽¹²⁾ The Native Authority Ordinance empowered the Governor to appoint chiefs and to create such chiefs superior⁽¹³⁾ or subordinate⁽¹⁴⁾ native authorities. In places where the Governor was unable to find a chief superior to the others he could create a superior native authority by setting up a council of chiefs in the area.⁽¹⁵⁾ If that was not possible he could content himself with the creation of subordinate native authorities.

4. The Native Courts Ordinance, on the other hand, empowered the Governor to establish native courts of two classes - First Class and Second Class courts.

The Native Authorities were to have in addition to their customary and traditional powers, the power to make minor administrative orders. Such orders were to be subject to the control of the District Commissioner. They were also to have power to make rules. Orders were intended to enable them to deal with the day to day administration while rules were to enable them to adapt their administration to view needs.⁽¹⁶⁾

The native courts, on the other hand, were to have jurisdiction to administer native law and custom (provided it was not repugnant to natural justice and morality) and, to a limited extent, criminal law. Only African parties were to appear before these courts but Government servants were exempted from the jurisdiction of the courts unless the District Commissioner's authority to make such sdrvant appear as a party was first obtained. This was no doubt to prevent the chiefs using their judicial powers to obstruct or belittle the Central Administration. Courts of First Class were to have power to award sentences of up to three months imprisonment, ten pounds fine or ten strokes of the cane or a combination of these punishments. Corresponding maximum sentences for courts of Second Class were to be one month, five pounds or six strokes or a combination thereof.⁽¹⁷⁾ The courts were not to be subjected to the usual procedural technicalities of European courts or to the supervision of the High Court.

The two Ordinances did not apply to Barotseland. The position of the Chiefs in Barotseland continued to be governed by the now uncertain terms of the Lewanika Concession of 1900. Compared with that in Nyasaland, the system introduced in Northern Rhodesia was far superior. The people's recognized traditional leaders were appointed native authorities. This prevented any conflict between tribal authority and non-tribal authority such as arose in Nyasaland in those places where the principal headman was not also the tribal chief. Native authorities were not mere Government agents like the principal headmen. They had legislative, executive and judicial powers which they exercised with a great deal of freedom.

5. See Government Notices 145, 176 and 253 of 1913, appointing principal headmen.

6. Hailey, Native Administration in the British African Territories, Part 11, p. 26, quoting.

7. Ibid.

8. District Admin. (Native) Ordinance (No.11 of 1924) This repeated the 1912 Ordinance.

9. District Admin. (Native) Amendment Ordinance (No.14 of 1926)

10. District Admin. (Native) (Amendment) Ordinance (No.27 of 1929)

11. No. 32 of 1929

12. No. 33 of 1929.

13. Native Authorities were in most cases constituted on a tribal basis. The superior native authority was in most cases the paramount chief of the tribe.

See bottom of page 137 for Nos. 14 - 17.

Further Reforms in Northern Rhodesia

The 1929 Ordinances were replaced by the Native Authority Ordinance⁽¹⁸⁾ and the Native Courts Ordinance⁽¹⁹⁾ of 1936. This time similar legislation was also enacted for Barotseland - the Barotseland Native Authority Ordinance and the Barotseland Native Courts Ordinance^(19a.) The new legislation gave extensive administrative powers to native authorities, including the power to set up treasuries and raise revenue. Revenue was to be raised by means of court fees and fines and by dog, bicycle, arms and game licences. These taxes were to be used by the Native Authority administration for its running and for the development of the area. The authorities were not, however, given the power to collect taxes due to the Central Government, but the Government agreed to pay to each native authority treasury ten per cent of the taxes collected from its area and from its people resident elsewhere. The new courts legislation restructured the system. Native Appeal Courts, to which appeals from native courts of first instance were to lie, were established. From the Native Appeal Court the case could go to the Court of the District Commissioner⁽²⁰⁾ and thence, on points of law, to the High Court. Barotseland native courts and native authorities were given more power than enjoyed outside Barotseland. For instance, appeals from the Court of the Paramount Chief lay direct to the High Court.

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14. Subordinate native authorities were created from the sub-chiefs of a tribe.
 15. This situation arose in areas occupied by small tribes with chiefs independent of each other. Since there would be no paramount chief in such an area, the solution was to combine all the chiefs collectively in a superior native authority. The collective body then performed functions performed elsewhere by a paramount chief.
 16. For a detailed discussion of native authorities today see Chapter 23 below.
 17. For a detailed discussion of native courts today, see Chapter 16 below.
 18. No. 9 of 1936.
 19. No. 10 of 1936.
 - 19a. Nos. 25 and 26 of 1936.
 20. The District Commissioner's Court had wide powers over judgments of the Native Courts. In many cases it meant a re-hearing of the case as if no trial had been held.

Nyasaland Reforms of 1933

The position in Nyasaland was restructured in 1933. In fact, the Northern Rhodesian alterations of 1936 were to bring the territory's system to the level of that which had been introduced in Nyasaland in 1933. It will be recollected that changes had been introduced in both Northern Rhodesia and Nyasaland in 1929.⁽²¹⁾ In that year, however, they differed. Indirect rule as practised in West Africa was introduced in Northern Rhodesia while in Nyasaland the administrative and judicial powers of the principal headmen had merely been increased to a level lower than that of the native authorities in Northern Rhodesia. The Nyasaland Government found their system unsatisfactory when compared with that in Northern Rhodesia and Tanganyika. Consequently, in 1930,^{as} in Northern Rhodesia in 1927,⁽²²⁾ the Governor convened a conference of administrative officers to formulate a system of indirect rule on the lines of that existing in Tanganyika. The conference recommended the introduction of indirect rule on the lines suggested by the Governor. The recommendations of the conference were in 1933 embodied in two ordinances - the Native Authority Ordinance⁽²³⁾ and the Native Courts Ordinance.⁽²⁴⁾

The Native Authority Ordinance abolished the offices of principal headman and village headman. They were replaced by the traditional chiefs who were appointed as native authorities. Where a chief was not available for appointment, any other person, a council or a group of persons could be appointed as the native authority of the area. The native authorities were charged with the maintenance of law and order. In this respect they were not different from the principal headmen. They, however, differed from their predecessors in that they had the power to make rules and orders for the peace, good order and welfare of the people under them. The rules were subject to the approval of the Governor and not the District Commissioner as was the case in Northern Rhodesia. The authorities were further empowered to establish treasuries and to levy rates, dues or fees for the purposes of providing services for the benefit of the community. Obedience to the rules was enforced through the local courts.

21. See above.

22. Ibid.

23. No. 13 of 1933.

24. No. 14 of 1933.

The Native Courts Ordinance empowered the Governor to authorize the provincial commissioners to establish native courts in their areas and to define the area of jurisdiction of such courts by warrant. The courts were to have civil and criminal jurisdiction and were to administer both native law and custom as well as statutory law emanating from orders and rules of the native authority of the area or from Ordinances of the Legislative Council. The courts were also to have the power to deal with matrimonial causes arising from marriages contracted under native or Muslim law. It should be noted that only Africans could be parties in cases before the Courts. The Ordinance divided the courts into three grades - A, B and C. Courts of the A class could impose sentences of up to six months imprisonment or a fine of up to five pounds or corporal punishment of up to twelve strokes with the cane or a combination of these punishments. This jurisdiction was higher than that given to Northern Rhodesian Courts of First Class. Courts of B class could impose corresponding sentences of three months, three pounds or twelve strokes or a combination of these while courts of C class could award correspondingly one month, one pound or five strokes or a combination of these. The Courts were to be presided over by chiefs or, where permitted, by sub-chiefs. The other members of the Courts were to depend on tribal custom. There was, therefore, no fixed composition. While the Chief or sub-chief was to receive a salary from the Central Government, the other members of the court were to be paid from the Native Authority treasury.

Purposes Served by Indirect Rule

From the above it can be seen that the system of indirect rule in Northern Rhodesia and Nyasaland was intended to serve two purposes. Firstly, it was intended to provide an arm of the Central Government, charged with the duty of maintaining law and order and with other administrative duties in general which until then had been the responsibilities of the District Commissioners. Secondly, it was intended to provide a training ground for Africans in the machinery of government. This latter purpose was to be accomplished through the Africans' participation in the legislative, judicial and executive functions of the Native Authority. The two purposes mentioned here were present in the mind of the author of the doctrine of indirect rule when he formulated it. With reference to the first purpose Lugard wrote that the merit of indirect rule lay in the fact that chiefs constituted "an integral part of the administration."

8. There are not two sets of rulers - British and native - working either separately or in co-operation, but a single government in which the native chiefs have well-defined duties and an acknowledged status equally with British Officials."⁽²⁵⁾ Before Uganda became a protectorate in 1893, Lugard had written: "The object to be aimed at in the administration of this country is to rule through its own executive Government..the Resident should rule through and by chiefs."⁽²⁶⁾ The integration of Chiefs into the Administration and giving them administrative powers as were conferred on them in West Africa, was originally, it should be noted, due to the shortage of European administrators.⁽²⁷⁾ Had Lugard had plenty of European administrators at his disposal, perhaps he would not have authored the doctrine. This is perhaps the reason why it never developed in South Africa and Southern Rhodesia.

Lugard, however, soon realised that apart from solving the problem of the shortage of administrators, the system also served well as the forerunner of self-government. By 1922 Lugard was able to write in the following vein on the virtues of indirect rule:-

"The first is that the ideal of self-government can only be realised by the methods of evolution which have produced the democracies of Europe and America - viz. by representative institutions in which a comparatively small educated class shall be recognised as the natural spokesman for the many."⁽²⁸⁾

This second purpose is more relevant here since it was the one that finally led the Africans into the Legislative Councils of Northern Rhodesia and Nyasaland. It became the Administrators' main argument in developing indirect rule. In 1925, a year before the introduction of indirect rule in Tanganyika, the Governor, Sir Donald Cameron, wrote in a memorandum:

"Being convinced that it is neither just nor possible to deny permanently to the natives any part in the government of the country, the Government of this Territory has adopted the policy of native administration which aims..at making it possible for this to evolve in accordance with their tradition and their most deeply rooted instincts, as an organised and disciplined community within the state... This policy is their strongest safeguard, the surest and safest foundation on which their existence in this Territory can be built, for it enlists on the side of law, order and good government all responsible elements in Native Society, and it aims at preserving that society, intact and in protecting it from disintegration into an undisciplined rabble of leaderless and ignorant individuals."⁽²⁹⁾

It was not, however, everyone who was impressed by the idea of indirect rule as a launching pad for Africans into the Central councils of government. A considerable section of opinion thought indirect rule was a negation of progress to the Africans in that it sought to tie them down to their old system.⁽³⁰⁾

See footnotes overpage.

9. This argument was to a certain extent valid, particularly in later years when the Imperial Government continued to confine African constitutional advancement to these bodies in spite of their unpopularity with the African nationalists. Opponents of the system did not see why educated Africans, who were to all intents and purposes as educated as Europeans or better educated than the farmer and artisan European who sat in the Legislative and Executive Councils, should be denied the opportunity of also participating in government. The Imperial Government and its Governors in Africa were, however, convinced that a beginning in lower bodies was necessary before Africans could be admitted to the central councils.

25. Lugard, The Dual Mandate, p. 203

26. Lugard, The Rise of Our East African Empire, Vol. 1. pp. 649 and 651.

27. See Introduction by Margery Perham in Lugard The Dual Mandate pp. xxxix, et seq and the book generally; Lugard, Political Memorandum (printed for private circulation), Parts of it are produced in The Principles of Native Administration in Nigeria (Oxford U.P. 1965).

28. Lugard, The Dual Mandate, p. 194. Lugard doubted whether this would be successful in Africa because of its many tribes - Ibid. p. 195.

29. Buel, R.L. The Native Problem in Africa, Vol. 1., p. 456, quoting the Governor's Memorandum - passage is quoted here as quoted from Buel in Mathewson, James Edward Policies and Practices of Native Participation in Municipal Government in Southern Africa (unpublished thesis submitted for the Ph.D. degree of the University of Pretoria, December, 1958) p.77. Introducing the system the following year, the Governor said, "The great principles to be followed are those building on the existing organisation and ideas of the people, leaving it to the people themselves assisted by sympathetic advice, to devise and develop their own institutions and of resisting the temptation to play the part of "King Maker" or "Constitution Maker" - Howman, R. African Local Government in British East and Central Africa (Report published for private circulation in Government circles of Southern Rhodesia) (Copy used by the author is a zographic reproduction by the University of S.A. - X37/183 of 31st December, 1962) (Pretoria, 1963) p.13, quoting the Governor's words.

"I do not believe there is any better training for the art of self-government than participation in local administration. Our own history shows that our constitutional government developed in Westminster, has owed a very great deal to our experience in local administration. I regard the extension of local government as one of the quickest and certainly the surest methods of making certain of the extension of central government" - Hansard, July, 13, 1943. Also quoted in Mathewson, p. 8.

The Governor of Sierra told the Legislative Council in 1920 that:

"Nine-tenth of the people enjoyed autonomy under their own elected chiefs. European Officers are the technical advisers, and helpers of the tribal authority" - Lugard. The Dual Mandate, p. 199.

The Governor of the Gold Coast observed:

"The chiefs are keenly appreciative of our policy of indirect rule and of the full powers they retain under their native institutions" - ibid.

30. See Fulani bin Fulani, "The African Mandates", New Europe, 7 and 14 July, 1919). For arguments for and against indirect rule, see Lugard, The Dual Mandate, Chapters X and XI and the Introduction by Margery Perham. See also Cmd. 5467 of 1911; Official Handbook 1216; "Africanus", (in Journal of African Society, January, 1921) p. 98.

The legislation on indirect rule enacted in Northern Rhodesia in 1929 and 1936 and in Nyasaland in 1933 was formulated with only the tribal areas in mind. The urban African was not, therefore, covered. European local government institutions in such urban areas did not cover him either. In Nyasaland the problem was partly solved by referring cases concerning urban Africans (which normally would be tried by a native court in the tribal area) to the nearest native authority court to the urban area concerned. In Northern Rhodesia, with its expanding mining industry, the problem was more complex. There were divergent views among the Europeans on whether a permanent African urban population should be encouraged. Some Europeans argued that Africans should be compelled to stay in the tribal areas and only come to work in the urban areas without making a permanent home there.⁽³¹⁾ Apparently this opinion was also shared by the Government.⁽³²⁾ Others, particularly employers of large forces of African labour, like the mining companies, argued that it was necessary for the prosperity of the country to have permanent and not seasonal African labour in the urban area.⁽³³⁾ This lack of clear policy on the part of the Government and the employers resulted in poor working, housing and living conditions. African discontent emanating from these squalid conditions erupted into serious disturbances on the Copper-belt in 1935 and 1940. A Commission was set up on each occasion to investigate the causes of the disturbances.⁽³⁴⁾

The 1935 disturbances and the findings of the Commission set the Government as well as private enterprise to work to improve the conditions of African workers. Townships were built and in 1938 the Government agreed to establish the first African local Government machinery - the African Advisory Committees⁽³⁵⁾ - on the Copperbelt. These Committees were composed of Africans nominated by the District Commissioner from the Government and Mine African townships. The Committees, renamed councils later, were subsequently extended to other areas. The councils advised the District Commissioner on various matters affecting Africans in the urban locality concerned. Urban native courts were also introduced to do in the urban areas what native authority courts were doing in the tribal areas. The members of an urban court were appointed by the chiefs who had the greatest of followers in the urban area concerned and approved by the District Commissioner.⁽³⁶⁾ The courts derived their jurisdiction (with modifications where necessary) from the Native Courts Ordinance, 1936. Improvements were made to the machinery in later years. Elections were introduced for some of the Advisory Councils.

See footnotes overleaf.

11. Native Urban councils were more representative than native authorities. Native authorities were composed of chiefs and their traditional counsellors and any commoners the chief might include. Because of this it was not possible for the community to forward its best men as councillors. On the other hand, urban councils, particularly where elections had been introduced, drew their members from the educated and progressive Africans of all tribes. In Nyasaland, the traditional composition of the native authorities was mitigated by setting up in some areas another structure of bodies called local advisory boards in which educated commoners as well as traditional leaders participated. These could be formed in urban areas as well as rural areas.

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- 31. For an instance of such views, see the speeches of the Secretary of Native Affairs, Thomas Sandford, in the Legislative Council - N.R. Legco Debates, 12 Dec., 1940, p.383 and 9 Dec., 1942, pp.250-55. In 1944 Sandford was succeeded by Cartmel-Robinson who had opposite views on the matter and a year later Hudson, an advocate of African stabilized labour, succeeded Cartmel - Robinson.
 - 32. Ibid. See also a Government Statement dated 18 February, 1941, showing the Government's unwillingness to adopt a policy of creating on the Copperbelt an African industrialized population on a permanent basis.
 - 33. See e.g. Saffrey, A. Lynn (in the Report on Some Aspects of African Living Conditions in the Copperbelt of Northern Rhodesia, 1943). See also Prain, R.L., "The Stabilisation of Labour in the Rhodesian Copperbelt" (in Prain, Sir. R.L., Selected Papers 1953 - 1957) (Rhodesia Selection Trust, 1958) pp. 99-109.
 - 34. See Commission Appointed to Inquire into the Disturbances in the Copperbelt of Northern Rhodesia, Report..., together with the Governor's Despatch to the Secretary of State on the Report, November, 1935 (Lusaka, Govt. : Printer, 1935) Commission Appointed to Enquire Into the Disturbances in the Copperbelt, Northern Rhodesia 1940, Report..... (Lusaka, Govt. Printer, 1941). For criticism of the Government on the 1935 disturbances, see Livingstone Mail, 29 May and 5 June, 1935; and also N. R. Legco Debates, 3 Dec. 1935, pp. 242-268.
 - 35. Mining Companies had in the absence of machinery for the expression of African views, started from about 1929 to set up bodies of tribal representatives of Africans working for them. These bodies held meetings with the Compound Officer to acquaint him with the workers' grievances.
 - 36. Where a party before the Court did not belong to a tribe represented on the court, an adviser from the tribe of the party would be included.

The setting up of local institutions in both tribal and urban areas paved the way for the next stage in the pyramid of local institutions. In Northern Rhodesia Gore-Browne (who had become a Member representing African interest in 1938) started the ball rolling for the next stage by introducing a motion in the Legislative Council calling for:-

- (1) the extension of urban advisory councils to all urban areas;
- (2) for the establishment of provincial councils whose members would be elected by the native authorities and the native urban advisory council. (37)

The Secretary for Native Affairs proposed an amendment (which was accepted) that they should be called "regional" instead of "provincial" councils in order to allow elasticity in the areas they would cover. (38) The main reason for Gore-Browne's proposals was to facilitate the consultation of African opinion. The motion received support from most of the Unofficial Members. Major McKee, however, expressed fears of where all that would end and whether it would not in the final stage detrimentally affect the rights of the European Community. (39) Official Members were also divided. The Secretary for Native Affairs warned against introducing an elective system to people he thought would not understand it. He argued that the native authorities as they were should be given a chance and not disturbed by new changes. He, of course, admitted that native authorities as they were, were not representative. (40)

The Councils were formed in 1943. Their functions were to discuss provincial matters pertaining to Africans and forward them to the Government. They were also to advise the Member or Members representing African interests as well as native authorities. They were to be presided over by the Provincial Commissioner of the Province. Members of the Legislative Council could attend the meetings if they wished to do so. The proceedings were very lively owing to the fact that the Councils comprised both traditional leaders from the native authorities and progressive Africans from the urban advisory councils. In Nyasaland the same developments were taking place. In 1944 and 1945 provincial councils were set up in all the three provinces of the territory. The membership comprised chiefs and commoners, originally appointed by the Governor on the nomination of the chiefs.

Please see footnotes overpage.

It should be remembered that Nyasaland did not have a structure of urban advisory councils as existed in Northern Rhodesia. The councils had the same jurisdiction as those of Northern Rhodesia. Departmental Officers whose departments would be discussed by the Council could attend the meetings to explain things and answer questions as well as listen to views.

37. N. R. Legco Debates, 17 Sept., 1942, pp. 148 - 160. See also Gore Browne's views on the same subject the previous year - ibid., 12 March, 1941, pp. 64 - 67.
38. Ibid., p. 159 - 160. In 1944, the Councils having been inaugurated as "regional" were re-named "provincial" councils.
39. For views of Members on the subject; see Record of Proceedings of 17th September, 1942, etc.
40. See his speech in ibid.

The establishment of the provincial councils was soon followed by the third and final stage of the pyramid - the constitution of bodies covering the whole territory. This took place in 1946 when the African Representative Council and the African Protectorate Council were respectively constituted in Northern Rhodesia and Nyasaland. Members of the African Representative Council were to be elected by the provincial councils but those from Barotseland were to be appointed by the Paramount Chief. The Council was to meet under the chairmanship of the Secretary of Native Affairs. It was to have power to discuss any matter of interest. Its proceedings were to be conducted on the same pattern as those of the Legislative Council.⁽⁴¹⁾ The Government made an undertaking to submit to the Council all Bills affecting Africans. Members of the African Protectorate Council were, on the other hand, to be appointed by the Governor on the result of a secret ballot held in each of the three provincial councils. Chiefs and commoners had the same prospects of being appointed to the Council.⁽⁴²⁾ The work and the conduct of proceedings of the council were similar to that of the African Representative Council. In 1948 the African Representative Council was entrusted with the responsibility of electing the two African Members to the Legislative Council. The same task was given to the African Protectorate Council the following year. The arguments for and against entrusting the responsibility to these bodies will be dealt with below in this Chapter.

The African Representative Council and the African Protectorate Council were the logical culmination of the pyramid. The native authority was intended to cater for a limited area and this in most cases was an area occupied by a particular tribe. The arrangement was in the majority of cases a tribe by tribe one. The urban advisory councils, on the other hand, although comprising a membership drawn from various tribes, were limited to a particular area. The next step was, therefore, to create inter-tribal organizations on a provincial basis. This made the tribes in a province, already bound together to a certain extent by the Provincial Commissioner's administration, draw even closer together. In the Provincial Council the participants were to think of themselves as belonging to the Western, Northern or Southern Province and not as Bembas, Lozis, Chewas or Yaos. Having brought a limited number of tribes together on a provincial basis, the next step was to bring the tribes of the territory together. In a territorial body the participants would think of themselves as Northern Rhodesian or Nyasaland Africans and not as belonging to the Southern or Northern Province.

(Footnotes on page 16)

15. Thinking on a national basis was what was required if the Government of the territory were one day to be entrusted to the Africans. Making an observation on this pyramidal structure, Howman wrote: "The pyramid has a beneficial influence on both individuals and communities. The higher councils bring together members of many different tribes and so assist to unify them, to lessen tribal animosities, to inculcate wider, more tolerant views and to bring about a spirit of co-operation. They learn to think on a national or provincial basis!" (43)

The African Representative Council and the African Protectorate Council were treated by the Administration as amounting to Legislative Councils for Africans. This view was, in fact, expressed, particularly in Northern Rhodesia, that the African Representative Council should be developed as the Legislative Council for Africans, enacting laws affecting Africans, leaving the ordinary Legislative Council as an all white body to legislate for whites only in specified matters. The two bodies were looked upon by the Administration, at least for the time being, as the answer to African constitutional aspirations. This view appears from the words of the Colonial Secretary in the House of Commons, when he said about provincial councils in Nyasaland: "African Provincial Councils are being set up...composed of chiefs and other responsible Africans...intended to provide an authoritative means for the expression of African opinion and to promote the development of political responsibility." (44)

Apart from the wish to complete the pyramid, the establishment of the African Representative Council and the African Protectorate Council was partly prompted by the Administration's fear of the rising signs of African nationalism. In Northern Rhodesia the political tone of speeches at Welfare Societies' meetings began to draw the attention of the Government. (45) The Colonial Office had, in 1945, agreed to the ultimate formation of an African Representative Council but thought the idea should be shelved until provincial councils had proved to be successful. (46) A year later the Council was hurriedly formed with the intention of drawing away the African intelligentsia from the African Welfare Societies. (47) The societies had in the same year come together to form the Federation of African Welfare Societies. (48) In Nyasaland the African National Congress had been formed in 1943, (49) and it became necessary to counter it by a national body formed by the Administration.

See footnotes 41 - 49 overpage.

That the African Protectorate Council was intended to counter the African National Congress can be seen from the following words of a Provincial Commissioner, reporting in 1943: "... the usefulness of the Council has ... administratively been negligible but from the political angle it is of some value in affording a medium of expression but as constituted at present it is not an effective counterpart to Congress and it must be opened to a greater proportion of intelligent and progressive Africans. One weakness has been the lack of items of real importance on the agenda!" (50)

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41. See e.g. The Proceedings of the First Session of the African Representative Council, November, 1946 (Lusaka, Govt. Printer, 1946).
42. This also applied to the African Representative Council, save that in this case there was direct election.
43. Howman, op.cit., Part II, p. 5.
44. House of Commons Debates, Vol. 402, Col. 1396, 1944.
45. For instance, a Provincial Commissioner reported in 1950 (this was, of course, after the African National Congress had been formed) that "Welfare activities by members have been negligible and the only interest shown has been in political subjects" - quoted in Howman, op.cit., Part II, p. 24.
46. Provincial Councils had been formed in 1943 and 1944 (See above).
47. See Gann, A History of Northern Rhodesia, p. 385.
48. See below under Section 3 of this Chapter.
49. See below under Section 3 of this Chapter. The following year the Government began to establish provincial councils.
50. As quoted by Howman, op.cit., Part II, p. 37.

The pyramid worked well for some time but it soon ran into trouble with the budding African nationalist who saw in the system an attempt to thwart genuine African political progress. The Nyasaland African National Congress had opposed the establishment of the provincial councils on the grounds that they would represent the interests of chiefs only.⁽⁵¹⁾ It should be noted that the aim of the Administration in both Northern Rhodesia and Nyasaland in setting up the pyramid was to enable Africans to put forward "constructive" advice to the Administration and not to provide platforms from which to denounce the Administration. It was, however, not possible to isolate these bodies from the influence of current political thinking among the Africans. While it was possible to keep out nationalists from the native authorities because of their traditional membership, it was impossible to do so in the other bodies where the elective system had been introduced. Nationalist politics began to encroach upon some of these bodies. For instance in 1950, the Provincial Commissioner for the Western Province reported: "Luanshya Urban Advisory Council spends (more) time discussing major political matters than dealing with local township affairs..."⁽⁵²⁾ The educated Africans and the nationalists assailed the system. By 1950 it had become clear that the system was already facing a big challenge from African nationalism. In that year the Hudson Commission referred to "the tendency in Nyasaland today to regard the present N.As. as little more than the rather paid agents of the Central Administration and not as instruments of local government."⁽⁵³⁾ Writing in 1952 on the working of the system in Nyasaland, Howman observed: "Widespread dissatisfaction with the system has grown and outside it the educated, often widely travelled element in the population has become very intolerant of the many (but not all) uneducated intensely conservative, apathetic, jealous and sometimes ailing chiefs!"⁽⁵⁴⁾

The criticism of the system was voiced not only by Africans. Some administrators criticised it as well. For instance, a Provincial Commissioner in Nyasaland made the following observations on the African Protectorate council. "It is not a live body and it is doubtful if it serves any useful purposes as an advisory body!"⁽⁵⁵⁾ He, however, added that it was a convenient electoral college to the Legislative Council; that it was a useful safety valve politically in diminishing the influence of the Congress; and that it brought chiefs and commoners together. For these reasons he thought it would be unwise to abolish it.⁽⁵⁶⁾ A Northern Rhodesian Provincial Commissioner reported on the Broken Hill Native Urban Advisory Council in 1950 as follows: "...earlier enthusiasm is being replaced by a sense of frustration which

has expressed itself in the greater volume of grievances -- genuine and illusory....this is to be expected when council proposes and the Town Board disposes." (57)

The investment of the African Representative Council and the African Protectorate Council with the power to elect the African members of the Legislative Council could have popularized the two Councils, had it not been for the fact that the nationalist organizations did not initially seek to have their members enter the Legislative Council. It was not until 1955 that the Nyasaland African National Congress used the African Protectorate Council to secure seats in the Legislative Council. In Northern Rhodesia it was not until the introduction of the electoral system for all races by the 1958 Constitution that the African National Congress participated in the elections. (58) The nationalist organizations were unable to use the Councils earlier because their composition favoured conservative elements.

There is no doubt that had wider constitutional changes not taken place the provincial and territorial councils would have remained in spite of criticism. However, in 1958, constitutional changes were made in Northern Rhodesia which introduced a widened franchise for all races. (59) This brought the African Representative Council and the provincial councils to an end. In Nyasaland the 1961 Constitution introduced a franchise for all races and terminated the existence of the African Protectorate Council and the provincial councils. The native authority system, however, remained in both territories. (60)

51. Hailey, Native Administration..., Part 11, op.cit., p.74,

52. As quoted by Howman, op.cit., Part 11, p. 24.

53. As quoted Ibid., Part 111, p.2.

54. Ibid.

55. Ibid., Part 11, p. 37.

56. Ibid.

57. Ibid., p. 25.

58. See below, Chapter 8,

59. Ibid.

60. See below, Chapter 22, for the present position.

The representation of African interests by Europeans in the Legislative Council can be treated as part of African constitutional advancement in that its purpose was to give Africans some voice, albeit indirectly, in the Legislative Council. It was the first step towards representation of Africans by Africans in the Council. Before the introduction of these Unofficial European Members, the Official Members had played the role of guardians of African interests, where such interests conflicted with those of the settlers. In Nyasaland it became the practice from the very inception of the Legislative Council to include among the Unofficial Members a missionary who, although not officially designated as a representative of African interests, was, in fact, intended to act as such. Missionaries were considered to know and understand African problems and to be champions of African interests. This was to a certain extent true, particularly in Nyasaland, where Scottish missionaries, right from the days of Johnston, had assumed the role of spokesmen for the Africans.⁽⁶¹⁾

In nominating Europeans to represent African interests the Governor took into consideration two main qualities. The first was that the person must know and understand the Africans sufficiently to be able to speak on their needs and problems. The second was that the person must be able to command the confidence of the Africans. Gore-Browne, the first European to be appointed in Northern Rhodesia in 1930, was a wealthy farmer in the heart of Bemba land and knew many leading Africans. He had first entered the Legislative Council in 1935 as an elected Member for the Northern Electoral Area. In the same year he had made an historic speech in which he outlined the duties of a trustee (the British and Northern Rhodesian Governments) towards his ward (the African) under three headings - (a) the trustee's responsibility for the ward's material and physical welfare; (b) the trustee's responsibility for the ward's intellectual development - i.e. his education; and (c) the trustee's responsibility for the ward's moral advancement. He had blamed the Administration for its failure to carry out these responsibilities.⁽⁶²⁾ In 1936 he had told the Legislative Council that "the question of ultimate representation and immediate native consultation is one which is exercising a great many people!"⁽⁶³⁾ Later, in the same year, he had told the Legislative Council that "it would not be fair to ask the Imperial Government, as we know very well, to surrender its control of natives in the present native areas!"⁽⁶⁴⁾

20. All these statements and his knowledge of the Africans made him a suitable person to represent African interests. In Nyasaland the first person to be appointed to this role in 1941 was Bishop Thorne, the territory's Anglican Church primate.

The Members representing African interests (later increased in number in both Northern Rhodesia and Nyasaland) discharged their functions diligently. At first they were, however, handicapped by the absence of a machinery through which they could consult Africans. This prompted Gore-Browne to move a motion in the Legislative Council in 1941 calling for the establishment of African Councils, leading to a supreme council for the whole territory. Such councils were to have, among other functions, that of advising the Member or Members representing African interests.⁽⁶⁵⁾ When nothing was done by the Government, he moved a similar motion in 1942.⁽⁶⁶⁾ This motion resulted in the establishment of the provincial councils in 1943 and the African Representative Council in 1946. Similar councils were established in Nyasaland. Gore-Browne also advocated that qualified Africans should be placed on the voters roll.⁽⁶⁷⁾ In 1944 he supported a motion to this effect moved by Page. The Officials and the Labour Party Unofficial Members voted together to defeat the motion.⁽⁶⁸⁾

Although the Members tried to maintain as much as possible their role of representatives of African interests, the non-missionary ones often found themselves caught up between the conflicting interests of the Africans and the settlers. In addition to being representatives of African interests these Members were settlers who shared the aspirations of the settlers. For instance, in 1939, after Moore had resigned over the Eledisloe Commission's Report, Gore-Browne became the leader of the Unofficial Members. In that capacity he moved a motion in the Legislative Council deploring the indeterminate recommendations of the Commission.⁽⁶⁹⁾ When the Unofficial Members Organization was formed in 1945 Gore-Browne was elected its leader. Welensky, whose Labour Party had won five of the eight elected seats and would have accordingly become leader of the Organization, preferred Gore-Browne as leader, seeing in him as much a champion of settler rights as any of the Labour Party Members.

Please see footnotes on page 153.

As leader of the Unofficial Members Gore-Browne went to London on several occasions to press for settler constitutional advancement. In 1946 he resigned his leadership of the Unofficial Members Organization, because as a representative of African interests he could not support amalgamation which was opposed by Africans. In 1948, however, in an attempt to recapture his leadership of the settlers, he moved a motion in the Legislative Council demanding self-government. He wound up his speech with the threat that if the Colonial Office did not grant the demand the Un-Official Members would, if necessary, paralyse the Government.⁽⁷⁰⁾ The Africans were greatly angered by the speech⁽⁷¹⁾ and began to question the sincerity of Gore-Browne as a representative of African interests. They demanded that he should give an undertaking that at the forthcoming constitutional talks in London he would adhere to the Africans' viewpoint.

The motion shattered Gore-Browne's political career. He lost African confidence⁽⁷²⁾ and he was unable to regain European confidence. This resulted in his quitting the Legislative Council in 1951. It is difficult to say whether the Gore-Browne motion influenced the Imperial Government to come to the conclusion that the time had come to have Africans in the Legislative Council to represent their own people, for the Constitution concluded that year - 1948 - provided for two African Members.

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61. Hetherwick, the missionary who had opposed Johnston on African taxation and other matters was later nominated to the Legislative Council.
62. N. R. Legco Debates, 2 Dec., 1935, pp. 195-200. The speech is quoted at length in Davidson, op.cit. pp.73-76.
63. N.R. Legco Debates, 4 May, 1936, pp. 70-71.
64. Ibid., 29 Oct., 1936, p. 251.
65. Ibid., 12 March, 1941, pp. 64-67.
66. Ibid., 17 Sept., 1942, pp. 148-168.
67. Ibid.
68. Ibid., 9 August, 1944, pp. 176-196.
69. Note, however, that when other Members questioned the genuineness of African opposition because Africans did not understand the issue, Gore-Browne said: "Those of them who are able to read newspapers..must have seen again and again that one of the main advantages of amalgamation with Southern Rhodesia which was put forward was that the whiteman would be free from a possibility of competition with the native..." Ibid., 6 June, 1939. p.458.
70. Ibid., 12 Jan., 1948., pp. 829 - 831.
71. The African Representative Council passed a resolution condemning the demand for self-government and stating that Northern Rhodesia was a blackman's country - African Representative Council Proceedings, 5 July, 1948, pp. 8 - 66.
- No. 72 - please see bottom of page 254.

THE FIRST AFRICANS IN THE LEGISLATIVE COUNCIL

It is an open question whether the representation of African interests by Europeans delayed or hastened African entry into the Legislative Council. However, when the arrangement was introduced, it was recognised that it would be a temporary measure. In 1941, while moving a motion for the establishment of African councils, Gore-Browne reminded the Legislative Council Members that European representation of African interests was a "stopgap" measure and that although it would continue for a long time it would finally come to an end. While moving a similar motion in 1942, he again reminded the Members of this fact. Even Welensky who, at that time, thought Africans could not be organized into Trade Unions told the Legislative Council during the debate of Gore-Browne's motion of 1942 that the country should expect direct African representation in the Council one day.⁽⁷³⁾

The constitutional alterations in Northern Rhodesia in 1948 and in Nyasaland in 1949 introduced the first Africans into the Legislative Council. In each case two Africans were involved. The years 1948 and 1949 can, therefore, be said to mark the beginning of real African constitutional advancement.

The inclusion of Africans in these institutions was, in fact, already overdue for in other territories it had taken place much earlier. To mention but a few instances, in the Gold Coast (now Ghana) the first African was appointed to the Legislative Council in 1888.⁽⁷⁴⁾ Before the constitutional changes of 1916, of the four Unofficial Members in the Legislative Council, two were Africans.⁽⁷⁵⁾ The 1916 Constitution raised the number of Africans to five and that of Europeans to three.⁽⁷⁶⁾ In 1942 two Africans were admitted to the Executive Council.⁽⁷⁷⁾ They were the first Unofficial Members (European or African) to sit in the Executive Council. The 1946 Constitution⁽⁷⁸⁾ produced a majority of elected Africans and thereafter progress was very rapid towards self-government in 1951.

72. Outside the Legislative Council Gore-Browne worked to regain the confidence of the Africans. He later became a member of the United National Independence Party and joined Dr. Kaunda in petitioning the United Nations for African rule in 1962.

73. N. R. Leroco Debates, 17 Sept. 1942, p.155.

74. De Smith, S.A. "The Independence of Ghana" (The Modern Law Review, Vol. 20, July, 1957) pp.347-363, at p.348.

75. Dennion, The Constitutional Law of Ghana (London, Butterworths, 1962) p. 26.

76. Ibid., p. 26.

77. De Smith, op. cit., p. 348.

78. S.R. & O. 1946, No. 353. See, too, de Smith, ibid.

p.349; Dennion, op. cit., pp. 37-49.

79. See the Constitution introduced that year, S.I. No. 2094 of 1950. See, too, de Smith, ibid.; Dennion, ibid., pp. 41-45. For the constitutional and political history of Ghana, see generally de Smith; Dennion; Wight, The Gold Coast Legislative Council (1947); Deurett, The Gold Coast, (2nd Ed. 1952); Wiseman, "The Gold Coast: From Executive Council to Responsible Cabinet" (10 Parliamentary Affairs 27) p.195; Holland, "Constitutional Experiments in British West Africa" (2 Public Law, 1957) p.42; The Autobiography of Kwame Nkrumah 1957, The Making of Ghana (London, H.M.S.O., 1957).

In Nigeria (annexed in 1961) a Legislative Council was established in 1962 and when it was abolished in 1922 it had four Unofficial Members - two Europeans and two Africans.⁽⁸⁰⁾ In the new Legislative Council constituted in 1922, six African and seven European Unofficial Members were nominated.⁽⁸¹⁾ The Richards Constitution of 1946 produced an African majority.⁽⁸²⁾ In 1943 the first Unofficial Members - two Africans and one European - were admitted to the Executive Council.⁽⁸³⁾ The 1951 Constitution provided for a Council of Ministers of twelve Africans and six European Officials.⁽⁸⁴⁾ European Unofficial Members disappeared. Nearer to Northern Rhodesia and Nyasaland, in Tanganyika, which had its first Legislative Council in 1920,⁽⁸⁵⁾ two Africans were included in the Legislative Council in 1945.⁽⁸⁶⁾ Two more were added by the 1948 Constitution,⁽⁸⁷⁾ bringing them to four.⁽⁸⁸⁾ In Kenya the first African was appointed to the Legislative Council in 1944. In 1947 a second was appointed and in 1948 two more were appointed bringing the total to four. In 1952 an African was included in the Executive Council, taking the place of a European representing African interests.⁽⁸⁹⁾ On the other hand, it was not until 1959 that Africans sat on the Executive Council in Nyasaland and Northern Rhodesia.⁽⁹⁰⁾

As mentioned above, the African members of the Legislative Council were elected by the African Representative Council in Northern Rhodesia and the African Protectorate Council in Nyasaland. This system was adopted because neither the Colonial Office nor the territorial Governments in Northern Rhodesia and Nyasaland was in favour of direct elections. It has been mentioned that when Page, supported by Gore-Browne, moved a motion in the Northern Rhodesia Legislative Council to include Africans on the voters roll, the officials voted against the motion.⁽⁹¹⁾ The Governor did not favour the inclusion of Africans on the voters roll, because it would give a small group of educated Africans an importance denied to their uneducated leaders (the Chiefs). He wanted a pyramid of councils (as was later developed) with a territorial council charged with the responsibility of electing African members to the Legislative Council when that stage arrived.

The Colonial Office shared the views of the Northern Rhodesia Governor on this issue. In 1947 the Colonial Secretary warned of the danger of appointing Africans to the state legislatures without regard to the African society structure. He stated with regard to the filling of such positions: "...these positions are necessarily being filled by men from the educated minority..(T)his, inevitable as it is, carries one danger for the future..the creation of a class of professional African politicians absorbed in the activities of the centre and out of touch with the people themselves!"⁽⁹²⁾

24. He went on to say that elections were unsuitable where there was no intelligent interest, since professional politicians and persons from the urban areas who were not representative of the rural areas and tribes would be elected. The answer, he said, was indirect elections through a pyramid of councils.⁽⁹³⁾ This attitude persisted at the Colonial Office for a long time after the statement just quoted. For instance, when questioned why the elective system had not also been extended to Africans by the 1955 constitutional changes in Nyasaland, the Colonial Secretary, Lennox-Boyd (Now Lord Boyd) said: "I consider that the present method of selection of African members of the Legislative Council is the most suited to the present stage of social and educational development of the African population in Nyasaland."⁽⁹⁴⁾

It is clear that the denial of the elective system to the Africans was to keep the position of the chiefs supreme over that of the educated and progressive Africans. The Colonial Office had maintained this policy in practically all the territories in Africa until it became no longer tenable. The policy of indirect rule, was, among other things, intended to check the development of political systems divorced from the traditional rulers. It was the intention of the Colonial office and the territorial governments in Africa to see constitutional development of the African people revolve around the chief. It was for this reason that in some cases the first African members to be nominated to the Legislative Council were chiefs.⁽⁹⁵⁾ The attitude of British Administrators in Africa towards an elective system and the position of educated Africans vis-a-vis that of chiefs is best shown by the words of the Governor of Nigeria in 1920 when he denounced a petition submitted to the Colonial Secretary by the West African National Congress calling for the introduction of an elective system in Nigeria. After describing the petition as "loose and gaseous talk", he denounced it further as an idea coming:

"from a self-elected and self-appointed congregation of educated African gentlemen who collectively style themselves the West African National Congress..a handful of men..born and bred in the British administered towns situated on the seashore, who in the safety of British protection have peacefully pursued their studies under British teachers in British schools, in order to enable them to become Ministers of Christian religion or learned in the law of England..men, whose eyes are fixed..not upon their own tribal obligations and the duties to their natural rulers which immemorial custom should impose upon them, but upon political theories evolved by Europeans to fit..wholly different circumstances." (96)

Please see page 157 for footnotes.

25. This type of thinking, of course, changed with the years but the change was very slow. As already seen above, a Colonial Secretary still defended the non-elective system as suitable for the Africans of Nyasaland as late as 1955. It was not until the 1958 and the 1960 constitutional changes in Northern Rhodesia and Nyasaland respectively that the Colonial Office found it no longer possible to withhold popular elections.⁽⁹⁷⁾

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80. Odumosu, O.I. The Nigerian Constitution: History and Development (London, Sweet and Maxwell, 1963) pp. 12 and 143.
81. Ibid., pp. 23 and 144.
82. Nigeria (Legislative Council) Order in Council, No. 1370 of 1946. See also Odumosu, op.cit., pp. 43 et seq. and 145 et seq.
83. Odumosu, op.cit. pp. 22 and 175.
84. Ibid., p. 176.
85. Tanganyika (Legislative Council) Order in Council (S.R. & O 1926, No. 991)
86. Cole, J.S.R. and Donison, W.N. Tanganyika: The Development of Its Laws and Constitution. (London, Stevens, 1944) p.39.
87. S.I. 1948, No. 105.
88. The total composition of the Legislative Council was then 14 Officials (excluding the Governor) 7 Europeans Unofficial Members and 4 African Unofficial Members.
89. For a short account of constitutional development in Kenya, see Mathewson, op.cit., pp. 66-70.
90. This was after the 1958 constitutional changes in Northern Rhodesia and the 1959 temporary changes in Nyasaland.
91. See Section 2 of this Chapter and N. R. Legco Debates, 9 Aug., 1944, pp. 176-196.
92. Howman, op.cit., Part II, p. 2. quoting.
93. Ibid.
94. House of Commons Debates, Vol. 537, Col. 58, 16 Feb. 1955.
95. This was so in the Gold Coast, Nigeria and Tanganyika, for instance.
96. As quoted by Odumosu, op.cit., p.15.
97. See Chapter 3 below.

End of Chapter 5.

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CHAPTER SIXTHE CLOSER ASSOCIATION MOVEMENT 1890 - 1953

Had it not been for the Jameson Raid and, later, the rejection of the British South Africa Company's amalgamation scheme by the elected members of the Southern Rhodesia Legislative Council, amalgamation of Northern and Southern Rhodesia would almost certainly have taken place quietly either between 1895 and 1898 or 1916 and 1918. In 1895 a draft Northern Zambesia Order in Council had been prepared to extend the provisions of the Matabeleland Order in Council, 1894, to the North of the Zambezi.⁽¹⁾ Had the Order been extended, it would have placed the two territories under one administrator and, subsequently, under one Legislative Council. The constitutional differences that later developed between the two territories would, perhaps, not then have arisen. The Jameson Raid made the Imperial Government change its mind on the extension of the Matabeleland Order in Council and this resulted in different constitutional arrangements for Northern Rhodesia.⁽²⁾

1. See above, Chapter 2.

2. Ibid.

In December, 1915, the Company put forward a scheme for the amalgamation of the two territories.⁽³⁾ The scheme sought to place the two territories under one Administrator who would run them as a single unit. The Administrator was to operate from Salisbury, but a senior official was to be stationed at Livingstone to run the day to day affairs of Northern Rhodesia. The Administrator was also to be the Secretary for Native Affairs and in this function he was to be assisted by two Chief Native Commissioners - one for Southern Rhodesia and the other for Northern Rhodesia. The two territories were to have one Legislative Council, making laws for the whole unit except Barotseland which was to remain under the authority of the High Commissioner. The Legislative Council was to be composed of fifteen elected and eight nominated members. Two of the nominated Members were to represent African interests. Roman-Dutch Law was to be extended to Northern Rhodesia.

The Company's reasons for wanting amalgamation were partly political and partly administrative. Administratively, the Company Directors thought union would reduce the expenses of running the two territories as well as make the civil service more efficient through replacement of the older type of official in Southern Rhodesia by young and better educated officials from the North. It was also going to save the Company from the costs of finally establishing a Legislative Council for Northern Rhodesia. Politically, the Directors were of the opinion that amalgamation would: (a) strengthen Rhodesia vis-a-vis the Union of South Africa; (b) increase the English element in Rhodesia; (c) advance the constitutional position by adding more elected members to the Legislative Council; (d) bring about a common native policy; and (e) strengthen both the Company and the settlers in their relations with the Imperial Government.

3. See Rhodesia Herald, 31 Dec., 1915, for a statement on the scheme. The scheme was published under the title: Draft Scheme of Administration.. (Salisbury, Govt. Printer, 1916). See also B.S.A.Co. to F.P.D. Chaplin: 18 Mar, 1916, in Annex 1 to B.S.A.Co. Minutes: 23 March, 1916: Draft Scheme of Administration, in Annex 3 to B.S.A.Co. Minutes: 13 April, 1916, (in L61/2/83 Nat. Arch. S.R.). For correspondence between the Company officials before the publication of the scheme, see for instance, F.D. Chaplin to Sir H. Birchenough: 10 Aug. 1915 (CH 8/2/2/2, f12-17 Nat. Arch. Ms.); Ibid., 21 Sept. 1915, (CH 8/2/2/2, F24-32, Nat. Arch. Ms.): For earlier suggestions for amalgamation, see Selborne's view that the Northern Rh. Railway Belt should join Sth. Rh. African 872, No. 118, 17 June, 1907. See further, African 948, No. 68 Encl. 19 May, 1911, where the High Commissioner (Selborne) acknowledged having found wide support in the two territories (N. and S. Rhodesia) for amalgamation. For the history of the closer associating movement from 1915 onwards, see Gann, A History of Northern Rhodesia pp. 74 et seq., Palley, op.cit., pp. 325 et seq., Taylor and Dvorin, "Political Development in British Central Africa 1890-1956: A Selective Survey of Literature and Background Materials" (Race, Vol. 1, No. 1, 1959) pp. 61-78; Røfberg, Robert I. "The Federation Movement in British East and Central Africa 1889-1953" Journal of Commonwealth Political Studies, Vol. 2, No. 2., pp. 141-57.

The scheme had a mixed reception in both Southern and Northern Rhodesia. In Northern Rhodesia it received support from some farmers who thought it would promote cattle exports to the South. The bulk of the settlers, led by Moore, however, opposed the scheme. The arguments against it were: that it would move the capital⁽⁴⁾ to Southern Rhodesia, leaving Livingstone a mere village, to the detriment of those who had invested money there; that the Congo Market would be lost by the Northern Rhodesia farmers to their Southern Rhodesia counterparts; that all senior officials would go to Southern Rhodesia, leaving Northern Rhodesia at the mercy of junior officials; that Northern Rhodesia representatives in the Legislative Council would be swamped; that Company rule, which they were determined to bring to an end, would be perpetuated; that Northern Rhodesia would lose African labour to the South where wages were higher; and, finally, that it was only the Company which would benefit from the scheme by cutting down its administrative expenses.⁽⁴⁾

In Southern Rhodesia opinion was even more sharply divided. This was reflected during the debate in the Legislative Council on the scheme. The settler Members in support of the scheme, like Lionel Cripps (a prominent farmer from the Eastern Districts), argued that amalgamation would strengthen Rhodesia economically and politically, placing her in a stronger position in the event of joining the Union of South Africa. Cripps warned that if amalgamation did not take place Northern Rhodesia would finally join the East African territories in a Federation, leaving Southern Rhodesia between a Federation in the North and a Union in the South. This would force Southern Rhodesia to drift towards the Union of South Africa and to join it owing to pressing circumstances rather than a desire to do so. He dismissed the fear of being swamped by Africans as unsound, adding that a loyal African population could, in fact, be an advantage. Opposition to the scheme was led by Charles Coghlan (later knighted), a leading Bulawayo lawyer and the most prominent of the settler leaders.⁽⁵⁾ His arguments were: that amalgamation would delay self-government for Southern Rhodesia; that whites would be swamped by Africans from the North; that although he did not like colour-bar, because Europeans were faced with a huge black majority, there was justification in excluding even educated Africans from the franchise⁽⁶⁾ which would not be possible if the territories were united; that it would financially burden Southern Rhodesia,⁽⁷⁾ that Roman-Dutch Law could be extended without amalgamation; and, lastly, that the scheme would benefit only the Company and not the public. At the end of the debate, a motion accepting the scheme was passed but the elected Members voted against it.⁽⁸⁾

The negative vote by the elected Members saved the Colonial Office from a dilemma. It was not in favour of amalgamation, but would have found it difficult to reject the scheme had the elected members voted for it. When the scheme was submitted to him, the Colonial Secretary, armed with a good excuse, vetoed it on the grounds that it could not be put into effect against the opposition of the majority of the elected members. He wrote to the Company as follows:

"I cannot ignore the fact that whether for good or for evil you have got an elective body in Southern Rhodesia. Once you allow a country to elect representatives it is impossible in my judgment for H.M. Government to ignore the opinions of the elected members or to go in direct opposition to the majority of them. I am confident that to do this would land any Secretary of State in grave difficulties, would impose upon him responsibilities which would create difficulties for the people responsible for government; which might be of the most formidable kind."⁽⁹⁾

Although the Colonial Office was not keen on the scheme, its exercise of the veto was a result of the hostility the settlers had shown to the scheme. The settlers had rejected their opportunity for amalgamation. When, "by the end of the twenties (they) at last woke up, the chances (had) slipped out of their grasp."⁽¹⁰⁾

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4. See Gann, op.cit., for a summary of these arguments. For the full speech, and those of others, see S.R. Legco Debates, 4th Session of the 6th Council, April, - May, 1917.
 5. Coghlan, who became first Prime Minister of self-governing Southern Rhodesia, later became a strong advocate of amalgamation.
 6. The existing franchise was open to all races but Coghlan did not think that this was a good arrangement.
 7. Copper had not yet been discovered in Northern Rhodesia. Its subsequent discovery made Southern Rhodesia leaders change their attitude in favour of amalgamation.
 8. See S.R. Legco Debates, 4th Session of the 6th Council, April - May, 1917, pp. 309-386. See also Jollie, Ethel Tawse, The Future of Rhodesia, (a pamphlet) (Bulawayo, 1917), which gives a full account of the objections to the scheme; Gann, op.cit., pp. 176 et seq. which gives a short summary of the arguments in Southern Rhodesia for and against the scheme.
 9. W. H. Long to P. D. Chaplin: 28 Dec., 1917 (CH 2/2/8, f8/187 - 195 Nat. Arch. Ms.)
 10. Gann, L. H., and Gelfand, M., Huggins of Rhodesia (London, Allen and Unwin, 1964) p. 82.

5. Disappointed at the veto of its scheme, the Company sought to place the administration of the two territories under one administrator without amalgamating them. It argued that it had to do so in order to cut down its administrative costs and to get some uniformity in policy.⁽¹¹⁾ The Colonial Office saw nothing objectionable about the new proposal. However, approving such a proposal soon after vetoing an amalgamation scheme would have raised suspicions. Accordingly the Colonial Office delayed its decision.⁽¹²⁾ It was, therefore, not until 1921 that the Rhodesia (Administrator) Order in Council was enacted. The Order placed the two territories under one Administrator and this remained the position until the end of Company rule.

11. P.D. Chaplin to High Commissioner: 28 May, 1917, Annex to B.S.A. Co. Minutes: 2 Aug., 1917 (in LO 1/2/86, Nat. Arch. Ms.)

12. See H. Wilson Fox to P.D. Chaplin: 3 Jan., 1918, (CH 8/2/1, F2027-2031, Nat. Arch. Ms.).

In 1917 no one seriously thought of Nyasaland joining the Rhodesians in a union or federation. There was, however, scattered talk of such a possibility and this prompted missionary - politician Alexander Hetherwick to write as follows against any link of Nyasaland with Southern Rhodesia:

"The conditions of the country are all against any such proposal. Nyasaland is a blackman's country. There is no scope within it for the settlement of a white population such as the South African Colonies and Southern Rhodesia afford. The place of the European in the protectorate is that of administrator of its government or director of its commercial or agricultural enterprises. The work of development will be done by the native himself under the Whiteman's rule and leadership. The future problems and lines of development are altogether different from those of South Africa. The River Zambezi has always been a natural boundary between Central and South Africa!" (13)

While there was very little talk at this time of Nyasaland joining a union or federation including Southern Rhodesia, a number of people were exercising their minds on a federation of Nyasaland and Northern Rhodesia or of the two territories with the East African territories. Hetherwick, in the above cited article, argued for a federation of Nyasaland and Northern Rhodesia^(13a) as a first step towards a wider federation of British East and Central African states. In 1918, Frank Melland, a Northern Rhodesian civil servant, advocated a confederation of Nyasaland, Northern Rhodesia, German East Africa, Kenya and Uganda.⁽¹⁴⁾ Lugard later suggested the division of East and Central African territories into two groups - one group comprising Nyasaland, Northern Rhodesia and Tanganyika and the other, Uganda, Kenya and the Sudan.⁽¹⁵⁾ He thought Southern Rhodesia, whether she joined the Union of South Africa or not, belonged to the South African group of territories.⁽¹⁶⁾

13. Hetherwick A. "Nyasaland Today and Tomorrow" (Journal of the African Society, Vol. 17, No. 65, 1917) pp. 11-19.

13a. See also Rhodesia Herald of Aug. 18, 1916, which in a leading article argued for amalgamation of Northern Rhodesia and Nyasaland.

14. "Africanus" (pseudonym for Melland), "A Central African Confederation", (Journal of the African Society, Vol. 17 No. 68, 1918) pp. 276-306.

15. Lugard, The Dual Mandate, p. 182.

Footnote No. 16 on page 7.

EARLY SETTLER MOVES ON CLOSER ASSOCIATION

In 1923 and 1924 already seen in Chapter Two, Company rule came to an end in Southern Rhodesia and Northern Rhodesia respectively. Southern Rhodesia obtained self-government which, in 1917, the elected members of the Southern Rhodesia Legislative Council had argued would be delayed if the territory amalgamated with Northern Rhodesia. Northern Rhodesia, on the other hand, became a protectorate. During the negotiations on the termination of Company rule, as has also been seen in Chapter Two, amalgamation schemes of parts of Northern Rhodesia with South/^{ern} Rhodesia, Nyasaland and Bechuanaland were suggested but not adopted by the Imperial Government. In 1924 copper was discovered on the present Copperbelt of Zambia, making Northern Rhodesia's economic prospects very bright. It became clear that Northern Rhodesia would no longer be the economic burden that Coghlan had feared in 1917. Opinion in Southern Rhodesia, therefore, suddenly changed, in favour of amalgamation.

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16. Ibid: On April 14, 1921, Sir J. Rees, an advocate of the creation of a single administrative area from Nyasaland to Lake Rudolph, asked the Colonial Secretary, Churchill, whether he could make a statement on the issue. Churchill replied that the Government could not make a statement at the time on the future administrative changes to be made in East Africa - Hansard, vol. 140 Col. 1330: 14 April, 1921. On September 14, 1921, The Times reported an unconfirmed story that the Secretary of State for the Colonies was engaged in a re-organization of the Crown colonies and Protectorates into groups based on their geographical position and that such groups would be placed under High Commissioners with a great deal of autonomy. See also a letter by Sir T. Morison in The Times, July 21 1920. For a summary of the thinking at that time on creation of groupings of territories, see Lugard, ibid., pp. 179-184. Suggestions had also been made earlier and even discussed in the British Parliament on a confederation of Southern Africa States - see e.g. Hansard, (3rd Ser.,) Vol. CCIV, Col. 1275, 1871; ibid., CCIV, 806; 1872; ibid., CCXIV, 790, 1873; ibid., CCLii, 461, 1830; Parl. Papers 1876, Lii (C.1399) and (C.1631); 1877, LX (C.1681). See also The Selborne Memorandum (1907) (Cd. 3564). This Memorandum was republished by Basil Williams (Oxford, U.P., 1925). See further, Butler, J.R.M. "Imperial Questions in British Politics, 1868-1880", (in The Cambridge History of the British Empire, pp. 17-64, at 40; Robinson, R.E. "Imperial Problems in British Politics, 1880-1895" (in ibid.) pp. 127-180, at pp. 134-5.

Interest in closer association started simultaneously in both Southern and Northern Rhodesia in 1925 but it was not directed towards each other. White Southern Rhodesia was looking for ways to amalgamate with Northern Rhodesia, the latter was looking for ways to federate with the East African territories. In 1924 a British Parliamentary Commission comprising a Tory Member (W. Ormsby-Gore), a Labour Member (Major Church) and a Liberal Member (Finfield) had visited Uganda, Kenya, Tanganyika, Northern Rhodesia and Nyasaland. It recommended⁽¹⁷⁾ co-operation between these territories but thought "that the day is still far off when such co-operation could be brought about by the imposition of federal government over the whole of the territories."⁽¹⁸⁾ The Commission, however, recommended periodic conferences of East African Governors at which the Governors of Nyasaland and Northern Rhodesia would be present. The first of these conferences was held in 1926 and agreement was reached on a number of matters, including a "dual policy" of development between white and black and several technical subjects. Before the Governors met the Unofficial Members of the Legislative Councils of East Africa, Nyasaland and Northern Rhodesia had met in 1925 at Tukuyu in Tanganyika. Like the Governors the following year, they had found the lack of communication facilities, e.g. roads, railways, a stumbling block to real co-operation between their territories.

They had, however, agreed on several matters, including the promotion of further white settlement. The idea of a federation had not been fully discussed at this meeting. In 1926 the Unofficial Members met again at the Victoria Falls. At this meeting they agreed that for the time being federation was impracticable owing to poor communications. This left Northern Rhodesia free to turn to the south for a political link. Such a link appeared natural to a considerable number of Northern Rhodesian settlers because of the railway line.⁽¹⁹⁾

In the meantime, as Northern Rhodesian Unofficial Members were meeting their East African and Nyasaland counterparts, the Southern Rhodesian Government was making approaches to the Colonial Secretary on amalgamation of Southern and Northern Rhodesia. Coghlan (the Prime Minister) instructed his High Commissioner in London to hold discussions with the Colonial Office on this subject. After these informal discussions Newton reported to Coghlan that the Colonial Secretary was willing to split Northern Rhodesia into three parts - giving the eastern part to Nyasaland, the middle portion (or the railway belt) probably to Southern Rhodesia, leaving Barotse-land as an African reserve.⁽²⁰⁾ The discussions between Newton and the Colonial Secretary led to a meeting in London between Coghlan, the Secretary of State in 1926.

9. Further talks were held in 1927 when the Secretary of State visited Southern Rhodesia. The talks were unsuccessful. The Colonial Office had become more interested in a federation of Northern Rhodesia and Nyasaland with the East African territories.⁽²¹⁾ The Dominions Office was, however, in favour of the amalgamation of Northern and Southern Rhodesia although it did not make a public pronouncement on the matter for fear of embarrassing questions in the House of Commons on native policy.⁽²²⁾

While Southern Rhodesia was making these approaches to the Colonial and Dominions Offices, it also sought to start a dialogue with the leaders of the Northern Rhodesian settlers. Both fronts had to be won to the idea of amalgamation. It would not be sufficient to win over the Colonial and Dominions Offices Northern Rhodesia's settlers remained opposed to the plan. Consequently, in 1927 the Southern Rhodesian Cabinet resolved that a conference be held between representatives of Southern and Northern Rhodesia.⁽²³⁾ The Imperial Government refused to sanction such a conference pending the visit of the Hilton Young Commission whose appointment had just been announced. Informal discussions were, however, held between three Northern Rhodesian non-Officials and the Southern Rhodesian Cabinet in 1928.⁽²⁴⁾ The majority of the officials were still at that time opposed to amalgamation.

17. Report of the East African Commission (popularly known as the Ormsby-Gore Report) (Cmd. 2387 of 1924)

18. Ibid., p. 7.

19. See Chronicle (Bulawayo) 2 Dec., 1925, where H.M. Moffat, then Minister of Mines and Works (later Prime Minister) was reported as saying that vesting of railways in a public interest would require amalgamation of the Rhodesias first.

20. Newton to Coghlan: 20 July, 1925 (CO 3/1/2, Nat. Arch. SR)

21. For the Colonial Office's attitude, see N.E. 1/1/1, Newton to Coghlan: 2 June, 1927. The Colonial Secretary apparently personally favoured amalgamation - Palley, op.cit., p.327, quoting a confidential source. It was, perhaps, the discovery of copper that had made the Colonial Office unwilling to part with Northern Rhodesia - Palley, op.cit. p.327, n.l.

22. National Archives NEL/7/7, Newton to Moffat: 9 Aug, 1928.

23. See National Archives LE 3/2/1/2: Cabinet Resolutions 684 of December, 1927 and 710 of 5 January, 1928.

24. For a record of the discussions, see National Archives LE3/1/1, 12 March, 1928, Livingstone Mail, March, 29, 1928. See also Gann, op.cit., pp.247-248. The three Northern Rhodesia non-officials (Murray, Stirke and Gordon) demanded a full amalgamation programme with one Parliament and one Cabinet in both of which Northern Rhodesia was to be adequately represented; the application of one law in both territories; purchase of the company mineral rights by the unified state; construction of the Kafue line, and that any amalgamation plan had to apply to all of Northern Rhodesia. The Southern Rhodesia Cabinet accepted all the demands except the construction of the Kafue line which they considered expensive. The talks produced no results, however.

At the time when the Hilton Young Commission was appointed the Northern Rhodesians were sharply divided on the question of closer association. The Northern Rhodesian Government was opposed to amalgamation on several grounds. The main ones were: that it would deprive the Northern Rhodesian farmers of the Katanga market in favour of Southern Rhodesian farmers; that it was better to have the railways run by the Chartered Company than to have supervision from the Southern Rhodesian Government; that Livingstone would be listened to better in London than Salisbury; and that the Government in Salisbury might expend money in a manner detrimental to the interests of Northern Rhodesia. The Officials did not like even the limited amalgamation of only the railway belt. They thought this would complicate labour problems of the mines and would give all the mining wealth to the Europeans while the Africans would remain with no viable economic resources.⁽²⁵⁾

While the Officials were solidly against amalgamation, the settlers were divided. Shopkeepers, led by Moore, opposed it because Southern Rhodesian traders would take business from them. Those at Livingstone feared the slump that would follow the transfer of the capital to Salisbury.⁽²⁶⁾ Farmers were sharply divided. Those against amalgamation argued that it would throw the territory's farmers into competition with the best equipped Southern Rhodesian farmers. Those in favour of amalgamation argued that Northern Rhodesian farmers would benefit from the superior agricultural and veterinary services of Southern Rhodesia.⁽²⁷⁾ non-Officials in the Legislative Council were also divided, with the majority against amalgamation. Captain Murray led the pro-amalgamation faction while Moore led the opposite faction. The attitude of the majority is illustrated clearly by Moore's reaction in the Council to a proposal on amalgamation. Referring to the speech of one of the supporters of the proposal, Moore stated:

"The Hon. Member said it was preferable to be governed by the Government of a United Rhodesia than from Downing Street. Of course, he knows. He must know. He has the God-like faculty of knowing everything. My experience is very much more limited than his, and I say you can do even worse than Downing Street, it would be by submitting all our affairs and direction, to a United Rhodesia. My opinion is that whatever money is available will be spent where the balance of voting power is, and that is not North of the Zambezi....Governments are always despotic, whether, it is that of Downing Street, or Salisbury or Pretoria, the despotism is much the same and equally resented."⁽²⁸⁾

25. See Gann, *op.cit.*, for a summary of these arguments.

26. See *Ibid.* for a summary of these arguments.

27. *Ibid.*

28. *N.R. Legco Debates*, 23 April, 1928, p. 127.

He described as "absurd" the proposition "that you can make 25 years' progress in one day by the stupid act of amalgamation"⁽²⁹⁾ When a motion was introduced in the Council in 1929, only its mover (Captain Murray) and his seconder (K. E. W. Harris) voted for it.⁽³⁰⁾ Anti-amalgamation feeling was so high among the non-Officials that at one stage some of them suggested that the territory's name should be changed to Zambesia, Transzambezia, Zambeziland, Cecilia or Windsoria,⁽³¹⁾ to distinguish it from Southern Rhodesia.

The Mining Companies also disliked amalgamation. Chaplin, who as Administrator had urged amalgamation, had now changed stands with Sir Charles Coghlan, who as a member of the Southern Rhodesian Legislative Council had led the opposition against the Company's scheme in 1917. Coghlan was now championing amalgamation while Chaplin, now a Director of the Chartered Company and of the Anglo-American Corporation, strongly opposed it.⁽³²⁾

29. Ibid. See also Davidson, op.cit., p.90 et seq. for non-Officials' views.

30. Ibid., 21 November, 1929, p. 166.

31. Ibid., 5 March, 1926, p. 21-23.

32. See, for instance, oral evidence given by Chaplin to the Hilton Young Commission, 17 April, 1928 (CH 5/2/1, f3177-3191, Nat. Arch. Ms.) At this time Moffat had become Southern Rhodesia's Prime Minister. For his evidence to the Commission, see National Archive LE 3/1/1, Confidential Speech by Moffat to the Hilton Young Commission, 30 March, 1928. For Moffat's views on amalgamation, see also Moffat to Downie, June 18, 1931, (DO 1/1/6, Downie Papers, Nat. Arch. MS.).

In November, 1927, the Secretary of State announced the appointment of a Royal Commission⁽³³⁾ whose terms of reference were:

- (1) To make recommendations as to whether, either by federation or some other form of closer union, more effective co-operation between the different Governments in Central and Eastern Africa may be secured, more particularly in regard to the development of transport and communications, customs tariffs and customs administration, scientific research and defence.
- (2) To consider which territories could either now or at some future time be brought within any such closer union...
- (3) To make recommendations in regard to possible changes in the powers and composition of the various Legislative Councils of the several territories: (a) as the result of the establishment of any Federal Council or other common authority; (b) so as to associate more closely in the responsibilities and trusteeship of Government the immigrant communities domiciled in the country; (c) so as ultimately to secure more direct representation of native interests in accordance with (4) below.
- (4) To suggest how the Dual Policy recommended by the Conference of East African Governors (i.e. the complimentary development of native and non native communities) can best be progressively applied in the political as well as the economic sphere;
- (5) To make recommendations as to what improvements may be required in internal communications between the various territories so as to facilitate the working of federation or closer union.
- (6) To report more particularly on the financial aspects of any proposals which they make under any of the above headings." (34)

In Central Africa it heard evidence in Nyasaland and Northern Rhodesia as well as in Southern Rhodesia, although the latter was not one of the territories it was to report on. It became necessary to hear evidence from Southern Rhodesians in order to make the recommendations on Northern Rhodesia and Nyasaland (particularly the former) complete. The commission did not, however, receive a great deal of evidence in Central Africa.⁽³⁵⁾ For instance, apart from the Paramount Chief of Barotseland, Yeta III, who gave both oral and written evidence, no Africans are listed in the Commission's Report as having given evidence.⁽³⁶⁾ This is understandable. Africans were not yet concerned about the issues involved. The position was, of course, different ten years later when the Bledisloe Commission came.⁽³⁷⁾

33. See Cmd. 2904 of 1927 - Future Policy in Regard to Eastern Africa. It was headed by Sir E. Hilton Young and the other members were Sir Reginald Mant, Sir George Schuster and Mr. J.H. Oldham.

34. Ibid. The terms are also contained on pp. 5-6 of the Report of the Commission (Cmd. 3234 of 1929).

35. In Nyasaland it heard 49 witnesses and received 1 memorandum. In Northern Rhodesia it heard 37 witnesses and received 10 memoranda while in Sthn. Rhod. it heard only 15 witnesses and received 1 memorandum - see Appendix to Report.

36. See Appendix to Report.

37. See below, in this Chapter.

The Commission reported in January 1929.⁽³⁸⁾ The Chairman differed from the other three Commissioners and wrote a minority report.⁽³⁹⁾ In his minority report Sir Hilton stated that there was need for co-operation in communications, defence, customs, research and other common services between the territories. He, however, dismissed as unreal at the time the linking of Nyasaland and Northern Rhodesia with East Africa. He thought the two territories had much in common with Southern Rhodesia and did not see much dissimilarity in their native policies. He ruled out the question of a federation between Nyasaland and Northern Rhodesia but recommended the establishment of a Central Authority for the two territories. The Central Authority, he suggested, could be created by appointing the Governor of Southern Rhodesia as High Commissioner for Northern Rhodesia and Nyasaland. The High Commissioner would then exercise the powers of the Secretary of State in safeguarding Imperial interests, ensuring active and consistent application of matters of native policy and the relationship between the native and immigrant communities and co-ordination of matters of defence, communications, customs and research.

In regard to Northern Rhodesia Sir Hilton suggested boundary changes - i.e. amalgamation of North - Eastern Rhodesia with Nyasaland; Central Northern Rhodesia (the railway belt) with Southern Rhodesia; and the creation of Barotseland as an inalienable African reserve administered by the Government of Southern Rhodesia. The new territories were then to have a central Legislative Council (dominated by Greater Rhodesia) in addition to their territorial Legislatures to handle common matters. Sir Hilton, however, cautiously added that the decision "as to final grouping of the three territories or as to the closeness of the union into which they may with advantage finally be included, must not be hastened or forced. All that can be done at the present time is to make a beginning with the satisfaction of needs for co-ordination, with studious care to avoid committing the territories to steps that time may show to have been mistaken, and that may be difficult to retrace, and to take practical steps to bring public opinion as to the redistribution of boundaries to a head."⁽⁴⁰⁾

38. Report of the Hilton Young Commission on Closer Union of Dependencies in Eastern and Central Africa (Cmd. 3234 of 1929) (London, H.M.S.O. 1929)

39. See pp. 252-263 of the Report.

40. Ibid., pp. 265 - 266.

The majority report⁽⁴¹⁾ also found a need for co-operation between the territories in Central Africa but thought that there was no urgent need, as there was in East Africa, for a Central Authority. After considering possible political adjustments such as Northern Rhodesia and Nyasaland joining East Africa or Southern Rhodesia, or being placed under the authority of the Governor of Southern Rhodesia as High Commissioner, or splitting Northern Rhodesia as suggested by Sir Hilton, or maintaining the status quo with the proposed Governor - General for East Africa supervising in an advisory capacity the native policies and common services of Northern Rhodesia and Nyasaland, the Commissioners:

(a) Rejected union of Northern Rhodesia and Nyasaland with East Africa as impracticable owing to lack of communication facilities but added that such union could not be ruled out in the future.

(b) Rejected the federation of the two protectorates with Southern Rhodesia because "it would be difficult to devise any stable form of federation between two protectorates and a Colony possessing responsible government". The self-governing Colony would naturally aspire to be the predominant partner, and the arrangement would be likely to produce such friction between the Colony and the Colonial Office, that the only escape would be either disruption of the federation or complete amalgamation"⁽⁴²⁾

(c) Rejected amalgamation of the two territories with Southern Rhodesia because: (I) it would be premature and would complicate the development of Nyasaland and Northern Rhodesia towards East Africa, (II) it was doubtful whether Southern Rhodesia was yet in a position to shoulder amalgamation responsibility; (III) Southern Rhodesia's native policy was still in an experimental stage and it would be burdensome and unwise to add to it more responsibility over natives; (IV) the form of government designed for East Africa should be seen to work before it could be decided whether Northern Rhodesia and Nyasaland should join East Africa or Southern Rhodesia.

(d) Rejected the plan of the Governor of Southern Rhodesia being appointed High Commissioner because; (i) due to his duties in Salisbury he would not be able to visit Nyasaland and Northern Rhodesia frequently; (ii) he would have no power of final decision in Southern Rhodesia in his co-ordination of policy and this would place him in the embarrassing position of carrying out policies in the North at variance with those in the South; and (iii) it would prejudice Nyasaland and Northern Rhodesia developing towards East Africa.

Please see footnotes overpage.

15. (g) Rejected partition of Northern Rhodesia as premature in spite of the fact that the railway belt had much in common with Southern Rhodesia and North-Eastern Rhodesia with Nyasaland. Unlike Sir Hilton, the other Commissioners found Southern Rhodesia's native policy very dissimilar to that of Nyasaland and Northern Rhodesia.

After rejecting all the other plans, the majority report recommended that the status quo in the government of the two protectorates should be maintained. The Commissioners gave various reasons for this recommendation, among which were: (a) that existing conditions might be changed by discovery of minerals and development of communications, making it, therefore, difficult at the time to foresee what may be the best ultimate grouping of these territories; (b) that Southern Rhodesia required time to settle in its new position without taking additional responsibilities;⁽⁴³⁾ and (c) that time should be given for proposals made for East Africa to work before finally settling the future of the Central African territories. The Report, however, made recommendations for some co-operative administrative steps which ought to be taken in Central Africa. These were: that the proposed Governor-General for East Africa should be the Secretary of State's chief adviser on important matters of policy affecting Nyasaland and Northern Rhodesia, paying occasional visits, to the territories to advise the Governors without giving orders; that where necessary consultations should take place between the East and Central African territories, including meetings between the Governor-General for East Africa and Southern Rhodesian Cabinet Ministers; and that if Southern Rhodesia so wished it could be represented at the East Africa Governor's Conference.

41. Ibid., pp. 269-287

42. A federation between the Colony of Southern Rhodesia and the protectorates is what latter happened (see below) but as correctly predicted by the Commissioners it became difficult to maintain the relationship. Southern Rhodesia sought to dominate the protectorates and to extend her policies North through the Federal Government which was more akin to the Government of Southern Rhodesia than to those of the North. The result was disruption and not amalgamation.

43. The Commissioners, however, thought that the question of a link with Southern Rhodesia, particularly in relation to the railway belt of Northern Rhodesia should be constantly kept in mind.

After the Hilton Commission the Southern Rhodesian Government made a request to the Imperial Government for a formal conference with the Unofficial Members of the Northern Rhodesian Legislative Council to discuss amalgamation. The request was turned down.⁽⁴⁷⁾ An unofficial Conference was, however, held at the Victoria Falls in October, 1930, between Southern Rhodesian Members of Parliament and the Northern Rhodesian Unofficial Members. The Conference condemned the Passfield Memorandum, resolved in favour of amalgamation and agreed that further conferences on the same lines should be held.⁽⁴⁸⁾ After the conference the Southern Rhodesian Government and the Northern Rhodesian Unofficial Members made separate representations to the Imperial Government. The latter diplomatically but clearly rejected the representations in this vein:

"His Majesty's Government..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 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.

On the other hand, His Majesty's Government, while considering that amalgamation is not practicable now or in the near future, do not wish to reject the idea of amalgamation in principle should circumstances in their opinion justify it at a later date, and fully realise the prejudicial effect upon progress in both countries if such rejection were regarded as a permanent bar to their future evolution. Their view is that for some time to come Northern Rhodesia should continue to work out its destiny as a separate entity, observing the closest possible co-ordination with its neighbours, and especially with Southern Rhodesia.

His Majesty's Government feel that, in order to prevent misconception, they should state at the outset that the conditions of any scheme of Amalgamation, if and when it arises for actual discussion, must make a definite provision for the welfare and development of the native population. Barotseland would necessarily require separate treatment, and arrangements may possibly have to be made in regard to other parts of Northern Rhodesia. Without going into detail of these contingencies, it is sufficient that it should be indicated that the territory to be amalgamated with Southern Rhodesia would not necessarily have boundaries co-terminous with the present boundaries of Northern Rhodesia" (49)

Please see overpage for footnotes.

REACTION TO THE REPORT.

Reaction to the Report was mixed. The Southern Rhodesian Government denounced the recommendations of the majority⁽⁴⁴⁾ and stated that nothing should be done to prejudice amalgamation between Southern and Northern Rhodesia. The Governor of Northern Rhodesia disagreed with the Chairman's minority report on the grounds that amalgamation would deprive Northern Rhodesia of the control of the mines. The Imperial Government accepted the recommendations⁽⁴⁵⁾ but after a lengthy consideration of the matter announced that although the recommendations were acceptable the time was not yet ripe for taking any far-reaching steps in the direction of the formal union of the several East African territories.⁽⁴⁶⁾ This decline to take any steps to federate East African territories rendered impracticable the recommendation that the proposed Governor-General for East Africa should be the Secretary of State's chief adviser on important matters of policy affecting Northern Rhodesia and Nyasaland.

The majority report of the Commission was a set back for Southern Rhodesia's amalgamationists, not only because it had recommended against amalgamation, but also because it had confirmed that opinion was divided in Northern Rhodesia. Southern Rhodesia was, however, despite this set-back, determined to press on with the issue. The immediate thing was to swing European opinion in Northern Rhodesia to the acceptance of amalgamation. This effort was greatly helped by the publication in 1930 of the Passfield Memorandum which angered many Europeans in the territory. Anti-amalgamationists swung to the support of amalgamation. Amalgamation became necessary to the Northern Rhodesian settlers not for economic reasons, but to cut themselves away from the Colonial Office and to prevent political engulfment by the Africans.

44. For reaction of Southern Rhodesian Europeans in general, see Jollie, Mrs. Tawse, "Europeans in Africa: Some Thoughts on the Hilton Young Report" (Countryside, July, 1929). See also Gann, op.cit., p.246.

45. See Statement of the Conclusions of H. M. Govt. of the United Kingdom AS Regards Closer Union in East Africa (Cmd. 3574 of 1930); Gann, op.cit.

46. See Cmd. 4141 of 1932 p. 46.

In communicating the statement to the Northern Rhodesian and Southern Rhodesian Governments, the Imperial Government pointed out that they fully appreciated the advantages to be derived from the close co-operation between the two territories in matters of policy which were of common interest to both and that they were at all times ready to facilitate consultation between the two Governments with a view to such co-operation. It should be noted that at this stage the inclusion of Nyasaland was not contemplated. It can, however, be discerned from the passage just quoted that the Imperial Government had in mind a possible closer union wider than that of Northern and Southern Rhodesia alone.

The statement shattered settler hopes for early amalgamation. It also made it clear that the Imperial Government would not budge on the question of control of native policy. The settlers did not, however, appreciate both the fact that amalgamation was far off (if it would occur at all) and that when it came it would mean a lot of concessions on their part on the question of control of African affairs. This failure to appreciate the two points caused the amalgamationists not to change their strategy until Welensky and Huggins awoke to the facts in 1948. (50)

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47. Gann says the request for a conference was refused - op.cit., p.249, but Palley, quoting a personal communication from a Confidential Source, says it was not directly turned down but that the Imperial Government offered such unacceptable terms to the Southern Rhodesian Prime Minister that he had no alternative but to turn them down - Palley, op.cit., p.328. National Archives NE 1/1/7, Newton to Moffat, 2 August, 1929 states that "Passfield would agree to amalgamation if it were possible to secure for the Imperial Government some greater control of the Native question that would involve some diminution of the powers at present possessed by Southern Rhodesia."
48. For deliberations of the conference, see Rhodesia Herald, October 3, 1930; Livingstone Mail, 1 October, 1930.
49. House of Commons Debates: July 2, 1931. The statement is also quoted at length in the Blodisloe Commission Report (Cmd. 5949 of 1939) Para. 274. For the communication to the Southern Rhodesian Government, see National Archives MO13/1/1, Secretary of State to the Governor: 1 July, 1931.
50. See below, for the two men's change after their interview that year with the Colonial Secretary and his Shadow counterpart. They were told that amalgamation was out.

In 1932 the Southern Rhodesia Prime Minister spoke to the Dominions Office about having informal talks on amalgamation and other matters, but did not receive co-operation from the Secretary of State.⁽⁵¹⁾ In 1933 political leadership changed in Southern Rhodesia. Godfrey Martin Huggins⁽⁵²⁾ (the man who was to become Prime Minister for the next twenty years before moving to the premiership of the Federation in 1953) became Prime Minister as leader of the Reform Party. Unable to govern effectively in the face of two opposition parties⁽⁵³⁾ (the Rhodesia Party and the Labour Party), Huggins held an election the following year in which he annihilated his opponents. Until he became Prime Minister, Huggins had been a federalist and not an amalgamationist. In 1932 he had written that the future of Southern Rhodesia was dependant upon federation with Northern Rhodesia and Nyasaland.⁽⁵⁴⁾ On becoming Prime Minister he became, however, an advocate of "unadulterated amalgamation as best suited to Central Africa's needs".⁽⁵⁵⁾ In the same year (when Huggins became Prime Minister) Northern Rhodesian Unofficial Members met the Southern Rhodesian Cabinet. In 1934 Huggins went to London with his Chief Native Commissioner and presented to the Colonial Office a scheme for the incorporation of the Copperbelt and the Railway Belt of Northern Rhodesia into Southern Rhodesia and the creation of separate black and white areas in Northern Rhodesia.⁽⁵⁶⁾ The African areas were to remain under the Colonial Office and Africans were to be advanced to the highest levels in these areas. The scheme, as expected, was rejected by the Colonial Office. It is difficult to understand how Huggins could have thought that the Colonial Office would accept so drastic a scheme only six years after the Hilton Young Commission had rejected the splitting of Northern Rhodesia and only three years after the Colonial Office had turned down representations resulting from the 1930 Victoria Falls Conference. It was perhaps one of those miscalculations which often afflicted Rhodesian settler leaders throughout the long-drawn campaign for closer association.

At this time, however, the amalgamation campaign gathered a new momentum in Central Africa. In Northern Rhodesia Europeans were now solidly behind amalgamation.⁽⁵⁷⁾ Even Moore, who had lost his enthusiasm because of the interpretation given to the Passfield Memorandum by the Joint Parliamentary Commission, swung back to the support of amalgamation in 1935.⁽⁵⁸⁾ The Chartered Company, which had vigorously opposed amalgamation in its evidence to the Hilton Young Commission in 1928, was now more favourably inclined.

20. Satisfied with Huggins' leadership, the Company's Chairman, Sir Henry Birchenough, saw the Colonial Secretary in 1934 and pointed out that it was necessary to establish a British bloc of territories including Northern Rhodesia, Southern Rhodesia, Nyasaland, Northern Bechuanaland and probably Tanganyika to counteract South Africa.⁽⁵⁹⁾ These views agreed with those of Sir Herbert Stanley (first Governor of Northern Rhodesia who had come back to Africa in 1931 as High Commissioner for South Africa, having been Governor in Ceylon). As Governor for Southern Rhodesia in 1935, Sir Herbert wrote a memorandum to the Colonial Secretary urging the creation of a Central African Union comprising Northern and Southern Rhodesia as a counterpoise to the Afrikaner dominated Union of South Africa.⁽⁶⁰⁾ The arrival of Sir Hubert Young in Northern Rhodesia as Governor added another personality to those in favour of amalgamation. Sir Hubert admired Southern Rhodesia's native policy.⁽⁶¹⁾ He wanted definite co-operation between the Central African territories. He urged the Colonial Office to make a statement to the effect that the interests of Southern and Northern Rhodesia and Nyasaland were closely linked, but this was refused.⁽⁶²⁾ The campaign also began to receive active support from Nyasaland in 1933. The settlers there publicly supported closer association and the Nyasaland Times (the country's only newspaper) backed the campaign on the grounds that unification of the territories would produce administrative economy and reduction of taxation. In 1935 Huggins put forward an idea for a loose federation of the two Rhodesias and Nyasaland which he argued would strengthen Southern Rhodesia's economy as well as fortify the British position in Central Africa.⁽⁶³⁾ No doubt he wanted to use this loose federation as a stepping stone to amalgamation.

51. See National Archive DOL/1/6, Moffat to Downie: 25 April, 1932, in which Moffat instructed his High Commissioner to arrange for informal talks with the Secretary of amalgamation with Northern Rhodesia and also Southern Rhodesia's claim to Northern Bechuanaland.

52. For Huggins' life story and political career, see Gann & Gelfand, op.cit.

53. Huggins temporarily formed a coalition Government with the Rhodesia Party pending fresh elections in 1934,

54. (in The Rhodesian Mining World and Industrial Review, July 2, 1932).

55. Taylor & Dvorin, op.cit., p. 69.

56. For details of the scheme see "Southern Rhodesia, Recent Progress and Development, an address made by Huggins on 18 July, 1934, to the Empire Parliamentary Association, Gann & Gelfand, op.cit., pp. 99-102 and 116. For the Chief Native Commissioner's views on the matter, see Corbutt, L.C., "The Racial Problem in Southern Rhodesia," (N.A.D.A. No. 12, 1934) pp. 6 et seq.

57. Gann, op.cit., p. 207. Even missionaries were now divided.

58. See N.R. Legco Debates, 27 Nov. 1933, pp. 577-8. Unofficial Members had become unanimous in favour of amalgamation - ibid.

The year 1935 also saw the first concrete act of official consultation in the form of the first Governors' Conference attended by the Governors of Northern and Southern Rhodesia and Nyasaland and presided over by the Governor of Southern Rhodesia. The Conference discussed closer relations in defence, communications, common currency, customs, education, research, trade representation, mining laws, dual taxation of Africans and the creation of a common court of appeal. Further conferences were to be held annually. The conferences resulted in the establishment of inter-territorial bodies⁽⁶⁴⁾ and the Rhodesia Court of Appeal.⁽⁶⁵⁾ Originally this court heard appeals from Southern and Northern Rhodesia only. By an amendment to the establishing Act in 1947,⁽⁶⁶⁾ the Court was empowered to hear appeals from Nyasaland which, until then, had been taken to the East Africa Court of Appeal.⁽⁶⁷⁾ The name of the Court changed to Rhodesia and Nyasaland Court of Appeal.

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59. Gann, *op.cit.*, p.260. A similar idea had been put forward in 1933 by the British Empire Producers Organization - *Ibid.*
60. Gann & Gelfand, *op.cit.*, p.110.
61. *N.R. Legco Debate* 5 Dec., 1935, p.389. See also *Rhodesia Herald*, 17 July, 1936, for a reported conversation between Sir Hubert and a Southern Rhodesian labour leader on the control of native policy from Downing Street.
62. Palley, *op.cit.*, p.329, n.2.
63. See *Rhodesia Herald*, May 24, 1935
64. e.g. The Inter-Territorial Communications Board and the Inter-Territorial Labour Conference which had a standing Committee to look after things between Conferences. Conferences of Directors of Education and Directors of Health were held. For a good summary of the inter-territorial co-operation as found by the Bledisloe Commission, See Report of that Commission (Cmd.5949 of 1939)
65. See Act, No. 33 of 1930 (S.Rhodesia) promulgated on 13 November, 1939 and brought into operation on 21 July, 1939 by Proc. No 20 of 1939.
66. See Rhodesia Court of Appeal Amendment Act, 1947 (No.14 of 1947) promulgated on 27 June, 1947 and brought into force by Proc. No. 27 of 1947.
67. See Eastern African Protectorates (Court of Appeal) Order in Council enacted 15 Feb, 1909 and gazetted 30 June, 1909.

Huggins did not see anything comforting in the machinery of Governors' Conferences and the functional institutions which were likely to result from them. If anything, he saw in this functional approach delaying tactics by the Imperial Government to prevent early realization of amalgamation. At his party's congress in November, 1935, he demanded full amalgamation, not only of Southern and Northern Rhodesia but of the three territories.⁽⁶⁸⁾ In 1936 another unofficial Conference took place at the Victoria Falls between Southern and Northern Rhodesian representatives. The Southern Rhodesian Government did not attend in that capacity although it approved of the conference. The Southern Rhodesian representatives, therefore, attended either as Members of Parliament or as party representatives. The Conference passed a resolution calling for the early amalgamation of Southern Rhodesia and Northern Rhodesia under a constitution conferring complete self-government.⁽⁶⁹⁾ The resolution outlined the type of constitution envisaged. One government was to be established for the two territories comprising a Governor, a Legislative Assembly, a Public Service and a High Court. Salisbury was to be the capital. The existing territorial electoral laws were to be maintained until changed by the new Legislative Assembly. There were to be no fewer than seven Members from Northern Rhodesia and no fewer than thirty from Southern Rhodesia. Not more than three nominated members were to represent African interest in the Legislature. The systems of law operating in the two territories were to remain until changed by the Legislature. The resolution asked the Southern Rhodesian Government to settle the details in the light of the above outline and to request the Imperial Government to receive a deputation from the Southern Rhodesian Government and the Northern Rhodesian elected members to discuss the principle of amalgamation and the draft constitution for the amalgamated territory. The draft constitution when prepared was to be submitted to the electorates of the two territories in a referendum. The resolution was forwarded to the Southern Rhodesian and Northern Rhodesian Governments for transmission to the Secretaries of State concerned.

In Southern Rhodesia the resolution was discussed in Parliament in the form of a Member's motion on April 1, 1936.⁽⁷⁰⁾ The motion was passed with only four voting against. The Conference's resolution and the record of the debate in the Assembly were transmitted to the Secretary of State for the Dominions. In Northern Rhodesia the resolution was also discussed in the Legislative Council but this was after the text had been transmitted to the Secretary of State for the Colonies and replied to. The non-Officials were not unanimous

the extent of the proposed amalgamation. Gore-Browne and Stephenson thought amalgamation should provide for a large measure of provincial autonomy and local self-government. Gore-Browne, in support of this view, told the Legislative Council that "it would not be fair to ask the Imperial Government, as we know very well, to surrender its control of natives in the present native areas."⁽⁷¹⁾

In October (1936) the Colonial Secretary and the Dominions Secretary replied to the representations emanating from the Victoria Falls Conference. The replies were sent through the Governor of Southern Rhodesia and the Governor of Northern Rhodesia. The reply to the Southern Rhodesian Governor (and similarly to the Northern Rhodesian Governor) partly read:-

"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 the 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...announced in 1931, was only taken after the most thorough examination of the whole problem and also after consultation with Members of the Parliamentary parties then in opposition. Although it was made clear in that announcement that His Majesty's Government did not wish to reject the idea of amalgamation in principle, should circumstances justify it at a later date, the announcement was definitely intended as settling the question for some time to come and 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 so much thought in 1931" (73)

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68. For deliberations of this Congress, see Rhodesia Herald, Nov. 22 of 1935. Huggins was opposed by some who did not want the black-white ratio upset by more blacks from the North.
69. For deliberations of this Conference see Rhodesia Herald, 24 January, 1936. See also Eledisloe Commission's Report (Cmd. 5949 of 1939), para. 278, where the resolutions are quoted in full.
70. S. R. Legislative Assembly Debates 1 April, 1936, et seq. The debate was a very long one and extended to May.
71. N. R. Legco Debates, 29 Oct., 1936, p.251.
72. As quoted by Davidson, op.cit. p. 100.
73. As quoted in the Eledisloe Commission Report, para. 280, where a long extract is reproduced.

24. The Secretary of State pointed out further that the unanimity reached at the Victoria Falls Conference was obtained only on the basis of a constitution conferring complete self-government and that he understood there were Members of the Southern Rhodesian Legislature who would not accept amalgamation on lesser terms. "I think that your Prime Minister will have realised from his discussions with my predecessor in London in 1934 and 1935 that His Majesty's Government could not regard it as practical politics to discuss such a suggestion at present even in relation to Southern Rhodesia..."⁽⁷⁴⁾ The Secretary, however, promised to discuss the matter with the Southern Rhodesian Prime Minister during the coronation celebrations the following year.⁽⁷⁵⁾ This was also extended to the Northern Rhodesian Unofficial Members. The Governor of Southern Rhodesia replied to the Secretary of State's despatch by telegram on October 15, (1936) as follows:-

"My Ministers ask me to inform you that in their opinion situation has undergone change in several important respects since 1931 and that my Prime Minister will be glad to avail himself of opportunity which you have been so good as to offer him to discuss the whole matter further with you when he visits England next year." (76)

74. Ibid.

75. Ibid.

76. Ibid.

In 1937 the Secretaries of State discussed the matter with the Southern Rhodesian Prime Minister and the Northern Rhodesian non-Officials - Gore-Browne and Moore. They also had discussions with the Governors of Northern Rhodesia and Nyasaland. Officials at the Colonial and Dominions Offices were at this time divided on the matter. Some had become very critical of the Southern Rhodesian settlers and thought they wanted amalgamation just to get a hold on the copper mines. Others, in spite of their awareness to this, were overwhelmed by the idea of a big British bloc of states in Central Africa. The Colonial Secretary did not like amalgamation. He preferred federation. He, in fact, thought co-operation could be achieved through a loose Central Authority co-ordinating economic, defence, judiciary and other matters and that some departments could be unified although the Imperial Government would in such event retain matters like native policy, land and labour.⁽⁷⁷⁾ The Secretaries of State and their senior civil servants agreed at a meeting that the question of closer association should be re-opened by appointing another Royal Commission of Inquiry. The appointment of such a Commission would serve two purposes. It would give the Imperial Government fresh enlightenment and re-appraisal of the matter. Secondly, it would for the time being, reduce the political bombardment on the issue from the Central African settlers.

On November 23, 1937, the decision to appoint a Royal Commission was announced⁽⁷⁸⁾ and the Commission was duly appointed on March 9, 1938, under the Chairmanship of Viscount Charles Bledisloe.⁽⁷⁹⁾ Its terms of reference were:-

"To enquire and report whether any, and if so what, form of closer co-operation or association between Southern Rhodesia, Northern Rhodesia and Nyasaland is desirable and feasible, with due regard to the interests of all the inhabitants, irrespective of race, of the territories concerned and to the special responsibility of Our Government in the United Kingdom of Great Britain and Northern Ireland for the interests of the Native inhabitants."⁽⁸⁰⁾

Unlike the Hilton Young Commission which was an East and Central African Commission, the Bledisloe Commission was only concerned with Central Africa. It, therefore, heard more evidence in Central Africa than the Hilton Young Commission.⁽²¹⁾ In Southern Rhodesia it heard evidence from 123 persons of whom 18 were Africans. The corresponding figures in Northern Rhodesia were 53, of whom 27 were Africans, and in Nyasaland 78, of whom 15 were Africans. Memoranda received in Southern Rhodesia were 40 and 5 of these were from Africans. In Northern Rhodesia and Nyasaland the numbers were 25 and 2 and 17 and 6 respectively.⁽⁸⁵⁾

26. In London, where the Commission had set from March 30 to April 21, it had received a memorandum from Hastings Kamuzu Banda.⁽⁸³⁾

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It can be seen that unlike the Hilton Young Commission, the Bledisloe Commission heard oral evidence and received memoranda from a good number of Africans. The increased number was due to the fact that Africans had become aware of what the settlers had in mind. In Northern Rhodesia opposition to amalgamation with Southern Rhodesia had started in the early thirties.⁽⁸⁴⁾ In 1933, for instance, the Ndola Native Welfare Association had passed a resolution reading as follows:

"That while this Association would welcome amalgamation with Nyasaland where laws and conditions are similar to those of this country, it humbly asks that the Government will not agree to the amalgamation of Northern Rhodesia and Southern Rhodesia. Such a step would, in the opinion of this Association, be greatly 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."⁽⁸⁵⁾

This resolution had been passed soon after an amalgamation motion debate in the Legislative Council. In Nyasaland African opposition started much later because the inclusion of Nyasaland in an amalgamated or federal state did not become a real issue until the close of the forties. The Commission, however, found the Africans in both Nyasaland and Northern Rhodesia hostile to amalgamation. Federation with Southern Rhodesia.⁽⁸⁶⁾ On the other hand, Africans in Southern Rhodesia opposed amalgamation with the North for different reasons. They disliked the idea because Africans in the North were backward. They preferred amalgamation with the more advanced South Africa.⁽⁸⁷⁾ The bulk of the European population in all the three territories were in favour of amalgamation. A few fiercely opposed it — in Southern Rhodesia, because Europeans would be swamped by Africans and the territory might lose its self-government, in Northern Rhodesia and Nyasaland, because it would betray the interests of the Africans to the Europeans of Southern Rhodesia.⁽⁸⁸⁾

See page 185 for footnotes 77- 88.

The Commission published its report in March, 1967⁽⁸⁹⁾ a year after its appointment. Unlike the Hilton Young Commission, the Bledisloe Commission was unanimous in its recommendations. Individual Commissioners, however, wrote separate opinions on certain points (particularly native policy). It was thought that individual emphasis was needed. The commission rejected both federation and amalgamation. It objected to federation on the grounds that the three territories were at different constitutional levels - (i.e. that Southern Rhodesia was self-governing while the other two were not) - and that "any attempt at Federation between governments enjoying such different stages of social and political development would not... achieve success".⁽⁹⁰⁾ On amalgamation, while agreeing that it might be the ultimate objective, the Commissioners also agreed that it could not be implemented at that stage. The Commissioners' main objection to amalgamation was the differing native policies in the three territories. They observed:

"We have been at some pains to examine the policies of the three administrations in respect of their dealings with the native population, bearing in mind the fact that in our Terms of Reference particular mention is made of the special responsibility of Your Majesty's Government ...for the interests of the native inhabitants in all the territories. The Native Policy of the Government of Southern Rhodesia, and the principles, under the guidance of the United Kingdom Government, the administrations in Northern Rhodesia and Nyasaland are seeking to apply, are both in the early stages of experiment, and it is soon as yet to say which of these policies (in so far as they are different) or what blend of both, is in the long run most likely to promote the moral and material well-being of the African inhabitants. It is clear, however, that, in their present application, they do present certain marked differences, and that while Southern Rhodesia along her own course has progressed furthest in the provision of certain social and development services, that course is in some respects restrictive and will, if persisted in, limit the opportunities open to Africans...

....One cannot overlook the fact that under any scheme of amalgamation, the Government of the Combined Territory must rest mainly in the hands of those who at present direct the policy of Southern Rhodesia, and it is therefore necessary to envisage a situation where that policy might be extended in greater or less degree over the Territories now known as Northern Rhodesia and Nyasaland." (91)

In their individual comments, the Commissioners further emphasized the point that native policy was the obstacle to closer association.⁽⁹²⁾

The Commissioners also commented on African opposition to amalgamation. After criticizing some of it as due to lack of appreciation of the issues involved, they observed:

See footnotes overpage

77. See Gann, op.cit., p. 273. For reasons why the Colonial Office officials opposed Southern Rhodesia's moves, see the autobiography of C. Dundas who was chief Secretary of Northern Rhodesia at the time - African Cross-roads (London, MacMillan, 1955) pp. 176-9.
78. See House of Commons Debates and House of Lords Debates, 23 Nov., 1937. See also para. 282 of the Commission's Report.
79. The other Members of the Commission were P. A. Cooper, Ernest Evans, Thomas Fitzgerald, William Henry Mainwaring, and Ian Leslie Orr-Ewing.
80. See the Journals quoted in Note. 79 above. The terms also quoted in Commission's Report at the beginning. The terms, it will be seen, included examination of amalgamation, although the British Government had already told the Southern Rhodesian Prime Minister that amalgamation would not be permitted. Huggins had, however, insisted that it should be included in the terms as not doing so would strengthen the cause of those wanting to join the Union. In so insisting he had agreed that the Imperial Government would not be bound on that point. See Huggins' draft Letter to Malcolm Macdonald to this effect in National Archives L/1/1, ff. 69 - 84.
81. The Bledisloe Commission heard evidence in Central Africa from May to Aug. 1938.
82. See Appendix to the Report. Compare the figures given above in connection with the Hilton Young Commission.
83. Banda who had left Nyasaland at the age of 13 for Southern Rhodesia, then South Africa and thence moved on to the United States of America before going to Britain where he trained as a doctor and later practiced in London, had kept himself in touch with Nyasaland events, culminating in his coming home in 1958 after 40 years' absence - see below, Chapter 8.
84. See Gann, op.cit. pp. 260 - 270 and Livingstone Mail 4 Oct., 1933, which contain a speech by one Malumingo.
85. As quoted in the Bledisloe Commission Report, para. 275.
86. For a summary of the evidence given by Africans, see Gann, op.cit., pp. 274 - 276.
87. For the evidence of Southern Rhodesian Africans, see e.g., Rhodesia Herald, June 9, 1938.
88. The evidence of the Commission was not officially published. The political fortnightly, New Rhodesia, however, published evidence of all public hearings at length and its issues of May 9 - August 19, 1938, give comprehensive accounts of the evidence. See also issues of the Rhodesia Herald and the Livingstone Mail of the period the Commission heard evidence in Central Africa. The case of the Southern Rhodesian Europeans amalgamation was given in a mimeographed pamphlet by Charles Olley, The Case Against Amalgamation (1938).

29.

"Nevertheless the striking unanimity, in the Northern Territories, of the native opposition to amalgamation, based mainly on dislike of some features of the native policy of Southern Rhodesia, and the anxiety of the natives in Northern Rhodesia and Nyasaland lest there should be any change in the system under which they regard themselves as enjoying the direct protection of Your Majesty, are factors which cannot in our judgment be ignored.

If so large a proportion of the population of the Combined Territory were brought unwilling under a Unified Government, it would prejudice the prospect of co-operation in ordered development under such a Government. We do not mean to suggest that amalgamation must necessarily be postponed until such time as a positive demand for it arises amongst the natives of all the Territories, but we are agreed in doubting the practical wisdom of such a step, until, through longer acquaintance with the issues involved, the fears and suspicions at present prevalent amongst the natives have been substantially removed and they are themselves in a better position to form a considered judgment on those issues." (93)

It will be remembered that the Hilton Young Commission had also pointed out that native policy was an obstacle.⁽⁹⁴⁾

African opposition had not appeared then. Ten years later the Bledisloe Commission found native policy still an obstacle. A new obstacle, African opposition, had, however, also appeared on the scene. These two obstacles continued to exist in later years.⁽⁹⁵⁾ The British Government appreciated the first but misjudged the second. It was due to this misjudgment of African opposition that federation was created in 1953, only to be dismantled ten years later.⁽⁹⁶⁾

After the Commission had rejected both federation and amalgamation, it stated that there was need for co-operation and that that co-operation should be further strengthened in the fields of communications, public works, customs, judiciary, currency, education, medical and agricultural services, scientific research, native labour, defence and publicity.⁽⁹⁷⁾

89. Cmd. 5949 of 1939. Extracts of the Report also appear in Mansergh, Nicholas (ed.) Documents and Speeches on British Commonwealth Affairs 1931-1932 (Oxford, U.P. 1953) 2 Vols., Vol. 11, pp. 1267 - 1274.

90. Ibid., para. 474. The Hilton Young Commission had also stressed this point - See above.

91. Ibid., paras. 479 and 480.

92. Ibid., paras. 245, 249 and 252.

93. Ibid., para. 486.

94. See above.

95. Lord Hailey in 1941 found native policy still the obstacle - see below. The officials Conference in 1951 found it still a problem but did not think it was an obstacle - see below.

96. See Chapter seven below.

97. Cmd. 5949 of 1939 paras. 511 - 524.

30. To bring about this co-operation it recommended the establishment of an Inter-Territorial Council whose duties were to be: (a) examination of the existing Government services of the three Territories so as to bring about the greatest possible measure of co-ordination of those services; and (b) surveying the economic needs of the whole area - agricultural, industrial and commercial - and framing plans for future development in the light of that survey. The Council was to comprise the Prime Minister of Southern Rhodesia and the Governors of Northern Rhodesia and Nyasaland. In addition there were to be three other representatives from Southern Rhodesia, two from Northern Rhodesia and two from Nyasaland. Those from Northern Rhodesia and Nyasaland were to be appointed by the Governor of each territory and could be either officials or non-officials. Those from Southern Rhodesia were to be appointed by the Government. The Council was to establish boards or committees where necessary to carry out particular functions. It was to publish an annual report of its activities, including those of the boards and committees under it. The application of the policies formulated by the Council was to be a matter for each individual Government. The Council was to have no power to enforce such policies. The Council was to meet at regular intervals and was to have a permanent Secretariat. The Chairman of the first meeting was to be the Governor of Southern Rhodesia. He was to be responsible for convening that first meeting.⁽⁹⁸⁾ In the event of Southern Rhodesia refusing to accept the setting up of this machinery, the Commission recommended that it be set-up for Northern Rhodesia and Nyasaland.⁽⁹⁹⁾ In fact, the Commission was of the view that Nyasaland and Northern Rhodesia could be amalgamated without delay.⁽¹⁰⁰⁾

REACTION TO THE REPORT

The Report angered the settlers. Hugins condemned it and went to London to present his Government's case in the light of the issues raised by the Report.⁽¹⁰¹⁾ Addressing the Rhodesian Group of the Overseas League, Hugins likened the Commissioners to "certain people (who) met and discussed the disease. They decided that a major operation was necessary. Then owing to some of the consultants not being satisfied, the surgeons lost their nerve, the operation was not performed, and the patient died."⁽¹⁰²⁾ In Northern Rhodesia the settlers denounced the Report. Typical of such denunciation was the following resolution passed at a Luanshya meeting: ".....the time when the native can express an opinion with an intelligent appreciation of the issues involved is too distant to allow the question of his agreement or disagreement to affect the question of amalgamation. The Southern Rhodesia policy is both wiser and juster.

The native's interests are protected and he is being educated to become a good agriculturist."⁽¹⁰³⁾ This thinking was typical of the Central African settler. He never appreciated the African's aspirations, fears, likes and dislikes and the grasp he already commanded of the Whiteman's politics. It was a political mistake that became fatal in later years. Moore, the leader of the non-officials in the Legislative Council, resigned his seat because of the Report but was re-elected unopposed.⁽¹⁰⁴⁾ Gore-Browne moved a motion in the Legislative Council condemning the indeterminate conclusions of the Commission and later went to London to present the non-officials' case.⁽¹⁰⁵⁾ On the other hand, the Governor of Northern Rhodesia held different views from those of the settlers. He was, in fact, to the left of the Commission. He even disagreed with the principle of amalgamation in the event of the native policies becoming harmonized. He disliked the native policy of Southern Rhodesia. He was apparently opposed even to amalgamation of Northern Rhodesia with Nyasaland on the ground that it would not benefit Northern Rhodesia. He agreed with the economic recommendations of the Commission but doubted the administrative economics of implementing them. In Nyasaland the Report caused no storm although a considerable number of the settlers were dissatisfied. In Britain, however, the Report caused controversy. In a debate in the Lords, Viscount Eledisloe argued in favour of Southern Rhodesia on the ground that it had made more progress in educating Africans than Northern Rhodesia. Baron Lugard of Abinger (author of indirect rule) on the other hand, condemned Southern Rhodesia's colour bar.⁽¹⁰⁶⁾ Academics also condemned the policies of Southern Rhodesia.⁽¹⁰⁷⁾

98. Ibid., p. 222.

99. Ibid.

100. Ibid., paras. 454 - 461.

101. Rotberg, op.cit., p. 154; Gann, op.cit., p. 279.

102. "Southern Rhodesia and the Eledisloe Report", an address by Huggins, (The African World, July 29, 1939)

103. Rotberg, op.cit., p. 154, quoting the resolution (passed on August 23, 1939).

104. See above, Chapter 4.

105. Ibid.

106. For speeches in this debate, see House of Lords Debates, 31 July 1939, Cols. 683 - 731.

107. See, for instance, letter by Miss Margery Perham, The Times (London) 29 July, 1939; Letter by E. A. Walker in Ibid., 12 Aug, 1941; letter by Keith in The Manchester Guardian, 9 Aug., 1941. See also Gann, op.cit., p. 278, for a summary of views on the report in Britain. The report stood as the most authoritative document on the issue until the officials report of 1951. For an excellent review of the report (the Eledisloe Report), see S. H. Frankel's article (in the South African Journal of Economics, June, 1939)

In London, Huggins told the Secretaries of State that since native policy had become the crux of the matter it was necessary that the problem be fully examined.⁽¹⁰⁸⁾ As a result of these talks, Lord Hailey, an expert on African affairs, was appointed in 1940 to examine the native policies of the three territories.⁽¹⁰⁹⁾ In the meantime, the war had broken out and this affected the amalgamation movement and prevented the Imperial Government from implementing some of the recommendations of the Blodisloe Commission. Lord Hailey, however, carried out his mission and reported in 1941.⁽¹¹⁰⁾ While recognizing improvements in Southern Rhodesia's native policy he reported that "the divergence in native policies appears to me to remain a factor which, though not necessarily conclusive as an argument against amalgamation, must be taken into account in weighing the general advantages and disadvantages which the scheme presents."

108. Rotberg, op.cit., p. 154.

109. Gann, op.cit., p. 279; Gann and Gelfand, op.cit., p. 121; Taylor & Dvorin, op.cit., p. 71.

110. See National Archives, S. 235/4302, for copies of his Confidential Reports on each territory. His overall conclusions were printed as a Note on the Bearing of Native Policy on the Proposed Amalgamation of the Rhodesias and Nyasaland (London, H.M.S.O., 1941)

111. Gann & Gelfand, op.cit., p. 170.

The war slowed down but did not halt the amalgamation campaign. At this time, opposition to the war effort by the Afrikaner nationalists "preyed infinitely harder on Huggins's mind than nationalist agitation amongst the Colony's.... still apparently apathetic black population,"⁽¹¹¹⁾ The necessity for a British dominion in Central Africa became greater than before to him. He correctly predicted that Smuts would lose power after the war and that South Africa would become a republic within ten years of Smuts' departure.⁽¹¹²⁾ Huggins also feared Wolensky's Labour Party.⁽¹¹³⁾ He distrusted workers and poor whites although it was the artisans and the poor farmers who had first elected him to power. In the midst of these fears he held another unofficial meeting with the Northern Rhodesian non-Officials in 1941 to discuss amalgamation.⁽¹¹⁴⁾ At this time Huggins realized that a change in Southern Rhodesia's native policy was necessary if closer association was to be attained. Col. Johnson (who had led the Pioneer Column into Rhodesia and who was at the time in retirement in England) had much to do with changing Huggins' attitude on this matter.⁽¹¹⁵⁾ The Colonel advised him to change his African policy and that, as a step in the right direction, he "ought to put three or four whites into the Assembly to represent Africans and that... (he) should come out as leader of a new crusade to grant more equitable representation to Africans."⁽¹¹⁶⁾ In 1941, Huggins issued what, for a person of his brand of politics, could be described as a revolutionary document on African policy.⁽¹¹⁷⁾ The document stated, inter alia, that white and black were blood brothers; that their differences were merely due to environment; that whites should advance their black fellow citizens without, of course, permitting white children to slither back into the backwardness and indolence that characterized indigenous tribesmen; that as soon as the gap between the two races was closed the economic difficulties would fall away; and that although for some time necessary segregation would continue, in the long run the two lines of the Colony's parallel development would meet. The statement "left many of his white fellow citizens aghast" but it won him acclamation from liberals in Central Africa and Britain.⁽¹¹⁸⁾ A Congress of Huggins' United Party in August of that year demanded immediate amalgamation.⁽¹¹⁹⁾

In the meantime in Northern Rhodesia, the non-Officials were also applying pressure for amalgamation. Pagot moved in the Legislative Council "that the Secretary of State be informed that it is the wish of the Unofficial Members that the Southern Rhodesian Government be invited to co-operate in the appointment of a Committee representative of both territories, to consider points of difference with a view to

34. formulating a policy and procedure adaptable to an amalgamated Rhodesia."⁽¹²¹⁾ In 1943 Welensky moved another motion "that Northern and Southern Rhodesia be amalgamated under a constitution similar to that now enjoyed by Southern Rhodesia."⁽¹²²⁾ The feeling in Northern Rhodesia at this time appears to have been that the principle of amalgamation should be adopted even though creation of the amalgamated state was to be postponed until the end of the war.

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111. Gann & Gelfand, op.cit., p. 170.
112. Ibid.
113. Ibid.
114. Ibid.
115. They were good friends and Huggins greatly admired him to the extent that before accepting his knighthood in 1941, he made it a condition that one be conferred on Col. Johnson too - Gann & Gelfand, op.cit. p. 169.
116. Ibid., 172. This advice was given in 1942 after Huggins's 1941 Statement - see below.
117. Statement on Native Policy in Southern Rhodesia by the Hon. Sir Godfrey Martin Huggins, (Salisbury, Govt. Printer, 1941. See also Gann & Gelfand, op.cit. p. 172.
118. Gann & Gelfand, op.cit. p. 173.
119. In a letter in 1942 advising Huggins to be more liberal, Col. Johnson told him that since he was popular he could talk Europeans into accepting his new policies and that even if they did not he "would at any rate end his career in a blaze of glory" - as quoted, ibid. p.172.
120. See The Times (London) 6 August, 1941; Rhodesia Herald, 6 August, 1941.
121. N. R. Lecco Debates, 14 July, 1941, p. 266.
122. Ibid., 25 November, 1943, p. 152.

The pressures from 1941 onwards resulted in the Colonial Secretary proposing in 1944 the establishment of an Inter-Territorial Council with a permanent Secretariat and under the chairmanship of the Governor of Southern Rhodesia.⁽¹²³⁾ Such a council, it will be remembered, had been recommended by the Bledisloe Commission. The establishment of such a Council was the farthest ^{the Imperial Government was prepared to go at} ~~the~~ Imperial Government, in fact, /that stage. considered the proposals a generous gesture which it was offering in appreciation of Southern Rhodesia's co-operation in the war effort. Huggins was told that amalgamation was out and that he should accept the Council. Although he did not like this merely advisory body, he was fully aware that he would not get anything better. He, therefore, decided to accept it, telling the Imperial Government at the same time that his country would continue to press for amalgamation. He persuaded his Cabinet to accept the body by telling them that if they did not, Northern Rhodesia and Nyasaland would go to East Africa while Southern Rhodesia would drift towards South Africa. Personally, Huggins thought the machinery would be a "sop",⁽¹²⁴⁾ a "job-off",⁽¹²⁵⁾ Welensky did not like the idea either. Huggins had to persuade him to accept it. When he asked Huggins: "What's the good of it? As it's constituted, we can't make it serve any good purposes. I am all for rejecting it", the latter replied:

"Roy, there is, perhaps, quite a lot to be said for your line of thought. But have you ever looked at it in this light? You and I both want to see closer union of the two Rhodesias. The British Government are taking the line that here is an instrument - h however, poor it may be --- that does give one a chance to demonstrate how far one can go with it. After all, if as the trial and error it proves to be useless, is not your position much stronger when you come to argue that you want something to replace it with?"⁽¹²⁶⁾

This makes Huggins' reasons for accepting the Council clear. He expected it to fail and then use that fact to achieve amalgamation.

The announcement of the establishment of the Council was made on October 10, 1944.⁽¹²⁷⁾ The Council replaced the Conference of Governors and met for the first time in June and July, 1945. The Governor of Southern Rhodesia was made Chairman of the Council while the Governors of Nyasaland and Northern Rhodesia and the Prime Minister of Southern Rhodesia became Members ex-officio.⁽¹²⁸⁾ In addition to the ex-officio Members each territory appointed three other Members. Northern Rhodesia and Nyasaland, later, as a practice, appointed the Chief Secretary and two Unofficial Members.

Southern Rhodesia, on the other hand, was represented by three Cabinet Ministers, the Leader of the Opposition having been offered and having declined one of the seats.⁽¹²⁹⁾ The appointments were made in Northern Rhodesia and Nyasaland by the Governor of each territory and in Southern Rhodesia by the Prime Minister. The Council's Chief Secretary and staff were appointed by the Chairman (the Governor of Southern Rhodesia) with the concurrence of the Governors of Northern Rhodesia and Nyasaland and the Prime Minister of Southern Rhodesia.⁽¹³⁰⁾ The Council's staff, in addition to their Council duties, were to help, if so required, the individual Governments to put into operation maximum administrative and technical co-operation.⁽¹³¹⁾ The Council was to be financed by a Common Fund to which Southern Rhodesia was to pay ten parts, Northern Rhodesia seven and Nyasaland three.⁽¹³²⁾

The Council was to meet at least twice a year as determined by the chairman in consultation with the three Governments.⁽¹³³⁾ Any of the three territories could, however, request a special meeting to discuss a specific matter and the chairman would be obliged to convene such a meeting without delay.⁽¹³⁴⁾ In urgent matters which could not await the convening of a meeting the opinion of the Members could be obtained in writing. The Council was to have no executive powers. Its role was to advise, leaving each Government to put the recommendations into operation. Its powers could be increased, however, since the Constitution could be amended by an agreement between the three Governments.⁽¹³⁵⁾ In carrying out its functions the Council was empowered to appoint Standing and Special Committees and to convene conferences.⁽¹³⁶⁾ Such Committees could include persons who were not Members of the Council but the Council's Secretary was to be an ex-officio member of every Committee. Several standing committees were later established. Such committees dealt with matters such as research, meteorology, economic development and planning, customs, education, currency, agriculture, health, veterinary services, forestry, legal matters, and migrant labour. As a result of the Council's and its committees' activities, a number of common services began to appear. For instance, the following bodies were established: the Central African Airways Corporation and the Central African Air Authority, the African Broadcasting Advisory Board, the Central African Instructional Film Unit, and the Inter - Territorial Hydro-Electric Commission. Common statistical, meteorological, archival and African labour services were established.⁽¹³⁷⁾

123. See Gann, A History of Northern Rhodesia, p. 358; Gann & Gelfand op.cit., p.209; Palley, op.cit. p. 331. Taylor & Dvorin, op.cit. p.71. Note that at this time a Secretariat which had been created to co-ordinate the war effort of the three territories was in operation Gann, Ibid., pp. 353, et. seq.
124. Gann, op.cit., p. 358.
125. Gann & Gelfand, op.cit., p. 209
126. Don Taylor, op.cit., p.72. For reasons why Welensky, accepted the Council, see N. R. Legco Debates, 3 July, 1952. See also Gann, op.cit., p. 358.
127. For a reflection of opinion on the announcement see editorials in the African World of October 21 and 28, 1944.
128. Constitution of the Central Africa Council: Agreement Between the Governments of Southern Rhodesia, Northern Rhodesia and Nyasaland, Art. 11.
129. See S. R. Legislative Assembly Debates, Vol. 27 (2), Col. 3170, 5 Feb. 1948.
130. Art. 11 (2).
131. Art. XII.
132. Arts. 11 (3) (5) and IV (1).
133. Art. V as amended in February, 1946.
134. Art. VI.
135. Art. XIII.
136. Art. LX.
137. For the Council's and its committees' activities and achievements, see The British Territories in East and Central Africa 1945-1950 (Cmd. 7987) pp. 29-31; The Colonial Territories 1948-1949 (Cmd. 7715); Ibid., 1950 (Cmd. 8243) : S.R. L.A. Votes and Proceedings June, 1948, Summarising activities from 1945-1948: Central African Council Annual Reports from the year 1945-1946 onwards; Gann, op.cit., p. 400, Palley, op.cit., pp.331 - 333 (Palley also gives a good summary of the Council's Constitution); Report of the Conference on Closer Association in Central Africa March, 1951, (Cmd. 8233 - Officials Conference. Report) For the Council's activities in particular subjects, see such documents as: Report by the Chief Secretary on Joint Services for European Education, 1946; Report on Kariba Gorge and Kafue River Hydro-Electric Projects by the Inter-Territorial Hydro-Electric Projects Power Commission, 1951; Council Report on Kariba Gorge 1951; Report on Migrant African Labour, 1947; Select Committee to Consider the need for Facilities for Higher Education for Africans in Central Africa Report: 1949.

The establishment of the Central Africa Council did not in anyway diminish the demand for amalgamation. Having put "a foot into the door" (as Huggins referred to their accepting the Council), he put more effort into achieving amalgamation. In the meantime, however, the British political scene had changed. The Labour Party had inflicted a crushing defeat on the Conservatives and had become the Government. The Party had previously been more outspoken against amalgamation. In 1943, as the war raged, the Party had published its post-war policy on the Colonies. In it, it had stated that the claims for amalgamation of the three Central African territories "should be resisted and that no such transfer should be agreed to unless the African inhabitants desire it and unless their social and political equality with minorities is completely assured."⁽¹³⁸⁾ The new Secretary of State for the Colonies, Creech Jones, had written in December, 1944:

"The British Government has refused to yield to the demand of the minority British population in the Rhodesias for amalgamation of these territories. The African populations are emphatically against amalgamation.... Britain has looked anxiously on, unfortunately without vigorous protest as Southern Rhodesia has discriminated in her policy of segregation. Our responsibility in Nyasaland and Northern Rhodesia is more direct. These are not countries of European colonization: they are the countries of the Africans and as such they must be preserved. We hold them in sacred trust. If our declaration mean anything at all, we have undertaken the responsibility of building up the political institutions and creating the conditions of social and economic advance of the black people of this area. To transfer that responsibility is to expose these people to risks which the history of South Africa has already taught us plainly. Let us collaborate with our kinsmen in Southern Rhodesia and help to make that country strong; let us try to understand their problems and modify their native policy but they must not expect us to forge that their policy of white supremacy and superiority will in the long run perpetuate social conditions and defeat the purposes it is alleged to serve." (139)

Creech Jones was not, however, as unco-operative and as difficult to deal with as Huggins and Welensky had expected. He was, in fact, the first Secretary of State to tell them plainly what they would not get and to give them at the same time advice on what form of closer association they should exercise their minds.

In September, 1948, Welensky and Huggins were in London for the African Conference. After the Conference Welensky decided to see Creech Jones about amalgamation. When he told Creech Jones that he was "horrified, really horrified about the lack of decision on the part of the British Govern^t"⁽¹⁴⁰⁾ on the amalgamation of the Rhodesias, the Secretary of State bluntly replied:

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"Do you really believe Mr. Welensky that any Government, either Tory or Socialist, would ever consider either granting Northern Rhodesia a constitution like Southern Rhodesia's or if there were amalgamation of the two, the kind of Constitution which would place the control of several million black people in the "Lands of a few hundred thousand whites? No Government, irrespective of its political hue, would carry out that kind of action today. The world wouldn't put up with it."

If you think the Conservatives, in power, would do what we won't do, why don't you go and see Oliver Stanley and put your proposals as bluntly to him as you have to me." (141)

Stanley was the Shadow Secretary of State for the Colonies. Creech Jones advised Welensky to think of some other solution like a federal arrangement which would leave the protection of African interests with the Imperial Government. When Welensky went to see Stanley, the latter confirmed what Creech Jones had said and gave the same advice. (142)

The two interviews left Welensky in no doubt that amalgamation was unattainable. The idea was dead as far as he was concerned. What was left was to convince Huggins that they should abandon amalgamation. When he saw Huggins at the latter's hotel he told him: "The only thing we have a chance with is Federation. I have completely satisfied myself that it is hopeless to press the case for amalgamation in any quarter here. Let us try and get federation, and there is always the hope that we can improve on the structure we create. But we must make a start!" (143) Huggins, after digesting what Welensky had said agreed that no purpose would be served by continuing to press for amalgamation. They agreed to switch to Federation and that as soon as they were back home they would organize a conference to examine the possibilities. This marked the burial of the amalgamation idea and the birth of the federation idea. It will be recollected that the idea of federation had occasionally come up in the past without being seriously given consideration. Inwardly, of course, Huggins and Welensky did not abandon the idea of amalgamation. They wanted to use federation as a step towards amalgamation - ^{hence} the words, "...there is always the hope that we can improve on the structure we create!" in the passage quoted above.

138. The Colonies: The Labour Party's Post War Policy, (1943) p. 8.

139. Four Colonial Questions: How Should Britain Act (London, Fabian Colonial Bureau, 1944) p. 3.

140. Don Taylor, op. cit., p. 103.

141. Welensky, op. cit., p. 23. Don Taylor, op. cit., pp. 103-104, puts the wording differently but the substance is the same.

142. Don Taylor, op. cit., p. 104. Sir Roy does not in his book mention that Stanley also suggested federation to him. He attributes the suggestion to the Secretary of State. Don Taylor's book appears to attribute the suggestion to Stanley only.

143. Don Taylor, op. cit., p. 106. Italics Don Taylor's.

Back home, Huggins and Welensky organized a conference to which European representatives from all the three territories were invited. The conference took place at the Victoria Falls on February 16, 1949 under the chairmanship of Sir Miles Thomas, Chairman of the Colonial Development Corporation.⁽¹⁴⁴⁾ No Africans were invited to the Conference - a blunder that contributed to the eventual downfall of the Federation. Welensky says that he suggested to Huggins that an African representative from Southern Rhodesia be included and that the latter turned the suggestion down on the grounds that the Conference was for representatives of established political parties who had already shown support for federation. Huggins' other reason was that since there was no restriction in Southern Rhodesia of Africans joining the existing parties,⁽¹⁴⁵⁾ no special arrangement for African representation was necessary. Welensky perhaps suggested only an African representative from Southern Rhodesia because he thought the Northern Rhodesian and Nyasaland Africans were adequately represented by the European Members representing African interests in the Legislative Councils of the two territories. If so, this was a mistaken assumption. It was essential for Africans to be directly represented at such an important conference. Commenting later on this failure to invite Africans, Creech-Jones wrote:

"No move could have been so clumsy and impolitic; in the light of political experience and of African opposition over a period of years the obtuseness of European statesmanship could not have been more emphasised. Africans were not invited to discuss even privately, the future of their country; nothing revealed more surely the contemptuous attitude of the instigators of the Conference towards them calculated to arouse African suspicion...The political situation never recovered from the folly committed by these Europeans." (146)

The Conference passed a resolution advocating a "federation of Southern Rhodesia, Northern Rhodesia and Nyasaland under a constitution which will create a Federal Parliament with such powers as are surrendered to it and which will not affect the other powers of government of the member states."⁽¹⁴⁷⁾ A Committee was appointed to produce a draft plan of the type of Constitution to be adopted. On Welensky's suggestion in the Committee, it decided to follow the Australian model. The draft plan produced by the Committee provided for two Houses of Parliament - a Senate and a House of Representatives. The Senate was to comprise five Members from each territory, chosen in a manner decided by each territory. The House of Representatives on the other hand, was to have proportionate representation and at first the Southern Rhodesians wanted Africans excluded from it. It was to be the more effective House, responsible for finance.

African affairs were to remain territorial but the Federal Government was to have overall supervision. Practically, all the major affairs of government were to be federal.⁽¹⁴⁵⁾ The Conference made three recommendations - (a) that a committee of experts be appointed to frame the Constitution and work out the financial arrangements; (b) that a further meeting be held after the committee of experts had completed its work; and (c) that thereafter there should be a referendum on the issue of federation, to be followed by a meeting to decide on the method of approaching the British Government.⁽¹⁴⁹⁾

The plan, as Gann says, was "something approximating to an amalgamation solution in a federal dress."⁽¹⁵⁰⁾ There is no doubt that had the plan been submitted to it, the British Government would have rejected it. It lacked serious consideration of the objections the Imperial Government had raised previously in relation to amalgamation. The conferees at the Victoria Falls seem to have deliberated under a mistaken belief that a mere substitution of the term "federation" for "amalgamation" and a pronouncement that African Affairs would be territorial, would be enough to satisfy the British Government. The plan was, however, never submitted to the British Government. From the viewpoint of results, the Conference was, therefore, a flop. "Its only achievement was thoroughly to frighten educated Africans in the Northern Territories, a disastrous mistake from the federalists point of view."⁽¹⁵¹⁾

The Conference's conclusions received condemnation from liberal opinion in England⁽¹⁵²⁾ and Central Africa and from Africans. African opposition at this time was beginning to build up on a large scale. Harry Nkumbula (later leader of the African National Congress) had, as a delegate to the first meeting of the Western Province Regional Council in 1943, told the Council that "the Africans in this country dread the very idea of amalgamating this country with Southern Rhodesia."⁽¹⁵³⁾ That meeting had ended by resolving that "All delegates were strongly and unanimously opposed to amalgamation."⁽¹⁵⁴⁾ At the time of the 1949 Conference Nkumbula was studying in London. Together with Hastings Kamuzu Banda they produced a memorandum denouncing the new idea of federation.⁽¹⁵⁵⁾ At African meetings in Northern Rhodesia and Nyasaland, federation was condemned with the same vehemence as amalgamation.⁽¹⁵⁶⁾ Greech Jones told Parliament that he could not make a statement on the Conference and also that the Government did not think it advisable to convene a conference to discuss federation.⁽¹⁵⁷⁾ Even some of the delegates to the Conference were not happy about the plan. Gore-Browne thought the proposals should be dropped.⁽¹⁵⁸⁾ The Nyasaland delegates were lukewarm about the plan.⁽¹⁵⁹⁾

had told the Conference that "in a country like Nyasaland with over two and a quarter million Africans and 2,500 Europeans it is impossible and inconceivable that we should try to force the amalgamation (he meant federation) of the three Territories without the support of the African" (160)

144. Gann, op.cit., p. 405; Welensky, op.cit., pp. 26-27; Taylor & Dvorin, op.cit. p. 72; Gann & Gelfand, op.cit., p. 215; and Jones, op.cit., pp. 133-4.
145. Welensky, op.cit., p. 127. Note that as early as 1945 Welensky had thought that Africans should be consulted directly on closer association - See his speech at Broken Hill as reported in Northern News, 15 Feb. 1945.
146. Creech Jones, A., African Challenge. The Falacy of Federation (London, African Bureau, 1952) pp. 9 and 10. Welensky admits: "It might, as I thought at the time, have been wiser to have invited a direct expression of African opinion....", op.cit. p. 27.
147. Welensky, op.cit., p. 29.
148. Gann, op.cit. p. 405. See also Gann & Gelfand, op.cit. p. 216; Franklin, H. Unholy Wedlock (London, Allen & Unwin, 1963) p. 38; Rothberg, op.cit. p. 155. Rothberg quotes Gore-Browne as saying Huggins wanted territorial legislatures to be like county councils.
149. Welensky, op.cit., p. 30.
150. Gann, op.cit., p. 216. Leys and Pratt say the Conference failed "largely because Huggins's idea of federation was too close to amalgamation to suit the Northern Rhodesia delegates" - A New Deal in Central Africa (London, Heinemann, 1960) p. 14. See also Franklin, loc.cit., p. 38, where the same reasons are given.
151. Gann, A History of Northern Rhodesia, p. 216.
152. See, for instance, Spectator, 8 March, 1949; New Statesman, 9 December, 1949; Anti-Slavery Reporter and Aborigines Friend, July, 1949.
153. Regional Council: Western Province, Chairman's Report Report of First Meeting... on December 20, 1943.
154. Ibid.
155. Gann & Gelfand, op.cit., p. 216.
156. Gann, op.cit., p. 407 et seq. For interesting information on African moods from this time onwards, see Frankel, P. Wayakeshi, (Weidenfield and Nicholson, 1959).
157. House of Commons Debates, Vol. 462, Col. 38, 1 March, 1949.
158. Ibid., Vol. 463/1201, 30 March, 1949.
159. Letter to the Manchester Guardian, 2 November, 1949. In fact, the Northern Rhodesian delegates as a whole (including Welensky) were not happy about the intended distribution of wealth and powers - See Franklin, op.cit., p. 30, where he gives a recollection of Gore-Browne that at one stage of the Conference Welensky said to him in a whisper, "We might as well walk out and go home now." This was when Huggins was giving views of the Federation he had in mind.
160. Welensky, op.cit., p. 29. For support of the Federal scheme and its advantages, see Huggins (in South Africa, Dec. 17, 1949); Cook, Stanley (in African World, Sept. 1949). For a balanced view on the subject, see Or, B.M. (in African World, May, 1949)

AND THE
OFFICIALS' CONFERENCES

In April, 1949, the Secretary of State for the Colonies visited Central Africa. At a press conference in Lusaka on 17 April, he told journalists that "certain arrangements already exists for the closer association of the three territories" and that "it may be wise to bring these arrangements into further review to see whether alternative arrangements were practicable, desirable or possible..." The Secretary went on to say: "Permanent white settlement needs to be controlled. Because Northern Rhodesia is a protectorate, the Africans have been guaranteed inherent rights and therefore in agricultural development there are certain definite restrictions so far as Europeans are concerned. Nevertheless, it is clear that for the economic well-being and social development of the Territory the European must have a permanent place and it has been British policy, while safeguarding the interests of the Africans, to encourage a degree of European development!"⁽¹⁶¹⁾ There was an uproar the following day by Europeans. Welensky, carried away by anger, lost all tact and thundered: "If the British Government wants to implement it, it will have to bring troops to this country to carry it out. The European community will not under any circumstances recognise a paramountcy of African interests. I am prepared to work in partnership with the African people - and for as long as I can see, in that partnership we will be the senior partners but I will never accept that Northern Rhodesia is to be an African State."⁽¹⁶²⁾ An utterance of this nature was certainly not the way to win support for federation. In November of that year Welensky moved a motion in the Legislative Council urging His Majesty's Government to accept the creation of a federation. The official Members walked out before the end of the debate while the Members representing African interests voted against it.⁽¹⁶³⁾

As mentioned above, the 1949 scheme was never submitted to the British Government. The reasons why it was not submitted are obscure but it can be guessed that Huggins knew Crooch Jones would find it unacceptable. He, therefore, perhaps wanted to wait until after the British general election which was to take place some time in 1950 in the hope that a Conservative victory might alter the situation.

161. Welensky, op.cit. pp. 33-44.

162. Ibid., p.34. 163. N.R. Legco Debates, 24 Nov., 1949, pp.322-

164. See Palley, op.cit. p.33, Note 3, quoting a personal communication from Sir John Kennedy, who was Governor of Southern Rhodesia at the time of the withdrawal. /425.

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Meanwhile, once the campaign for federation had been 201
launched, Huggins turned his mind to destroying the Central
African Council. Apart from the fact that he had accepted
it only as a stop-gap before attaining amalgamation, he had
run into political trouble in 1948 as a result of the Council's
affairs. Following an agreement at a meeting of the Council,
Huggins had presented to his Legislature the Currency Board
Bill. The Bill was defeated and Huggins had to go to the
country. He routed his opponents and one might have expected
him to proceed with strengthening the Council. But, of course,
this he could not do, as it would have worked against the
early attainment of federation. Instead, he seized on this
opportunity to put an end to the institution. In January,
1950, his Government gave notice that Southern Rhodesia
would leave the Council at the end of twelve months from the
date of announcement. The reason given for taking this step
was that the Council suffered from lack of constitutional
authority. Apparently the Southern Rhodesian Government
thought that dissolution of the Council would not be a
destructive but a constructive act which would enable greater
co-operation in the form of federation to take place. This
view was not, however, shared by the Governments of Northern
Rhodesia, Nyasaland and the United Kingdom who wanted the
Council to continue in preference to a tighter association.
The fact that the lack of executive power was a defect in the
functioning of the Council could not be denied. However, had
Southern Rhodesia wanted it to succeed, it could have succeeded.
In fact, had Southern Rhodesia been told that both amalgamation
and federation were out, there is no doubt that she would have
made the Council succeed. The apparently bright prospects for
federation prompted the Southern Rhodesian Government to
quickly destroy the Council.

In 1950 a general election was held in Britain. The
Labour Party won with a very narrow majority. Creech Jones
lost his seat and was replaced as Secretary of State for the
Colonies by Griffiths, Minister of Insurance in the previous
Government. Before dealing with the events from 1950, it is
necessary to discuss briefly the lines of thought prevailing
in Britain and Central Africa at this time. In Central Africa,
European leaders and the European public in general had,
apparently abandoned amalgamation in favour of federation.
The few Europeans on the right in Southern Rhodesia who
opposed federation for fear of being swamped by Africans from
the North and the few others on the left in Nyasaland and
Northern Rhodesia who opposed federation because it would
prejudice the rights of the Africans in those territories,
never hoped to turn the tide of European thinking in their
favour against the combined efforts of Huggins and Welensky.

45. European reasons for federation had changed in one important respect. Formerly Federation had been intended to prevent the spread of Afrikanerdom in Central Africa, particularly in Southern Rhodesia. Now, it was intended to prevent Northern Rhodesia and Nyasaland, particularly the former, from rule by Africans. The fear of Afrikaners had been replaced by the fear of the emerging African nationalists.⁽¹⁶⁶⁾ Events in Accra and Lagos were more unsettling and frightening than those in Pretoria. Nkrumah represented a deadlier menace than did Malan. The 1950 Constitution had given the Africans in the Gold Coast self-government⁽¹⁶⁷⁾ while the 1951 Nigerian Constitution had produced a Ministry of twelve Africans and six Officials.⁽¹⁶⁸⁾

160. See Creech-Jones, op.cit., p.8. et.seq. See Don Taylor, op.cit., where Welensky is quoted as saying that the Southern Rhodesian Prime Minister did his best to make the Council a success but that it was doomed from the start because it was consultative. This statement does not agree with Huggins' and Welensky's original reasons of accepting the Council (see above) and Welensky's words in the Legislative Council on 3 July, 1952 - N.R. Legco Debates, 3 July, 1952. Jones, op.cit., p.133 says: "Their hope in accepting it was.. that it would fail." Northern Rhodesian civil servants who worked on the Council thought Huggins was determined to sabotage the Council - Franklin, op.cit., p.35. Although Franklin says this might be an exaggeration, he observes: "The Southern Rhodesian Prime Minister and his Government and Parliament certainly did not have the Central African Council and made little attempt to help it succeed" ibid. Note a view by the journal, East Africa and Rhodesia, of 9 October, 1952, that "a major cause of non-success of the Council was the obstruction for which Nyasaland became notorious." Malcolm Barrow denied this charge in the Legislative Council in 1952 in these words: "Nyasaland did at all times seek to co-operate and in actual fact there was the fullest possible co-operation between member territories in that Council" - Nyasaland Legco, 68th Session December, 1952, p.43.
166. Gann & Gelfand, op.cit., p.221. Huggins declared: "From the Gold Coast, and Nigeria comes the heady intoxicating stuff of "black nationalism", from the South the doctrine of "Apartheid" and Afrikaner supremacy" Gutheridge, W.F. "The Debate on Central African Federation in Retrospect" Parliamentary Affairs, Vol. 10, 1957) pp.210-219, at p.214, quoting.
167. S.L. 1950, No. 2094. See Chapter 5, above, for constitutional changes in the Gold Coast and Nigeria at this time.
168. Odumosu, op.cit. p. 176. See Chapter 5.

Opinion in British-Government quarters had greatly changed in favour of closer association although it was not clear yet what form it would take. The takeover by the Afrikaner nationalists in South Africa had unsettling effects on the British Government just as the Gold Coast events had on the settlers. Southern Rhodesia had to be prevented from getting into closer links - in government or policy - with South Africa. Huggins and Welensky knew about these anxieties of the British Government and used them to achieve their goals. Non-Government opinion in Britain was still as divided as before. Those in favour of federation put forward the old arguments of economic benefits and the glory of a big British dominion in Central Africa. Those against Federation also put forward the same old arguments that federation would be detrimental to African interests in the Northern Territories. They argued that Central Africa could be linked without the constitutional ties contemplated.

Africans in Northern Rhodesia and Nyasaland had become more vociferous against federation. They denounced it at meetings, in conversations, in pubs and in newspapers. The Nyasaland African National Congress and the Northern Rhodesia African National Congress were totally opposed to it. The Africans in Southern Rhodesia, suffering from lack of organisation and afflicted with unprecedented apathy, said very little. The branches of the Northern Congresses in Southern Rhodesia were, however, very vocal against the move.

THE OFFICIALS' CONFERENCE

In August, 1950, Huggins decided that it would be preferable to have the matter investigated by officials rather than by politicians. He is reported as saying: "At this point - August of 1950 - I realised that after twenty-six years of effort nothing happened and the probable reason was that the matter had been discussed at too high a level - that was between the Secretary of State and the Southern Rhodesia Ministers, chiefly the Prime Minister". (169)

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The idea was, in fact, not new. It had earlier been suggested to Huggins by G. H. Baxter, Assistant Under-Secretary for Commonwealth Relations, but the former had not taken the advice then.⁽¹⁷⁰⁾ Huggins accordingly cabled London suggesting to the Secretary of State that a conference be held at official level. Griffiths, although cautiously,⁽¹⁷¹⁾ accepted the idea as giving him a respite from a possible clash with Huggins and Welensky. He had many problems to deal with in Malaya, West Africa, the West Indies and East Africa. The idea appealed to him in several respects. Officials would do this work quietly without wanting to hit the headlines at briefings after sessions. The British public and the Central African settlers had respect for civil servants and would not, therefore, subject them to denunciations, as they would politicians. If the officials rejected closer association the British Government would not be to blame and the storm from pro-federation elements would not be great. If they accepted closer association the British Government could not be accused by anti-federation elements. Above all, the British Government could easily shelve the report if it turned out to be unacceptable.

On November 8, 1950, the Secretary of State announced that "His Majesty's Government have, after careful consideration, formed the conclusion that it is desirable that there should be a fresh examination of the problem (of closer association), and they have accepted the suggestion of the Prime Minister of Southern Rhodesia that a conference of officials of the three Central African Governments, of the Central African Council and of the Commonwealth Relations Office and Colonial Office, shall be held in London for this purpose." The Secretary further stated that "the officials will examine the problem in all its aspects and consider whether it is possible in the light of this examination, for them to formulate proposals for a further advance to be made in the closer association of the three Central African territories which they could recommend."⁽¹⁷²⁾ According to Leys and Pratt the agreement to call a conference of officials must have been reached in March, 1950, for officials began working on a comparative survey of native policies in the three territories long before the announcement was made.⁽¹⁷³⁾ The document produced by this enquiry was used at the Conference.⁽¹⁷⁴⁾

The Conference opened in London on March 5, 1951 under the chairmanship of G.H. Baxter of the United Kingdom.⁽¹⁷⁵⁾ It lasted until March 31.

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169. G. Clegg, E.M. Race and Politics: Partnership in the Federation of Rhodesia and Nyasaland (Oxford, 1960) p.64; cf. Don Taylor, op.cit., p.128; Jones, op.cit., p.135.
170. Gann & Gelfand, op.cit., p.218; Gann, op.cit., p.140
171. Jones, op.cit., p.135.
172. House of Commons Debates, Vol.480, Col.966, 8 Nov.1950. Announcement is also quoted in Conference's Report - Cmd. 8233.

The Conference's Report⁽¹⁷⁶⁾ was published soon after the Conference on the tricky question of native policy, the officials, like the Hilton Young Commission and the Bledisloe Commission before them, encountered difficulties⁽¹⁷⁷⁾ but minimised them by stating that there were more similarities than dissimilarities between the policies.⁽¹⁷⁸⁾ "We do not believe that the differences in Native policy which still exist can now be regarded as a valid argument against closer association, provided that a suitable scheme can be devised."⁽¹⁷⁹⁾ The Conference found that there was urgent need for closer association between the three territories in order to promote progress in economic, strategic, communication, administrative and social facilities necessary to the three territories.⁽¹⁸⁰⁾ After agreeing on the need for closer association, the Conference examined the various forms it could take. It rejected the splitting of Northern Rhodesia so that one part could be joined to Nyasaland while the other joined Southern Rhodesia on the grounds that it would fail to achieve the needed closer association of the three territories and the economic benefits deriving therefrom. The Conference also thought that such a scheme would be strongly objected to by both Africans and Europeans in Northern Rhodesia. Amalgamation was rejected because the three territories were at different political and economic levels and because the elimination of United Kingdom control over native policy in the North would be acceptable to neither the Africans nor the United Kingdom, even with the insertion of safeguards. "After full consideration our conclusion is that a solution by amalgamation, although it has many intrinsic merits, stands so little chance of general acceptance that if only for that reason we cannot recommend it."⁽¹⁸¹⁾

173. Leys and Pratt, *op.cit.*, p.19.

174. Cmd.8235-Comparative Survey of Native Policy (Ldn.HMSO.1950)

175. For the list of officials who participated, see annex 1 to the Report.

176. Report on Closer Association in Central Africa 1951 (Cmd.8233) (London, H.M.S.O.1951). Extracts are reproduced in Mansergh, *op.cit.*, Vol.1, pp.1274-1284. The Conference also published an economic Report (Cmd 8234 of 1951) (London.HMSO, 1951).

177. See East Africa and Rhodesia, 21 June, 1951, which reported that at first the officials became pessimistic because of native policy differences. See also Gann & Gelfand, *op.cit.*, p.220, who say conference started with pomp but soon fell into difficulties.

178. Cmd. 8233, para. 18.

179. *Ibid.*, para. 19.

180. *Ibid.*, paras. 25-31.

181. *Ibid.*, para. 38.

182. *Ibid.*, para. 39.

183. *Ibid.*, para. 40.

184. *Ibid.*, para. 41.

185. *Ibid.*, para. 89 & 90 and Annex VII (Legislature) para 48, 88, 92 (Cabinet & Governor General).

(See page 206 for subject matter referring to footnotes 182 to 185).

The Conference also rejected another suggestion that the three territories should while retaining their existing constitutional positions, enter into a League to which by agreement they would handover certain functions and powers to be exercised by it on their behalf. The suggestion was unacceptable because: it would be difficult to work efficiently; it would produce friction and deadlock; it would not have adequate authority to secure the prosecution of constructive policies; it was unlikely to be accepted by Southern Rhodesia.⁽¹⁸²⁾

The Officials found Federation the only working solution. "We believe that this would enable the territories to be knit together effectively for common action in those spheres where it would be most beneficial to all of them while leaving unimpaired the authority of the individual territories in spheres where this seemed most appropriate, and recognising the responsibility of His Majesty's Government...towards the African peoples."⁽¹⁸³⁾

After suggesting that such a federation should be called British Central Africa⁽¹⁸⁴⁾ (the old name of Nyasaland) the Conference detailed the structure it should take. The territories were to retain their existing Governments and Legislatures and Northern Rhodesia and Nyasaland were to continue to be responsible to His Majesty's Government. At federal level there was to be a Central Government based on the Cabinet system, with a Governor General and a unicameral Legislature.⁽¹⁸⁵⁾ The Legislature was to comprise 25 members - 17 from Southern Rhodesia, 11 from Northern Rhodesia and 7 from Nyasaland. Three of the members from each territory were to be Members specially chosen to represent African interests. In the Northern Territories two of the three members were to be elected on the franchise existing in each territory. The African Members from Northern Rhodesia and Nyasaland were to be elected by the African Representative Council and the African Protectorate Council respectively and officially nominated by the Governor of the territory. The European special members were to be nominated by the Governor of each territory. In Southern Rhodesia the Secretary for Native Affairs was to call for lists of names from such organizations as the Federation of African Welfare Societies and the Race Relations Committee of the Joint National Council (comprising representatives of Chambers of Industry, Trade, Commerce and Mining and Municipal Councils and Farmers). After discussion between these bodies and the Native Affairs Department (which could add more names), the names were to be submitted to the Prime Minister who would forward them to the Governor for nomination.

In regard to African affairs the Conference recommended that since Africans were not yet appreciative of the benefits of closer association and since they would not be able to play a full part in the federal Government and Legislature like their European counterparts, services which intimately affected African life and development (including territorial political development) should be left as then existing.⁽¹⁸⁷⁾ However, because African affairs would feature at federal level, it was necessary that Africans should be represented in the Federal Legislature and that an African Affairs Board and a Minister of African Interests be included in the Constitution.⁽¹⁸⁸⁾ The African Affairs Board was to consist of the three Secretaries of Native Affairs of the territorial Governments, one elected or Unofficial Member and one African from each of the three territories. The Chairman of this nine-Member Board was to be the Minister of African Interests. The Board's functions were to be to examine all federal legislation (principal and subsidiary) before publication and to say whether it was or was not detrimental to Africans. Reference of legislation to the Board was to be obligatory and on publication of the legislation the Federal Government was to make the views of the Board known to the Legislature in a statement. If the Board reported that legislation would be detrimental to African interests, the Government could proceed with it but the Governor-General was then to reserve the Legislation for the signification of His Majesty's pleasure and refer it to the Secretary of State. The Board was also to hold a general watching brief in respect of all federal matters affecting African interests and to promote liaison between the three territories in matters affecting Africans.⁽¹⁸⁹⁾

The Chairman of the Board, as mentioned above, was to be the Minister of African Interests. The Minister was to be a member of the Federal Legislature and a member of the Cabinet. He was, however, to be outside politics. He was to be appointed by the Governor-General from among the Members representing African interests and was to be responsible to the Secretary of State for the activities of this Minister. The Minister's appointment was to be terminable by the Governor-General subject to the approval of the Secretary of State. The Minister's function was to be the proposing of measures in the Cabinet which he thought essential in the interests of Africans and consideration of whether measures by other Ministers were not detrimental to Africans. The Minister was to co-operate with the other Ministers but where he disagreed with them and the difference was not resolved by consultation, he was to report the matter to the Governor-General. The Governor-General was then to report the matter to the Secretary of State who would give or withhold his approval of the matter.

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Such a measure was not to come into effect until the approval of the Secretary of State, unless the Governor-General certified, after representations by the Prime Minister, but on his own responsibility, that on grounds of public policy the measure should come into force.⁽¹⁹⁰⁾

The Officials outlined the advantages of the two institutions⁽¹⁹¹⁾ (Board and Minister) and wound up by saying that "the existence of these special arrangements would be a protection for African interests and, still more important, should give a sense of security to Africans, at the present stage of their political development."⁽¹⁹²⁾ At a glance, it can be seen that there were objectionable features in the two institutions, particularly as regards the Minister of African Interests, which those who were going to run the Federal Government could not readily accept. The Minister was to be above politics - i.e. he was not to belong to a political party. He was not to be selected by the Prime Minister and appointed by the Governor-General as the other Ministers. The Minister was not to be dismissable by the Prime Minister. He was not to be bound by the principle of collective responsibility with the other Members of the Cabinet. In all, he would be like an Opposition Member in the Cabinet. The Officials were no doubt aware of these objectionable aspects but the paramount thing in their minds was that federation should be attained and since the obstacle was the protection of African interests, independent protection machinery was necessary.

186. Ibid., paras. 64-87 and Annex V. Federal functions were to be: external affairs; defence; immigration; economic planning and development; external trade and certain aspects of inter-territorial trade; federal income tax; customs; census and statistics; railways; civil aviation; trunk roads; electric supply and distribution; posts and telecommunications; broadcasting, films and tourism; European Education (primary and secondary); higher education, medium and long term research; surveys; major water developments; and national parks; Territorial functions were to include provincial and native administration income tax (territorial); agriculture; forestry; veterinary services; game; fisheries; co-operation; marketing; health; African education (primary and secondary); labour; mines; local government; police; prisons; public works (territorial); roads (other than trunk) and irrigation (except major development).

187. Ibid., paras. 47 and 60.

188. Ibid., para. 43.

189. Ibid., para. 49 and Annex III.

190. Ibid., para. 50.

191. Ibid., para. 51.

192. Ibid., para. 52.

Had the Report not contained a sweeping statement on native policy and proposed the African Affairs Board and the Minister for African Interests, it would have perhaps been acclaimed in several quarters. These three provisions were the most controversial parts of the Report. The "cuckoo in the nest", as the Minister for African Interests immediately came to be known in Central Africa, was denounced as an impracticable provision. The African Affairs Board was criticised for being an institution which would be outside Parliament and yet have a great deal of power over the work of Parliament. This, combined with a Minister who would be in the Cabinet but not bound by Cabinet decisions and the principle of collective responsibility, made the two institutions unacceptable to the Central African European leaders. On the other hand, profederation elements in Central Africa had nothing to criticise in the Officials' conclusions on native policy. Opposition Members in the Southern Rhodesia Legislative Assembly and some members of Huggins' own party, however, feared that while the British Government would not relinquish its control of African policy in Northern Rhodesia and Nyasaland, it would be able to influence African policy in Southern Rhodesia through the African Affairs Board.⁽¹⁹³⁾ The Officials' conclusions on native policy were, however, the most resented in liberal circles in Britain and Central Africa. The press and individuals criticised the officials for dismissing lightly what was, in fact, the most crucial aspect of the whole problem of close association.⁽¹⁹⁴⁾ Creech Jones later summed up the officials' observations as follows: "It must be said that this is an exquisite example of official white-washing of a policy in Southern Rhodesia which, it would seem, the officials wished to minimise in order to establish the case for their recommendation."⁽¹⁹⁵⁾ Africans in Northern Rhodesia and Nyasaland reiterated their opposition to closer association with Southern Rhodesia. The Congresses whipped chiefs and commoners to a massive anti-federation campaign.⁽¹⁹⁶⁾ Nkumbula and Banda issued a memorandum in Britain denouncing the Officials' Report.⁽¹⁹⁷⁾

Huggins, despite his dissatisfaction with parts of the Report, decided to accept it. He feared that not doing so might make the British Government withdraw the whole plan, with the consequence of Northern Rhodesia becoming an African ruled state.⁽¹⁹⁸⁾ He consequently wrote to the Secretary of State for Commonwealth Relations urging acceptance of the Report.⁽¹⁹⁹⁾ The British Government, however, dilly-dallied in coming to a decision.⁽²⁰⁰⁾

193. Gann & Gelfand, *op.cit.*, p.220.

Footnotes 194 to 200 overpage.

It finally circumvented the problem by stating that the Report would serve as a basis for further discussion without saying whether or not the principle of federation was accepted. Griffiths explained eight years later in a letter to The Times that "a Labour Government regarded the decision on this matter, which inevitably affected the whole future destiny of these peoples, as one which they themselves should take. Neither we nor officials of the Colonial Service had any right to take this highly important decision for them." (201)

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194. See e.g. The Manchester Guardian and The Scotsman of June 14, 1951. For criticism by individuals, see Creech Jones, op.cit., p.13; Kirkwood, K. "The Proposed Federation of the Central African Territories," (New Africa, Pamphlet, No.21, published in Johannesburg in 1951 by the South Africa Institute of Race Relations) Criticism of the conclusions continued even after federation had been established, see e.g. Jones, op.cit. pp.136 and 137; Kirkwood, K., "British Central Africa: Politics Under Federation" (in Annals of American Academy, Vol.298, 1955); Leys & Pratt, op.cit., p.22.
195. Op.cit., p.13.
196. See The Daily Telegraph, 25 June, 1951.
197. Banda, H.K. and Nkumbula, Federation in Central Africa, (1951). Memorandum is partly reproduced in Pike, John G. Malawi: A Political and Economic History (London, Pall Mall Press, 1968). pp. 114-115.
198. Gam & Gelfand, op.cit., p.221.
199. Ibid. p.220.
200. Ibid. p.221.
201. The Times (London), 24 September, 1959.

THE VICTORIA FALLS CONFERENCE OF 1951

In August (1951) the Secretary of State for the Colonies (Griffiths) and the Secretary of State for Commonwealth Relations (Gordon-Walker) visited Central Africa to see things for themselves. The two Secretaries planned to climax their visit with a conference at the Victoria Falls at which they wanted the Central Africans to take a decision for themselves. In Nyasaland and Northern Rhodesia they listened to strong African opposition and were told by the Congresses that they would not attend the Victoria Falls conference. They also found considerable opposition from Africans in Southern Rhodesia. The Southern Rhodesian Africans opposed federation if it meant extending the Southern Rhodesian African policy to the North. Their attitude now, unlike that of 1938, was to accept federation with the North if it meant extension of the African policy of the North to Southern Rhodesia.⁽²⁰²⁾ A link with the Union which they had advocated in 1938 was no longer thinkable in the light of the African policy then obtaining there.

The Conference opened at the Victoria Falls on September 18.⁽²⁰³⁾ All interested European parties were there. Five Africans (two from Northern Rhodesia and three from Nyasaland) were also present. This was the first time that Africans had come to the Victoria Falls to discuss closer association since conferences for that purpose started there in 1930. These Africans were not representatives of the Congresses. On federation it did not matter, however, which Africans attended. Congress and non-Congress members, chiefs and commoners, civil servants and non-civil servants, were all against federation. The five Africans were, therefore, no exception. They had come to the Victoria Falls to oppose the plan.

Huggins warned the Conference against "Krugerism" and pointed out that there was need to preserve Western civilization on the Continent.⁽²⁰⁴⁾

202. Ibid., 14 September, 1951. Mr. (now Sir) Patrick Fletcher then Minister of Native Affairs) told Gordon Walker during the visit that in Southern Rhodesia African opposition did not count. He was heavily criticized by British newspapers and told that it might not count in Salisbury but did so in London - see e.g. The Manchester Guardian, 13 September, 1951.

203. For a summary of this conference, see Gann & Gelfand, op.cit. pp.22 (et. seq) Gann, op.cit., pp.411-13; Palley, op.cit. pp.336 et. seq; Jones op.cit. pp.137 et. seq Franklin, op.cit. pp.59-63; Mason, Philip. Year of Decision Rhodesia and Nyasaland in 1960 (Oxford, 1960); CMI. 8573 - Report of the 1952 Conference (See below) p.37

204. Gann & Gelfand, op.cit. p.221.

55. His Minister of Finance, Edgar Whitehead, eloquently gave the economic benefits of federation.⁽²⁰⁵⁾ Welensky, propounded Rhodes's dictum of "equal rights for all civilised men." After pointing out the tragedies likely to emerge from black nationalism in the Gold Coast and white nationalism in South Africa, he urged the adoption of the policy of multi-racialism in Central Africa. Malcolm Barrow, in keeping with Nyasaland's cautious approach to the issue, told the Conference that the Europeans in Nyasaland could not impose federation against the wishes of the African people and that the whites had made a mistake when they did not invite Africans to the last (1948) Conference. John Moffat (who had replaced Gore-Browne) and other Europeans representing African interests warned against ignoring African opposition and urged that African support must be obtained. Africans spoke little but they left the conference in no doubt of their strong opposition to federation. The Northern Rhodesian Africans, however, were prepared to consider federation once partnership had been defined and put into operation.⁽²⁰⁶⁾

On the other hand, the Secretaries of State (particularly Griffiths) were adamant on several issues. African opposition was not to be overridden. They were to be talked into accepting federation. Nyasaland, which the Southern Rhodesian delegation wanted excluded from the federation, was to be included. Africans were to be represented in the Federal Parliament.⁽²⁰⁷⁾ The two Ministers wanted the "cuckoo Minister" to remain. They did not want the African Affairs Board replaced by an Upper House as suggested by Huggins. The Secretaries of State refused to commit themselves and the British Government that they had accepted federation without discussing the matter with their Cabinet colleagues and probably in Parliament.⁽²⁰⁸⁾ It became clear that the Conference would not achieve the results expected by Huggins in the light of the unyielding attitude of the Secretaries of State on basic issues.

205. Ibid.

206. Ibid., p.222; Gann, op.cit., p.412. Franklin says the two delegates "had been persuaded by the Chief Secretary and the Secretary for Native Affairs to say that they would be prepared to consider the federal scheme as outlined in the Officials' Report after partnership had been defined and put into practice with the land, protectorate and political safeguards." op.cit. pp.59-60.

207. For the deadlock reached on the inclusion of Nyasaland, African representation and other matters, see Franklin, op.cit., pp.59-61; Leys and Pratt op.cit., pp. 31-32; Gann & Gelfand, op.cit., pp. 221 et seq., Gann, op.cit. pp.411-2. Huggins, although impressed by the five Africans at the Conference was of the opinion that they were not yet ready to sit in Parliament - Gann & Gelfand p.222. Later Huggins startlingly declared that if the Northern territories sent Africans to the Federal Parliament, Sthn. Rhodesia would do the same - Gann & Gel. p.223.

208. Gann, op.cit., p. 411.

Huggins had, in fact, anticipated this. He had thought there ²¹³ would be an election in Britain before the Conference and that the Labour Party would be defeated and the conference held under Conservative Secretaries of State. When it became clear that there would be no change of government he sought to postpone it but failed.

While the Conference was in session news came that the British Parliament had been dissolved. The Secretaries, anxious to go home for the election campaign, abruptly and inconclusively brought the Conference to an end but with a communique⁽²⁰⁹⁾ on what had been discussed. The communique, after recapitulating the contents of the Officials' Report, stated that the Conference just concluded was not intended to reach final decisions on the matter; that with the exception of the Africans from Nyasaland and Northern Rhodesia (although the latter had agreed to reconsider the matter when partnership had been defined) all present were in favour of federation; that European and African partnership was the only policy workable; that British traditions and principles should be retained in the three territories; and that a federation would give advantages of common communications, research, defence, higher education and economic planning and development. It further stated that the Conference had agreed that since the fears of the Africans in Northern Rhodesia and Nyasaland were the main obstacle to the introduction of federation, in any further consideration of the matter the following should be recognized:

(1) "The protectorate status of the two Northern Territories would be accepted and preserved. This... (would exclude) any consideration now or in the future of amalgamation of the three territories unless a majority of the inhabitants of all three territories desired it.

(2) Land and land settlement questions in Northern Rhodesia and Nyasaland (would) remain as at present (subject to the ultimate authority of His Majesty's Government in the United Kingdom), the responsibility of the Territorial Government and Legislature in each territory and not of any federal authority. The land rights of the African people in Northern Rhodesia and Nyasaland (would) remain secured in accordance with the existing Orders in Council on the subject.

(3) The political advancement of the peoples of Northern Rhodesia and Nyasaland, both in local and Territorial Government, (would) 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". These guarantees would be enshrined in the constitution.

Huggins was incensed by the inconclusiveness of the Conference. He had expected the Conference to come to a definite decision. He later described the Conference as having degenerated into a "mothers' society" or a "native benefit society" presided over by the Secretary of State and attended by delegates in a "molotov spirit".⁽²¹⁰⁾ Welensky also later said of the Conference: "We never got down and carried out the primary purpose of the meeting, to examine the Officials report".⁽²¹¹⁾ The outcome of the Conference was not, however, completely negative. Although the Secretaries of State had not publicly stated that the British Government would support federation, they had committed themselves to federation on the lines recommended by the officials. The language of the communique showed this plainly. Further, agreement had been reached on a number of subjects and provided solutions were found to African opposition and effective guarantees for African interests, there were no longer any other obstacles in the way of federation. While the Ministers did not agree with every argument put forward by Huggins and his colleagues in favour of federation, they were greatly impressed by the economic arguments. They appreciated the South African threat but did not certainly see the Gold Coast position the way Huggins and Welensky saw it. On African opposition, the Secretaries were apparently not convinced that it was as big as it appeared on the surface. They suspected that in Northern Rhodesia it was due mainly to left-wing Europeans while in Nyasaland it was all due to Dr. Banda's influence from England. The Secretaries were also impressed by the fact that for the first time Africans and Europeans in Central Africa had come together to discuss their future.⁽²¹²⁾

209. The communique is reproduced in full in Mansergh, op.cit., Vol.11, No. 1284-1286; and also in Commonwealth Survey, No.81 of 28 September, 1951, published by the Central Office of Information (British). See also Cmd. 8573 of 1952, p.37- Report of the 1952 Conference.

210. Gann & Gelfand, op.cit., p.224; Mason, op.cit., p.28. For speeches by Huggins referring to the Conference, see e.g., The Daily Telegraph, 6 Oct., 1951; The Manchester Guardian, 22 Nov., 1951; The Johannesburg Star, 20 Nov., 1951.

211. N. R. Lerco Debates, 3 July, 1952.

212. For benefits from the conference and the impressions of the two Secretaries, see Gann and Gelfand, op.cit. pp.22-3. See also Gann, op.cit., p.412; Palley, op.cit. p.336; Cmd. 8573 of 1952 op.cit., Annex 11, SS.7 and 11. For Huggins's impressions of the African delegates and the latter's impressions of Huggins, see Gann & Gelfand, op.cit., p.222.

58. The two Secretaries reported favourably on federation to their colleagues,⁽²¹³⁾ The Labour Party, however, lost the general election and what they would have done had they won it is now a question of opinion. The new Government decided to go ahead with federation. On November 21, the new Secretary of State for the Colonies, Oliver Lyttelton (now Viscount Chandos), announced to Parliament⁽²¹⁴⁾ that His Majesty's Government were in full agreement with the Victoria Falls Conference communique and that they were in favour of a scheme for federation on the general lines recommended by the Officials' Report. The announcement stated further that federation would be in the best interests of Africans as well as other inhabitants in the three territories and that the Government undertook to ensure that the assurances in the Victoria Falls Communique regarding African interests would be embodied in a federal constitution. The Secretary of State ended the announcement by saying that further discussions and consultations as contemplated in the Victoria Falls communique would be furthered.

The British Government's argument in favour of establishing federation was now that withholding it would worsen race relations between Europeans and Africans and that that position would leave a vacuum of which the Afrikaners could take advantage.⁽²¹⁵⁾ This fear was strengthened by an unprecedented increase of Afrikaner immigration into Southern and Northern Rhodesia. It was thought in some quarters that the immigration was being subsidised for the purposes of weakening British influence, buttressing the position and influence of the Union in Central Africa and providing wider support for the Union's African policy.⁽²¹⁶⁾ Coincidentally, Afrikaners were at this time beginning to demand their own schools and the official use of their language.⁽²¹⁷⁾ All these things were constantly being brought to the notice of London. A considerable number of people began to express anxieties "that there was danger from a "wooden horse" built up within."⁽²¹⁸⁾ It will be recalled that the Victoria Falls conference had expressed grave concern at the dangers which would flow from the weakening or dilution of the British connection, traditions and principles in the three territories and had agreed that they should be so strengthened as to ensure that they continued to prevail. As far as the argument that withholding federation would worsen black-white relations was concerned, perhaps that was right, but its introduction eventually had the same effect.

213. Gann, *ibid.*

214. Cmd. 3411 -- Closer Association in Central Africa: Statement by H.M.G. in the United Kingdom; House of Commons Debates, Vol. 494, Col. 392, 21 November, 1951.

Footnotes 215 - 218 on page 216.

The November 21 announcement cleared the uncertainty. Federation was to be implemented. What was left was to settle the differences between London and Salisbury. In January, 1952, Huggins and the Governors of Northern Rhodesia and Nyasaland flew to London to have informal talks with the Secretary of State for the Colonies. At these informal talks Huggins again suggested that Nyasaland should be excluded. Lyttelton is said to have banged the table and insisted that it should be part of the federation.⁽²¹⁹⁾ Lyttelton also told Huggins in no uncertain terms that the British Government would not sanction amalgamation.⁽²²⁰⁾ The Secretary further refused to reduce the number of African representatives in the Federal Parliament; to let the civil service of the territories be unified with that of the Federation; and to give power to the Federal Government to veto legislation inconsistent with the Preamble of the Federal Constitution.⁽²²¹⁾ At the end of the informal talks it was announced that a formal conference would take place in April to formulate a draft scheme for the federation. Parliament was told that the scheme prepared by the forthcoming conference would be published and that a further conference would be held later in the year to consider a detailed scheme before the question of ratification or abandonment of such scheme was put to the four Governments.⁽²²²⁾ The informal conference had agreed on a number of points which would serve as the basis of discussion at the April Conference.

215. The officials had said: "...there can be no doubt that thinking Africans as well as Europeans in all the territories are becoming increasingly anxious about the course of native policy South of the Limpopo " Cmd. 3233, para. 32.

216. Creoch Jones, op.cit., p.11.

217. Ibid.

218. Ibid.

219. Gann & Gelfand, op.cit., p.224; Gan, op.cit., p.413, See also Welensky, op.cit., p.43; Franck, op.cit., p.323.

220. Cmd. 9573, op.cit., para 8. The British Government issued a formal statement part of which read: "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 assumed towards the two Northern Territories. This they cannot do." - ibid.

221. Gann, op.cit., pp. 413-414.

222. Ibid.

These were: that the Federal franchise should be written into the Constitution; that amendments to the Constitution should require a two-thirds majority and reservation for Her Majesty's approval; that the Constitution should contain a declaration of rights of the races (the declaration was to form part of the Preamble but be without legal force) that immigration from outside the federation would be a federal responsibility, with the territories, however, having the control of movement within the Federation to enable Southern Rhodesia to bar Indians from the North; and that there be a concurrent list of subjects in addition to the exclusive federal list. The "cuckoo" Minister was to disappear on the grounds that it would be impossible to have a Minister not responsible to his colleagues. As a result of the disappearance of the Minister for African interests, the African Affairs Board was to be redesigned.⁽²²³⁾

The Tories and the Socialists had at this stage become sharply divided on the issue.⁽²²⁴⁾ The Tories had become fully committed to federation. The Socialists, on the other hand, although not in principle opposed to federation as such, thought African consent was necessary before it could be established.⁽²²⁵⁾ It had become quite clear at this time that although African opposition would be listened to, it had ceased to be an important factor on whether federation should be established or not.

The Conference opened on April 23 as planned. The delegations included Africans from all the three territories.⁽²²⁶⁾ Before the opening of the Conference, the various delegations held informal talks with the respective Secretaries of State at which formal invitations to the Conference were made. The Africans from the North turned down the Secretary of State's invitation to attend the Conference, even as observers (although the Nyasaland Africans had at first agreed to attend as observers).⁽²²⁷⁾ The Northern Africans, therefore, boycotted the Conference⁽²²⁸⁾ (but remained in London for the duration of the Conference). The Conference, however, proceeded without them.⁽²²⁹⁾ Southern Rhodesia still wanted a strong central government controlling a unified civil service and a bicameral legislature. Huggins and Welensky also wanted a federal police force to enforce federal laws. The British Government, on the other hand, wanted a decentralized government, and was opposed to a federal police force, pointing out that in Britain no problem had been experienced because the police force was in the hands of the local authorities. There was lively debate on the franchise, the African Affairs Board, the right of secession of a territory from the federation and the name of the federated territory. Secession was advocated by the Southern Rhodesian opposition delegation, but Huggins and the United Kingdom delegation resisted it.⁽²³⁰⁾

Footnotes on page 218.

223. See House of Commons Debates, 4 March, 1952. See also 218
Cmd. 8573 of 1952, op.cit..
224. The following exchanges in the House of Commons on
March 4, 1952, in a debate on federation show the
division: Sir P. Macdonald (Tory) speaking in support
of the proposals said: "If they are not accepted (by
the Africans) we shall still have to go forward..It
is the duty and responsibility of this House to
govern the territories or get out " - House of Commons
Debates, Vol. 497, Col. 303, 4 March, 1952.
Mr. Griffiths (Labour) said: "The time has gone when
we can make decisions and, having made decisions, impose
them. They must, now be made by agreement and discussion."
Ibid., Col. 227. Mr. Simon (Tory): "If federation did
not come about there would be a danger of Southern
Rhodesia looking southwards instead of north-wards."
Ibid., Col. 252. Mr. Brockway (Labour) countered:
"There is one certain way of preventing the Rhodesians
from joining the Union and that is to give the African
peoples in Northern and Southern Rhodesia political
rights " - ibid. Col. 285. Mr. Griffiths (Labour)
expressing the Labour Party's only objection to
federation stated: "The federation of these territories
is desirable in principle. The problem is how to
achieve it with willing consent of the Africans "
ibid., Col. 221. Mr. Alport (Tory) giving his party's
view stated: "We must consult them, that is true, but
we are under an obligation to act in good faith; and
if it is the view of the House that federation is an
advantage to Central Africa then surely we are under
a moral obligation to make that decision and to stand
by the consequences " - ibid., Col. 312.
225. Ibid.
226. The Northern Rhodesian and Nyasaland Africans were
drawn from the African Representative Council and the
African Protectorate Council respectively. The two
Southern Rhodesian Africans were handpicked by Huggins.
They were J. Z. Savanhu, editor of the African Weekly,
published by African Newspapers Ltd., in Salisbury, and
J. M. N. Nkomo, who later became leader of four
successive nationalist organizations (i.e. African
National Congress banned in 1959; National Democratic
Party, banned in 1961, Zimbabwe African People's Union,
banned in 1962, and the People's Caretaker Council,
banned in 1964.)
227. Cmd. 8573, op.cit. para. 11.
228. For their reasons for boycotting the Conference, see
their letter to The Times (London), April, 29, 1952.
The letter is dominated by expressions of fear of the
extension of Southern Rhodesia's political, economic
and social discriminatory policies to the North. Mr.
Griffiths, justifying their boycott in the House, stated
that they were "still very apprehensive lest attendance
at the Conference be taken to imply that they accept
Federation even in principle. Also they fear that Her
Majesty's Government has already decided to go through
with Federation notwithstanding unanimous opposition "
House of Commons Debates, Vol. 499, Col 1237, 29 April,
1952. (Griffiths).
229. Lyttelton replying to a suggestion by Griffiths that the
Conference should not go on in the absence of the
Africans said: "It is quite intolerable to suggest that
we should not proceed with the Conference because two of
the three territories were not represented by African
delegates. That would go further than a veto on a
decision. It would be a veto on a discussion." House
of Commons Deb. Ibid., Col. 1258.
230. Gann, op.cit. p. 414, Gann & Gelfand, op.cit. p. 225.

(231)

The Conference produced a Federal Draft Scheme, containing detailed proposals for the federal constitution. Three other subsidiary reports were later produced by Commissions which had been set up by the Conference to examine in more detail the fiscal, judicial and civil service structures.⁽²³²⁾ The Federal Draft Scheme opened with a set of principles which was to be included in the preamble to the final constitution. These were: that the three territories were the rightful home of all their lawful inhabitants; that the association of the territories in a federation would conduce to the security, advancement and welfare of all their inhabitants; that Southern Rhodesia would continue to enjoy self-government as a member of the federation; and that Northern Rhodesia and Nyasaland would continue, under the protection of Her Majesty, to enjoy separate Governments responsible among other matters for local and territorial political advancement, so long as their respective peoples so desired. It can be seen that the recitals to be included in the Preamble were intended to assure both Africans and Europeans of their rights. The declaration that the three territories were the rightful home of all the lawful inhabitants whatever their origin was, no doubt, intended to allay the fears of Europeans in Northern Rhodesia and Nyasaland, particularly in the former, that they would not be politically squeezed out through the doctrine of paramountcy of African interests. Southern Rhodesian Europeans who feared the loss of self-government were to get comfort from the fact that the country would remain self-governing. Africans in Northern Rhodesia and Nyasaland, on the other hand, were to be equally comforted by the facts that their countries would remain protectorates under the United Kingdom Government and that their political advancement would be the responsibility of the territorial Government.

231. Draft Federal Scheme: Report of the Conference Held in London in April and May, 1952. (Cmd. 8573 of 1952). London, H.M.S.O. 1952.)

232. Draft Federal Scheme: Report of the Fiscal Commission (Cmd. 8672 of 1952). Draft Federal Scheme: Report of the Judicial Commission (Cmd. 8671 of 1952). Draft Federal Scheme: Report of the Civil Service Preparatory Commission (Cmd. 8673 of 1952). London, H.M.S.O. 1952.)

The federation was to be called the "Federation of Rhodesia and Nyasaland"⁽²³³⁾ and not "British Central Africa" as the officials had suggested. During the debate on the name, some Southern Rhodesian delegates had suggested that the name be the "Kingdom of Rhodesia and Nyasaland" on the grounds that this would allay the fears of the Africans and at the same time be popular with European loyalists.⁽²³⁴⁾ The Federation was to have a unicameral Legislature comprising the Governor General (representing the Queen and acting in the same capacity as the Queen in Britain)⁽²³⁵⁾ and 35 members.⁽²³⁶⁾ The distribution of the 35 members⁽²³⁷⁾ and of the 26 elected members⁽²³⁸⁾ remained as recommended by the Officials and so was the mode of their election at the first election.⁽²³⁹⁾ Thereafter a federal franchise was to apply in Southern and Northern Rhodesia but not in Nyasaland where the local franchise was to continue until the territory's Legislative Council passed a resolution requesting the Federal Legislature to extend the federal franchise law to the territory.⁽²⁴⁰⁾ The number of Members to represent African interests remained⁽²⁴¹⁾ as the officials had recommended but more details were given regarding their election and nomination. The two Africans from each of the Northern Territories were to be elected by a body designated by the Governor of each territory as representative of Africans and these were to be the African Representative Council in Northern Rhodesia and the African Protectorate Council in Nyasaland.⁽²⁴²⁾ The two Europeans (one from Northern Rhodesia and one from Nyasaland) representing African interests were to be appointed by the Governor of each territory,⁽²⁴³⁾ as the Officials had recommended. In Southern Rhodesia the three Members were to be elected in accordance with regulations to be made by the Governor of Southern Rhodesia. The regulations were to provide for the election of two Africans and one European.⁽²⁴⁴⁾

233. Cmd. 8573, *op.cit.*, Chapter 1, para. 2.

234. Gann & Gelfand, *op.cit.*, p.225; Gann, *op.cit.*, p.414.

235. Cmd. 8573, *op.cit.*, Chapter 11, Part 1, para. 1.

236. *Ibid.*, Chap. 11, Part 3, para. 1 (1).

237. *Ibid.*, Chap. 11, Part 3, para. 1 (1) and para. 14 (1).

238. *Ibid.*, Chap. 11, Part 3, para. 2.

239. *Ibid.*, Chap. 11, Part 3, paras. 3 and 4.

240. *Ibid.*, para. 5.

241. *Ibid.*, para. 6.

242. *Ibid.*, paras. 10 and 11 and footnote 23 on p. 17.

243. *Ibid.*, para. 14 (2).

244. *Ibid.*, para. 9. Note that the Draft Scheme did not specifically mention the race of the Members from Nyasaland and Northern Rhodesia. The recommendation of the Officials on this matter must have been tacitly accepted.

This was a departure from the recommendation of the Officials who had not specified the race of the three Members and had suggested that they be appointed by the Governor from lists submitted by certain organizations and the Native Affairs Department. Since there were no qualifications laid down for both the elected and appointed members for African interests in existing electoral laws, the Draft Scheme provided for such qualifications. In Southern Rhodesia they were to be citizens while in Northern Rhodesia and Nyasaland they were to be either British subjects or British protected persons.⁽²⁴⁵⁾ 221

The Federal Legislature was to have power to make laws from two lists of subjects - the Exclusive List (subjects within the jurisdiction of the Federal Legislature only)⁽²⁴⁶⁾ and the Concurrent List (subjects on which both the Federal and Territorial Legislatures could make laws).⁽²⁴⁷⁾ Powers not included in the two Lists were to be territorial. The Federal Legislature was to have power to delegate generally or specially matters in the Exclusive List to the Territorial Legislatures.⁽²⁴⁸⁾ The Territorial Legislatures were to be equally competent to delegate matters within their exclusive jurisdiction to the Federal Legislature.⁽²⁴⁹⁾ Delegation by either Legislature could be revoked.⁽²⁵⁰⁾ Where, on subjects falling under the Concurrent List, legislation of a Territorial Legislature was inconsistent with federal legislation, the latter was to prevail to the extent of the inconsistency.⁽²⁵¹⁾

Chapter III of the Draft Scheme dealt with legislation and procedure. The most important provision under this Chapter was the reservation of certain Bills by the Governor-General for the signification of Her Majesty's pleasure. The Bills to be covered by this provision were to be:

- (a) any Bill which revoked or amended any provision of the Constitution or was inconsistent with or repugnant to the Constitution;
- (b) any Bill required to be reserved by the African Affairs Board (see below); and
- (c) any Bill that concerned the electoral law.⁽²⁵²⁾

In addition to these, the Governor-General was also to be required by Royal Instructions to reserve the following Bills: Any Bill provisions of which appeared inconsistent with obligations of Her Majesty under international law; any Bill whereby any grant of land or money or other donation might be made to him (the Governor-General), and any Bill containing provisions to which Her Majesty's assent had once been refused or which had been disallowed by Her Majesty.⁽²⁵³⁾ Her Majesty was to have power to disallow a Federal law at any time within twelve months after it had been assented to by the Governor - General.⁽²⁵⁴⁾

Chapter IV of the Scheme contained provisions on the Executive. The Executive was to comprise the Governor-General, appointed by Her Majesty, the Prime Minister and the other Ministers.⁽²⁵⁵⁾ The Prime Minister and the other Ministers were to be appointed by the Governor-General.⁽²⁵⁶⁾ The Governor-General was to act on the advice of the Council of Ministers (i.e. the Prime Minister and the other Ministers) save in those instances where the Constitution gave him discretion.⁽²⁵⁷⁾ The cuckoo Minister had disappeared. This, it will be remembered, had been agreed to at the January informal conference and the question was not even debated at the April Conference.

Provisions regarding the controversial African Affairs Board were dealt with in Chapter V. The composition of the Board had radically been changed from that recommended by the Officials.⁽²⁵⁸⁾ The officials, it will be recollected, had recommended a Board of nine members and a chairman who was to be the Minister of African Interests. While the Chairman was to be drawn from among the Members representing African interests in the Federal Assembly, the other Members were to be the Secretaries of Native Affairs from the three territories, one elected or unofficial member from each of the territorial legislatures and three Africans, one appointed from each territory. The Board as contained in the Draft Scheme was to consist of a chairman and six ordinary members.⁽²⁵⁹⁾ No person who was a member of the Federal Assembly or a Territorial Legislature or a public officer was to qualify as chairman of the Board.⁽²⁶⁰⁾ The Chairman was to be such person as the Governor-General, in his discretion, might, with the approval of the Secretary of State, appoint.⁽²⁶¹⁾ The ordinary Members of the Board (two from each territory) were to be nominated by the territorial Governors and appointed by the Governor-General of the two members from each territory one was to be an African and the other a European. The Chairman and the ordinary members were to cease to be Members if their appointment was revoked by the Governor-General, with the approval of the Secretary of State, or at the termination of the period which might be specified in the instrument of appointment, or if a member became a Member of the Federal Assembly, or of a Territorial Legislature or if he became a public officer or if he resigned his position.⁽²⁶³⁾

245. Ibid., paras. 7 and 8.

246. Ibid., para. 2 (1), e.g. external affairs, defence, immigration.

247. Ibid., para. 2 (2), e.g. deportation, marketing boards and bankruptcy.

248. Ibid., para. 3 (1), (2) (6).

249. Ibid., para. 3 (2) (c)

250. Ibid., para 3 (3).

251. Ibid., para 2 (2).

252. Chapter III, para. 6 (1).

253. Ibid., para. 6 (2).

254. Ibid., para. 7.

255. Ibid., Chapter IV, paras. 1. and 4.

256. Ibid., para 4 (1).

(257-263 overpage.)

The Board's functions remained substantially the same but 223 with a significant change in one respect which will be pointed out below. Its general function was to be to make to the Prime Minister (or through him to the Executive Council) representations in relation to any matter within the legislative or executive competence of the federation as the Board might consider to be desirable in the interests of Africans.⁽²⁶⁴⁾ It was also to assist territorial Governments if so requested in matters affecting Africans.⁽²⁶⁵⁾ In relation to legislation, the Board was to be given a copy of any Bill for consideration before it was introduced in the Federal Assembly unless the Governor-General, in his discretion, certified in writing that such a Bill was of a nature that it would not be in the public interest to publish it before its introduction or the Bill was too urgent to permit a copy being sent to the Board before its introduction in the Assembly. A Bill was to include the draft of a Bill which it was proposed to introduce in the Federal Assembly.⁽²⁶⁶⁾ If the Board considered that a Bill or a subordinate law ("subordinate law" was defined as meaning an instrument with the force of law made in the exercise of power conferred by a law of the Federal Legislature⁽²⁶⁷⁾ was a differentiating measure ("differentiating measure" was defined as meaning a Bill or subordinate law by which Africans were subjected or made liable to any conditions, restrictions or disabilities disadvantageous to them to which Europeans were not also subjected or made liable, or which might in its practical application have a like effect⁽²⁶⁸⁾), it might send to the Prime Minister a notice in writing to that effect, stating therein why in its opinion the Bill or subordinate law was a differentiating measure.⁽²⁶⁹⁾ Such notice was to be delivered at the latest before the Bill received the Governor-General's assent.⁽²⁷⁰⁾ A notice concerning a subordinate law could be sent at any time within thirty days after the publication of the law.⁽²⁷¹⁾ Any such objection could be withdrawn at any time.⁽²⁷²⁾

257. Ibid., para. 6.

258. See above.

259. Cmd. 8573, op.cit., Chapter V, para. 1 (1).

260. Ibid., para. 1 (2).

261. Ibid., para. 2.

262. Ibid., para. 3.

263. Ibid., para. 4.

264. Ibid., para. 5 (1).

265. Ibid., para. 5 (2).

266. Ibid., para. 6 (1).

267. Ibid.

268. Ibid.

269. Ibid., para. 6 (3) (1).

270. Ibid., para. 6 (3) (2) (a)

271. Ibid., para. 6 (3) (2) (b).

272. Ibid., para. 6 (4).

Where the Prime Minister received the notice of objection before the Bill was introduced and it was thereafter introduced, the notice was to be tabled in ^{the} Assembly when introducing the Bill. If notice was received after the Bill had already been introduced (whether already passed or not) the notice was to be tabled as soon as was practicable after receipt. ⁽²⁷³⁾ If the Assembly passed a Bill objected to or if the notice of objection was received after a Bill had been passed then the objection notice was to be placed before the Governor-General when the Bill was presented to him for assent. ⁽²⁷⁴⁾ The Governor-General was then to reserve the Bill for the signification of Her Majesty's pleasure and send the notice of objection with the Bill to the Secretary of State. ⁽²⁷⁵⁾ The Governor-General could however, in his discretion, assent to the Bill if he was satisfied, upon representations by the Prime Minister, that it was essential in the public interest that the Bill be brought into immediate operation. ⁽²⁷⁶⁾ The Governor-General was, however, in this case, to send the notice of objection and the statement of his reasons for assenting to the Bill to the Secretary of State. ⁽²⁷⁷⁾ It should be noted that the provision of putting a law into effect which had been objected to before sending it to the Secretary of State did not apply to Bills regarding those matters which the Constitution required to be reserved before promulgation. ⁽²⁷⁸⁾ In the case of subordinate law, the Prime Minister, on receipt of the objection notice, was to send it and his comments to the Governor-General. ⁽²⁷⁹⁾ The Governor-General was then to pass the notice and the Prime Minister's comments to the Secretary of State. ⁽²⁸⁰⁾ The Secretary of State could then disallow the subordinate law within twelve months of his receipt of the notice. ⁽²⁸¹⁾ If disallowed, the law was to cease to have effect on a date published in the Gazette by the Governor-General but without prejudice to acts already done under such law or to the enactment of a new law. ⁽²⁸²⁾

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273. Ibid., para. 6 (5) (1)
 274. Ibid., para. 6 (5) (2)
 275. Ibid., para. 6 (5) (3)
 276. Ibid., para. 6 (5) (4)
 277. Ibid., para. 6 (5) (4)
 278. Ibid., p. 32.
 279. Ibid., para. 6 (6) (1).
 280. Ibid., para. 6 (6) (2) (a).
 281. Ibid., para. 6 (6) (2) (a).
 282. Ibid., para. 6 (6) (2) (b).

68. In examining the powers of the Board in relation to legislation, 225 it will be seen that a significant change had been made to the powers suggested by the Officials. The Board was now to watch over and comment on differentiating measures which imposed disabilities on Africans. The Officials had recommended that it should comment on legislation "detrimental to African interests." The Officials recommendation would have given the Board wider powers since it would have been able to comment on legislation which, although not expressly differentiating, was likely to operate to the detriment of the Africans. The new provision limited the Board's comments to legislation which differentiated in its wording.⁽²⁸³⁾ Statutes not differentiating in wording but so doing in operation were later put on the Federal Statute Book without the Board being able to challenge them. Examples of such laws were the Defence Act and the regulations made under it. Although there was no differentiation ex facie the Act, it was implemented in a differentiating manner in that Africans could not rise to commissioned ranks. It is possible that the change to the formulation suggested by the Officials was made without its significance being realised.

The Draft Scheme also contained provisions on finance,⁽²⁸⁴⁾ the public service⁽²⁸⁵⁾ and the judiciary.⁽²⁸⁶⁾ Regarding the judiciary, there was to be a federal supreme Court composed of a President and such other judges as the Governor-General was to appoint.⁽²⁸⁷⁾ One such judge could be designated Vice-President.⁽²⁸⁸⁾ The judges were to be removed only for misbehaviour and after an address from the Assembly praying for such removal.⁽²⁸⁹⁾ The Court was to have original jurisdiction in proceedings between territorial Governments or a territorial Government and the Federal Government and in such other matters as were to be prescribed by law.⁽²⁹⁰⁾ The Court was also to have appellate jurisdiction in cases from its own original side as would be provided by federal law and from the territorial High Courts as would be prescribed by territorial law.⁽²⁹¹⁾ Federal criminal law was to be administered by territorial courts as if it were territorial law.

The last Chapter of the Draft Scheme - Chapter LX - contained such miscellaneous subjects as adaptation of the existing rights under the Lewanika Concession (these were to be safeguarded by the Constitution); penalty for voting or sitting when unqualified to do so; tabling of laws in the Territorial Legislatures; and amendment of the Constitution. Bills amending the constitution were to require a two-thirds majority of the total membership of the Federal Assembly. Such amendments were to be reserved for the signification of Her Majesty's pleasure. Such signification was to be effected by Order in Council. Power to amend the Constitution was to include the power to establish a second chamber.

The Draft Scheme was presented to the British Parliament on June 18, 1952,⁽²⁹²⁾ and published at the same time in Central Africa. In presenting the White Paper to the House of Commons, the Secretary of State for the Colonies stated: "The Federal proposals published today take full and fair account of interests of all the inhabitants of Southern Rhodesia, Northern Rhodesia and Nyasaland. They offer the framework of a new political organism which we believe will satisfy the needs of Central Africa and promote the welfare of the three Territories and all their inhabitants!"⁽²⁹³⁾ At the same time, Huggins, in a debate on the White Paper told his Legislative Assembly: "We must be certain in our minds whether, if we failed to take advantage of the tremendous opportunities which be within our grasp for fear of taking a leap forward into the future, we would not be betraying our trust, our heritage, our Empire traditions and descendants."⁽²⁹⁴⁾

283. See House of Commons Debates, Vol. 504, Col 8812, 24 July, 1952, where the difference in wording as regards the Board's function was pointed out by the Labour ex-Secretary of State. See also Franck, op.cit., pp. 48-49, where the significance of the change is pointed out.

284. Cmd. 8573, op.cit., Chapter VI. See also Cmd. 8672 of 1952, op.cit.

285. Ibid., Chap. VII. See also Cmd. 8673 of 1952, op.cit.

286. Ibid., Chap. VIII. See also Cmd. 8671 of 1952, op.cit.

287. Ibid., Chap. VIII, para. 1 (1).

288. Ibid., para. 1 (1).

289. Ibid., para. 1 (2)

290. Ibid., para. 3.

291. Ibid., para. 5.

292. Cmnds. 8671, 8672 and 8673 were presented to Parliament on 29 October, 1952. It was at this time that it was announced that the final conference which was to be held that year (1952) would not be held until the following year.

293. House of Commons Debates, 19 June, 1952, Col. 1204.

294. For the full debate, see Hansard, 23 June, 1952, et seq.

The fact that it was now a foregone conclusion that federation would be established generated a lot of activity among the pro-federation and the anti-federation elements. In Britain, while the Government was now fully committed to federation, the Opposition still opposed it vigorously. The press was divided. The Sunday Times, Daily Telegraph, Daily Express, Yorkshire Post, Nottingham Guardian, Birmingham Post and Newcastle Journal supported federation.⁽²⁹⁵⁾ The Times, Manchester Guardian, Daily Mirror, Daily Herald, Observer, Daily Worker, Western Mail, Scotsman and Glasgow Herald were critical of federation, some of them to a point of hostility towards the project.⁽²⁹⁶⁾ Other papers, like the News Chronicle⁽²⁹⁷⁾ supported federation with reservations. The movement most active in favour of federation was the United Central Africa Association formed that year (1952) to promote federation and which operated both in the United Kingdom and in Central Africa.⁽²⁹⁸⁾ To this must be added the Conservative Party⁽²⁹⁹⁾ and the Capricorn Africa Society.⁽³⁰⁰⁾ Stoutly against federation were the Africa Bureau,⁽³⁰¹⁾ the Fabian Society,⁽³⁰²⁾

295. Gann, op.cit., p.418. Note Their Combined circulation was 8,317,500 - ibid.
296. Ibid. Their combined circulation was 7,645,700 - ibid.
297. Its circulation was 1,390,000 - ibid.
298. It published a lot of literature between its formation in 1952 and its disbandment in 1953 - e.g. Lord Milverton, African Opportunity: Rosin, Muriel. The Intelligent Woman's Guide to Federation and the White Paper: Central African Federation: A Test of African Opinion: Birth of a Nation: The British Purpose in Central Africa and the Central African Federation: The Only Way to Partnership Between the Races: Reynolds, Rex. A Reference Book for Speakers on Federation and the White Paper: A Study of the Proposals and the Arguments For and Against Them, See also Rhodesia Herald of April 3, 1959; for the Association's views.
299. See A Bi-monthly Survey of Commonwealth and Colonial Affairs (published by the Conservative Research Dept. and the Conservative overseas Bureau) Nos. 2 and 3 (special issue June 20, 1952), Nos. 4, 5, and 6 (Revised Special issue, Dec. 31, 1952) and Nos. 8 & 9.
300. This organisation was formed in 1949. It wanted a larger grouping of States covering Central Africa, East Africa as well as Angola, Mozambique and the Belgian Congo. It supported federation as the first step towards this. Its publications included: Greater Rhodesia: The London Proposals Examined (1951); The Capricorn Convention (1952) What would have Rhodes Done? (1952); Appendix to The Capricorn Declarations and the Capricorn Conventions The Society's Notes in its Race Relations Policy (1952)
301. The Bureau published, among other literature, the following: Creech-Jones, African challenge: The Fallacy of Federation (1952); A Petition to Her Majesty Queen Elizabeth II, Against Federation Made by Chiefs and Citizens of Nyasaland With A Postscript by A. Creech-Jones. (1953). Together with the Central Africa Committee, The Racial Unity and the National Peace Council (all three also anti-federation) they published: Our Trust in Central Africa A Study of the Scheme for Central African Federation (1953. The Bureau's Information Digest also contained articles against federation.

71. and the Church of Scotland.(303) To these must be added the 228
Labour Party (304) and the Liberal Party (305), in general.

In Central Africa, European opposition to federation was encountered mainly in Southern Rhodesia. Stockil, the Leader of the Opposition, denounced the conclusions of the Conference and described them as amounting to Southern Rhodesia's virtual loss of self-government and a return to Colonial Office rule.(306) Charles Olley, an outspoken white supremacist, saw in Federation the end of white supremacy.(307) Few whites opposed the scheme in Northern Rhodesia and Nyasaland. Those who did were mostly missionaries.(308) There was, however, a large body of non-locally recruited white civil servants who were opposed to federation(309) but, as public servants, their opposition could not be publicly voiced. The Governor of Nyasaland was a lukewarm supporter.(310) For different reasons opposition also came from Asians(311) and Coloureds(312) who feared the policies of the Southern Rhodesia Government.

302. The Society's Colonial Bureau, published, for instance, British Central Africa (1951); Venture (a journal of the Bureau - special number entitled East and Central Africa (August/Sept, 1952); Advance to Democracy. A Report to the Fabian Colonial Bureau on the Implications of 'Partnership' in Multiracial Societies (Controversy Series Number 8, June, 1952).

303. See Bulletins No. 1 of March 1953 and No. 2 of May, 1953, of the Scottish Council for African Questions.

304. The Party on its own published very little but very much used the organs of the Fabian Society.

305. Its principal publication was: Platform Points: Central African Federation (July, 1952).

306. See his speech in the Legislative Assembly, Hansard, 23 June, 1952.

307. Olley vigorously, denounced federation verbally and in writing - see issues of the Rhodesia Monthly Review (1950-53) which Olley published. Olley led the White Rhodesia Council (formed in 1959) a white supremacist organisation strongly opposed to federation. The organization published: Dominion Status versus Federation (mimeographed); 100 Facts Against Federation: The Case of the White Rhodesia Council. Two other organizations - the Rhodesia Association and the Rhodesia League also opposed Federation. For the views of the Rhodesia Association, see New Rhodesia, April 8, 1953, and for those of the League, see Rhodesia Herald, March 26 and April 7, 1953.

308. For the views of the various churches, see Gann, op.cit. pp. 418-23.

309. Ibid., p.427. See House of Commons Debates, Vol.629, Col.434, 2 Nov.1960, where Major Wall alleged that a number of Colonial Officials never really supported federation or tried to make it work. See also Federal Hansard, Vol. XIV, Col.3239, et seq. 26 October, 1960, where Mr. R.L. Moffat, a European Member representing African interests, who was then a District Commissioner in Northern Rhodesia at the time of the Campaign, stated that perhaps the majority of the District Commissioners were in favour of the federation but that some were not. Mr. Moffat said he himself was not in favour and did not put the federation case to the Africans as was required by him by his superior. He explained the reasons for his action. See also in the same Hansard, a speech by Mrs. Rosin blaming the Colonial office for the failure of its officials in Northern Rhodesia and Nyasaland to explain federation.

(See page 229 for footnotes 310,311,322).

The main opposition, however, came from the Africans. (313)
 The Congresses, in a desperate bid to stop what they considered Her Majesty's attempt to dishonour protectorate treaties signed between their grandfathers and Queen Victoria, rallied the African population behind them and unleashed extensive anti-federation propoganda for internal and external consumption. (314)
 Nyasaland chiefs drew up a petition to the Queen, reminding her of the treaties and praying that she intervene to stop federation. (315) A delegation of the chiefs flew to London to present the petition to the Queen. They were, however, unable to obtain an audience with the Queen and the petition was presented through the Colonial Secretary. (316)

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310. See an attack on him in East Africa and Rhodesia, 7th August, 1952. See also remarks by Welensky that the attitude of the Northern Governments towards the Federal Government changed only after Sir Evelyn Home and Sir Robert Armitage had become Governors of Northern Rhodesia and Nyasaland respectively - Federal Newsletter, No. 45 of 1960.
311. For views of Asians, see Rhodesia Herald, Sept, 1952: Report of the Central African Asian Conference (held at Limbe between July 26 and 28, 1952) (mimeographed).
312. For their views, see Rhodesia Herald, August 18, 1951, Sept. 1, 1951 and January 5, 1953.
313. For African opposition at this time, See Gann, op.cit. pp. 423-27.
314. The two Congresses published no sophisticated literature but the following illustrates the thinking of the two organizations at the time. Literature by the Northern Rhodesia African National Congress: - The President's Statement at Mapoloto and Delegates Conference (Mimeo.); Proposed Constitution for a Self-Governing State of Northern Rhodesia As Adopted By the Chiefs in Conference (1952) (Mimeo); The President's Statement On the Effects of the National Days of Prayer (1953) (Mimeo); The President's Statement on the White Paper of January, 1953 (1953) (Mimeo); Congress News (the mouthorgan of the Organization - it later became Congress circular). Literature by the Nyasaland African National Congress:- Memorandum of the Nyasaland Congress (Salisbury Branch) on the Federation of Nyasaland and the Rhodesias (1951) (Mimeo); Resolutions Passed By the Nyasaland African National Congress (1953) (Mimeo).
315. See A Petition to Her Majesty Queen Elizabeth II Against Federation Made By Chiefs and citizens of Nyasaland With A Post-Script By A Creech-Jones (London, Africa Bureau, 1953)
316. See The Times (London) Feb. 5, 1953, for a letter the Chiefs wrote to the newspaper before leaving.
317. Gutheridge, op.cit., p. 216, quoting.

In the midst of this opposition, Huggins and Welensky, aided by the efficient machinery of the United Central Africa Association, robustly defended federation. On the one hand, they had to placate African fears and feelings and in doing so they inflamed Stockil and Olley. On the other hand, they had to re-assure the Europeans in Southern Rhodesia that self-government was not being traded for political expediency. The dilemma caused Welensky on one occasion, in an attempt to convince Europeans in Southern Rhodesia that there was no danger in federation, to say: "On the one side is Mr. Charles Olley of the White Rhodesia Council who says that federation means the death of white supremacy; on the other is Mr. Harry Nkumbula (President of the Northern Rhodesia African National Congress) who says that federation means the end of African hopes of political supremacy."⁽³¹⁷⁾ At times Huggins and Welensky made statements which were harmful to their cause in the eyes of those who opposed federation on the ground that it was detrimental to Africans.⁽³¹⁸⁾ Perhaps this was inevitable. The Europeans had the vote and it was they who could foil the scheme as well as dislodge Huggins from power. They needed more assurances than the voteless African masses whose opposition the two men thought would come to an end once federation had been established.

In September, 1952, the Minister of State for the Colonies, Henry Hopkinson, visited Central Africa to see things for himself. Earlier, the Leader of the Opposition, Clement Atlee, had also visited Central Africa for the same purpose.⁽³¹⁹⁾ Hopkinson, who was an enthusiast of federation, shocked those who were opposed to federation on his return to Britain by declaring that although African opposition was still very strong, ninety per cent of the Africans did not understand the issues involved. The Minister was rapped on the knuckles by the press for this statement.⁽³²⁰⁾

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318. Huggins for instance, told a meeting of the United Central Africa Association that there was no need to fear a black Parliament. "...the whole thing is fantastic; it would not happen in fifty or sixty years". Further assuring them he said Europeans were the ones making the laws and that they could ensure their survival by, for instance, raising qualifications if too many Africans registered as voters. - Johannesburg Star, 29 July, 1953. The African Affairs Board, intended to safeguard African interests, was called by Huggins: "A little piece of Gilbert and Sullivan which would make very little difference" - The Times (London) 13 October, 1952. For this belittling of the safeguards, he was attacked by the Archbishop of Canterbury - ibid., October 20, 1952.
319. For Atlee's rather cautious assessment of the position, see his statement in the Daily Herald and the Johannesburg Star of September 8, 1952. See also the Rhodesia Herald of that date.
320. See The Times (London) of 13, 14, 16 Aug., 1952; Scotsman, 13 Aug., 1952.

The final conference opened in London in January 1953, as planned. The usual delegations attended but no Africans did. The work of the Conference was to consider the Draft Scheme in the light of the subsidiary reports produced by the three Commissions set up by the 1952 Conference and to make the necessary amendments to the Draft Scheme where necessary. The Conference resulted in the publication of two documents - a general report of the Conference,^(320a) and a revised Draft Constitution^(320b) for the Federation. A number of alterations were made to the Draft Scheme. Some modifications of the Exclusive and Concurrent Legislative Lists were adopted.⁽³²¹⁾ The composition of the Legislature and the distribution of the twenty-six ordinary seats and of the nine seats of members representing African interests were not changed.⁽³²²⁾ Apart from providing for the appointment of an Acting Governor-General or a Governor-General's Deputy, no changes were made to the structure of the Executive.⁽³²³⁾

Further changes were, however, made to the African Affairs Board.⁽³²⁴⁾ Instead of being outside Parliament, the Board was now going to be a Standing Committee of the Assembly. Its new composition was to be: (a) the two specially appointed European Members charged with special responsibility for African interests; (b) the Specially Elected European Member (Southern Rhodesia) charged with special responsibility for African interests; and (c) one Specially Elected African Member from each of the three territories to be selected by a majority vote of the Specially Elected African and European Members. The Board's general functions remained the same.⁽³²⁵⁾ Its functions in relation to legislation also remained the same. However, while the procedure of objection in relation to subordinate legislation did not change,⁽³²⁶⁾ that in connection with Bills did.⁽³²⁷⁾ Instead of sending the notice of objection to the Prime Minister, the Board was now to lay a report on the Bill before the Assembly stating its reasons for saying that the Bill differentiated. This could be done at any time during the passage of the Bill in the Assembly. After a Bill had been passed the Board could still present a request in writing to the Speaker that the Bill be reserved for signification of Her Majesty's pleasure on the grounds that it was a differentiating measure giving the reasons why the Bill was such a measure. If the decision to make the request was not unanimous, a statement to that effect was also to be included. On receiving the request, the Speaker was to have it delivered to the Governor-General at the time of the presentation of the Bill for assent. The powers of the Governor-General on receiving the Bill remained the same.

No changes were made to the provisions regarding the legislative powers of the Federal Assembly and the procedure therewith.⁽³²⁸⁾ Provisions on finance, the public service and the judiciary were now fully given in the light of the Reports⁽³²⁹⁾ of the Fiscal, Public Service and Judicial Commissions.⁽³³⁰⁾ An important provision was added to the provisions on amendment of the Constitution. No amendments were to be made to the Constitution until after ten years of its coming into operation unless the legislatures of the three territories voted by resolution to the draft Bill that they had no objection to the amendment being made. It was further provided that in not less than seven years and in not more than nine years of the coming into force of the Constitution, a conference was to be convened, comprising delegates from the Federation, the three territories and the United Kingdom and chosen by the respective Governments, for the purpose of reviewing the Constitution.⁽³³¹⁾

The views of the participants at the end of the 1953 Conference are concisely summarised in the last paragraph of the introduction to the general report of the conference, signed by Viscount Swinton (Secretary of State for Commonwealth Relations), Oliver Lyttelton (Secretary of State for the Colonies), the Marquess of Salisbury (Lord President of the Council), G. M. Huggins (Prime Minister of Southern Rhodesia), G. M. Rennie (Governor of Northern Rhodesia) and G.F.T. Colby (Governor of Nyasaland). The six declared:

"We have reached the moment of decision. We are convinced that a Federation on the lines proposed is the only practicable means by which the three Central African Territories can achieve security for the future and ensure the well-being and contentment of their peoples. We believe that this Federal Scheme is a sound and a fair scheme which will, promote the essential interests of all the inhabitants of the three Territories, and that it should be carried through."⁽³³²⁾

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- 320a. Cmd. 8753 of 1953. Report By the Conference on Federation Held in London in January, 1953.
 320b. Cmd. 8754 of 1953. The Federal Scheme - Prepared By A Conference Held in London in January, 1953.
 321. Cmd. 8754, op.cit., Chap. 2, Part 2.
 322. Ibid., Part 3.
 323. Ibid., Chap. 1V.
 324. Ibid., Chap. V.
 325. Ibid., para. 58.
 326. Ibid., paras. 65-67.
 327. Ibid., paras. 61-64.
 328. Ibid., Chap. 111.
 329. Cmds. 8671, 8672 and 8673 of 1952, op.cit.
 330. For consideration of these reports, see CMD. 8753 of 1952, pp. 18-21.
 331. Cmd. 8754, Chap. 1X, Part 3. For the Review Conference in 1960, see Chap. 7 below.
 332. Cmd. 8753, p. 7.

The results of the Conference were again greeted with opposition in Britain and Central Africa. Last minute attempts to foil the scheme were launched. The Archbishop of Canterbury, together with the Moderators of the Church of Scotland⁽³³³⁾ and the Free Church Federal Council, wrote a letter to The Times against going ahead with the scheme. In Northern Rhodesia, the African National Congress burned the White Paper at a rally as a sign of their dislike of the Federation and threatened that its imposition would be followed by unrest.⁽³³⁴⁾ In Nyasaland, chiefs as already mentioned above, petitioned the Queen. Later, on the advice of Rev. Michael Scott,⁽³³⁵⁾ the chiefs and the African National Congress petitioned the United Nations.⁽³³⁶⁾ Ray Stockil and Charles Olley warned the whites against accepting federation. In the meantime, Huggins and Welensky, having gained what they had fought for for years,⁽³³⁷⁾ were becoming more unguarded in their references to Africans.

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333. 4 March, 1953.
334. Chronology, Vol. LX, No. 7, p. 202; Walker, E.A. A History of Southern Africa (London, Longmans, 1957, 3rd Ed.) p. 362.
335. Rev. Scott was later deported from Nyasaland. For his views, see Scott, African Episode. (London, Africa Bureau, 1953).
336. Chronology, Vol. LX, No. 8, p. 232; Walker, op.cit., p. 363.
337. See, for instance, a speech made by Huggins on January 29, 1953 and reported in the Manchester Guardian, 30 Jan., 1953. For criticism of the speeches of Huggins referring to Africans at that time, see a letter by Prof. Arthur Lewis to The Times (London) 2 March, 1953.
338. House of Common Debates, Vol. 513, Col. 658. For his full speech, see Cols. 658 - 676.
339. Ibid., Col. 676. For his full speech, see Cols. 676-691.
340. For the full debate on the motion, see ibid., Cols. 658-796.
341. This fear was later justified when Art. 29(7), empowering Her Majesty's Government to legislate for the federation if it appeared necessary, appeared in the final Constitution.
342. 25,570 voted in favour and 14,729 against. In percentages of the electorate, those in favour amounted to 63.45 and those against to 36.45. This was nearly the two-thirds that Stockil had demanded. For the results of this referendum, see Drew, J.D.C.. "The Four Southern Rhodesian Referendums." (in Occasional Papers of the National Archives of Rhodesia and Nyasaland, Vol. 1., June, 1963) pp. 42-57; Chronology, Vol. LX, No. 8, p. 234; Rotberg, op.cit., p. 157. Walker, op.cit., p. 363; Gam, op.cit., p. 430.

On March 24, 1953, the Secretary of State for the Colonies moved in the House of Commons "that this House approves the proposals on Central African Federation as set out in Command Papers 8753 and 8754."⁽³³⁸⁾ Griffiths, the Opposition's spokesman on Colonial affairs, moved an amendment on behalf of the Opposition "that this House while recognising the advantages which may be expected to accrue from the federation of the three Central African Territories, cannot approve the Federation Scheme in the form contained in Command Papers 8753 and 8754, which does not contain adequate safeguards for African interests, and opposes the imposition of the scheme against the will of the African people."⁽³³⁹⁾ After a bitter debate the Government motion was, however, carried by 304 to 260 votes.⁽³⁴⁰⁾

In Southern Rhodesia, the final scheme was referred to a referendum in April. Ray Stockil, in a last bid to prevent the inevitable, had demanded that the scheme should only be considered accepted if two-thirds of the electorate voted for it and that the referendum should be delayed until the document had been completely finalised as there were still some ambiguities which could result in alterations.⁽³⁴¹⁾ Huggins turned down both these demands. The electorate voted massively in favour of the scheme.⁽³⁴²⁾ In Northern Rhodesia the Legislative Council accepted the scheme by seventeen votes to four - the four voting against being the two African Members and the two Europeans representing African interests.⁽³⁴³⁾ The Nyasaland Legislative Council equally accepted the scheme.

The acceptance of the Constitutional Draft by the United Kingdom Parliament and by the Southern Rhodesian electorate and the Legislative Councils of Northern Rhodesia and Nyasaland brought to an end decades of campaigning for the establishment of some form of closer association in Central Africa.⁽³⁴⁴⁾ A new stage had commenced - i.e. that of putting the scheme into operation through the enactment of various constitutional instruments by Her Majesty in Council and the United Kingdom Parliament.⁽³⁴⁵⁾

Footnotes 338 - 342, see page 76.

343. N. R. Legco Debates, 17 & 18 April, 1953, pp. 27-112. See also Gann, Ibid., Chronology, IX, No. 9, p. 278; Walker, op.cit., p. 863.

344. For accounts varying in detail of the closer association movement from early days to 1953, see generally the following; Gann, ibid., Gann & Gelfand, op.cit., Jones, op.cit., Mason, op.cit., Franklin, op.cit., Bretsford, op.cit., Palley, op.cit., Welensky, op.cit., Gray, op.cit., Pratt & Ley's, op.cit.; Taylor & Dvorin, op.cit., op.cit.; Gutheridge, op.cit.; Kirkwood, op.cit.; and other literature quoted in this Chapter not here mentioned.

THE CONSTITUTION, LIFE AND DISSOLUTION OF THE FEDERATION1. THE CONSTITUTION

In May, 1953, the Rhodesia and Nyasaland (Federation) Bill was introduced in the British Parliament.⁽¹⁾ On July, 14 the Bill became law.⁽²⁾ The Act empowered the Crown to enact legislation providing for the establishment of the Federation and of such authorities as might appear expedient and the conferment of the necessary powers and duties on such authorities.⁽³⁾ The Act also empowered the Crown, if necessary or expedient, to amend the constitutions of the three territories so as to bring them into conformity with the Federal Constitution.⁽⁴⁾ In pursuance of the Act, the Crown, on August 1, issued the Federation of Rhodesia and Nyasaland (Constitution) Order in Council, 1953.⁽⁵⁾ Section 1 (1) of the Order established the Federation. Section 1 (2) provided that Chapters 1 and IV and Articles 35, 45, 53-55, 64 and 66 were to come into effect on a date appointed by Her Majesty but that at any time after making the Order (the Constitution Order) Her Majesty could appoint a person to be Governor-General. In pursuance of this subsection, a second Order - the Federation of Rhodesia and Nyasaland (Commencement) Order in Council, 1953, was also issued on August 1. Section 1 of this Order provided that Section 1 (2) of the Constitution Order would come into force on September 3, 1953. On September 3, therefore, the following provisions of the Constitution came into effect:-

Chapter 1 - concerning the establishment of the federation; the taking of office of the Governor-General; appointment of the Acting Governor-General; the power of the Governor-General to appoint the Deputy Governor-General; the construction of references to the Governor-General; the seat of the Government, and the official language; Article 35 - concerning the effect of federal and territorial law on each other; Chapter IV - concerning Executive powers; Article 45 - concerning enforcement of federal laws; Articles 53-55 - concerning the exclusive jurisdiction of the Federal Supreme Court in certain matters; Article 64 - concerning the exercise of the functions of the Federal Supreme Court before assumption of them by the Court; and Article 66 - concerning the assumption of functions by the Federal Supreme Court. This was to be on a day proclaimed by the Governor-General.

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1. For the debate of the Bill, see House of Commons Debates, Vol. 515 and Vol. 516, 1953.
 2. 1 & 2 Eliz. II, C, 30.
 3. S. 1 (1) (a) (i) and (ii).

On September 4 the first Governor-General, Lord Llewellyn, assumed office.⁽⁶⁾ On September 7 a temporary Ministry comprising Huggins, Welensky and Darrow was sworn in. The Ministers were allowed to retain their seats in the territorial legislatures if they so wished until after the general election. Huggins and Welensky did so. On October 23⁽⁷⁾ the Governor-General issued a proclamation⁽⁸⁾ bringing the remaining provisions of the Constitution into force.⁽⁹⁾ During the period between his assumption of office and the first meeting of the Federal Assembly, the Governor-General was, in addition to his executive functions, vested with the legislative powers conferred on the Federal Legislature by the Constitution.⁽¹⁰⁾ He was to exercise the powers to such extent as might, in his opinion, be necessary or expedient to enable the Constitution to function.⁽¹¹⁾ Regulations made in pursuance of these powers were to be deemed to be laws made by the Federal Legislature.⁽¹²⁾ If still subsisting on the date of the first meeting of the Federal Assembly, they were to continue to have effect as if they were enactments of the Federal Legislature until amended or revoked by a subsequent law of the Legislature.⁽¹³⁾ Although in exercising these powers the Governor-General was to act in accordance with the advice of the Temporary Ministry, he could, however, in his discretion, and in relation to any matter, disregard their advice.⁽¹⁴⁾ This provision operated notwithstanding the provisions of Article 39 of the Constitution (requiring the Governor-General to act in accordance with the advice of the Executive Council except in those cases where he was expressly given discretion). Where he so disregarded the advice of the Temporary Ministry, he was, however, to report his views to the Secretary of State and was to comply with any instructions from the Secretary on the matter.⁽¹⁵⁾

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4. S. 1 (1)(b). The Crown was also empowered to make provision for the restriction of the right of petition for special leave to appeal from the territorial High Courts to the Privy Council once the Federal supreme Court had been established - S.1 (1) (a)(iii). The Crown's powers were limited by two requirements: Firstly, Orders made under the Act were to be tabled in both Houses of Parliament and both Houses were to adopt an address to the Crown to issue the Order or Orders - S.1 (4). Secondly, once an Order had been made, unless it specified the method of amendment or revocation, it could not be amended save by an Act of Parliament.
 5. S.1. 1953, No. 1199.
 6. He did this in pursuance of the Order in Council and the Royal Instructions of August.
 7. The day later became officially known as "Federation Day" and was made a public holiday.
 8. Proc. No. 2 of 1953.
 9. This was done in pursuance of Section 1 (3) of the Constitution Order which provided that the remaining provisions would come into force on a date appointed by the Governor-General by proclamation.
 10. Section 2 (1) of the Constitution Order.
 11. Ibid.
 12. S. 2 (3) 13. Ibid. 14. S.2 (4) 15. Ibid.

In December elections were held. The United Central Africa Association had disbanded and reconstituted itself as the Federal Party, led by Huggins, with Welensky and Barrow as his chief lieutenants.⁽¹⁶⁾ Although three other parties - the Democratic Party,⁽¹⁷⁾ the Progressive Party⁽¹⁸⁾ and the Confederate Party⁽¹⁹⁾ - had been formed, only one of these - the Confederate Party, an extreme right wing organisation - was still in existence at the time of the elections.⁽²⁰⁾ The fight was, therefore, a straightforward one between the Federal Party and the Confederate Party, with a few independents. The Federal Party overwhelmingly defeated the Confederate Party. It polled 34,992 votes and had 24 of its 26 candidates elected. On the other hand, the Confederate Party polled 15,263 votes and had only one⁽²¹⁾ of its 23 candidates elected. The four independents who contested polled 1,848 votes but only one⁽²²⁾ of them was elected.⁽²³⁾ Huggins became Prime Minister. A new Government of five Ministers (later increased to seven) took over from the transitional Ministry. The first session of the first Parliament was opened by the Governor-General on February 3, 1954.

16. The Party later united with the United Rhodesia Party and became the United Federal Party. For the Federal Party's programme, see the Party's Constitution adopted in 1953 (mimeographed); Federal Party Policy (1953); Hirsch, M.L. The Roads Offered (1953).
17. The Party was formed in 1951, from the Afrikaner Society of Southern Rhodesia. It dissolved in 1953 before the elections and its members joined the Confederate Party. For its programme see Democratic Leaders Statement to the Press and Public (1951) (Mimeo).
18. The Party was formed in 1953 by liberal Europeans in Northern Rhodesia. It disbanded before the elections on the grounds that it did not want to split the liberal vote. For its principles, see Rhodesia Herald, 28 July, August 19, Sept 2, and Oct. 16, 1953.
19. For its programme, see Confederate Party Constitution (1953) Confederate Party Statement of Principles (1953); Details Given of Confederate Party Native Policy (1953) (Mimeo).
20. See Notes 17 and 18 above.
21. This was Mr. Dendy Young, later judge of the High Court of Southern Rhodesia and now Chief Justice of Botswana. He resigned his Rhodesian judgeship as a result of the disagreement among the judges arising from the declaration of independence by Rhodesia.
22. This was Dr. Alexander Scott, the former leader of the Progressive Party.
23. For a detailed account of this election, see Dvorin, Eugene P. "Central Africa's First Federal Election: Background and Issues" (The Western Political Quarterly, Vol. 7, 1954) pp. 369-390. The total electorate of the three territories was about 67,000 - Dvorin gives the total of 67,005 whites and 1149 - Survey of Developments Since 1953 - Report by Committee of Officials (See below) puts it at 66920 - p.11. Of these voters only 449 were Africans - 441 of them in Southern Rhodesia and 8 in Northern Rhodesia - ibid.

The final Constitution of the Federation contained a preamble and eight chapters.⁽²⁴⁾ The preamble recited that Southern Rhodesia was a colony and part of Her Majesty's dominions; that Northern Rhodesia and Nyasaland were territories under Her Majesty's protection; that the territories were the rightful home of all their lawful inhabitants regardless of origin; that the territories would continue to enjoy their existing forms of government and that Northern Rhodesia and Nyasaland would continue "to enjoy separate Governments for so long as their respective peoples so desire"; that the Governments in Northern Rhodesia and Nyasaland would remain responsible (subject to the ultimate control of Her Majesty's Government in the United Kingdom) for, in particular, the control of land in those territories, and for the local and territorial political advancement of the peoples thereof; and that the association of the two Protectorates and a Colony in a "Federation under Her Majesty's sovereignty, enjoying responsible government..., would conduce to the security, advancement and welfare of all their inhabitants, and in particular would foster partnership and co-operation between their inhabitants and enable the Federation, when those inhabitants so desire, to go forward with confidence towards the attainment of full membership of the Commonwealth." It has already been mentioned (in the previous Chapter) that the recitals in the Preamble sought to assure the Europeans in Southern Rhodesia that they would not lose their self-government and the Africans in Northern Rhodesia and Nyasaland that they would not lose the protection of Her Majesty. Two aspects of this Preamble later became very controversial. These were the "fostering of partnership" and the "attainment of full membership of the Commonwealth when the inhabitants so desired." Partnership was adopted as the racial policy of the Federation. Its interpretation and implementation, however, became burning issues throughout the life of the Federation and contributed greatly to its demise. What was meant by "when those inhabitants so desire" also raised bitter differences of opinion when the question of dominion status for the Federation became an issue. Both these controversies will, however, be dealt with later in this Chapter.

24. Chapter I - The Federation in General; Chapter II - The Federal Legislature; Chapter III - Legislative Powers Within Federation; Chapter IV - Executive Powers Within Federation; Chapter V - Judicial Powers Within Federation; Chapter VI - African Affairs Board; Chapter VII - Finance; Chapter VIII - Amendment and Review of Constitution.

The body of the Constitution did not differ very much from the final draft of the January, 1953, Conference. The most significant addition to the final draft was Article 29 (7). This Article preserved the powers of the Crown, where they were conferred by an Act of Parliament as opposed to prerogative, to make laws by Order in Council for the Federation or any of the constituent territories. The reason why this provision was inserted, although not so stated, was, no doubt, to make the position clear that the powers of the Crown under the Foreign Jurisdiction Act (under which the Crown legislated for Northern Rhodesia and Nyasaland) were preserved in case it would be argued that because they were not specifically preserved such powers had disappeared in accordance with the ratio decidendi of Campbell v. Hall.⁽²⁵⁾ That case decided that once a territory had been given a legislature, the Crown lost its legislative powers except those preserved as long as that legislature continued to exist.^(25a) In North Charterland Exploration Company v. The King,⁽²⁶⁾ it was, however, suggested that the rule in Campbell v. Hall ceased to have effect since the passing of the Foreign Jurisdiction Acts 1890-1913. Assuming the suggestion to be correct, this would have, of course, applied only to the two territories where the Foreign Jurisdiction Acts extended, i.e. Northern Rhodesia and Nyasaland which were protectorates and not to Southern Rhodesia which was a colony. However, not taking chances on the correctness of the suggestion in the North Charterland Exploration Company Case, it was necessary to include a specific provision to exclude the rule in Campbell v. Hall not only in relation to Northern Rhodesia and Nyasaland but also in relation to Southern Rhodesia and the Federation itself where the Foreign Jurisdiction Acts did not apply.

Article 1 of the Constitution established the Federation. Article 2 provided for a Governor-General and Commander in Chief appointed by Her Majesty as her representative in the Federation. There were also provisions for the appointment of an Acting Governor-General⁽²⁷⁾ in the event of the absence of incapacity of the Governor-General; and of a Deputy Governor-General⁽²⁸⁾ if the Governor-General was absent from the seat of Government but not from the Federation, or if he was absent from the Federation for a short period, or if he was suffering from an illness he thought would be of a short duration.

25. (1874) Lofft 655; 11 Cowp. 204; Keir and Lawson, Cases in Constitutional Law. (Oxford, Clarendon Press, 4th Ed.) p. 487-492.

25a. For a short discussion of the Rule in this case, see Wade & Phillips, Constitutional Law (Edition by Wade & Bradley (London, Longmans, 1965) pp. 418-420.

26. (1931) 1 Ch. 169.

27. Art. 3.

28. Art. 4.

6. An Acting Governor-General was to be appointed by Her Majesty. A Deputy Governor-General, on the other hand, was to be appointed by the Governor-General. His appointment could, however, be revoked by either the Governor-General or Her Majesty. In addition to following the Royal Instructions, therefore, a Deputy Governor-General was also to follow the instructions laid down by the Governor-General in the instrument of appointment or given him, in the Governor-General's discretion, from time to time.⁽²⁹⁾ 240

The composition of the Legislature remained the same as in the final draft.⁽³⁰⁾ The 26 Elected Members were, as in the final draft, to be elected to the first Parliament on the existing territorial franchise laws and thereafter under an electoral law of the Federal Parliament except for Nyasaland which was to continue under the territorial system until its Legislative Council by resolution decided to have elections governed by federal law.^(30a) Election of Members of the Federal Assembly under the territorial franchise laws made these laws, for the time being, part of the Federal Constitution. For this reason it is necessary to mention briefly the franchise qualifications obtaining in each territory at the time. The franchise law of Southern Rhodesia was contained in the Electoral Law Act, 1951. Regulations - the Southern Rhodesia Federal Electoral Regulations, 1953,⁽³¹⁾ and the Southern Rhodesia Federal Electoral Districts Delimitation Regulations, 1953⁽³²⁾ - were made by the Governor-General with the approval of the Secretary of State to adapt the law for federal elections. In order to be registered as a voter under the 1951 Act, a person had to be a citizen of Southern Rhodesia and to possess the requisite educational qualifications - i.e. adequate knowledge of the English Language and the ability to complete and sign the enrolment form without assistance from another person. In addition, a person was required during a period of three months immediately preceding the date of his application for registration: (i) to have occupied, either solely or jointly with others, a house, warehouse, shop or other building situated within the Colony which, either separately or jointly with any land occupied therewith, was of the value of not less than £500 (in joint occupation the applicant's share had to be not less than £500); or (ii) to have been the owner of a registered mining location in the Colony; or (iii) to have been in bona fide receipt within the Colony of income, salary or wages at the rate of not less than £240 per annum (the value of board, lodging and clothing or any money received for any or all of these could be included in computation of the incomes, salary or wages). A married woman (except one married under a polygamous system) could qualify through her husband's property or income qualifications provided she had the other qualifications.

7. A person was not considered to have the required property qualifications by reason of his sharing in any communal or tribal occupation of lands or buildings. This referred mainly to lands in African reserves and private locations. Although non-racial, this franchise disqualified the majority of the Africans. Although hundreds of them had the requisite educational qualifications, they earned far less than the £20 per month required. They could not qualify through the ownership of property in the urban areas. The Land Apportionment Act barred them from owning or leasing property there. Very few owned farms. Lands and buildings they owned in the reserves were not acceptable qualifications under the Act. There were, therefore, very few Africans on the Voters' Roll.⁽³³⁾

The franchise law obtaining in Northern Rhodesia was that enacted in 1925. This has been discussed in Chapter Four and it is not necessary to repeat the details here. It must be mentioned, however, that, because the franchise was only open to British subjects, the roll had virtually no Africans in 1953.⁽³⁴⁾ Few Africans wanted to exchange their protected person status for the status of British subject. Apart from this there was also the question of the high income and property qualifications required. Africans earned very little while their property in the reserves, as in Southern Rhodesia did not meet the requirements. The electoral law was adapted for federal elections by the Northern Rhodesia Federal Electoral Regulations, 1953, made by the Governor-General with the approval of the Secretary of State. Nyasaland, as already seen in Chapter Four, had no electoral law. The election of the four ordinary Nyasaland Members was, therefore, to be carried out under regulations made by the Governor-General. The Governor-General, in pursuance of this power, accordingly made the Nyasaland Federal Electoral Regulations with the approval of the Governor of Nyasaland and the Secretary of State. The qualifications laid down by the regulations were the same as those obtaining in Northern Rhodesia save that as far as the citizenship qualification was concerned a voter had to be not just a British subject but a citizen of the United Kingdom and the Colonies.

29. Arts. 3 and 4.

30. Art. 9.

31a. Arts. 10, 11 and 12.

31. These dealt with the elections in general, and, particularly of the ordinary seats.

32. The regulations dealt with the delimitation of the country into constituencies.

33. See note 23 above.

34. See note 23 above.

No material changes were made to the provisions of the final draft regarding the election and qualifications of the Specially Elected or Appointed Members.^(34a) The three Members (two Africans and one European) from Southern Rhodesia were to be elected in accordance with regulations to be made by the Governor of Southern Rhodesia.⁽³⁵⁾ In pursuance of this power, the Governor made the Southern Rhodesia Federal Electoral (Specially Elected Members) Regulations, 1953,⁽³⁶⁾ which, for the purposes of the European Member, made the whole territory an electoral district and, for the purposes of the African Members, divided the territory into two electoral districts - Mashonaland and Matebeleland. The candidates were to be registered voters and the electors were to be those on the ordinary Voters Roll. The two Africans from Northern Rhodesia were to be elected in accordance with regulations made by the Governor of Northern Rhodesia by such body as he might designate as representative of the Africans.⁽³⁷⁾ The Governor accordingly made the Federal Assembly (Specially Elected African Members) (Northern Rhodesia) Regulations, 1953,⁽³⁸⁾ and designated the African Representative Council as the body representative of Africans.⁽³⁹⁾ For a person to qualify for election he had to be a British subject or protected person, a Member of the Council and able to speak English sufficiently to enable him to take active part in the proceedings of the Federal Assembly.

The two Africans from Nyasaland were also to be elected in accordance with regulations made by the territory's Governor by a body he, from time to time, designated.⁽⁴⁰⁾

34a. See Arts. 13, 14 and 15. Note that a European representative in African interests had to be unquestionably European and not half-European - Thornicroft v. Federal Minister of Internal Affairs, 1954 (1) S.A. 519 (S.R.) where nomination of a coloured was disallowed.

35. Art. 13 (1).

36. See S. R. G/Ns 857/53 and 1042/53.

37. Art. 13 (2).

38. See N. R. G/N. 309/53.

39. See N. R. G/N 308/53.

40. Art. 13 (3).

9. In pursuance of these provisions the Governor made the Federal Assembly (Specially Elected African Members) (Nyasaland) Regulations, 1953, and designated the African Protectorate Council as the body representative of Africans.⁽⁴¹⁾ Unlike in Northern Rhodesia, candidates were not required to be Members of the African Protectorate Council. They were, however, to file nomination papers signed by not less than ten and not more than twenty persons, one of whom had to be a Member of the Council. The other qualifications were the same as those required in Northern Rhodesia. The appointment of the Northern Rhodesia and Nyasaland European Members representing African interests remained as in the final draft.⁽⁴²⁾

Articles 16 and 17 dealt with the offices of Speaker and Deputy Speaker while Articles 16-23 dealt with procedure in the Assembly. Provisions regarding sessions, dissolution and prorogation of the Assembly were contained in Articles 26, 27 and 28 respectively. In exercising his discretion in proroguing and dissolving the Assembly, the Governor-General was required by Clause 3 of the Royal Instructions to follow the constitutional conventions obtaining in the United Kingdom. The procedure to be followed in the Assembly was based on that of the British House of Commons. A Bill passed by the Assembly was to be sent to the Governor-General for his assent. The Governor-General could, except in the case of a Bill he was required to reserve in terms of Articles 10 (2)⁽⁴³⁾ 75,⁽⁴⁴⁾ or 97 (1)⁽⁴⁵⁾ of the Constitution or Clause 2⁽⁴⁶⁾ of the Royal Instructions, either assent to the Bill or withhold assent or reserve the Bill for the signification of Her Majesty's pleasure.⁽⁴⁷⁾ Where (subject to the provisions of Article 97 (1),) a Bill was reserved for the signification of Her Majesty's pleasure, the assent, if forthcoming, was to be given through a Secretary of State.⁽⁴⁸⁾ A Bill presented to the Governor-General was to lapse if assent was declared to be withheld or if assent had not been given at the expiration of twelve months from the date on which it was presented.⁽⁴⁹⁾ A Bill was to become law after a proclamation in the Gazette by the Governor-General that it had been assented to.⁽⁵⁰⁾ Her Majesty, through a Secretary of State could, however, disallow any Bill assented to by the Governor-General within twelve months of such assent.⁽⁵¹⁾

The main legislative powers of the Federal Legislature were contained in Article 29. The Article empowered the Legislature to make laws for the peace, order and good government of the Federation in those matters that came under its jurisdiction.⁽⁵²⁾ Such laws could be made for the whole of the Federation or part of it.⁽⁵³⁾ The laws could make (except in two cases)^(53a) different provision for different parts of the Federation.⁽⁵⁴⁾ The Constitution maintained the division of subjects on which the Federal Legislature could make laws.⁽⁵⁵⁾

10. It could only make laws on those subjects which appeared in the Exclusive or Concurrent Legislative Lists,⁽⁵⁶⁾ and matters incidental to the execution of the powers conferred on the Governor-General, the Federal Legislature or the Federal Judiciary.⁽⁵⁷⁾ Any law outside these permitted fields was to be void.⁽⁵⁸⁾ Subjects outside the two Lists were reserved to the territories.⁽⁵⁹⁾ Where, on coming into force of the Constitution, a territory had the power to make laws on a subject under the Federal Exclusive List, the power was to continue until the Governor-General prescribed by notice in the Gazette that the subject had become exclusively Federal.⁽⁶⁰⁾

41. Nyas. G/No. 160/53 and 169/53.
 42. Art. 9 (1) (c).
 43. Article 10 (2) required the Governor-General to reserve any Bill that made provision for qualifications or disqualifications for election as an elected member, or the circumstances in which an elected member should vacate his seat, or qualifications or disqualifications for registration as a voter, or for voting, at elections. This did not include, however, a Bill seeking to disqualify a person from election or registration as a voter or to make a person vacate his seat in the Assembly because of commission of an offence relating to elections.
 44. Article 75 required the Governor-General to reserve Bills reported on by the African Affairs Board as differentiating.
 45. Article 97 (1) required the reservation of Bills amending the Constitution.
 46. The Clause required the Governor-General (except where prior instructions had been given or a suspending Clause had been inserted) to reserve any Bill which appeared to him to be inconsistent with the Crown's treaty or international obligations, or which might result in a grant of land or money or other donation being made to him or which contained provisions from which assent had previously been withheld or which had previously been disallowed.
 47. Art. 24 (1).
 48. Art. 24 (2).
 49. Art. 24 (4).
 50. Art. 24 (3).
 51. Art. 25 (1). The Bill in such case became annulled on presentation of a speech or message by the Governor-General to the Federal Assembly or by a proclamation in the Gazette.
 52. Art. 29 (1).
 53. Art. 29 (6).
 53a. These concerned the incidence of taxes in terms of Arts. 60 (3) and 61 (2).
 54. Ibid.
 55. Art. 29 (2) and (3) read with the Second Schedule to the Constitution.
 56. Subjects on the Exclusive List were, for example, external affairs, defence, immigration, extradition, aliens, citizenship, external trade, banks and banking (other than land banks), railways, shipping and aviation. Subjects on the Concurrent List were, for example, deportation, naturalisation, development of industry, control of movement between the territories, bankruptcy, land banks.
 57. Art. 29 (1) (2) & (3).
 58. Art. 29 (4) & (5).
 59. Laws of territorial legislatures outside the Concurrent List and the residuary subjects were also to be void. Art. 29 (5).
 60. Art. 29 (2).

11. Until the publication of such a notice, the subject was to be regarded as falling under the Concurrent List,⁽⁶¹⁾ Once the requisite notice had been published, the territory's power on that subject ceased to exist.⁽⁶²⁾ The notice had, therefore, the effect of amending the Constitution of ^{the} territory.⁽⁶³⁾ The first subject to be placed under the Exclusive List by notice was foreign affairs. By notices⁽⁶⁴⁾ in the Government Gazettes of the three territories as required by Article 29 (2), the Governor-General prescribed October 30, 1953, as the date on which the Federal Legislature would have the power to make laws with respect to external affairs to the exclusion of the territorial legislatures. No such date or dates were prescribed for the other subjects on the Exclusive List. This left such subjects concurrent wherever a territorial legislature had power to legislate on the subject concerned. The Federal Legislature, however, acquired exclusive power over most of the remaining subjects by enacting comprehensive legislation which in terms of Article 35 (1) prevailed over territorial legislation. Article 35 (1) provided that where a territorial law was inconsistent with Federal law in those matters where both legislatures were competent, Federal law was to prevail.

61. Ibid.

62. Ibid. Any law passed by the territorial legislature on that subject was, however, to continue in operation until it had been expressly or impliedly repealed by Federal law - Art. 35 (4). See also dicta in the Australian cases of D'Eugen v. Pedder (1904) 1 C.L.R. 91 (where Griffith C.J., at p.111, stated: "As from the point at which the quality of exclusiveness attaches to the Federal power the competence of the state is altogether extinguished.") and Pirrie v. Macfarlane (1925) 36 C.L.R. 170 - (where Isaacs J., at 191-2 stated that where such subjects as defence or customs were expressly by sections 106 and 107 eliminated from state constitutions because they were made exclusively federal by Section 52, the control of such a matter was necessarily by force of the very words of the constitution placed outside the ambit of the State Constitution and beyond any power of the state to affect it).

63. Note that while S. 14 (1) and (2) of the Federation of Rhodesia and Nyasaland (Constitution) Order in Council, 1953, provided for the continuance of the territorial Constitution and Article 29 (4) of the Constitution continued the legislative competence of the territorial legislatures, both sections provided that the territorial constitutions and the legislative powers of the legislatures thereunder would be subject to the provisions of the Order and the Federal Constitution respectively. Note also that the R & N (Fed.) Act 1953, permitted amendments to the territorial Constitutions.

64. S. R. G/N. 903/1953; N.R. G/N 310/1953; Nyas. G/N 102/1953.

Such territorial law was to be void to the extent of the inconsistency. It was to be immaterial whether the Federal law was enacted before or after the territorial law.⁽⁶⁵⁾

In order to facilitate the assumption of functions by the Federal Government without the enactment of the required Federal legislation, the Federal Legislature enacted the Territorial Laws Amendment Act, 1954, enabling the Federal Government to administer provisions of certain territorial laws. The Act empowered the Governor-General to declare that any provisions of a territorial law relating to matters within the competence of the Federation would be administered by the Federal Government. In cases where such provisions concerned a concurrent matter, the concurrence of the Governor of the territory concerned had first to be obtained before the Federal Government administered them. The Governor-General was also empowered to make by Order such amendments, adaptations and modifications to the provisions of any such territorial law as would be necessary to enable the Federal Government to administer it or remove anomalies and difficulties arising out of the change.⁽⁶⁶⁾ In pursuance of the Act the Federal Government took over the administration of a great number of territorial laws relating to a variety of subjects - e.g. non-African agriculture in Southern Rhodesia and Northern Rhodesia (but not Nyasaland), public health, copyright and weights and measures. When necessary and convenient such territorial laws were replaced by Federal legislation.

In addition to the legislative powers granted under Article 29, the Federal Legislature could also acquire legislative competence under Articles 32, 31 (1) and 6. Article 32 (2) permitted a territorial legislature to confer on the Federal Legislature by legislation power to make laws, in relation to that territory on matters not included in the Federal or Concurrent List for the purposes of the creation and regulation of any authority to exercise functions in respect of more than one territory; or the establishment or regulation of schools for any special category of pupils; or to exercise control and the establishment of such services as may be necessary for such control or such other matter, being a matter included in the Federal or Concurrent Legislative List, as may be specified in the law by which the authority is conferred.^(66a) The delegation could be general or restricted and could be indeterminate or for a limited time.⁽⁶⁷⁾ While the delegation lasted such matter was to be deemed to be under the Concurrent List.⁽⁶⁸⁾ The delegation, whether granted generally or for a specified period, could be revoked at any time but the revoking law in such case was not to come into operation until six months after its enactment.⁽⁶⁹⁾

... in the case of a Federal law on an ordinary concurrent List subject which could not be repealed or amended by a territorial law, a law enacted by the Federal Legislature on delegation could be amended or repealed by the territorial legislature concerned after revocation of the delegation.⁽⁷⁰⁾

Article 31 (1) provided that Northern Rhodesia and Nyasaland, whose agriculture (non-African and African) remained territorial on coming into force of the Constitution, could later, by an enactment, place on the Concurrent List non-African agriculture; or animal health (including animal diseases and animal pests other than tsetse); or plant pests and diseases.⁽⁷¹⁾ Any law made to effect such transfer could be amended or replaced by the Legislature that made it but such amendment or replacement was not to diminish the inclusion of the subject concerned on the Concurrent List.⁽⁷²⁾ In pursuance of these provisions the Northern Rhodesian Legislative Council enacted the Non-African Agriculture (Transfer to the Concurrent List) Ordinance in 1955, enabling the Federal Government to assume responsibility over the subject on January 1, 1956, when the Ordinance came into operation.⁽⁷³⁾

Article 6, on the other hand, empowered the Federal Legislature to make special laws (which normally would be outside its competence) for areas set aside for use as, or in conjunction with, the seat of the Federal Government. Exercising this power, the Legislature enacted the Seat of Government (Special Laws) Act, 1956. In pursuance of this Act, the Governor-General, for instance, made regulations⁽⁷⁴⁾ which removed all racial discrimination relating to the supply and consumption of liquors at certain functions and receptions held at the Government House and at the King George VI Army Barracks in Salisbury. The regulations were necessary because of the law prevailing in Southern Rhodesia then which prohibited the supply to Africans or the consumption by Africans of European liquor.

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65. This means that while Federal law was able to repeal territorial law on a concurrent subject, territorial law could not do the same to Federal law.
66. These extensive legislative powers of the Governor-General were upheld in R. V. Christopoulos, 1957 R & N 251. This was in accordance with the principles laid down in R. v. Dirch (1878) 3 App. Cas. 339 and Hodge v. The Queen (1833) 9 A.C. 117.
- 66a. Instances of such enabling laws, were the Art Gallery (Authorisation) Act of the Southern Rhodesia Legislature and Ordinances of similar title enacted by the Northern Rhodesia and Nyasaland Legislatures in 1957. The Federal Government assumed responsibility by enacting the Rhodes National Gallery Act, 1958.
67. Art. 32 (3). 68. Ibid. 69. Art. 32 (4).
70. Art. 35 (2).
71. Nothing in the Article was however, to be construed as empowering the Legislatures of the two territories to place the control of game, game reserve or fishing rights on the Concurrent List - Art. 31 (5).
72. Art. 3 (2).
73. Nyasaland never surrendered its non-African agriculture until the dissolution of the Federation.

71. and the Church of Scotland.⁽³⁰³⁾ To these must be added the 228
Labour Party⁽³⁰⁴⁾ and the Liberal Party⁽³⁰⁵⁾, in general.

In Central Africa, European opposition to federation was encountered mainly in Southern Rhodesia. Stockil, the Leader of the Opposition, denounced the conclusions of the Conference and described them as amounting to Southern Rhodesia's virtual loss of self-government and a return to Colonial Office rule.⁽³⁰⁶⁾ Charles Olley, an outspoken white supremacist, saw in Federation the end of white supremacy.⁽³⁰⁷⁾ Few whites opposed the scheme in Northern Rhodesia and Nyasaland. Those who did were mostly missionaries.⁽³⁰⁸⁾ There was, however, a large body of non-locally recruited white civil servants who were opposed to federation⁽³⁰⁹⁾ but, as public servants, their opposition could not be publicly voiced. The Governor of Nyasaland was a lukewarm supporter.⁽³¹⁰⁾ For different reasons opposition also came from Asians⁽³¹¹⁾ and Coloureds⁽³¹²⁾ who feared the policies of the Southern Rhodesia Government.

302. The Society's Colonial Bureau, published, for instance, British Central Africa (1951); Venture (a journal of the Bureau - special number entitled East and Central Africa (August/Sept, 1952); Advance to Democracy. A Report to the Fabian Colonial Bureau on the Implications of 'Partnership' in Multiracial Societies (Controversy Series Number 8, June, 1952).

303. See Bulletins No. 1 of March 1953 and No. 2 of May, 1953, of the Scottish Council for African Questions.

304. The Party on its own published very little but very much used the organs of the Fabian Society.

305. Its principal publication was: Platform Points: Central African Federation (July, 1952).

306. See his speech in the Legislative Assembly, Hansard, 23 June, 1952.

307. Olley vigorously, denounced federation verbally and in writing - see Issues of the Rhodesia Monthly Review (1950-53) which Olley published. Olley led the White Rhodesia Council (formed in 1959) a white supremacist organisation strongly opposed to federation. The organization published: Dominion Status versus Federation (mimeographed); 100 Facts Against Federation: The Case of the White Rhodesia Council. Two other organizations - the Rhodesia Association and the Rhodesia League also opposed Federation. For the views of the Rhodesia Association, see New Rhodesia, April 8, 1953, and for those of the League, see Rhodesia Herald, March 26 and April 7, 1953.

308. For the views of the various churches, see Gann, op.cit. pp. 418-23.

309. Ibid., p.427. See House of Commons Debates, Vol.629, Col.434, 2 Nov.1960, where Major Wall alleged that a number of Colonial Officials never really supported federation or tried to make it work. See also Federal Hansard, Vol. XLV, Col.3239, et.seq. 26 October, 1960, where Mr. R.L. Moffat, a European Member representing African interests, who was then a District Commissioner in Northern Rhodesia at the time of the Campaign, stated that perhaps the majority of the District Commissioners were in favour of the federation but that some were not. Mr. Moffat said he himself was not in favour and did not put the federation case to the Africans as was required by him by his superior. He explained the reasons for his action. See also in the same Hansard, a speech by Mrs. Rosin blaming the Colonial office for the failure of its officials in Northern Rhodesia and Nyasaland to explain federation.

(See page 229 for footnotes 310, 311, 312).

The main opposition, however, came from the Africans. (313)
 The Congresses, in a desperate bid to stop what they considered Her Majesty's attempt to dishonour protectorate treaties signed between their grandfathers and Queen Victoria, rallied the African population behind them and unleashed extensive anti-federation propaganda for internal and external consumption. (314)
 Nyasaland chiefs drew up a petition to the Queen, reminding her of the treaties and praying that she intervene to stop federation. (315) A delegation of the chiefs flew to London to present the petition to the Queen. They were, however, unable to obtain an audience with the Queen and the petition was presented through the Colonial Secretary. (316)

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310. See an attack on him in East Africa and Rhodesia, 7th August, 1952. See also remarks by Welensky that the attitude of the Northern Governments towards the Federal Government changed only after Sir Evelyn Home and Sir Robert Armitage had become Governors of Northern Rhodesia and Nyasaland respectively - Federal Newsletter, No. 45 of 1960.
311. For views of Asians, see Rhodesia Herald, Sept, 1952: Report of the Central African Asian Conference (held at Limbe between July 26 and 28, 1952) (mimeographed).
312. For their views, see Rhodesia Herald, August 18, 1951, Sept. 1, 1951 and January 5, 1953.
313. For African opposition at this time, See Gann, op.cit. pp. 423-27.
314. The two Congresses published no sophisticated literature but the following illustrates the thinking of the two organizations at the time. Literature by the Northern Rhodesia African National Congress: - The President's Statement at Mapoloto and Delegates Conference (Mimeo.); Proposed Constitution for a Self-Governing State of Northern Rhodesia As Adopted By the Chiefs in Conference (1952) (Mimeo); The President's Statement On the Effects of the National Days of Prayer (1953) (Mimeo); The President's Statement on the White Paper of January, 1953 (1953) (Mimeo); Congress News (the mouthorgan of the Organization - it later became Congress circular). Literature by the Nyasaland African National Congress: - Memorandum of the Nyasaland Congress (Salisbury Branch) on the Federation of Nyasaland and the Rhodesias (1951) (Mimeo); Resolutions Passed By the Nyasaland African National Congress (1953) (Mimeo).
315. See A Petition to Her Majesty Queen Elizabeth II Against Federation Made By Chiefs and citizens of Nyasaland With A Post-Script By A Creech-Jones (London, Africa Bureau, 1953)
316. See The Times (London) Feb. 5, 1953, for a letter the Chiefs wrote to the newspaper before leaving.
317. Gutheridge, op.cit., p. 216, quoting.

In the midst of this opposition, Huggins and Welensky, aided by the efficient machinery of the United Central Africa Association, robustly defended federation. On the one hand, they had to placate African fears and feelings and in doing so they inflamed Stockil and Olley. On the other hand, they had to re-assure the Europeans in Southern Rhodesia that self-government was not being traded for political expediency. The dilemma caused Welensky on one occasion, in an attempt to convince Europeans in Southern Rhodesia that there was no danger in federation, to say: "On the one side is Mr. Charles Olley of the White Rhodesia Council who says that federation means the death of white supremacy; on the other is Mr. Harry Nkumbula (President of the Northern Rhodesia African National Congress) who says that federation means the end of African hopes of political supremacy."⁽³¹⁷⁾ At times Huggins and Welensky made statements which were harmful to their cause in the eyes of those who opposed federation on the ground that it was detrimental to Africans.⁽³¹⁸⁾ Perhaps this was inevitable. The Europeans had the vote and it was they who could foil the scheme as well as dislodge Huggins from power. They needed more assurances than the voteless African masses whose opposition the two men thought would come to an end once federation had been established.

In September, 1952, the Minister of State for the Colonies, Henry Hopkinson, visited Central Africa to see things for himself. Earlier, the Leader of the Opposition, Clement Atlee, had also visited Central Africa for the same purpose.⁽³¹⁹⁾ Hopkinson, who was an enthusiast of federation, shocked those who were opposed to federation on his return to Britain by declaring that although African opposition was still very strong, ninety per cent of the Africans did not understand the issues involved. The Minister was rapped on the knuckles by the press for this statement.⁽³²⁰⁾

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318. Huggins for instance, told a meeting of the United Central Africa Association that there was no need to fear a black Parliament. "...the whole thing is fantastic; it would not happen in fifty or sixty years". Further assuring them he said Europeans were the ones making the laws and that they could ensure their survival by, for instance, raising qualifications if too many Africans registered as voters. - Johannesburg Star, 29 July, 1953. The African Affairs Board, intended to safeguard African interests, was called by Huggins: "A little piece of Gilbert and Sullivan which would make very little difference" - The Times (London) 13 October, 1952. For this belittling of the safeguards, he was attacked by the Archbishop of Canterbury - ibid., October 20, 1952.
319. For Atlee's rather cautious assessment of the position, see his statement in the Daily Herald and the Johannesburg Star of September 8, 1952. See also the Rhodesia Herald of that date.
320. See The Times (London) of 13, 14, 16 Aug., 1952; Scotsman, 13 Aug., 1952.

The final conference opened in London in January 1953, as planned. The usual delegations attended but no Africans did. The work of the Conference was to consider the Draft Scheme in the light of the subsidiary reports produced by the three Commissions set up by the 1952 Conference and to make the necessary amendments to the Draft Scheme where necessary. The Conference resulted in the publication of two documents - a general report of the Conference,^(320a) and a revised Draft Constitution^(320b) for the Federation. A number of alterations were made to the Draft Scheme. Some modifications of the Exclusive and Concurrent Legislative Lists were adopted.⁽³²¹⁾ The composition of the Legislature and the distribution of the twenty-six ordinary seats and of the nine seats of members representing African interests were not changed.⁽³²²⁾ Apart from providing for the appointment of an Acting Governor-General or a Governor-General's Deputy, no changes were made to the structure of the Executive.⁽³²³⁾

Further changes were, however, made to the African Affairs Board.⁽³²⁴⁾ Instead of being outside Parliament, the Board was now going to be a Standing Committee of the Assembly. Its new composition was to be: (a) the two specially appointed European Members charged with special responsibility for African interests; (b) the Specially Elected European Member (Southern Rhodesia) charged with special responsibility for African interests; and (c) one Specially Elected African Member from each of the three territories to be selected by a majority vote of the Specially Elected African and European Members. The Board's general functions remained the same.⁽³²⁵⁾ Its functions in relation to legislation also remained the same. However, while the procedure of objection in relation to subordinate legislation did not change,⁽³²⁶⁾ that in connection with Bills did.⁽³²⁷⁾ Instead of sending the notice of objection to the Prime Minister, the Board was now to lay a report on the Bill before the Assembly stating its reasons for saying that the Bill differentiated. This could be done at any time during the passage of the Bill in the Assembly. After a Bill had been passed the Board could still present a request in writing to the Speaker that the Bill be reserved for signification of Her Majesty's pleasure on the grounds that it was a differentiating measure giving the reasons why the Bill was such a measure. If the decision to make the request was not unanimous, a statement to that effect was also to be included. On receiving the request, the Speaker was to have it delivered to the Governor-General at the time of the presentation of the Bill for assent. The powers of the Governor-General on receiving the Bill remained the same.

75. No changes were made to the provisions regarding the legislative powers of the Federal Assembly and the procedure therewith.⁽³²⁸⁾ Provisions on finance, the public service and the judiciary were now fully given in the light of the Reports⁽³²⁹⁾ of the Fiscal, Public Service and Judicial Commissions.⁽³³⁰⁾ An important provision was added to the provisions on amendment of the Constitution. No amendments were to be made to the Constitution until after ten years of its coming into operation unless the legislatures of the three territories voted by resolution to the draft Bill that they had no objection to the amendment being made. It was further provided that in not less than seven years and in not more than nine years of the coming into force of the Constitution, a conference was to be convened, comprising delegates from the Federation, the three territories and the United Kingdom and chosen by the respective Governments, for the purpose of reviewing the Constitution.⁽³³¹⁾

The views of the participants at the end of the 1953 Conference are concisely summarised in the last paragraph of the introduction to the general report of the conference, signed by Viscount Swinton (Secretary of State for Commonwealth Relations), Oliver Lyttelton (Secretary of State for the Colonies), the Marquess of Salisbury (Lord President of the Council), G. M. Huggins (Prime Minister of Southern Rhodesia), G. M. Rennie (Governor of Northern Rhodesia) and G.F.T. Colby (Governor of Nyasaland). The six declared:

"We have reached the moment of decision. We are convinced that a Federation on the lines proposed is the only practicable means by which the three Central African Territories can achieve security for the future and ensure the well-being and contentment of their peoples. We believe that this Federal Scheme is a sound and a fair scheme which will, promote the essential interests of all the inhabitants of the three Territories, and that it should be carried through."⁽³³²⁾

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- 320a. Cml. 8753 of 1953. Report By the Conference on Federation Held in London in January, 1953.
 320b. Cml. 8754 of 1953. The Federal Scheme - Prepared By A Conference Held in London in January, 1953.
 321. Cml. 8754, op.cit., Chap. 2, Part 2.
 322. Ibid., Part 3.
 323. Ibid., Chap. IV.
 324. Ibid., Chap. V.
 325. Ibid., para. 58.
 326. Ibid., paras. 65-67.
 327. Ibid., paras. 61-64.
 328. Ibid., Chap. III.
 329. Cmls. 8671, 8672 and 8673 of 1952, op.cit.
 330. For consideration of these reports, see CML. 8753 of 1953, pp. 18-21.
 331. Cml. 8754, Chap. IX, Part 3. For the Review Conference in 1960, see Chap. 7 below.
 332. Cml. 8753, p. 7.

The results of the Conference were again greeted with opposition in Britain and Central Africa. Last minute attempts to foil the scheme were launched. The Archbishop of Canterbury, together with the Moderators of the Church of Scotland⁽³³³⁾ and the Free Church Federal Council, wrote a letter to The Times against going ahead with the scheme. In Northern Rhodesia, the African National Congress burned the White Paper at a rally as a sign of their dislike of the Federation and threatened that its imposition would be followed by unrest.⁽³³⁴⁾ In Nyasaland, chiefs as already mentioned above, petitioned the Queen. Later, on the advice of Rev. Michael Scott,⁽³³⁵⁾ the chiefs and the African National Congress petitioned the United Nations.⁽³³⁶⁾ Ray Stockil and Charles Olley warned the whites against accepting federation. In the meantime, Huggins and Welensky, having gained what they had fought for for years, were becoming more unguarded in their references to Africans.⁽³³⁷⁾

333. 4 March, 1953.

334. Chronology, Vol. LX, No. 7, p. 202; Walker, E.A. A History of Southern Africa (London, Longmans, 1957, 3rd Ed.) p. 862.

335. Rev. Scott was later deported from Nyasaland. For his views, see Scott, African Episode. (London, Africa Bureau, 1953).

336. Chronology, Vol. LX, No. 8, p. 232; Walker, op.cit., p. 863.

337. See, for instance, a speech made by Huggins on January 29, 1953 and reported in the Manchester Guardian, 30 Jan., 1953. For criticism of the speeches of Huggins referring to Africans at that time, see a letter by Prof. Arthur Lewis to The Times (London) 2 March, 1953.

338. House of Common Debates, Vol. 513, Col. 658. For his full speech, see Cols. 658 - 676.

339. Ibid., Col. 676. For his full speech, see Cols. 676-691.

340. For the full debate on the motion, see ibid., Cols. 658-796.

341. This fear was later justified when Art. 29(7), empowering Her Majesty's Government to legislate for the federation if it appeared necessary, appeared in the final Constitution.

342. 25,570 voted in favour and 14,729 against. In percentages of the electorate, those in favour amounted to 63.45 and those against to 36.45. This was nearly the two-thirds that Stockil had demanded. For the results of this referendum, see Drew, J.D.C.. "The Four Southern Rhodesian Referendums..." (in Occasional Papers of the National Archives of Rhodesia and Nyasaland, Vol. 1., June, 1963) pp. 42-57; Chronology, Vol. LX, No. 8, p. 234; Rotberg, op.cit., p. 157. Walker, op.cit., p. 863; Gann, op.cit., p. 430.

On March 24, 1953, the Secretary of State for the Colonies moved in the House of Commons "that this House approves the proposals on Central African Federation as set out in Command Papers 8753 and 8754."⁽³³⁸⁾ Griffiths, the Opposition's spokesman on Colonial affairs, moved an amendment on behalf of the Opposition "that this House while recognising the advantages which may be expected to accrue from the federation of the three Central African Territories, cannot approve the Federation Scheme in the form contained in Command Papers 8753 and 8754, which does not contain adequate safeguards for African interests, and opposes the imposition of the scheme against the will of the African people."⁽³³⁹⁾ After a bitter debate the Government motion was, however, carried by 304 to 260 votes.⁽³⁴⁰⁾

In Southern Rhodesia, the final scheme was referred to a referendum in April. Ray Stockil, in a last bid to prevent the inevitable, had demanded that the scheme should only be considered accepted if two-thirds of the electorate voted for it and that the referendum should be delayed until the document had been completely finalised as there were still some ambiguities which could result in alterations.⁽³⁴¹⁾ Huggins turned down both these demands. The electorate voted massively in favour of the scheme.⁽³⁴²⁾ In Northern Rhodesia the Legislative Council accepted the scheme by seventeen votes to four - the four voting against being the two African Members and the two Europeans representing African interests.⁽³⁴³⁾ The Nyasaland Legislative Council equally accepted the scheme.

The acceptance of the Constitutional Draft by the United Kingdom Parliament and by the Southern Rhodesian electorate and the Legislative Councils of Northern Rhodesia and Nyasaland brought to an end decades of campaigning for the establishment of some form of closer association in Central Africa.⁽³⁴⁴⁾ A new stage had commenced - i.e. that of putting the scheme into operation through the enactment of various constitutional instruments by Her Majesty in Council and the United Kingdom Parliament.⁽³⁴⁵⁾

Footnotes 338 - 342, see page 76.

343. N. R. Lezco Debates, 17 & 18 April, 1953, pp. 27-142. See also Gann, Ibid., Chronology, IX, No. 9. p.278; Walker, op.cit., p. 863.

344. For accounts varying in detail of the closer association movement from early days to 1953, see generally the following; Gann, ibid., Gann & Gelfand, op.cit., Jones, op.cit., Mason, op.cit., Franklin, op.cit., Bretsford, op.cit., Palley, op.cit., Welensky, op.cit., Gray, op.cit., Pratt & Ley's, op.cit.; Taylor & Dvorin, op.cit., op.cit.; Gutheridge, op.cit.; Kirkwood, op.cit., and other literature quoted in this Chapter not here mentioned.

THE CONSTITUTION, LIFE AND DISSOLUTION OF THE FEDERATION1. THE CONSTITUTION

In May, 1953, the Rhodesia and Nyasaland (Federation) Bill was introduced in the British Parliament.⁽¹⁾ On July, 14 the Bill became law.⁽²⁾ The Act empowered the Crown to enact legislation providing for the establishment of the Federation and of such authorities as might appear expedient and the conferment of the necessary powers and duties on such authorities.⁽³⁾ The Act also empowered the Crown, if necessary or expedient, to amend the constitutions of the three territories so as to bring them into conformity with the Federal Constitution.⁽⁴⁾ In pursuance of the Act, the Crown, on August 1, issued the Federation of Rhodesia and Nyasaland (Constitution) Order in Council, 1953.⁽⁵⁾ Section 1 (1) of the Order established the Federation. Section 1 (2) provided that Chapters 1 and IV and Articles 35, 45, 53-55, 64 and 66 were to come into effect on a date appointed by Her Majesty but that at any time after making the Order (the Constitution Order) Her Majesty could appoint a person to be Governor-General. In pursuance of this subsection, a second Order - the Federation of Rhodesia and Nyasaland (Commencement) Order in Council, 1953, was also issued on August 1. Section 1 of this Order provided that Section 1 (2) of the Constitution Order would come into force on September 3, 1953. On September 3, therefore, the following provisions of the Constitution came into effect:-

Chapter 1 - concerning the establishment of the federation; the taking of office of the Governor-General; appointment of the Acting Governor-General; the power of the Governor-General to appoint the Deputy Governor-General; the construction of references to the Governor-General; the seat of the Government, and the official language; Article 35 - concerning the effect of federal and territorial law on each other; Chapter IV - concerning Executive powers; Article 45 - concerning enforcement of federal laws; Articles 53-55 - concerning the exclusive jurisdiction of the Federal Supreme Court in certain matters; Article 64 - concerning the exercise of the functions of the Federal Supreme Court before assumption of them by the Court; and Article 66 - concerning the assumption of functions by the Federal Supreme Court. This was to be on a day proclaimed by the Governor-General.

1. For the debate of the Bill, see House of Commons Debates, Vol. 515 and Vol. 516, 1953.

2. 1 & 2 Eliz. II, C. 30.

3. S. 1 (1) (a) (i) and (ii).

On September 4 the first Governor-General, Lord Llewellyn, assumed office.⁽⁶⁾ On September 7 a temporary Ministry comprising Huggins, Welensky and Barrow was sworn in. The Ministers were allowed to retain their seats in the territorial legislatures if they so wished until after the general election. Huggins and Welensky did so. On October 23⁽⁷⁾ the Governor-General issued a proclamation⁽⁸⁾ bringing the remaining provisions of the Constitution into force.⁽⁹⁾ During the period between his assumption of office and the first meeting of the Federal Assembly, the Governor-General was, in addition to his executive functions, vested with the legislative powers conferred on the Federal Legislature by the Constitution.⁽¹⁰⁾ He was to exercise the powers to such extent as might, in his opinion, be necessary or expedient to enable the Constitution to function.⁽¹¹⁾ Regulations made in pursuance of these powers were to be deemed to be laws made by the Federal Legislature.⁽¹²⁾ If still subsisting on the date of the first meeting of the Federal Assembly, they were to continue to have effect as if they were enactments of the Federal Legislature until amended or revoked by a subsequent law of the Legislature.⁽¹³⁾ Although in exercising these powers the Governor-General was to act in accordance with the advice of the Temporary Ministry, he could, however, in his discretion, and in relation to any matter, disregard their advice.⁽¹⁴⁾ This provision operated notwithstanding the provisions of Article 39 of the Constitution (requiring the Governor-General to act in accordance with the advice of the Executive Council except in those cases where he was expressly given discretion). Where he so disregarded the advice of the Temporary Ministry, he was, however, to report his views to the Secretary of State and was to comply with any instructions from the Secretary on the matter.⁽¹⁵⁾

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4. S. 1 (1)(b). The Crown was also empowered to make provision for the restriction of the right of petition for special leave to appeal from the territorial High Courts to the Privy Council once the Federal supreme Court had been established - S.1 (1) (a)(iii). The Crown's powers were limited by two requirements: Firstly, Orders made under the Act were to be tabled in both Houses of Parliament and both Houses were to adopt an address to the Crown to issue the Order or Orders - S.1 (4). Secondly, once an Order had been made, unless it specified the method of amendment or revocation, it could not be amended save by an Act of Parliament.
 5. S.1. 1953, No. 1199.
 6. He did this in pursuance of the Order in Council and the Royal Instructions of August.
 7. The day later became officially known as "Federation Day" and was made a public holiday.
 8. Proc. No. 2 of 1953.
 9. This was done in pursuance of Section 1 (3) of the Constitution Order which provided that the remaining provisions would come into force on a date appointed by the Governor-General by proclamation.
 10. Section 2 (1) of the Constitution Order.
 11. Ibid.
 12. S. 2 (3) 13. Ibid. 14. S.2 (4) 15. Ibid.

3.

In December elections were held. The United Central Africa Association had disbanded and reconstituted itself as the Federal Party, led by Huggins, with Welensky and Barrow as his chief lieutenants.⁽¹⁶⁾ Although three other parties - the Democratic Party,⁽¹⁷⁾ the Progressive Party⁽¹⁸⁾ and the Confederate Party⁽¹⁹⁾ - had been formed, only one of these - the Confederate Party, an extreme right wing organisation - was still in existence at the time of the elections.⁽²⁰⁾ The fight was, therefore, a straightforward one between the Federal Party and the Confederate Party, with a few independents. The Federal Party overwhelmingly defeated the Confederate Party. It polled 34,992 votes and had 24 of its 26 candidates elected. On the other hand, the Confederate Party polled 15,263 votes and had only one⁽²¹⁾ of its 23 candidates elected. The four independents who contested polled 1,843 votes but only one⁽²²⁾ of them was elected.⁽²³⁾ Huggins became Prime Minister. A new Government of five Ministers (later increased to seven) took over from the transitional Ministry. The first session of the first Parliament was opened by the Governor-General on February 3, 1954.

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16. The Party later united with the United Rhodesia Party and became the United Federal Party. For the Federal Party's programme, see the Party's Constitution adopted in 1953 (mimeographed); Federal Party Policy (1953); Hirsch, M.L. The Roads Offered (1953).
 17. The Party was formed in 1951, from the Afrikaner Society of Southern Rhodesia. It dissolved in 1953 before the elections and its members joined the Confederate Party. For its programme see Democratic Leaders Statement to the Press and Public (1951) (Memo).
 18. The Party was formed in 1953 by liberal Europeans in Northern Rhodesia. It disbanded before the elections on the grounds that it did not want to split the liberal vote. For its principles, see Rhodesia Herald, 28 July, August 19, Sept 2, and Oct. 16, 1953.
 19. For its programme, see Confederate Party Constitution (1953); Confederate Party Statement of Principles (1953); Details Given of Confederate Party Native Policy (1953) (Memo).
 20. See Notes 17 and 18 above.
 21. This was Mr. Dendy Young, later judge of the High Court of Southern Rhodesia and now Chief Justice of Botswana. He resigned his Rhodesian judgeship as a result of the disagreement among the judges arising from the declaration of independence by Rhodesia.
 22. This was Dr. Alexander Scott, the former leader of the Progressive Party.
 23. For a detailed account of this election, see Dvorin, Eugene P. "Central Africa's First Federal Election: Background and Issues" (The Western Political Quarterly, Vol. 7, 1954) pp. 369-390. The total electorate of the three territories was about 67,000 - Dvorin gives the total of 67,003 whites. Cmd. 1149 - Survey of Developments Since 1953 - Report by Committee of Officials (See below) puts it at 66,920 - p. 11. Of these voters only 449 were Africans - 441 of them in Southern Rhodesia and 8 in Northern Rhodesia - ibid.

The final Constitution of the Federation contained a preamble and eight chapters.⁽²⁴⁾ The preamble recited that Southern Rhodesia was a colony and part of Her Majesty's dominions; that Northern Rhodesia and Nyasaland were territories under Her Majesty's protection; that the territories were the rightful home of all their lawful inhabitants regardless of origin; that the territories would continue to enjoy their existing forms of government and that Northern Rhodesia and Nyasaland would continue "to enjoy separate Governments for so long as their respective peoples so desire"; that the Governments in Northern Rhodesia and Nyasaland would remain responsible (subject to the ultimate control of Her Majesty's Government in the United Kingdom) for, in particular, the control of land in those territories, and for the local and territorial political advancement of the peoples thereof; and that the association of the two Protectorates and a Colony in a "Federation under Her Majesty's sovereignty, enjoying responsible government..., would conduce to the security, advancement and welfare of all their inhabitants, and in particular would foster partnership and co-operation between their inhabitants and enable the Federation, when those inhabitants so desire, to go forward with confidence towards the attainment of full membership of the Commonwealth." It has already been mentioned (in the previous Chapter) that the recitals in the Preamble sought to assure the Europeans in Southern Rhodesia that they would not lose their self-government and the Africans in Northern Rhodesia and Nyasaland that they would not lose the protection of Her Majesty. Two aspects of this Preamble later became very controversial. These were the "fostering of partnership" and the "attainment of full membership of the Commonwealth when the inhabitants so desired." Partnership was adopted as the racial policy of the Federation. Its interpretation and implementation, however, became burning issues throughout the life of the Federation and contributed greatly to its demise. What was meant by "when those inhabitants so desire" also raised bitter differences of opinion when the question of dominion status for the Federation became an issue. Both these controversies will, however, be dealt with later in this Chapter.

24. Chapter I - The Federation in General; Chapter II - The Federal Legislature; Chapter III - Legislative Powers Within Federation; Chapter IV - Executive Powers Within Federation; Chapter V - Judicial Powers Within Federation; Chapter VI - African Affairs Board; Chapter VII - Finance; Chapter VIII - Amendment and Review of Constitution.

The body of the Constitution did not differ very much from the final draft of the January, 1953, Conference. The most significant addition to the final draft was Article 29 (7). This Article preserved the powers of the Crown, where they were conferred by an Act of Parliament as opposed to prerogative, to make laws by Order in Council for the Federation or any of the constituent territories. The reason why this provision was inserted, although not so stated, was, no doubt, to make the position clear that the powers of the Crown under the Foreign Jurisdiction Act (under which the Crown legislated for Northern Rhodesia and Nyasaland) were preserved in case it would be argued that because they were not specifically preserved such powers had disappeared in accordance with the ratio decidendi of Campbell v. Hall.⁽²⁵⁾ That case decided that once a territory had been given a legislature, the Crown lost its legislative powers except those preserved as long as that legislature continued to exist.^(25a) In North Charterland Exploration Company v. The King,⁽²⁶⁾ it was, however, suggested that the rule in Campbell v. Hall ceased to have effect since the passing of the Foreign Jurisdiction Acts 1890-1913. Assuming the suggestion to be correct, this would have, of course, applied only to the two territories where the Foreign Jurisdiction Acts extended, i.e. Northern Rhodesia and Nyasaland which were protectorates and not to Southern Rhodesia which was a colony. However, not taking chances on the correctness of the suggestion in the North Charterland Exploration Company Case, it was necessary to include a specific provision to exclude the rule in Campbell v. Hall not only in relation to Northern Rhodesia and Nyasaland but also in relation to Southern Rhodesia and the Federation itself where the Foreign Jurisdiction Acts did not apply.

Article 1 of the Constitution established the Federation. Article 2 provided for a Governor-General and Commander in Chief appointed by Her Majesty as her representative in the Federation. There were also provisions for the appointment of an Acting Governor-General⁽²⁷⁾ in the event of the absence or incapacity of the Governor-General; and of a Deputy Governor-General⁽²⁸⁾ if the Governor-General was absent from the seat of Government but not from the Federation, or if he was absent from the Federation for a short period, or if he was suffering from an illness he thought would be of a short duration.

25. (1874) Lofft 655; 11 Cowp. 204; Keir and Lawson, Cases in Constitutional Law. (Oxford, Clarendon Press, 4th Ed.) p. 437-492.

25a. For a short discussion of the rule in this case, see Wade & Phillips, Constitutional Law (Edition by Wade & Bradley (London, Longmans, 1965)) pp. 418-420.

26. (1931) 1 Ch. 169.

27. Art. 3.

28. Art. 4.

6. An Acting Governor-General was to be appointed by Her Majesty. A Deputy Governor-General, on the other hand, was to be appointed by the Governor-General. His appointment could, however, be revoked by either the Governor-General or Her Majesty. In addition to following the Royal Instructions, therefore, a Deputy Governor-General was also to follow the instructions laid down by the Governor-General in the instrument of appointment or given him, in the Governor-General's discretion, from time to time.⁽²⁹⁾

The composition of the Legislature remained the same as in the final draft.⁽³⁰⁾ The 26 Elected Members were, as in the final draft, to be elected to the first Parliament on the existing territorial franchise laws and thereafter under an electoral law of the Federal Parliament except for Nyasaland which was to continue under the territorial system until its Legislative Council by resolution decided to have elections governed by federal law.^(30a) Election of Members of the Federal Assembly under the territorial franchise laws made these laws, for the time being, part of the Federal Constitution. For this reason it is necessary to mention briefly the franchise qualifications obtaining in each territory at the time. The franchise law of Southern Rhodesia was contained in the Electoral Law Act, 1951. Regulations - the Southern Rhodesia Federal Electoral Regulations, 1953,⁽³¹⁾ and the Southern Rhodesia Federal Electoral Districts Delimitation Regulations, 1953⁽³²⁾ - were made by the Governor-General with the approval of the Secretary of State to adapt the law for federal elections. In order to be registered as a voter under the 1951 Act, a person had to be a citizen of Southern Rhodesia and to possess the requisite educational qualifications - i.e. adequate knowledge of the English Language and the ability to complete and sign the enrolment form without assistance from another person. In addition, a person was required during a period of three months immediately preceding the date of his application for registration: (i) to have occupied, either solely or jointly with others, a house, warehouse, shop or other building situated within the Colony which, either separately or jointly with any land occupied therewith, was of the value of not less than £500 (in joint occupation the applicant's share had to be not less than £500); or (ii) to have been the owner of a registered mining location in the Colony; or (iii) to have been in bona fide receipt within the Colony of income, salary or wages at the rate of not less than £240 per annum (the value of board, lodging and clothing or any money received for any or all of these could be included in computation of the incomes, salary or wages). A married woman (except one married under a polygamous system) could qualify through her husband's property or income qualifications provided she had the other qualifications.

7. A person was not considered to have the required property qualifications by reason of his sharing in any communal or tribal occupation of lands or buildings. This referred mainly to lands in African reserves and private locations. Although non-racial, this franchise disqualified the majority of the Africans. Although hundreds of them had the requisite educational qualifications, they earned far less than the £20 per month required. They could not qualify through the ownership of property in the urban areas. The Land Apportionment Act barred them from owning or leasing property there. Very few owned farms. Lands and buildings they owned in the reserves were not acceptable qualifications under the Act. There were, therefore, very few Africans on the Voters' Roll.⁽³³⁾

The franchise law obtaining in Northern Rhodesia was that enacted in 1925. This has been discussed in Chapter Four and it is not necessary to repeat the details here. It must be mentioned, however, that, because the franchise was only open to British subjects, the roll had virtually no Africans in 1953.⁽³⁴⁾ Few Africans wanted to exchange their protected person status for the status of British subject. Apart from this there was also the question of the high income and property qualifications required. Africans earned very little while their property in the reserves, as in Southern Rhodesia did not meet the requirements. The electoral law was adapted for federal elections by the Northern Rhodesia Federal Electoral Regulations, 1953, made by the Governor-General with the approval of the Secretary of State Nyasaland, as already seen in Chapter Four, had no electoral law. The election of the four ordinary Nyasaland Members was, therefore, to be carried out under regulations made by the Governor-General. The Governor-General, in pursuance of this power, accordingly made the Nyasaland Federal Electoral Regulations with the approval of the Governor of Nyasaland and the Secretary of State. The qualifications laid down by the regulations were the same as those obtaining in Northern Rhodesia save that as far as the citizenship qualification was concerned a voter had to be not just a British subject but a citizen of the United Kingdom and the Colonies.

29. Arts. 3 and 4.

30. Art. 9.

30a. Arts. 10, 11 and 12.

31. These dealt with the elections in general, and, particularly of the ordinary seats.

32. The regulations dealt with the delimitation of the country into constituencies.

33. See note 23 above.

34. See note 23 above.

No material changes were made to the provisions of the final draft regarding the election and qualifications of the Specially Elected or Appointed Members.^(34a) The three Members (two Africans and one European) from Southern Rhodesia were to be elected in accordance with regulations to be made by the Governor of Southern Rhodesia.⁽³⁵⁾ In pursuance of this power, the Governor made the Southern Rhodesia Federal Electoral (Specially Elected Members) Regulations, 1953,⁽³⁶⁾ which, for the purposes of the European Member, made the whole territory an electoral district and, for the purposes of the African Members, divided the territory into two electoral districts - Mashonaland and Matebeleland. The candidates were to be registered voters and the electors were to be those on the ordinary Voters Roll. The two Africans from Northern Rhodesia were to be elected in accordance with regulations made by the Governor of Northern Rhodesia by such body as he might designate as representative of the Africans.⁽³⁷⁾ The Governor accordingly made the Federal Assembly (Specially Elected African Members) (Northern Rhodesia) Regulations, 1953,⁽³⁸⁾ and designated the African Representative Council as the body representative of Africans.⁽³⁹⁾ For a person to qualify for election he had to be a British subject or protected person, a Member of the Council and able to speak English sufficiently to enable him to take active part in the proceedings of the Federal Assembly.

The two Africans from Nyasaland were also to be elected in accordance with regulations made by the territory's Governor by a body he, from time to time, designated.⁽⁴⁰⁾

34a. See Arts. 13, 14 and 15. Note that a European representative in African interests had to be unquestionably European and not half-European - Thornicroft v. Federal Minister of Internal Affairs, 1954 (1) S.A. 519 (S.R.) where nomination of a coloured was disallowed.

35. Art. 13 (1).

36. See S. R. G/Ns 857/53 and 1043/53.

37. Art. 13 (2).

38. See N. R. G/N. 309/53.

39. See N. R. G/N 308/53.

40. Art. 13 (3).

9. In pursuance of these provisions the Governor made the Federal Assembly (Specially Elected African Members) (Nyasaland) Regulations, 1953, and designated the African Protectorate Council as the body representative of Africans.⁽⁴¹⁾ Unlike in Northern Rhodesia, candidates were not required to be Members of the African Protectorate Council. They were, however, to file nomination papers signed by not less than ten and not more than twenty persons, one of whom had to be a Member of the Council. The other qualifications were the same as those required in Northern Rhodesia. The appointment of the Northern Rhodesia and Nyasaland European Members representing African interests remained as in the final draft.⁽⁴²⁾

Articles 16 and 17 dealt with the offices of Speaker and Deputy Speaker while Articles 18-23 dealt with procedure in the Assembly. Provisions regarding sessions, dissolution and prorogation of the Assembly were contained in Articles 26, 27 and 28 respectively. In exercising his discretion in proroguing and dissolving the Assembly, the Governor-General was required by Clause 3 of the Royal Instructions to follow the constitutional conventions obtaining in the United Kingdom. The procedure to be followed in the Assembly was based on that of the British House of Commons. A Bill passed by the Assembly was to be sent to the Governor-General for his assent. The Governor-General could, except in the case of a Bill he was required to reserve in terms of Articles 10 (2)⁽⁴³⁾ 75,⁽⁴⁴⁾ or 97 (1)⁽⁴⁵⁾ of the Constitution or Clause 2⁽⁴⁶⁾ of the Royal Instructions, either assent to the Bill or withhold assent or reserve the Bill for the signification of Her Majesty's pleasure.⁽⁴⁷⁾ Where (subject to the provisions of Article 97 (1),) a Bill was reserved for the signification of Her Majesty's pleasure, the assent, if forthcoming, was to be given through a Secretary of State.⁽⁴⁸⁾ A Bill presented to the Governor-General was to lapse if assent was declared to be withheld or if assent had not been given at the expiration of twelve months from the date on which it was presented.⁽⁴⁹⁾ A Bill was to become law after a proclamation in the Gazette by the Governor-General that it had been assented to.⁽⁵⁰⁾ Her Majesty, through a Secretary of State could, however, disallow any Bill assented to by the Governor-General within twelve months of such assent.⁽⁵¹⁾

The main legislative powers of the Federal Legislature were contained in Article 29. The Article empowered the Legislature to make laws for the peace, order and good government of the Federation in those matters that came under its jurisdiction.⁽⁵²⁾ Such laws could be made for the whole of the Federation or part of it.⁽⁵³⁾ The laws could make (except in two cases)^(53a) different provision for different parts of the Federation.⁽⁵⁴⁾ The Constitution maintained the division of subjects on which the Federal Legislature could make laws.⁽⁵⁵⁾

10. It could only make laws on those subjects which appeared in the Exclusive or Concurrent Legislative Lists,⁽⁵⁶⁾ and matters incidental to the execution of the powers conferred on the Governor-General, the Federal Legislature or the Federal Judiciary.⁽⁵⁷⁾ Any law outside these permitted fields was to be void.⁽⁵⁸⁾ Subjects outside the two Lists were reserved to the territories.⁽⁵⁹⁾ Where, on coming into force of the Constitution, a territory had the power to make laws on a subject under the Federal Exclusive List, the power was to continue until the Governor-General prescribed by notice in the Gazette that the subject had become exclusively Federal.⁽⁶⁰⁾

41. Nyas. G/Ns. 130/53 and 139/53.
42. Art. 9 (1) (c).
43. Article 10 (2) required the Governor-General to reserve any Bill that made provision for qualifications or disqualifications for election as an elected member, or the circumstances in which an elected member should vacate his seat, or qualifications or disqualifications for registration as a voter, or for voting, at elections. This did not include, however, a Bill seeking to disqualify a person from election or registration as a voter or to make a person vacate his seat in the Assembly because of commission of an offence relating to elections.
44. Article 75 required the Governor-General to reserve Bills reported on by the African Affairs Board as differentiating.
45. Article 97 (1) required the reservation of Bills amending the Constitution.
46. The Clause required the Governor-General (except where prior instructions had been given or a suspending Clause had been inserted) to reserve any Bill which appeared to him to be inconsistent with the Crown's treaty or international obligations, or which might result in a grant of land or money or other donation being made to him or which contained provisions from which assent had previously been withheld or which had previously been disallowed.
47. Art. 24 (1).
48. Art. 24 (2).
49. Art. 24 (4).
50. Art. 24 (3).
51. Art. 25 (1). The Bill in such case became annulled on presentation of a speech or message by the Governor-General to the Federal Assembly or by a proclamation in the Gazette.
52. Art. 29 (1).
53. Art. 29 (6).
- 53a. These concerned the incidence of taxes in terms of Arts. 30 (3) and 31 (2).
54. Ibid.
55. Art. 29 (2) and (3) read with the Second Schedule to the Constitution.
56. Subjects on the Exclusive List were, for example, external affairs, defence, immigration, extradition, aliens, citizenship, external trade, banks and banking (other than land banks), railways, shipping and aviation. Subjects on the Concurrent List were, for example, deportation, naturalisation, development of industry, control of movement between the territories, bankruptcy, land banks.
57. Art. 29 (1) (2) & (3).
58. Art. 29 (4) & (5).
59. Laws of territorial legislatures outside the Concurrent List and the residuary subjects were also to be void. Art. 29 (5).
60. Art. 29 (2).

11. Until the publication of such a notice, the subject was to be regarded as falling under the Concurrent List.⁽⁶¹⁾ Once the requisite notice had been published, the territory's power on that subject ceased to exist.⁽⁶²⁾ The notice had, therefore, the effect of amending the Constitution of ^{the} territory.⁽⁶³⁾ The first subject to be placed under the Exclusive List by notice was foreign affairs. By notices⁽⁶⁴⁾ in the Government Gazettes of the three territories as required by Article 29 (2), the Governor-General prescribed October 30, 1953, as the date on which the Federal Legislature would have the power to make laws with respect to external affairs to the exclusion of the territorial legislatures. No such date or dates were prescribed for the other subjects on the Exclusive List. This left such subjects concurrent wherever a territorial legislature had power to legislate on the subject concerned. The Federal Legislature, however, acquired exclusive power over most of the remaining subjects by enacting comprehensive legislation which in terms of Article 35 (1) prevailed over territorial legislation. Article 35 (1) provided that where a territorial law was inconsistent with Federal law in those matters where both legislatures were competent, Federal law was to prevail.

61. Ibid.

62. Ibid. Any law passed by the territorial legislature on that subject was, however, to continue in operation until it had been expressly or impliedly repealed by Federal law - Art. 35 (4). See also dicta in the Australian cases of D'Eriou v. Pedder (1904) 1 C.L.R. 91 (where Griffith C.J., at p.111, stated: "As from the point at which the quality of exclusiveness attaches to the Federal power the competence of the state is altogether extinguished.") and Pirrie v. Macfarlane (1925) 36 C.L.R. 170 - (where Isaacs J., at 191-2 stated that where such subjects as defence or customs were expressly by sections 106 and 107 eliminated from state constitutions because they were made exclusively federal by Section 52, the control of such a matter was necessarily by force of the very words of the constitution placed outside the ambit of the State Constitution and beyond any power of the state to affect it).

63. Note that while S. 14 (1) and (2) of the Federation of Rhodesia and Nyasaland (Constitution) Order in Council, 1953, provided for the continuance of the territorial Constitution and Article 29 (4) of the Constitution continued the legislative competence of the territorial legislatures, both sections provided that the territorial constitutions and the legislative powers of the legislatures thereunder would be subject to the provisions of the Order and the Federal Constitution respectively. Note also that the R & N (Fed.) Act 1953, permitted amendments to the territorial Constitutions.

64. S. R. G/N. 903/1953; N.R. G/N 310/1953; Nyas. G/N 102/1953.

Such territorial law was to be void to the extent of the inconsistency. It was to be immaterial whether the Federal Law was enacted before or after the territorial law.⁽⁶⁵⁾

In order to facilitate the assumption of functions by the Federal Government without the enactment of the required Federal legislation, the Federal Legislature enacted the Territorial Laws Amendment Act, 1954, enabling the Federal Government to administer provisions of certain territorial laws. The Act empowered the Governor-General to declare that any provisions of a territorial law relating to matters within the competence of the Federation would be administered by the Federal Government. In cases where such provisions concerned a concurrent matter, the concurrence of the Governor of the territory concerned had first to be obtained before the Federal Government administered them. The Governor-General was also empowered to make by Order such amendments, adaptations and modifications to the provisions of any such territorial law as would be necessary to enable the Federal Government to administer it or remove anomalies and difficulties arising out of the change.⁽⁶⁶⁾ In pursuance of the Act the Federal Government took over the administration of a great number of territorial laws relating to a variety of subjects - e.g. non-African agriculture in Southern Rhodesia and Northern Rhodesia (but not Nyasaland), public health, copyright and weights and measures. When necessary and convenient such territorial laws were replaced by Federal legislation.

In addition to the legislative powers granted under Article 29, the Federal Legislature could also acquire legislative competence under Articles 32, 31 (1) and 6. Article 32 (2) permitted a territorial legislature to confer on the Federal Legislature by legislation power to make laws, in relation to that territory on matters not included in the Federal or Concurrent List for the purposes of the creation and regulation of any authority to exercise functions in respect of more than one territory; or the establishment or regulation of schools for any special category of pupils; or to set control and the establishment of such services as may be necessary for such control or such other matter, being a matter included in the Federal or Concurrent Legislative List, as may be specified in the law by which the authority is conferred.^(66a) The delegation could be general or restricted and could be indeterminate or for a limited time.⁽⁶⁷⁾ While the delegation lasted such matter was to be deemed to be under the Concurrent List.⁽⁶⁸⁾ The delegation, whether granted generally or for a specified period, could be revoked at any time but the revoking law in such case was not to come into operation until six months after its enactment.⁽⁶⁹⁾

List subject which could not be repealed or amended by a territorial law, a law enacted by the Federal Legislature on delegation could be amended or repealed by the territorial legislature concerned after revocation of the delegation.⁽⁷⁰⁾

Article 31 (1) provided that Northern Rhodesia and Nyasaland, whose agriculture (non-African and African) remained territorial on coming into force of the Constitution, could later, by an enactment, place on the Concurrent List non-African agriculture; or animal health (including animal diseases and animal pests other than tsetse); or plant pests and diseases.⁽⁷¹⁾ Any law made to effect such transfer could be amended or replaced by the Legislature that made it but such amendment or replacement was not to diminish the inclusion of the subject concerned on the Concurrent List.⁽⁷²⁾ In pursuance of these provisions the Northern Rhodesian Legislative Council enacted the Non-African Agriculture (Transfer to the Concurrent List) Ordinance in 1955, enabling the Federal Government to assume responsibility over the subject on January 1, 1956, when the Ordinance came into operation.⁽⁷³⁾

Article 6, on the other hand, empowered the Federal Legislature to make special laws (which normally would be outside its competence) for areas set aside for use as, or in conjunction with, the seat of the Federal Government. Exercising this power, the Legislature enacted the Seat of Government (Special Laws) Act, 1956. In pursuance of this Act, the Governor-General, for instance, made regulations⁽⁷⁴⁾ which removed all racial discrimination relating to the supply and consumption of liquors at certain functions and receptions held at the Government House and at the King George VI Army Barracks in Salisbury. The regulations were necessary because of the law prevailing in Southern Rhodesia then which prohibited the supply to Africans or the consumption by Africans of European liquor.

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65. This means that while Federal law was able to repeal territorial law on a concurrent subject, territorial law could not do the same to Federal law.
66. These extensive legislative powers of the Governor-General were upheld in R. V. Christopoulos, 1957 R & N 251. This was in accordance with the principles laid down in R. v. Birch (1878) 3 App. Cas. 689 and Hodge v. The Queen (1833) 9 A.C. 117.
- 66a. Instances of such enabling laws, were the Art Gallery (Authorisation) Act of the Southern Rhodesia Legislature and Ordinances of similar title enacted by the Northern Rhodesia and Nyasaland Legislatures in 1957. The Federal Government assumed responsibility by enacting the Rhodes National Gallery Act, 1958.
67. Art. 32 (3). 68. Ibid. 69. Art. 32 (4).
70. Art. 35 (2).
71. Nothing in the Article was however, to be construed as empowering the Legislatures of the two territories to place the control of game, game reserve or fishing rights on the Concurrent List - Art. 31 (5).
72. Art. 3 (2).
73. Nyasaland never surrendered its non-African agriculture until the dissolution of the Federation.

14. While the Federal Legislature could acquire more legislative powers by delegation to it by a territorial legislature of certain territorial subjects, it could also diminish its powers under the Federal List by conferring on the legislature of a territory authority to make laws for that territory on any matter under the Federal List.⁽⁷⁵⁾ The delegation could be general or restricted in content or duration.⁽⁷⁶⁾ While the delegation lasted the subject or subjects concerned were to be deemed to be on the Concurrent List.⁽⁷⁷⁾ The delegation whether general or for a specified period could be revoked at any time but such revoking law was not to come into operation until the expiration of six months after its enactment.⁽⁷⁸⁾ Any law made by the territorial legislature while it enjoyed the delegation was to remain in operation until amended or repealed by a subsequent law of the Federal Legislature.⁽⁷⁹⁾

The Federal Legislature was specifically prohibited from making laws on two matters - trade unions and industrial conciliation, and acquisition of African land. Article 30 (1) barred the Federal Legislature from making laws with respect to trade Unions or like associations or the settlement of disputes between employers and employees or between employees, being disputes connected with the employment or non-employment, or with the terms of employment or conditions of labour, of any persons. It was to have such power, however, to the exclusion of a territorial legislature, where the unions or associations concerned were of Federal officers or the persons concerned were Federal officers.⁽⁸⁰⁾ Article 33 (1) prohibited the Federal Legislature (notwithstanding anything in the Constitution) from making provision for the acquisition, whether compulsorily or by agreement, of any African land or interests or rights over any African land otherwise than in accordance with the provisions of any of the African land laws applicable to the land in question.⁽⁸¹⁾ Consequently a law authorizing the acquisition of land compulsorily for the purpose of settling immigrants could not apply to African land notwithstanding provisions to the contrary in such law.⁽⁸²⁾

74. Fed. G/N. 163/1956.

75. Art. 31 (1).

76. Art. 32 (3).

77. Ibid.

78. Art. 32 (4).

79. Art. 35 (4).

80. "Federal Officer" was defined as a "substantive holder of a paid office in the Federal Public Service, being an office service in which is pensionable service under any law of the Federal Legislature, and includes any person holding such an office on probation and any person holding a paid office in the Federal public service for a specified term under a contract or agreement" - Art. 30 (3).

81. Art. 33 (1).

82. Ibid.

15. "African land" was defined as land forming part of any African trust land, native trust land, native reserve, native area or special native area within the meaning of any of the African land laws.⁽⁸³⁾ This provision was, no doubt, included in order to allay the fears of the Africans in Northern Rhodesia and Nyasaland who thought their land would be taken away by the Federal Government for European settlement. The Federal Legislature was also to have no power, notwithstanding provisions in the Constitution or any other law of the Federal Legislature, to alienate from the Chief and the people of Barotseland the territory reserved from prospecting by virtue of the concessions from Lewanika to the British South Africa Company of 1900 and 1909 except with the consent of the Chief and the approval of a Secretary of State.⁽⁸⁴⁾

A further provision which rather curtailed the legislative power of the Federation was contained in Article 34. That Article provided that "where a law of the Federal Legislature makes provision in relation to any territory with respect to any matter which is not itself included in the Federal or Concurrent Legislative List and is within the legislative competence of the Federal Legislature by reason only of the inclusion in the Federal Legislative List of the power to implement treaties, conventions and agreements with, and other obligations towards, countries or organisations outside the Federation, that provision shall not have effect in relation to that Territory unless and until the Governor of the Territory has declared by notice in the official Gazette of the Territory that it shall so have effect." This provision bestowed some form of local veto power on the Governor of a territory over Federal legislation.

In conclusion, as far as the legislative powers of the Federal Legislature are concerned, it must be noted that these powers and those of the territorial legislatures were subject to the legislative powers of Her Majesty. Article 29 (7), as stated earlier, provided that nothing in the Constitution affected the power to make laws for the Federation or any of the territories conferred on Her Majesty by an Act of the United Kingdom Parliament. The probable reason why this was included has already been mentioned above.

83. Art. 33 (4) - African land laws were listed as follows: Northern Rhodesia - the Northern Rhodesia Crown Lands and Native Reserves) Orders in Council, 1928 to 1951 (see footnote 19) on p. 29 of the Federation of Rhodesia and Nyasaland Constitution Order in Council, 1953, for the legislation between 1928 and 1951); Nyasaland - the Nyasaland Protectorate (African Trust Land) Order in Council, 1950 (S.L. 1950/1183); Southern Rhodesia - the Southern Rhodesia Constitution Letters Patent and the Land Apportionment Act 1941: with all the relevant amendments to these laws.

84. Art. 33 (2).

16. No material alterations were made to the structure of the Executive contained in the final draft. The Federation's executive powers were vested in Her Majesty but were to be exercised on her behalf by a Governor-General or any other authority authorized by the Governor-General or a Federal law.⁽⁸⁵⁾ The executive power was to extend to the execution and maintenance of the Constitution and to all matters in which the Federal Legislature had the power to make laws.⁽⁸⁶⁾ The Governor-General was to appoint the Prime Minister and the other Ministers and assign functions to them.⁽⁸⁷⁾ The Ministers were to hold office at Her Majesty's pleasure.⁽⁸⁸⁾ An Executive Council comprising the Prime Minister and such other Ministers as might be appointed by the Governor-General on the recommendation of the Prime Minister was to advise the Governor-General in the government of the Federation.⁽⁸⁹⁾ In all his functions the Governor-General was to act in accordance with the advice of this Council save in the case of the dissolution of Parliament,⁽⁹⁰⁾ appointment of the Prime Minister and the other Ministers,⁽⁹¹⁾ appointment of Members of the Executive Council or such other cases in which the Constitution granted him discretion.⁽⁹²⁾ Advice tendered to him was not to be a subject of a court enquiry.⁽⁹³⁾ The Governor-General's relationship with his Government was in all circumstances the same as that of the Queen and her Government in Britain.⁽⁹⁴⁾

85. Art. 36 (1).

86. Art. 36 (2).

87. Art. 37 (1).

88. Ibid.

89. Art. 38 (1).

90. Art. 27.

91. Art. 37.

92. Art. 39.

93. Art. 39.

94. Clashes occasionally occurred between the first Governor-General and the Executive Council - Palley, op.cit., p.355, note 1, quoting a personal communication. In 1963, the second Governor-General was placed in an embarrassing position. He was required to read a speech from the Throne which bitterly attacked the British Government and accused it of betraying the people of the Federation and causing them irreparable harm. The speech also mentioned that the Federal Government had not been consulted when the British Government took decisions relevant to future constitutional development of the Federation's component territories (See Fed. Parl. Debates, Vol. 20, Cols. 2 - 3, 8 April, 1963). Placed in this constitutional dilemma of either resigning or reading the Speech, the Governor-General took the less critical course and read the Speech. He was, however, very disturbed by it - Palley, p.355, Note 3, quoting personal communication.

95. Art. 41 (1).

96. Art. 41 (2).

97. Art. 41 (2). Subject matter for 95 to 98 on page 17.

98. Art. 41 (3).

17. The Governor-General could, with the consent of the Governor of the territory concerned, entrust, either conditionally or unconditionally, to that Governor or any officer or authority of that territory functions in relation to any matter to which the executive authority of the Federation extended and failing to be performed in that territory.⁽⁹⁵⁾ A Federal law could, regardless of whether a territorial legislature had the power to enact such law, confer powers or impose duties upon the Governor or any officer or authority of a territory.⁽⁹⁶⁾ Such provision was, however, to have no effect unless and until the Governor of the territory concerned had declared by notice in the Gazette that it should take effect.⁽⁹⁷⁾ Conversely, the Governor of a territory, with the consent of the Governor-General, could also entrust conditionally or unconditionally to the Governor-General or any officer or authority of the Federation functions in relation to any matter to which the executive authority of the territory extended and which, in the opinion of the Governor, was ancillary or directly related to any matter to which the executive authority of the Federation extended.⁽⁹⁸⁾ The Governments of the Federation and the territories were to consult on matters of common interest and the territorial executive authorities were to exercise their powers in a manner that did not impede or prejudice the exercise of Federal authority.⁽⁹⁹⁾

The Governor-General was to have powers of mercy on offenders against Federal law.⁽¹⁰⁰⁾ Territorial Governors were to continue to enjoy the same powers in relation to offenders against territorial law but were not to exercise such power on an offender against Federal law.⁽¹⁰¹⁾ This means that although territorial courts were to administer Federal law,⁽¹⁰²⁾ offenders against such law could only be pardoned, reprieved, respited or have their sentences commuted or remitted by the Governor-General. This was in line with the practice in other federations, for instance, Australia, Canada and India.

Apart from details, the provisions of the final draft on the judiciary became Chapter V of the Constitution unchanged. There was to be a Federal Supreme Court consisting of a Chief Justice, such number of other judges as the Governor-General might deem necessary, not being less than two and not more than six (increase beyond six required prayer of the Federal Assembly to the Governor-General), and the Chief Justices of the three territories.⁽¹⁰³⁾ The Chief Justice and the Federal judges were to be appointed by the Governor-General while the Chief Justices of the territories were to become Members of the Court by virtue of their office.⁽¹⁰⁴⁾ Provision was also given for the appointment of an Acting Chief Justice and Acting Judges.⁽¹⁰⁵⁾ The judges were to be paid from the Consolidated Revenue Fund⁽¹⁰⁶⁾ and were not to be removed from office except for misbehaviour or infirmity of body or mind. (107)

18. 99. Art. 42 (2) & (4). The effort of the Governments to co-operate met with difficulties from the very beginning. Disagreements often arose. For instance, when the Southern Rhodesia Prime Minister (Todd) thought that a Consultative Economic Council should be established, the Fed. PM thought there was no need for such a formal body. Palley, op.cit., p. 357, note 4, and Gann & Gelfand, op.cit., pp. 232 et. seq., reveal the disagreements that arose between Huggins and Todd. For Todd's accusations on lack of consultation, see S. R. Leg. Ass. Deb., Vol. 37, Cols. 1019 and 1045, 21 July, 1955; Vol. 38, Col. 2143, 21 March, 1956; Vol. 39, Cols. 329 and 340, 20 July, 1956. See, however, Palley, op.cit. 357, where it is said the provision of consultation was not observed in spirit in Southern Rhodesia, and Gann & Gelfand, op.cit., p. 232, where the view is mentioned that Southern Rhodesia was attempting to interfere in Federal matters. Todd maintains that his downfall from power in 1958 was engineered by Welensky (Federal Prime Minister then) - Palley, op.cit., p. 357, note 4. That there was lack of consultation was confirmed by the Official's Report of 1960 (Cmd. 1150 of 1960) Chapter 5. The Officials commented: "It is generally conceded that in practice this co-operation has worked somewhat unevenly. In some cases it has taken the shape of formal, and sometimes statutory, consultation; in others it has emerged as informal ad hoc co-operation, designed to overcome administrative or technical differences as they were foreseen or arose. As a result, not only do certain gaps appear to exist in the existing machinery for co-operation but such machinery as had been established has on occasion come into operation only when difficulties have already arisen which might have been avoided by earlier consultation." para. 225. The most important machinery established was that of Heads of Government meetings." For other forms of co-operation, see Officials Report of 1960 (Cmd. 1149, Chapter 7). By 1961, however, contact between the Governments, had become perfunctory and the Heads of Government meetings had ceased - Alport, Lord C. Sudden Assignment (London, Hodder & Stoughtons 1965) p. 41.
100. Art. 43 (1).
101. Art. 43 (2).
102. See below.
103. Art. 46 (1)
104. Art. 47 (1).
105. Arts. 48 and 49.
106. Art. 50.
107. Art. 47 (6) (b). Both the Chief Justice and Federal judges could, of course, resign by addressing a written notice to that effect to the Governor & General. Otherwise they would retire on attaining the age of 65.

18. To qualify for an appointment as a judge, a person was to have been a judge of a Court of unlimited jurisdiction in civil and criminal matters in some part of Her Majesty's dominions or to have practised as an advocate of such a court for not less than ten years.⁽¹⁰⁸⁾

The Court was to have original as well as appellate jurisdiction. It was to exercise original jurisdiction to the exclusion of any other court in (a) disputes between the Federation and a territory or between territories;⁽¹⁰⁹⁾ (b) determination of the right of a person to be or remain a Member of the Federal Assembly;⁽¹¹⁰⁾ (c) any matter where a writ or order of mandamus or prohibition or an injunction or interdict was sought against an officer or authority of the Federation.⁽¹¹¹⁾ The court was also to have jurisdiction, to the exclusion of any other court, to determine any question on interpretation of the Constitution referred to it by the High Court of a territory, or which might be required by any law of the Federal Legislature or of a territorial Legislature to be referred, by a lower court to a higher court for decision.⁽¹¹²⁾ In addition to the jurisdiction just outlined, the Federal Legislature or a territorial Legislature could confer on the court original jurisdiction in matters within its legislative competence.⁽¹¹³⁾ This provision was, however, not to include the conferment of original criminal jurisdiction. A law purporting to confer original criminal jurisdiction was to be void. Jurisdiction conferred by a territorial legislature under these provisions was not to come into effect until the Federal Assembly had accepted the conferment by resolution and the Chief Justice of the Federation had been so informed by the Speaker of the Federal Assembly.⁽¹¹⁴⁾ The Court's appellate jurisdiction was contained in Articles 55 and 56. Article 55 provided that notwithstanding anything in any law of the Federal or territorial legislature, the Court was to have jurisdiction, to the exclusion of any other court, to hear and determine appeals from the High Court of any territory on any question regarding the interpretation of any provision of the Federal Constitution or that of such territory. Article 56 empowered the Federal Legislature to confer on the court the jurisdiction to hear appeals from the territorial High Courts in matters other than those mentioned in Article 55.

It should be noted, however, that a great deal of federal law was, in fact, to be administered by territorial courts. Article 45 provided that except for matters falling under Articles 22 and 53 - 57 jurisdiction in civil or criminal proceedings arising under the Federal Constitution or other law of the Federal Legislature (unless excepted by such law) was to vest in and exercised by the courts of any territory as if the law were territorial.

With regard to appeals from the Federal Supreme Court, Article 61 empowered the Federal Legislature to provide by law the right of appeal to Her Majesty in Council in such cases or classes of cases and in such circumstances and under such conditions as might be proscribed in that law. Appeals from the territorial High Courts to the Privy Council were to cease once the Federal Supreme Court had been established except as proscribed by the Constitution.⁽¹¹⁵⁾ These provisions were not, however, to impair the right of Her Majesty in Council to grant special leave to an applicant to appeal to Her Majesty in Council against a decision of the Federal Supreme Court or the High Court of a territory.⁽¹¹⁶⁾

108. Art. 47 (1) - (3).

109. Art. 53. No case was decided under this head during the life of the Federation.

110. Two cases were determined under this head but this was before the constitution of the Federal Supreme Court. became law. These were Thornicroft v. Federal Minister of Internal Affairs, 1953 S.R. 143 (See note above on facts of case) and D. Enis v. Federal Minister of Internal Affairs, 1954 (1) S.A. 117 (S.R.). Both cases were heard by the Rhodesia Court of Appeal in terms of the transitional provisions under Art. 64 of the Constitution. In the latter case it was held that no action could at that stage lie against a Government official in the absence of a law governing proceedings against the Crown. Such a law was passed by the first session of Parliament - see Federal Crown Proceedings Act (No. 14 of 1954).

111. Several cases were decided under this head, among them Ranger v. Greenfield and Wood NN.O 1963 (1) R & N 127 (F.S.C.); Chassay Brothers v. Shaw and Macintyre NN.O 1956 R. & N. 188 (F.S.C.) and the Controller of Customs and Excise, 1957 R & N & 780. This provision also extended to statutory bodies which were held to be bodies empowered to carry out part of the functions of the Federation - see Southern Rhodesia Electricity Supply Commission and Minister of Power v. Chamber of Mines, Rhodesia, 1960 R & N 348. Note that the provision conferred original jurisdiction only in the circumstances mentioned and not, for instance, in cases like Codron v. Macintyre and Shaw NN.O, 1960 R & N 418, where a vindicatory claim was involved. This had to be asserted in the territorial High Court. See also Kanto (Pvt.) Ltd. v. Macintyre N.O. and the Controller of Customs and Exercise, 1957 R & N 780, where the point that the Court had no jurisdiction was decided sub-silentio. See also Exparte Goodair, 1955 (4) S.A. 78 (S.R.), where Norton A.C.J. queried whether Art. 53 (c) precluded the Southern Rhodesian Courts from issuing a writ or order of mandamus or prohibition against a Federal Prisons officer and whether the High court had been deprived of the power of releasing any prisoner no matter where he was detained. It will be noted that Art. 53 (c) did not mention the Writ Habeas Corpus. It is submitted this could have been still issued - see also Palley, op.cit. p. 402 note 5.

112. Art. 54.

113. Art. 57.

114. Ibid.

115. Art. 63.

116. The first case to go to the Privy Council under this provision was Mungoni v. Attorney-General of Northern Rhodesia (1962) A. C. 336. A notable case that went to the Privy Council under this provision was R. V. Mapolisa, 1963 R & N 801 (F.S.C.).

21. Her Majesty in Council was, however, not to grant leave to appeal from a decision of the High Court of a territory where an appeal lay to the Federal Supreme Court or where no such appeal lay but a law of the Federal Legislature or of a territorial legislature (provided it was not inconsistent with a Federal law) provided that the decision of the territorial High Court was to be final.⁽¹¹⁷⁾

The Federal Legislature did not make provision for appeals to the Privy Council as permitted by Article 61 until 1962. It will be noted that Article 61 used the words "may by law provide". This left the discretion to the Federal Legislature. When the Federal Supreme Court was established by the Federal Supreme Court Act, 1955 (and inaugurated in July of the same year) no provision was made in the Act for appeals to the Privy Council. Appeals could, therefore, only be made on the basis of special leave granted by the Privy Council in terms of Article 63. In 1962, as a result of the new Constitution of Southern Rhodesia,⁽¹¹⁸⁾ the Federal Legislature passed the Federal Supreme Court Amendment Act⁽¹¹⁹⁾ which provided for an appeal to the Privy Council as of right from any determination of the High Court of Southern Rhodesia in relation to a claim by any person that the provisions of the Declaration of Rights contained in the Southern Rhodesia Constitution, 1961, had been contravened in relation to him.⁽¹²⁰⁾

117. Art. 63. In such case both the Federal Supreme Court and the Privy Council were prevented from hearing such an appeal - Article 63 read with section 1 (a) (iii) of the Rhodesia and Nyasaland (Federation) Act, 1953, as interpreted in Gonthi v. R. 1958 R & N 35. In this case it was found that the Legislative Council of Nyasaland had not, in fact, declared High Court decisions on fact in criminal cases originating from subordinate courts to be final. The appeal could, therefore, be heard by the Federal Court. In Pindeni v. R. 1959 (2) R & N 475, Section 60 of Ordinance No. 26 of 1958 of Nyasaland, which barred appeals on fact and sentence, was upheld. Where no appeal lay to the Federal Supreme Court and no provision was found in the law that the decision of the High Court was final an appeal could be taken to the Privy Council by special leave - per Tredgold F.C.J. in Gonthi v. R. (supra).

118. S.L. 1961 No. 2314 (The Southern Rhodesia (Constitution Order in Council, 1961).

119. Act No. 46 of 1962.

120. S71 (5) of the original 1961 Southern Rhodesia Constitution provided that a person aggrieved by a decision of the High Court in cases concerning the Declaration of Rights could appeal to Her Majesty in Council but that the provision would not operate during the period when the Federal Constitution provided for an appeal on such matter to the Federal Supreme Court.

22. This right of appeal did not apply in the other cases. The position in such other cases, therefore, remained as before.

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The contraversial African Affairs Board found its way into the Constitution in Chapter IV. The composition,⁽¹²¹⁾ the general functions⁽¹²²⁾ and the functions in relation to legislation - Bills and subordinate legislation⁽¹²³⁾ of the Board remained as contained in the final draft.⁽¹²⁴⁾ Decisions of the Board were to be taken by a majority vote of the members present.⁽¹²⁵⁾ The Chairman⁽¹²⁶⁾ and the vice-chairman were to have a deliberative as well as a casting vote when presiding.⁽¹²⁷⁾ The quorum was to be three members⁽¹²⁸⁾ and the board could function despite a vacancy in its membership.⁽¹²⁹⁾ It was to sit even during adjournment or prorogation of the Federal Assembly.⁽¹³⁾ Members of the Board were to continue to sit and to act after dissolution of Parliament until the first meeting of the new Parliament.⁽¹³¹⁾ It will be recollected that the final draft had reduced the status of the Board to that of a Standing Committee of the Federal Assembly.⁽¹³²⁾ The Federal Assembly Standing Orders (Orders 193 and 197) later provided that except as otherwise provided in the Constitution the Board was to be treated as a Select Committee and, therefore, required to report on its work to the Assembly each session. The work of the Board during the life of the Federation will be dealt with later.

Chapter VIII of the Constitution dealt with finance. The Federal Legislature could impose taxes on income and profits,⁽¹³³⁾ a federal emergency tax,⁽¹³⁴⁾ a territorial surcharge if so required by a territory,⁽¹³⁵⁾ export duties,⁽¹³⁶⁾ and sales tax.⁽¹³⁷⁾ Trade between the territories was to be free.⁽¹³⁸⁾

121. Art. 67 (1) (a) & (b).

122. Art. 70 (a) & (b).

123. Arts. 71, 73, 74, 75, 76 and 77.

124. See above Chapter 6, for a discussion of the functions of the Board as contained in the final draft.

125. Art. 68 (1).

126. The first Chairman was J. F. Haslam (3 Feb - 20 Dec. 1964), a European Special Member from Northern Rhodesia. He resigned because of ill-health. He was succeeded by Rev. Ibbotson (European Special Member from Southern Rhodesia) who died in office and was succeeded by Sir. John Moffat on 3 April, 1955. Sir John held office until April 1959 and was succeeded by Mr. J. L. Pretorius (Nyasaland Special European Member) on April 6. He resigned early in 1961 and was replaced by H. E. Davies. (now Mr. Justice Davies) (European Special Member from S. Rhodesia) on Feb. 9, 1962. He held office until the dissolution of the Federation.

127. Art. 68 (1). 128. Art. 68 (2)(a) & (b) 129. Art. 69 (a)

130. Art. 69 (b) 131. Ibid. 132. See Chap. 6.

133. Art. 80. 134. Art. 81 135. Art. 82.

136. Art. 83.

137. Art. 83.

138. Art. 87.

23. Article 88 contained provisions on the establishment of a Loan Council while Articles 89-92 contained provisions on the raising of loans. Articles 93-96 dealt with miscellaneous provisions on finance.

The provisions in the final draft regarding the amendment of the Constitution were not changed. The Federal Legislature was to have the power to amend the Constitution by a two-thirds majority vote of all the Members of the Assembly.⁽¹³⁹⁾ These powers of amendment included that of establishing a second chamber of the Federal Legislature, prescribing the functions of such second chamber and making such necessary amendments to the Constitution as might appear necessary or expedient as a result of the establishment of the Second Chamber.⁽¹⁴⁰⁾ The Governor-General was to reserve all Bills amending the Constitution for the signification of Her Majesty's pleasure.⁽¹⁴¹⁾ If the Legislature of a Territory objected to a Bill amending the Constitution or a provision therein within sixty days of its being passed by the Federal Legislature or if the African Affairs Board reported on it as differentiation and asked for its reservation, Her Majesty was not to assent to such Bill otherwise than by an Order in Council.⁽¹⁴²⁾ No Order of this nature was to be submitted to Her Majesty unless the draft thereof had been laid before each House of the United Kingdom Parliament for forty days and neither House had within that period resolved that the Order should not be submitted to Her Majesty for enactment.⁽¹⁴³⁾ In the case of other Bills amending the Constitution but not coming under the above provisions, Her Majesty's assent was to be signified through a Secretary of State. Such assent was not to be signified in less than sixty-five days after the passage of the Bill by the Federal Assembly unless within that period the Legislature of each of the three territories passed a resolution that it did not object to the Bill.⁽¹⁴⁴⁾ Amendments made by the Federal Legislature during the life of the Federation will be discussed later in this Chapter.

138. Art. 87.

139. Art. 97 (1) (a).

140. Art. 97 (5). No such Chamber was established.

141. Art. 97 (1) (b).

142. Art. 97 (2). This was done in the Case of the Constitution Amendment Bill. See below.

143. Art. 97 (3).

144. Art. 97 (4).

The powers of amendment given above were subject to some restrictions. Article 98 provided that no Bill to amend provisions of the Constitution relating to matters on which the Federal Legislature could make laws or to amend Article 98 itself or Article 99 (see below) was to be introduced in the Federal Assembly until after the expiration of ten years from the date of coming into force of the Constitution unless the draft of such Bill had been laid before the Legislature of each of the three territories and each of them had passed a resolution that it did not object to the introduction of such Bill in the Federal Assembly. Article 99, on the other hand, provided that not less than seven and not more than nine years of the coming into force of the Constitution there was to be convened a conference consisting of delegations from the United Kingdom, the Federation and each of the three territories of the Federation, chosen by their respective Governments, for the purpose of reviewing the Constitution. The Conference held in pursuance of this provision will be discussed later in this chapter.

General features of the Constitution

It is now necessary to examine some of the general features of the Constitution. The first feature is that the Federal Government was a Government of enumerated powers. This is not surprising. The Victoria Falls Conference of 1948 had decided that the Constitution of the projected federation should be based on that of Australia.⁽¹⁴⁵⁾ The Australian Constitution enumerates the powers of the Federal Government and divides them into exclusive and concurrent⁽¹⁴⁷⁾ powers.⁽¹⁴⁶⁾ Those not enumerated are reserved to the states. This position is, however, in direct contrast to that in Canada where the powers of the provinces are enumerated and the remainder are reserved to the Federation.⁽¹⁴⁸⁾ Being a Government of enumerated powers, the Federal Government could, therefore, exercise only those powers allocated by the Constitution to the Federal Legislature, Judicature and Executive and those which were incidental to the powers expressly given.⁽¹⁴⁹⁾

145. See Chapter Six.

146. See Articles 51 and 52 of the Constitution.

147. See Article 107 of the Constitution. Other Federations which have enumerated powers for the Federal Government are e.g. the United States of America, the Soviet Union, Cameroon and the Federal Republic of West Germany.

148. S. 92 of the Canadian Constitution - the British North America Act 1867 - enumerates the powers of the Provinces while Section 91, although it mentions subjects on which the Federal Legislature can make legislation empowers the Legislature to make laws on all subjects not given exclusively to the Provinces.

149. Cf. The United States cases: Kansas v. Colorado 206 U.S. 46 (1907) at p. 8 and McCulloch v. Maryland, 4 Wheat 316 (1819) at pp. 405-6 and 421, for the exercise of incidental powers.

Any law outside the enumerated powers was to be void unless, as has been seen, such power was delegated to the Federation by a territory. The successful operation of the Federal Government was, therefore, based on the co-operation of the territories which, if they chose to do so, could bring the Federal machinery to a halt. This is why it was necessary to include the provision that "the executive authority of a Territory shall be so exercised as not to impede or prejudice the exercise of the executive authority of the Federation within that Territory and in such manner as to ensure respect for this Constitution and for the laws of the Federal Legislature which apply to that territory."⁽¹⁵⁰⁾ Whether the executive authority of a territory had exercised its powers prejudicially to the Federal Government was, however, not a matter for the courts to decide. It was a matter to be settled by consultation. Conflicts between the powers of the Federal Executive and Legislature, on the one hand, and a territorial executive and legislature, on the other, were however, subject to judicial decision.⁽¹⁵¹⁾

The second feature is the division of the subject matter of legislation between the Federal Government and the territorial Governments. Most of the subjects that lay in the field of "African policy" remained with the territorial Governments while most of those concerning Europeans came under federal jurisdiction. The reason for this is obvious. Leaving most of the subjects concerning Africans with the territorial Governments was intended to allay the fears of the Africans in Nyasaland and Northern Rhodesia. The Southern Rhodesian Government would have been happy to see many matters concerning Africans under Federal control. The Africans in Southern Rhodesia would have had no objection to this position. They would, in fact, have stood to gain from the more liberal policies of the Federal Government. The position was different in the case of Nyasaland and Northern Rhodesia. The Africans in these two countries were opposed to Federation because they did not want to be placed under the political power of Southern Rhodesia whose African policy they opposed. The British Government as well did not, favour Southern Rhodesia's African policy although it did not publicly condemn it. All along it had hesitated to agree to closer association, whether of a federal or unitary nature, because of Southern Rhodesia's African policy. It was not, therefore, prepared to relinquish its control over African Affairs in the Northern Territories and place the Africans there in doubt about their future. In fact, Federation became possible because of the compromise that African Affairs would remain a territorial concern.

150. Art. 42 (4)

151. See Mutasa and Others V. Minister of Law, 1959 R & N 251.

The third feature is that like most federal constitutions, this Constitution was subject to control by the Courts.⁽¹⁵²⁾ Acts of the Federal Legislature or Executive or of a territorial legislature or executive inconsistent with the Constitution could be invalidated.⁽¹⁵³⁾ It is, of course, not necessary to provide for judicial review in specific terms: it can be implied.⁽¹⁵⁴⁾ The Federal Constitution, however, specifically empowered the Federal Supreme Court "to determine any question as to the interpretation of this constitution".^(154a)

The fourth feature is the status of the Federation. Its status can not be fully understood from its written Constitution only. That Constitution has to be read in conjunction with the conventional powers and privileges the Federation enjoyed. The position in the Federation was complicated by the fact that the constitutional status of the territories which comprise it differed. The Australian and Canadian federations were established from territories which had the same constitutional status. This was also the case with the West Indies Federation. The Central African Federation was, on the other hand, created from a colony enjoying self-government and two protectorates under Colonial office rule. This was not altered by federation - which makes it difficult to classify the constitutional status of the Federation in relation to the United Kingdom. An association of two protectorates and a colony could neither be a protectorate nor a colony. Designating the Federation a colony or a protectorate was not constitutionally and politically feasible. Southern Rhodesia could not have accepted membership of a Federation with an inferior status to that which it enjoyed as a colony, while Nyasaland and Northern Rhodesia could not be placed in a position that compromised their protectorate status and virtually made them colonies. The Federation was, therefore, something between a protectorate and a colony - "a hybrid created by statute".⁽¹⁵⁵⁾

152. This is so in the United States, Canada, Australia, and India, for instance. The position is, however, different in such federations as Russia and Yugoslavia. There the Courts have no power to declare laws unconstitutional.

153. See Mutasa and Others v Minister of Law (supra) where an unsuccessful attempt was made to invalidate certain provisions of the Prisons Act, 1955 (Act. No. 9 of 1955).

154. See the case of Marbury v Madison, 1 Cranch 137 (1803) where, for the first time, the United States Supreme Court exercised the power to invalidate an Act of Congress although the Court was not specifically given the power to do so by the Constitution. The power was inferred. See also A.K. Gopalan v The State of Madras, 1950 S.C.R. 95 in which the Indian Supreme Court assumed the same powers although the Constitution said nothing on the matter.

154 Art. 54.

155. Palley, op.cit., p. 351.

The Preamble to the Constitution mentioned that the Federation would enjoy responsible government. "Responsible Government" as a term was applicable to several forms of government which, although sharing the common characteristics of a Prime Minister, a Parliament and a Cabinet, differed materially in powers permitted and restrictions imposed by the United Kingdom Parliament or Government. One thing was, however, clear and that was that the Federation was not a dominion or a full Member of the Commonwealth. It enjoyed self-government but was not entirely self-governing.⁽¹⁵⁶⁾ The Preamble to the Constitution, in fact, stated that when the inhabitants so desired, they would "go forward with confidence towards the attainment of full membership of the Commonwealth." The Federation, however, to a large extent assumed the constitutional position of Southern Rhodesia before federation. The powers then exercised by Southern Rhodesia could be referred to as those of a semi-Dominion - i.e. a country enjoying powers wider than those of an ordinary colony but short of those of a Dominion or full member of the Commonwealth. Southern Rhodesia's position was a unique one among the existing British dependencies. Her Prime Minister attended meetings of the Commonwealth Prime Ministers.⁽¹⁵⁷⁾ She had her own citizenship law and her affairs were handled by the Dominions Office (later the Commonwealth Relations Office) which handled affairs of full Members of the Commonwealth.⁽¹⁵⁸⁾ Affairs of other dependencies were handled by the Colonial Office. In the field of foreign affairs the territory enjoyed a measure of autonomy like that of Dominions. She maintained a High Commissioner in London. The United Kingdom Government had delegated to the Colony's Government the power to conclude trade agreements with foreign governments as long as such arrangements related to treatment of goods - i.e. tariffs and customs unions. This did not, however, include arrangements relating to shipping questions. The Colony was also permitted to enter into agreements with neighbouring countries (British or foreign) regarding representation of such countries in the Colony, and vice-versa.

156. This was the opinion of the then Lord Chancellor, Lord Dilhorne, in 1962 - see H.L. Debates, Vol. 245, Col. 1221: 9 Dec., 1962. This opinion was, in fact, that of the Government. During the controversy on Nyasaland's secession, the British Government pointed out that, in fact, the Federation's self-governing status was lower than that enjoyed by S. Rhodesia - see below.

157. The first meeting attended by the Southern Rhodesian Prime Minister was that of 1935. The invitation was extended to Huggins personally in recognition of his statesmanship. The practice was then followed from time to time until it became firmly established.

158. As will be seen below, the Federation, having started under the Commonwealth Relations Office, was later placed under the Central African Office - a special office established to handle only the affairs of the Federation.

28. It participated as a separate Member (from Britian) in a number of international commercial and technical organizations. This participation was, of course, not due to the fact that the country was an international person but to the fact that the constitutions of those bodies accepted semi-international persons as members. 262

These powers, it should be noted, were merely delegated by the United Kingdom Government to the Southern Rhodesian Government. The constitutional arrangement that the United Kingdom was responsible for Southern Rhodesia's external affairs did not change. The Colony had, therefore, to consult with the United Kingdom each time she wanted to enter into an agreement with another country.⁽¹⁵⁹⁾ At the January, 1953, Conference, it was agreed that arrangements would be made between Her Majesty's Government and the Federal Government that the autonomy enjoyed by Southern Rhodesia in external affairs would now be enjoyed by the Federal Government.⁽¹⁶⁰⁾ In October, 1953, agreement was reached on the matter.⁽¹⁶¹⁾ The Federal Government was empowered to conclude:

(a) agreements of purely local concern with any neighbouring state, colony or territory in Africa, including arrangements for the exchange of representatives;

(b) trade agreements (bilateral or multilateral), including agreements relating to tariffs and customs unions, but not those relating to shipping questions;⁽¹⁶²⁾ and

(c) multilateral agreements involving membership of international technical organizations, where the Federation would be eligible for membership.⁽¹⁶³⁾ In addition the Federation was also authorized, after consultation with the United Kingdom, to enter into direct negotiations with Governments of other Commonwealth countries for the exchange of High Commissioners. In minor matters the Federal Government could directly go into correspondence with other Commonwealth countries without consultation of the United Kingdom. Any agreements concluded by the Federation were to be expressed as being concluded between Her Majesty the Queen and the Head of the foreign State or between Her Majesty's Government in the United Kingdom and the foreign Government.⁽¹⁶⁴⁾

159. For a summary of the autonomy Sthn. Rhodesia enjoyed in external affairs, see Cmd. 1149 of 1960, *op.cit.*, p.21.

160. Cmd. 8754 (Report of the 1953 Conference), Footnote 20.

161. Cmd. 1149 (Report of the Officials 1960) *op.cit.*, p.22.

162. The power to conclude agreements of this nature remained with the United Kingdom. The prohibition did not, however, include inland transport and establishment matters - *ibid.*

163. *Ibid.*

164. *Ibid.*

29. Further powers in foreign affairs were granted to the Federation in 1956 and 1957 but these will be discussed below when considering the Federation's demands for increased constitutional status.

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In its internal affairs, the Federation enjoyed a wide measure of self-government. It had its own citizenship.⁽¹⁶⁵⁾ The Crown had no general powers to legislate for the Federation by Order in Council. This power was excluded by the provisions of Section 1 (2) of the Rhodesia and Nyasaland Federation Act, 1953, and by Article 29 (7) of the Federal Constitution. The Crown could only legislate for the Federation on the strength of an Act of the United Kingdom Parliament.⁽¹⁶⁶⁾ Although legally it could do so, in practice the United Kingdom Government was not to initiate legislation unless requested to do so by the Federal Government. This conventional limitation was in keeping with the practice observed generally by the United Kingdom in its legislative relationship with dependencies enjoying self-government.⁽¹⁶⁷⁾ The convention was formalised in 1957.⁽¹⁶⁸⁾

In spite of this wide measure of self-government the Federation enjoyed, it remained far short of the powers of a full member of the Commonwealth. It suffered several limitations. First, the fact that the United Kingdom continued to exercise vast powers in the government of Northern Rhodesia and Nyasaland was a severe restriction on the powers of the Federation. Secondly, the Federation was subject to the Colonial Laws Validity Act, 1865,⁽¹⁶⁹⁾ a law not binding on full members of the Commonwealth.⁽¹⁷⁰⁾ Accordingly the Federal Legislature could not legislate repugnantly to an Act of the United Kingdom Parliament extending to the Federation.⁽¹⁷¹⁾ Thirdly, the Federal Legislature could not make laws with extra-territorial effect.⁽¹⁷²⁾ Fourthly, a large body of laws were subject to reservation for Her Majesty's approval⁽¹⁷³⁾ and this approval was given on the advice of the United Kingdom and not Federal Ministers. Consequently, laws duly passed by the Federal Legislature could be prevented from coming into effect against the will of the Federal Legislature and Government. Fifthly, at law there was nothing to stop the United Kingdom Parliament authorizing Her Majesty by an Act to legislate for the Federation by Order in Council.⁽¹⁷⁴⁾ Further, even if the Federal Constitution had been silent on the matter, the Federal Legislature could not have been able to abolish appeals to the Judicial Committee of the Privy Council by special leave.⁽¹⁷⁵⁾ The powers of the Federation enjoyed in the field of external affairs were not exercised as of right. They were delegated powers which at law (although this was unthinkable in practice) could have been withdrawn. The United Kingdom had to be consulted (unless it dispensed with such requirement) before the Federation acted in external affairs.

90. The United Kingdom remained ultimately responsible for the Federation's external affairs. The Federation could not become a member of the United Nations. It did, of course, become a member of several international institutions but, as pointed out above, this was due to the fact that the constitutions of those bodies allowed semi-states to join. Lastly, the Governor-Generals of the Federation were appointed on the advice of the United Kingdom Ministers. The Federal Prime Minister was consulted in the appointment of the second Governor-General, Lord Dalhousie, but this was a matter of courtesy. In the case of full members of the Commonwealth, a Governor-General is appointed on the advice of the Prime Minister of the country concerned unless other arrangements are contained in the country's Constitution. (176)

Two other general features of the Federal Constitution were the absence of a clause allowing or prohibiting secession and the enshrinement of a political policy - "partnership" - in the Preamble. These two features will be dealt with in detail below.

165. Act No. 12 of 1957.

166. Art. 29 (7).

167. In the case of the Dominions (as the full members of the C/wealth were then called), this practice was translated into law in 1931 by the Statute of Westminster. This statute was not, of course, applicable to the Federation of Rhodesia and Nyasaland.

168. See below under "Demands for Dominion Status!"

169. Act No. 28&29 Vic. c. 63. For a discussion of this Act and its effect, see Wade and Phillips (7th Ed. by Wade and Bradley) op.cit. pp. 437-437 and also pp. 48-49. Wheare K.C. The Constitutional Structure of the Commonwealth (Oxford, Clarendon Press, 1960) and The Statute of Westminster and Dominion Status (O.U.P. 3rd Ed. 1947). For a ~~law~~ which was invalidated for repugnancy to this Act, see Attorney General for New South Wales v. Trethowan, (1932) A.C. 526. See also Nadan v. The King, (1926) A.C. 482.

170. See Section 2 of the Statute of Westminster, 1931. For the powers assumed by a Dominion Parliament as a result of Section 2, see Moore v. Attorney-General of Irish Free State, (1935) A.C. 484.

171. See the cases in note 169 above.

172. In 1957 it was agreed that the Federation would be given the right to legislate extra-territorially - see below. For the granting of this power to the Dominions, Section 3 of the Statute of Westminster. In Croft v. Dunphy (1933) A.C. 150, the Privy Council refused to decide whether this power was retrospective.

173. See above.

174. For Dominions, Section 4 of the Statute of Westminster, prohibits the United Kingdom Parliament from enacting a law applying to a Dominion unless it has been requested by the Dominion concerned to pass such a law.

175. For the powers of a Dominion to abolish such appeals - see British Code Corporation v. The King (1935) A.C. 500 at 518; Attorney-General for Ontario v. Attorney-General for Canada (1947) A.C. 127. Canada, for instance, abolished such appeals in 1949 by the Supreme Court Act, enacted that year.

176. For a summary discussion of the Federation's autonomy and subordination, see deSmith, S.A. The New Commonwealth and its Constitutions (London, Stevens, 1964) pp.38-40; Cmd.1149 of 1960 op.cit., pp.20-26; Palley, op.cit., pp.350-352; Baxter, G.H. and Hodgins, P.W. "The Constitutional Status of the Federation of Rhodesia and Nyasaland" (International Affairs, Vol.33, No.4, 1957) pp.442-452.

The British Government created the Canadian Federation because it was becoming difficult to govern and defend the territories as separate entities. Economic interests also weighed very hard in favour of unity.⁽¹⁷⁷⁾ The Australian Federation was motivated by the desire of the States to have common defence, unrestricted trade with each other and a common immigration policy.⁽¹⁷⁸⁾ In both Canada and Australia the inhabitants wanted the association. The Central African Federation, on the other hand, had no common basis for its creation. The British Government wanted a Federation in Central Africa in order to ward off the infiltration of Afrikanerdom and a possible joining of South Africa by Southern Rhodesia, as well as for economic reasons. The Central African whites wanted Federation for two main and one minor reasons. The main reasons were prevention of Northern Rhodesia and Nyasaland (particularly the former) becoming African States, and economic expansion. The minor reason which at first was quite important but had lost its significance after the late forties, was fear of Afrikanerdom. Events in the Gold Coast and Nigeria had pushed this possibility to the background, although Huggins and Welensky continued to use it to scare the British into accepting amalgamation and later federation. The British Government and the Central African whites, therefore differed in the political objects they wished to achieve by federation. This difference, although suppressed or at least not appreciated at the time of the creation of the Federation, later became pronounced, creating a wide gap between the opinions of the Federal Government and the British Government on the efficacy of federation.

Unlike in Canada and Australia where at least the majority of the inhabitants were in favour of federation, in Central Africa the majority of the inhabitants were totally against it. This robbed the association of the most important requisite - consent of the inhabitants. Politically, therefore, the Central African Federation was a "union of total dissent."⁽¹⁷⁹⁾

177. Keith, A. B. The Dominions and Sovereign States (London, Macmillan, 1938) pp. 420 - 422.

178. Ibid., pp. 422-424. For a discussion of the origin and structure of the two Federations, see pp. 420 - 524.

179. Gann & Gelfand, op.cit. p. 234.

This explains why its ten-year life was a stormy one. Much of this storm was, of course, due to the political tactlessness of both the Central African white leaders and the British Government who, instead of reducing African fears, increased them to a hysterical point.

For the sake of clarity the following review of those ten years proceeds on a systematic rather than on a chronological basis.

A. Partnership

Partnership was embodied in the Preamble of the Constitution as the guiding racial policy of the Federation. It was, however, not defined anywhere in the Constitution.⁽¹⁸⁰⁾ This left individuals and organizations to define it the way they liked. Huggins and Welensky occasionally spoke of there being "senior" and "junior" partners.⁽¹⁸¹⁾ Africans were the junior partners and Europeans the senior partners. Africans had to work their way through a maze of standards laid down by the senior partners before being declared by the latter to have attained equal status.

180. The term "partnership" it should be noted was not new politics. British politicians had first used it to describe the relationship between Britain and the self-governing Dominions. Later it was thought a better term to replace the term "trusteeship". In 1943, for instance, the Secretary of State for the Colonies said: "Some of us feel now that the word 'trustee' is rather too static in its connotation, and we should prefer to combine the status of trustee the position also of partner" - House of Commons Debates, 13 June, 1943, Col. 48. The whites in Northern Rhodesia first talked of partnership after the Passfield Memorandum and Gore-Browne proposed its adoption as the territory's policy in 1936 - N. R. Legco Debates, 29 October, 1936, p. 248. See also a motion by Welensky - Ibid., 4 July, 1945, pp. 230-247, and the Secretary for Native Affairs' Speech - ibid., 22 June, 1949. An attempt in Northern Rhodesia to define it failed when in meetings of African and European non-officials Welensky and his colleagues began to speak of junior and senior partners. In 1952 the Northern Rhodesian Government issued a statement in which it defined partnership as meaning mutual regard for the other's outlook, beliefs, customs and legitimate aspirations and anxieties. In the economic field everybody was to rise to any level according to ability. Discriminatory practices were to go. In the political field, African representation was to rise until parity was reached. Such parity was to last until racial representation disappeared. East Africa and Rhodesia, Vol. 28, No. 1436: 17 April, 1952; Gann, A History of Northern Rhodesia, op.cit., p. 432-3. The Statement pleased neither racial group.

181. For Huggins's statement, see Johannesburg Star, 20 Nov., 1951.

Huggins is said to have described the relationship at one time as that of a horse and its rider. Those Africans who approved of Federation interpreted partnership to mean African "advancement of all kinds, but particularly political advancement and the sharing of power..."⁽¹⁸²⁾ The majority of the Africans in Nyasaland and Northern Rhodesia denounced partnership as : incompatible with protectorate status; endangering African rights; a sop to Africans to make them accept Federation; implying racial representation incompatible with majority rule; likely to lessen control over immigration; and likely to stand in the way⁽¹⁸³⁾ of independence. The Rhodesia Herald defined it as meaning "that all the people of the Federation should pull together for the common good, with a return to each proportionate to the value put into the common enterprise!"⁽¹⁸⁴⁾ The Federal Party (the Party in Government) adopted a partnership policy which could hardly be accepted to African leaders. The policy stated that Africans and Europeans had distinctive and complimentary roles to play; that each group was to be rewarded according to its contributions to the partnership; that the races naturally wished to develop on traditional lines and that there would have to be therefore, separate facilities and amenities as long as existing wide differences in cultural levels of the mass of the people continued; and that special racial representation would disappear as Africans obtained full political privileges.⁽¹⁸⁵⁾

The policy, as can be seen, permitted discrimination to continue. Defining the position in these terms was a fatal mistake at that embryonic stage of the Federation when it was so vital to convert Africans to accepting Federation. The mistake was repeated when in June, 1955, Nauti Yamba, an African Member from Northern Rhodesia, moved a motion in the Federal Assembly for the removal of separate facilities and discrimination from all public places.⁽¹⁸⁶⁾ The motion was unanimously opposed by the Federal Party Members and the Government.⁽¹⁸⁷⁾ It w

182. Mason, The Year of Decision, op.cit, p. 53.

183. Gann, A History of Northern Rhodesia, p. 432.

184. Rhodesia Herald, 31 August, 1953.

185. Gann, A History of Northern Rhodesia, pp. 432 et seq.

186. See Rhodesia Herald, 24 June, 1954 and Harvard, 23 June, 1954.

187. In his speech, the Prime Minister, Huggins, said:
"If this motion were carried out, if it could be-but fortunately, it cannot - it would create so much ill-feeling and so much resentment in the Europeans that we should put the clock of advancement and co-operation and partnership by at least ten years."

34. It was lost by a heavy majority. Opponents of the Federation quickly pointed out that they had always known that partnership was not a genuine but bogus policy, employed to hoodwink the British Government into accepting Federation. At about the same time John Moffat introduced in the Northern Rhodesia Legislative Council his famous Resolutions (later christened "Moffat Resolutions")⁽¹⁸⁸⁾ which sought to dispel the fear of domination of one race by another.⁽¹⁸⁹⁾ The Resolutions were accepted, only one member (John Gaunt) opposing them. Moffat was soon after this appointed special European Member for Northern Rhodesia in the Federal Assembly. In August 1955, he moved in the Federal Assembly that the House should investigate the basic principles necessary for a united multi-racial nation and the parliamentary systems to be adopted to that end during the period of transition. The motion suffered the same fate as Yamba's the previous year.⁽¹⁹⁰⁾

Partnership, therefore, never made headway. Little was done to remove discrimination and to advance Africans in the Federal Civil Service. In 1960, the Monckton Commission observed:

"Racial discrimination, though diminishing, remains one of the more important forces working against Federation. The reference to "partnership" in the Preamble to the..... Constitution led Africans to believe discrimination would quickly disappear. The fact that it did not, and that the term itself has remained undefined, has resulted in growing suspicion and disillusion." (191)

In 1958 the Federal Prime Minister had established an Office of Race Affairs, responsible to himself. The function of the Office was to review all policies, practices and activities which could hamper or adversely affect "the creation of a favourable climate for the Federal Government's policy of partnership" and make the necessary recommendations to the Government. In April, 1959, an African Minister, J.Z. Savanhu, (one of the four African Members from Southern Rhodesia) was appointed to take charge of the Office with the title of Parliamentary Secretary to the Ministry of Home Affairs.⁽¹⁹²⁾

The establishment of the Race Relations Office did not, as is evidenced by the passage quoted above, improve the position appreciably. In 1962 Savanhu resigned as Parliamentary Secretary and from the United Federal Party because partnership had not been implemented to his satisfaction in the Federal Civil Service.⁽¹⁹³⁾ There is no doubt that a full-scale implementation of partnership in those fields the Federal Government had jurisdiction, e.g. in its civil service and the armed forces, would have reduced African opposition and would have given the Federation a longer life.⁽¹⁹⁴⁾

188. N. R. Legco Debates, 29 July, 1954, pp. 616 - 668.

189. For a full account of the Resolutions, see the next Chapter.

See page 269 for 190 - 1

The consummation of the Federation appeared to be a victory for the Europeans over the African nationalists in Northern Rhodesia and Nyasaland. The African Congresses for the time being turned to local politics. The Northern Rhodesia African National Congress organized a series of boycotts and strikes, beginning from January, 1954.⁽¹⁹⁵⁾ A new constitution had been negotiated in 1953. That Constitution had raised African seats by two, bringing the total to four.⁽¹⁹⁶⁾ In Nyasaland, the Congress pressed for a new Constitution for the territory. This culminated in the 1955 Constitution. These campaigns pushed opposition to the Federation to the background. In 1956, Henry Chipembere (then a Congress leader and Member of the Legislative Council) told the Legislative Council that "there is unfortunately mistakeable silence in this opposition to Federation. This silence tends to give the Government and other Members of the Nyasaland community the impression that opposition to Federation has died down, but the reverse is the truth."⁽¹⁹⁷⁾

What Chipembere said was soon borne out by a sudden upsurge of renewed opposition against Federation in both Nyasaland and Northern Rhodesia. The Nyasaland African Congress, rallying people behind two slogans - secession and self-government - demanded that the two African Members from Nyasaland in the Federal Assembly should resign. When they refused to do so they were expelled from the Organization. Three things also happened at this time which gave impetus to the renewed opposition. In Southern Rhodesia the Africans formed the Southern Rhodesia African National Congress on September 12, 1957.⁽¹⁹⁸⁾ This was the first real country-wide nationalist movement in the country. In 1958 a split occurred in the Northern Rhodesia African National Congress because Nkumbula was, as a leader, considered to have become too moderate. The Secretary-General, Kenneth Kaunda, with Simon Kapwepwe and Mwanakayumbwa Sipalo formed the Zambia African National Congress which soon drained off the majority of Nkumbula's following. The biggest event was, however, the arrival of Dr. Hastings Kamuzu Banda on the scene on July 6, 1958. On arrival at Chileka Airport, he was given a broom to sweep away the Federation and he promised to do so and also to bring self government. The arrival of Banda changed the tempo of politics in Central Africa and perhaps the Federation's future became doomed from July 6, 1958. The three Congresses (excluding Nkumbula's) worked together and launched a concerted effort against the Federal and territorial establishments. This culminated in the ban of the three organizations and the detention of their leaders. This did not, however, destroy the opposition to Federation.

~~See over for footnotes.~~

In 1960, despite the fact that the three organizations were still banned and their leaders in jail, the Monckton Commission observed:

"The dislike of Federation among Africans in the two Northern Territories is widespread, sincere and of long standing. It is almost pathological"(199).

Unfortunately the Federal Government and the British Government did nothing to reduce this opposition by introducing constitutional advancement appreciable to the Africans. Of course, by 1958, it was, perhaps, already too late to halt the opposition. The vital years when Africans could have been won to the support of Federation were 1954 - 1956. Instead of trying to win the Africans the Federal Government was, in fact, demanding dominion status so as to remove British control in the Northern Territories.

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190. The voting was 20 against and 9 in favour. Those voting in favour were the eight members representing African interests and Dr. Scott, an independent. One of the two African members from Southern Rhodesia voted against the motion. This was perhaps due to fear of losing support since the two Southern Rhodesian Africans had been elected by a predominantly white electorate.
191. Cmd. 1148 of 1960, p. 75 (see below). For the Commission's views on partnership, see pp. 75-78 & 115-116.
192. In addition to Savanhu, two other Africans - G. Chipunza and G. Lewanika - were later appointed Parliamentary Secretaries. No African, however, ever reached a position of full ministerial responsibility.
193. See Fed. Parl. Debates, Vol. 19, Cols. 1840 et seq., 7 Nov., 1962.
194. For a discussion of the policy of partnership, see Glegg, op. cit.; Creighton, op. cit.; pp. 101-106; Leys & Pratt, op. cit., pp. 170-4; Mason, op. cit., pp. 51 et seq.; Sanger, C. The Central African Emergency (London, Heinmann, 1960) pp. 46-50.
195. See the next Chapter.
196. See the next Chapter. Elections under this Constitution were held in February, 1954.
197. Nyasaland Legco Debates, 71st Session, July, 1976.
198. The organization was formed from the remnants of the old African National Congress and the newly formed and Salisbury based Southern Rhodesia African National Youth League. Joshua N.M. Momo became the organization's leader.
199. Cmd. 1148 of 1960, p. 16, para. 27.

The Constitution Amendment and the Electoral Bills

Another serious blunder that affected the life of the Federation was the manner in which the Federal Government and the British Government handled the 1957 Constitution Amendment Bill and the 1958 Electoral Bill. These two Bills were the most controversial pieces of legislation the Federal Assembly had ever handled. The two Bills were the first to be acted upon by the African Affairs Board in terms of Article 75.⁽²⁰⁰⁾ The failure of the British Government to act in accordance with the recommendations of the African Affairs Board made the position of the Board as a safeguard ridiculous and left many people convinced that the British Government would not refuse the Federal Government whatever powers it sought. This conviction generated increased African opposition.⁽²⁰¹⁾

The Constitution Amendment Bill⁽²⁰²⁾ was introduced in the Federal Assembly in June, 1957. The purposes of the Bill, according to the memorandum published together with the Bill were:

- (a) to increase the number of Members of the Federal Assembly to 59 by adding 24 new Members of whom 6 were to be Africans;
- (b) to enable the Federal Legislature to enact an Electoral Act⁽²⁰³⁾ for the election of 53 of the 59 Members ~~in~~ i.e. all except the 2 specially appointed European Members and the 4 specially elected Members from the Northern Territories;
- (c) to provide for the substitution of ordinary elected Members whose race was not specified for the 15 Members (12 Africans and 3 Europeans) whose race was specified as and when Africans were elected among the ordinary elected Members;
- and (d) to make it clear that the Territorial Courts had jurisdiction to adjudicate on questions about the registration and de-registration of voters.⁽²⁰⁴⁾ It should be noted that the Federation had no electoral law yet at this stage, the first election having been held under the existing territorial laws. The Federal Legislature was, in fact, not competent to enact an electoral law. The Amendment under consideration sought to give it this power. Once the Amendment had been enacted the power of the Southern Rhodesian Government to regulate the election of the three members (two Africans and one European) representing African interests was to be terminated. The three Members and the two additional African Members were to be elected under the Federal electoral law. In Northern Rhodesia and Nyasaland the appointing and electing of the six existing Members were to remain under territorial law. The election of the four new Members (two from each of the two territories) was, however, to be governed by the Federal electoral law, subject, in relation to Nyasaland, to the provisions of Article 12 (1) of the Constitution which provided that before Federal electoral law applied to Nyasaland^{*} the Territory's Legislative Council should pass a resolution^{to that effect}.

The Federal electoral law was, therefore, going to control the election of 44 ordinary elected Members, 8 elected African Members, (4 from Southern Rhodesia and 2 from each of the Northern Territories) and 1 specially elected European Member from Southern Rhodesia. This meant in all 53 out of the 59 Members of the Assembly.

Under these changes the nomenclature of some of the African Members was to be revised. The four from Southern Rhodesia and the four new ones from Northern Rhodesia and Nyasaland were to be called "Elected African Members." The other four Africans from Northern Rhodesia and Nyasaland whose election was to continue under territorial law were to be called "Specially Elected African Members." The substitution of ordinary elected Members for Members whose race was specified was to be effected progressively as follows: If and when one or more Africans were elected at a general election among the 24, 14 and 6 ordinary Members for Southern Rhodesia, Northern Rhodesia and Nyasaland respectively, the number of ordinary elected Members in that territory was to increase by the number of Africans elected while a corresponding reduction was to be made in the number of special seats. This process was to be followed each time an African or Africans were elected to ordinary seats until there were no special seats. The reduction in the number of Special Members was to take effect first among the "Elected African Members" and, thereafter, in the case of Northern Rhodesia and Nyasaland, among the "Specially Elected African Members". These were to go last because they were an essential ingredient of the African Affairs Board. It was thought by the time these were eliminated the need for the Board would have disappeared.

200. Other amendments had been made to the Constitution on which the Board had not acted because they did not contain objectionable provisions. These were the Constitution Amendment Act 1954 (enacted to remove ambiguity in Art. 82); the Constitution Amendment Act, 1958 (enacted to give effect to recommendations of the Fiscal Commission presented to Parliament in 1957 (C. Fed. 55); the Constitution Amendment Act, 1959 (enacted to provide for alterations to Item 40 of the Federal Legislative List in the Second Schedule to the Constitution. The Item dealt with professional qualifications.

201. "These changes made (African) politicians realize that the Federation must be dissolved, if they were to obtain full powers of government over their own people." - Palley, *op. cit.*, p. 397.

202. F.B.L, 1957.

203. Clause 5 of the Bill. This was to replace the provisions of Article 11 and 12 of the Constitution (regarding elections under territorial laws) subject, in the case of Nyasaland, to the limitations expressed in Article 10 - (i.e. that the Nyasaland Legislative Council was to pass a resolution to that effect before the applications of the Federal Electoral Law to that country.

204. See Clause 9 of the Bill.

39. It will be seen that in the process Africans were not going to gain any seat over those they held, since an election to the ordinary seat was followed by a reduction in the special seats. Gaining could only begin after all the special seats had been eliminated.

After a controversial debate the Bill was passed by the House on July 31 by a two-thirds majority as required by Articles 97 and 98 of the Constitution.⁽²⁰⁵⁾ The decisive votes were those of the two Southern Rhodesian Africans. Without those two votes the Government could have fallen short of the required two-thirds majority since it was a foregone conclusion that the Special Members from the Northern Territories and the Independent, Dr. Alexander Scott, would vote against the Bill. Savanhu, one of the two⁽²⁰⁶⁾ Southern Rhodesian Africans, resigned his seat soon after voting for the Bill but, subsequently sought re-election under the ticket of the governing Party.

The African Affairs Board⁽²⁰⁷⁾ considered the Bill and in accordance with Article 75 presented a request that the Bill should be reserved by the Governor-General for the signification of Her Majesty's pleasure. The Board issued a report in terms of Article 74.⁽²⁰⁸⁾ The Report branded the Bill a differentiating measure in these words: "The Board are of the opinion that removal of half of the African Members representative of the Protectorates from the provisions of Article 13 of the Constitution and the provision that they shall come within the same category as the Africans from Southern Rhodesia (who are at present elected by a voters' roll overwhelmingly European) has the effect (of a differentiating measure)!"⁽²⁰⁹⁾ The Board also considered that the difference between the increase of Members for African interests from 9 to 15 and of the ordinary Members from 26 to 44 was in itself a differentiating measure.⁽²¹⁰⁾

205. For the debate on the Bill, see, e.g. Federal Parl. Debates of June 26, July 15, 16, 17, 22 and 23.

206. The other was Mike Masocha Hove, who later became Federal High Commissioner in Nigeria.

207. It should be noted that the Electoral College of the Board was going to be changed by the Amendment. It was going to be increased by the six new Members. Its constitution was also to be changed by the conversion of "Specially Elected Members" from Southern Rhodesia to "Elected African Members". All African Members were to be eligible for election to the Board.

208. Fed. Ass. 18. See also Fed. A. 21. A Communication From the Secretary of State for Commonwealth Relations on the Constitution Amendment Bill.

209. P. 3 of the Report.

210. ^{P. 2} of the Report.

40. On October 31, in accordance with Article 75 and 97 of the Constitution, the Bill was tabled in the two houses of the United Kingdom Parliament. The Parliamentary Under-Secretary of State for Commonwealth Relations informed the House of Commons that the Report of the Board and the arguments of the Federal Government would be presented to Parliament. This was done in Command Paper 298 which reproduced both the Report⁽²¹¹⁾ of the Board and the Memorandum by the Federal Government on the Objects of the Bill and on the African Affairs Board's Report.⁽²¹²⁾ Despite strong opposition⁽²¹³⁾ in both Central Africa and Britain and pressure on the British Government to disallow the Bill, it was passed by 301 votes to 245.⁽²¹⁴⁾ The Act as finally enacted did not differ from the Bill.⁽²¹⁵⁾

The enactment of the Constitution Amendment Act was immediately followed by the introduction of the Electoral Bill.⁽²¹⁶⁾ As mentioned above, one of the purposes of the Constitution Amendment Bill was to enable the Federal Legislature to enact an electoral law. The Electoral Bill consequently sought to introduce such law in accordance with the Constitution as amended by the 1957 Constitution Amendment Act. The Government published a White Paper explaining the Electoral Bill.⁽²¹⁷⁾

The Bill sought to introduce two voters' rolls - a General Roll and a Special Roll. The general qualifications for both rolls were to be: (i) citizenship of the Federation or the status of a British protected person, (ii) a minimum age of 21 years; and (iii) residence in the Federation for a continuous period of two years and in a constituency for a continuous period of three months. Special voters were also to have an adequate knowledge of English and to be able to complete the registration form unaided. Before dealing with the means qualifications for each roll it must be mentioned that earlier, in 1957, the Federal Legislature had enacted the Citizenship of Rhodesia and Nyasaland and British Nationality Act⁽²¹⁷⁾ which left the protected persons of Northern Rhodesia and Nyasaland with that status but also gave them the choice of becoming citizens by naturalization if they so wished. In introducing the Electoral Law the question arose whether citizenship should in all cases be a prerequisite for the vote.⁽²¹⁸⁾ If citizenship became a pre-requisite it would have meant that Africans in Nyasaland and Northern Rhodesia would be compelled to apply for citizenship in order to qualify for the vote.⁽²¹⁹⁾ This, apart from other difficulties, would have been contrary to the spirit of the Preamble to the Constitution which stated that Northern Rhodesia and Nyasaland would continue as protectorates and that their African inhabitants would remain protected persons.⁽²²⁰⁾

Footnotes on page 274.

In fact, had citizenship been insisted on as a pre-requisite, it would have amounted to shutting the door to the franchise on the Africans of the Northern Territories who were very unwilling to shed their status of British protected persons. To avoid these complications it was agreed that every person applying for the Federal franchise was to be either a Federal citizen or a British protected person by virtue of his connection with Northern Rhodesia or Nyasaland.⁽²²¹⁾ Protected persons applying for the vote were, however, to make a declaration of allegiance to the Queen⁽²²²⁾ instead of taking the oath of allegiance.

The means qualifications for the General Rule were to be: (i) £720 income per annum during each of the previous two years preceding date of application, or ownership on that date of immovable property in the Federation of not less than £1,500; (ii) £480 income per annum during each of the two years preceding the date of application or ownership of immovable property in the Federation on that date of £1,000 - and in each case completion of a prescribed course of education (Standard Six was prescribed in this case); (iii) £300 income per annum during each of the previous two years on date of application or ownership of immovable property in the Federation of not less than £500 and in each case completion of a course of not less than four years of secondary education of a prescribed standard; and (iv) in the case of ordained Ministers of religion, full time service and either a divinity degree or five years training at a theological college, or not less than two years training and a period of practice that in the aggregate brought the period of training and practice to five years.

211. Pp. 4-6 of the Command Paper.

212. Pp. 7-11 of the Command Paper.

213. See, for instance, Central Africa and the British Parliament - Background to the Constitution Amendment Bill (published by the Central Africa Bureau while the Bill was before the British Government).

214. For the debate on the Bill, see House of Commons Debates, Vol. 578, Cols. 816-942; 25 November, 1957.

215. Act No. 16 of 1957.

216. F.B. 27, 1957.

217. Act No. 12 of 1957.

218. P.3, para 6 of C. Fed. 72.

219. Ibid.

220. Ibid.

221. Ibid., Para. 7. See below for the deal that the British Government and the Federal Government were alleged to have made in relation to the extension of the franchise to protected persons.

222. Ibid. The declaration read: "I, A.B., declare that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her heirs and successors according to law."

42. The means qualifications for the Special Roll were to be: (i) £150 income per annum during the two previous years or immovable property of not less than £500; (ii) £120 income per annum during the previous two years plus completion of two years of secondary education of a prescribed standard.

On January 9, 1958, the Federal Assembly passed the Bill by a two-thirds majority as required by Article 10 (20) (i) of the Constitution.⁽²²³⁾ In accordance with the same Article (10 (2) (iii)) the Governor-General was required to reserve the Bill for the signification of Her Majesty's pleasure. On the day the Bill was passed, the African Affairs Board, by a majority vote of its Members, presented a request under Article 75 of the Constitution that the Bill should be reserved.⁽²²⁴⁾ The Federal Government again wrote a Memorandum supporting the Bill.⁽²²⁵⁾ Both the Board's Request and the Federal Government's memorandum were reproduced in Command Paper 362.⁽²²⁶⁾ The Board attacked the Bill as a differentiating measure on two grounds. The first was that the high income qualifications for the General Roll would exclude Africans save a few since the average wage rate for the Africans was £70 per year while that of Europeans was £1,100.⁽²²⁷⁾ The second was that the high educational qualifications required favoured the Europeans, since the standard of European education was higher than that of Africans.⁽²²⁸⁾ The Bill was also criticized by the general public in Central Africa and Britain.⁽²²⁹⁾ Although Bills reserved under Article 75 did not require laying before Parliament as did Bills reserved under Article 97 in conjunction with Article 75 or with a resolution of a territorial legislature objecting to the Bill, the Secretary of State decided to table the Bill. Despite heavy opposition from the Opposition benches and bodies outside Parliament, the Bill was approved⁽²³⁰⁾ and soon thereafter received assent.

223. For the debate on the Bill, see, for instance, Fed. Parl. Debates of December 16, 1957.

224. Fed. Doc. A.23. See also Fed. A.24 - A Communication from the Secretary of State for Commonwealth Relations on the Electoral Bill.

225. Memorandum by the Federal Government on the Objects of the Electoral Bill and on the African Affairs Board's Request.

226. For the Board's Request, see pp. 2 - 5 of the Command Paper, and for the Federal Government's Memorandum, see pp. 6 - 10.

227. p. 3 of the Command Paper.

228. Ibid.

229. See, for instance, Central Africa and the Franchise - An Examination of the Federal Electoral Bill: 1958 (issued by the Central Africa Bureau, 1958).

230. For the debate in the House of Commons, see House of Commons Debates. Vol. 582, Cols. 1077 - 1168.

The two measures, when closely examined, reveal disadvantages to the African people. The Constitution Amendment Act did not only raise the difference between ordinary Members and Members representing African interests from 17 (9 to 26) to 29 (15 to 44)²³¹ but also placed the Africans to be elected by Africans in a minority to the Africans to be elected by a predominantly white electorate. Of the twelve Africans, only four, two from Nyasaland and two from Northern Rhodesia, were to be elected by an African electorate - i.e. the African Protectorate Council and the African Representative Council respectively. The other four Africans from the two Northern Territories and the four Africans from Southern Rhodesia were to be elected by a virtually white electorate. They were going to owe allegiance to that electorate and it was clear that they would have to be Members of a European party if they were to get the support of the white electorate. The fact that Africans elected by a predominantly white electorate and belonging to the governing party hardly represented African interests had been demonstrated in the case of the two existing Southern Rhodesian Members in the House. For instance, in 1954, when Savanhu condemned the treatment of strikes at Wankie Colliery by the Government of Southern Rhodesia, the Federal Prime Minister was said to have applied pressure on him to retract his statement. Secondly, before voting on the Constitution Amendment Bill, the two Members were invited to a meeting in Harare African Township and told to vote against the Bill. African meetings elsewhere asked them to do the same. When the vote was taken, however, they voted for the Amendment to the consternation of the African people.

The predominance of Africans elected by Europeans over those elected by the Africans was also going to change completely the character of the Board as will be seen below, making it more of a Government instrument. The Electoral Act, had, in addition to the disadvantages put forward by the Board, the disadvantage for Africans that no matter how numerous the African voters became on the Special Roll (which was to all intents and purposes to be an African Roll), their effect in the election of the 44 ordinary Members was nil. It was these 44 ordinary seats which mattered in the government of the country.

231. The Board declared on this point: "In Parliament it is the size of the majority that is important." Fed. A. 18.

There is no doubt that the British Government saw all these disadvantages in the two measures. Apparently they said they did not consider them serious enough to warrant vetoing the legislation. Lord Home, the Commonwealth Secretary, is said to have pressed Welensky to liberalize the franchise. When Welensky, however, told him that he had gone to the limit acceptable to his electorate,⁽²³²⁾ the Secretary of State accepted this. The British Government's behaviour on the two measures was governed by three considerations. The first consideration was that it had tied its hands long before the measures were introduced. Talks had been held in London in January, 1957, between the Federal Prime Minister and the Secretaries of State. On January 8 the Colonial Secretary, Lennox-Boyd, is said to have agreed that the Federal Assembly could be enlarged and that the composition of the African Affairs Board could be changed.⁽²³³⁾ The franchise and citizenship are also said to have been discussed.⁽²³⁴⁾ In April, 1957, further talks had been held in London between the Secretaries of State and the Federal Prime Minister. A communique after those talks confirmed that agreement had been reached in principle on the enlargement of the Federal Assembly.⁽²³⁵⁾ After the talks in January and April it was alleged that the British Government had "made a deal" with the Federal Prime Minister to the effect that in return for the granting of the vote to British protected persons without forfeiture of their status, the Federal Government could go ahead with enlarging the Federal Assembly and introducing a franchise law and that the British Government would not veto the measures.⁽²³⁶⁾

232. Welensky, *op.cit.*, p. 81.

233. Palley, *op.cit.*, p. 390.

234. See Keesing's Contemporary Archives 1957-1958, p.13524.

235. *Ibid.*, pp.15529-15530. It was also announced that the enlargement of the Assembly, citizenship and the franchise, had been discussed with the territorial Governments and that agreement had been reached on the enlargement of the Federal Assembly.

236. See Welensky, *op.cit.*, pp. 74-84, where a package deal seems admitted although not including an undertaking that the British Government would not veto the legislations. See, however, Ghai, Y.P. "The Kenya Council of State and the African Affairs Board of the Central African Federation: An Experiment in the Protection of Minorities," (International Comparative Law Quarterly, Vol. 12, 1963) p. 1089, at p.1117. When the Colonial Secretary was questioned by Creech-Jones on whether he had made a deal with the Federal Prime Minister that he should go ahead with the Constitution Amendment Bill, he gave an evasive answer — House of Commons Debates, Vol. 573, Col. 863.

237. In Southern Rhodesia the figures were 1,211 and 949 respectively. *Cmd. 1149 op.cit.* p. 41.

238. Special Report of the African Affairs Board, Fed. A21, 9 Dec., 1957.

239. See Special Report of the African Affairs Board, Fed. A 24, 24 June, 1958.

Secondly, the British Government was apparently impressed by Welensky's concession to grant the Africans in the Northern Territories the vote without requiring them to renounce their status of protected persons. The Colonial Secretary must have been under the mistaken belief that Africans in the two territories would welcome this concession. If so, this turned out to be a false belief since the franchise was effectively boycotted. For instance, on August 31, 1958, there were only 9 Africans in Nyasaland on the General Roll and 23 on the Special Roll. The corresponding figures in Northern Rhodesia were 639 and 4,301.⁽²³⁷⁾ Thirdly, the Secretaries of State, it appears, although perhaps not fully satisfied, thought the two measures were liberal. Replying to the African Affairs Board on why he accepted the Constitution Amendment Bill, the Secretary for Commonwealth Relations stated that the proposals "represent a necessary, desirable, and substantial advance on anything which has gone before."⁽²³⁸⁾ In a similar reply on the Electoral Bill he stated that the provisions "mark a distinct advance on those now operating because they will largely increase the number of Africans eligible to register and thus to cast a vote for the election of members to the Assembly and by the reinforcement of the principle of a non-racial common basis for the franchise."⁽²³⁹⁾

However, as mentioned above, the British Government's approval of the two measures against the African Affairs Board's recommendations convinced many people, particularly the Africans, that the Federal Government would get whatever it wanted. At this time the Federal Prime Minister had started demanding dominion status and Africans were now apprehensive that the Federal Government would achieve that purpose. To prevent this happening the Africans became determined to destroy the Federation.

A general election under the amended Constitution and the new franchise law took place at the end of 1958. The United Federal Party won all the elected African seats in the three territories. The two elected Africans from Nyasaland were elected unopposed because of a general boycott of the election. One of the two Africans was, in fact, a person of Nyasaland origin living in Southern Rhodesia who went to stay in the constituency for a few months to satisfy the nomination requirements. The other two Africans from each of the Northern Territories were elected by an enlarged electoral college of Members of the designated bodies and the African registered voters in the country.⁽²⁴⁰⁾ The two Europeans representing African interests were appointed as before by the Governor of each territory.

D. The African Affairs Board

Huggins had said of the proposed Board in 1952 that it was "only a little piece of Gilbert and Sullivan with the music."⁽²⁴¹⁾ This contempt remained a feature of the Federal Government's attitude towards the Board. The manner in which the Board was treated during the life of the Federation justified the views of those who had said it would be an inadequate safeguard for African interests. The Board's functions, it will be remembered, were divided into two categories. The first category consisted of the general functions of consultation and of making to the Federal Government such representations as might be desirable.⁽²⁴²⁾ This category also included the assistance which the Board was expected to give to a territorial Government on request on any matter affecting Africans.⁽²⁴³⁾ The second category consisted of powers to declare legislation^a differentiating measure in terms of Article 71 of the Constitution. In exercising powers under the first category the Board gave consideration to such matters as facilities for Africans in Government institutions and on the Rhodesian Railways, cadet corps training for Africans; Federal conditions of service for African civil servants and the advancement of Africans with professional qualifications; university facilities for Africans at South African universities; conditions of Africans in the defence forces; and the period training at a proposed African agricultural college.⁽²⁴⁴⁾ The Board had successes in this category of functions although not to the extent expected by the Board Members and those who wanted to see the Board do more.^(244a) It should be noted that the Board was not competent to deal with individual complaints unless they had wider implications.⁽²⁴⁵⁾ On one occasion, however, it agreed to consider a complaint of bad treatment in one of the Federal prisons.⁽²⁴⁶⁾

240. The Federal Govt. had wanted the electoral college system abolished. The British Government insisted that it should remain. The Federal Govt. wanted the two Africans elected by African voters. A compromise was reached by adding African voters to the African Protectorate Council and the African Representative Council for the purpose of electing these members. See also Franklin, op. cit., pp. 125 et. seq.

241. The Times (London), October 13, 1952.

242. Art. 30 (9) of the Constitution.

243. This function was never exercised, it appears, for it is not referred to in any of the Board's reports.

244. A summary of the actions taken by the Board in regard to these matters is contained in the Board's Report of 30 January, 1959 - Fed. A. 30 prepared by the first Board for the information of the Board which was to be appointed by the Second Parliament.

244a - 246 footnotes overpage 280.

47.

It was in the second category of functions that the Board proved a failure. This category was, in fact, the more important in that the functions were intended to prevent the Federal Legislature and Executive from placing Africans by legislation under disadvantageous conditions not applicable to Europeans. The fact that the Board met its most humiliating failures under this category lends support to the view that this was the more important one.

Activities of the Board under the second category can be split into two - those concerning principal legislation and those concerning subordinate legislation. One instance in relation to subordinate legislation will suffice. In 1955, the Board sent a report⁽²⁴⁷⁾ to the Prime Minister that it considered the Defence (Regular Force) (African Members) Regulations, 1956,⁽²⁴⁸⁾ differentiating in that they excluded Africans from promotion to commissioned ranks. The report was, however, later withdrawn when the Board received assurances from the Prime Minister that it was the intention of the Federal Government to promote Africans when suitable candidates became available. In relation to Bills, the Board first made a report on a Bill in 1955.⁽²⁴⁹⁾ The Bill was the Rhodesia and Nyasaland Cadet Corps Bill.⁽²⁵⁰⁾ The Board pointed out that a clause in the Bill was differentiating in that it excluded Africans from the operation of its provisions. The Government replied that they saw nothing objectionable in principle to the establishment of African cadet corps but added that so long there was no compulsory military training for Africans there was no need to provide cadet training for them.⁽²⁵¹⁾

244a. Note, however, Palley, *op.cit.*, pp. 385 - 386, where it is observed: "However, it cannot be said that the representations on many of these matters were successful as it was evident that the Government not only resented the existence of the Board but was antagonistic to Members of the Board who had been outspoken against Government action." See attitude of Federal Minister of Law to the Board, *Fed. Parl Debates*: 29 June, 1959, Col. 2085. For an attack on Sir John Moffat, see *ibid.* July, 1959, Col. 1166.

245. See Report of the Board of 2nd June, 1955, Fed. A. 1.

246. See Report of the Board of 26th June, 1956, Fed. A. 7.

247. Report of the Board of 26th June, 1956, Fed. A. 7.

248. See Fed. Gazette Notice 79/1956.

249. Report of the 2nd June, 1955, Fed. A. 1.

250. F. B. 2, 1955.

251. Report of 26 June, 1956 - Fed. A. 61.

It appears that in those matters brought to the attention of the Federal Government which did not require reservation or in which the Board did not request reservation, the Federal Government always put the Board off by saying that no discrimination against Africans would be practised or that such facilities would be extended to the Africans when suitably qualified ones were available.

As already mentioned elsewhere, the Constitution Amendment Bill and the Electoral Bill were the first to be reserved for the signification of Her Majesty's pleasure in terms of Article 75. They were the first test on how effective the Board was as a constitutional safeguard. During the debate on the Constitution Amendment Bill in the House of Commons an Opposition front bencher, James Callaghan, quoted the Rev. Andrew Doig (a Specially Appointed Member for African interests from Nyasaland and a Member of the Board) as saying: "If the Bill is approved by the British Parliament the African Affairs Board is seriously discredited in African eyes..."⁽²⁵²⁾

When the British Government agreed to the Bill becoming law, Rev. Doig resigned forthwith from the Board on the grounds that it had been demonstrated that the Board was not effective.⁽²⁵³⁾ Sir John Moffat (the Board's Chairman) sought an undertaking that in future all matters reserved by his Board would be referred to the British Parliament for a free vote but this was refused.⁽²⁵⁴⁾ The Board's ineffectiveness was aggravated when the Electoral Bill was also approved. The fears of those who had doubted the effectiveness of the Board were confirmed. Some enthusiasts of the Board were disillusioned. The Africans lost the little respect they had for the Board.⁽²⁵⁵⁾

After the 1958 general election the Board's stature as a safeguard was further reduced by the fact that it then passed into the hands of the United Federal Party Members.⁽²⁵⁸⁾ Of the six members, four (including the Special European from Southern Rhodesia) were United Federal Party Members. The remaining two Members were the two European appointed Members from the Northern Territories. "The Board was now converted into a reflection of the Assembly and was no longer a safeguard for a largely unenfranchised group of the society. Even if the Board as now composed acted honourably in all respects, as a safeguard it lost all psychological value because at best it no longer had the appearance of independence and at worst the Government had now packed the Board with its supporters in order to destroy its embarrassing powers, at the same time maintaining the facade of a safeguard!"⁽²⁵⁹⁾ Sir John Moffat (who had resigned his appointment to fight the Northern Rhodesian general election in early 1959)⁽²⁶⁰⁾ thought the Board under its new composition could no longer be considered an impartial or independent body.⁽²⁶¹⁾

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49. He called for the abolition of the Board and its replacement by another body of similar nature which would review legislation concerning all races and not only Africans. He thought the new body should have powers of veto and act as a kind of "constitutional court"⁽²⁶²⁾ The Federal Government rejected the idea as its introduction would have curtailed its powers. Yamba moved a motion calling for the setting up of an independent body to replace the Board.⁽²⁶³⁾ The motion was rejected.

Although the chairmanship of the reconstituted Board was given to Pretorius (a Specially Appointed Member from Nyasaland) it had become a Party instrument. For this reason, there was co-operation between the Board and the Federal Government. This co-operation increased when Davies, a United Federal Party Member and Specially elected European Member from Southern Rhodesia, took over the chairmanship.⁽²⁶⁴⁾ Much of the work was, however, being carried out informally.⁽²⁶⁵⁾ Only once did it consider a Bill potentially differentiating. The Bill concerned was the Tobacco Marketing and Levy Bill.⁽²⁶⁶⁾ The Board objected to provisions dealing with the grading and sale of African tobacco grown on Tribal Trust Land. After hearing evidence justifying the differentiation, the Board dropped the matter and did not ask for a reservation.⁽²⁶⁷⁾

252. House of Commons Debates, Vol. 578, Col. 819: 25 Nov., 1957.

253. Ghai, op.cit., p. 1116.

254. Franck, op.cit., p. 58.

255. Op.cit., p. 1117. The Africans... felt that neither case had been judged upon its merits, both had been settled in advance by a political bargain which, they felt, was greatly to their disadvantage. The damage done by this was more than the failure of the Board. It destroyed faith in the British Crown of reservation and disallowance. The notions of safeguard were seen as illusory. Leys and Pratt op.cit., p. 117.

256. Ghai, op.cit., p. 1116.

257. Ibid., p. 1119.

258. Moffat informed the Assembly in July that there was bloc voting by the U.F.P. - Fed. Parl. Debates, Cols. 6024-5, 29th July, 1959. "The Members of the United Fed. Party," he told the Assembly, "voted to give one political party a majority on the Board. I think it was obvious to all of us who took part in the election that the matter had been arranged beforehand. I think that the Government had decided who were to go on to the Board and issued their instructions and the Members of the Board acted accordingly." The U.F.P. Members denied this charge.

259. Palley, op.cit., p. 398.

260. He was replaced by his brother, R.L. Moffat.

261. Ghai, op.cit., p. 1117.

262. Macdonald, A.C., "The African Affairs Board in the Federation of Rhodesia and Nyasaland," (Public Law, 1959) p. 364, at p. 371.

263. Fed. Parl. Debates, Col. 1153, 1 July, 1959.

264. Palley, op.cit., p. 386.

265. "It is, however, submitted that, although the reconstituted Board was doing valuable work by making such informal representations, the fact that this had to be done informally in order to achieve results in a sense derogated from its status as an institutional safeguard i.e. as long as it did not officially take action the Government was prepared to co-operate, but once the Board made a formal stand the Government became hostile." Palley, op.cit., p. 386.

50. In 1961 and 1962 the Board reported on two cases concerning subordinate legislation it considered differentiating, ⁽²⁶⁸⁾ The Government in each case complied with the Board's objections by either amending the provisions or withdrawing them.

In evaluating the existence of the Board the verdict should be indeed that it failed. Apart from the fact that it perhaps had some psychological effect ⁽²⁶⁹⁾ on the Federal Government when drafting legislation, it hardly played the role that was intended for it. Ghai thinks the Board failed because not many people expected it to succeed in the first instance. ⁽²⁷⁰⁾ De Smith thinks the Board "suffered from major weaknesses" in that although it was intended to protect African interests, "its composition was potentially subject to effective control by the party in office" and that "having regard to the degree of self-government achieved by the Federation and to the realities of political power, it was unlikely that the United Kingdom Government would feel able to advise Her Majesty to refuse her assent to a Bill that had been reserved as a differentiating measure save in very extreme cases." ⁽²⁷¹⁾ It was no doubt the low opinion held by many people ^{about} the Board's effectiveness as a safeguard that influenced the Monckton Commission to recommend new safeguards in the form of Councils of State and Bills of Rights in the Constitutions of the Federation and of the three territories. ⁽²⁷²⁾ The Commission did not actually recommend the abolition of the Board, but commented on the existing safeguards (the Board and provisions for reservation) as follows:

"These safeguards are important so far as they go. But they have limitations, and some of these limitations are already clear. The African Affairs Board has in recent years lost the confidence of the Africans. The Board's prestige and usefulness were seriously injured when it tried unsuccessfully to keep the Federal Constitution Amendment Act of 1957 and the Federal Electoral Act of 1958 off the statute book. In the eyes of many, this failure was a convincing proof of the Board's ineffectiveness as a safeguard." ⁽²⁷³⁾

266. F.B. 34A of 1960.

267. Fed. A 45.

268. See Fed. A. 45 and A. 62. The regulations of 1961 concerned the control of the sale of maize by Africans in the Eastern Province of Northern Rhodesia. Those of 1962 concerned African witnesses in the Federal Supreme Court. See Also Report of 1959-1960, Fed. A. 37. In 1960, the Board was sent a draft regulation by a Minister so that it could give its advice before the making of the regulation. This had never been done before and was evidence of the co-operation and common understanding that was prevailing between the Government and the Board at this time.

269. See Pallev, *op.cit.*, p. 399, where this point is made.

270. *op.cit.*, p. 1113.

271. De Smith, S.A. "Fundamental Rights in the Commonwealth (I)" (I.C.L.Q., Vol. 10, Jan., 1961) at p. 96.

272. Commission's Report (Cmd. 1148 of 1960) pp. 79-89 and 116-118. See below.

273. *Ibid.*, p. 79.

Before the Federation had properly rooted itself the Federal Government was already talking in terms of securing dominion status for the Federation as soon as possible. In 1956 the Prime Minister submitted a scheme to the United Kingdom Government which sought independence on the basis of a treaty to be signed between the United Kingdom and an independent Federation. The Federal Government was to undertake in the treaty not to enact any discriminatory legislation and to observe all the limitations on Federal power contained in the existing Constitution. As an additional safe-guard territorial Governments were to be given the power to veto any legislation that sought to increase Federal powers or to interfere with territorial powers.⁽²⁷⁴⁾ The scheme was rejected by the United Kingdom Government on the grounds that the Preamble to the Constitution provided that the Federation could only advance to full membership of the Commonwealth when the inhabitants so desired (including the Africans)⁽²⁷⁵⁾ and that it would prejudice the Review Conference to be held later in terms of the Constitution.⁽²⁷⁶⁾ In November of the same year, the Federal Government, however, gained some additional autonomy in external affairs. It was entrusted with the authority to make arrangements for the treatment of representatives of Governments and international organisations in the Federation.⁽²⁷⁷⁾

Talks on increased status continued, particularly after the assumption of office by Welensky.⁽²⁷⁸⁾ In April, 1957, the Federal Government obtained further autonomy in external and internal affairs. In the field of external affairs the following powers were accorded:

- (a) So far as the United Kingdom was concerned, the Federation was to be free, to the extent this was not already the case, to conduct all relations with other Members of the Commonwealth direct, to exchange High Commissioners with them and to make agreements of any kind with them.
- (b) In addition to matters already entrusted or which might be entrusted in future the Federation could enter into negotiations and agreements with any foreign country, subject in each case to the need to safeguard the responsibility which Her Majesty's Government had in international law so long as the Federation was not a separate international entity.
- (c) The Federation could, if it so desired, attach its own representatives to the United Kingdom diplomatic missions in foreign countries as it had already done in Washington and Lisbon.
- (d) In addition to the arrangements in respect of the appointment of non-diplomatic representatives in certain foreign countries, the Federation was in future to be free, in so far as this was not already the case, to appoint diplomatic agents or consular or trade representatives in countries which were willing to receive them in order to deal with matters within the competence of the Federation and to receive such agents or representatives from other countries.

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(e) The Federal Government was authorized, in so far as it did not already possess authority, to acquire in its own right membership of international organisations which by virtue of the terms of their constitutions, the Federation were eligible to join. (279)

In all these matters the Federal Government was expected to inform the United Kingdom Government on the initiation and progress of negotiations. (280)

In internal matters three concessions were made. (281) These concerned access to the Sovereign, legislative relationship between the United Kingdom Government and the Federal Government, and extra-territorial legislative power. In reference to the first matter, the Federal Government was given direct access to the Sovereign in those matters which affected the Sovereign personally, on the award of honours for services to the Federation, (282) and on a number of ceremonial matters. On extra-territorial legislative power, it was agreed that empowering legislation would be enacted at Westminster at a convenient time.

274. The full details of the scheme were never revealed - see e.g. Fed. Parl. Deb., Col. 916, Aug. 2, 1956, where the Fed. Prime Minister explained his motives.
275. The interpretation of the word "inhabitants" and of the Preamble by the United Kingdom was challenged by Huggins. His view was that the United Kingdom was distorting the Preamble, which he argued was included in order to assure Southern Rhodesia that dominion status would be achieved and not for the purpose of ruling out "independence without consent expressed in some unspecified fashion through a black plebiscite" - see Gann & Gelfand, op.cit., pp. 251-4. See also, Welensky, op.cit., p. 71; Baxter and Hodgson, "The Constitutional Status of the Federation of Rhodesia and Nyasaland" (International Affairs, Vol. 33, 1957) p. 442, at p. 449; and Palley, op.cit., p. 406.
276. Gann & Gelfand, op.cit., pp. 251-4.
277. Cmd. 1149 of 1960 op.cit., p. 23, para. 12. When in 1957 the Indian Government complained about the treatment of its representatives to the United Kingdom Government, the latter replied that India and the Federation should settle the matter. In 1958 the United Kingdom refused to intervene in the case of the Federal Immunities and Privileges Act (an Act of the Federal Legislature) and Orders issued thereunder on the grounds that these powers were within the jurisdiction of the Federal Government - H.C. Debates, Vol. 585, Col. 1358, 3 April, 1958. In 1956 too, before the retirement of Huggins and at the last Prime Ministers' Conference he attended, the Prime Ministers agreed that the P.M. of the Federation should continue to attend - Cmd. 1149, op.cit., p. 21, para. 4. It will be recollected that the original attendance of the Southern Rhodesian P.M. was extended to Huggins personally. This agreement was necessary for the attendance of his successor.
278. See Keesing's Contemporary Archives 1957-8, op.cit., p. 15324.
279. See Joint Statement Issued By the Secretary of State For Commonwealth Relations and the Prime Minister of the Federation on 27th April, 1957. For text, see Keesing's Contemporary Archives 1957-8, op.cit., pp. 15529 - 30. See also Cmd. 1149, op.cit., p. 23, para. 13.
280. Ibid.
281. Ibid.; Cmd. 1149, op.cit., p. 20, para. 2.
282. From this time the Federation maintained its own honours list.

53. No such legislation was, however, passed and the Federation 286 dissolved without having enjoyed this power. The most important internal concession the Federal Government obtained was that relating to the legislative powers of the United Kingdom. The Federal Government was apprehensive about the possibility of the United Kingdom using Article 29 (7) of the Constitution to legislate for the Federation. Although when this fear was raised in the Southern Rhodesian Legislative Assembly in 1953, Huggins had dismissed it, he had, soon after assuming the premiership of the Federation, sought to have the United Kingdom's powers under the Article fettered. He, at the same time, had sought assurances that while the power remained unfettered, the British Government would not use it. The matter was raised more strongly by his successor, culminating in the agreement that the United Kingdom would not use the power. The joint statement declared on the matter:

"The Federal Prime Minister drew attention to doubts which had arisen in regard to the purpose and effect of Article 29 (7) of the Federal Constitution and to the subject of legislation in the United Kingdom for the Federation. United Kingdom Ministers made it clear that the United Kingdom Government recognise the existence of a convention applicable to the present stage of the constitutional evolution of the Federation whereby the United Kingdom Government in practice does not initiate any legislation to amend or to repeal any Federal Act, or to deal with any matter included within the competence of the Federal Legislature except at the request of the Federal Government." (283)

The Agreement to a large extent conferred upon the Federation the constitutional position of the Dominions in the decade before the passing of the Statute of Westminster (in 1931). However, there were still some limitations which could only be removed by attainment of full dominion status. These limitations could be summarised as follows. First, it should be noted that the powers granted by the 1957 agreement were conventional. Dominions, on the other hand, did not enjoy similar powers under convention but under law. The Federation could not adopt the Statute of Westminster which made the Dominions formally independent of the United Kingdom. The Statute applied only to the countries specified therein. This is why it was necessary for the United Kingdom Parliament to enact a special law to enable the Federal Legislature to legislate extra-territorially. The Federation could not exercise that power in terms of section 3 of the Statute of Westminster. Secondly, although the Federation was going to enjoy a wide measure of autonomy in external affairs, it would not achieve international personality.

283. The granting of this convention formally was criticized by some people as "British willingness to give virtually unreserved support to a European-controlled Federal Government." - Leys and Pratt, op.cit., p. 117.

54. It could not, therefore, join the United Nations or other organizations admitting only actual States and not "semi-States",⁽²⁸⁴⁾ Thirdly, there were still some limitations in amending the Constitution. The United Kingdom could still, in terms of positive law, enact legislation for the Federation by virtue of Article 29 (7). It was these limitations that the Federal Government intended to remove in its negotiations after 1957. Of course, of the three, only the first two were important to the achievement of full nationhood. Inability to amend parts of its Constitution by a State, while a derogation of sovereignty, is, in the sense of international personality, not inconsistent with statehood. Australia and Canada, for instance, cannot amend some provisions of their constitutions except by an Act of the United Kingdom Parliament.⁽²⁸⁵⁾ The treaty suggested by Huggins could, therefore, despite the limitations it was going to place on the Federation in its internal affairs, have given the Federation its statehood.

The greatest obstacle to the Federation acquiring dominion status was the position of Africans in Northern Rhodesia and Nyasaland.⁽²⁸⁶⁾ Dominion status meant the removal of the powers the United Kingdom had over the Northern Territories, particularly over African affairs. It was clear that the biggest change that would be brought by dominion status would be the vesting of the control of African affairs in the Federal Government. In fact, the Federal Government's main reason in demanding dominion status was to acquire this power. A United Kingdom Parliamentary delegation which visited the Federation in 1957 observed:

".....as far as we can see the major change which would come about with full independence would be the assumption of responsibility for African Affairs in the protectorates of Northern Rhodesia and Nyasaland. It is clearly this function which is behind the desire for full Dominion Status...." (287)

The demand for independence took a vigorous turn soon after the April, 1957, concessions given above. The concessions must have made Welensky feel that the British Government would not resist the final grant of power if he applied the necessary pressure. By 1958, Welensky was, therefore, already talking of dominion status as inevitable and that if the British Government did not grant it they would face another Boston Tea Party. Statements of this nature, hinting on unilateral declaration of independence, were indeed not good politics at a time when the future of the Federation was to be reviewed. They only helped to frighten the Africans and the Europeans sympathetic to them. Opposition to Federation, as already pointed out above, was renewed on a large scale, at this time.

55. The Parliamentary delegation mentioned above observed:

"So far as we were able to ascertain, African opinion in Northern Rhodesia and Nyasaland is opposed to any alteration which would transfer to a self-governing Dominion the present exercise of Her Majesty's responsibilities for their protection." (283)

The Africans feared that unless they applied pressure to dismember the Federation or at least prevent dominion status the British Government would accede to the Federal Government's demands as they had done in the case of the Constitution Amendment Bill and the Electoral Bill.

In the meantime, the Federal Government and the British Government were at variance on the interpretation of the Preamble to the Constitution. The British Government was of the view that the word "inhabitants"⁽²⁸⁹⁾ irrespective of whether they were voters or not and that before dominion status could be granted, these inhabitants were to express their approval. The Federal Government, on the other hand, argued that the word applied only to voters and that the British Government was perverting the original meaning of the Preamble. The controversy on this and on the whole subject of dominion status continued until towards the end of 1960 when signs began to appear that instead of getting dominion status the Federation might, in fact, disintegrate. This was particularly so after the report of the Mandelson Commission. The struggle of the Federal Government was thereafter directed, not at the achievement of dominion status but at the very survival of the Federation.

284. For a list of organisations of which the Federation was a member, see Cmd. 1149, *Op. cit.*, pp. 24-25, para. 16. See also p. 25, para. 16 for countries where the Federation maintained representatives and pp. 25-6 for countries which had representation in the Federation.

285. Although the Australian Parliament can amend the main body of the Constitution, the view is that it cannot amend Sections 1 to 8. The power to amend Section 9, which embodies the Constitution, is provided but not the power to amend Sections 1 to 8. The Australian Parliament cannot therefore abolish the Federation, see Wynès, *W. Anstey Legislative, Executive and Judicial Powers in Australia* (Law Book Co. of Australia, 2nd Ed.) p. 94 ff. for a contrary view. The Canadian Legislature cannot amend, for instance, Section 92 of the British North America Act, 1867, which enumerates the powers of the Provinces.

286. For a discussion of the obstacles the Federation had in obtaining dominion status, see Baxter and Hodgson, *Op. cit.*

287. The Federation of Rhodesia and Nyasaland: Report on a Visit by a Parliamentary Delegation (London, Executive Committee of the U.K. Branch of the Commonwealth Parliamentary Association, September, 1957) p. 30. For the delegation's observations on the question of dominion status as a whole, see pp. 29-31.

288. *Ibid.*, p. 30.

289. This appears to be the meaning the British Government had attached to the word from the beginning - see *H.C. Debates*, Vol. 516, Col. 1969: 24 June, 1953 (Lyttelton) and *H.C. Debates*, Col. 903, 27 July, 1953.

Article 99 of the Federal Constitution, as will be recollected, provided that in not less than seven years and in not more than nine years from the date of coming into operation of the Constitution, there was to be convened a conference of delegations of the four Central African Governments and the United Kingdom Government for the purpose of reviewing the Constitution. The Constitution having come into force on October 23, 1953, the conference could not, therefore, be held earlier than October 23, 1960 or later than October 23, 1962. In a joint statement on April 27, 1957, the Federal Government and the United Kingdom Government announced their intention to hold the conference in 1960. (290)

In 1959, the Conservative Government, elected in 1955, was in its final year. Anxious to deal with some of the constitutional problems of the Federation before it possibly left office, it decided on a Royal Commission as the best method to deal with the situation before the review conference.

Five reasons were advanced in support of this step. These were:

- (a) That Conservative Party and the churches in the United Kingdom were worried by the turn of events in Central Africa;
- (b) That Labour Party opinion was inflamed to a point of demanding the breakup of the Federation and it was necessary to dissuade the Party from a firm commitment towards that direction;
- (c) That for the good of the Federation it was necessary to take the issue out of the forthcoming United Kingdom general election;
- (d) That ignorance in the United Kingdom about the Federation had to be dispelled and a Commission was the best method of doing so; and
- (e) That a Commission would help to keep the separate Nyasaland Inquiry (the Delvin Commission) within its proper bounds. (291)

The Federal Government was opposed to the idea of a Royal Commission. Its objections were as follows:

- (a) That a Royal Commission would be fatal to the Federal Government and the United Federal Party as the only Party supporting Federation;
- (b) That it would likely encourage the movement in Southern Rhodesia to join South Africa;
- (c) That since the Labour Party opposed Federation, a Commission including Labour Party members as suggested would reflect that opinion;
- (d) That it would appear as if the Federation were on trial;

57. (e) That the appointment of a Commission would be tantamount to taking the matter out of the hands of the Governments concerned and entrusting it to a body with no responsibility;
- (f) That African nationalist opinion would take it as a concession to violent pressure or at best London interference on their behalf;
- (g) That the report of the Commission would not dispel ignorance about the benefits of the Federation as the British Government expected since the alleged critics of the Federation were not susceptible to conversion; and
- (h) that it was dubious whether the issue would be removed out of the United Kingdom election. (292)

After a lot of persuasion by the British Government (292a) the Federal Government finally, however, agreed to the idea of a Royal Commission. The five Governments concerned (British, Federal, Southern Rhodesian, Northern Rhodesian and Nyasaland) also agreed that there should be appointed a committee of officials "to survey developments since Federation was inaugurated in 1953, in the economic, political and social spheres and, where possible and appropriate, to make suggestions and analyse the arguments for and against constitutional changes which may be desirable and practicable." (293) The Committee of Officials held its first meetings in Salisbury from September to October, 1959, and produced its first report, relating to the first half of its task - Survey of Developments Since 1953. (294) It then sat in London from November to December and produced its second report, relating to the second part of its terms of reference - Possible Constitutional Changes. (295)

290. See the Joint Statement of April 27, 1957, referred to above.

291. Welensky, *op.cit.*, pp. 133 - 139. These reasons were given to the Federal Government in Salisbury by Lord Perth.

292. *Ibid.*, p. 140.

292a. After Lord Perth, Lord Home also came to the Federation in March, 1959, to urge the Federal Government to accept the idea - *Ibid.*, pp. 140 -3

293. See Possible Constitutional changes - Report By the Committee of Officials. (Cmd. 1150 of 1960) London, H.M.S.O., 1960) (published as Appendix VII to Monckton Commission Report) p. 4., para. 1.

294. Survey of Developments Since 1953 - Report by Committee of Officials (Cmd. 1149 of 1960) (London, H.M.S.O., 1960) (Published as Appendix VI. to Monckton Commission Report).

appointment of a Royal Commission but before the proposal to appoint such a Commission had been announced on July 21, 1959, the Federal Government and the British Government argued at length on the composition of the Commission and its terms of reference. Finally, on terms of reference, one thing appeared firmly agreed upon and that was that the Commission would not consider secession. The Federal Government was very apprehensive about secession and did not want it touched upon. On July 21, 1959, the United Kingdom Prime Minister, after consultation with the Federal and Southern Rhodesian Prime Ministers and the Governors of Nysaland and Northern Rhodesia, announced that Her Majesty's Government proposed that an Advisory Commission should be appointed with the following terms of reference:

"In the light of information provided by the Committee of Officials and of any additional information the Commission may require, to advise the five Governments, in preparation for the Review, on the constitutional programme and framework best suited for the achievement of the objects contained in the Constitution of 1953 including the Preamble"(296).

The terms seemed agreed upon and understood by all the parties concerned, particularly the United Kingdom and Federal Governments. However, on November 24, while announcing the now completed composition (296a) of the Commission, the United Kingdom Prime Minister's statement included words that re-opened the argument on the content of the terms. After recapitulating earlier events and quoting in full the Commission's terms of reference, he said:

"At the same time as I said on July 21st, I regard the Commission as free in practice to hear all points of view from whatever quarter and on whatever subject. It will, of course, be for the Commission to decide what use to make of the material which reaches them. I am sure the House will have full confidence in Lord Monckton's ability to deal with this.

In these cases I do not think it is ever wise to be too specific or rigid in interpretation. But the House will see that these terms will permit the Commission to consider the whole field of the redistribution of powers in either direction between the Federation and the Territories and to advise on the timing of any programme and the character of any changes in the framework that they may suggest"(297).

Answering supplementary questions from the Opposition Leader (Gaitskell) and the Liberal Party Leader (Crimond) he further said:

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296. Cmd. 1148 of 1960 (Monckton Commission's Report) p.6, para. 2.
 296a. For arguments on the composition of the Commission, see Welensky, *op. cit.*, pp 145-8; 150-1; and 153-6. Viscount Monckton was appointed chairman of the Commission. For other members, see Report. The Labour Party refused to serve on the Commission.
 297. House of Commons Debates, 24 November, 1959. Also quoted in Welensky, *op. cit.*, p.157. Italics own.

"I tried to make as wide and generous an interpretation of the terms of reference as possible and I think that when Members look at them they will see that they do include a very wide possibility for Lord Monckton and his colleagues to conduct their affairs in such a way as to bring about the result we all wish.... This Commission is appointed to review an existing Constitution to which its terms of reference naturally relate. I am sure that it is the wish of the House that a solution should emerge acceptable to all the races in the Territories concerned. The terms of reference in my opinion give the Commission full scope to advise us on how best that object can be achieved, but, of course, if the Commission thinks that it could not fulfil its task to its satisfaction within the terms of reference no doubt it would say so." (298)

That the Commission was free in practice "to hear all points of view from whatever quarter and on whatever subject" did not exclude the hearing of evidence on secession. The Federal Prime Minister was naturally alarmed by this interpretation of the terms. Macmillan, anticipating Welensky's concern about his announcement, sent a secret message soon after the announcement saying that he had not yielded and would not yield an inch on the terms of reference. (299) He added that it was necessary to let people talk as long as recommendations would be strictly within the terms. (300) Replying to the message, Welensky pointed out that the words had created the impression to many and anxiety in him that secession was included in the terms. (301) Macmillan replied that there was no such extension to the terms but added that while irrelevant evidence could not be avoided, what mattered was the use to be made of the evidence. (302)

Although at the time it could be easily understood and believed that Macmillan had used such wide language merely to carry the Opposition with him, later events soon indicated that he might have intended what he said. In January, 1960, Macmillan came to Africa, starting his tour and his speeches on "the winds of change" in Nigeria. (303)

298. Ibid. Also quoted in Welensky, op.cit., pp.157-8.

299. Welensky, op.cit., p. 158.

300. Ibid.

301. Ibid., pp. 158 - 160, where the lesser is quoted at length.

302. Ibid., pp. 160 - 161.

303. For this visit, see ibid., pp. 170 - 189.

304. cited ibid., at p. 171. See also Rhodesia Herald, January 14, 1960 and British newspapers of this date.

305. For the controversy that arose between Macmillan and the Federal Government on the Lagos Speech and Macmillan's denial that his words meant that secession was permitted, see Welensky, op.cit., pp. 171 - 4.

60. At a Lagos press conference on January 13, he told the pressmen:

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"Before the British Government's ultimate responsibility over Nyasaland and Northern Rhodesia is removed, the people of the two Territories will be given an opportunity to decide on whether the Federation is beneficial to them. This will be an expression of opinion that is genuinely that of the people." (304)

The implication of these words was that secession was permitted. That they were said after a commission had been appointed and when doubt had arisen on the British Government's interpretation of the terms, gave them significance. When Macmillan arrived in the Federation the Federal Government was fuming and he was obliged to address a public meeting to dispel the fears that had been created by his Lagos statement. He denied, however, that his statement meant that secession was permitted. (305)

Confusion and controversy on the terms of reference continued. Lord Shawcross, at one stage proposed to the Federal Government by Macmillan to be Chairman of the Commission and now a Member of the Commission, said, when asked on the B.B.C. whether the Commission could recommend abolition of the Federation if that was widely canvassed: "I think it has been publicly said the Commission is free to entertain the views of any people on the whole future of the Federation. I would certainly feel I was completely free in that respect. If I felt that was the right conclusion I should not have the slightest hesitation in saying so and I have made that very clear." (306) Viscount Monckton was alleged to have said that he would not be restricted by the terms of reference (307) and that the Commission might, in fact, report on secession. Lord Home arrived in the Federation on February 21 and in the afternoon of that day addressed the Federal Cabinet on the issue of the terms of reference. Part of his speech was as follows:

"As you gentlemen are aware, the Commission's terms of reference were very carefully chosen. It is difficult to stop people expressing views, some of which may suggest that secession is desirable; but at all events our firm stand on the essentials of the terms of reference brought such a cleavage between us and the Labour Party that they refused to co-operate in the Commission's work. You see, whatever views may be put forward to the Commission, the question of what is contained in its report is quite different.

Press reports of what Lord Monckton said about secession were misleading as to tone and context; but it is not inconceivable that, in the hypothetical event of an overwhelming volume of evidence being in favour of secession, the Commission may have to decide whether, in fact, it can report within its terms of reference or whether it may not have to say that it is unable to make a report." (308)

It was now clear that the Commission might after all hear evidence on and consider secession. When the Commission finally assembled in the Federation, at the Victoria Falls, in February, to begin its work, it informed the Federal Prime Minister that it had decided not to place any limitations on the scope of evidence it would receive and that until it had studied the evidence it could not usefully consider how precisely it would deal with it under its terms of reference for the purposes of preparing its report, nor could it attempt to anticipate the conclusions it might eventually reach.⁽³⁰⁹⁾ This left the Commission clearly free to hear evidence on secession and to make recommendations on it. Welensky felt he had been tricked but it was too late to do anything about the Commission.

The Commission heard a great deal of evidence from people of all races.⁽³¹⁰⁾ The African nationalists, however, boycotted the Commission mainly because it was not going to consider secession.⁽³¹¹⁾ It should be noted that the Commission came when Southern Rhodesia and Nyasaland were under states of emergency and the African nationalists were in prison. In Northern Rhodesia the Zambia African National Congress had been banned and its top leaders charged and jailed. The Northern Rhodesia African National Congress which was not banned in Northern Rhodesia (its branches in Southern Rhodesia were banned) also boycotted the Commission.

The Commission heard evidence until May but its report was not published until October 11.⁽³¹²⁾

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306. Quoted in Welensky, *op.cit.*, p.167. Welensky protested to the Secretary of State for Commonwealth Relations on this statement. Lord Home replied that Lord Shawcross had no preconceived ideas - *ibid.*, p. 169.
307. See conversation between Dingle Foot, Q.C. and Dr. Banda at Gwelo Prison where the latter was detained. The conversation was obtained by "bugging" the room where the two talked - see *ibid.*, p. 176-178, where the conversation is partially reproduced.
308. *Ibid.*, p. 183. For further extracts of the meeting, see pp. 183 - 6.
309. *Ibid.*, p. 186.
310. For evidence in Northern Rhodesia, see *Evidence*, Vol. I (Cmd. 1151 of 1960) and Vol. II (Cmd. 1151 - 1) published as Appendix VIII to the Commission's Report. For evidence in Nyasaland, see *Evidence*, Vol. III. (Cmd. 1151 - 11) also published as Appendix VIII to the Report.
311. During the interview between Dingle Foot and Banda referred to in Note 307 above, Foot tried to persuade Banda to give evidence if he were released since Monckton had said he was not going to be restricted by the terms.
312. Report of the Advisory Commission on the Review of the Constitution of Rhodesia and Nyasaland (popularly known as the Monckton Commission Report (Cmd. 1148) (London H.M.S.O., 1960). The two Governments had disagreed on the date of publication. The British Government wanted the publication declared while the Federal Government wanted it earlier - Welensky, *op.cit.*, p. 267 - 3.

62. After reading an advance copy in September, Welensky wrote the Colonial Secretary (the Commonwealth Secretary, Sandys, was in the Federation at the time):

"As I anticipated from the beginning, the report is a disaster. Its mere publication will make the continuation of the Federation virtually impossible. Almost without exception its recommendations play into the hands of African extremists and its philosophy of appeasement will rule out any possibility of reasonable changes being made on merit. The secession proposals are the final straw and I consider them to be a complete breach of understandings upon which I agreed to the appointment of the Commission"(313)

The Commissioners were not unanimous. W. M. Chirwa and H. G. Habanyama wrote a minority report.⁽³¹⁴⁾ Some of the Commissioners wrote reservations to certain parts of the majority report.⁽³¹⁵⁾ The Commission made recommendations on the Federal Legislature and franchise;⁽³¹⁶⁾ territorial Constitutions;⁽³¹⁷⁾ allocation of functions between Governments;⁽³¹⁸⁾ powers of taxation and fiscal arrangements;⁽³¹⁹⁾ machinery of co-operation between Governments;^(319a) removal of discrimination and the development of partnership;⁽³²⁰⁾ safeguards;⁽³²¹⁾ the public service;⁽³²²⁾ economic development;⁽³²³⁾ secession;⁽³²⁴⁾ elements of subordination of the Federation;⁽³²⁵⁾ the programme of constitutional development;⁽³²⁶⁾ and miscellaneous matters.⁽³²⁷⁾ Of these recommendations only those in connection with the Federal Legislature and franchise, the territorial constitutions, allocation of functions between Governments, removal of racial discrimination, safeguards, secession, elements of subordination and the programme of constitutional development will be discussed.

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313. Welensky, *op. cit.*, 272. For a summary of the letter to Macmillan, see pp. 274-5. For further exchanges on the Report, see pp. 276 - 83.
314. See Report, pp. 139 - 156.
315. *Ibid.*, pp. 123 - 138.
316. *Ibid.*, pp. 35 - 42 and 111 - 113.
317. *Ibid.*, pp. 43 - 46 and 113 - 114.
318. *Ibid.*, pp. 47 - 62 and 114.
319. *Ibid.*, pp. 63 - 71 and 114 - 115.
- 319a. *Ibid.*, pp. 72 - 74 and 115.
320. *Ibid.*, pp. 75 - 78 and 115 - 116.
321. *Ibid.*, pp. 79 - 89 and 116 - 118.
322. *Ibid.*, pp. 92 - 94 and 118.
323. *Ibid.*, pp. 95 - 97 and 119.
324. *Ibid.*, pp. 98 - 105 and 119 - 120.
325. *Ibid.*, pp. 106 - 109 and 121.
326. *Ibid.*, pp. 110 and 121 - 122.
327. *Ibid.*, pp. 90 - 91 and 118.

63. On the Federal Legislature and franchise, the Commission recommended a House of Sixty Members plus a Speaker, and parity between Europeans and Africans. Asians were to be represented by a non-voting Member while Coloureds were to choose as individuals for the purposes of elections whether to be classified African or European. The sixty Members were to be elected by a common roll or if that was not possible by communal rolls. The franchise was to remain qualitative but the literacy test was to be abolished. Two Members of the Commission, Woodrow Cross and Ellman - Brown, made a reservation on this recommendation.⁽³²⁸⁾ Their reasons were that parity was in contradiction to the desire to eliminate racial distinction in government and that in any case the arrangement would lower standards in the Legislature and the quality of Government as Africans still needed more time to raise their educational level. They thought it would be unrealistic to expect Southern Rhodesia, which had been self-governing since 1923, to submit its important matters such as defence and finance to a central Government which most likely would not be able to rely on adequate support in the Assembly due to the parity arrangement.

The Federal Government, the Southern Rhodesian Government and the majority of Europeans attacked this parity recommendation. There is no doubt that had it been adopted by the Federal Government, Southern Rhodesia would have sought to secede. There would have been a possibility of an African Government at the Federal level, controlling the armed forces and all the important matters of the three territories. Such a position would have soon brought majority rule to Southern Rhodesia. On the other hand, had the recommendation been accepted it probably would have saved the Federation as the Africans would have had some of their fears of European domination removed. There was also the possibility that the Southern Rhodesian African nationalists would have talked their Northern colleagues into accepting such a recommendation, as the only way to rescue Southern Rhodesian Africans from white domination.⁽³²⁹⁾

On territorial constitutions, the Commission recommended that Her Majesty's Government should declare as soon as possible that further constitutional advance toward self-government would be made in Northern Rhodesia, as had been done in Nyasaland earlier in the year.⁽³³⁰⁾

328. See pp. 124 - 127 of the Report for their arguments.

329. See Chapter 8 below.

330. See reservation by Gondwe and Katijungu on this recommendation - pp. 131 - 2 of the Report.

Such constitutional advance would include the introduction of African majority rule and of an unofficial majority in the Executive Council.⁽³³¹⁾ The special position of Barotseland was to be maintained. The Commission also thought a new constitution was necessary for Southern Rhodesia. The Commissioners urged that the changes in Northern Rhodesia be made as soon as possible without waiting for the Federal Review Conference. The recommendation for African majority rule in Northern Rhodesia was severely opposed by Europeans in that territory. The Federal Government was also opposed to the recommendation. It could not see the liberation surviving in the event of two black Prime Ministers in the North, both vehemently opposed to Federation. Africans, on the other hand, welcomed the recommendation.

With regard to the allocation of functions between Governments, the Commission recommended that day to day matters should be territorial; that no function should be divided between Federal and Territorial Governments on a racial basis; that the Federal Government should deal with all external affairs and regulate the economy, including taxation; and that non-African education, non-African agriculture, health, all roads and prisons (which matters were then Federal) should become territorial. Several Members had reservations on health⁽³³²⁾ and non-African agriculture in Southern and Northern Rhodesia⁽³³²⁾ becoming territorial matters. The Commission found discrimination was still rife and recommended that the Governments should take firm action by legislation against it so as "to give a positive impetus to the development of partnership" save where such discrimination was for the protection of those concerned.⁽³³³⁾ Had these steps been taken the Southern Rhodesian Government would have no doubt resisted repealing the Land Apportionment Act (often called the cornerstone of all discrimination in the country) on the grounds that it was for the protection of the Africans.

The question of safeguards was considered at length. The Commission found the existing safeguards inadequate. It recommended the introduction of more effective safeguards in the form of Bills of Rights and Councils of State in both the Federal and the territorial Constitutions. The Bills were to be enforceable by the courts and appeals in such cases were to lie to the Privy Council. The Councils of State for the Federation and each territory were to be on the model of the Kenya Council of State.⁽³³⁵⁾ The functions of these councils were to be: (i) to consider new legislation and report to the Legislature on whether it was unfairly discriminatory; (ii) to consider existing legislation and, if found to be unfairly discriminatory, to report to the Government and the Legislature;

65. and (iii) to acquaint themselves with any unfairly discriminatory trends and report on them. They were not to deal directly with individual complaints. They were to have the power to delay legislation but not to veto it. The Councils were, however not to have jurisdiction over emergency regulations and legislation, but such legislations was to be operative for only two months unless the Legislature concerned prolonged it.

The Councils were not to be part of the Legislatures. Members of the Legislatures were to be barred from membership of the Councils. Members of the Councils were to be selected on personal eminence, experience and detachment to act as wise and impartial men and not as representatives of races or Territories (in the case of the Federal Council). The Federal Council was to consist of twelve persons appointed equally from the three territories by the Governor-General and the Chief Justices of the Federation and the three territories. The Governor-General and the Chief Justices were to appoint an independent chairman with only a casting vote. The Councils of Northern Rhodesia and Nyasaland were each to have not less than six Members and an independent chairman, all chosen by the territory's Governor in consultation with his Chief Justice and approved by the Secretary of State. Southern Rhodesia, on the other hand, was to devise its own system of appointing Members of its Council.

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331. See pp. 132-133 for reservation by Woodrow Cross, Prof. Jack, Robinson, Sir Victor Robinson, Chief Sigola and Taylor, and p. 133 for that by Justice Deadle, Ellman-Brown and McClelland. There was a great deal in favour of health remaining a Federal function. It had the advantage of spreading the services more evenly in all the territories.
332. See pp. 134-5 for reservation by Woodrow Cross, Ellman-Brown, Prof. Jack, Mr. Justice Deadle, McClelland, Robinson, Sir Victor Robinson and Chief Sigola.
333. See p. 135 for reservation by Gondwe and Katilungu, and pp. 135.6 for reservation by Crawley, Gondwe, Katilungu and Molson.
335. The Kenya Council of State was established in 1958 by the Kenya (Constitution) Order in Council, 1958 (S.I. 1958, No. 600, Part VI). It consisted of a Chairman and ten Members appointed by the Governor and holding office at Her Majesty's pleasure. Four of the members were appointed for ten years, three for seven years, and three for four years. The members were not appointed according to race. The object was "to provide a body of experienced opinion and of impartial and mature judgments." Members of the Legislative Council were barred from membership. Its powers were advisory and not mandatory. It could not make or repeal laws and its powers did not extend to legislation in operation at its establishment. It examined proposed legislation to see if it were differentiating (for definition of differentiating measure, see S.54 (2) of the Constitution). The Council had by 1960 worked so well that it was considered for export to other territories. For a comparison of the Kenya Council of State and the Councils of State suggested for the Federation, see Chai, op.cit.

The system was, however, intended to ensure independence and freedom of the Council from political control. The Council would be composed of not less than six Members. The Commissioners did not agree on whether membership should be on a basis of parity between Africans and Europeans or on a basis of parity between Africans and Europeans plus Indian and Coloured Members or on a non-racial basis altogether.

The provisions regarding Bills of Rights and Councils of State in the Federal and territorial constitutions were to be specially entrenched. Amendment of these provisions in the Federal Constitution were to require (a) the votes of at least three-quarters of the Members of the Assembly; and (b) a referendum in which the majority of the electors in each of the main racial groups in a majority of the territories and, in addition, a majority of the electors in each of the main racial groups voting throughout the Federation, were to support the amendment.

The Federal Government did not quarrel with the inclusion of a Bill of Rights in the Constitution. It, however, objected to the introduction of a Council of State and the procedure under which provisions of the Constitution regarding the Bill of Rights and the Council of State were to be amended. It disliked the Council of State because it would be in some respects a superior body to the Federal Legislature. Secondly, although the Council was going to wield such considerable power, the Government would not have control over the appointment of the Members. It should be noted that the Federal Government was sensitive to anything likely to reduce its powers.⁽³³⁶⁾ It had worked to reduce the existing African Affairs Board to a point of ineffectiveness and it naturally disliked the introduction of a body more powerful. Were the Federal Government, however, to have the powers of appointing the Members of the Council, the institution would have lost the independent image it was to project. It would have ended up as another Government organ, devoid of stature and respect in the eyes of those not supporting the Government.

336. De Smith said of the suggested councils: "No independent government could be expected to acquiesce in the presence of what would be in effect an extra-parliamentary branch of the legislature, lacking the prestige enjoyed by the judiciary but vested with an entrenched power to obstruct and thwart the implementation of major policy decisions, unless it has effective control over the membership of that body; and once it has control over the membership the character of such a safeguard would almost inevitably be transformed." - "Fundamental Rights in the Commonwealth (I)", op.cit., p. 97.

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The Commission's most controversial recommendation was that concerning secession. It will be remembered that this subject had caused a lot of misunderstanding between the Federal and British Governments in interpreting the terms of reference of the Commission. After stating that the existing Constitution did not expressly or impliedly provide for secession, that the attainment of self-government did not import the right to secede and that only an Act of the United Kingdom Parliament could make secession possible, the Commissioners declared that secession was not incompatible with the Federal concept. It recommended that it should be made clear before the Review Conference that secession would be discussed (statements to the effect that it would not be discussed had moved the African nationalists in Nyasaland to declare that they would not attend the Conference); that Her Majesty's Government should not leave the question of secession entirely open or declare the Federation indissoluble; and that a declaration of intention by Her Majesty's Government to permit secession by any of the territories, if so requested after a certain time or at a particular stage of constitutional development, would have a favourable effect and should, therefore, be made. A request for secession was to be timed by the constitutional stage reached, for instance, self-government, or by fixing a certain period after the adoption of the new Federal Constitution. The wishes of the inhabitants in such event were to be determined by Her Majesty's Government. The Commission recommended that the procedure to be followed in determining such wishes should be decided at the Review Conference. Inhabitants in this case were to include even those not enfranchised.⁽³³⁷⁾ The Commission was no doubt prompted to explain the term "inhabitants" because of the divergent views which had arisen in interpreting the same term in the Preamble of the existing Constitution.⁽³³⁸⁾ The declaration of intention to permit secession was not to be embodied in the body of the Constitution, but the Preamble was to be amended to include a reference to it. However, the members who made reservations wanted the provisions on secession included in the body of the Constitution or fully spelt out in the Preamble.

337. See Reservation by Gondwe and Katilungu at p. 137 of the Report. The two Commissioners objected to Her Majesty's Government, being the only determiners and ascertainers of the wishes of the people. They wanted the people of the territory concerned to have a say too. See also reservation by Mr. Justice Beadle, Woodrow Cross, Ellman-Brown, Mrs. Huxley, Robinson and Sir Victor Robinson, who had similar views to those of Gondwe and Katilungu but were more concerned with the position of Southern Rhodesia.

338. See above.

The question whether secession was legally possible under the existing Constitution will be discussed below under sub-section (H). As mentioned above, the Commission's recommendations on secession were not acceptable to the Federal Government. The Federal Prime Minister described them as the death knell of the Federation. He told the Assembly in a debate on the Report: "...I must recognize that what the Monckton Commission has had to say on the subject of secession is now a political factor which has to be dealt with alongside many others; but that it is a political factor which has immensely complicated our task, I have not the slightest doubt. Not only does it call into question the permanence of the Federation and all that that implies in regard to internal and external confidence, but it gives active encouragement to all the forces of unreason and self-aggrandisement, to say nothing of the 'laager' element, to direct all their energies to breaking the Federation up."⁽³³⁹⁾ The Prime Minister seems not to have appreciated that the Commission's motive in recommending a declaration permitting secession was that such a declaration would influence the Africans in the North, particularly in Nyasaland, not to insist on immediate secession since they could have it in the future if the inhabitants so wished.

The Commission also examined closely the Federation's still existing elements of subordination. It recommended that authority for the Federation to determine its Royal Style and Titles should await full independence; that the Governor-General should not be appointed on the advice of the Federal Prime Minister until independence; that the right of appeal to the Privy Council should be entrenched in the Constitution (under the existing Constitution it was dependent on the Federal Legislature enacting a law to that effect if it so wished); that the Federation should be given by an Act of the United Kingdom Parliament power to legislate extra-territorially in accordance with the 1957 Agreements that there should be no change in the Federation's power over external affairs save as might be granted by the United Kingdom Government from time to time; that, depending on the acceptance of the recommendations on the safeguards, the Governor-General should no longer reserve any Bill in the competence of the Federal Legislature except one relating to constitutional amendments; that provided safeguards as recommended were accepted, powers of disallowance of laws should be removed from the Federal Constitution;⁽³⁴¹⁾ and that the right of the United Kingdom Parliament to legislate for the Federation and the application of the Colonial Laws Validity Act, 1865, should be retained in order to provide for the future constitutional development of the Federation.

It can be seen that the Commission did not think the Federation should be granted dominion status. Such a recommendation would have been unrealistic in view of the hostility against Federation. Its approach was that the Federation should enter another period of trial after the Review Conference as a dependency. With their recommendations accepted and implemented, the Commissioners thought a new atmosphere would be created in the Federation to allow independence to be a feasible proposition in a few years.

In concluding this summary of the Commission's Report, it should be mentioned that the Commissioners, in view of their varying social backgrounds and political affiliations and views, produced a commendable report. The Report, however, came on the scene when the Federation was already torn to pieces and moribund, too late to save it from disintegration.

339. For his full speech, see Fed. Parl. Debates, Vol. 14, Cols. 3144-51. For an extract of this speech, see Mansergh, op.cit., 1952 - 1962, pp. 152 - 157.

341. See Reservation on this point by Gondwe and Katilungu at p. 138 of the Report.

Perhaps owing to the difficulties they thought would arise if the Review Conference were held, the British Government was reluctant to hold it as agreed in April, 1957. The Federal Government, however, insisted that it should be held before the end of the year (1960). The British Government finally yielded to the insistence of the Federal Government and agreed to hold the Conference in December. (342)

The Conference opened in London on December 5 under the chairmanship of the British Prime Minister. Delegations from the four Governments in the Federation, the United Kingdom Government and all the major political parties in the Federation (including African nationalist parties) were present. The political atmosphere in the Federation and among the representatives of the various groups in London was tense as the Conference opened. In Southern Rhodesia the first petrol bombs used for political motives were thrown at the homes and property of some of the Africans attending the Conference on the European ticket.

From the point of view of results the conference was a complete failure. It turned out to be an occasion for denunciation. The African nationalists denounced the Federation, the Governments in Central Africa and the British Government. The Federal Government and United Federal Party representatives slashed the British Government and the African nationalists. The Dominion Party representatives criticized both the British and Federal Governments. The Central Africa Party (Southern Rhodesia) and the Liberal Party (Northern Rhodesia) representatives refrained from these denunciations and tried to bridge the gap between the United Federal Party and Federal Government representatives on the one hand and the African nationalists on the other. At one stage Dr. Banda (leader of the Malawi Congress Party) led his colleagues, Joshua Nkomo (leader of the National Democratic Party of Southern Rhodesia) and Kenneth Kaunda (leader of the United National Independence Party of Northern Rhodesia) in a dramatic walk-out from the conference. The conference closed inconclusively but with a statement that it would be reconvened in the New Year. (343)

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342. On this insistence, Welensky later wrote: "As the British Government saw it, I had most tactlessly compelled them to honour at least one of their obligations - their 1957 pledge to hold this Conference - and they were determined to make me pay for my Colonial stubbornness by turning it into a withering indictment of the Federation and all its work, and of myself." - Welensky, op.cit., p. 285.
343. For a summary of events at the Conference, see ibid., pp. 285-9.

While the Review Conference was in session it was decided to hold the preliminary stages of the constitutional conferences for Southern Rhodesia and Northern Rhodesia. It will be recalled that the Monckton Commission had recommended early constitutional reforms in Northern Rhodesia and Southern Rhodesia. Nyasaland had had a constitutional conference earlier in the year. The Northern Rhodesia talks, which reconvened in London on January 30, 1961, culminated, after a long struggle to reach an agreement, in the 1962 Constitution (344) while the Southern Rhodesia talks, which opened in Salisbury on February 4, 1961, resulted in the 1961 Constitution. (345)

The period after the conference was one of great anxiety on the part of the Federal Government. The Conference had ended inconclusively and uncertainty had set in over the affairs of the Federation. Months passed and nothing was done to reconvene the Review Conference. (346) The Northern Rhodesia talks became difficult and the British Government became more occupied with these and relegated the Review Conference to the background. In August elections under the new constitution were held in Nyasaland. The Malawi Congress Party won all the twenty lower roll seats and two of the higher roll seats. (347) This placed Dr. Banda in a stronger position and he became more outspoken than ever against Federation.

In February, 1962, the Secretary for Commonwealth Relations came to the Federation and held talks with the Federal Government and leaders of political opinion in the three territories. It is alleged that during this visit the Secretary of State informed Banda that he would be allowed to secede from the Federation. (348)

344. See the next Chapter for a discussion of the 1962 Constitution and the background to it.

345. S.I. 1961 No. 2314.

346. Welensky writes of this period: "...I was becoming more anxious everyday about the future of the Federation as a whole. Months had gone by since the Federal Review Conference had been adjourned; at the end of July, with the June agreement on Northern Rhodesia and the Southern Rhodesia referendum safely achieved, I instructed our High Commissioner in London to tackle the United Kingdom Government. They were both dilatory and evasive; August and September were holiday months; Sandys thought he would like to see new Governments installed in all three territories (first)...." - op.cit., p. 312.

347. See the next Chapter for the discussion of the 1961 Constitution and the background to it.

348. Welensky, op.cit., p. 318. Welensky says Dutler, the Minister in charge of Central African Affairs (see below) told him months after that Sir Glyn-Jones, the Governor of Nyasaland, had shown him a record of that meeting although he had not been able to find a record of it at the Colonial or Commonwealth Relations offices - ibid.

Before leaving for London, Sandys handed a memorandum to Welensky. According to Welensky the memorandum was difficult to understand, but it seemed to envisage that each territory would be granted the right to secede as soon as it reached self-government.⁽³⁴⁹⁾ After discussing the Scheme the Federal Government decided that although they would be prepared to see Nyasaland secede on certain conditions, they should not agree to consider the matter until they knew and had agreed on what they would get in return for making such a concession.⁽³⁵⁰⁾ It was also decided that the Prime Minister should go to London for talks with the British Government.

In the meantime, the constitutional crisis in Northern Rhodesia was taking serious proportions. The British Government intended to put forward new proposals to placate violent African feelings. When Sandys left the Federation Welensky had given him a scheme which would allow Nyasaland to secede and would divide Northern Rhodesia into an African area and a European area, with the Copperbelt and rail link in the white area.⁽³⁵¹⁾ The European area was then to remain in the Federation while the African area could be placed under an African Government.⁽³⁵²⁾ The news that the British Government intended to introduce new proposals for Northern Rhodesia sent Welensky hurrying to London soon after the departure of Sandys. He feared that the British Government might break the alleged agreement they had reached on what the Constitution for Northern Rhodesia should be. He arrived in London on February 28 and began a series of talks with the British Prime Minister and the Secretaries of State.⁽³⁵³⁾ In the afternoon of Welensky's arrival the Colonial Secretary made a statement in the House of Commons on the new constitutional proposals.

349. *Ibid.*, p. 319.

350. *Ibid.*

351. *Ibid.*, p. 318.

352. *Ibid.* This idea was not new. It had been suggested by Gore-Browne in 1936 and by the Dominion Party in the fifties. If Welensky seriously expected the scheme to be accepted then he must have been under a misconception of what the British Government had in mind for the Northern Territories.

353. For a summary of the talks, see *ibid.*, pp. 323-27.

73.

During the talks Macmillan asked Welensky whether "the strength and stability of the Federation would be affected if Nyasaland seceded." The latter replied: "The Rhodesians won't be affected, but a precedent will be created. If you let Nyasaland secede, Kaunda will seize every chance of getting the same result for Northern Rhodesia."⁽³⁵⁴⁾ The British Ministers pressed him to produce a plan on the secession of Nyasaland and added that he was duty bound, in fact, to do so. Their reason for this hurry was because they were going to hold talks with Dr. Banda within two months and they wanted to tell him he would have secession if he wanted. Angered by their attitude, Welensky told the Ministers:

"This is an impossible position, I am committed to Federation. I think I perhaps went too far in our talks in Salisbury. But one thing I am certain: there is going to be no Federal Review Conference. This is a matter which must be resolved now between Governments." ⁽³⁵⁵⁾

The talks produced no results. Before leaving Welensky told Macmillan that he intended to resign at once and seek a new mandate through a general election.⁽³⁵⁶⁾ Macmillan tried to persuade him not to take that course but Welensky was adamant.

On March 6 Welensky informed his Legislative Assembly of the London talks.⁽³⁵⁷⁾ Two days later the Governor-General dissolved Parliament.⁽³⁵⁸⁾ Elections were fixed for April 27. The reason for the election was given as: to get a new mandate to prevent the break-up of the federation.⁽³⁵⁹⁾ Many people considered the general election a farce and unnecessary. The Central Africa Party described the dissolution as a desperate action and the election as pointless.⁽³⁶⁰⁾ The Dominion Party (the Opposition in the Federal Assembly)⁽³⁶¹⁾ and the African parties boycotted the election. The Rhodesian Republican Party, a small right wing organization, however, participated. When the nominations closed the U.F.P. had forty seats uncontested. Only fifteen seats were left to be contested. The U.F.P. won fourteen of these. The fifteenth was won by an independent.⁽³⁶²⁾

354. Ibid., p. 325.

355. Ibid., p. 326.

356. Ibid., p. 327.

357. Ibid. See also Fed. Parl. Debates, 6 March, 1962.

358. Ibid.,

359. Ibid.

360. Ibid., p. 328.

361. The right wing groups in Southern Rhodesia were at this time coming together to form the Rhodesia Front and announced that they would be concentrating on the forthcoming Sthn. Rhodesian general election. This was held in December and was won by the Rhodesia Front -ibid.

362. Ibid.

Another development took place after Welensky's talks in London. On several occasions the Federal Government had requested the British Government to place the affairs of the Federation under a special Office. The British Government had neither turned down the request nor acted on it. This time the British Prime Minister informed Welensky that Federal affairs would be handled by a special Minister as from March 19 and that R. A. Butler would take over that ⁽³⁶³⁾ job. This was welcomed by the Federal Government but, unknown to them and perhaps unintended by the British Government, Butler was soon to assume the role of "Liquidator of the Federation."

On April 9 the United Kingdom's High Commissioner in the Federation, Lord Alport, informed Welensky that the British Government had accepted his refusal to put forward a scheme for the future structure of the Federation and that consequently it would put forward one; that since the situation in Nyasaland demanded immediate action it was necessary to issue a statement that Dr. Banda's demands would be investigated; and that Butler would make a four-point statement to Parliament. The four points were to be; that Nyasaland's demands should be recognized; that a three or four-man advisory committee would be set up to investigate whether Nyasaland should continue to associate with the Rhodesias and, if so, how, and to make recommendations on the future relationship of Northern Rhodesia and Southern Rhodesia; that while acknowledging Nyasaland's demands nothing would be done to grant them until after an inquiry on the political and economic effects of secession had been completed; that the final Federal Review Conference would not be held until after the Northern and Southern Rhodesian general elections based on the new Constitutions; and that the conference would take account of the advisory committees recommendations ⁽³⁶⁴⁾. Welensky reacted sharply, arguing that the statement would amount to recognition of Banda's victory and that since he was in the midst of an election campaign, such a statement would confuse the people and cause untold damage. ⁽³⁶⁵⁾ The protestations were brushed aside and on May 8 the first Secretary of State (Butler) made the statement. ⁽³⁶⁶⁾

363. Ibid., pp. 328-9. See statement on this by the Prime Minister on March 15 - House of Commons Debates, Vol. 655, Cols. 1545-7. Extract of this speech is reproduced in Mansergh, op.cit., 1952-1962., pp. 157-159.

364. Ibid., p. 334.

365. Ibid. For further exchanges on the matter, see pp. 335-7.

366. Ibid., p. 337. See also House of Commons Debates, 8 May, 1962.

367. Ibid., p. 339.

Three days later (May 11) the Secretary arrived in the Federation. He visited all three territories and held talks with the various political leaders. On May 17, he told a press conference at Zomba (Nyasaland's capital) that Dr. Banda and his Ministers had agreed to examination of the consequences of secession and that he had invited the Doctor to London in July for talks on the territory's future.⁽³⁶⁷⁾ On May 26 the Secretary flew to London and on June 1 Welensky wrote him expressing concern about the way he and his colleagues kept on saying that any settlement of the Federation's problems must depend on the consent of the inhabitants - treating the Preamble to the Constitution as the juridical basis for this. He pointed out that the Preamble required consent only in two cases - i.e. if amalgamation were proposed and if the Federation were to come to full membership of the Commonwealth and Britain's responsibilities over Northern Rhodesia and Nyasaland were to be relinquished. "When it is suggested that the consent of the people is needed to a new form of association the Federal Government must insist that this is only part of the requirement. The consent of the three territories and of the Federal Government is necessary to any major alteration to the present Constitution....If the majority of the people in one or more Territories want to leave the Federation and the people of another territory and the Federal Government want to preserve the Federation as it is, a compromise may have to be agreed upon." ⁽³⁶⁸⁾ To support his argument Welensky quoted remarks made by Lord Swinton and Oliver Lyttelton at the 1952 Conference on Federation,⁽³⁶⁹⁾ adding that he had the opinion of an eminent jurist⁽³⁷⁰⁾ stating that the consent of the Federal Government was fundamental to the release of Nyasaland and the setting up of a new association.⁽³⁷¹⁾ The Federal Government was prepared to negotiate, Welensky mentioned, but were not prepared to let Nyasaland out until the British and Federal Governments had agreed on the future relationship of the Rhodesias and that of the Rhodesias and Nyasaland.⁽³⁷²⁾ The Federal Government wanted the agreement so reached to be a composite settlement with independence for the Federation as an integral element.⁽³⁷³⁾

The Committee of advisers mentioned above was appointed, under the chairmanship of Sir Roger Stevens. It visited the Federation from July to September, 1962. The committee did not, however, publish the report of its advice. This made the Federal Government suspicious about the nature of the advice.⁽³⁷⁴⁾ In the meantime, elections took place in Northern Rhodesia on October 30.⁽³⁷⁵⁾ The elections resulted in a coalition Government between Kaunda's United National Independence Party and Nkumbula's African National Congress, which although disunited in other matters, was united against Federation.

With Banda, Kaunda and Nkumbula now in control of matters there was little comfort for the Federal Government. The discomfort was increased by the victory of the right wing Rhodesia Front in the Southern Rhodesian election.⁽³⁷⁶⁾ The Front, a conglomeration of right wing groups with no common policy save that of defeating the United Federal Party, was dominated by elements of the former Southern Rhodesia Dominion Party⁽³⁷⁷⁾ who, although not demanding secession like Banda, had become very critical of the Federation.

On November 5 Lord Alport informed the Federal Prime Minister that the First Secretary of State had decided in the interests of achieving a constructive solution to the Federal problem that the issue of Nyasaland should be disposed of by an announcement before the start of the Nyasaland constitutional conference; that the British Government accepted the principle of Nyasaland's secession from the Federation; and that it would be made clear that Nyasaland would have to shoulder the full financial and political consequences of secession.⁽³⁷⁸⁾ Welensky repeated his argument that he would be prepared to consider the withdrawal of Nyasaland if it were to be part of an overall settlement.⁽³⁷⁹⁾ On November 10 Butler informed Welensky that his decision was right in the circumstances and that he would go ahead with it but would not make the announcement until shortly before the Christmas adjournment of Parliament.⁽³⁸⁰⁾ Postponement of the announcement to shortly before the Christmas adjournment caused the Nyasaland talks to be held before the announcement, but perhaps Dr. Banda had already been told of the intended statement.

368. Ibid., pp. 339 - 40.

369. See below under subsection H.

370. The jurist referred to was Sir Ivor Jennings.

371. Welensky, op.cit., p. 340.

372. Ibid. 373. Ibid.

374. Alport, op.cit., p. 117.

375. See the next Chapter.

376. Lord Alport says it was this victory which made the continuation of the Federation impossible.

377. The Dominion Party had started as a Federation - wide party. Later it split into two - the Federal Dominion Party (led by the late Winston Field) and the Southern Rhodesia Dominion Party (with more right wing views) led by Harper. The latter wanted to concentrate on Southern Rhodesian politics with the ultimate aim of pulling Southern Rhodesia from the Federation. Field was later to lead the Rhodesian Front.

378. Welensky, op.cit., pp. 349-350.

379. Ibid., pp. 350 - 1.

380. Ibid., p. 351. For further exchange on the issue, see pp. 352 - 355.

On December 19 the First Secretary of State told the House of Commons that Nyasaland would be allowed to secede but that this did not mean the end of the link between the Rhodesias.⁽³⁸¹⁾ He added that Her Majesty's Government wanted to see economic prosperity and racial harmony in Central Africa. Welensky also made a statement to his Assembly on the same day. He bitterly attacked the British Government and said there was no longer honour in dealing with it.⁽³⁸²⁾ Relations between the Federal Government and the British Government became very strained after this date.⁽³⁸³⁾ On February 28, 1963, Butler appointed Sir George Curtis to consider the practical problems of Nyasaland's secession. At the same time he visited the Federation to have a round of talks with the Federal Government.⁽³⁸⁴⁾ The talks were conducted in a dispirited state and Butler talked more of economic links between the two Rhodesias,⁽³⁸⁵⁾ than about the political links. Political links were pushed to the background. Regarding Nyasaland, Butler told Welensky that the decision could not be reversed. It is possible that the British Government already had, at this stage, ideas to dismember the Federation and if possible replace it by an economic association.

Angered by his talks with Butler, Welensky instructed his High Commissioner in London after Butler had left the Federation that he should request the British Government, since their decision was irrevocable, to take Nyasaland out of the Federation immediately as he was not prepared to ask the Federal Assembly to vote supplies for that territory beyond June 30. He also wanted to pull out Federal civil servants from Nyasaland as soon as possible.⁽³⁸⁶⁾ Welensky did not know that more shocks were in store for him. On March 6 the British High Commissioner formally invited the Federal Government to send representatives to London for preparatory talks on the Federal Review Conference. The talks were to begin on March 26.⁽³⁸⁷⁾ Similar invitations were also extended to the Southern Rhodesian and Northern Rhodesian Governments.⁽³⁸⁸⁾ Southern Rhodesian representatives were to arrive on March 21 and those from Northern Rhodesia on March 24. The talks were intended to find a possible basis on which a later Conference could consider links between the two Rhodesias and if it became possible, how Nyasaland could fit into the new structure.

381. House of Commons Debates, Vol. 689, Col. 1267. For the full statement, see Cols. 1266-1270. Extract of the statement is also reproduced in Mansergh, op.cit., 1952-1962, pp. 160 - 2.

382. See Fed. Parl. Debates, 19 and 20 December, 1962, Cols. 2033 - 2057 and 2170 - 2182.

383. For relations from this time onwards; see generally Welensky, op.cit. and Alport, op.cit.

384. Welensky, op.cit., p.355.

385. Ibid., p. 356. 386. Ibid. 387. Ibid., pp 356-7.

40. The Review Conference was to be held either in Britain or in Africa. (389) 311

The representatives were seen separately. Talks with the Federal Government began on March 26. On March 29 Butler reqd to Welensky and his colleagues the draft statement of a decision the British Government had arrived at and which he was going to announce at 6 p.m. that day. The intended statement was going to take the following line: that any constructive policy in Central Africa must be aimed at working out a relationship between the territories that was acceptable to them; that the existing situation could not continue unchanged; that the British and Federal Governments had been trying to discuss the basis of a conference at which a new relationship could be worked out; that in the light of these discussions it had been decided that no territory could be kept in the Federation against its will; that it followed from this that any territory must be allowed to secede if it so wished; and that before any changes were made in the existing association there were to be further discussions, preferably at a conference in Africa on the broad lines of a new relationship. (390)

The statement was made as scheduled. (391) It was a bombshell to the Federal Ministers. They boycotted a luncheon given by Macmillan that day. (392) At no stage had the matter been discussed with them before the British Government made its decision. Any territory consequently could secede if it so wished. "Liquidator" Butler, it appears, had systematically brought Welensky to London just to tell him that the Federation he was presiding over could not continue as it was. It was, of course, obvious that the association would not continue at all since Northern Rhodesia was certainly going to exercise its right to quit. It is unlikely that Welensky would have gone to London if he had known that the talks would produce this result. The Federal Ministers returned home bitter and disappointed. (393)

At this stage it is necessary to examine the validity of the accusations levelled against the British Government by the Federal Government and of the legal position of secession in the Federal Constitution. After the British Government had announced that Nyasaland would be allowed to secede the Federal Government published a scathing attack on the British Government, accusing it of breaking pledges and conventions. (394)

388. Ibid. 389. Ibid., p. 357. 390. Ibid., p. 359.

391. House of Commons Debates, Vol. 675, Col 32, 29 March, 1963. For verbal exchanges between Federal and British Ministers after the Statement had been made see Welensky, op.cit., pp. 360 - 361.

392. Welensky, op.cit., p. 359.

393. See Federal Parl. Debates, 8 April, 1963, for Welensky's denunciation of the British Government's decision.

79. It contended that the British Government was breaking pledges 312 made at the 1953 Conference on Federation to the effect that no major change would be made to the Federation by the United Kingdom Government and Parliament without the consent of the Governments of the Federation and of the three territories. By accepting in principle that Nyasaland should be allowed to secede, the Federal Government pointed out, Her Majesty's Government was proposing to act unilaterally and in defiance of the 1953 undertakings. The British Government was also accused of breaking the convention that the British Government would not legislate for any matter within the competence of the Federation without being requested to do so by the Federal Government. Earlier, in 1960, while speaking on the Report of the Mankton Commission in the Federal Assembly, Welensky had said:-

"I would like first, to refer to the legal argument which the Commission imported into their consideration of this issue (secession). The legal premise on which the Commissioners approach the problem of secession is that the Federation is not indissoluble and that the forthcoming Conference can consider any part of the Constitution, including Article, which provides that the Federation shall consist of Southern Rhodesia, Northern Rhodesia and Nyasaland. It is implied in this approach that at the time of its creation the Federation was temporary and experimental.

In answer to this I want to say I am advised on a very eminent authority in the Commonwealth that when Parliament gave power to Her Majesty in Council to provide for Federation of the three territories, it showed no sign of intention that the Federation should be temporary or experimental (Mr. Yamba: It was a matter of imposition).

On the contrary, I am advised that both the Act of 1953 and the Order in Council seem to contemplate that the Federation is to be an indestructible union composed of indestructible territories and that there is only one lawful means by which a territory can be authorized to secede from the Federation. It is the same means by which a territory can be authorized to secede from the Dominion of Canada or a state from the Commonwealth of Australia. That lawful means is an Act of Parliament of the United Kingdom Parliament, an Act which must be passed in accordance with the recognized constitutional conventions which require the request and consent of the Federal Government (Mr. Yamba: or the people of the territory concerned)" (395).

The Federal Government's view was, therefore, that the Federation was permanent; that secession was not possible except on the basis of an Act of the United Kingdom Parliament enacted at the request and with the consent of the Federal Government; and that the United Kingdom could not act unilaterally because of the pledges it made in 1953 and the convention it had followed since the inception of the Federation and formally confirmed in the April, 1957, Agreement not to legislate for matters within the competence of the Federation unless requested to do so by the Federal Government. These arguments were replied to by the United Kingdom Government as will be seen below.

Footnotes on page 313.

The United Kingdom Ministers at the Conference had insisted that a secession clause should be inserted in the Constitution and that no territory could have that right. (396) Lord Swinton had likened the inclusion of such a clause to the Minister telling the parties after a marriage service all about divorce facilities. (397)

394. See Federation of Rhodesia and Nyasaland: The British Government's Broken Pledges and Consequences, (Salisbury, 1962) (C. Fed. 231) and The Constitutional Convention (C. Fed. 232) (Salisbury, Govt. Printer, 1962). See also Fed. Parl. Debates Cols. 2033, 2170: 17 Dec. 1962 and Col. 11: 6 April, 1963.

395. For the full speech, see Fed. Parl. Debates, Vol. 14, Cols. 144-5: 25 Oct. 1960. Extract of the Speech is reproduced in Mansergh, op. cit., 1952-1962, pp. 152-157.

396. See House of Lords Debates, Vol. 245, Col. 1165: 19 Dec. 1962. (Lord Salisbury): Col. 1200 (Viscount Chandos); Col. 1209 (Viscount Boyd); Col. 1180 (Lord Colyton); Col. 1171 (Lord Malvern). See also Federation of Rhodesia and Nyasaland: The British Government's Broken Pledges and the Consequences, op. cit., pp. 4-5, giving detailed extracts from the Minutes of the Conference and referring to Welensky's personal knowledge of these statements; The Federation of Rhodesia and Nyasaland - Commentary on Statements Relating to the Establishment of the Federation and their Bearing on the Withdrawal of Nyasaland (Cmd. 1943) (London, HMSO, 1963). See further Franck, op. cit., p. 323, on Lyttelton's attitude on the matter as reported by Lord Malvern (formerly Sir Godfrey Huggins).

397. The exact words said by Lord Swinton (Commonwealth Relations Secretary) were as follows: "I know no Federal Constitution within the Commonwealth, or indeed I think outside it, in which a secession clause is to be found, and there must be very good reasons for that, particularly when one remembers that there have been both within the Commonwealth and outside it, great jealousies of State and provincial rights when Federation took place, yet great as those sectional, and provincial interests were territorially, never was such a clause inserted in the Constitution measures, except, which is delightful Mr. Hopkinson reminds me, within the Soviet Union. It would be right to describe a claim to secede as a precursor of liquidation. After all, it would be, would it not, rather an odd way of starting to make a success of federation to insert in the document of Constitution of federation, in the foreground of it an invitation to secede. It is rather like a marriage service in which the Minister after uniting the parties, immediately drew their very active attention to the facilities for divorce which were available to them. Divorce figures (feature) very prominently in the newspapers, but I think most of us do not believe married life is founded on the prospect of divorce and I think that is as true of political partnerships as it is of other social ones. At a time when we want everyone to concentrate on making federation a success and bringing the union into the most real partnership, it would be odd to invite people to look to secession, but there is one absolutely overriding economic objection to this which rules it out from the very start. The Federation has got to raise loans and to raise them on Federal assets and federal securities. Make no mistake about it - if you doubt my words ask anybody in the City of London federation could never raise a penny of money by loan if it was not known whether federation was to continue, and whatever views you take about what I may call the moral side of the thing, there is an economic argument to which there can be no possible answer." - as reproduced in Cmd. 1943 op. cit. (The bracketed word "feature" - is omitted in the extract). The words in italics were omitted in the portion of the Statement published by the Federal Government to support its case.

Huggins had equally opposed the inclusion of such a clause, urged strongly by Ray Stockil (Southern Rhodesian leader of the opposition).

The words referred to by the Federal Government as pledges by the United Kingdom Government were part of the Minute of the 13th Meeting of the January 1953 Conference on Federation (held on 19th January). After the main discussion on the constitutional draft had been completed at the 12th Meeting, W.H. Eastwood (Rhodesia Labour Representative) had expressed anxiety about the clause of the draft constitution providing for a review of the Constitution after not less than seven years and not more than nine years (which had been accepted at the 12th Meeting), because it might impair the financial credit of the Federation.⁽³⁹⁸⁾ A short discussion followed but the delegates agreed that since any proposal to terminate the Constitution could only be put into effect with the concurrence of the Federal Government and the three Territorial Governments and of Her Majesty's Government, it was unlikely that investors would consider the proposed review clause a reflection on the permanence of the Federation.⁽³⁹⁸⁾ No amendment was, therefore, made to the clause.

The British Government published their own document to deny the accusations of the Federal Government.⁽⁴⁰⁰⁾ They argued that both the Minute of the 13th Meeting and the verbatim report could not be construed as constituting a pledge by the British Ministers that no change in the Federation would be made by the United Kingdom without the consent of the four Governments in the Federation even in the circumstances envisaged by the Review Conference. Until 1962, the British Government pointed out, there had not been, so far as could be ascertained, any such pledge given. There was no record of it in any public document, any contemporaneous announcement or in the constitution itself, Article 29 (7) of which provided that "nothing in this constitution shall affect any power to make laws for the Federation or any of the Territories conferred on Her Majesty by an Act of the Parliament of the United Kingdom". If a pledge of such importance had been made, the British Government contended, there was no reason to be secret about it.

398. Eastwood raised the question in these words: "There is one point. You remember we were dealing with the constitution the other day we dealt with this revision, not before seven and not later than nine years. It has been suggested that that is a possible loophole for secession and if not secession it might mean voluntary liquidation. Could anything be read into it at all. Is it likely to be inferred by the financial world?" - Cmd. 1948, op.cit. para. 6.

399. Cmd. 1948, op.cit., para. 4. For the verbatim report that followed the raising of the matter by Eastwood, see ibid., para. 6.

400. The Federation Of Rhodesia and Nyasaland-Commentary On Statements Relating to the Establishment of the Federation and Their Bearing on the Withdrawal of Nyasaland-Cmd.1948 of 1963 (London, H.M.S.O., February, 1963)

32. The document quoted the Ireland Act of 1949, one of the purposes of which was "to declare and affirm the constitutional position and the territorial integrity of Northern Ireland." Section 1 (2) of that Act states: "It is hereby declared that Northern Ireland remains part of His Majesty's dominions and of the United Kingdom and it is hereby affirmed that in no event will Northern Ireland or any part thereof cease to be part of His Majesty's dominions and of the United Kingdom without the consent of the Parliament of Northern Ireland." The United Kingdom contended that had a pledge been made that the Federation could not be changed without the consent of the four Governments, such declaration would have been included in the Rhodesia and Nyasaland Federation Act or in the Constitution itself as were done the safeguards maintaining the protectorate status of Nyasaland and Northern Rhodesia and preventing their amalgamation with Southern Rhodesia save under certain circumstances. In fact, the British Government did not think such a pledge could have been made since it would have had the effect of granting the Federal Government and each of the Territorial Governments the powers of a permanent veto enabling any of the four Governments to insist on the indefinite perpetuation of the Federation established in 1953 whatever might be the views of the United Kingdom and of the other three Governments in the Federation.

On the Federal Government's argument that the Federation was meant to be permanent because no secession provision was included in the Constitution, the United Kingdom Government argued (i) that omission of such provision was not relevant; (ii) that it could not be inferred from its absence that in no circumstances could secession be contemplated or that an undertaking or guarantee as to the permanence of the Federation existed; (iii) that it was, of course, the purpose and desire of Her Majesty's Government in endorsing the Federation in 1953 that a stable and lasting association should be created but that it was, however, in no position to give, and did not give, any undertaking or guarantee as to its permanence. The document wound up the argument in these words:

"The responsibility of Her Majesty's Government for the inhabitants of Nyasaland as a territory under the special protection of Her Majesty remained unimpaired by the establishment of the Federation. In the new circumstances that have arisen, the expressed wish of the majority of the inhabitants of the territory to withdraw from the Federation, it would in the view of Her Majesty's Government be a breach of its obligation to the people of the Protectorate to disregard that wish. Nothing said in the discussions quoted can be held to preclude Her Majesty's Government from acting as they have done."(401)

After the statement on the secession of Nyasaland on December 19, 1962, the First Secretary had been asked by Turton whether Her Majesty's Government had not given on January 19, 1953, the assurance that no change in the federal structure would be allowed until the consent of the other Governments had been obtained and, if so, whether that consent had been obtained before making the statement and, if not, why the Secretary had disregarded that promise. The Secretary had replied:

"I am aware of the exchanges which took place at the conference in 1953, which have hitherto been confidential and unpublished, and I have the following observations to make.

First, then and now it was and has been clearly established that Her Majesty's Government have the inalienable right to take action on these matters.

Secondly, I would sympathise with my hon. Friend in his obvious desire that we should have worked with agreement. We attempted to gain agreement with the Federal Government. I have been in touch with them ever since May last, and had conversations during the whole of last week with Federal Ministers, and I am sorry to say that we were unable to reach agreement on the terms on which this statement should be made.

In the circumstances, in this difficult situation, Her Majesty's Government have decided that we cannot allow a refusal to agree to put off our duty to Nyasaland and that the future consultations - I stress this - which I shall have in Africa with the Federal Government and the other Governments will do better if they take place on the basis that we have decided for Nyasaland." (402.)

Before dealing with the British Government's arguments on the accusation by the Federal Government that it had broken the convention not to legislate for the Federation without the Federal Government's consent, observations must be made on the validity of the arguments of the two Governments on secession given above. The Federal Government either genuinely or deliberately misunderstood both the Minute of the 13th Meeting and the words of Lord Swinton. What Lord Swinton objected to was the inclusion of a clause authorizing secession but did not, in doing so, mean to convey that the Federation was indissoluble under any circumstances. His thinking at the time is made clear by his likening the Federation to a marriage. (403)

Although a Minister in marrying a couple does not tell them about divorce facilities or incorporate in their marriage certificate a clause saying divorce is permissible, it is known that permanence will only be maintained under certain circumstances. If those circumstances are violated divorce or separation takes place. Lord Swinton did not want a clause on secession included because it would possibly invite secession.

402. House of Commons Debates, Vol. 669, Cols. 1266-70:
19 December, 1962.

403. See note 397.

Swinton's words likening the Federation to a marriage. Was this because those words clearly implied that secession like divorce after a marriage was not ruled out.

On the Minute and verbatim report of the 13th Meeting, the first thing that should be noted is that the question raised by Eastwood came up after the constitutional provisions had been agreed upon. The question was not raised in relation to Article 1 of the Draft Constitution - the Article providing for the establishment of a Federation of the three territories. Secondly, it was not raised while discussing the competence of the United Kingdom Government and Parliament to dismember the Federation. Thirdly, it was not raised at the time when the provisions regarding the review of the constitution were being discussed. The matter was raised because some thought, after the provisions had been agreed upon, that secession or voluntary liquidation could be read into them, to the detriment of the Federation's financial credit. In raising the matter Eastwood was concerned with the financial credit of the Federation. Had it not been for Eastwood's financial fears the question would not have been raised and the so-called pledges would not have been made since the provisions concerned had been disposed of at the 12th Meeting. From the discussion that ensued and which is recorded verbatim in Paragraph 6 of Command Paper 1948 the secession and voluntary liquidation that Eastwood referred to was that being decided on by the four Governments in Central Africa. If Eastwood did not mean this, the meeting, however, discussed it in that context. The position of the British Government's power (in conjunction with that of Parliament) to dismember the Federation was not put in issue. In fact, after Lyttelton (referring to the position of the four Governments in Central Africa) had said: "I think the position is that you cannot upset the constitution without agreement, can you?" Greenfield (the Southern Rhodesia Minister of Law) said: "You could not do so constitutionally without the intervention of Her Majesty's Government." Lord Swinton spoke immediately after Greenfield: "That is a risk you always run in a sense, that it would be possible I suppose for Her Majesty's Government if they could persuade Parliament to do it to pass an Act of Parliament tomorrow morning to take away the whole responsible government from Southern Rhodesia and the whole of the functions which would be given to the Federation. You cannot legislate against the United Kingdom Government going off its head." Greenfield's words show that the position of the United Kingdom Government and Parliament was not in question.

140. Greenfield shortly thereafter said: "In this case it is 'the Lord giveth and the Lord taketh away.'" The Lord here referred to was the British Government, the United Kingdom

35. Lord Swinton's words, although he had misunderstood Greenfield (who, in fact, meant that loans would be safe because the four Governments could not upset the Constitution without the intervention of the United Kingdom) indicate that Her Majesty's Government retained the power to dismember the Federation or take away powers from it.

The casual manner (as shown by the verbatim report) with which the matter was discussed shows that it was not intended to affect the position already agreed upon. The appearance of Article 29 (7) in the final constitution belies the Federal Government's arguments. That Article had serious constitutional consequences on the powers of the Federation and yet Huggins and Welensky did not at the time seek to have its full import explained.⁽⁴⁰⁵⁾ The Article was pregnant with powers, including that of the United Kingdom Parliament to empower Her Majesty by an Act to dismember the Federation or alter its structure.

In dismissing the Federal Government's arguments and upholding those of the United Kingdom Government, it must be mentioned that the Federal Government was, in fact, relying on a "pledge" which had not the binding force of law.⁽⁴⁰⁶⁾ It was not contained in the Constitution or in a statute. The pledge could neither be sustained as forming the basis of a convention because until revealed it was not known even by the British parliamentarians. It cannot, therefore, be said to have received the general acceptance which is a requisite for a binding convention. Had the pledge, assuming it was accepted to be one, been given the publicity given to the 1957 conventional agreements, the British Government would not have been able to wriggle out of the situation easily.

On the charge that it had broken the convention not to legislate for matters within the competence of the Federation,⁽⁴⁰⁷⁾ the United Kingdom Government advanced three arguments in rebuttal. The first was that such a convention did not apply in the case of dependencies which had a responsible government type of constitution but only to those having self-government constitutions like Southern Rhodesia. In view of the fact that the United Kingdom remained ultimately responsible for the Northern Territories, it was pointed out, the Federation could not be said to be self-governing.

405. In fact, at first, Huggins dismissed the fears expressed on the Article by the Opposition as groundless. It was only later that he sought to have the powers under the Article fettered.

406. DeSmith says that although the Federal Government's contentions could not be sustained on general principles of constitutional law, they held a strong argument because of the pledges made.

407. See The Constitutional Convention (C. Fed. 232), op.cit.

86. The second argument was that the convention applied only to concurrent matters (i.e. those matters in which both the United Kingdom and the Federation could make law) and not to constituent power, so that while the enacting of ordinary legislative measures would have been a breach of the convention, the power to make constitutional changes remained unfettered. Thirdly, that if the convention extended to powers of amendment of the Constitution too, then it did so only to those parts which the Federal Legislature had power to amend and these did not include Article 1 of the Constitution, constituting the Federation, because an amendment to permit the secession of one territory or to dissolve the Federation would be in conflict with Section 1 (1) of the Federation of Rhodesia and Nyasaland (Constitution) Order in Council and accordingly repugnant to the Order in terms of the Colonial Laws Validity Act.⁽⁴⁰⁸⁾

The validity of the first and third arguments cannot be disputed. It was clear from the beginning that although the Federation took over most of the important powers Southern Rhodesia enjoyed before the association, it was not as free from the powers of the United Kingdom as was Southern Rhodesia. The Federation had a great deal of responsible government but was not self-governing. In the absence of clear provisions to that effect in the Constitution or in an Act of Parliament of the United Kingdom or in an Order in Council, the Federation could not, therefore, escape the legislative powers of the United Kingdom by asserting the convention that the United Kingdom could not legislate for a self-governing territory without being requested by the Government of that territory to do so. The convention of 1957 which could have bound the United Kingdom had it been worded otherwise, did not do so. The United Kingdom undertook not to legislate for the Federation without being requested to do so only in those matters which were within the competence of the Federal Legislature. Since the provisions establishing the Federation were not within the competence of the Federal Legislature the powers of the United Kingdom remained unfettered by the Convention. The second argument of the British Government was that the convention did not apply to constitutional amendments that cannot be sustained. It certainly applied to all the provisions of the Constitution except the constituent ones.

In conclusion, it must be mentioned that the mere fact that the United Kingdom had the power to dismember the Federation or change its structure would probably not, under normal constitutional circumstances, have given rise to the exercise of the power.

408, see House of Lords Debates, Vol. 245, Col. 1221: 19 Dec., 1962 (Lord Dilhorne, L.C.) also Vol. 238 Cols. 957 -8: 27 March, 1962 (Viscount Kilmauir, L.C.).

It has never been the practice of British Governments to exercise their legal powers in conflict with the wishes of the Government of a territory once the territory has been given responsible government. These powers were used in Central Africa because of the vast responsibilities of the United Kingdom in Northern Rhodesia and Nyasaland and because of the political complexities that had arisen. It should be noted that at the time when these controversies were raging between the Federal Government and the British Government, the latter had dissolved another Federation (the West Indies Federation) because of friction between its states. The West Indies Federation enjoyed self-government but the British Government dissolved it against the views of the Federal Government.⁽⁴¹⁹⁾ Before dissolving the Federation an order in Council was enacted derogating from the granting of self-government.⁽⁴¹⁹⁾ The constitutional powers of the United Kingdom in relation to the West Indies Federation were not as wide as those she retained in relation to the Federation of Rhodesia and Nyasaland.⁽⁴¹¹⁾

419. On the decision to dissolve the West Indies Federation, see House of Commons Debates, Vol. 653, Cols. 230-231: Feb. 6, 1962; ibid., Vol. 655, Col. 1102: March 13, 1962.

410. See House of Commons Debates, Vol. 657, Cols. 127-139: 2 April, 1962; and S.Ls. 1962, p.1032.

411. None of the territories constituting the West Indies Federation had a constitutional relationship with the United Kingdom similar to that which Northern Rhodesia and Nyasaland had with the United Kingdom.

By the beginning of 1963 it had become clear that the Federation could not survive and preparations began to dissolve it. On May 3, 1963, the United Kingdom announced its intention to dissolve the Federation.⁽⁴¹²⁾ On June 18 the First Secretary of State announced that the Government of the Federation and the Governments of Southern Rhodesia and Northern Rhodesia had agreed to attend a conference on the orderly dissolution of the Federation and the consequential problems involved.⁽⁴¹³⁾ The Nyasaland Government, whose territory was already to all intents and purposes no longer a member of the Federation, agreed to send observers to the Conference.⁽⁴¹⁴⁾

The Conference was held at the Victoria Falls Hotel on the 28th of June and completed its work on 3rd July.⁽⁴¹⁵⁾ It agreed that arrangements should be made for the orderly and speedy transfer of Federal responsibilities to the territories and that some items which were not complicated could be transferred to the territories even before dissolution. Others had to be studied by the machinery the Conference agreed to set up.⁽⁴¹⁶⁾ Two Committees - A and B - were to be set up.

Committee "A" (General Committee)

This Committee was to comprise representatives of the United Kingdom, the Federation, Southern Rhodesia and Northern Rhodesia, under a United Kingdom chairman, appointed after consultation with the other three Governments. The committee was to work out details on the reversion of Federal functions to the territories; provide solutions to problems arising from dissolution, particularly as regards the Federal Public Service, the Armed Forces and the Judiciary; and to make recommendations as to the means of dealing with Federal assets and liabilities.⁽⁴¹⁷⁾

Committee "B" (Committee on Inter-Territorial Questions)

This committee was to be composed of officials representing the Territorial Governments, assisted by Federal officials. The Committee was to work under the chairmanship of the United Kingdom. Its terms of reference were to work out, in respect of those Federal functions referred to it by Committee "A" above, detailed arrangements for the reversion of these functions to territorial responsibility, having regard to the possibility of collaboration between the territories in particular fields.⁽⁴¹⁸⁾

412. For this decision, see Alport, *op. cit.*, p. 177.

413. See Report of the Central Africa Conference, 1963, (Cmd. 2093 of 1963), (London, H.M.S.O., July, 1963), p.3.

414. *Ibid.*

415. For a list of those who attended, see *ibid.*, Annex. A .

416. *Ibid.*, paras. 2, 4 and 5.

417. *Ibid.*, para. 9.

418. *Ibid.*, para. 9.

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The Conference discussed at length (leaving details to the two Committees) matters concerning the Federal Public Service, (419) Federal assets and liabilities, (420) inter-territorial collaboration, (421) transfer of money and taxation functions, (422) defence, (423) citizenship, (424) and the Federal Supreme Court. (425) It also considered the time table for dissolution. It was agreed that in drawing up the time table it was necessary to strike a balance between the need for speed and the orderly transfer of Federal functions to territorial responsibility. The end of the year was set as the approximate time when the main range of Federal functions would have been, or would be in the position to be, transferred to the territories. The Federal Legislature and Executive were to be brought to an end by that time. Subject to settlement on that date of the important general issues such as the apportionment of the Public Debt and other liabilities, the apportionment of assets and the future of the Federal Public Service, December 31 was to be the dissolution date. The Committees referred to above were to complete their work by mid-September. Thereafter Governments were to reach final decisions on all questions to arise out of dissolution. This was to be done by mid-October. The decisions were to be made through consultation and not at a Conference. If all the decisions were made in sufficient time before December 31, the British Government was then to enact legislation to give effect to all decisions from midnight of December 31.

After the Conference a Bill was introduced in the United Kingdom Parliament, resulting in the Rhodesia and Nyasaland Act. (426) The purpose of this Act was to confer on Her Majesty in Council powers to provide for the dissolution of the Federation or the secession therefrom of any of the territories comprising it as well as matters incidental.

419. Ibid., paras. 14 - 20.

420. Ibid., paras. 21-28.

421. Ibid., paras. 29 - 36.

422. Ibid., paras. 37 - 42.

423. Ibid., paras. 43 - 46.

424. Ibid., paras. 47 - 50.

425. Ibid., para. 51.

426. IP & 12 Eliz, C 34

The ACT received Royal Assent on 31 July.

Section 1 (1) stated that Her Majesty might by Order in Council provide for the dissolution of the Federation of Rhodesia and Nyasaland with the consequential distribution of the functions of the Federal Government and Legislature among the Territories and that such Order in Council might make or authorize the making of such incidental, supplemental and consequential provisions as appear necessary and expedient.⁽⁴²⁷⁾

The time table was adhered to successfully. Accordingly, in September, in pursuance of the powers conferred by the Rhodesia and Nyasaland Act, Her Majesty enacted the Federation of Rhodesia and Nyasaland Order in Council, 1963,⁽⁴²⁸⁾ to implement decisions which had already been reached by the civil servants (it will be noted that the Committees referred to above were to complete their work by mid-September) and to transfer legislative and executive powers in respect of specified matters from the Federal to the Territorial Governments at varying dates between October 1 and December 1. It has been suggested that the Order was, in fact, ultra-vires the Act in so far as it purported to confer legislative powers on the Legislature of Southern Rhodesia, thereby amending the Southern Rhodesian Constitution.⁽⁴²⁹⁾ The Rhodesia and Nyasaland Act did not, it appears, clearly grant power to produce such a result. The position was, however, different in the case of Northern Rhodesia and Nyasaland. Section 3 (3) of the Act provided that "the powers conferred by this Act shall be in addition to, and not in derogation of, the powers conferred by any other enactment." This preserved the powers of the Crown under the Foreign Jurisdiction Act, 1890, in relation to Nyasaland and Northern Rhodesia;⁽⁴³⁰⁾ but not in relation to Southern Rhodesia.

The Rhodesia and Nyasaland Order in Council was replaced on December 20 by the Federation of Rhodesia and Nyasaland (Dissolution) Order in Council, 1963.⁽⁴³¹⁾ Section 1 of this Order provided that the Federation of Rhodesia and Nyasaland and, with it, the Federal Government, the Federal Legislature, and except as provided by Section 19 (temporary continuation of certain Federal Courts), the other Federal Authorities established by the Constitution of the Federation, were to be dissolved immediately before January 1, 1964.

427. For other provisions of the act, see Sections 2 and 3. The Act has only three sections.

428. S.I. 1963, No. 1635.

429. See Palley, op.cit., pp. 680-3.

430. See Buck V. Attorney-General (1964) 2 All E.R. 663 at 668.

431. S. Is. 1963, No. 2085; Appendix 18 of the Laws of Zambia.

The Constitution was to cease to have effect thereupon
except as provided by Section 19.

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The Order provided for the establishment of an authority
to be known as the Liquidating Agency.⁽⁴³²⁾ The Agency was to consist
of three persons holding or acting in the office of Secretary to the
Treasury of Southern Rhodesia, Permanent Secretary to the Ministry
of Finance of Northern Rhodesia and Secretary to the Treasury of
Nyasaland or any office which might be substituted therefor.⁽⁴³³⁾
The three could act through their deputies.⁽⁴³⁴⁾ The Agency was to
be a body corporate, capable of suing or being sued and of holding,

acquiring and alienating movable or immovable property and of
doing all such other acts (subject to the Order) done by
bodies corporate.⁽⁴³⁵⁾

The functions of the Agency were to be the winding
up of the Federation and, subject to the Order, disposal of
its assets and liabilities. In addition to the general
functions the Agency was also to: (a) apportion and distribute
as might be agreed between the Governments of the Territories
the assets and liabilities of the Federation or any other
body vesting in or devolving on the Agency; (b) exercise
until May 1, 1965, functions of the Commissioner of Taxes of
levying and collecting taxes on income or profits; and (c)
collect excise duty and surtax payable in respect of any
month up to and including December, 1963.⁽⁴³⁶⁾ The Agency
could be entrusted with additional functions.⁽⁴³⁷⁾ It could,
in fact, do anything calculated to facilitate the discharge
of its functions or which was incidental or conclusive thereto,
including in particular, but without prejudice to the
generality of the said powers, power to: (a) declare forfeit
to the Agency after three months' notice any unclaimed monies
or other property held to the order of the Exchange Control
Suspense Account of the Federation; (b) dispose of outstanding
matters in relation to the Commonwealth Assistance Loan under
the Federation of Rhodesia and Nyasaland Credit Agreement,
1962; (c) pay to the Government of a Territory any expenditure
incurred by it in the performance of functions on behalf of
the territories jointly; (d) invest money in such bonds,
stock or other securities as it might think fit; (e) borrow
sums required by it for meeting any of its obligations or
discharging any of its functions; (f) write off debts or
settle claims; (g) delegate the exercise of any of its
functions or powers; and (h) arrange for the audit of account.⁽⁴³⁸⁾
The life of the Agency was to continue until it was satisfied,
with the concurrence of the Territorial Governments, that it
had completed the performance of its functions.⁽⁴³⁹⁾

432. S. 3 (1) of the Order in Council.

433. S. 3 (2).

434. S. 3 (3).

435. S. 4.

436. S. 6 (2) (a) - (c).

437. S. 6 (3).

438. S. 7 (a) - (c).

439. S. 9.

Any freehold property of the Federation situate in a Territory was to vest on dissolution in Her Majesty or such other person or authority as the Governor of the Territory might designate for the purposes of the Territory's Government.⁽⁴⁴⁰⁾ Any property not so situate was to vest in the Liquidating Agency.⁽⁴⁴¹⁾ Movable property, including currency notes, coin bonds, securities, money in bank and other funds, unless otherwise provided by the Order or allocated to a Territory by agreement made before dissolution, was equally to vest in the Agency.⁽⁴⁴²⁾ Claims by the Federal Government were to be prosecuted by the Agency while claims against it were to be made against the same body or a Territorial Government if it agreed with the Agency.⁽⁴⁴³⁾ The outstanding Internal and External Public Debts of the Federation were to be settled in terms of Sections 12 and 16 respectively and in accordance with the detailed provisions of Schedule 1 to the Order.

Section 17 provided for the winding up of certain Federal Statutory bodies.⁽⁴⁴⁴⁾ While Section 18 dealt with pending legal proceedings and the substitution of parties where necessary. The Federal Supreme Court, the Court Martial Appeal Court, the Special Court for Income Tax Appeals and the Patents Tribunal were to continue to hear and determine cases pending before them on dissolution.⁽⁴⁴⁵⁾ This applied only to cases from Southern and Northern Rhodesia.⁽⁴⁴⁶⁾

The complicated problem of the Federal Public Service was dealt with in Sections 20 - 32. A Staff Authority and a Staff Commission were to be established by the Federal Government before its dissolution to look after the welfare and rights of Federal Civil Servants serving in the Territorial Services on secondment. The two institutions were to last until June 1, 1964.⁽⁴⁴⁷⁾ By that time it was thought the position of these officers would have been settled. A fund called the Central African Pension Fund was to be established. The purposes of this Fund were to be the payment of pensions, sums by way of commutation of pension and refund of pension contributions, and gratuities, allowances and other benefits to persons in or formerly in the Federal Public Service.

440. S. 10. (1).

441. Ibid.

442. S. 10 (2).

443. S. 11.

444. The Bodies referred to were the Agricultural Marketing Council, the Cold Storage Commission, The Dairy Marketing Board, the Federal Broadcasting Corporation, the Grain Marketing Board, the Pig Industry Board, the North-Eastern Tobacco Marketing Board, the South-Western Tobacco Marketing Board, and the Tobacco Export Promotion Council.

445. S. 19.

446. Ibid.

447. For these two institutions, see Ss. 20, 21, 22 and 23.

The Fund was to be vested in Trustees domiciled in the United Kingdom but appointed by the Governments of the Federation and the United Kingdom(448). A body to be called the Central African Pension Agency was also to be established. It was to consist of the Officer for the time being performing the functions of Pensions Officer of the Government of Southern Rhodesia. In carrying out duties under these provisions, the Officer was not to be deemed to be acting on behalf of the Southern Rhodesian Government. In dealing with persons in Northern Rhodesia and Nyasaland, the Officer was to act through the agency of the Pensions Officer of the territory concerned. The functions of the Agency were to be, among other things, the payment of pensions and discontinuance, suspension, forfeiture, withholding or commutation of such pensions.(449)

Certain services were considered necessary to be run jointly after the Federation had been dissolved. These were electric power, civil air transport, agricultural research, currency and the Bank of Rhodesia and the Railways. Two of these services - electric power and the railways did not extend to Nyasaland. It would be recalled that some of these services were also operated jointly before the establishment of the Federation.

(a) Electric Power

The Order in Council provided for a joint authority for Northern Rhodesia and Southern Rhodesia known as the Higher Authority for Power.⁽⁴⁵⁰⁾ It was to consist of four members - two Ministers from the Northern Rhodesian Government and two Ministers from the Southern Rhodesian Government.(451) Its functions were to run the supply of electricity from the jointly owned Kariba Scheme and to control the Central African Power Corporation, a body which was also to be constituted under the Order(452). In addition it was to perform other functions conferred by the Order(453). It could delegate its functions to the Corporation(454). The Central African Power Corporation was to be a corporate body comprising a chairman (initially appointed by the Southern and Northern Rhodesian Governments and thereafter by the Higher Authority) and seven other members, six of which were to be appointed equally by each of the two Governments and the other, who was to be acceptable to the Commonwealth Development Corporation, by the Higher Authority(455). Each Government was to designate one of its three members as a deputy chairman(456). The Corporation was to replace the Federal Power Board and assume its assets and liabilities. Its functions were to be the supply of electricity and matters incidental thereto(457).

The Agreement to establish the Power corporation was concluded on November 25, 1963,⁽⁴⁵⁸⁾ between the Southern Rhodesian and Northern Rhodesian Governments. The arrangement worked well until the unilateral declaration of independence by the Rhodesian Government on November 11, 1965. Thereafter, the Zambian representatives refused to meet their Rhodesian counterparts. The arrangement has, however, not been dissolved at the time of writing.

(b) Civil Air Transport

The Order in Council provided for the establishment of a joint authority for the three Territories known as the Higher Authority for Civil Air Transport.⁽⁴⁵⁹⁾ The Authority was to consist of three Members - Ministers appointed by each of the three territories.⁽⁴⁶⁰⁾ The Order also provided for the establishment of a corporation, with corporate body status, to be known as the Central African Airways Corporation.⁽⁴⁶¹⁾ The Corporation was to be composed of a Chairman (initially appointed jointly by the three Governments and thereafter by the Higher Authority) and five other Members, two appointed by each of Southern and Northern Rhodesia and one by Nyasaland.⁽⁴⁶²⁾ As long as the agreement between the Central African Airways (the body that existed under Federation) and the Colonial Development Corporation (concluded on September 6, 1954) so required, there was to be one additional Member appointed by the Higher Authority with the approval of the Commonwealth Development Corporation.⁽⁴⁶³⁾ This new corporation was to replace the Central African Airways Corporation established by the Central African Airways Corporation Act, 1960.⁽⁴⁶⁴⁾ The functions of the Higher Authority were to be the supervision of air services and the control of the Corporation.

448. For this Fund, see Ss. 24-26 and also S. 32.

449. Ss. 27-31.

450. S. 33 (1).

451. S. 33 (2).

452. S. 36.

453. S. 34 (1).

454. S. 34 (2).

455. S. 37 (1).

456. S. 37 (2).

457. S. 43 (1).

458. See S.R. G/N 657A of 1963 for text.

459. S. 47 (1).

460. S. 47 (2).

461. S. 50.

462. S. 51 (1) (a) and (b).

463. S. 51 (1) (c).

464. S. 56 (1).

465. S. 48 (2).

466. S. 48 (3).

467. S. 57.

468. See, e.g., S.R. G/N 750a of 1963 for text and annexures.

469. S. 61 (1).

470. S. 61 (2).

471. S. 62 (1) and (3).

472. S. 63 (1). See also Ss. 64 and 65 for other provisions on the Council.

It could also exercise the powers of the Government of any territory and such other powers as might be entrusted to it to obtain from and grant to other Governments rights or concessions in connection with air services.⁽⁴⁶⁵⁾ The Authority could delegate some of its functions to the corporation.⁽⁴⁶⁶⁾ On the other hand, the functions of the Corporation were to be generally, to supply the needs of the territories for air services within, into, and through the territories.⁽⁴⁶⁷⁾

Agreement regarding the establishment of the corporation was concluded on December 4 and 5, 1963.⁽⁴⁶⁸⁾ The arrangement would have worked well had it not been for the seizure of independence by Rhodesia. The Corporation was dissolved and out of the arrangement was born Zambia Airways, Malawi Airways and Rhodesia Air Services.

(c) Agricultural Research

An Agricultural Research Council, a body corporate, was to be established.⁽⁴⁶⁹⁾ The Council was to be composed of a chairman appointed jointly by the Governments of the three territories, three others appointed equally by each of the three Governments and such other Members as the three Governments might think necessary to be appointed.⁽⁴⁷⁰⁾ The functions of the Council were to be the promotion, direction, control and carrying out of agricultural research, including veterinary and tsetse research in the three territories, particularly in regard to soils, vegetation, crops, livestock, forestry, hydrology, wild life and fisheries and such other functions as might be further conferred on it by the three Governments.⁽⁴⁷¹⁾ The Council was to replace the Agricultural Research Council of Rhodesia and Nyasaland established in terms of section 18 of the Research Act, 1959, and was to assume that body's rights, assets and liabilities.⁽⁴⁷²⁾ This body, like the others, was disrupted by Rhodesia's declaration of independence.

~~Footnotes on page 327.~~

473. The committee consisted of the Ministers of Finance of the three territories.

474. S.66.

Footnotes on page 327.

(d) Currency and the Bank of Rhodesia

The Order in Council provided that Federal currency was to continue as legal tender until January 1, 1965, or such later date as might be appointed by the Committee of Ministers, ⁽⁴⁷³⁾ not later than June 1, 1965. The Capital Stock of the Bank of Rhodesia and Nyasaland held by the Federal Government was on dissolution to be held by the Liquidating Agency and if the Agency ceased before the date on which the Bank was to cease, by some other person or body appointed by the Committee of Ministers. ⁽⁴⁷⁵⁾ The Committee of Ministers was to exercise the functions conferred on the Governor-General and the Federal Minister of Finance and such other functions as might be conferred on it. ⁽⁴⁷⁶⁾ The Bank was to dissolve on December 31, 1965, or earlier on a day appointed by the Committee of Ministers. ⁽⁴⁷⁷⁾ Its gold, cash, securities, outstanding loans and other financial assets were to be distributed among the Central Banks of the Territories in proportion to the amount of Federal currency which had been handed in by them before demonitisation to the Bank of Rhodesia and Nyasaland and redeemed by that Bank. ^(477a) Immovable property and movable property other than that mentioned above was to vest in the Central Bank of the territory in which it was situated. ⁽⁴⁷⁸⁾ The Bank ceased to exist in June, 1965 and was replaced by the Central Banks of Malawi, Zambia and Rhodesia.

(e) Railways

The Rhodesia Railways was to be operated jointly by Northern Rhodesia and Southern Rhodesia. ⁽⁴⁷⁹⁾ This had been the position before Federation. It was to be run by a Board of Management comprising a Chairman appointed by the Higher Authority for Railways and six other Members, appointed by each of the two Governments. ⁽⁴⁸⁰⁾ The Board was to be a corporate body with all the powers conferred by such status. ⁽⁴⁸¹⁾ The Order also provided for the establishment of an authority to be called the Higher Authority for Railways, composed of four members - two Ministers appointed by each Government. ⁽⁴⁸²⁾ The powers of this Authority were to be those contained in the operative railways legislation.

The two Governments had concluded the agreement on December 10, 1963, ⁽⁴⁸³⁾ on which the joint enterprise was to be run. The arrangement reached an impasse, however, after the Rhodesian declaration of independence. This resulted in a split of the unitary system into Zambia Railways and Rhodesia Railways.

475. S. 67. 476 S. 68 (2) (a) & (b). 477. S. 70 (1).
 477a. S. 70 (2)(a). 478. S. 70 (2) (b). 479. S. 71 (1).
 480. S. 71 (2). 481. S. 71 (1) & (3). 482. S. 71 (4).
 483. See e.g. S.R. G/N 750 B of 1963. A further agreement was concluded between Sthn. Rhodesia, Nthn. Rhodesia and Bechuanaland - see S.R. G/N No. 773 of 1963.

The dissolution of the Federation would terminate Federal citizenship. The Order in Council accordingly made provision for the citizenship of those persons who were Federal citizens. As from dissolution the British Nationality Acts 1948 and 1958 were to have effect as follows: Section 1 (3) of the Act of 1948 (which as amended by the 1958 Act included the Federation among Commonwealth countries with separate citizenship from that of the United Kingdom and Colonies) was to be read with the insertion of Southern Rhodesia in place of the Federation.⁽⁴⁸⁴⁾ Any reference in those Acts to protectorates was to include the protectorates of Northern Rhodesia and Nyasaland.⁽⁴⁸⁵⁾ Any reference in the Acts to a period of residence in a protectorate was to include residence in either of the two protectorates before dissolution.⁽⁴⁸⁶⁾ Any person who was a citizen of the Federation without being also a citizen of the United Kingdom and Colonies was, on dissolution, notwithstanding anything to the contrary in the British Nationality Acts 1948 and 1949, to become a citizen of the United Kingdom and Colonies unless he became a citizen of Southern Rhodesia.⁽⁴⁸⁷⁾ It should be noted that only very few Africans in Northern Rhodesia and Nyasaland were Federal citizens. The majority had remained protected persons during the existence of the Federation and dissolution was, therefore, not going to affect their status in any way.

The Demise

On December 31, 1963, the Federation, which had been in a "coma" since the day it was announced that Nyasaland would be allowed to withdraw, passed away and was buried amidst deep sorrow and bitter feelings in some quarters and joy in others. "The burial was performed with all proper decency. The obsequies, if a trifle perfunctory, were as much as time and the pre-occupation of the grave diggers with their own political and personal problems would permit."⁽⁴⁸⁸⁾ Welensky, who had championed closer association from the 1930s and in whose hands the Federation had crumbled, felt bitter towards the British Government. He sums up the hopes he had for the Federation and his disappointment at its dissolution in the concluding pages of his book as follows:-

484. S. 74 (1) (a).

485. S. 74 (1) (b).

486. Ibid.

487. S. 74 (2).

488. Alport, op.cit., p. 245.

489. Welensky, op.cit., pp. 363 - 364.

"The core of the tragedy is that the most hopeful and constructive experiment in racial partnership that Africa has seen in our time has been wantonly destroyed by the Government which only ten years earlier gave it its impetus.

In spite of the fate that overtook it, I still believe that the Federation of Rhodesia and Nyasaland was a noble concept, which could have succeeded and which, if it had been permitted to continue, could have provided a truly significant example to the world of how people of different races and different territorial origins could live and work together for their mutual advantage and betterment." (489)

It may be true that the Federation was a noble concept and the most hopeful and constructive experiment in racial partnership in Africa. However, it lacked support from the majority of its inhabitants - the Africans. The Africans in Northern Rhodesia and Nyasaland could only be kept in it by force of arms. Lord Alport aptly sums up the difficulties that faced the experiment in these words:

"....the Federation began in an atmosphere of heartsearching and indecision. Many of the British in the Northern administrations were fiercely opposed to it. In Southern Rhodesia it was anathema to a determined minority of Europeans. Everywhere its African opponents heavily outnumbered the handful who were in its favour. In the outside world there was widespread criticism of it, ranging from the sentimental anti-colonialism of certain sections of American opinion to the ruthless and vindictive propaganda of Nasser and the Soviet bloc. At the height of its prestige as a world power, a British Government might perhaps have been able to shrug off all this criticism and, ignoring opposition, have carried a federal experiment in Central Africa through to success. Yet, I doubt it - the odds against it were perhaps always far too great." (490)

On dissolution of the Federation many statutes enacted by the Federal Legislature were adopted by the three territories as part of their law. This saved the Territorial Legislatures from re-enacting these statutes after the assumption of Federal functions. (491)

489. Wolensky, op.cit., pp. 363 - 364.

490. Alport, op.cit., p. 247.

491. For constitutional anomalies which followed the dissolution of the Federation, see Palley, op.cit., pp. 692 - 701.

CONSTITUTIONAL DEVELOPMENT FROM 1953 - 1964

The campaign for Federation did not completely distract the attention of both Africans and Europeans in Northern Rhodesia and Nyasaland from local constitutional issues. In the case of Nyasaland it had been stated when the first two Africans were nominated to the Legislative Council in terms of the 1949 constitutional changes "that the introduction of a new Constitution would be further considered after experience of working the enlarged Council."⁽¹⁾ Accordingly, in 1953, one African and one Asian were added to the Council. This brought the composition of the Council to ten officials (excluding the Governor), six European non-Officials, one Asian non-Official and three African non-Officials.⁽²⁾ The increase of Africans to three made it possible to nominate one from each of the three provinces of the territory.

THE NORTHERN RHODESIAN CONSTITUTION OF 1954

European non-Officials kept pressure on the British Government for further constitutional changes. The British Government decided, however, not to entertain the demands until the Federation issue was out of the way. When this question had been settled and what was left was the introduction of the Federal constitution, the non-Officials resumed their demands. Welensky and Beckett went to London to present to the British Government proposals for two more elected seats in the Legislative Council and an additional portfolio in the Executive Council. They were, however, prepared to accept that the new portfolio be held by the Member representing African interests. They were also prepared to accept two more Africans in the Legislative Council provided one of the Europeans representing African interests was withdrawn. This, if accepted, would have meant, in fact, a gain of only one seat for the Africans while Europeans gained two. The proposals also demanded a reduction of officials in the Legislative Council and parity in the Executive Council between officials and non-Officials.⁽³⁾ This time, the European non-Officials were, however, no longer alone in the ring with demands for constitutional changes. The African National Congress had made an impact on the political scene through its campaign against Federation. "Majority rule" and "one man one vote" were no longer slogans of the "spoilt natives" of the Gold Coast only. They had become current in the streets of Lusaka.

1. House of Commons Debates, Vol. 489: 20 June, 1951 (Dugdale)
2. Bretford, op.cit., pp. 641 - 2; Jones, op.cit., p.196; Cmd. 1149 of 1960, op.cit., p. 52.
3. For these proposals, see Gann, A History of Northern Rhodesia pp. 437-9.

While, therefore, Welensky and Beckett put to the British Government the above demands, Africans at first called for an African majority in the Legislative Council and three members in the Executive Council. Later they toned down their proposals to parity with European non-Officials in both the Legislative and Executive councils. They also called for the extension of the franchise to British protected persons⁽⁴⁾.

The Secretary of State, faced with these two sets of diametrically opposed proposals adopted what he considered a compromise solution although it was, in fact, acceptance of the European plan with a few modifications. He agreed to increase the European Unofficial Members from ten to twelve and Africans from two to four. In the Executive Council all the four unofficials were to hold portfolios. The Secretary of State had, therefore, disagreed with the European non-Officials in only three things contained in their demands: reduction of officials in the Legislative Council; parity in the Executive Council and withdrawal of one European member representing African interests if Africans were increased to four. In one respect he had, in fact, done more than the European non-Officials had demanded. They had demanded one additional portfolio which would have raised the number of non-Officials with portfolios to three. Since they had said they would not mind if the additional portfolio went to the European Member representing African interests, this would have left one elected Unofficial Member without a portfolio. The Secretary of State decided to give all the four Unofficial Members (including the Member representing African interests) portfolios. On the other hand, the Secretary of State had rejected all the African demands.

The European non-Officials denounced the Secretary of State's plan and called it appeasement. They decided to resist its introduction to the hilt. Welensky, who was now a Member of the Federal Interim Government, contemplated resigning from Federal politics and fighting to foil the plan by all means, including, if necessary, political strikes in industry and on the mines. Since Welensky commanded unrivalled support among the railway workers and mineworkers, such political strikes would have been obeyed, causing economic repercussions the country could not afford. In addition Welensky's departure from Federal politics, would have placed the new institution in jeopardy. The Secretary of State, however, refused to alter his plan. Doing so would have meant depriving the Africans of the little advance he had given them. He had completely ignored the Africans' demands in his plan and was not unaware of the vehement denunciations the Africans were levelling at the plan.

4. Ibid.

Welonsky was persuaded by wiser counsels not to quit Federal politics. But, in the meantime, he persuaded his colleagues to resign from all official bodies, including the Executive Council. Faced with this new problem the Secretary of State promised a personal visit to the territory and that he would not change the franchise for five years. This mollified the European Unofficial Members whose fear was that the British Government might introduce drastic changes in the constitution to give Africans the vote before long.

The new Constitution was put into effect by an Order in Council without any changes. The Legislative Council was now to be composed of the Speaker, eight Officials and eighteen non-Officials. The non-Officials were divided into six Members representing African interests and twelve elected Members. Of the six Members representing African interests four were to be Africans and two were to be Europeans. The Africans were to be selected for appointment by the African Representative Council while the two Europeans were to be directly appointed by the Governor. The Executive Council, on the other hand, was to consist of five officials and four non-Officials. It will be seen from the composition of the Legislative Council that the European elected non-Officials, who had wanted to control the Council as a step towards self-government, had failed to do so. If the Officials and the Members representing African interests combined, the European elected Members would be out-numbered by two. The officials, therefore, became the deciding bloc in contentious issues between European elected Members and Members representing African interests. In the Executive Council the European non-Officials had also failed to gain parity which they had demanded. The Officials remained with a majority of one over all non-Officials, including the Member representing African interests. The European Elected Members could not, in fact, rely on the Member representing African interests. He was likely to side with the Official Members more than with them.

Elections under the new Constitution were held on February 18, 1954.⁽⁵⁾ The Federal Party won ten of the twelve elected seats. The other two were won by independents who had lost during the Federal election the previous December, under the ticket of the Confederate Party.⁽⁶⁾ The four African seats were captured by African National Congress supporters although they had not been sponsored by the organization. The organization and its active leadership kept out of the contest.

5. An election had also been held in Southern Rhodesia on January 27, 1954. This had been won by the United Party, a party with policies similar to those of the Federal Party. In fact, this was the Party Huggins led before forming the Federal Party. The two later joined to become the United Federal Party.

6. See Dvorin, "Central Africa's First General Election," p. 38. See also Gann, A History of Northern Rhodesia, p. 439.

4. New European faces appeared in the Legislative Council to represent African interests. These were Harry Franklin, a former Director of Information in the territory and John Smith Moffat. One of them automatically had a seat in the Executive Council. Both were very liberal men and commanded African respect and confidence.

A new element was introduced in the working of the Executive Council. This was the principle of collective responsibility. Until then non-Officials who were in the Executive Council but who did not hold portfolios did not consider themselves to be in any way bound by decisions of the Government. They considered themselves free to question Ministers in the Legislative Council and to criticize the Government. Occasionally, Members holding portfolios also questioned Government policy and asked questions from the officials.⁽⁷⁾ The Unofficial Members did not then consider themselves part of the machinery of Government. They saw themselves as Members of the Opposition co-opted to a Government Committee to give advice without being bound by the conclusions of the Committee. The introduction of collective responsibility was the first step towards a full ministerial system of government in the territory.

Before leaving the events in Northern Rhodesia for the time being for those in Nyasaland, mention must be made of a constitutional development that took place in 1953 with regard to Barotseland. The Lozi Paramount chief had never been happy about the lack of a clear definition by law of the constitutional position of his country. A special relation existed between Barotseland and the Crown by virtue of the Lewanika Concession of 1900 but the Paramount Chief did not think that sufficient. The movement of events in Central Africa towards Federation and the constitutional advances in Northern Rhodesia themselves raised apprehensions in the Paramount Chief that the special position of his territory might be forfeited. He made representations to the British Government to have the status of his territory clearly defined and settled. These representations were agreed to by the British Government. Accordingly an Order in Council - the Northern Rhodesia (Barotseland) Order in Council, 1953,⁽⁸⁾ - was enacted to give Barotseland special status. The Order officially styled the territory "Barotseland Protectorate." Although, therefore, the country remained part of Northern Rhodesia, the new arrangement allayed the fears of the Lozis on the drift of events in Central Africa."⁽⁹⁾

7. Cmd. 1149 of 1960, op.cit., para. 54.

8. S. 1. 1953, No. 739.

9. Sec. Gann, A History of Northern Rhodesia, p. 439.

In Nyasaland, in the meantime, the failure to stop Federation and its consummation on October 23, made the African National Congress turn its efforts to the homefront. In January, 1954, the organization conceded defeat and by a resolution at its annual conference called off its resistance campaign against Federation. The resolution added, however, that the organization was still opposed to Federation.⁽¹⁰⁾ Free for the time being from its bitter activities against "chitanganya",⁽¹¹⁾ the organization called for immediate constitutional changes in the country. It should be noted that the slogans "self-government" and "one man one vote" had an earlier circulation among the Africans of Nyasaland than among those of Northern Rhodesia.⁽¹²⁾

The Colonial Office, perhaps feeling guilty of the fact that the British Government had imposed Federation against the overwhelming opposition of the Protectorate's people, did not want to antagonize them further by withholding reasonable constitutional changes. Consequently, early in 1955 the Colonial Secretary announced provisions for a new Constitution.^(12a) The provisions were to increase African representation in the Legislative Council from three to five. Non-African unofficial seats were to be reduced to six by abolishing the special seat for Asians. Europeans, Asians and Coloureds were to be taken as one entity for the purposes of representation. Officials were to be increased to eleven (excluding the Governor). No changes were to be made to the Executive Council: it was to continue to be composed of Officials and two European non-Officials. In terms of numbers the new provisions were to make very little difference. The Africans were to gain only two seats while the non-Africans were to lose a seat. The Officials (including the Governor) were to continue to be in majority in the Legislative Council and to dominate the Executive Council. The significant changes were to be in the systems of election of the Unofficial Members particularly the non-African. For the first time in the history of Nyasaland an electoral system was to be introduced for the election of the non-African Unofficial Members. The six non-Africans were to be elected on a constituency basis by a non-African electorate. There would, therefore, be six constituencies in all.

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10. Report of the Nyasaland Commission of Inquiry (popularly known as the Delvin Report) Cmd. 314 of 1959 (London, H.M.S.O., 1959) p. 11, para. 23. See below on this Report.
11. Nyanja word for Federation.
12. Not only was the Nyasaland African National congress formed earlier (in 1943) than the Northern Rhodesia African National Congress (1948) but Rev. Booth and Chilembwe had called for self-government many years earlier.

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6. Candidates were to be registered voters not subject to any disqualification at the time. In order to qualify as a voter a non-African had to be a British subject of twenty-one years of age, born in Nyasaland or who had resided in the territory continuously for two years immediately preceding application. In addition the applicant was to be in occupation of property to the value of £250 and to have been in such occupation for at least three months prior to the date of application or in receipt of income of not less than £200 per annum, plus, in each case, an adequate knowledge of the English Language to be able to complete and sign the necessary form for registration without assistance. Married women who had the other qualifications could, if they were unable to do so in their own right, qualify on the property or income qualifications of their husbands. This provision was not to apply to women married under a system allowing polygamy, even though the husband had only one wife. What was going to matter was not the number of wives the wife's husband had but the system under which the wife was married. Such a woman could, of course, qualify in her own right like a single woman if she had the necessary qualifications. Disqualifications were to be those usually found in electoral laws of this nature - e.g., insanity, bankruptcy and a prison sentence of a certain period.

Africans, on the other hand, were to have no popular franchise. The five Members were to be elected by the provincial Councils. The Councils of the Southern and Central Provinces were each to elect two while the Council of the Northern Province was to elect one. The election was, however, now to be direct instead of the Members being appointed by the Governor from a panel of names submitted by the African Protectorate Council. The African Protectorate Council was, in fact, to lose its function in this respect to the provincial Councils. In order to qualify as a candidate for the five African seats, the candidate had to be a British subject or British protected person, resident in the Protectorate on nomination day and able to speak, write and comprehend English. The British subject referred to here was an African British subject - i.e. those Africans who had become naturalized. The disqualifications were to be similar to those of non-African candidates.

The provisions were welcome to Europeans. For a long time Europeans had demanded the introduction of an electoral system without success.⁽¹³⁾ That it was now going to be introduced was, therefore, an achievement.⁽¹⁴⁾

13. See above, Chapter 4.

14. The proposals were, however, criticized at the Federal level and in Southern Rhodesia. N. H. Wilson, a right wing Southern Rhodesia politician wrote in the Rhodesia Herald of Feb.

15. 1955, that all economic progress in the territory would collapse if the proposals were introduced.

7.

The change was, no doubt, accelerated by the changed circumstances brought about by the Federation. On the other hand, Indians and Coloureds were going to be hit hard by the new provisions. The majority of the Coloureds would not qualify on the non-African roll as they were not British subjects but British protected persons. Children took the legal status of their mothers and most of the Coloureds were children of African mothers. As a result, when the registration closed shortly before the election, only six Coloureds were on the roll.⁽¹⁵⁾ The Indians were also adversely affected by the proposals in several ways. They would lose their special representative. Secondly, although they had the necessary income or property qualifications and were able to speak English, a great number of them could not write or read it. Thirdly, their wives, unless they were able to qualify in their own right, were not going to do so on the qualifications of their husbands since most of them were married under systems that permitted polygamy. Fourthly, a good proportion of the Indian population were of African mothers and, therefore, classified as British protected persons. It was clear, therefore, that Indians would be heavily outnumbered on the common roll by Europeans. It was also unlikely that an Indian could be elected. The effect of the limitations became clear when at the close of the registration only 338 out of 8,490 Indians had registered.⁽¹⁶⁾ On the other hand, 1866 whites out of a population of 6,730 had registered.⁽¹⁷⁾

It will be seen that this franchise was in its major aspects similar to that of Northern Rhodesia. It, however, differed from that of Northern Rhodesia in one material aspect. Africans who had become British subjects by naturalization could, if they had the other qualifications, be registered as voters in Northern Rhodesia. Under the Nyasaland provisions such Africans would not qualify. The franchise would be open to non-Africans only. An African who was a British subject remained racially an African.

While non-Africans, particularly Europeans, were happy with the provisions, Africans were disappointed by both the small increase in their seats and the withholding of a popular franchise from them.^(17a) The African National Congress denounced the indirect election system by provincial councils as being part of the British Government's tactics to delay one man one vote and self-government.

15. See Leys, "An Election in Nyasaland" (Political Studies, Vol. V. No. 3). See also Jones, op.cit., p. 199.

16. Ibid.

17. Ibid.

17 a. Note that they had demanded for self-government-See Rhodesia Herald, Feb. 11, 1955.

6. A considerable section of British opinion also criticized the little advance given to the Africans. Asked by Johnson in the House of Commons why Africans were not to be elected under the same procedure as non-Africans, the Colonial Secretary, Lennox-Boyd (now Lord Boyd) replied: "I consider that the present method of selection of African Members is the most suited to the present stage of social and educational development of the African population in Nyasaland."⁽¹⁸⁾ When the question was repeated by the same Member the following week,⁽¹⁹⁾ the Colonial Secretary avoided answering it altogether.

In spite of criticism of the proposals in Britain and denunciation of them by the African National Congress, the Colonial Secretary announced on June 15, 1955, that the proposals would be put into effect unchanged.⁽²⁰⁾ They were accordingly implemented by the Nyasaland Order in Council, 1955.⁽²¹⁾ When announcing that the provisions would not be changed, the Secretary of State, however, added that the new Legislative Council would have a life of four years and that during that time he expected the parties concerned in the territory to join together and work out measures which would be introduced at the end of four years. This promise pacified to a certain extent the high feelings of the Congress leaders that they decided to participate in the elections. Elections took place early in 1956. Europeans won all of the six non-African seats. Indians put up two candidates but both lost. The African National Congress won all the five African seats.⁽²²⁾ The former nominated Members and others who contested lost heavily. The Leader of the Nyasaland Progressive Association (a small organization which wanted ^{to} work within the framework of Federation), Matinga,⁽²³⁾ got only one vote. This shows how much Federation was disliked in the Protectorate.

18. House of Commons Debates, Vol. 537, Col. 58; 16 Feb., 1955.
 19. Ibid., Col. 1274; 23 Feb., 1955.
 20. Cmd. 814, op.cit., para. 23.
 21. S.I. 1955 No. 552. See also Nyasaland (No. 2) Order in Council 1955 (S.I. 1955 No. 1212); Nyasaland Order in Council, 1956 (S.I. 1956 No. 231) and Nyasaland (No. 2) Order in Council, 1956 (S.I. 1956 No. 334).
 22. In the Northern Province M. W. K. Chieme got 16 of the 22 votes cast; in the Central Province Chinyama was elected by 16 votes out of 49 and Chijozi by 8 votes (Congress candidates, therefore obtaining 24 of the 49 votes, losing the other 25 to other several candidates); and in the Southern Province H. B. Chipembere was elected by 21 votes out of 48 and N. B. Kwenje by 10. (Congress Candidates: therefore, obtaining 31 of the 48 votes).
 23. Matinga was the first President of the Nyasaland African National Congress. In 1958 he became a Member of the Federal Assembly.

One thing was apparent in both the Northern Rhodesian elections of 1954 and the Nyasaland African elections of 1956, African nationalism was on the ascendance. Congress Members or supporters had swept the board in both elections. This was to be the trend of events from this time onwards. Encouraged by their noticeable impact on the political scene, the nationalist organizations of both countries decided to wrest the initiative from Europeans, particularly in bringing about constitutional changes. The period from 1954 to 1960 was, therefore, packed with incidents which for the first time placed both the white settlers and the British Government in a defensive position. Several factors contributed to this unprecedented determination on the part of the Africans. The first factor was that the African leaders had seen during the Federation campaign (despite their failure to stop it) that they had tremendous support among the Africans. This support had been demonstrated in the defeat of moderates in the electoral colleges by Congress members or supporters. Second, the Federation campaign had organized the two Congresses into forces the Administration could no longer ignore. Third, the African leaders knew that their campaign against Federation had created a lot of sympathy for their cause among many British people and that the British Government could no longer, in the face of such sympathetic opinion, afford to ignore the Africans and make more concessions to the white settlers. Fourth, the success the Gold Coast Africans were making of their self-government was a source of inspiration. If the Gold Coast Africans could do it why not the Africans in Northern Rhodesia and Nyasaland. Fifth, the British Government had already committed itself to the policy of granting self-government to colonial territories. Addressing the House of Commons in 1951 the Colonial Secretary, Lyttelton, had said:

"Certain broad lines of policy are accepted by all sections of the House as being above party politics. These have been clearly stated by my predecessors from both the main parties.

Two of them are fundamental. First, we all aim at helping Colonial territories to attain self-government within the British Commonwealth. To that end we are seeking as rapidly as possible to build up in each territory the institutions which its circumstances require. Second, we are all determined to pursue the economic and social development of the Colonial territories so that it keeps pace with their political development.

I would like to make it plain at the outset that His Majesty's Government intend no change in these aims. We desire to see successful constitutional development both in those territories which are less advanced towards self-government and in those with more advanced constitutions. His Majesty's Government will do their utmost to help colonial Governments and Legislatures to foster the health, wealth and happiness of the Colonial peoples.

I hope, therefore, that however much there may from time to time be disagreements between us on details, all parties will be with me in agreeing on those ends." (24)

10. It was clear from this statement that self-government was attainable although the colonial peoples might differ with the British Government on the timetable. It was also clear from the statement that it was not to be to the minority white elements in the territories but to the indigenous peoples that self-government would be given. It was, however, possible, if the indigenous people did nothing to prevent it, for more power to be granted to the white settlers, particularly in territories like Kenya and Northern Rhodesia where there were large numbers of whites. It was, therefore, up to the indigenous people to: (a) prevent more power being conceded to the white settlers; and (b) apply pressure on the British Government to speed up the time table for self-government of the indigenous people.

With this background the two Congresses set out to work for advanced constitutional reforms. The talks would have been easy in Nyasaland where the Africans were already only one seat short of parity with the European Unofficial Members. However, the existence of a Federal Government which was hostile to majority rule in both Nyasaland and Northern Rhodesia made the task of the Nyasaland Africans almost as difficult as that of those of Northern Rhodesia - who at the time occupied only four of the eighteen unofficial seats.

In Northern Rhodesia, African political activities which culminated in the 1958 constitutional changes began in January, 1954, when the African Mineworkers' Union demanded African advancement on the mines. On January 3, 1955, the mineworkers went on the longest strike ever staged by Africans, on the grounds that their negotiations with the mine companies had failed to produce results. The strike lasted for three months. The African National Congress publicly supported the strike. The European Mineworkers' Union conceded thirteen jobs to the Africans but its members refused to teach the Africans who were to take up these jobs. At the end of 1955 Africans rioted at Nchanga. In the meantime the Congress, which had been exploiting these industrial unrests, decided to go into action itself. On February 16, 1956, the President-General, Nkumbula, issued a circular in which he described Northern Rhodesia as the darkest spot in the whole of the British Empire. The circular also stated that the social colour bar and racial discrimination in the territory was ^{more} than in the Union of South Africa.

24. House of Commons Debates, Vol. 493, Cols. 985 - 6; 14 November, 1951. The extract is also reproduced in Manchester, op.cit., Vol. 11, 1931 - 1952, p. 1266.

11.

In April the Organization called for boycotts of European and Indian shops because they practised discrimination against Africans. While the boycotts were taking place Nkumbula called for constitutional reforms based on a franchise of £50 per annum. He also called on the Government to set up an inquiry into the grievances that caused his organization to stage the existing boycotts and added that if the Government did not do so Congress would. On April 22 Congress announced that it had already an alternative Government to rule Northern Rhodesia.⁽²⁵⁾ The boycotts were effective. Europeans were alarmed by the turn of events. At a meeting of various European Associations on April 29, the Europeans expressed their concern at the actions of the Congress "in using an economic boycott as a cover for its openly expressed aim of dominating Northern Rhodesia!" The meeting "demanded that the Government..take immediate steps to amend the laws of the territory to ensure that no African political organisations can achieve such domination."⁽²⁶⁾ Four Congress leaders were charged with conspiring to injure the business of European traders" but were acquitted because the Court found they had genuine grievances and were not staging boycotts for the purposes of organizing Congress.

In June strikes by Africans again started on the Copperbelt. On June 11 Nkumbula and Katilungu, the leader of the African Mineworkers Union, entered into a working alliance in promoting African industrial and political advancement. Tension between the races was growing at an alarming rate. Harry Franklin, one of the two European Members representing African interests in the Legislative Council, managed, in August, to extract a promise from Nkumbula to work for better race relations. The undertaking did not, however, extend to Katilungu's Mine Workers' Union and strikes went on. In the same month (August) the mining Companies declared a dispute with the African Mineworkers' Union and asked the Government to set an inquiry. This led to more strikes. On September 12 the Government declared a state of emergency on the Copperbelt. Thirty two Union leaders (including Nkoloma, Katilungu's deputy) were arrested and restricted. Katilungu, who was in England at the time, arrived back and urged the strikers to go back to work. They did.

25. Mason, The year of Decision, p. 115.

26. Ibid.

In October Nkumbula told the country that he was disappointed by his appeal for good race relations because Europeans and Africans had not heeded to it. In the same month Congress had its general conference at which matters ranging from the strikes on the Copperbelt to secession for Northern Rhodesia from the Federation were discussed. The Conference demanded: (a) the end of the state of emergency on the Copperbelt; (b) that British protected persons should be given the vote; (c) that there should be parity between Africans and Europeans in both the Legislative Council and the Executive Council; and (d) that Northern Rhodesia should be allowed to secede from the Federation when the Review Conference took place.

The Copperbelt emergency ended in January, 1957, but some leaders of the African Mineworkers' Union remained under restriction. The Harragin Tribunal that had been appointed to inquire into the dispute recommended an increase of six shillings and eight pence per shift for the African Miners. The miners had demanded an increase of ten shillings and eight pence. The award was not satisfactory and the Africans talked of further strikes. In the same month (January) the Congress called on its Members not to co-operate with anything which was, or anyone whose acts were, detrimental to African interests. "Anything which was or anyone whose acts were detrimental to African interests" were wide words. They covered withdrawal of their services if they were not paid adequately and boycott of shops where they were not properly treated.

In September (1957) Europeans, realizing as they had never before how serious and delicate the situation had become and how explosive it could be if the Congress leaders were to call for an out and out confrontation with the whites, began to see qualities in Nkumbula they had never appreciated. The press began to call him a responsible leader, pointing out that far from being a dangerous agitator, he was, in fact, the moderating influence whose absence would make the organization take more extreme measures. At about this time a series of beerhall boycotts began. In the meantime, Katilungu had lost favour with the Congress leaders who began to denounce him for his frequent appeals to his Union Members not to go on strike. This broke the alliance between Nkumbula and him, culminating in what Katilungu called a declaration of war on Congress leaders who were trying to divide his Union.⁽²⁷⁾

27. To test whether he still had the support of his followers, Katilungu at one stage resigned but was re-instated.
28. The account of Congress activities given above is based mainly on Mason, The Year of Decision, pp. 107 et. seq. and issues of the time of The African Weekly. The Bantu

Congress activities increased during the end of 1957 and the beginning of 1958. The organization repeatedly called for constitutional reforms not short of parity. John Gaunt moved in the Legislative Council that the organization should be banned. This was supported by all the European non-Officials except those representing African interests. The Officials also opposed the motion. It was accordingly lost. In February, 1958, Nkumbula and Kaunda went to see the Governor with constitutional proposals. This was the first time a Governor had held political discussions with leaders of the Congress. This event marked a new phase in the political trend of the country. It was becoming clear that the Europeans were losing the initiative to the Africans.⁽²⁸⁾

THE NORTHERN RHODESIAN CONSTITUTION OF 1958

It was with this background of events that the Northern Rhodesian Government on March 28, 1958, published a White Paper containing proposals for constitutional changes in the territory.⁽²⁹⁾ The proposals provided for a Legislative Council of 30 Members divided into 22 Elected Members, 6 Official Members and 2 Nominated Members. The 22 Elected Members were to be divided as follows: (a) 12 Members elected from 12 "Ordinary Constituencies." These constituencies were to cover all the Crown Land areas generally adjacent to the railway line plus certain areas of Native Trust Land and Native Reserves adjacent to those Crown Lands; (b) 6 Members elected from 6 "Special Constituencies". These constituencies were to cover the rest of Northern Rhodesia (including those smaller Crown Lands not generally adjacent to the railway line; (c) 2 Members elected from 2 "Regrouped constituencies" covering the total area of the "Special Constituencies" but specifically reserved for European Members; and (d) 2 Members elected from 2 "Regrouped Constituencies" covering the total area of the "Ordinary Constituencies" but specially reserved for African Members.

For the Executive Council, the proposals provided for nine Ministers presided over by the Governor who was not included in the nine. Of the nine Ministers, four were to be officials. Of the other five, four were to be persons elected in the ordinary constituencies. In addition there were to be two Assistant Ministers who were to work under Ministers but were not to be Members of the Executive Council. Of the total of eleven Ministers and Assistant Ministers, two were to be Africans and one of these was to be a Minister.

29. See Northern Rhodesia Proposals for Constitutional change (Cmd. 530 of 1958), (London, H.M.S.O., March 1958) Appendix 11. Note that the proposals are published as an Appendix to Cmd. 530, although they had been published earlier on their own.

14.

The proposals provided for a franchise based on a Common Roll. The Roll was, however, to have two types of voters - "ordinary" and "special". The general qualifications for all voters were to be: (i) the ability to pass a simple literacy test - i.e. the ability to complete in English without assistance the application form for registration; (ii) a minimum age of 21 years; (iii) status of British subject or citizen of Rhodesia and Nyasaland or British protected person by virtue of connection with Northern Rhodesia; (iv) two years' residence in the territory and three months in the constituency concerned. The income and property qualifications of the two types of voters were based on the Federal Ordinary and Special Rolls. An ordinary voter was to have the following qualifications: (a) £720 income per annum or ownership of property (including leaseholds) of at least the value of £1,500; or (b) £400 income per annum or ownership of property (including leasehold) of not less than £1,000 value, plus in each case primary education; or (c) £300 income per annum or ownership of property (including leasehold) of not less than £500 value, plus four years secondary education; (d) Ministers of religion who had undergone certain stipulated courses of training and periods of service in the Ministry and who followed no other profession or gainful occupation; (e) Paramount Chiefs and other Chiefs recognized by the Governor or those certified by the Resident Commissioner in the Barotseland Protectorate to be ^{of} the equivalent status. On the other hand, a special voter was required to have the following qualifications: (a) £150 per annum income or ownership of property valued at not less than £500; or (b) £120 per annum income plus two years' secondary education; (c) persons who had been for the preceding two years headmen or hereditary councillors and were recognized as such by their chiefs. Such Headmen and councillors were to qualify under this provision if they were doing unpaid service in such office and had been recommended for registration by their chief. In addition persons who were in receipt of a monthly or annual pension earned after twenty years service with one employer were to qualify under this provision. Wives of ordinary or special voters, including first wives of polygamous marriages, were to qualify on the qualifications of their husbands provided they possessed the general qualifications required of all voters.

The special qualifications were to be progressively raised as more and more Africans acquired higher standards of education and better economic standards and qualified for the ordinary roll. This was to take place within ten years. At the end of that period the special qualifications were to be abolished.

Appendix C to the proposals set out the progression as follows:

- (a) At commencement £150 plus simple literacy or property of the value of not less than £500 plus simple literacy.
- (b) After three years, £300 income per annum or £750 property, plus in each case simple literacy; or £210 income per annum plus a course of primary education or £600 income per annum plus a course of primary education; or £150 income per annum or £500 property, plus in each case two years secondary education.
- (c) After six years, £450 income per annum or £1,000 property, plus in each case, simple literacy; or £300 income per annum or £750 property plus in each case a primary education; or £200 income per annum or £500 property, plus in each case two years secondary education.
- (d) After eight years, £600 income per annum or £1,250 property, plus in each case simple literacy; or £390 income per annum or £900 property, plus in each case a course of primary education; or £250 income per annum or £500 property, plus in each case two years secondary education.
- (e) After ten years, all new applicants to be registered as voters under qualifications for the ordinary voter but those already registered as special voters to remain on the roll whether or not his income had become lower than that of the qualifications prevailing. A special voter who acquired qualifications could apply to be transferred to the ordinary voters roll.

Ordinary and special votes were to count in full, provided (a) that in the twelve "ordinary constituencies" the total of special votes was not to count more than one-third of the total of ordinary votes cast; (b) that in the six "special constituencies" the total of ordinary votes was not to count more than one-third of the total of special votes cast; (c) that in the amalgamated constituencies the total of special votes was not to count more than one-third of the ordinary votes cast where the seat was reserved for a European and the total of ordinary votes was not to count more than one-third of the total of special votes cast where the seat was reserved for an African. Candidates for "ordinary constituencies" were to be ordinary voters but those for "special constituencies" could be either ordinary or special voters. Candidates for the amalgamated constituencies were also to be ordinary voters. Every candidate who had special qualifications only was to obtain a certificate from two-thirds of the recognized Chiefs in the constituency, where he wanted to stand stating that they had no objection to his standing as a candidate.

The proposals were based on the 1954 Moffat Resolutions. These resolutions had called for the creation of a multi-racial society in the territory in which no one race would dominate another. The division of the seats and the franchise in the proposals sought to achieve this object. A candidate for an ordinary constituency would, in addition to seeking the support of the ordinary voters have to seek the support of the special voters since their one-third influence could be decisive for his victory or defeat.

16. It should be noted that the ordinary section of the Voters' Roll was intended to be predominantly white and the candidates for the twelve constituencies would, with all certainty be white. On the other hand, the special section of the Roll would be predominantly African. A white candidate would, therefore, be forced to seek the support of Africans. Although both ordinary and special voters could be candidates for the six special seats, because the voters were going to be predominantly African, it was certain that the candidates for these would be African. Such Africans, however, would be forced to seek the support of the Europeans since the ordinary voters would have a one-third influence. The amalgamated constituencies on the other hand were intended to serve two purposes. The first was that both Africans and Europeans would be sure of seats. The second was that although both African and European voters would have the limited influence of one-third in the election of the other race's reserved seats, the fact that the European reserved constituencies ^{were} to be in areas that were predominantly African and the African reserved constituencies in areas that were considered European, was going to produce two European Members representing interests that were predominantly African and the African reserved constituencies in areas that were considered European, were going to produce two European Members representing interests that were predominantly African and two Africans representing interests that were predominantly European. It will also be noted that the arrangement would prevent a situation whereby all Africans represented African areas and all Europeans represented European areas.

In putting forward the proposals the Northern Rhodesian Government stated that the franchise was intended to produce a balance between completely racial representation where Africans would be elected by Africans and Europeans by Europeans and a completely non-racial approach where Africans would have no special provision to ensure adequate representation for them.⁽³⁰⁾ The Government believed that the provision of cross-voting thereby forcing candidates to seek support from both races, would produce moderation in politicians of both races.⁽³¹⁾

The proposals were, however, condemned by all the leading political groups. The United Federal Party and the Federal Government⁽³²⁾ opposed them on the grounds that they offered no advance towards self-government. Instead they gave the officials renewed strength. Secondly, they objected to the appointment of an African Minister on racial grounds with no consideration of qualifications other than that he was an African.

Thirdly, they considered the requirement that only candidates with special qualifications should get certificates from Chiefs, a "flagrant violation of democratic principles."⁽³³⁾ The Party and the Government proposed that the Executive Council should be under the chairmanship of an Unofficial Member commanding the support of the majority of the Members in the Legislative Council. This would make the Unofficial Member concerned a semi-Prime Minister and the constitutional position that of "semi - self- government." They further proposed that the influence of special voters in the election of ordinary constituency candidates should be limited to one -fifth and that the votes of the ordinary voters should not be devalued in the election of candidates for the special constituencies.⁽³⁴⁾ The right wing Dominion Party described the proposals as a transgression of the pledges to the Europeans. John Gaunt, a prominent member of the Party, predicted "that if the proposals were admitted Northern Rhodesia would be black in fifteen years!"⁽³⁵⁾ In fact, Northern Rhodesia became black four years later in 1962 when Africans formed the first black dominated Government. The Dominion Party did not, however, put forward proposals of its own. The African Legislative Council Members also denounced the proposals and put forward their own. They proposed for parity in the Legislative Council (twelve Africans elected by Africans on a low qualification franchise and twelve Europeans elected by Europeans).⁽³⁶⁾ The African Provincial Councils and the African Representative Council equally disapproved of the proposals and suggested parity in both the Legislative and Executive Councils.⁽³⁷⁾ The bitterest attack of the proposals came from the African National Congress which described them as wholly inadequate. The White Paper was burnt at a rally of the organization as a sign of disapproval of its contents. The organization published its own proposals in a Black Paper. It had abandoned parity and now advocated a Legislative Council of 21 Africans and 14 non-Africans.⁽³⁸⁾

Further discussions were held in Lusaka between the Governor and the leaders of the various groups. Later, a delegation of the European Unofficial Members went to London. The Africans also made representations in London. The British Government stoutly defended the proposals in substance although they were prepared to consider matters of detail. The Colonial Secretary advanced three arguments in favour of the proposals, all wrapped in the concept of multi-racialism. First, he argued that members elected by a multi-racial electorate would tend to have a community rather than a racial outlook even though the influence of special voters was limited in the election of European candidates for the ordinary and European reserved seats.

10. Second, that the influence of Africans on the ordinary roll, would increase as Africans qualified. Third, that the device of reserved seats prevented a situation in which African and European Members represented separate areas of the territory.⁽³⁹⁾

On August 1, the Colonial Secretary informed the House of Commons that he would publish his complete proposals on constitutional changes in Northern Rhodesia in a White Paper and that he intended to implement the proposals in two stages—i.e. enactment of a law to enable the registration of voters and enactment of an Order in Council thereafter to bring the whole of the new Constitution into force.⁽⁴⁰⁾ On September 10 the Colonial Secretary sent a despatch to the Governor concerning the proposals. He had made some modifications to the original proposals in the light of those submitted by the various parties and as a result of a detailed study of the White Paper. The modifications, with the exception of one which included nuns and lay brothers under the definition of religious Ministers for the purposes of the ordinary franchise qualifications,⁽⁴¹⁾ were all concessions to the Federal Government and the United Federal Party. Votes of ordinary voters were no longer to be devalued in relation to special seats.⁽⁴²⁾ The reason given for this change (which had been advocated by the U.F.P. and the Federal Government) was that the ordinary votes was in the nature of a permanent certificate of fitness to vote while the special vote was a temporary arrangement⁽⁴³⁾ — a concession to persons who by permanent standards would not be able to vote. The requirement of obtaining a certificate from the chiefs of a special constituency was now to apply to candidates with an ordinary as well as those with special vote.⁽⁴⁴⁾

32. When Welensky was sent an advance copy of the proposals and he consulted his Minister of Justice, Greenfield, the latter remarked: "The proposed changes are complicated and require considerable detailed study against the background of the present constitution and the Federal Constitution and franchise. They are unlikely to be understood by more than a small proportion of the European electorates let alone Africans." Welensky himself says of the plan: "We tried to understand it with the help of diagrams, and threw away the diagrams." — Welensky, *op.cit.*, p. 189 (for both quotations).

33. *Ibid.*

34. Mason, *op.cit.*, p. 125. For the U.F.P. and the Federal Government's struggle against the proposals, see Welensky, *op.cit.*, pp. 88 - 96 and 100 - 8.

35. Mason, *op.cit.*, p. 125.

36. *Ibid.*

37. *Ibid.*

38. *Ibid.*

39. See generally the Secretary of State's despatch, Cmd. 530 of 1958, pp. 5-12. See also Mulford, *op.cit.*, p. 14.

40. Cmd. 530 of 1958, *op.cit.*, p. 3.

41. *Ibid.*, p. 10, para. 19.

42. *Ibid.*, pp. 8 - 9, para. 13.

43. *Ibid.*

44. *Ibid.*, para. 14, p. 9.

19. The Executive Council's composition was changed by raising non-Official Ministers to six. Two of these Ministers were to be Africans but this was no longer to be specifically mentioned in the Constitution. The provision for Assistant Ministers was dropped.⁽⁴⁵⁾ This change was also a concession to the U.F.P. and the Federal Government. The fifth modification was that instead of raising the special qualifications at fixed intervals, it was now to be done at every stage when the number of special voters equalled that of ordinary voters.⁽⁴⁶⁾

Further concessions were made on December 19 and again these were in favour of the Federal Government and the United Federal Party. The Governor was to consult the leader of the party with the majority of seats in the Legislative Council on appointing non-Official Ministers and before appointing the two nominated Members of the Legislative Council. It was known, even at this stage, that the party that would have the majority of seats would be the United Federal Party. The United Federal Party and the Federal Government, it will be remembered, had proposed that the Executive Council should be under the chairmanship of a non-Official. While this was not directly granted, the leader of the majority party was now to wield tremendous power in the Council. While the Governor would remain chairman of the Council the fact that he would consult with the leader of the majority party in policy and other matters was going to reduce his powers to a point of ineffectiveness. The arrangement assured the United Federal Party that all the Ministers would be its members. It was also assured that the two nominated Members would be its Members since they were to be appointed after consultation with the leader of the majority party. A far-reaching concession was that if there were no suitable men for the Executive Council, the Council was to be deemed complete without being full. This aspect was welcomed by the Federal Government and the United Federal Party as well as by Europeans in general because it permitted the constitution of the Executive Council without Africans if the leader of the majority party (who was to recommend the appointments) decided that there were no suitable Africans to be appointed Ministers.

The final draft of the Constitution disappointed both the Africans and right wing Europeans. The Dominion Party called the draft "a blow to the prestige of Sir Roy and his party" and "to civilized Government in Central Africa."⁽⁴⁷⁾ Africans were disappointed because their demands had completely been ignored.

45. Ibid., para. 14, p. 9.

46. Ibid., para. 19, p. 10.

47. Mason, The Year of Decision, p. 127.

20. The United Federal Party, although not fully happy, had managed to secure very significant changes in its favour. It was, in fact, the only party that would gain under the new arrangement. The constitutional proposals, however, plunged the African National Congress into a serious internal crisis culminating in a split. Nkumbula, convinced that there would be no concessions to the Africans, was unwilling to adopt steps advocated by his lieutenants to oppose the new constitution. Kaunda (the Secretary-General), Kapwepwe (the Treasurer-General) and Sipalo (who had returned from studies overseas in 1957) and several others wanted the Congress to take a militant stand to foil the introduction of the new constitution. Nkumbula refused to do this and instead argued that the Organization should participate in the elections to be held under the new constitution. This stand by Nkumbula split the organization from top to bottom. Kaunda, Kapwepwe, Sipalo and several others broke away from Nkumbula in October (1958) to form the Zambia African National Congress. The new organization was headed by Kaunda, with Sipalo and Kapwepwe as Secretary - General and Treasurer - General respectively. The organization applied for registration as a lawful society under the Societies ordinance⁽⁴⁸⁾ on December 1 and was registered on February 9, 1959. From December 24 to 27 (1958) it held its first National Council meeting and adopted its programme of action. The programme adopted was a militant one. In relation to the new Constitution, the Organization announced that it would not participate in the elections to be held under the new Constitution; that it would dissuade people from registering as voters; and that even if they registered it would dissuade them from voting.⁽⁴⁹⁾

Free from his extremists, Nkumbula announced in December that the African National Congress would participate in the forthcoming elections. His task was, however, made difficult by the success of the Z.A.N.C.'s "don't register" campaign. Although the Government had expected about 24,640 special voters, at the final count only 6,046 had registered.⁽⁵⁰⁾ The A.N.C. was also losing membership at a very fast rate to Z.A.N.C. The position of the latter organization was enhanced by the fact that both the Nyasaland African National Congress and the Southern Rhodesia African National Congress soon preferred it to the A.N.C. as the more nationalist of the two organizations.

48. Cap. 262.

49. Milford, *op.cit.*, p. 15.

50. For the final figures of ordinary and special voters when the rolls closed, see Cm1. 1149 of 1960, *op.cit.*, p.45, para. 66, Table 6.

21. By the beginning of 1959 the Government was already becoming alarmed by the success of the campaign against registration and by speeches at the Z.A.N.C. meetings. As seen in Chapter Seven the Southern Rhodesian Government declared a state of emergency on February 20⁽⁵¹⁾ and the Nyasaland Government on March 2, 1959.⁽⁵²⁾ Congress leaders in both countries were arrested and detained. Early in March, the Northern Rhodesian Government (which had refused to declare a state of emergency at a meeting of the four Governments),⁽⁵³⁾ issued the Safeguard of Elections and Public Security Regulations to deal with the activities of the Z.A.N.C. On March 11th the Governor banned 44 branches of the organization.⁽⁵⁴⁾ On March 20th the remaining 42 branches were also banned.⁽⁵⁵⁾ Kaunda, Kapwepwe and Sipalo were charged, convicted and sent to Salisbury Central Prison in Southern Rhodesia to serve their sentences. The ban of the branches was an indirect way of eliminating the organization without banning the parent body. Branches had, under the Societies Ordinance, separate registration. By banning the branches and refusing to register new ones, the Organization could not operate.

After the registration of voters had been completed in terms of the Northern Rhodesia (Electoral Provisions) Order in Council, 1958,⁽⁵⁶⁾ and the rest of the Constitution had been brought into effect by the Northern Rhodesia (Legislative Council) Order in Council, 1959, elections took place in March. This was soon after the ban of the 86 branches of the Z.A.N.C. Candidates for the special constituencies had difficulties in obtaining certificates from the Chiefs.⁽⁵⁷⁾ When nominations closed, only four of the six special constituencies had candidates nominated. In the other two constituencies the candidates sought nomination but none succeeded in getting the required number of Chiefs.

51. See below.

52. See below.

53. For preparation for the states of emergency in all the three territories, see Welensky, op.cit., pp. 109-134.

54. See G/N. 82 of 1959 - 11 March, 1959.

55. See G/N. 93 of 1959 - 20 March, 1959.

56. S.L. 1958, No. 1520.

57. Expressing the difficulty, Nkumbula told a newspaper reporter on nomination day: "I have travelled on foot or by bicycle over 600 miles in the past three weeks to get the chiefs' signatures. I still need two more, and one of the Chiefs, I must try to find today lives about 150 miles from the nearest road. I will have to cycle all the way." - As quoted in Welensky, op.cit., p. 135.

"...what we predicted has now come about. There has been a total failure in two constituencies; there has been a veto on at least one U.F.P. candidate in another constituency which allowed no time for a replacement to be effected, and in two other constituencies the U.F.P. candidates have been eliminated by a mechanical failure. Everything that has occurred has reinforced our belief that this domination procedure is utterly bad in principle and also impracticable..." (58)

The results of the elections were very disappointing to the African National Congress and justified the stand taken by the Z.A.N.C. leaders. It won only one seat and that was by Mkumbula himself. The United Federal Party won 13 of the 22 elected seats, eleven of these were ordinary seats and the other two were the African reserved seats. The Dominion Party won one ordinary seat. The Central Africa Party won both the European reserved seats and one special seat. African independents won two of the Special seats. The remaining special seats where nominations failed were later won by independents.⁽⁵⁹⁾

After the elections John Roberts, leader of the majority party (the United Federal Party), submitted to the Governor the names of five persons (one of whom was an African) whom he recommended for appointment as Ministers. The sixth place was also given to a nominated African Member recommended by Roberts. In all there were, therefore, four European non-officials and two African non-officials. The Government became dominated by the United Federal Party despite the presence in the Executive Council of four officials. Roberts acted like a Chief Minister and the Governor acted on his advice, although full ministerial responsibility had not yet been granted. The Governor, however, still wielded much power, at least in theory. The Executive Council acted in an advisory capacity only. The Governor retained special powers which enabled him, if he considered it expedient in the interests of public order, public faith or good government, to give effect to Bills which had been considered by the Legislative Council and had either been rejected or passed with modifications which he felt unable to accept. He was also able to control the acts of the Legislative Council by his powers of assent to Bills and reservation of Bills for the signification of Her Majesty's pleasure.

The Governor was required to reserve certain Bills, e.g., those which had discriminatory provisions, for Her Majesty's assent. He could not assent to such Bills.

58. Ibid., p. 136.

59. For the results of this election, see Mulford, op.cit., p. 16. and Welensky, op.cit., p. 136.

23. In the case of the other Bills he was required to submit them after assent to Her Majesty for notification that she would not exercise her power of disallowance.⁽⁶⁰⁾ Apart from the reservation of Bills that he had not assented to and the submission of Bills he had assented to but which, he was required to submit to the Queen by the Constitution, it was unlikely in practice that the Governor would use his powers to block the wishes of the Executive Council or of the Legislative Council.

Events in Nyasaland

While the above events were taking place in Northern Rhodesia, those in Nyasaland were even more unsettling to the British and Federal Governments. After the 1956 elections Europeans in Nyasaland completely lost the initiative to bring about constitutional changes. They no doubt wanted things to remain as they were, because demanding further changes would have meant losing their majority of one over the Africans and might have resulted in an African majority. The Africans, however, seized the initiative both within and without the Legislative Council. The five African Members declared soon after their election that they would work vigorously for the secession of Nyasaland from the Federation and for self-government. When the first session of the new Legislative Council opened in July, 1956, the five Members denounced Federation and called for majority rule immediately. The session was the bitterest the Council had ever had in its history. When Lord Home visited Nyasaland in October, 1957, the five Members and the two African Federal Assembly Members went to see him together and told him that they would rather go back to the law of the jungle than accept Federation and that they preferred political to economic advancement.⁽⁶¹⁾

In the meantime, the Nyasaland African National Congress kept the political scene outside the Legislative Council equally filled with demands for the twin objectives of secession and self-government. In June, 1957, the Organization ordered the two Federal Members of Parliament to resign their seats. When they refused, they were expelled from the Organization on July 10. The two men, however, said they would, in spite of the expulsion, continue to work against Federation in the Federal Assembly.⁽⁶²⁾

60. For the Governor's powers, see the Northern Rhodesia (Legislative Council) Order in Council, 1959, and the Royal Instructions to the Governor.

61. Mason, The Year of Decision, p. 136.

62. Ibid. See also Cmd. 814 of 1959, op.cit., para.27.

63. Cmd. 814 of 1959, para. 23.

24. The announcement that the Federal Review Conference would take place in 1960 moved the Congress to demand immediate constitutional changes although the then existing Constitution was not due to expire until May, 1960.⁽⁶³⁾ The Organization wanted Nyasaland to go to the Review Conference represented by an African Government.⁽⁶⁴⁾ It accordingly demanded an African majority in the Legislative and Executive Councils. On September 19 and November 21 (1957) the Organization's leaders saw the Governor and presented to him proposals for a House of 40 Members elected by adult suffrage and an Executive Council elected by the House.⁽⁶⁵⁾ During the discussions the leaders conceded 3 seats in the House for non-Africans and 2 seats in the Executive Council for the Officials.⁽⁶⁶⁾ On March 6, 1958, the Colonial Secretary told the House of Commons that the Nyasaland Government would not be in a position to formulate their proposals before late summer.⁽⁶⁷⁾ On April 2 the Congress leaders saw the Governor and express their disappointment about the delay but the Governor reiterated that the earliest he thought his Government would be able to publish its proposals was early in 1959. Unwilling to wait until the time mentioned by the Governor, the Congress leaders decided to send a delegation to London to press for early changes. The delegation was led by Dr. Banda who joined it from Ghana where he was now living. It saw the Colonial Secretary on June 13 but received no promise for earlier changes.

Two things happened about this time which affected the course of Congress politics. One was the withdrawal by the Government of its recognition of the Organization. The other was the arrival of Dr. Banda in Nyasaland in the middle of 1958. Since its formation in 1943, the Government had recognized Congress as an organization representative of Africans. Early, in 1957, this recognition was withdrawn on the grounds that the organization had lost support.⁽⁶⁸⁾ This was, of course, not the real reason for the action. The real reason was that the Organization was becoming more and more hostile to the Administration. The speeches of the Congress Members in the Legislative Council and of Congress leaders at meetings of the organization left the Government in no doubt that the Organization had become a formidable opposition to the Administration which it could no longer allow to operate with its blessing. The withdrawal of recognition was, however, a tactless step on the part of the Government as it made the Organization more hostile to the Administration.

64. Ibid.

65. Ibid.

66. Ibid.

67. Ibid., para. 29.

68. Mason, The Year of Decision, p. 135.

25. At about the time when the Northern Rhodesia African National Congress was having internal dissension between its militant and non-militant elements, the Nyasaland African National Congress was also having similar troubles. Chipembere, who led the militant wing of the Organization, at first admired the Organization's leader, T. D. T. Banda, although he thought he lacked the necessary education to lead the organization during that critical period. Chipembere and his fellow militants, M. W. Chiume and D. K. Chisiza, wanted Dr. Hastings Kamuzu Banda to come and lead the Organization. Dr. Banda had left Nyasaland as a boy of 13 for Southern Rhodesia. From there he had gone to South Africa and then to the United States where he acquired a number of degrees before going to Edinburgh University to study medicine. He qualified as a doctor in 1942 and set up practice in London. While in the United States he had not taken part in Nyasaland politics but he did so when he went to England. During the Federation campaign he had taken a prominent part in opposing it with the result that some British Ministers and European leaders in Central Africa thought all the opposition to Federation was due to him.⁽⁶⁹⁾ He had later left Britain to settle in Ghana when that country became self-governing. From Ghana he had kept in regular touch with Chipembere and Chiume who continuously asked him to return to the Protectorate and assume the role of "Messiah," which the people wanted him to do. At the general conference of Congress in August, 1957, a resolution had been passed inviting the Doctor to come home and lead the organization. At this same conference a memorandum from him on the question of the resignation of the two Federal Members of Parliament had been read. The memorandum was decisive in making the conference accept the expulsion of the two Members. In the meantime, the President of the Organization, T. D. T. Banda, who had reluctantly supported the expulsion of the two Members, had by the end of 1957 completely lost favour with the militant wing of his Organization. In March, 1958, he was suspended from office for alleged maladministration.⁽⁷⁰⁾ In June, 1958, as already seen above, Dr. Banda led a delegation which saw the Colonial Secretary in London on constitutional changes. After the talks with the Colonial Secretary it was agreed between him and the other Members of the delegation (Chipembere, D. K. Chisiza and Chief Kuntaja) that he should come to Nyasaland in due course.

69. See above, Chapter 6.

70. Banda thinks these charges were trumped up by Chipembere and Chiume in order to have him removed from office.

Doctor Banda finally arrived on July 7, 1958. His arrival at Chileka Airport marked a new turn in Central African politics. At the Airport, as already mentioned elsewhere he was given a broom to sweep away the Federation. He promised the wildly cheering and dancing crowds that he would certainly sweep away the Federation and bring them self-government. The mysterious Doctor had come at last. From this time huge crowds at Congress meetings became the order of the day.⁽⁷¹⁾

By the time the leaders of the four Congresses in Central Africa went to Accra in December, 1958,⁽⁷²⁾ for the All-African People's Conference, the impact of the Doctor's presence on the Central African scene had already unnerved the four Central African Governments. Plans were afoot to deal with the situation. It ought to be mentioned here that the independence of Ghana in March, 1957, and the All-African People's Conference just referred to above, inflamed nationalist activity in Central Africa as they did elsewhere in Africa.⁽⁷³⁾ After the leaders had returned from the conference the tempo of nationalist activities increased. As mentioned above, a meeting of the leaders of the Nyasaland, Southern Rhodesia and Zambia Congresses took place early in 1959.⁽⁷⁴⁾

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71. For the efforts of Chipembere and Chiume to bring Dr. Banda to Nyasaland and his arrival and activities, see Cmd. 814 of 1959, pp. 12 - 14, paras. 26 and 27, 29 and 30 and 46 - 90.
72. For an account of this conference in relation to events in Nyasaland, see *ibid.*, paras. 83 - 90.
73. The Conference in December had been called by Nkrumah specifically for the liberation movements after he had earlier, in April, convened the first conference of independent African States. The tone of deliberations at the December Conference can be seen from the following extract from the final resolutions of the Conference: "That the All-African People's Conference in Accra declares its full support of all fighters for freedom in Africa, to all those who resort to peaceful means of non-violence and civil disobedience as well as to all those who are compelled to retaliate against violence to attain national independence and freedom for the people. Where such retaliation becomes necessary, the Conference condemns all legislations which consider those who fight for their independence and freedom as ordinary criminals!" as quoted in *ibid.*, para. 83. On the impact of the independence of Ghana on the nationalist movement, de Smith wrote: "...inevitably the birth of Ghana has given a new impetus to nationalist sentiment, not only in British African dependencies but also in African territories controlled by other European powers." - de Smith, S.A. "The Independence of Ghana" (*The Modern Law Review*, Vol. 20, July, 1957), pp. 347 - 363, at 363.
74. See letter written by Chipembere to Chiume (published as Appendix 1 to the Delvin Report) mentioning that George Nyandoro (Secretary-General of the S.R. Congress), Sipalo (Secretary-General of Z.A.N.C.) and Du (this was D. K. Chisiza - Secretary - General of the Nyasaland Congress) were meeting at a secret venue. This meeting was later alleged to have planned a massacre of Europeans, an allegation not found substantiated by the Commission - see Part IV of the Report.

27. In February and March states of emergency were declared in Southern Rhodesia and Nyasaland respectively. In March, too, the Zambia African National Congress was put out of operation. Preparations for this clamp down on nationalist organizations had been going on for several months.⁽⁷⁵⁾ Dr. Banda and his top lieutenants were flown to Southern Rhodesia for detention at Gwelo Prison. Top provincial and branch leaders were also flown to Southern Rhodesia and detained at Khami Prison while the bulk of the ordinary members and less prominent leaders were detained in Nyasaland, as mentioned above, Southern Rhodesian leaders were also detained,⁽⁷⁶⁾ while leaders of the Z.A.N.C. were charged, convicted and sent to Salisbury Central Prison to their sentences. The only top leaders who escaped arrest were Joshua Nkomo, the President of the Southern Rhodesia Congress, and Kanyama Chiume, the Publicity Secretary of the Nyasaland Congress, who were out of Central Africa when the states of emergency were declared.

A commission, headed by Mr. Justice Devlin was set up by the Colonial Secretary to inquire into the circumstances that led to the state of emergency in Nyasaland.⁽⁷⁷⁾ The Commission heard evidence in Nyasaland from free and detained persons and also in Southern Rhodesia from Nyasaland detainees (including Dr. Banda) and interested persons. The Commission's Report,⁽⁷⁸⁾ published in July, 1959, was an indictment of the Nyasaland Government and the Colonial Secretary for the conditions of a police state prevailing in the Protectorate.⁽⁷⁹⁾ Dr. Banda was absolved of responsibility in regard to most of the accusations levelled against him by the Nyasaland Government but his organization as such and some of his lieutenants did not escape blame for causing the tension that led to the state of emergency.

75. See note 53 above.

76. The Southern Rhodesian leaders were detained together with most of the leaders from Nyasaland except Dr. Banda and his immediate lieutenants.

77. See S.L. No. 624 of 1959 (Nyasaland (Commissions of Inquiry) Order in Council, 1959). For the attitude of the Federal Government to the Commission, see, Welensky, *op.cit.*, pp. 109-134.

78. Report of the Nyasaland Commission of Inquiry (Cmd. 814 of 1959) (London, H.M.S.O., July, 1959). The Report is an exhaustive account and gives a good background to the political development of Nyasaland.

79. For a rebuttal of the Commission's charges against the Nyasaland Government, see Despatch by the Governor Relating to the Report of the Nyasaland Commission of Inquiry (Cmd. 815 of 1959) (London, H.M.S.O., July, 1959), published at the same time with the Report. Shortly afterwards the Colonial Secretary (Lennox-Boyd) resigned and was elevated to the House of Lords. The resignation was timed in such a manner as not to be linked with the Report although this conclusion by the public could not be escaped. He was succeeded by Iain Macleod.

1956 - 1960

Having deviated to view the background, a return can now be made to the actual constitutional developments that followed the 1955 Constitution. It should be noted that that Constitution, was not due to expire until May, 1960. The Governor, as has been seen, had indicated in the face of pressure from Congress leaders in 1958 that his Government should be able to formulate its proposals early in 1959. The Government was unable to do this owing to the circumstances that led to the state of emergency and the ban of Congress. On August 24, 1959, the Governor announced some interim constitutional changes.⁽³⁰⁾ Two Africans were appointed to the Executive Council for the first time. The Executive Council was at the same time re-organized to give the Unofficial Members a more active part in the day to day affairs of government. In May, 1960, the life of the existing Legislative Council was extended pending discussions for a new constitution.⁽³¹⁾

In March, 1960, the new Colonial Secretary, Iain Macleod, who had succeeded Lennox-Boyd, visited Central Africa. Welensky had been informed on February 2, by the United Kingdom High Commissioner in Salisbury that since leaving Salisbury Macmillan⁽³²⁾ had been in consultation with Macleod and that he had decided that Banda should be released.⁽³³⁾ Welensky says the reason given was that it was essential for the successful outcome of the Federal Constitutional Review that Africans in Nyasaland should see the prospect of a substantial constitutional advance in the territorial sphere within the Federation and that in order to open such prospect there must be talks with Banda as a free man. The Federal Government reacted sharply to this information. "To release Banda", Welensky told the British Government, "just when the Monckton Commission is starting work will seriously prejudice any change it might have had of finding some solutions to our problems here in the Federation. And for the Secretary of State to begin separate constitutional discussion with Dr. Banda is to make a nonsense of the Commission's work."⁽³⁴⁾

Macleod arrived in Salisbury on March 24 and went to Nyasaland on March 29. At dawn on April 1, Dr. Banda was released from Gwelo Prison and flown to Nyasaland where he had interviews immediately on arrival with the Colonial Secretary and the Governor. The release was a slap in the face for Welensky who would have wanted Banda to remain incarcerated until perhaps after the Federal Review Conference. If Welensky entertained the hope that the Review Conference could be held while Banda was in prison, then he was, indeed, hoping for an impossibility.

Footnotes over page

No British Government at that stage could sit at a Conference table to settle Central African constitutional matters without the African nationalists of Nyasaland and Northern Rhodesia. The position was, of course, different in the case of the Southern Rhodesian Africans.

After talks with all political leaders in Nyasaland, Macleod flew to Mauritius. On April 14, he announced that a constitutional conference for Nyasaland would be held in the summer.⁽⁸⁵⁾ On May 25 the Governor of Nyasaland was invited to obtain and submit nominations of the various groups to be represented at a conference to be held in London from July 25.⁽⁸⁶⁾ The conference opened on July 25 as planned and lasted until August 4.⁽⁸⁷⁾ The talks, in which Dr. Banda was the dominating figure, resulted in an agreed constitution for the Protectorate.⁽⁸⁸⁾ It should be noted that at the time the conference took place the whites in Nyasaland had already bowed to inevitability of an African majority in the Legislative Council and an African dominated Executive Council.

The terms of the new constitution were partly brought into effect by the Nyasaland (Electoral Provisions) Order in Council, 1960,⁽⁸⁹⁾ as amended later by the Nyasaland (Electoral Provisions) (Amendment) Order in Council, 1960.⁽⁹⁰⁾ The two measures were enacted to enable the registration of voters before the whole Constitution came into force. The whole Constitution was brought into effect by the Nyasaland (Constitution) Order in Council, 1961,⁽⁹¹⁾ which repealed the two Orders above.

80. see Report of the Nyasaland Constitutional Conference - Held in July and August 1960 (Cmd. 1132 of 1960) (London, H.M.S.O., August, 1960) para. 5.

81. Ibid., para. 1.

82. For Macmillan's journey to Africa (including Central Africa) see Chapter 7 above.

83. Welensky, op.cit., p.179.

84. Ibid., p.180, Welensky writes in his book that the outgoing Colonial Secretary (Lennox-Boyd) had given a pledge that Nyasaland would have no constitutional change until after the Review Conference and that when this was put to Lord Home while he was addressing the Federal Cabinet (See Chapter 7) on February 21, 1960, Lord Home said: "When I get home I will examine these assurances in consultation with Iain Macleod. But I feel I must point out that circumstances in Nyasaland are now different from what they were, when Lennox-Boyd may have given these assurances!"

--- ibid., p. 185.

85. Cmd. 1132 of 1960, op.cit., para. 1.

86. Ibid.

87. Ibid., para. 3.

88. See Cmd. 1132 of 1960.

89. S.I. 1960, No. 2210.

90. S.I. 1960, No. 2414.

91. S.I. 1961, No. 1389.

PROVISIONS OF THE NYASALAND CONSTITUTION OF 1960

The new Constitution provided for a Legislative Council comprising a Speaker appointed by the Governor,⁽⁹²⁾ three ex-officio members, two official Members nominated by the Governor,⁽⁹³⁾ twenty-eight elected Members⁽⁹⁴⁾ and such number of nominated Members as the Governor might appoint.⁽⁹⁵⁾ The ex-officio Members were to be the Chief Secretary, the Attorney-General and the financial Secretary.⁽⁹⁶⁾ In order to be elected as a member of the Legislative Council a person was to have the following qualifications: (a) 25 years of age; (b) be a registered voter; (c) be ordinarily resident in Nyasaland and to have been so resident for a period of not less than two years before nomination or for periods amounting in aggregate to not less than two years during the four years immediately before that date; and (d) ability to speak English well enough to take an active part in proceedings of the Council. A person was to be deemed to have an adequate knowledge of English if his mother tongue was English or if he possessed a recognized university degree or if he had been a Member of the Legislative Council established by the Order or by the former Legislative Council.⁽⁹⁷⁾ Persons other than these were to prove that they knew English adequately. In order to be a candidate for a lower roll seat a person was to be a registered voter under that roll and in order to be a candidate for a higher roll seat a person was equally to be a registered voter under that roll.⁽⁹⁸⁾ Of the twenty-eight elected Members, eight were to be elected by the higher roll and twenty by the lower roll.⁽⁹⁹⁾

As indicated in the last paragraph, the Constitution established two rolls - higher and lower. An applicant for registration as a voter on either roll was, in addition to possessing the specific qualifications for each roll, required to be: (a) a British subject or British protected person by virtue of connection with Nyasaland, or an African who, although not a British subject or British protected person by virtue of his connection with Nyasaland, was paying or was exempt from paying tax as a Nyasaland African under the African Tax Ordinance,⁽¹⁰⁰⁾ or the wife or daughter of such person; (b) 21 years of age; (c) at the time of application ordinarily resident or carrying on business or employed or the owner of immovable property in the constituency in which he sought to be registered and had been in addition ordinarily resident at any place in Nyasaland for a continuous period of two years.⁽¹⁰¹⁾

92. S. 20 & 21 (1) of S.L. 1961, No. 1189. All sections cited below are of this Order.

93. S. 20 & 24. 94. SS. 20 & 25. 95. SS. 20 & 26.
96. S. 23. 97. S. 27 (1) & (2). 98. S. 27 (3). For disqualifications, see S. 26. The disqualifications were the usual ones found in most British territories.

In addition to the general qualifications above for a person to be registered on the lower roll, he had to have one of the following qualifications: (a) literacy in English and receipt of income of not less than £120 for any of the three years immediately preceding the application; (b) literacy in English and ownership of immovable property of the value of not less than £250; (c) literady in English, Nyanja, Yao, Tumbuka, Ngonde, Tonga, Gujerati or Urdu and satisfaction of the registration officer - (i) that his name was on a tax register and that he had paid his taxes for the last ten years, or (ii) that his name not being on a tax register, he had for the last ten years belonged to a class of persons which had been exempted from paying tax; (d) was a chief, former chief or sub-chief, recognized as such by the Governor; (e) was a native authority or a Member of a native authority, recognized as such under the Native Authority Ordinance;⁽¹⁰²⁾ (f) was a Member or former member (either appointed or elected) of a District Council established under the Local Government (District Councils) Ordinance;⁽¹⁰³⁾ (g) was a group or village headman recognized as such by the Governor; (h) was a master farmer registered on any register of master farmers maintained by a Provincial Agricultural Officer under the Master Farmers Scheme; (i) was a pensioner receiving a pension for life paid in respect of past service to an employer or in respect of past service to an employer or in respect of injury received during service; (j) had served in Her Majesty's armed forces on active service as defined in the Army Act⁽¹⁰⁴⁾ or had served for a minimum of six years and was no longer serving but had not been discharged for misconduct; (k) was a University graduate, literate in English; (l) was a woman who had been married for a continuous period of ten years or for ten years in the aggregate and was literate in any of the languages mentioned above.⁽¹⁰⁵⁾

In addition to the general qualifications mentioned above, a person seeking registration on the higher roll had to have one of the following qualifications: (a) income of not less than £720 per year for either of the two years immediately preceding the application; (b) ownership of property at the time of application of not less than £1,500 value; (a) income of not less than £480 per year or immovable property of not less than £1,000, plus in each case education up to the standard of the Nyasaland Education Department Primary Leaving Examination; (d) income of not less than £300 for the preceding two years or immovable property of not less than £500, plus in each case four years secondary education; (e) a university degree.⁽¹⁰⁶⁾

99. S. 60 (a) and (b). 100. Cap. 159.
 101. Cap. 159. 102. Cap. 73. 103. Cap. 100.
 104. This was the British Army Act (3 & 4 Eliz. 2, C. 18).
 105. S. 5. 5 (d) - (e)

It will be seen that the higher roll was based on the Federal ordinary roll. This roll was intended to be dominated by non-Africans and to elect, therefore, non-African candidates. Very few Africans would qualify under this roll although in some constituencies they could have a decisive vote, enabling a European candidate they favoured to win. The fact that a person could only stand for a seat of the roll on which he was registered caused most of the Malawi Congress Party leaders to register on the lower roll although they could qualify for the higher roll. On the other hand, the lower roll was intended to be an African roll. The inclusion of twelve alternative qualifications for this roll was an attempt to retain a qualitative franchise while enfranchising most of the adults in the country. The arrangement was a compromise between outright "one man one vote" and a restrictive lower franchise like that of Northern Rhodesia and the Federation (and later that of Southern Rhodesia). The most embracing qualification was that of having paid tax for ten years. It enfranchised the majority of the male persons of 30 years and over. The franchise was therefore, virtually one of adult male suffrage.

The Constitution provided^d for an Executive Council of three ex-officio Members and seven appointed Members.⁽¹⁰⁷⁾ The Members were now to be styled Ministers.⁽¹⁰⁸⁾ The ex-officio Members were to be the Chief Secretary, the Attorney-General and the Financial Secretary.⁽¹⁰⁹⁾ The other seven Members were to be appointed by the Governor.⁽¹¹⁰⁾ Of the seven, two were to be public officers while five were to be elected Members of the Legislative Council.⁽¹¹¹⁾ Three of the five were to be Members elected by the lower roll while the other two were to be Members elected by the higher roll.⁽¹¹²⁾ If the Governor, in his discretion, so recommended and a Secretary of State approved, one of the two appointed officers or both could be replaced⁽¹¹³⁾ by an elected Member or elected Members as the case might be. In appointing elected Members to the Council the Governor was to have regard to the composition of the parties in the Legislative Council.⁽¹¹⁴⁾ He was to consult the person or persons who appeared to him to be the leader or leaders of the main party or parties in the Legislative Council.⁽¹¹⁵⁾

106. S. 56 (a) - (e).

107. S. 6 (1).

108. S. 6 (2).

109. S. 7.

110. S. 8 (1)

111. S. 8(2).

112. Ibid.

113. S. 8 (3).

114. S. 8 (4).

115. S. 17.

116. S. 18 (1).

117. Ibid.

118. Ibid.

119. S. 18 (2).

120. S. 9.

121. S. 10.

33. The Governor could in his discretion charge any Member of the Executive Council with responsibility for a Government department.⁽¹¹⁶⁾ He could also appoint up to three Parliamentary Secretaries to assist Ministers.⁽¹¹⁷⁾ Such Parliamentary Secretaries were to be appointed from members of the Legislative Council but were not to be Members of the Executive Council.⁽¹¹⁸⁾ If three were to be appointed, at least two of them were to be Members elected under the lower roll.⁽¹¹⁹⁾ In formulation of policy and in the exercise of all powers conferred on him by the Constitution or any other law, the Governor was to consult the Executive Council except in those cases where the Constitution or any other law stipulated otherwise.⁽¹²⁰⁾ The Governor could, however, even in those cases where the Constitution required him to consult the Executive Council, act against its advice.⁽¹²¹⁾

It will be seen that although Africans were going to dominate the Legislative Council, this would not be so with the Executive Council. If the Council were constituted as laid down, it would have seven Europeans (i.e. 3 ex-officio officials, 2 appointed officials and 2 higher roll non-officials) as against three Africans. Even if the Governor decided to give to the non-officials the two seats for the appointed officials and these were given to Africans, there would be parity between Europeans and Africans. It was, however, possible (and this was what later happened) for an African party to sponsor its European supporters for the upper roll seats and then, if they won, to have them fill the two upper roll seats. Another aspect was that, assuming the two seats for appointed officials were not given to the non-officials, there would be parity between officials and non-officials. If the two seats were given to the non-officials then there would be three officials as against seven non-officials.

The Constitution had other provisions which, however, do not warrant discussion. These provisions concerned the offices of Governor, Acting Governor and Deputy-Governor;⁽¹²²⁾ the Public Service;⁽¹²³⁾ the Judicature;⁽¹²⁴⁾ and miscellaneous matters.⁽¹²⁵⁾

Compared with the Northern Rhodesian 1953 Constitution, the Nyasaland Constitution was more advanced in some respects, less advanced in one or two respects and similar in other respects. Beginning with the similarities, it will be seen that both Constitutions provided for a higher and a lower roll.

122. Ss. 3 - 5.

123. Ss. 63 - 73.

124. Ss. 74 - 84.

125. Ss. 85 - 89 and 90 - 93.

34. Both Constitutions intended the lower roll to be predominantly black and the higher roll to be predominantly white. The higher roll was in both Constitutions based on the Federal ordinary roll. The object in both constitutions was that the higher roll should return to the Legislative Council European Members and the lower roll African Members. Both Constitutions, therefore, sought to ensure racial representation to a point. Both Constitutions, although giving absolute majority to the non-officials in the Legislative Council, retained some official Members. The Officials were also retained in the Executive Council. Although the Members of the Executive Council were accorded Ministerial status under both Constitutions, the Governor remained with vast powers, not only to override the Executive Council, but also the Legislative Council. The powers of the Executive Council in each case were advisory. In setting up the Executive Council the Governor was, under both Constitutions, to pay regard to the state of the parties in the Legislative Council by consulting the leader of the majority party.

Several differences, however, existed between the two Constitutions. The Nyasaland lower roll was wider than that of Northern Rhodesia. The Nyasaland Constitution did not provide for cross-voting as did the Northern Rhodesian Constitution. While the object in the Northern Rhodesian Constitution was to create a multiracial rather than a racial majority in the Legislative Council, that in the Nyasaland Constitution was to create a racial majority. While the distribution of seats in the Northern Rhodesian Constitution did not assure even a dominant party like the U.F.P. a majority over other parties and the officials combined, that in the Nyasaland Constitution assured the dominant party an overall majority by making it possible for such party to win all or nearly all the lower roll seats. It will be noted that while the Northern Rhodesian Constitution gave the majority of the elected seats to the higher roll, the Nyasaland Constitution had the reverse position. Six officials sat in the Northern Rhodesian Legislative Council while only five were to do so in Nyasaland. The Nyasaland Constitution provided for no nominated Members. The Northern Rhodesian Constitution provided for two such Members. With regard to the composition of the Executive Council the Northern Rhodesian Constitution gave a clear majority of one to the non-Officials. The Nyasaland Constitution, on the other hand, provided for parity between the Officials and the non-Officials, unless the Governor were to decide to give one or both of the two seats for appointed Officials to the non-Officials. If that happened the non-Officials would then have a majority of two over the officials.

35. While the Northern Rhodesian Constitution specifically mentioned that two of the non-Official Ministers had to be Africans there was no mention of this in the Nyasaland Constitution. The inclusion of Africans in the Executive Council was assured by the fact that three of the five non-Official Ministers were to be Members elected under the lower roll (which was to be predominantly African and, therefore, elect Africans). The Northern Rhodesian Constitution mentioned that at least four of the non-Official Ministers should be Members elected on the higher roll. This was intended to cover the four European non-Official Ministers. There was no mention, however, that the African Ministers should be appointed from Members elected in the special constituencies. It was, of course, taken for granted that the two Africans would come from such Members or such Members and nominated Members. The Nyasaland Constitution also reserved two Executive Council seats to Members elected on the higher roll. Further, the Nyasaland Constitution provided for three Parliamentary Secretaries of whom if appointed, two were to be Members elected on the lower roll.

The only aspect on which the Northern Rhodesian Constitution could be said to have been more advanced is that it gave the non-Officials a clear majority in the Executive Council not dependent on the Governor's discretion. On the other hand, the Nyasaland Constitution was more advanced in several aspects. The lower roll franchise was wider than that of the Northern Rhodesian Constitution. The Nyasaland Constitution assured the dominant party of a clear majority over both the Officials and other parties. As far as African advancement was concerned, the Constitution gave the Africans a majority of twelve over the European non-Officials and a majority of seven over the European non-Officials and Officials combined. In the Executive Council the Africans were going to have three Ministers and possibly five if the Governor did not appoint Officials other than those who would be included ex-officio. The Northern Rhodesian Constitution allowed Africans in the Executive Council. It was clear that the next stage in Nyasaland would be full internal rule by Africans. On the other hand, Africans in Northern Rhodesia were still to fight, not even for a majority, but for parity in the Legislative Council and the Executive Council.

A year elapsed after the conclusion of the Nyasaland Constitutional Conference on August 4 before the elections were held. After the Conference the Colonial Secretary wanted the Governor to bring Dr. Bandaand, if necessary, one of his colleagues into the Government. When this idea was put to the Federal Prime Minister he opposed it and argued that the Doctor should wait for the elections. The plan was not carried out.

Two things must first be mentioned before dealing with the elections under the new constitution and the Government formed thereafter. The first is that after the ban of the African National Congress a political vacuum was created among the Africans for nearly a year. In August, 1960, however, Orton Edgar Chirwa (Nyasaland's first African advocate and later Minister of Justice and Attorney-General of the country) was released from Khami Prison in Southern Rhodesia and flown to Nyasaland. He was allowed to organize a new party without holding meetings since emergency regulations were still in force. In this he was helped by the then nineteen year old Aleke Banda who had been arrested from Inyati Secondary School in Southern Rhodesia (where he was doing Form IV), detained at Khami Prison and then deported to Nyasaland. Dr. Banda later alleged that Chirwa had been encouraged to organize a new party so that he could replace him but that Chirwa had refused to do that. The new organization was called the Malawi Congress Party. Although people had at first hesitated to join it,⁽¹²⁶⁾ once they were assured that the party had the blessing of Dr. Banda and that Chirwa did not intend to replace the Doctor, the membership soon rose to a million. The leadership of the organization was handed to Dr. Banda soon after his release and he went to the constitutional conference in July, 1960, as leader of the Malawi Congress Party. The second thing is that when Dr. Banda was released on April 1, 1960, his lieutenants were not released with him. They remained in Southern Rhodesian Prisons but were later flown to Kanjedza Prison in Nyasaland where scores of other detainees were still held. In September, 1960, the Commonwealth Relations Secretary visited the Federation,⁽¹²⁷⁾ while he was visiting Nyasaland he informed Welensky that the remaining Nyasaland detainees should be released. Welensky opposed this as these were considered more dangerous, if let loose, than Dr. Banda. There was also a rumour that Chipembere, Chiume, the two Chisiza brothers and other top men did not like the Constitution their leader had accepted.⁽¹²⁸⁾ This made the possibility of violence if they were released more real. In spite of Welensky's opposition the detainees were released on September 23, 1960, and driven straight to the General Conference of the Malawi Congress Party which was taking place at the time.

126. Chiume (who was then in London) had, in fact, accused Chirwa of wanting to replace Dr. Banda and urged people not to join the party. He had reminded the people of Chirwa's past. Chirwa had in the early fifties led, together with C. J. Matinga, the Progressive Association which favoured Federation. Chiume later corrected the position when he knew that the party had the blessing of Dr. Banda.

127. See above, Chapter 7.

37. The elections took place in August, 1961. The Malawi Congress Party contested all the twenty lower roll seats and supported some Europeans contesting the higher roll seats. In some lower roll constituencies Malawi Congress Party candidates were opposed by candidates of the Christian Liberation Party led by T. D. T. Banda (ex-President of the Nyasaland African National Congress - see above) and others. On August 15 the results were announced. The Malawi Congress Party had won all the lower roll seats, receiving 94% of the total votes cast. Its supported candidates had also won two of the higher roll seats. The results were, therefore, Malawi' Congress Party - 22; United Federal Party - 5; Independents: --- 1. (129)

In accordance with the Constitution the Governor consulted Dr. Banda before appointing the non-official Ministers. The two appointments to be made from persons elected on the higher roll were given to the two Europeans, who had been supported by the Malawi Congress Party. The three appointments to be made from persons elected on the lower roll were given to Members of the Malawi Congress Party elected on the lower roll. The Governor decided not to appoint to the Executive Council Officials other than those who would hold Ministries ex-officio. The two Ministries which would have ^{been} held by such officials were given to lower roll Malawi Congress Party Members. Dr. Banda took the dull (but most important in a country which is dependent on agriculture) Ministry of Natural Resources. The Government turned out to contain only Malawi' Congress Party Ministers apart from the three ex-officio Ministers. The United Federal Party thought it had been tricked. It had expected to get two or more Ministries. This would have occurred had the Malawi Congress Party not had its supporters elected to the higher roll seats. Having failed to enter the Executive Council through this provision the United Federal Party thought the Governor should have given it the two seats to which he had decided not to appoint officials. The Governor could have done this. He must, however, have considered that the Executive Council would run better with two segments (official and Malawi Congress Party) than with three - two of which (U.F.P. and M.C.P.) would be hostile to each other. The swearing in of the new Government marked the end of the era of European dominated government in Nyasaland and the beginning of African domination.

128. Dr. Banda had, when invited to the Conference, taken the stand that he would not go unless his followers were released from detention. He did not, however, continue to insist on this, perhaps after clearing the matter with his lieutenants.

129. For a full account of this election, see Mair, L.P., The Nyasaland Elections of 1961. (London, Athlone, 1962).

The creation of an African dominated Government in Nyasaland could not fail to have immediate effects on the nationalist movement and the general political position in neighbouring Northern Rhodesia. The British Government could not reasonably withhold from the Africans of Northern Rhodesia what it had given to the Africans of Nyasaland. The situation in Northern Rhodesia was, of course, more complex than that in Nyasaland. There was a bigger and more vociferous European population in Northern Rhodesia and the Federal Government was likely to take a tougher stand against changes there than it had done in the case of Nyasaland.

EVENTS PRECEDING THE NORTHERN RHODESIAN CONSTITUTION OF 1962

Reverting to the situation in Northern Rhodesia, it should be mentioned first that when the Zambia African National Congress was banned and Kaunda, Sipalo and Kapwepwe were jailed, the African National Congress could not fill the political gap that had been left by the banned organization. The fact that the African National Congress came out with only one seat under a Constitution Nkumbula had thought was an advance, discredited him and vindicated the jailed Z.A.N.C. leaders. Instead of joining the African National Congress, the ex-Z.A.N.C. members (together with a few other small groups which had sprung up after the ban of Z.A.N.C.) formed the United National Independence Party in the same year the organization was banned (1959). The territory's newly qualified and first African advocate, Mainza Chona, who had just returned from Britain, became the new organization's President. Being of unknown political views the Government did not interfere with him. As happened in Nyasaland when the M.C.P. was formed, people were hesitant to join the organization until they were assured that the three jailed Z.A.N.C. leaders would lead the organization when they came out of jail. When the three leaders were released they assumed their former positions - i.e. Kaunda became President while Sipalo and Kapwepwe became Secretary-General and Treasurer-General respectively.

When Macleod came to the Federation in March, 1960,⁽¹³⁰⁾ he saw, among other leaders, Kaunda and invited him to visit London for talks.⁽¹³¹⁾ Kaunda saw Macleod on May 20 and after that meeting Macleod wrote Welensky, indicating his constitutional ideas for Northern Rhodesia.⁽¹³²⁾ Later Macleod again wrote Welensky, saying he wanted to promise before the Federal Review Conference that he would hold a constitutional conference for Northern Rhodesia in 1961,⁽¹³³⁾

In reply Welensky reminded Macleod that he was breaking a pledge he had made at Lusaka Airport on March 29 (1960) to the effect that he would not amend the Northern Rhodesian Constitution before the Federal Review and that if a conference were held in the near future, Kaunda would demand a lower franchise like that granted to Nyasaland.⁽¹³⁴⁾

The Secretary of State's difficulty was that Africans wanted their political position advanced before the Federal Review Conference. Encouraged by the advanced constitution already given to Nyasaland and Kenya they were determined to get the same advance before the end of the year (1960). On the other hand, the Federal Government, already faced with a constitution in Nyasaland which was going to give the Africans, when implemented, a majority in the Legislative Council and a large say in the Executive Council, did not want its position complicated further by another Nyasaland-like Constitution in Northern Rhodesia, at least before the Review Conference. It was, therefore, determined to see that such a position did not arise.

Despite the Federal Government's opposition,^(134a) the conference opened in London in December, 1960 simultaneously with the Federal Review Conference. The Conference had been preceded by discussions in Lusaka between the Governor and the various political groups. Opening the Conference, the Colonial Secretary told the delegates:

"Our purpose at this Conference is to try to find an agreed basis for the next phase of constitutional advancement in Northern Rhodesia. As with any major step in the political evolution of a country, the solution which we seek must on the one hand meet the natural aspirations of the peoples of the territory and on the other provide for maintenance of stable government and an efficient and developing administration." (135)

The Secretary of State outlined the points which the delegates were to take into account in their contribution to the Conference.

130. See above, Chapter. 7.

131. Welensky, *op.cit.*, p. 188.

132. For a summary of Macleod's letter on his meeting with Kaunda, see *Ibid.*, pp. 196 - 197; for a summary of Macleod's ideas on Northern Rhodesia, Nyasaland and the Federation, see *Ibid.*, pp. 197 - 3. For Welensky's reply to Macleod's letter, see *ibid.* pp. 199-200.

133. *Ibid.*, p. 271.

134. *Ibid.*

134a. See Chapter 7.

135. Northern Rhodesia Proposals for Constitutional changes, 1960 (Cmd. 1295 of 1961) (London, H.M.S.O., February, 1961) Para. 2.

136. *Ibid.*

137. *Ibid.*, para. 4.

138. *Ibid.*, para. 5.

- (a) Increase of African seats.
- (b) A broadly based qualitative franchise - not one man one vote and not leaving the position as it was.
- (c) That though the Governor was to remain with ultimate responsibility and ex-officio members were to remain on the Executive Council, the composition of the Council should in the next phase reflect generally the composition of the Legislative Council.
- (d) That the Governor should retain some powers of nomination of Members to the Legislative Council.
- (e) That since the Conference should have an eye on future constitutional developments towards self-government, it should think in terms of a Bill of Rights and a Council of State for the safeguard of minority interests in the future.
- (f) That it was necessary to give chiefs some special place in the Central Councils of the Government. (136)

Reaching a solution was not going to be an easy thing owing to the divergence of the views held by the different parties to the Conference. The United Federal Party opposed an increase of African Members and widening of the franchise. They favoured African representation to be increased by the bringing of chiefs into closer association with the Government. They stood by the 1958 Constitution and argued that individual merit as found in the 1958 Constitution should continue to be the criterion for political and economic advance. The Party further argued that politics should develop on party and not on racial lines; that political development should be evolutionary and that Northern Rhodesia should be granted self-government on the 1958 Constitution and franchise. (137) It should be noted that the self-government the Party was calling for was one in which Europeans would dominate the Government. The Dominion Party argued that increasing African representation and widening the franchise would mean a departure from the policy of non-racialism, partnership and evolutionary advancement. (138) It was rather ironical for the right wing Dominion Party to speak of multiracialism and partnership. The reason for this is not hard to find. The Dominion Party was no longer under any illusions that the policies it stood for had ceased to be practical politics, given the course that had been set for the country. It made more sense, therefore, to argue in favour of retaining the existing Constitution which would guarantee European control for some time. The Liberal Party accepted the broad principles of the Secretary. It, however, wanted two more principles added. The first was that Europeans should accept African majority rule as ultimately inevitable while the second was that Africans, on the other hand, should accept that majority rule would be attained "in an orderly sequence through a period of peaceful, planned transition of power." (139)

41. The Chiefs' representatives advocated an African majority in both the Legislative and the Executive Councils and a franchise based on universal adult suffrage.⁽¹⁴⁰⁾ They accepted the principle of safeguards for the minorities.⁽¹⁴¹⁾ On their role under the intended Constitution, they suggested that the chiefs should be associated with the work of the Legislative Council.⁽¹⁴²⁾ The two nominated Members, L.H. Ngandu (an African) and V.D. Mistry (an Asian) also urged majority rule.⁽¹⁴³⁾

The two African nationalist organizations - the United National Independence Party and the African National Congress -- demanded an African majority in both the Legislative Council and the Executive Council and a one man one vote franchise. These demands were the same as those put forward by the Chiefs' representatives. The United National Independence Party accepted a non-racial approach to constitutional development and that such development should be evolutionary, allowing a transitional period "so long as this was not made an excuse for delay in granting African demands." It also agreed that discussion towards self-government should begin provided it was on the basis of majority rule. The Party, however, rejected the viewpoint that the Governor should continue to exercise powers of nomination of Members to the Legislative Council. It also rejected the principle of parity as being ten years behind the time.⁽¹⁴⁴⁾ The African National Congress also accepted the principle of non-racialism but condemned the 1958 Constitution as perpetuating white supremacy. It proposed a Legislative Council of 75 Members with 16 reserved seats for Europeans and that the Governor should continue to preside over the Executive Council, with Ministers continuing to be responsible to him.⁽¹⁴⁵⁾

The British Government did not table its proposals at this stage. It only advanced the principles on which the new Constitution would be based. This first stage of the Conference, therefore, closed after a brief sitting with only the views of the various groups from Northern Rhodesia having been given. The Conference was to reconvene in the New Year.

On January 8, 1961, it was announced that the Conference would reconvene on January 30. On January 9, the British Prime Minister sent a message to Welensky containing the British Government's intended constitutional scheme for Northern Rhodesia and asking him to give his frank views on the matter.

140. Ibid., para. 7.

141. Ibid.,

142. Ibid.,

143. Ibid., paras. 10 and 11.

144. Ibid., para. 8.

145. Ibid., para. 9.

The scheme envisaged(1) a Legislative Council of (a) 30 elected Members - 15 Africans and 15 whites or 16 Africans and 14 whites; (b) 6 nominated officials and 2 or 3 nominated non-officials (including one Asian), with some representative but non-voting chiefs; (2) an Executive Council of 4 Officials, 3 African and 3 European non-Officials, assisted perhaps by 3 Parliamentary Secretaries (race unspecified) who were to be Members of the Government but not of the Executive Council; and (3) a franchise which by altering the qualifications for both ordinary and special rolls was to produce an African electorate of about 100,000. Macmillan added in the message that he favoured, for the elected Members, the 16 Africans and 14 whites arrangement.⁽¹⁴⁶⁾

Welensky opposed the whole scheme as a sell-out of the Northern Rhodesian Europeans and a prelude to the breakup of the Federation. On January 14 (1961) he wrote to Macmillan on the scheme: "It will drive Southern Rhodesia out of the Federation. The electorate in Northern Rhodesia is well aware of this and in any case they are no less opposed than Southern Rhodesia to...African control of the Government in Northern Rhodesia. Feeling is running extremely high... Little will be required to spark off serious trouble....I cannot overemphasise the dangers of the situation."⁽¹⁴⁷⁾

Macmillan in reply refused to alter the proposals. Welensky wrote again on January 26 saying the proposals were no basis for negotiations in which he or his party could participate and that going on with the Conference would be disastrous.⁽¹⁴⁸⁾ Welensky wanted the Conference postponed until the matter had been discussed further.⁽¹⁴⁹⁾ Faced with Welensky's threat not to participate in the Conference, Macmillan despatched Sandys to the Federation to talk to Welensky and asked Macleod not to table his proposals for a few days. Welensky got no concessions from Sandys except that if the Federal Government wished (since it was not directly represented at the Conference) it could send a representative to watch over developments.⁽¹⁵⁰⁾ Welensky accordingly sent his Minister of Law, Greenfield, to work together with the leader of the United Federal Party in Northern Rhodesia, John Roberts.⁽¹⁵¹⁾

The Conference resumed on January 30. On January 25 the Colonial Secretary had asked the Governor to inform the delegates that because of their divergent views it was necessary for the groups to hold separate discussions before he tabled his proposals.⁽¹⁵²⁾ The United Federal Party and the Dominion Party boycotted the resumed conference, although John Roberts stayed in London to watch over developments.⁽¹⁵³⁾

146. Welensky, *op.cit.*, p. 291.

147. *Ibid.*, p. 292.

148. *Ibid.*, pp. 292 - 3.

149. *Ibid.*, p. 293.

150. *Ibid.*

43. The United Federal Party perhaps wanted to force a postponement of the Conference. This, however, turned out to be a miscalculation since the Secretary of State decided to go ahead with the Conference despite the boycott. The Secretary of State, it will be noted, had complied with the provisions of Paragraph 30 of the Report,⁽¹⁵⁴⁾ of the Federal Conference of January, 1953, which required the views of the Federal Government to be sought before Her Majesty was advised on constitutional changes in the territorial sphere.⁽¹⁵⁵⁾ The Conference was adjourned to February 3 soon after resumption in order to allow the Secretary of State to have separate discussions with the various groups.⁽¹⁵⁶⁾

Welensky sought to go to London himself to influence things. Although Macleod had no objection to Welensky's coming, Macmillan had. Macmillan thought it would be better if Welensky came in March, shortly before the Prime Minister's Conference and not solely for the Northern Rhodesian constitutional problem.⁽¹⁵⁷⁾ It should be noted that the British Government was already acting "unfairly" to parties other than the United Federal Party by giving a great deal of attention to the Federal Government, which was not a direct participant in the talks and in spite of the boycott of the Conference by the U.F.P. The reasons for this were no doubt the apprehensions it had about the extent to which Welensky might go to block the introduction of the intended Constitution. These apprehensions appeared to be confirmed by the fact, that at this time reports began circulating of British troop-carrying aircraft arriving at Nairobi. The Federal Government sent an aircraft of its Air Force to check on the reports and on receiving confirmatory information brought by the crew a decision was taken to prevent the landing of British military aircraft in the Federation by rolling drums at all airports if necessary.⁽¹⁵⁸⁾ Welensky, it appears, was, in fact, contemplating a major political step.

151. Cmd. 1295 of 1961, para. 13; Welensky, op.cit., p. 293.
152. Cmd. ibid., para. 14.
153. Ibid.; Welensky, ibid.
154. Cmd. 6573 of 1953, op.cit.
155. Cmd. 1295 of 1961, op.cit., para. 14.
156. Welensky, op.cit., p. 293.
157. Ibid., pp. 293 - 4.
158. Ibid., pp. 296-7. Welensky says Macmillan later told him that the troop movements were in anticipation of violence in Northern Rhodesia by the Africans after announcement of the proposals and that the British troops were, in fact, intended to help Federal troops. Welensky was not convinced by this explanation which was tendered

159. Ibid. p. 298.
160. Ibid. pp. 298; 299-300.
161. Ibid. p. 300.
162. Ibid.
163. Ibid.
164. Ibid. p. 301.

Rumours were rampant that he intended to declare independence unilaterally and to arrest the Governors and senior officials of Northern Rhodesia and Nyasaland shortly before the declaration. Welensky himself did nothing to dispel these rumours, which were strengthened by the fact that he had previously talked of a Boston Tea Party. In fact, when Greenfield telephoned from London to tell him that Macleod would go ahead with his conference and that John Roberts should stay in London to the bitter end, Welensky uttered words which suggest that he intended to take a major decision if Macleod were to go ahead. He records in his book that he told Greenfield:

"You do that Julian. And if there is the slightest hint that Macleod is going to table proposals which we can't accept, let me know. Then I'll recall Parliament at once and I'll do something else I can't talk to you about on the 'phone." (159)

The conference did not resume on February 3 as expected. It was again postponed to no fixed date. The African nationalists, aware of the fact that all the delay was due to the manoeuvres of the Federal Government and submission to them by the British Government, threatened that unless the Conference went ahead immediately and met African aspirations, there would be trouble in Northern Rhodesia.⁽¹⁶⁰⁾ This threat was not an empty one for back in Northern Rhodesia the situation was simmering with potential trouble as the Africans waited for the results of the Conference.

On February 11, in a bid to further placate the feelings of the Federal Government, Macmillan sent two alternative schemes to Welensky which he said were not acceptable to extremists and that the extremists would reject them probably causing disorders in the country.⁽¹⁶¹⁾ Welensky was asked to give the schemes immediate consideration as the conference was to open on February 14.⁽¹⁶²⁾ The latter, however, rejected both schemes and added that implementation of any of them would kill the Sandys-Whitehead agreement (i.e. the Southern Rhodesia constitutional agreement which had just been arrived at) and would make Whitehead pull Southern Rhodesia out of the Federation.⁽¹⁶²⁾ Welensky sought to go to London but was told by the Commonwealth Relations Secretary that the Prime Minister did not favour the idea.⁽¹⁶³⁾ On February 12 and 13 Sandys had last minute talks by telephone with Welensky and informed the latter that Macleod would address the Conference that week and that at the end of the Conference a statement would be issued which, without providing the details, would refer to three elements which would be embodied in the new Constitution - equal number of Members elected by lower and upper rolls and a number of national seats, candidates of which were to obtain support from both rolls.

The terms of the intended statement rather mollified Welensky who thought it met him on two points - that the method of electing national Members would be examined later and that the upper roll franchise would not be lowered.⁽¹⁶⁵⁾ On February 14 Macleod made his address to the Conference. Welensky says Whitehead and he were shocked when they received copies of the address. It contained departures from what Welensky and Sandys had agreed upon regarding the election of the national Members. Welensky and Whitehead felt that the plan as announced would result in complete African control of lower and national seats and considerable representation in the Upper roll seats, giving the Africans not parity but majority rule.⁽¹⁶⁶⁾

The conference ended on February 17 without agreement on the major issues. The British Government consequently put forward its own plan. On February 21 Macmillan informed Welensky that a statement on the British plan would be made that afternoon in the House of Commons. At an interview that afternoon between the British High Commissioner, Metcalfe, and Welensky, at which Whitehead and John Roberts were present, Welensky told Metcalfe:

"Your Government are determined to go ahead with their constitutional proposals for Northern Rhodesia, ignoring the advice we've given. I must make it quite plain that these proposals are completely unacceptable. I shall take no action until I know that they have been tabled. Then I shall immediately issue a statement explaining why they are unacceptable; I shall recall the Federal Assembly as a matter of urgency; and in view of the potentially dangerous security situation and the need to maintain order, I shall call up a considerable number of troops. I insist that your Government understands that the responsibility for whatever happens is theirs. We have done our best to be reasonable." (167).

Metcalfe replied:

"I feel it is my duty to point out that my Government has been at considerable pains to try to meet views of the various groups in Northern Rhodesia. The proof is that the scheme is also unacceptable to U.N.I.P. and A.N.C. But I still believe it can be made to work with good will on all sides. The consequences of the actions you contemplate will be extremely serious. However, I must accept the fact that the decisions have been taken, and I have no alternative but to inform my Government at once." (168)

165. Ibid.

166. Ibid.

167. Ibid., p. 303. Welensky's statement about his intention to call up troops was ambiguous. It could have been in anticipation of violence by Africans or merely to intimidate the British Government. However, since he also intended to recall the Federal Assembly, there was more reason to believe that both the recall of the Assembly and the call - up of troops were intended to enforce a major decision by the Federal Government - likely a declaration of independence. When this statement is read with Welensky's words to Greenfield on the telephone already quoted above and his statements about a Boston Tea Party, the conclusion is made stronger.

168. Ibid., pp. 303-4.

The Secretary of State for the Colonies made his statement as scheduled⁽¹⁶⁹⁾ and a White Paper⁽¹⁷⁰⁾ containing the proposals was released at the same time. The proposals provided for a Legislative Council composed of three elements - (a) Members elected by voters on the upper roll, (b) equal Members elected by voters on the lower roll, and (c) Members elected by national constituencies covering the whole country. Expected number of Members for each segment was put at 15.⁽¹⁷¹⁾ Both the upper and lower rolls were to vote for their respective Members separately. The national seats were, however, to be elected by both rolls combined. For a candidate to be elected in a national constituency he was to obtain a proscribed minimum percentage of the votes cast by voters of each roll. The votes on each of the two rolls were to be equalized by averaging the percentage of votes cast on each roll which was secured by each candidate.⁽¹⁷²⁾ The upper roll seats were to be predominantly in urban areas and the lower roll seats in the rural areas.⁽¹⁷³⁾ In addition to elected Members there were to be up to six officials and such nominated Members as Her Majesty might from time to time direct by instruction through the Secretary of State.⁽¹⁷⁴⁾ The powers of nomination were to be used sparingly and no more than one or two were envisaged to be appointed.⁽¹⁷⁵⁾ The Governor was, however, to retain this power and to exercise it to ensure the maintenance of Government during abnormal times.⁽¹⁷⁶⁾

The division of the Legislative Council into three segments and the provision of national seats were intended to "achieve the objective of securing substantially increased African representation in the Council, while maintaining the principle of a non-racial political approach in which political parties (were to be) obliged to seek support from both races!"⁽¹⁷⁷⁾

The Executive Council was to consist of three or four officials and six non-officials.⁽¹⁷⁸⁾ The Council was to be under the chairmanship of the Governor and was to be advisory to him.⁽¹⁷⁹⁾ Collective responsibility of Ministers was to be maintained.⁽¹⁸⁰⁾ In choosing unofficial Ministers the Governor was to consult and pay due regard to the person or persons who commanded the widest support in the Legislative Council.⁽¹⁸¹⁾ The Council was to include at least two African and two non-African Members of the Legislative Council.⁽¹⁸²⁾ The Governor was to have the power to appoint both official and unofficial Members of the Legislative Council as Parliamentary Secretaries.⁽¹⁸³⁾ The Parliamentary Secretaries were not to be Members of the Executive Council but were to support the Government in the Legislative Council.⁽¹⁸⁴⁾

47. 3 The plan did not have details on the franchise, but the upper and lower rolls were to be maintained. The existing qualifications for the upper roll were to be maintained but a few qualifications were to be added to enable between 1,500 and 2,000 Africans to qualify on that roll.⁽¹⁸⁵⁾ Major changes were, however, to be made to the lower roll qualifications to include hereditary councillors, departmental councillors to native authorities, any member of a native authority, headmen of registered villages, members of native courts, pensioners in receipt of monthly or annual pension, ex-servicemen who had seen service or who had completed regular engagement, registered peasants or improved farmers and wives of all these. In each of these cases, literacy enabling the applicant to fill the form of registration in the vernacular was to be required.⁽¹⁸⁶⁾ Some of these classes of persons qualified under the existing lower roll. The final qualifications for both rolls will be given below.

The Conference had agreed to a Bill of Rights and to a House of Chiefs. The House of Chiefs was to be composed of chiefs from all the provinces, including Barotseland. The manner of Barotseland's representation in the House was to be discussed later with the Paramount Chief but the conference had agreed on the representation from the other provinces as follows: Northern Province - 4; Southern Province - 4; Luapula Province - 3; Western Province - 1; Eastern Province - 4; Central Province - 3; and Northern Western Province - 3. The Chiefs from each province were to be elected by an electoral college of all the chiefs of the province.

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169. Statement by the Secretary of State for the Colonies on Proposals for Constitutional Change (Northern Rhodesia) (Cmd. 1301 of 1961) (London, H.M.S.O., February, 1961).
170. Cmd. 1295 of 1961.
171. Ibid., para. 17.
172. Ibid., para. 18.
173. Ibid., para. 20.
174. Ibid., para. 21.
175. Ibid.
176. Ibid.
177. Ibid., para. 19.
178. Ibid., para. 24.
179. Ibid., para. 25.
180. Ibid.
181. Ibid.
182. Ibid.
183. Ibid.
184. Ibid.
185. Ibid., para. 22, Annex III. See also Cmd. 1301 of 1961, para. 1.
186. Ibid., para. 22 and Annex II. See also Cmd. 1301 of 1961, para. 7.

48. They were to hold their seats for three years. Although chiefs were to be permitted to stand for election to the Legislative Council, membership of the House of Chiefs was to be incompatible with that of the Legislative Assembly, A

Chief was to lose his membership of the House of Chiefs if he ceased to be a Chief.⁽¹⁸⁷⁾ The functions of the House of Chiefs were to include the examination and discussion of legislation put before it by the Governor. It could also discuss matters of its own volition on the certificate of the Governor made after consultation with the Chairman of the House that the matter was one of public interest.⁽¹⁸⁸⁾

The details to the plan were to be finalized in Lusaka between the Governor and the various groups concerned. The plan as a whole did not automatically apply to Barotseland. It was to do so only after talks with the Paramount Chief. Reactions to the proposals from both Africans and Europeans were condemnatory. The day following the announcement of the plan all the United Federal Party Ministers in the Northern Rhodesia Government, no doubt on the instigation of the Federal Government, resigned. They were immediately replaced by nominees of the Governor from the Liberal Party. Perhaps the United Federal Party expected the Government or at least the administration to collapse as a result of their action. The step later appeared to be a miscalculation as the Party's Northern Rhodesia wing was no longer able to influence things from a position of strength. Perhaps the Governor was relieved to be rid of them as their presence, while so hostile to the proposals, would have no doubt adversely affected the administration. Welensky mobilized four units of the army and defiantly invited the British Government to send its troops.⁽¹⁸⁹⁾ Rumours that he was about to declare unilateral independence increased and no effort was made to dispel them. The African nationalists, on the other hand, also denounced the proposals as falling far short of their demands. They saw the plan as a conspiracy by the British and Federal Governments to thwart African aspirations. They criticized the arrangement of working out the details in Lusaka as they feared that the United Federal Party and the Federal Government would very much influence matters. The Chiefs accepted the proposals as a workable temporary measure.⁽¹⁹⁰⁾

187. Ibid., (Cmd. 1295), Annex IV.

188. Ibid.

189. Mulford, op.cit., p. 23.

190. Ibid., p. 23.

191. Welensky, op.cit., pp. 304 - 5.

192. Mulford, op.cit., p. 24.

193. Ibid.

194. Ibid. see interview given to The Northern News by John Roberts in the issue of June 16, 1961.

195. Mulford, op.cit., p. 25. 196. Cmd. 1423 of 1961.

They had every reason to accept the proposals. They had gained a House of Chiefs - which was more than they had expected.

The stand taken by the Federal Government apparently unnerved the British Government. They immediately started a new round of discussions with Welensky. When Welensky went to London in March for the Prime Ministers' Conference Macmillan asked him to put forward proposals.⁽¹⁹¹⁾ In the meantime the Governor was conducting discussions with the various groups in Lusaka. By May rumours began to circulate that the British Government intended to alter their plan to accommodate the United Federal Party. Early in June Sandys came to the Federation to finalise the remaining aspects of the new Southern Rhodesian Constitution. It was rumoured that he had brought with him a new plan for Northern Rhodesia. The rumour was strengthened by the visit of the Northern Rhodesian Governor to Salisbury while Sandys was there.⁽¹⁹²⁾ The United Federal Party's objections at this stage concerned mainly the national seats and the upper roll votes in the election of national candidates. They wanted the removal of the provision that national candidates should get support from each roll. They argued that this was inconsistent with the Colonial Secretary's objective that parties should seek support from both races. They wanted the provision altered and replaced by the requirement that candidates should obtain a minimum percentage of the votes cast by each race. With regard to upper roll votes the Party wanted their value enhanced so as to count more than the lower roll votes. It also advocated that half of the national seats should be reserved to Whites.⁽¹⁹³⁾

By the middle of June it had become clear that the British plan would be changed.⁽¹⁹⁴⁾ Kaunda threatened to unleash his party's master plan - "non-violent action campaign" aimed at destroying the Federation. He warned the Colonial Secretary that if he accepted the Sandys - Welensky plan, there would be untold strife, chaos and bitterness in Northern Rhodesia.⁽¹⁹⁵⁾

On June 26 new proposals were published in a White Paper.⁽¹⁹⁶⁾ Major changes had been made to the February plan with regard to national seats. The Governor stated in the White Paper that because of the anxiety expressed by certain political groups that under the February plan it was possible for all the national seats to be won by one race, thereby creating great disparity of racial representation in the Legislative Council, it had become necessary that four of the proposed seven double Members National Constituencies should be made to return one European Member and one African Member.

Footnotes on previous page.

The fifteenth National seat was to be reserved for Asians and Coloureds who were to vote separately in a special national constituency covering the whole country. The second anxiety mentioned by the White Paper as having been expressed was that the minimum percentage requirements could lead to frustration of the national seats and that it could be possible for a candidate to win with a small minority of the votes. The Governor dealt with this anxiety in several ways. First, where an election was frustrated in a national seat, only one bye-election was to be held under the same regulations. Secondly, regarding the possibility of a candidate being returned on a minority vote, the Governor pointed out that although the emphasis in the national seats was placed on obtaining support from both races and not necessarily on accumulation of the majority vote, he had, to ensure that a candidate had substantial support from at least one section of the community, added the qualification that candidates must obtain at least twenty per cent of the votes cast on one or other of the rolls.

The new proposals also altered the minimum percentage requirements of the February plan. The reason for this change was given as the fact that under the February plan a candidate would have been required to get more votes from the predominantly African lower roll than from the racially mixed upper roll. Secondly, the presence of a substantial number of Africans on the upper roll while the lower roll remained virtually African would have placed European candidates at a disadvantage. The Governor pointed out that unless the qualifications had been put so high it would have been possible under the February plan for an African candidate to get elected by obtaining African votes from both rolls, thereby defeating the spirit of the Constitution. To remedy the situation, the new proposals put the minimum percentage of votes to be obtained from each roll by a candidate at $12\frac{1}{2}$ of the votes cast or 400 votes, whichever was the lesser. The Governor argued that the requirement of a specific number of votes (400) had the advantage of giving the candidates a specific target which would enable them to measure their chances of success in advance and that it set an upper limit to the number of votes of each race a candidate would require in order to qualify without reducing its utility as a measure of support. On the other hand, the alternative of $12\frac{1}{2}$ per cent was intended to defeat the possibility of a low poll or boycott in which it would be impossible to poll 400 votes.

51. It will be seen on analysis that the new proposals were disadvantageous to the Africans but quite advantageous to the United Federal Party. Under the February plan it was possible for Africans to get as much as ten or more of the national seats, leading to an African majority or even an African party majority when added to the lower roll seats. Under the new plan it was inevitable that half of the national seats would be won by whites. This posed the possibility of equality in seats between an African party or parties on the one hand, and a European party or parties on the other, if they won all the lower roll and upper roll seats, respectively and shared equally the national seats. Such a position would have placed the Governor in the embarrassing position of either giving one of the parties a majority through the support of a nominated Member or Members or appointing to the Executive Council Members from both or all the parties. The $12\frac{1}{2}$ per cent or 400 votes of the votes cast could be more easily obtained from the lower roll by a European candidate than by an African candidate from the upper roll.⁽¹⁹⁷⁾ By making Asians and Coloureds vote separately, potential upper roll votes for African candidates had been removed. Most of the Asians and Coloureds were going to be on the upper roll and would have supported Africans, enabling them to win upper roll or national roll seats. That the changes had given the United Federal Party the advantage over the other parties is borne out by the words of the Federal Prime Minister while announcing the new agreement to his Parliament:

"I don't consider it a good Constitution. It is inspired by doubtful principles overshadowed by political expediency which cannot but give cause for concern, and has been bedevilled throughout by haste. Nevertheless, I am now satisfied that it is a reasonably workable instrument which has a chance of providing for the continuation of responsible government in Northern Rhodesia!" (193)

Reactions to the new proposals were mixed. The United Federal Party, as indicated above, was pleased with the changes. Although they had advocated a percentage lower than $12\frac{1}{2}$, the 400 votes alternative suited them. They were now assured of at least half of the national seats. The Liberal Party which expected to gain most in the national constituencies under the February plan was now at a disadvantage.⁽¹⁹⁹⁾

197. Taking, for instance, a constituency given by Milford of 5000 Europeans and 14,000 Africans, an African candidate would be required to get 625 ($12\frac{1}{2}\%$ of 5000) or 400 votes while a European candidate would be required to get 1,875 ($12\frac{1}{2}\%$ of 14,000) or 400. Candidates in this case would choose the 400 alternative. This expressed in percentages meant 3% for the European candidate and 8% for the African candidate. In terms of votes the European need ed to convert 1 in 35 Africans while the African had to convert 1 in 13 Europeans. It should be noted that in every constituency the Africans were to number exceedingly more than Europeans.

While the African National Congress accepted the new proposals, the United National Independence Party condemned them and accused the British Government of making concessions to the Federal and Southern Rhodesian Governments. A congress of the Party at Mulungushi formally rejected the proposals and gave the President power to put into effect the Party's master plan. On July 14 beerhall boycotts began and incidents of violence were reported in Lusaka and on the Copperbelt. In August disturbances of a serious nature occurred in the Luapula and Northern Provinces. In the middle of that month the Government banned U.N.I.P. in the two Provinces and the Party's Youth League on the Copperbelt. The disturbances, however, continued and by September the following black statistics had been reported - 901 incidents and 1,400 arrests; 38 schools burned down (34 of them in the Northern Province); 24 bridges seriously damaged or destroyed; more than 150 roadblocks made; 27 Africans killed; 650 people convicted of various offences (550 of whom were U.N.I.P. Members).⁽²⁰¹⁾

The British Government was shaken by the turn of events. As violence continued Kaunda flew to London to confer with the Colonial Secretary. After the meeting Macleod announced that further representations would be considered provided violence stopped.⁽²⁰²⁾ When Welensky was asked to give his views on the re-opening of the talks when violence stopped, he informed Macleod that doing so would amount to a surrender to violence. He added, however, that if the British Government intended to go ahead in spite of his objections, he would want to send one of his senior Ministers to London.⁽²⁰³⁾ On September 12, the day Macleod was to make a statement on the matter, the Federal High Commissioner informed the British Prime Minister that if the British Government intended to issue a statement his Prime Minister might come to London. Macmillan told the High Commissioner that such a move would be unfortunate.⁽²⁰⁴⁾ The statement was made as scheduled and a copy of it sent to Welensky with a message that no useful purpose would be served by sending a Minister to London or himself coming and that if he did not agree with British assessment of the situation he should not make their position more difficult than it was already.⁽²⁰⁵⁾

198. Welensky, *op.cit.*, p. 307.

199. Mulford, *op.cit.*, p. 27.

201. *Ibid.*, p. 28.

202. *Ibid.*

203. Welensky, *op.cit.*, pp. 313-4.

204. *Ibid.*, p. 314.

205. *Ibid.*, p. 314-15. Welensky writes on this message: "The only answer I could have given to this missive would have been very rude; I did not reply to it." - *Ibid.*, p. 315.

At last the British Government had decided to resist the Federal Government - a thing it should have done earlier, for the end result would have been the same and violence would have been avoided. The Prime Minister and the Secretaries of State had hitherto treated the Federal Government not only as if it were a direct participant but as if it were the only party involved, despite the fact that the United Federal Party had committed the discourtesy of boycotting the Conference.

Early in October, Reginald Maudling replaced Macleod. The change was a tactical move on the part of the British Government after having taken the decision to re-open the talks. As a new man, Maudling could depart from the June agreement without being fettered by previous pledges, promises or pronouncements. Soon after taking office the new Colonial Secretary announced that he would be visiting the Federation and that while doing so he would be prepared to receive representations from political groups in Northern Rhodesia on the remaining areas of divergence.⁽²⁰⁶⁾ Early in November Welensky visited London and held talks with Sandys and Maudling. On November 29 Maudling arrived in the Federation and stayed until December 3.

After receiving representations in Lusaka the Colonial Secretary confessed that the differences between the various groups had worsened.⁽²⁰⁷⁾ Back in London, he told the Federal High Commissioner to inform his Government that he was not bound by the June White Paper and that the Federal Government would also be released from the agreement if he re-opened talks. When informed of this Welensky records his feelings as follows: "Our being 'released' from our side of the bargain was cold comfort but at least it gave us the right to demand that consultations be re-opened, with all the vigour of the February and June talks."⁽²⁰⁸⁾ He wrote to his High Commissioner: "I want you to stress to Maudling and Sandys the importance we attach to this and that if changes are proposed I shall insist on formal consultations in London, I will send Greenfield and may decide to go."⁽²⁰⁹⁾

206. Ibid., p. 315.

207. Milford, op.cit., p. 29.

208. Welensky, op.cit., p. 316.

209. Ibid., p. 317.

210. Welensky wrote to the High Commissioner after receiving this information: "Other letters have been forgotten. Nobody has ever questioned this letter yet. I am coming tonight unless there's a cast iron reason against. You can tell Sandys and Macmillan that I stand on those June proposals. This is going to decide the fate of the Federation because if they put in an anti-Federal Government in Northern Rhodesia, it is the end of us." - Ibid., p. 321.

In February, 1962, Sandys, as seen in Chapter Seven, came to the Federation and held talks with political leaders in all the three territories. It was during this visit that Welensky gave him papers on the consequences of allowing Nyasaland to secede and a scheme for splitting Northern Rhodesia into two States - black and white. After Sandys had returned to London the Federal High Commissioner had an interview with him after which he reported to his Government that the view of the British Government was that the Northern Rhodesian question should be settled before the resumption of the Federal Review Conference and that the British Government would deny that there had been an agreement on Northern Rhodesia between them and the Federal Government the previous June.⁽²¹⁰⁾

In the afternoon of February 27 the British Cabinet met to finalize matters on Northern Rhodesia before making a statement the following day. When Welensky was informed that a statement would be made the following afternoon, he decided to leave immediately for London.⁽²¹¹⁾ He arrived in the afternoon the following day. The same afternoon the Colonial Secretary made his statement. On March 1 Welensky and his Minister of Law met Macmillan, DeWilling and Sandys. Welensky put forward the scheme to partition Northern Rhodesia which he had previously given to Sandys.⁽²¹²⁾ No decision was reached on the scheme.⁽²¹³⁾ It was, of course, clear that the British Government could not have agreed to such a scheme in 1962 when even as early as 1927 and 1930 it had not received support at Whitehall.⁽²¹⁴⁾

The final plan announced by the Colonial Secretary did not make many alterations to the June proposals. Only one major change was made. The requirement in the June proposals that a candidate should obtain 12½% or 400 votes (whichever was the lesser) of the votes cast by each race was altered to 10% of the votes cast without the alternative of a specific figure. The change was quite material in that both races were now to have an equal chance. Kaunda thought the new arrangement would make it possible for Africans to get a majority although not necessarily a U.N.I.P. one.

211. *Ibid.*, pp. 321-22. A letter from Sandys was read to Welensky by the United Kingdom High Commissioner at the former's residence as he was about to leave. Although it discouraged him from going Welensky, went all the same.

212. *Ibid.*, pp. 322-3.

213. *Ibid.*, p. 323.

214. See the Hilton and Bledisloe Commissions Reports, Chapter 6 above.

215. Milford, *op.cit.*, p. 30.

55. He, however, realized that if his Party were to make headway in the elections it had to gain European support to satisfy the 10% requirement. The violence of the previous year had damaged the image of U.N.I.P. in the eyes of many whites. Aware of this handicap, Kaunda tactfully repudiated responsibility for the disturbances and informed the country that his master plan had been one of civil disobedience and not terrorism. (215)

PROVISIONS OF THE CONSTITUTION FINALLY INTRODUCED

The franchise qualifications as finally embodied in the Northern Rhodesia (Electoral Provisions) Order in Council, 1962, required the general qualifications of (a) citizenship of the Federation of Rhodesia and Nyasaland or of the United Kingdom and Colonies or the status of British protected person by virtue of connection with Northern Rhodesia; (b) 21 years of age; (c) two years continuous residence in the Federation; and (d) literacy in English. In addition applicants for registration on the upper roll were to satisfy one of the following requirements:

- (a) Income of £720 per annum or ownership of immovable property of the value of £1,500; or
- (b) Income of £480 per annum or ownership of immovable property worth £1,000 plus full primary education; or
- (c) Income of £300 per annum or ownership of property worth £500 plus four years secondary education; or
- (d) Be a person in the following categories:
 - (i) Chiefs
 - (ii) Hereditary councillors
 - (iii) Members of Native Authorities or native courts.
 - (iv) Members of municipal councils, Town management Boards or Area Housing Boards.
 - (v) Ministers of Religion.
 - (vi) Members of prescribed religious bodies with two years secondary education.
 - (vii) University graduates.
 - (viii) Holders of a letter of exemption issued under the African Exemption Ordinance before July 1, 1961.
 - (ix) Holders of a Certificate of Honour or a decoration of gallantry or other award from Her Majesty.
 - (x) Pensioners.
 - (xi) Persons in receipt of an income of £300 who have been in the service of one employer for a continuous period of ten years.
- (e) The wives (including the first wife of a polygamous marriage) of the persons from (a) - (d)

Applicants for registration on the lower roll were, in addition to the general qualifications, to satisfy one of the following qualifications:

56.

- (a) £120 income per annum or ownership of immovable property worth £250; or
- (b) Wife (including the first wife in a polygamous marriage) of a person qualifying under (a) above; or
- (c) Literacy in the vernacular and coming under any of the following classes of persons:
 - (i) Tribal Councillors
 - (ii) Members of Native Authorities and Native Courts.
 - (iii) Members of Municipal Councillors, Town Management Boards or Area Housing Boards.
 - (iv) Headmen
 - (v) Pensioners
 - (vi) Persons registered as Individual, Peasant or Improved farmers for the two years immediately preceding application.
 - (vii) Members of prescribed religious orders.
 - (viii) Holders of Certificates of Honour or a decoration for gallantry or other award from Her Majesty.
 - (ix) Wife (including first wife of a polygamous marriage) of any of the persons above.

It will be seen that the only additional qualifications under the upper roll were those coming under (d). The other qualifications remained as they were under the 1958 Constitution. The new qualifications would add a considerable number of African voters on the upper roll but not sufficient to prevent the United Federal Party from winning most of the upper roll seats. It will be noted that the qualifications for the upper roll seats, in this case, were wider than those granted to Nyasaland under the 1961 Constitution. The lower roll, on the other hand, although wide enough to permit hundreds of Africans to qualify was not as wide as the Nyasaland one. The qualification of having paid tax for ten years contained in the Nyasaland franchise was absent in the franchise given above.

ELECTIONS UNDER THE NEW CONSTITUTION

After the enactment of the Northern Rhodesia (Electoral Provisions) Order in Council which brought the parts of the new Constitution relating to elections into effect, the registration of voters began. A timetable to hold the elections by October was set and the time of eleven weeks, beginning from April and ending on June 30, was allocated to the registration of voters. The Government expected 30,000 upper roll voters and 70,000 lower roll voters. Ninety per cent of the upper roll was expected to be European while Africans would dominate the lower roll. Asians and Coloureds were to have a separate roll. However, Coloureds who did not want to vote in the national constituency could elect to vote in one of the national constituencies either as an African or as a European, provided that a Coloured who had no African ancestry could not elect to have his vote counted among the votes of Africans and a Coloured who had no European ancestry could not have his vote counted among European votes..

Asians did not have this option. It should be noted that in applying for registration a person had to state his race. Although the registration was very slow at the beginning,⁽²¹⁶⁾ there was a rush in June, bringing the numbers at the close of the registration to 37,300 upper roll voters and 92,255 lower roll voters.

Two further orders - the Northern Rhodesia (Constitution) Order in Council, 1962, and the Northern Rhodesia (Delimitation Commission) Order in Council, 1962 - were enacted. The former Order was to bring the whole Constitution into effect while the latter was to enable constituencies to be delimited.⁽²¹⁷⁾ Although the United Federal Party wanted the elections postponed,⁽²¹⁸⁾ beyond October, the First Secretary of State, Butler, who was now in charge of Central African Affairs, insisted that they be held as scheduled. Nomination day and election day were fixed for October 9 and 30 respectively. In all 144 candidates submitted their nominations for the 45 seats. The United National Independence Party fielded 40 candidates and supported 4 independents; African National Congress 31 and supported 1 independent; Liberal Party 29; United Federal Party 28; Rhodesia Republican Party 5; Barotseland National Party 3; and Independents without any party support 3. No European submitted a nomination for a lower roll seat but 10 Africans, 2 Asians and 2 Euro-Africans submitted nominations for upper roll seats. In the seven double-member national constituencies 54 candidates were nominated - 28 Europeans, 24 Africans and 2 Euro-Africans. The Asian and Coloured national constituency had three nominations, all Asians.⁽²¹⁹⁾

The United Federal Party won 13 of the upper roll seats and U.N.I.P. 1. On the lower roll U.N.I.P. won 12 and the A.N.C. 3. Only 5 national seats had results. The other ten were frustrated because of the failure of the candidates to obtain the minimum percentage requirements. Of the five seats successfully contested, the U.F.P. won two and the A.N.C. two. The Asian and Coloured seat was won by U.N.I.P. The state of the parties was accordingly U.N.I.P. - 14; U.F.P. - 15; and A.N.C. - 5. The other parties had all lost. Bye-elections in the frustrated National seats were fixed for December 10.

216. At the end of the first month of registration, for instance, only 1,461 new upper roll and 8,026 new lower roll voters had registered although more than one-third of the period had already elapsed.

217. See Report of the Delimitation Commission, Sept. 1962 (Lusaka, Govt. Printer). For other literature on elections, see The Electoral Regulations, 1962 and The Election Forms Regulations, 1962.

218. Welensky, op. cit., p. 344.

219. Mulford, op. cit., pp. 96 - 100.

It can be seen that for the time being the A.N.C. held the balance of power. It could make the U.F.P. or U.N.I.P. form the Government by aligning with either.⁽²²⁰⁾ Consequently negotiations began between Kaunda and Nkumbula and John Roberts and Nkumbula for a coalition. Nkumbula found himself in a dilemma. He disliked U.N.I.P. because of the rough time it had given to his organization through intimidation and other forms of violence. U.N.I.P. was, however, an African party and so was the A.N.C. Both had fought for African majority rule and the opportunity of an African Government had now presented itself. Nkumbula also disliked the U.F.P. because it supported Federation which he wanted destroyed. Secondly, the U.F.P. was a European party and forming a Government with it would not give the A.N.C. the image of a nationalist organization. Just to be difficult, however, Nkumbula asked Kaunda to denounce intimidation and Roberts to denounce Federation before he could co-operate with either of them to form a coalition Government. Nkumbula knew, that neither leader would comply with his demand.

On November 3 the Governor announced the resignation of the Liberal Party Ministers who had been in the Government since they replaced the U.F.P. Ministers early in 1961.⁽²²¹⁾ He then formed a caretaker Government of officials until the results of the bye-elections. In the meantime, Nkumbula was under pressure from various quarters all over Africa urging him to form a coalition Government with Kaunda. The Northern Rhodesia Council of Chiefs met and passed a resolution urging the two leaders to come together. A split of opinion was also growing in the ranks of the A.N.C., the majority wanting a coalition with U.N.I.P. Kaunda, desperate for a coalition, swallowed his pride and went to see Moise Tshombe, the self-styled and secessionist President of the "Katanga Republic" who held the financial strings of the A.N.C. and from whom Nkumbula had to get clearance before joining the U.N.I.P. Kaunda and his party had vituperated Tshombe for his secession. On November 14 the Pan African Movement of East, Central and South Africa, of which Kaunda was President, admitted the A.N.C. to Membership. All along the A.N.C. had been refused membership on the grounds that it was not representative and nationalist enough. The admission was no doubt intended to make it more difficult for the A.N.C. to join with the U.F.P.

220. For the tortuous negotiations for a coalition between Kaunda and Nkumbula, see *ibid.*, Chapter VII. "I have the key in my pocket to form a coalition but; the key is still there," Nkumbula told a meeting - *ibid.*, p. 171.

221. See above.

Later Kaunda and Nkumbula met Julius Nyerere in East Africa. From there Nkumbula flew to London to see Butler and he was later joined there by Kaunda. In London, the two leaders ironed out their differences and announced that they would work together.⁽²²²⁾ On return they told their followers that the First Secretary of State had committed the British Government to the grant of a new Constitution to the territory before the end of 1963.

Dye-elections were held on December 10 for the ten national seats and one upper roll seat. Eight of the ten national seats were again frustrated. The A.N.C. won the two successfully contested seats and the U.F.P. won the upper roll seat. This raised the A.N.C.'s seats to 7 and the U.F.P.'s to 16. Kaunda and Nkumbula after this set themselves to forming a Government. A minimum of two Ministries, it will be remembered, were to be held by non-African elected Members. These were filled by the A.N.C. European Members. There was disagreement on the allocation of ministries but this was soon resolved. The two leaders had finally managed to form a coalition, which, although shaky, marked the end of an era and the beginning of a new one. The new Government took office on December 16,⁽²²³⁾ bringing to an end 72 years of European Governments.⁽²²⁴⁾

222. The U.F.P. which still hoped for a coalition with the A.N.C. said the statement did not bind the A.N.C. Stubbs, a European who had won a seat for the A.N.C. expressed a similar view. The A.N.C. European Members no doubt wanted the organization to join with the U.F.P.

223. The non-official Ministers were: K.D. Kaunda (U.N.I.P. - Local Government and Social Welfare); H.M. Nkumbula (A.N.C. - African Education); S.M. Kapwepwe (U.N.I.P. - African Agriculture); R.C. Kamanga (U.N.I.P. - Labour and Mines); F.N. Stubbs (A.N.C. - Transport and Works); C.E. Cousins (A.N.C. - Land and Natural Resources). Each Minister had a Parliamentary Secretary of his own Party. The officials held the portfolios of Chief Secretary, Finance, Native Affairs and Justice. A U.N.I.P. Parliamentary Secretary, A.N.C. Wina, was appointed to the Ministry of Finance.

224. For a detailed account of the background to the 1962 Constitution, the 1962 Constitution itself and the elections under it, see Mulford, op.cit.

60. THE NYASALAND AND NORTHERN RHODESIAN CONSTITUTIONS COMPARED

As stated earlier, granting a new constitution to Northern Rhodesia was not as easy, from the point of view of the British Government, as was the case with Nyasaland. In Northern Rhodesia the British Government met with stiff opposition from the Federal Government. This made the British Government produce several plans before settling on the final one. While it had taken less than a fortnight (July 25 - August 4, 1960) to get agreement on the Nyasaland Constitution, it had taken over a year (December 1960 - February 1962) to produce a British imposed constitution in Northern Rhodesia. No agreement could be reached.

The constitution as finally brought into effect was, with regard to Africans, less advanced than that of Nyasaland. The Nyasaland Constitution assured the Africans of a clear majority in the Legislative Council. This was not the case with the Northern Rhodesian Constitution. It was designed not to produce a clear African majority. Answering criticism that his intended Constitution would not give a clear result in an election, Macleod had said: "If you seek to find, as we did, a non-racial approach to this problem, you cannot at the same time, build an assured majority into the structure."⁽²²⁵⁾ The final Constitution, however, did not only fail to give a clear majority to a party, it also failed to produce good results in the national constituencies which were considered the constitution's "masterpiece" provision in creating a non-racial approach to politics.

225. House of Commons Debate, 21 February, 1961.

The Government installed after the 1961 elections worked so well that in 1962 it was agreed that Nyasaland would have internal self-government in 1963. This was effected by an Order in Council^(225a) about the middle of 1963. On July 6, the day Dr. Banda had arrived back in Nyasaland in 1958,^(225b.) Nyasaland became self-governing. Dr. Banda became Prime Minister. No fresh elections accompanied this change. On September 26 of the same year it was announced that Nyasaland would become independent on July 6, 1964.

On June 10, 1964, the Malawi Independence Act^(225c) was enacted to come into operation on July 6. In pursuance of the powers granted by the Independence Act to make Orders between the enactment of the Act and July 6, Her Majesty enacted the Malawi Independence Order, 1964,⁽²²⁶⁾ which contained the independence Constitution.⁽²²⁷⁾ On July 6 both the Malawi Independence Act and the Malawi Independence Order⁽²²⁸⁾ became law and Malawi became an independent state, ending seventy-three years of foreign rule.⁽²²⁹⁾ Section 1 of the Independence Act provided that "on and after 6th July, 1964...the territories which immediately before the appointed day (July 6) are comprised in the Nyasaland protectorate shall together form part of Her Majesty's dominions under the name of Malawi; and on and after that day Her Majesty's Government in the United Kingdom shall have no responsibility for the government of those territories." The section further stated that "no Act of the Parliament of the United Kingdom passed on or after the appointed day shall extend or be deemed to extend to Malawi as part of its law.." It will be seen from the Section that the territories which hitherto were a protectorate became part of Her Majesty's dominions. This means that the territories became as from that date annexed to the Crown and the people of Malawi, who until that date were protected persons of Her Majesty, became subjects of Her Majesty, with all the constitutional rights and obligations of that status. This is a curious constitutional position which takes place when a territory not forming part of Her Majesty's dominions attains independence and decides to do so under the Crown. The section also released Malawi from the power of the United Kingdom Government and Parliament, as she assumed the powers conferred on Dominions by the Statute of Westminster, 1931. The Colonial Laws Validity Act ceased to apply to Malawi and no law of the Malawi Parliament was to be void or inoperative because it was repugnant to the law of England.⁽²³⁰⁾ It should, however, be noted that Malawi was only released from the powers of the United Kingdom Government and not from those of Her Majesty, who continued to exercise power as the Queen of Malawi through her representative, The Governor-General,

PROVISIONS OF THE INDEPENDENCE CONSTITUTION

It is not necessary to discuss in detail the provisions of this Constitution. Only an outline of the main provisions will, therefore, be given. The Independence Order retained the existing Parliament until it was dissolved and a new one elected under the new Constitution. (231) The Leader of the Government retained the title of Prime Minister but the Governor assumed the title of Governor-General. There was to be a Parliament consisting of Her Majesty and a National Assembly. (232) The National Assembly was to consist of fifty-three Members. (233)

Fifty of these were to be elected by a general roll from fifty constituencies. (234) Three were to be elected by a special roll from three constituencies. (235) Only Africans (including Coloureds) and Asians were to be eligible for election to the general roll seats. (236)

Only those persons registered on the special roll were to be eligible for election to the special roll seats. (237) While a European was to be free to register on the general roll (without, of course, qualifying to stand for a seat for that roll), only Europeans could register on the special roll. (238) In order to qualify as a candidate for election to any seat, a person was to be a registered voter on the roll to whose seat he sought election, a citizen of Malawi of 21 years of age and able to speak and, unless incapacitated by blindness or other physical cause, read the English Language well enough to take an active part in the proceedings of the Assembly. (239) The qualifications were to be the usual ones except that a person who was detained under a detention order or was subject to a restriction order was also to be disqualified. (240)

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- 225a. The Nyasaland (Constitution) Order in Council, 1963 (S.I. 1963 No. 883). It was later amended by Orders Nos. 2092 of 1963 and 493 of 1964.
- 225b. July 6, the day Dr. Banda arrived back and the day Nyasaland became self-governing in 1963, independent in 1964 and a republic in 1966, has been named "Kamuzu Day!" and is a public holiday.
- 225c. C.46.
226. S.I. 1964 No. 916.
227. Schedule 2 to the Order.
228. The Order repealed the existing Constitution and its amendments.
229. Nyasaland was formally declared a protectorate on May 4, 1891 - see Chapter 3 above.
230. See Schedule 1 to the Act.
231. S.7 of the Independence Order.
232. S.31 of the Constitution (Schedule 2 to the Independence Order, 1964).
233. S.32.
234. S.41(1).
235. Ibid.
236. S.32(2).
237. Ibid.
238. See Schedule to the Constitution (Ss.1 and 2).
239. S.34(1) of the Constitution.
240. S.35 ibid.

Two voters rolls--the general and the special rolls - were maintained but their character had drastically changed. In order to be registered on the general roll a person had to be a citizen of Malawi of 21 years of age and of any race,⁽²⁴¹⁾ who had been ordinarily resident in the country for a continuous period of two years and in the constituency at the time of application (although time in this case was not specified) unless he was born or was employed or was carrying on business in that constituency.⁽²⁴²⁾ In order to be registered on the Special roll a person had to have the non-race qualifications mentioned above in addition to being a European.⁽²⁴³⁾ It will be seen that income and property qualifications had been discarded.

Executive power was vested in Her Majesty but was to be exercised on her behalf by a Governor-General.⁽²⁴⁴⁾ The Governor-General was to appoint as Prime Minister the person commanding the largest majority in the National Assembly.⁽²⁴⁵⁾ On the advice of the Prime Minister he was then to appoint the Ministers.⁽²⁴⁶⁾ The Ministers could be appointed from among Members of the National Assembly or non-Members.⁽²⁴⁷⁾ Not more than three, however, could be appointed from outside Parliament.⁽²⁴⁸⁾ There was to be a Cabinet consisting of the Prime Minister and the other Ministers.⁽²⁴⁹⁾ The Cabinet was to advise the Governor-General in the government of Malawi and was to be collectively responsible to Parliament for that advice and for all things done by or under the authority of any Minister.⁽²⁵⁰⁾ The Governor-General, on the advice of the Prime Minister, could by directions in writing, assign to the Prime Minister or any other Minister responsibility for any business of the Government, including administration of any Government Department.⁽²⁵¹⁾ There was also provision for the appointment of Parliamentary Secretaries by the Governor-General on the advice of the Prime Minister.⁽²⁵²⁾

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241. See Schedule to the Constitution (S.1).

242. Ibid.

243. Ibid. (S.2)

244. S.58 (1) and (2) of the Constitution.

245. § 59.

246. Ibid.

247. Ibid.

248. Ibid.

249. S. 61 (1). This provision which entitled all Ministers to sit in the Cabinet was altered after the Cabinet crisis in September 1964 (see below) by Section 6 of the Malawi Constitution (Amendment) Act, 1964 (Act No. 1 of 1964). The amendment provided that the Cabinet would consist of the Prime Minister and such other Ministers as were from time to time appointed by the Prime Minister. This was to enable the Prime Minister to leave out of the Cabinet Ministers he could not count on their loyalty.

250. S. 61 (2).

251. S. 62.

252. S. 66 (1).

Unlike Ministers, some of whom could be appointed from outside Parliament, all Parliamentary Secretaries were to be appointed from among the Members of the National Assembly.⁽²⁵³⁾ Ministers who were not Members of the National Assembly could attend and take part in the proceedings of the National Assembly or any of its Committees but were not to vote.⁽²⁵⁴⁾

Unlike the 1961 Constitution, the 1964 Constitution contained a Bill of Rights. At the 1960 Constitutional Conference it had been suggested "that in order to preserve fundamental human rights, provisions should be written into the revised Constitution, on the model of those in the Nigerian Constitution, due allowance being made for local circumstances."⁽²⁵⁵⁾ The Conference had agreed that "while such a provision would not be appropriate to the next stage of constitutional advance..., a study of the matter might be usefully started so that when the time came suitable provisions could be included to this end."⁽²⁵⁶⁾ In pursuance of this conclusion of the 1960 Conference a Bill of Rights was accordingly included in the 1964 Constitution. Chapter 11, Sections 11 - 23 outlined the rights that were to be protected. These were the right to life;^(257a) right to personal liberty;^(257b) protection from slavery and forced labour;⁽²⁵⁹⁾ protection from deprivation of property;⁽²⁶⁰⁾ protection of privacy of home and other property;⁽²⁶¹⁾ provisions to secure the protection of law;⁽²⁶²⁾ protection of freedom of conscience;⁽²⁶³⁾ protection of freedom of expression;⁽²⁶⁴⁾ protection of freedom of Assembly and association;⁽²⁶⁵⁾ protection of freedom of movement;⁽²⁶⁶⁾ and protection from discrimination on grounds of race.⁽²⁶⁷⁾ The last three sections of the chapter (sections 24 - 26) dealt with derogations from these rights and freedoms,⁽²⁶⁸⁾ enforcement of protective measures for these rights,⁽²⁶⁹⁾ and the declaration of a state of emergency and when the rights could be derogated from.⁽²⁷⁰⁾ The provisions of the Bill were almost identical to those of the Bill of Rights in the Constitution of Zambia which will be discussed below under Chapter Nineteen. For this reason it is not necessary to discuss the provisions listed above.

The 1964 Constitution also contained provisions dealing with the appointment and functions of the Governor-General;⁽²⁷¹⁾ citizenship;⁽²⁷²⁾ the Judicature;⁽²⁷³⁾ finance;⁽²⁷⁴⁾ the public service;⁽²⁷⁵⁾ and other miscellaneous matters.⁽²⁷⁶⁾

253. Ibid. 254. S. 38.
 255. Cmd. 1132 of 1960, op.cit. para. 11.
 256. Ibid., para. 12. 257a. S. 12 of the Constitution.
 257. S. 13. 258. S. 14.
 259. S. 15. 260. S. 16.
 261. S. 17. 262. S. 18.
 263. S. 19. 264. S. 20.
 265. S. 21. 266. S. 22.
 267. S. 23. 267a. S. 24.
 269. S. 25. 270. S. 26.
 271. Op. cit. S. 27 - 10.

In September (1964), two months after independence Malawi suffered a serious political crisis. Six⁽²⁷⁷⁾ Ministers resigned on the grounds that the Prime Minister did not give them a free hand in running their Ministries⁽²⁷⁷⁾ as he wanted to run everything himself. There were also^{Six} other subsidiary complaints. The Ministers who resigned were the men who had fought and had been detained⁽²⁷⁸⁾ with Dr. Banda in 1959.⁽²⁷⁹⁾ The six Ministers were later expelled from the party and ended up in flight from the country. Faced with the crisis, Dr. Banda sought to consolidate his position against this very serious challenge to his leadership - the first since his return to Nyasaland. Having won the loyalty of the Party and the National Assembly,⁽²⁸⁰⁾ he took measures to forestall the likely resignation of Members of the National Assembly from the party while continuing to hold their seats in opposition to him. He got Parliament to enact the Constitution of Malawi (Amendment) Act, 1964,⁽²⁸¹⁾ Section 4 of which provided that a Member should lose his seat "...if, having been elected as a candidate representing a political party established in Malawi, he subsequently ceases to represent or be a member of that party or claims to represent another political party."⁽²⁸²⁾ This, not only prevented the ex-Ministers from taking up their seats on the Opposition benches but also scared Members who might have thought of resigning in sympathy with the ex-Ministers.

272. Ss. 75 - 86.

274. Ss. 87 - 89

275. Ss. 94 - 106.

276. Ss. 107-110.

277. The seventh, Mr. John Msonthi, who had also resigned, quietly withdrew his resignation and returned to his Ministry.

278. Only Chiume among the Ministers had not been detained.

279. The Ministers involved were H. B. Chipembere, M.W.K. Chiume, G.E.C. Chirwa, A.W. Dwanausi, W. Chokani; and Y. K. Chisiza.

280. For the debate in the National Assembly on the crisis, see Malawi Parliamentary Debates, Sept. 3, 1964. For an account of the crisis, see Pike, *op.cit.*, pp. 164-170; Chimwene Wanga (pseudonym), "The Littlest Revolution" (Africa Today, April, 1965). For Chipembere's own views on the rebellion, see "Dr. Banda's Opposition in Exile" (The Guardian, July 7, 1966).

281. Act No. 1 of 1964.

282. This provision was later copied by Kenya and Zambia - see below, Chapter 11.

PREPARATIONS FOR A REPUBLICAN CONSTITUTION

The crisis over, Dr. Banda decided to strengthen his position further by turning Malawi into a republic. It is doubtful whether before the crisis Dr. Banda had seriously contemplated turning Malawi into a republic,⁽²³³⁾ at least so soon. Although Dr. Banda could have quickly declared a republic soon after successfully dealing with the Cabinet crisis, the announcement that the country would become one was not made until July 20, 1965.⁽²³⁴⁾ The change was to take place on July 6, 1966. The announcement was followed by the setting up of a constitutional committee to work on a republican constitution. The proposals worked out by this Committee were submitted to a National Convention of the Malawi Congress Party to which chairmen of District Councils and chiefs were invited. The convention unanimously approved the proposals.⁽²³⁵⁾ Thereafter the proposals were published in a White Paper⁽²³⁶⁾ before being enacted by Parliament into the present Constitution.

The above account brings to an end the constitutional history of Malawi before the adoption of her present, republican Constitution. The present Constitution will be treated in the next Part (Part Three) of this study.

CONSTITUTIONAL DEVELOPMENTS IN NORTHERN RHODESIA FROM 1962-1964

The Shaky coalition Government formed by Kaunda and Nkumbula managed to stay in office in spite of constant threats by Nkumbula that he might quit the coalition. The threats appear to have been no more than tactical moves to restrain followers of the United National Independence Party from persecuting followers of the African National Congress.

As had been promised by Butler to Kaunda and Nkumbula in 1962, Northern Rhodesia was granted a new Constitution in 1963.⁽²³⁷⁾ This Constitution gave the territory internal autonomy such as had been given to Nyasaland earlier in the same year. The House was to be enlarged to 80 seats, 10 of them reserved for Europeans. Five of the seats were to be held by nominated Members. Elections were held under the new Constitution early in 1964. The United National Independence Party won 55 of the seats and the African National Congress 10. The 10 reserved European seats were won by the National Progressive Party, formerly the Northern Rhodesia wing of the United Federal Party.⁽²³⁸⁾ Kaunda, now with an overwhelming majority in the House, formed the first Government consisting entirely of elected members and became the first Prime Minister of the country. The officials disappeared from both the House and the Government.

67. The status of the country, however, still fell short of that of a dominion.

The new Government immediately put a request for independence to the British Government. With the Federation dead and buried and Welensky no longer in the picture, constitutional advancement in Northern Rhodesia ceased to be a complicated problem. The British Government had already set the date for the independence of Nyasaland at July 6, 1964. They were, therefore, only too ready to see Northern Rhodesia follow suit as soon as possible. Consequently, a conference to discuss the independence of Northern Rhodesia opened in London on May 5, 1964. It lasted until May 19. The Conference agreed on an independence Constitution for the country and agreed on October 24, 1964, as the date on which the territory should become independent under the name "Republic of Zambia".⁽²⁸⁹⁾ This meant that the country was to skip the important stage of Dominion status through which other former British administered territories had passed before becoming republics. Cyprus and Durma had, of course, done the same thing earlier.

THE ZAMBIA INDEPENDENCE ACT

In July the United Kingdom Parliament enacted the Zambia Independence Act, 1964.⁽²⁹⁰⁾ Section 1 of that Act provided that "on 24th October, 1964...., the territories which immediately before the appointed day (October 24) are comprised in Northern Rhodesia shall cease to be a protectorate and shall together become an independent republic under the name of Zambia; and on and after that day Her Majesty shall have no jurisdiction over those territories." In October Her Majesty in Council, in pursuance of the powers conferred by the Act enacted the Zambia Independence Order, 1964, schedule 2 of which contained the new Constitution.⁽²⁹¹⁾ The Order was to come into effect immediately before October 24. On independence day the provisions of Section 1 of the Zambia Independence Act terminated the country's status as a dependency of Britain. It will be seen that, unlike the provisions of Section 1 of the Malawi Independence Act which excluded only the jurisdiction of the United Kingdom Parliament and Government, Section 1 of the Zambia Independence Act excluded the jurisdiction of Her Majesty from Zambia. The reason was that on independence day Zambia became a republic under the sovereignty of its own head of state and not a Dominion under the sovereignty of Her Majesty. Once Her Majesty had ceased to have power over Zambia the United Kingdom Parliament and Government became automatically excluded from exercising power over the country.

Footnotes 283 - 291 over page 399.

68. The United Kingdom and Government can only exercise power where Her Majesty has power to enable the two institutions to do so. There was, therefore, no need to mention the termination of the power of the two institutions once termination of Her Majesty's power had been mentioned.
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283. Roberts, Simon, "The Republican Constitution of Malawi" (Public Law, Winter, 1966) pp. 304 - 323, at p. 304.
284. Ibid., p. 305.
285. Ibid.
286. M. G. White Paper 002 of 1965.
287. The Northern Rhodesia (Constitution) Order in Council, 1963 (S. L. 1963, No. 2088, later amended by the Northern Rhodesia (Constitution) (Amendment) Order, 1964 (S. L. 1964, No. 919) and the Northern Rhodesia (Constitution) (Amendment No. 2) Order, 1964 (S.L. 1964, No. 1191).
288. The National Progressive Party later disbanded on the grounds that there was no room for a European party in an African country. The Members remained in the House as independents until the election of December 19, 1968, when the ten reserved seats were abolished.
289. For the conclusions of the Conference and the outline of the intended independence Constitution, see Report of the Northern Rhodesia Independence Conference, 1964 (London, H.M.S.O. May, 1964) (Cmd. 2365 of 1964).
290. 1964, G. 46 (Appendix 3 to the Laws of Zambia).
291. S. L. 1964, No. 1652.

A COMPARATIVE STUDY OF THE REPUBLICAN CONSTITUTIONS OF
ZAMBIA AND MALAWI

by

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Thesis submitted in part fulfilment of the requirements for
the degree of DOCTOR LEGUM in the Faculty of Law in the
University of South Africa after completion of the doctor-
rate examination in Constitutional Law, Public International
Law and Labour Law.

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February, 1973.

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GENERAL FEATURES

Certain general features of the Constitutions of Zambia and Malawi should be examined before an analysis of their provisions is made. The first of these features is that both Constitutions, unlike the British Constitution, are in written form.⁽¹⁾ The original Constitution of Zambia (which came into operation on October 24, 1964)⁽²⁾ had one hundred and twenty-five sections. That of Malawi (which came into operation on July 6, 1966)⁽³⁾ had ninety-eight sections. Since then amendments introducing new or repealing existing sections have been made to both Constitutions. The two Constitutions (including the new sections that have been introduced since the Constitutions came into effect) can be regarded as very short when compared with, for instance, that of India which has over four hundred articles or that of Malaysia which has over two hundred articles.

-
1. A country is said to have a written Constitution "when the most important constitutional laws are especially enacted" ----- Phillips, O. Hood Constitutional Law of Britain and the Commonwealth (London, Sweet & Maxwell, 2nd Ed. 1957) p. 5. The United Kingdom is the only major country without a written Constitution but it is not, as is often stated by writers, the only country with an unwritten Constitution. Wolf-Phillips, after what he calls "diligent research," discovered that the Kingdom of Bhutan in the Far East, Israel and some small kingdoms and sultanates in the Middle East also have no written Constitutions - Wolf-Phillips, Leslie Constitutions of Modern States (London, Pall Mall, 1960) pp. xi - xii. Note that Wolf - Phillips thinks a better term to describe the Constitutions of the United Kingdom and these other States is "uncodified" rather than "unwritten" since some of the constitutional principles in these countries are contained in statutes.
 2. See Zambia Independence Order (S.I. 1964 No. 1652) Schedule 2.
 3. See Republic of Malawi (Constitution) Act, 1966 (Act No. 23 of 1966) Second Schedule.

Neither Constitution has a preamble.⁽⁴⁾ They go straight to the provisions, opening with Section 1 which declares the country, in the case of Zambia, "a sovereign Republic" and, in the case of Malawi, "a sovereign democratic republic." It should be noted that while most written Constitutions commence with a preamble, those emanating from Westminster normally do not do so.⁽⁵⁾ The British apparently do not think that a Constitution is the right document in which to express the political philosophies.⁽⁶⁾ However, preambles have been adopted by several Commonwealth countries on introduction of a republican Constitution to replace the British-enacted independence Constitution.⁽⁷⁾

Like all written Constitutions, the Constitutions of Zambia and Malawi are a mere "framework, a skeleton, which has to be filled out with detailed rules and practices."⁽⁸⁾ A considerable number of sections in the two Constitutions provide that certain things shall be done as may be or as shall be prescribed by or under an Act of Parliament.⁽⁹⁾ These sections are fertile ground for supplementary legislation. The two Constitutions are, in fact, already heavily supplemented by ordinary legislation. Matters such as citizenship, the judiciary, parliamentary elections, chieftainship and the public service are regulated in detail by ordinary statutory law.

-
4. Since the Americans prefaced their Constitution with a preamble in 1797, the practice has become fashionable. Such preambles are intended to express the philosophy and spirit permeating the Constitution and are, as a result, often very emotional, invoking not only the name of the people, but, sometimes, even that of the Deity. For instance, that of the 1964 Constitution of Pakistan opened: "Whereas sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority exercisable by the people within the limits prescribed by him is a sacred trust..". That of the Constitution of Malagasy opens: "Affirming its faith in God and its faith in the dignity of the human person..." That of the Constitution of Eire invokes the name of "the Most Holy Trinity from Whom all authority and to Whom, as our final end, all actions both of men and States must be referred", while that of the 1969 Constitution of Ghana begins: "In the Name of Almighty God from Whom all authority is derived and to Whom all actions both of men and States must be referred."
5. See, however, the Constitution of Trinidad and Tobago which has a preamble.
6. It is for this same reason that they are contemptuous of inclusion of a Declaration of Rights in a Constitution - see Chapter 20.
7. See, e.g., the 1960 Constitution of Ghana and the Constitution of India.
8. Jennings, *The Law and the Constitution* (London, Oxford, 6th Ed., 1957) p. 35: "It is not practicable for a written Constitution to contain more than a selection of laws" - Phillips, O. Hood *op.cit.*, p. 5.
9. See, e.g., Sections 3(2)(c), 10(1), 16(1), 24(3), 26(1) and 49(1) (Constitution of Malawi); Sections 4(1) - (4), 7, 8, 9, 11, 33(1), (3), (4), (a), 39, 97(2)(b), (4), 98(2)(b), (4) (Constitution of Zambia).

3. In addition to statutory law, the two Constitutions are supplemented by conventions and judicial decisions. Conventions are, however, unlikely to play as big a role as they do in the United Kingdom.⁽¹⁰⁾ Most of the matters which are governed by convention in the United Kingdom are specifically provided for in the Constitutions of Zambia and Malawi.^(10a) These include summoning, prorogation and dissolution of Parliament⁽¹¹⁾ assent to Bills,⁽¹²⁾ powers of the Head of State,⁽¹³⁾ and the relationship between the Cabinet and Parliament, on the one hand, and the Head of State, on the other.⁽¹⁴⁾

Judicial decisions will, however, play a very important part in expanding the two Constitutions, particularly the Zambian Constitution which has a Declaration of Fundamental Human Rights. It should be noted that although the two Constitutions are subject to interpretation by the courts, neither Constitution specifically grants a general power to the courts to discharge this function. Section 20 of the Constitution of Zambia specifically confers on the High Court only the jurisdiction to determine matters concerning Sections 13 - 26 (Fundamental Human Rights). Section 90 (1) of the Constitution of Zambia and Section 62 (1) of the Constitution of Malawi, however, empower the judiciary to exercise jurisdiction to hear and determine any civil or criminal proceedings under any law and, further, to exercise such other jurisdiction as may be conferred by the Constitution or any other law.⁽¹⁵⁾

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10. On conventions of the United Kingdom Constitution, see Dicey, A. V. Introduction to the Study of the Law of the Constitution (London, Macmillan, 10th Ed., 1959) pp. Cii - ciii, 422; Anson, Sir William Law and Custom of the Constitution (4th Ed. by Sir Maurice Gwyer) p.23.
- 10a. This will not, however, prevent the evolution of conventions. For the development of conventions from a written Constitution, see Jennings, op.cit., p. 33; Horwill, Usages of the American Constitution. See also Leroy, "Les Tendances du Pouvoir et de la Liberte en France au xxo Siecle" (Archives de la Philosophie du Droit, 1936) pp. 7 et. seq., for conventions which evolved round the French Constitution of 1875. For reasons why conventions develop in the working of a written Constitution, see Jennings, p. 32; Phillips, O. Hood op.cit., pp. 67-68; Wade and Phillips, op.cit., pp. 1 and 3; Holdsworth, "The Conventions of the Eighteenth Century Constitution" (17 Iowa Law Review, 1932).
11. Ss. 62-84 (Constitution of Zambia); Ss. 44 and 45 (Constitution of Malawi).
12. S. 71 (Zambia); S. 35 (Malawi).
13. Ss. 48 and 49 (Zambia); Ss. 47 and 48 (Malawi)
14. S. 44, 45 and 51 (Zambia); Ss. 49, 59, 53 and 54 (Malawi). See also Sections in Note 11 above.
15. See below, Chapter 15.

4. If it were necessary that a provision should be found in a Constitution authorizing the courts to interpret such a Constitution, the provisions of Sections 93 (1) and 62 (1) could perhaps be relied upon as conferring that power. The words "any law" could then be held to include the Constitution. However, courts in countries of Anglo-American influence, which have written Constitutions, have not taken the absence of a provision in the Constitution specifically conferring jurisdiction on them to interpret the Constitution as barring them from so doing. Unless specifically excluded from doing so, they will always assume the interpretative role on the strength of the following reasoning:

"It is the function of the judges to decide what the law is in disputed cases. A constitution is part of the law and it therefore falls within the purview of the judges. Moreover it may happen that there appears to be some conflict between the law of the Constitution and some other rule of law or some action, whether of the legislature or of the executive. If the judges are to decide what the law is in such a case, they must determine the meaning not only of the rule of ordinary law but also of the law of the Constitution. And if, in terms, a Constitution imposes restrictions upon the powers of the institutions it sets up, then the Court must decide whether their actions transgress these restrictions, and in doing so, the judges must say what the Constitution means." (16)

Because of the absence of a Bill of Rights in the Constitution of Malawi, the number of cases involving the Constitution is likely to be very small for many years. Even in Zambia, where such a Bill exists, it is unlikely that the Zambian High Court and Court of Appeal will play as important a role in supplementing the Constitution through their decisions as the United States of America's Supreme Court. Two factors militate against this. The first is that unlike the provisions of the American Bill of Rights which are vague and not detailed, those of the Zambian Bill of Rights are detailed, specific and heavily qualified. This will greatly restrict the interpretative manoeuvres of the courts. The second factor is the type of society in Zambia. The majority of the society is not yet as affluent as that of the United States. The people likely to be affected by violations of the Bill will be, in the main, those with no means to take a matter to the courts. (17)

16. Wheare, Modern Constitutions, p. 100. In the United States of America where the Constitution does not specifically confer the power to interpret the Constitution on the Courts, the Supreme Court claimed the power in Marbury v. Madison, 1 Cranch 137 (1803). The Indian Supreme Court also claimed such powers in similar circumstances - see A. K. Gopalan v. the State of Madras (*supra*).

17. Section 27 of the Constitution provides for a legal aid scheme where a person has no means but the process to get that aid is difficult - see below, Chapter 20.

5. The two Constitutions are unitary and rigid. They are rigid in that they can only be amended by a special procedure, different from that used to amend ordinary laws.⁽¹⁸⁾ Until it was amended in 1969,⁽¹⁹⁾ the Constitution of Zambia was more difficult to amend than that of Malawi. While the amendment of some sections required only the support of two-thirds of all the Members of the National Assembly at the second and third readings, that of others required, in addition to this, approval by the electorate in a referendum. The referendum provision has now been abolished and all amendments require, as in Malawi, only the support of two-thirds of all the Members of the National Assembly at the second and third readings.

Both Constitutions are of a republican nature but the system of Government in the two countries is a mixture - a hybrid - of the American presidential system and the British Cabinet system.⁽²⁰⁾

18. "A rigid" Constitution is one under which certain laws generally known as constitutional or fundamental laws cannot be changed in the same manner as ordinary laws" - Wade & Phillips, *op.cit.*, p. 127. For a classification of Constitutions into "rigid" and "flexible" Constitutions and for the features that place a Constitution in one or the other of the two classes, see, O. Hood Phillips, *op.cit.*, pp. 6 - 7; Dicey, *op.cit.*, pp. 126-137; Wheare, *Modern Constitutions*, pp. 15-18; Wolf-Phillips, *op.cit.*, pp. xiii-xvii. Wheare objects to the classification of Constitutions into "rigid" and "flexible" because, as he says, "the ease with which a Constitution is amended depends not only on the legal provisions which prescribe the method of change but also on the predominant political and social groups in the community and the extent to which they are satisfied with or acquiesce in the organisation and distribution of political power which the Constitution prescribes" - p. 23. This reasoning agrees with that of James Bryce who, in a lecture in 1934, stated: "The stability of any Constitution depends not so much on its form as on the social and economic forces that stand behind and support it; and if the form of the Constitution corresponds to the balance of those forces, their support, maintains it unchanged" - *Studies in History and Jurisprudence* (Oxford, University Press, 1901) Vol. 1., p. 66. Wheare's view should, however, be criticized on the ground that the classification must be based on the requirements of amendment stipulated in the Constitution rather than on the attitude of the society, since the latter method of classification would be very uncertain owing to society's caprices. Wolf - Phillips prefers "conditional" and "unconditional" to "rigid" and "flexible" Constitutions - *op.cit.*, pp. xiii-xvii.

19. See Constitution (Amendment) (No.3) Act, 1969.

20. On the British Cabinet and the American presidential systems of government, see the classical work of Walter Bagehot, *The English Constitution* (London, Kegan Paul, 1896). See also Wolf-Phillips, *op.cit.*, pp. xix-xxi; and de Smith, S.A. "Westminster's Export Models: The Legal Framework of Responsible Government" (*Journal of Commonwealth Political Studies*, Vol. 1., 1961) p.13.

6. It is similar to the American system in that: (a) the Head of State is also the Head of Government; (b) all executive power is vested in the President, assisted by a Cabinet whose advice he is not under obligation by law or convention to accept; (c) the President is not a Member of the National Assembly. On the other hand, the system is dissimilar to the American system and similar to the British system in that: (a) the President is, like the British sovereign, part of Parliament although not a Member of the National Assembly; (b) the President, like the British sovereign, dissolves Parliament; (c) the President's term of office, like that of the British Prime Minister, is determined by the dissolution of Parliament and election of a new one; (d) Ministers are Members of the National Assembly;⁽²¹⁾ (e) Ministers initiate most of the legislation and control the business of the National Assembly. In all it can be said that the working of the governmental machinery in both countries is more British than American.

Because the President is a part of Parliament and because the Ministers sit in the National Assembly in both countries, there is no true separation of powers between the Legislature and the Executive as is found in the United States of America and other countries with Constitutions similar to that of the United States of America. The relationship between the three grand departments of government - the Executive, the Legislature and the Judiciary - is similar to that between the same departments in the United Kingdom except that in Zambia and Malawi the President, as Head of Government, is not, like the British Prime Minister, a Member of the National Assembly.

In both Zambia and Malawi the Government is responsible to a unicameral legislature styled the National Assembly. Zambia has, however, also a House of Chiefs which is not part of the Legislature but which considers legislation submitted to it by the President. Establishment of a similar House in Malawi was rejected on the grounds that it would amount to a Second Chamber.⁽²²⁾

21. Formerly, in Malawi, a Minister could choose to be or not to be a Member of the National Assembly. Now, a Minister who previously would have been a non-Member of the National Assembly, is, although not elected and representing a constituency deemed a Member of the National Assembly as long as he remains a Minister - see Constitution (Amendment) Act, 1971 (Act No. 25 of 1971).

22. See Cmd. 1887 of 1962, p. 20.

7.

The final general feature is that unlike that of the United Kingdom, the Legislatures of Zambia and Malawi are not supreme.⁽²³⁾ They have not the power, as is said of the United Kingdom Legislature, to do all things except make "a woman a man, and a man a woman"⁽²⁴⁾ or power "so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds!"⁽²⁵⁾ The laws they enact must conform to the Constitution. If not, the Courts can declare such laws unconstitutional and, therefore, of no effect, a thing the English Courts cannot do.⁽²⁶⁾

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23. On the supremacy of the United Kingdom Parliament, see Dicey, op.cit., pp. 39-35; Wade & Phillips, op.cit., pp. 36-59; Hood Phillips, op.cit., p. 36.
24. The expression that the English Parliament could "do everything but make a woman a man, and a man a woman" was first used by De Lolme - Dicey, op.cit., p. 36.
25. Coke, Sir Edward 4 Institutes, p. 36.
26. According to Dicey the essentials for a sovereign Parliament are : (a) power to change any law (fundamental or non-fundamental) by the same method - i.e. absence of a special procedure in changing certain laws that are considered fundamental; (b) absence of a person or persons, executive, legislative, or judicial which can pronounce void an enactment passed by the Legislature because it is opposed to the Constitution or on any ground. On the other hand, the essentials for a non-supreme Legislature are, according to Dicey: (a) existence of laws called fundamental which must be obeyed by the Legislature and which it cannot change save by following a special procedure; (b) existence of a person or persons, judicial or otherwise, having authority to pronounce upon the validity or constitutionality of laws passed by such law-making body.

The Courts in England have pronounced on the sovereignty of Parliament in a number of cases among which are: Edinburgh and Dalkeith Rly v. Wanchope (1842) 3 C.L. & F. 710, per Lord Campbell; Lee v Bude and Terrington Ry (1871) L. R. 6 C.P. 576, per Willes J.; Liversidge v Anderson (1942) A.C. 206, per Lord Wright; Stockdale v. Hansard (1839) G Ad. & E. 1, per Lord Denman C.J.; National Union of Municipal Workers v Gillian (1946) 1 K.B. 81, per Scott L.J.; R. V. Local Government Board, ex parte Arlidge, (1914) 1 K.B. 160 at 175-176, per Vaughan Williams L.J.; R.v. Electricity Commissioners, (1924) 1 K.B. 171.

DECLARATORY AND TRANSITIONAL PROVISIONS

Before proceeding to discuss the major constitutional provisions as contained in Schedule 2 to the Zambia Independence Order⁽¹⁾ and Schedule 2 to the Republic of Malawi (Constitution) Act,⁽²⁾ it is necessary to deal first with the provisions that transformed the Protectorate of Northern Rhodesia into the Republic of Zambia and the Realm of Malawi into the Republic of Malawi and matters incidental thereto. Some of the provisions were transitional and, having served their purpose, are now "dead wood" in a living document. They, however, continue to be part of the Constitution and the living provisions can only be better understood if read together with this dead wood. This Chapter will therefore deal with the declaratory provisions which are still operative and transitional provisions which have ceased to operate.

1. Establishment of Republics

The Republic of Zambia was brought into being by two British enactments - the Zambia Independence Act, 1964.⁽³⁾ The Legislature of Northern Rhodesia played no part in the territory's change of status. Section 1 of the Zambia Independence Act provided that the territories which immediately before the appointed day (October 24, 1964) were comprised in Northern Rhodesia should on that day cease to be a protectorate and together become an independent republic under the name of Zambia.⁽⁵⁾ On and after that day Her Majesty was to cease having jurisdiction over the country.⁽⁶⁾ Section 9 of the Act empowered Her Majesty in Council to enact Orders during the period before the appointed day if necessary. In pursuance of this power Her Majesty in Council enacted the Zambia Independence Order, Schedule 2 of which contained the country's new Constitution.⁽⁷⁾ Section 1 of the Constitution declared Zambia "a sovereign Republic" as from October 24, 1964.

1. S.L. 1964 No. 1652 (Appendix 3 to the Laws of Zambia)

2. Act No. 23 of 1966.

3. 1964 C. 65 (Appendix 3 to the Laws of Zambia).

4. See Note 1 above.

5. See ante, Chapter 3.

6. Ibid.

7. See S.1 of the Order which states that the Order is made in pursuance of powers granted by the Foreign Jurisdiction Act, 1890, and the Zambia Independence Act, 1964.

Unlike Zambia, Malawi became a Republic by an Act⁽⁸⁾ of her own Parliament. The country, it will be recollected, had become a Dominion under the Crown on July 6, 1964,⁽⁹⁾ as a result of two British enactments - the Malawi Independence Act, enacted by Parliament, and the Malawi Independence Order, enacted by Her Majesty in Council. The Republic of Malawi (Constitution) Act is described in the Preamble as "an Act to constitute the Republic of Malawi and to provide for matters incidental thereto or connected therewith". Section 1 of the Act provided that it was to "come into operation on the 6th July, 1966" while Section 1(1) to the Constitution (which is contained in Schedule 2 to the Act) provided that "Malawi shall on the appointed day become a sovereign democratic Republic." In enacting the Act the Malawi Parliament did not turn itself into a Constituent Assembly first as did, for instance, the Parliament of India in 1949, and the Parliament of Ghana in 1960.⁽¹⁰⁾ The Government of Ghana also referred the question of changing to republican status to a referendum before the Constitution was enacted by the Constituent Assembly. In Malawi, the people were not directly consulted by way of a referendum, although Section 1 (2) of the Constitution states that "the powers of the Republic of Malawi derive from the people of Malawi..." A convention of the ruling Party (the Malawi Congress Party), to which Chiefs and District Council chairman were invited, was, however, convened in October, 1965. This Convention unanimously approved the proposals presented to it by the Constitutional Committee which had been appointed earlier by the Government to work on the matter. The Constitution as finally enacted was drawn from these proposals.⁽¹¹⁾ The people can, therefore, be said to have been indirectly consulted⁽¹²⁾ — Malawi Congress Party members through their delegates, and the other people through the Chiefs and District Council Chairmen.

The provision of Section 1 (2) that the powers of the Republic of Malawi derive from the people of Malawi means that sovereignty in the Republic rests in the people. The Section adds that these powers "shall, subject to and in accordance with the provisions of this Constitution, be vested in persons who are elected by and responsible to the people of Malawi." There is no similar provision in the Constitution of Zambia,⁽¹³⁾ but it is doubtful whether this is of any significance.

8. See Note 2 above.

9. See ante, Chapter 3.

10. See the Constituent Assembly and Plebiscite Act, 1960 (Act No. 1. of 1960).

11. Roberts, op.cit., p. 305. Speaking during the debate on the Constitution Bill, Dr. Banda said Parliament was putting into legal form the decision of the people as expressed by their delegates at the Convention - Official Reports of the Debates of the 6th Meeting of the Third Session of Parliament, May 18, 1966, p. 548.

12. See M.C. White Paper 002. 1965. op.cit., Roberts op.cit., p.305.

3. Although many countries have included similar provisions in their Constitutions,⁽¹⁴⁾ it is not necessary to do so in order to confer sovereignty on the people. The fact that there is an elective system which renders the elected representatives answerable to the electorate at the end of each parliament's life is probably sufficient to vest sovereignty in the people of Zambia.

It has been mentioned above that Zambia became a republic as a result of two British enactments and that Malawi became a republic as a result of an act of her own Parliament. In turning the Northern Rhodesia Protectorate into the Republic of Zambia, the British Parliament and the Crown terminated a status they had themselves previously conferred upon the territory. On the other hand, the Republic of Malawi (Constitution) Act terminated the constitutional status of a Dominion and the form of government therein that had been conferred upon the country by two British enactments - the Malawi Independence Act, 1964, enacted by the British Parliament, and the Malawi Independence Order, 1964, enacted by Her Majesty in Council. The question arises whether the Parliament of Malawi was competent to effect this change. The answer to (15) this question is in the affirmative. Paragraph 1 of Schedule 1 to the Malawi Independence Act, 1964, freed Malawi from the application of the Colonial Laws Validity Act, 1865, as from July 6, 1964.

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13. The Constitutions of the Republics of Botswana, Kenya, Tanzania and Singapore, for instance, also do not have such a provision.
14. See, for instance, the 1963 Constitution of Algeria (A.M.27); the 1961 Constitution of Gabon (Art. 3); the 1960 Constitution of the Ivory Coast (Art.4); the 1960 Constitution of Niger (Arts. 394); the 1964 Constitution of the Upper Volta (Arts. 3 & 4); the 1963 Constitution of the Republic of Senegal (Art. 2); the 1962 Constitution of Rwanda (Art. 7); the 1962 Constitution of Chad (Art. 2); the 1961 Constitution of the Cameroon (Art. 2); the 1959 Malagasy Constitution (as amended) (Art. 3); the 1960 Constitution of the Republic of Mali (Art. 2); the 1964 Constitution of Dahomey (Arts. 3 & 4); the 1964 Constitution of Congo (Kinshasa) (Art. 3); the 1963 Constitution of the Republic of the Congo (Brazzaville) (Art. 2); the Constitution of the People's Republic of China (Art. 2); the Constitution of the Socialist Federal Republic of Yugoslavia (Art. 71); the Constitution of the Mexican United States (Art. 39); and the Constitution of Japan (Art. 1). The practice is more prevalent in the French speaking countries, the People's Democracies and the South American Republics than in the Commonwealth Republics and sovereign Kingdoms.
15. The Schedule is headed: "Legislative Powers of Malawi".

Paragraph 2 of the Schedule stated that "no law and no provision of any law made on or after the appointed day by (the Legislature of Malawi) shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any Act of Parliament of the United Kingdom, including this Act (the Independence Act), or to any order, rule or regulation made under any such Act, and, subject to paragraph 5 of this Schedule, the powers of any such legislature shall include the power to repeal or amend any such Act, order, rule or regulation in so far as it is part of the law of Malawi." Paragraph 5 of the Schedule provided that in repealing, amending or modifying constitutional provisions the Legislature was to follow the procedure laid down in the provisions concerned. The "Constitutional provisions" referred to were the Malawi Independence Act, the Malawi Independence Order and any law, or instrument made under a law of the Legislature amending, modifying or re-enacting with or without amendments or modifications provisions of the Act or the Order. Section 13 of the Independence Order also empowered the Malawi Parliament to "alter any of the provisions of this Order in the same manner as it may alter any of the provisions of the Malawi Independence Act, 1964". Section 46 of the Constitution originally empowered the Legislature to amend the Constitution or (in so far as it formed part of the Law of Malawi) the Independence Act by a two-thirds majority. After the Cabinet revolt of September, 1964, uncertain of his support, Dr. Banda removed the two-thirds majority requirement by a constitutional amendment.⁽¹⁶⁾ Amendments to the Constitution thereafter fell under the provisions of Section 50 of the Constitution which stated that "save as otherwise provided in this Constitution, any question proposed for decision in the National Assembly shall be determined by a majority of the votes of the members present and voting."

The provisions outlined above empowered the Malawi Parliament to amend the Malawi Independence Act (in so far as it formed part of the law of Malawi) and the Malawi Independence Order without exception. The provisions of Section 1(1) of the Independence Act which conferred Dominion Status on Malawi were, however, not part of the law of Malawi. They were part of the law of the United Kingdom and only the United Kingdom Parliament could repeal them. The Malawi Parliament could, however, repeal all the provisions of the Independence Order, including Schedule 2 which contained the Constitution. This it did by enacting the Republic of Malawi (Constitution) Act which repealed all the provisions except Sections 11 and 12 of the Order and Sections 105 and 106 of the Constitution.

16. See Constitution of Malawi (Amendment) Act 1964 (Act No. 1 of 1964).

5. The Act did not repeal any provision of the Independence Act and was, therefore, in conflict with it. However, as has been seen, no law of the Malawi Legislature was, as from July 6, 1964, to be invalid because it conflicted with a law of the United Kingdom, including the Independence Act. The Republic of Malawi (Constitution) Act could not, therefore, be impeached on that ground. It was up to the British Parliament to repeal or amend the provisions of the Independence Act so as to recognize the new circumstances in Malawi. The Republic of Malawi (Constitution) Bill, however, required the assent of the Governor-General before becoming law. This meant that Her Majesty assented, through her representative, the Governor-General, to the liquidation of her jurisdiction over Malawi. The assent was duly given soon after the passage of the Bill.

2. Operation of Existing Laws

The laws existing in Zambia and Malawi on Republic Day continued to have the force of law as if there had been no change except where Parliament or some other competent authority legislated otherwise.⁽¹⁷⁾ Such existing laws were defined by the Zambia Independence Order as "all Ordinances, laws or statutory instruments, having effect as part of the law of Northern Rhodesia or any part thereof immediately before the commencement of this Order (including any Ordinance, law or statutory instrument made before the commencement of this Order) which were made or had effect as if they were made in pursuance of the existing Orders or were continued in force by the Federation of Rhodesia and Nyasaland (Dissolution) Order in Council 1963."⁽¹⁸⁾ The Republic of Malawi (Constitution) Act did not define existing law. This was no doubt because the Malawi Independence Order, 1964, had already done so when Malawi became independent in 1964. The definition given in that Order is similar to that in the Zambian one. Existing law in Malawi on Republic Day, therefore, meant the existing law that had been defined by the Malawi Independence Order, 1964, and the law made thereafter.

Some of the existing laws, because of the change of the constitutional position, required modification, adaptation, qualification and exception to bring them into conformity. Power to do this was granted in the Zambia Independence Act, the Zambia Independence Order and the Republic of Malawi (Constitution) Act.⁽¹⁹⁾

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17. S. 4 (1) Zambia Independence Order, 1964; S.2 (1) Zambia Independence Act; S.5 (1) Republic of Malawi (Constitution) Act. See Schedule 1, Part 11 of the Zambia Independence Act for laws that ceased to operate on Independence Day. See also S. 4 (2) of the Malawi Independence Act, 1964.
18. S. 4 (6) Zambia Independence Order, 1964. See also S. 2 (3) Zambia Independence Act.
19. See also the Malawi Independence Order, 1964 (S.4) and the Malawi Independence Act, 1964 (S 4 (4)-(6)).

6. Section 9 of the Zambia Independence Act empowered Her Majesty to make, by Order in Council, where necessary or expedient as a result of the impending constitutional changes, such adaptations in any Act of Parliament enacted before the Act (the Zambia Independence Act) or in any instrument. This enabled Her Majesty in Council to amend Acts of Parliament by Orders in Council - a power not normally possessed. Such Orders could be made so as to take effect immediately on enactment or on the appointed day⁽²⁰⁾ and could contain transitional or other incidental or supplemental provisions which appeared to Her Majesty to be necessary or expedient.⁽²¹⁾ The Orders could be varied or revoked by subsequent Orders during the period before the appointed day.⁽²²⁾ They could also during that period be annulled in pursuance of a resolution of either House of Parliament.⁽²³⁾

The above provisions concerned only legislation made by the United Kingdom Parliament or by Her Majesty in Council which required changes or adaptation to define the new constitutional position of Northern Rhodesia and the country's constitutional relationship with the United Kingdom. They did not apply to legislation enacted by the Northern Rhodesia Legislative Council or the Governor or any other authority in Northern Rhodesia or to Acts of the United Kingdom Parliament or Orders in Council which were part of the law of Northern Rhodesia but were of no constitutional consequence.^(23a) Separate provisions were made for this. In pursuance of the powers under Section 9 of the Independence Act, Her Majesty in Council made the Zambia Independence Order which, among other things, contained transitional provisions on the modification, adaptation, qualification or exception of the law in force in the country to bring it into conformity with constitutional changes. Section 4 (3) of the Order empowered the President of Zambia after assuming office and until April 24, 1965, to make by Order such amendments to the existing laws of Zambia or any Act of the United Kingdom Parliament or Order of Her Majesty in Council (save the Zambia Independence Order and the Zambia Independence Act) having effect as law in Zambia immediately before the commencement of the Order into conformity with the Order. Since it was necessary to amend a large body of legislation before the appointed day - the day on which the President was going to assume office and exercise the above powers - Section 1 (2) of the Order empowered the Governor, acting in accordance with the advice of the Prime Minister, to exercise the above powers and those under Section 82 of the Constitution (i.e. summoning of Parliament) until the President assumed office on October 24, 1964.

The Republic of Malawi (Constitution) Act granted the President for one year (July 6, 1966 - July 6, 1967) the power to modify, adapt, qualify and except existing laws so as to bring them into conformity with the new constitutional position.⁽²⁴⁾ The period given the Malawi President was six months longer than that given to the Zambian President. The powers given to the President were those of modifying, adapting, qualifying and excepting other laws to make them conform to the new Constitution and not to make the Constitution conform to the other laws. It has also been seen in relation to Zambia that the power did not extend to the provisions of the Zambia Independence Act and the Zambia Independence Order. They could not be modified to conform to other laws.

The powers granted to the President of Zambia from October 24, 1964 to April 24, 1965 and to the President of Malawi from July 6, 1966 to July 6, 1967, ran concurrently with those of Parliament; in both cases these powers came into effect together with the Constitution. They also ran concurrently with those of any other person or authority authorized to amend or repeal existing law by the Order or the Act. Section 4 (5) of the Zambian Independence Order and Section 5 (4) of the Republic of Malawi (Constitution) Act provided respectively that the powers conferred "shall be without prejudice to any powers conferred by this Order (Act in the case of Malawi) upon any person or authority to make provision for any matter, including the amendment or repeal of any existing law." It should be noted that the powers of the President in each case were limited to existing law on the coming into force of the Constitution and did not extend to law enacted by Parliament after the Constitution had come into force. The latter law could only be modified, amended or repealed by Parliament or any other person (including the President) or authority authorized to do so under powers other than those contained in Section 4 (5) of the Zambia Independence Order or Section 5 (4) of the Republic of Malawi (Constitution) Act.

20. If an Order were made after the appointed day, it was to be made so as to take effect from the appointed day (S. 10 (1)).

21. S. 10 (2)(a). 22. S. 10 (2) (b). 23. S.10 (2)(c) •

23a. This is not specifically stated but can be inferred from the granting of powers to the President (and before he assumed office to the Governor) to modify, adapt qualify and except laws in force in Zambia, made later by the Zambia Independence Order.

Matters prescribed or provided for under existing law (including amendments made to any such law in terms of the above provisions) which were also to be provided for or prescribed under the new Constitution by Parliament or by any other person or authority took effect, as from the commencement of the Constitution in each case, as if they had been made under the new Constitution by Parliament or by the person or authority concerned.⁽²⁵⁾

3. Existing Offices

Where an office existed under the old Constitution and a similar or equivalent office was established under the new Constitution, any person who held or acted in such office immediately before the coming into operation of the new Constitution was deemed, as far as was consistent with the new Constitution, to have been elected or appointed to hold or act in that office under the new Constitution.⁽²⁶⁾ Such person was also deemed to have taken the oath of allegiance and any other oaths required by the Constitution.⁽²⁷⁾ In order to prevent that the holding of an office under the new Constitution would amount to a new appointment, a provision was included in each case that any person who was required under the previous Constitution to vacate his office at the expiration of any period or on attainment of a certain age remained under the same condition.⁽²⁸⁾ The Republic of Malawi (Constitution) Act further provided that the above provisions, relating to continuance of offices and appointments, did not in any way prejudice the powers conferred on any person or authority to make provision for the abolition of offices or the removal of persons holding or acting in such offices.^(28a) This power was not referred to in the Zambia Independence Order itself but was provided for in Section 56 of Schedule 2 to the Order (the Constitution). The section gives the President power to create and abolish offices.^(28a)

The Zambia Independence Order made specific mention of existing offices of Ministers and Parliamentary Secretaries. Any office of Minister (except that of Prime Minister)⁽²⁹⁾ or of Parliamentary Secretary existing under the previous Constitution was deemed to have an equivalent office established under the new Constitution and any person who held such office immediately before the commencement of the new Constitution was deemed to have been appointed immediately after the assumption of office by the President to hold the equivalent office.⁽³⁰⁾ This provision, it appears, was not necessary as the provisions above relating to offices in general would have applied even in this case. This apparently accounts for the absence of a similar provision in the Republic of Malawi (Constitution) Act.

Footnotes on page 415.

9. 4. The National Assembly, Constituencies and Voters' Rolls

In both Zambia and Malawi the National Assembly existing under the pre-Republic Constitution was not dissolved when the republican Constitution came into operation. The old National Assembly became the National Assembly under the new Constitution.⁽³¹⁾ In Zambia, this National Assembly, unless dissolved earlier, was to continue until March 10, 1969.⁽³²⁾ In Malawi, it was to continue, unless dissolved earlier, until July 7, 1971.⁽³³⁾ The members continued to represent their constituencies under the previous Constitution.⁽³⁴⁾ The number of constituencies and their boundaries remained the same.⁽³⁵⁾ In Zambia this meant that sixty-five members continued to represent sixty-five main roll constituencies and ten members the ten reserved roll constituencies.⁽³⁶⁾ The number of constituencies could not be altered until after the expiration of the interim period - i.e. after the dissolution of the existing National Assembly.⁽³⁷⁾ An Electoral Commission in terms of Section 67 of the Constitution could, however, be set up to work on new boundaries to be put into effect at the end of the interim period.⁽³⁸⁾ Members who did not become citizens of Zambia on October 24, 1964, could continue to hold their seats until October 24, 1966.⁽³⁹⁾ Thereafter⁽⁴⁰⁾ they could only continue to hold their seats if they became citizens. In Malawi only the fifty Members representing the fifty general roll constituencies continued as Members.⁽⁴¹⁾ The special roll⁽⁴²⁾ constituencies were abolished and the Special Members ceased to be Members of the National Assembly on July 6, 1966.⁽⁴³⁾

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24. Section 4 of the Malawi Independence Order, 1964, also gave similar powers to the Governor-General until January, 1965.
25. S. 4. (4) Zambia Independence Order; S. 5 (3) Republic of Malawi (Constitution) Act.
26. Ibid., S. 5 (1); 6 (1).
27. Ibid.
28. Ibid. 28a. S.6(2)(b).
- 28b. S. 6 (2)(b). The original section was repealed and replaced by Section 3 of the Constitution Amendment Act, 1969 (act No. 1 of 1960).
29. This office was to be replaced by that of President.
30. S. 5 (2) Zambia Independence Order.
31. Ss. 9 and 10 Zambia Independence Order; S.7(1) Republic of Malawi (Constitution) Act. The perpetuation of the existing National Assembly was done in a number of other countries on attainment of independence - see, e.g., S.6 of the Lesotho Independence Order (S.1. 1966 No. 1172); S.6 of the Trinidad and Tobago (Constitution) Order in Council (S.1 1962 No. 1875); Ss. 8, 9 and 10 of the Mauritius Independence Order.
32. S.11 Zambia Independence Order. It was dissolved in December, 1968.
33. S. 7 (6) Republic of Malawi (Constitution) Act.
34. S. 10 (1)(b) Zambia Independence Order; S.7(2) Republic of Malawi (Const.) Act.
35. S. 9 (2)(a) and (b); S.3 (i) ibid.
36. S.9 (2)(a) and (b) Zambia Independence Order.
37. S. 9 (2) and (4).
38. S. 9 (3) and (4).
39. S. 10 (1) (b).
40. Ibid. 41. S. 7 (2) Republic of Malawi (Const.) Act.

The Republic of Malawi (Constitution) Act further provided that the persons who were Speaker and Deputy Speaker before July 6, 1966, were to be deemed to have been so elected under the new Constitution and that Members of the National Assembly and the Speaker and Deputy Speaker would be deemed to have taken the necessary oath under the new Constitution.⁽⁴⁴⁾ No similar provision was included in the Zambia Independence Order. So far as Members of the National Assembly were concerned, the provision deeming them to have taken the necessary oath was perhaps not necessary for once a Member of the old Assembly had been deemed to be a Member of the new Assembly, it followed that he should be deemed to have satisfied all the requirements of membership under the new Constitution. Absence of a reference to the Speaker and the Deputy Speaker in the Zambia Independence Order cannot, however, be explained in the same manner. Being a Member of the National Assembly does not include being a Speaker or Deputy Speaker. A person deemed to continue as a Member of the National Assembly would not, therefore, be deemed to continue as speaker or Deputy Speaker by the same provision. The two offices must have been intended to come under Section 5 (1) of the Order which deemed a person who held an office under the old Constitution which continued to exist under the new Constitution to have been appointed or elected to that office under the new Constitution.⁽⁴⁵⁾

In both countries procedure of the old Assembly continued as procedure of the new Assembly, with, of course, such modifications, adaptations, qualifications and exceptions as were necessary.⁽⁴⁶⁾ The voters rolls also remained and were to do so until altered by Parliament.⁽⁴⁷⁾ In Zambia such alterations could not be brought into effect until after the interim period.⁽⁴⁸⁾ Preparations for alterations to be brought into effect at the end of the interim period could, however, be made during the interim period.⁽⁴⁹⁾ Persons registered on the rolls on the coming into force of the new Constitution were, in each case, deemed to possess the qualifications required under the new Constitution.⁽⁵⁰⁾ In Zambia the perpetuation of the existing rolls meant the continuance of two rolls - the main roll on which Africans registered and the reserved roll on which Europeans registered.⁽⁵¹⁾

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42. On the Special Roll, see Chapter 3 above.
 43. S. 7 (3) Republic of Malawi (Const.) Act.
 44. S. 7 (7).
 45. See above under Existing Offices.
 46. S. 12 Zambia Independence Order; S. 7 (5) Republic of Malawi (Const.) Act.
 47. S. 9 (2)(c) and (d) Zambia Independence Order; S. 3 (3) Republic of Malawi (Const.) Act.
 48. S. 9 (4) Zambia Independence Order.
 49. Ibid.
 50. S. 9 (2)(d) and (5).
 51. S. 9 (2)(c)(i) and (ii).
 52. S. 9 (2)(c)(iii).

11. Persons who were neither African nor European could be registered on either roll at their own choice.⁽⁵²⁾ In Malawi, on the other hand, it meant the continuance of the general roll. The special roll was abolished - albeit not directly - by the abolition of the special constituencies and the Members representing them.⁽⁵³⁾ The voters on that roll did not, however, lose their vote. Section 8 (3) of the Republic of Malawi (Constitution) Act provided that every person who immediately before the appointed day was registered in any constituency as a voter was to continue to be registered until such time as a new or revised roll of voters would have been prepared. This entitled the special roll voters to be removed to the general roll.

All money granted, voted or appropriated by the previous National Assembly to the service of the Government was deemed by the Republic of Malawi (Constitution) Act to have been granted, voted or appropriated by the new Assembly in accordance with the new Constitution.⁽⁵⁴⁾ No similar provision exists in the Zambia Independence Order. Inclusion of the provision in the Republic of Malawi (Constitution) Act was, it appears, not necessary. The money, having been granted, voted or appropriated for the current financial year, the change of Government, Constitution and National Assembly would not have constitutionally barred the new Government, even if this provision did not exist, from using the money. This may explain why a similar provision is absent in the Zambia Independence Order.

5. Rights, Liabilities and Obligations

All rights, liabilities and obligations of Her Majesty in respect of the Government of Northern Rhodesia or of the holder of any other office under the Crown in respect of the Government of Northern Rhodesia on behalf of that Government became, on commencement of the Constitution, rights, liabilities and obligations of the President on behalf of the Government.⁽⁵⁵⁾ They became enforceable by or against the President.⁽⁵⁶⁾ The rights referred to were those that arose from contract or otherwise but did not include those discussed below under the heading "Property and Assets"; those arising from treaty, convention or agreement with another country or international organization; and those relating to Barotseland which were terminated by the provisions of Section 8 of the Zambia Independence Act.⁽⁵⁷⁾ In Malawi all rights, liabilities and obligations of Her Majesty, the Governor-General or any public officer in respect of the Government of Malawi, regardless of how they arose, became the rights, liabilities and obligations of the Government.⁽⁵⁸⁾

12. Section 9 (1) of the Act also provided that all rights and obligations under conventions, treaties or agreements which were exercisable by or binding upon the Government immediately before the appointed day (July 6, 1966) should continue to be so exercisable and binding.⁽⁵⁹⁾ There is no similar provision in the Zambia Independence Order which, as has been seen above, in fact, excepted rights, liabilities and obligations arising from treaty, convention or agreement. The exclusion of such rights, liabilities and obligations in the Zambia Independence Order was perhaps due to the fact that until she became independent, Zambia, as Northern Rhodesia Protectorate, was not responsible for its international obligations or liabilities nor had she any international rights.

53. See above.

54. S. 7 (3) Republic of Malawi (Constitution) Act.

55. S. 20 (1) Zambia Independence Order.

56. S. 7 (3) Republic of Malawi (Constitution) Act.

57. S. 20 (1) Zambia Independence Order.

58. Ibid. This position of vesting the rights, liabilities and obligations in the President is also found in Botswana Independence Order, 1966. The Zambian provision has, however, been amended and the rights, liabilities and obligations are now as in Malawi (see below) vested in the Government. The vesting of rights, liabilities and obligations in the President or Government is rather strange since the President or the Government is rather a corporation sole like the English Crown. The rights, liabilities and obligations should have been vested in

59. the state which is a corporation sole.

53. S. 12 Republic of Malawi (Constitution) Act. See also s. 17 of the Lesotho Independence Order and S. 26 of the Constitution of Kenya (Amendment) Act (No. 28 of 1964) which vested such rights, liabilities and obligations in the Government.

59. See S. v. Devoy, 1971 (1) S.A. 359 (N.P.D.), where the Court held that an extradition agreement which had been concluded between the Federation of Rhodesia and Nyasaland and South Africa and had been continued as part of the law of Nyasaland by the Extradition of Offenders Enactments (Adaptations and Modifications) Regulations, 1964, after the dissolution of the Federation of Rhodesia and Nyasaland on December 31, 1963, and further continued by the Malawi Independence Order, 1964, when Nyasaland became independent as the State of Malawi on July 6, 1964 and by the Republic of Malawi (Constitution) Act, 1966 when Malawi became a republic was still in force between the Republic of South Africa and the Republic of Malawi. Contrast with S. v. Eliasov, 1965 (2) S.A. 771 (T.P.D.), where the court held the same extradition agreement not operative between the Republic of South Africa and Rhodesia because although letters were exchanged between the Government of the Republic of South Africa and the Government of Rhodesia, after the dissolution of the Federation of Rhodesia and Nyasaland to continue the agreement, the exchange of letters was not published by the President of the Republic of South Africa as required by S. 2 of the South African Extradition Act (No. 67 of 1962). See also S. v. Bull, 1967 (2) S. A. 636 (T) where the Court also held that the extradition agreement was still in force between Malawi and South Africa despite the dissolution of the Federation.

13. Those international rights, liabilities and obligations that were to be inherited by Zambia were, therefore, to be settled between the United Kingdom and Zambia and the countries involved. Malawi, on the other hand, had, at the time she assumed republican status, become responsible for its international transactions when she attained independence in 1964. It should be noted, however, that at international law there is no general rule that states that on achievement of independence by a colonial territory the treaties that were binding upon it are automatically terminated.^(59a) Whether, a treaty remains in force or lapses after independence of a territory depends largely upon whether the newly independent State consents to be bound by any particular treaty.^(59b)

Section 13 of the Republic of Malawi (Constitution) Act confirmed all estates, interests or rights in or over land, minerals or mineral oils validly created, granted or recognized by the Governor of the former Protectorate, the Governor-General or any other authority acting in exercise or purported exercise of any power in that behalf conferred by law. There is no similar provision in the Zambia Independence Order. Section 20 (1) of the Order may, however, be said to cover confirmation of titles and interests over land; to that it was not necessary to include a separate provision.

6. Property and Assets

Any property and assets which vested in Her Majesty or in the Government of Northern Rhodesia for the purposes of the Government of Northern Rhodesia vested in the President on behalf of the Government on coming into operation of the republican Constitution.⁽⁶⁰⁾ In those cases where property was liable to escheat or forfeiture to Her Majesty, it became so liable to the President on behalf of the Government.⁽⁶¹⁾

59a. See S. v. Bull (supra) and S. V. Devoy (supra).

59b. Ibid. See also Oppenheim, L. International Law, 8th Edition by Lauterpacht, H.; McNair, The Law of Treaties, p. 591; Schwartzberger, George A. Manual of International Law, 4th Edition, Vol. 1, p. 82. O'Connell, State Succession in Municipal and International Law, Vol. 11, 6 - 9, 67, 115, 173-178; O'Connell, International Law, Vol. 1., p. 428.

60. S. 19 (1) Zambia Independence Order. See also S.16 of the Botswana Independence Order, 1966, which has an identical provision. The Zambian provision has, however, been amended now and the property and assets are vested in the Government.

61. S. 19 (2) Zambia Independence Order. See also S.16 of the Botswana Independence Order which has an identical provision.

Property held in trust for Her Majesty or the Governor of Northern Rhodesia for the purposes of the Northern Rhodesian Government was now to be held in trust for the President.⁽⁶²⁾ This latter provision and Section 19 (1) did not apply to property or assets vested in Her Majesty, the Secretary of State or the Governor of Northern Rhodesia by virtue of the Northern Rhodesia (Crown Lands and Native Reserves) Orders in Council 1928 to 1963 or by virtue of the Northern Rhodesia (Native Trust Land) Orders in Council 1947 to 1963.⁽⁶³⁾ Different provisions applied to such property and assets.

In Malawi the property and assets did not become vested in the President. All property of every nature and kind whatsoever and all assets vested in or held in trust for Her Majesty or the Governor-General or any person in right of the Government vested in or was to be held on behalf of the Government.⁽⁶⁴⁾ This position has been amended in respect of public land. Section 3 of the Malawi Land (Amendment) Act, 1967,⁽⁶⁵⁾ introduced Section 6A into the principal act - the Malawi Land Act, 1965.⁽⁶⁶⁾ The Section vested all public land in perpetuity in the President. Section 7 of the Amendment Act states that the provisions of Section 11 of the Republic of Malawi (Constitution) Act shall be read and construed subject to the provision of the Amendment Act. All property and assets which vested in the Government or which were to be held in trust for the Government at the commencement of the Constitution so vested or became held in trust subject to (a) any rights granted, leased or otherwise disposed of to, or recognized as being vested in, any person immediately before the coming into operation of the Constitution; and (b) any rights that might, subject to any law, be granted, leased or otherwise disposed of to, or in trust for, any person authorized in that behalf by the Government or by or under any law.⁽⁶⁷⁾ This provision is not included in the Zambia Independence Order. The provisions of Section 20 (1) of the Order dealt with under "Rights, Liabilities and Obligations" above should, however, cover obligations of this nature.

62. S. 19 (3) Zambia Independence Order.

63. S. 19 (4).

64. S. 11 Republic of Malawi (Const.) Act. In Kenya (see S. 25 of the Constitution of Kenya (Amendment) Act (Act No. 23 of 1964) and in Lesotho (see S. 16 of the Lesotho Independence Order, 1966) property and assets are also vested in or held for the government.

65. Act No. 8 of 1967.

66. Act No. 25 of 1965.

67. S. 11 Republic of Malawi (Const.) Act.

7. Prerogatives and Privileges

Prerogatives and privileges exercised by Her Majesty or the Government of Northern Rhodesia before independence vested in the President under the new Constitution.⁽⁶³⁾ This was also the case with the prerogatives and privileges exercised in Malawi by Her Majesty or the Governor-General.⁽⁶⁴⁾ The subject of prerogatives and privileges will be further dealt with under functions of the President in Chapter Fourteen.

8. Citizenship

The transitional provisions regarding citizenship in Zambia and in Malawi differed because the two countries did not have the same constitutional status when they became republics. Malawi was an independent country and had, accordingly, a citizenship law of her own. Zambia, on the other hand, had no citizenship law of her own until October 24, 1964. To avoid repetition later, both the transitional and existing provisions on citizenship will be discussed in Chapter Twenty.

8. Legal Proceedings and Jurisdiction

Both in Zambia and in Malawi legal proceedings pending before the Courts at the commencement of the republican Constitution continued as if they had been instituted before the Courts under the old Constitution.⁽⁷⁰⁾ Judgments already given could be executed or appealed against.⁽⁷¹⁾

Jurisdictions of the Courts were maintained. Section 15 of the Republic of Malawi (Constitution) Act provided that until Parliament otherwise provided "the civil and criminal jurisdiction of the Supreme Court of Appeal, the High Court and all subordinate courts (including Local Courts) shall, subject to the provisions of this Act and of any law in force in Malawi, be exercised in conformity with the existing laws and the substance of the common law and the doctrines of equity". There is no similar provision in the Zambia Independence Order. The provision was, it appears, unnecessary, both in the Republic of Malawi (Constitution) Act,⁽⁷²⁾ and the Zambia Independence Order. Once existing laws had been perpetuated (with the necessary modifications, adaptations, qualifications and exceptions) it followed that the laws governing jurisdiction of the various Courts and its exercise had also been perpetuated and the Courts were to function in accordance with those laws and those that came into effect at the commencement of the Constitution until Parliament provided otherwise.

63. S.13 Zambia Independence Order.

69. S.10 Republic of Malawi (Const.) Act.

70. S.17 Zambia Independence Order; S.14 Republic of Malawi (Cnst.) Act.

16. In addition it stands to reason that all Courts would apply the common law which they had previously applied except in so far as there was specific substitution. Part of the divorce jurisdiction of the Courts of Zambia was terminated by Section 7 (1) of the Zambia Independence Act. As from October 24, 1964, no Court having jurisdiction under the law of Zambia had jurisdiction by virtue of the Colonial and Other Territories (Divorce Jurisdiction) Acts 1926-1950 to make a decree for the dissolution of a marriage or to make an order on an incidental matter thereto unless the proceedings of the decree were pending before the Court.⁽⁷³⁾ There is no similar provision in the Republic of Malawi (Constitution) Act. Jurisdiction of the Malawi courts under the Colonial and Other Territories (Divorce Jurisdiction) Acts 1926-1950 had been terminated when the country became independent in 1964.

10. Judicial Committee of the Privy Council

Section 5 of the Zambia Independence Act empowered Her Majesty to confer on the Judicial Committee of the Privy Council by Order in Council jurisdiction and powers to hear appeals from the Courts of Zambia in accordance with whatever provisions would be contained in such Order. The Zambia Independence Act having been enacted earlier than the Zambia Independence Order, Section 5 of the Act provided that the provisions relating to appeals to the Judicial Committee from the Zambian Courts could, if enacted, be included in the Order in Council that was going to revoke the Northern Rhodesia (Constitution) Order in Council, 1963, as amended. A provision was later included in the Constitution, empowering the President to declare by Order that the Judicial Committee shall be a court of appeal for the Republic of Zambia.⁽⁷⁴⁾ Such Order has not been made and accordingly no arrangements have been made by Her Majesty in Council to enable the Judicial Committee to hear appeals from Zambia. Arrangements were, however, made in terms of Section 6 of the Act for the disposal of pending proceedings before the Committee.

71. Ibid.

72. See Chapter 15 below where it is stated that Section 15 removed the uncertainty on whether Local Courts had jurisdiction to administer the common law and equity.

73. The requirement that rules made for the Courts in Zambia in terms of Section 1 (4) of the Indian and Colonial Divorce Jurisdiction Act, 1926, should be made by the Secretary of State with the concurrence of the Lord Chancellor also ceased - S. 7(3) Zambia Independence Act. The function was to be entrusted to an authority determined by the law of Zambia - ibid. Provisions of Section 1 (4) requiring the approval of the Lord Chancellor for the nomination of any judge for any purpose equally ceased.

74. S. 102 of the Constitution. See below under Chapter 15.

17.

The Republic of Malawi (Constitution) Act has no provisions regarding the Judicial Committee of the Privy Council. Appeals to the Committee had been terminated two years earlier when the country became independent.⁽⁷⁵⁾ Only those proceedings which were pending before the Committee on July 6, 1964, were continued.⁽⁷⁶⁾

11. Agreements Relating to Barotseland.

It will be remembered that several agreements had been made between the Paramount Chief of Barotseland and the British South Africa Company and the Crown and that although Barotseland was administratively part of Northern Rhodesia it had enjoyed special status and in 1953 received formal protectorate recognition.⁽⁷⁷⁾ Before the grant of independence to the country, a series of negotiations were held between the Litunga of Barotseland, the Government of Northern Rhodesia and the British Government on the position of Barotseland in an independent Zambia. These negotiations resulted in the Barotseland Agreement, 1964, which spelt out the rights of Barotseland in an independent Zambia.⁽⁷⁸⁾

On October 24, 1964, some agreements on Barotseland ceased to have effect. Section 8 of the Zambia Independence Act provided that agreements between Her Majesty and the Litunga existing before October 24, 1964, were to cease to have effect in so far as they, before that date, conferred any rights or imposed obligations on Her Majesty or the Government of Northern Rhodesia.⁽⁷⁹⁾ This did not, however, apply to the 1964 Agreement or to any agreement made before or after the enactment of the Zambia Independence Act varying or superseding that Agreement.⁽⁸⁰⁾ This Agreement was not affected because it had been concluded to operate from independence. The agreement has, however, as will be seen in Chapter Twenty-Four, been abrogated by the Government of Zambia.

12. Emergency Powers

Section 7 of the Zambia Independence Order enabled a state of emergency declared by the Governor in terms of Section 4 of the Preservation of Public Security Ordinance immediately before the coming into operation of the Order to be deemed, on coming into force of the Order, to be in force in terms of Section 29 (1) (b) of the Constitution (concerning declarations of a state of near emergency) and to have been approved by the National Assembly.

75. S. 14 (1) Malawi Independence Order, 1964.

76. S. 14 (2).

77. See Chapters 2 and 8 above.

78. See Chapter 22 below.

79. Rights and obligations conferred or imposed on parties like the British South Africa Company did not, however, cease to exist.

18. Such state of near emergency, unless sooner revoked or extended by the National Assembly in accordance with Section 29 of the Constitution, was to last until April 24, 1965. No such state of near emergency was declared during the relevant period. The provision, therefore, expired without having been used.

The Emergency Powers Orders in Council, 1939-1964 which have the force of law in the United Kingdom and the overseas dependencies ceased to apply to Zambia.⁽⁸¹⁾ The orders were substituted by Section 29 of the Constitution. Section 10 of the Malawi Independence Order, 1964, also terminated the Orders in relation to Malawi. Unlike the Zambia Independence Order, the Malawi Independence Order did not terminate all the Orders on independence day. Only Section 6 (2)(d) and Section 8 of the Emergency Powers Order in Council 1939 ceased to operate on July 6, 1964.⁽⁸²⁾ The rest of the provisions of the Orders were to operate until July 6, 1966.⁽⁸³⁾ Although, when this provision was made it had not been anticipated that Malawi would become a republic on July 6, 1966, it happened that the termination coincided with this change of the country's constitutional status.

13. The First President.

Section 8 (1) of the Zambia Independence Order provided that the first President would be the person named in Section 32 (1) of the Constitution and that if that person was not the President designate, the President would be the person then President designate. If there was no President designate on coming into force of the Constitution, the office of President was to be deemed vacant and the provisions of Section 37 of the Constitution would be brought into force.⁽⁸⁴⁾ The person named in Section 32 (1) of the Constitution was Kenneth David Kaunda. The President designate was to be the person elected in terms of the Zambia (Election of First President) Order, 1964.⁽⁸⁵⁾ Such President designate was to take the necessary oaths in terms of Section 39 of the Constitution as soon as possible after the commencement of the Independence Order.⁽⁸⁶⁾ The election of the first President was not an election by the people but by the Legislative Assembly. Kaunda was elected the President designate, as was expected since his United National Independence Party held a vast majority in the Assembly.

80. S. 8 (2) Zambia Independence Act.
 81. S. 13 Zambia Independence Order.
 82. S. 10 Malawi Independence Order, 1964.
 83. Ibid.
 84. S. 8 (1) Zambia Independence Order.
 85. S. 1, 1964 No. 1283.
 86. S. 8 (2) Zambia Independence Order.

19. He was duly sworn in on coming into force of the Constitution as the Republic's first President.

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The Republic of Malawi (Constitution) Act does not refer to the first President in its main part. Such mention is, however, made in the Constitution (which is Schedule 2 to the Act) itself. Section 9 names Ngwazi Dr. Hastings Kamuzu Banda as the first President. The election in this case was also not an election by the people but by the National Assembly. This was done in terms of the Election of the First President of the Republic Act, 1966.⁽⁸⁷⁾

14. Chiefs

Any person who was recognized by the Governor as of chiefly status or under any law as the Litunga of Barotseland or as Paramount Chief, Senior chief or Sub-chief immediately before the coming into force of the Zambia Independence Order continued to enjoy that status under the new Constitution until such recognition was withdrawn by the President.⁽⁸⁸⁾ The Republic of Malawi (Constitution) Act refers to chieftainship in Schedule 2 to the Act. Section 6 of the Constitution states that the institution of chieftaincy shall be recognized and preserved in the Republic so that the chiefs may make the fullest contribution to the welfare and development of the country in their traditional fields.⁽⁸⁸⁾ The recognition of chiefs under the new Constitution meant recognition of those who were chiefs immediately before it came into operation.

15. Remuneration of Certain Officers

Until new provisions were made in terms of Section 111 of the Constitution, Section 21 of the Zambia Independence Order provided that salaries of holders of offices to which Section 111 applied (i.e. judges of the High Court and the Court of Appeal, the Director of Public Prosecutions and the auditor-General) were to be the salaries they were receiving before the Order came into operation. Provision for such salaries was later made when Parliament enacted the Constitutional Offices (Emoluments) Act, 1965.⁽⁹⁰⁾ The Republic of Malawi (Constitution) Act makes no mention of a transitional provision of this nature. The officers concerned continued to be paid in terms of the existing law on the matter.

87. Act No. 22 of 1966.

88. S.14 Zambia Independence Order.

89. For a full account of the role and powers of chiefs in Zambia and Malawi, see Chapter 23 below.

90. Act No. 45 of 1965.

2.

The Zambia National Assembly originally consisted of seventy-five elected Members⁽¹³⁾ and five nominated Members.⁽¹⁴⁾ The elected Members were divided into two groups. Sixty-five represented sixty-five main roll constituencies while ten represented ten reserved roll constituencies. The main voters' roll was predominantly African while the reserved roll was predominantly European. Asians and Coloureds had to decide whether to be registered on the main or the reserved roll. Africans could not be registered on the reserved roll and Europeans could not be registered on the main roll. Candidates for election to the National Assembly could stand only for seats belonging to the roll on which they were registered. The five nominated Members were appointed in terms of Section 60 of the Constitution which empowered the President, if he considered it desirable in the public interest, to appoint up to five persons as Members of the National Assembly in order to enhance its representative character or to obtain the service of any person who, by reason of his qualifications, would be of special value as a Member of the Assembly. The membership of the Assembly could also be increased by one in the event of a non-Member of the Assembly being elected Speaker.⁽¹⁵⁾

The division of elected Members into those representing main roll constituencies and those representing reserved roll constituencies was carried over from the pre-independence Constitution as a temporary arrangement subject to termination at the dissolution of the "interim Parliament". Although the division and the number of constituencies could not be altered during the interim period, arrangements for alterations to be made at the end of the period, could be made during the period.⁽¹⁶⁾ In pursuance of this provision alterations were made to the composition of the Assembly, the boundaries of the constituencies and the voters' rolls. The alterations came into force when the interim Parliament was dissolved in December, 1963. The number of elected Members was raised to 105.⁽¹⁷⁾

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8. Botswana, like Zambia, has a House of Chiefs which is not part of Parliament - see below in this Chapter.
 9. Kenya had a senate but abolished it in 1966 (see Act No. 40 of 1966).
 10. Pakistan is at present working on a new Constitution.
 11. Nigeria is at present under military rule.
 12. Lesotho is at present working on a new Constitution.
 13. S.58 (1)(a) (Zambia).
 14. S.58 (1)(b).
 15. S.58 (2).
 16. S.9 Zambia Independence Order, 1964.
 17. S.2 Constitution (Amendment) (No. 3) Act, 1967 (Act No. 2 of 1968)

3. The ten reserved seats were terminated. The main and reserved rolls were abolished and replaced by one roll. The provision of up to five nominated Members was retained, bringing the maximum membership of the Assembly to 110. This is the present membership of the Assembly.

The Malawi National Assembly, on the other hand, consists of 60^(17a) elected Members,⁽¹⁸⁾ 15 nominated Members⁽¹⁹⁾ and such persons who become Members by virtue of "being Ministers in terms of Section 50 (2) of the Constitution."^(19a) The President is, as in Zambia, empowered by Section 20 of the Constitution to appoint fifteen persons as Members of the National Assembly in order to enhance the representative character of the Assembly "or to represent particular minority or other special interests in the Republic." The quoted words are not included in Section 60 of the Constitution of Zambia. Their presence in the Malawi provision does not make the content of the provision significantly different from that of Zambia. The important words are: "to enhance the representative character of the Assembly," which are contained in both provisions. These words alone empower the President to appoint persons to represent minority or special interests.⁽²⁰⁾ As in Zambia, membership of the Malawi National Assembly can be increased by one if a person who is not a Member of the Assembly is appointed Speaker.⁽²¹⁾

The power to nominate Members, possessed by the President in both Zambia and Malawi, is also enjoyed in one form or another by Heads of State in a number of Commonwealth countries. In Canada,⁽²²⁾ Fiji,^(22a) Trinidad and Tobago,⁽²³⁾ Jamaica,⁽²⁴⁾ Barbados⁽²⁵⁾ and Bermuda⁽²⁶⁾ the Governor-General appoints the entire Senate. In

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- 17a. The number was originally 50. It was increased to 60 by the Constitution Amendment Act, 1969 (No. 25 of 1969).
18. S.19 (1)(a) (Malawi). Formerly the nominated members were
19. 5.20 ~~5.20~~ Formerly 5 nominated Members were 5. These 5 replaced the Special Members who had been abolished by Section 7 (3) of the Republic of Malawi (Constitution) Act. The 5 were all Europeans. The number was increased by the Constitution (Amendment) (No. 2) Act, 1970. The 10 new Members were all African.
- 19a. S.50 (1) empowers the President to appoint Ministers from persons who are not Members of the National Assembly. Formerly these Ministers did not become Members of the National Assembly although they were permitted to participate in the proceedings but without a vote.
20. See below on whether these provisions for nominated Members should be used to swell the majority of a ruling party.
21. S.19 (2) (Malawi). This provision also exists in the Constitutions of, e.g., Uganda (S.40 (4)); Malta (S. 53(2)); Trinidad and Tobago (S. 29 (3)); Singapore (S.23 (2)); Botswana (S.59 (2)).
22. See S. 24 of the Constitution.
- 22a. 8 are appointed by the Governor-General on the advice of the Great Council of Chiefs; 7 on the advice of the Prime Minister; 6 on the advice of the Leader of the Opposition; 1 on the advice of the Council of Rotuma - S.15 of the Constitution.

4. In Ceylon the Governor-General appoints 15 of the 30 Members of the Senate.⁽²⁷⁾ In Swaziland the King appoints 6 of the 12 Senators.⁽²⁸⁾ The Senators (in Swaziland) are appointed on grounds either of their special or practical experience so that they represent economic, social or cultural interests not already adequately represented or by reason of their particular merits which would enable them to contribute substantially to the good government of Swaziland.⁽²⁹⁾ The King also nominates 6 of the 30 Members of the House of Assembly after consultation with bodies he considers necessary and after taking into account interests not already adequately represented in the House.⁽³⁰⁾ In Lesotho the King nominated 11 of the 33 Senators under the 1966 Constitution.⁽³¹⁾ The President of India nominates 13 of the Members of the Council of States on account of their knowledge of literature, science, art or social service.⁽³²⁾ The Yang di-Pertuan Agong of Malaysia appoints 32 of the Senators from persons "who in his opinion have rendered distinguished public service or have achieved distinction in the professions, commerce, industry, agriculture, cultural activities or social service or are representative of racial minorities or are capable of representing the interests of aborigines."⁽³³⁾

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23. S. 23 of the Constitution. 13 are appointed on the advice of the Prime Minister; 4 on the advice of the Leader of the Opposition; and 7 on the advice of the Prime Minister after consulting religious, economic or social bodies or associations.
24. S. 35 of the Constitution. 13 are appointed on the advice of the Prime Minister and 3 on the advice of the Leader of the Opposition.
25. S. 36 of the Constitution. 12 are appointed on the advice of the Prime Minister; 2 on the advice of the Leader of the Opposition; and 7 in the Governor-General's discretion to represent religious, economic or social interests or other interests.
26. S. 27 of the Constitution. 4 are appointed on the advice of the Government Leader; 2 on the advice of the Opposition Leader; and 5 are appointed by the Governor acting in his discretion.
27. S. 9 (1) of the Constitution.
28. S. 38 (4) of the Constitution.
29. S. 38 (5).
30. s. 42.
31. S. 41 of the Constitution. The other 22 Members were ex-officio by virtue of their being Principal or Ward Chiefs.
32. Article 30 (1)(a) and (3). The other Members are elected by the Legislatures of the States - Article 30 (4).
33. Article 45 (2) of the Constitution as amended by Act 19 of 1964, S.6. The other Members are elected by the Legislatures of the States - Article 45 (1)(a).

5. In Tanzania, in addition to appointing 32 Members from among the members of the Revolutionary Council of Zanzibar, the President appoints up to 20 Members from Zanzibar and up to 10 Members from no specified part of the Union.⁽³⁴⁾ In Kenya the President is empowered to nominate 12 Members.⁽³⁵⁾

Several similarities and dissimilarities can be seen between the provisions in Zambia and Malawi, on the one hand, and those in the other States mentioned above. The Malawi and Zambian provisions differ in purpose wholly from those in Canada, Ceylon, Jamaica and Bermuda and partly from those in Trinidad and Tobago and Barbados. The appointment of the entire 102 Senators in Canada, the entire 22 Senators in Fiji, 21 Senators in Jamaica, 11 Senators in Bermuda, 15 of the 30 Senators in Ceylon, 14 of the 21 Senators in Barbados 17 of the 24 Senators in Trinidad and Tobago, and the 52 Members of the Tanzanian National Assembly from Zanzibar is a method of filling the House,⁽³⁶⁾ not aimed particularly at representation of particular interests or enhancement of the representative character of the House as is the case in Zambia and Malawi. The purpose of the provisions in Jamaica, Bermuda, Ceylon, Barbados and Trinidad and Tobago, appears to be to avoid a Second Chamber which is hostile to the party which has a majority in the First Chamber (for it must be remembered that the Governor-General either acts by convention or on the advice of the Government. On the other hand, the provisions in India, Malaysia and Swaziland, and Trinidad and Tobago (in relation to 7 of the 24 Senators) and Barbados (in relation to 7 of the 21 Senators) are similar to those in Zambia and Malawi in that the aim of the appointment is either representation of special interests or enhancement of the representative character of the House. The Kenya provisions and those of Tanzania, in relation to the 10 Members, differ from those of Malawi and Zambia in that the purpose of nominating the Members is not stated. This leaves the President, in both Kenya and Tanzania, with discretion to appoint such Members for a variety of reasons including those envisaged by the provisions in Zambia and Malawi.⁽³⁷⁾

34. See Ss. 24 (1) and 31, 32 and 33 of the Constitution.

35. S.39 of the Constitution as deleted and replaced by Act No.45 of 1968. The twelve Members were before the replacement of the original provision called "specially elected Members" and were elected by the House of Representatives - see S.39 and Schedule 6 of the original Constitution.

36. This was also so in the case of Lesotho.

37. A further difference that may be noted is that while in Zambia and Malawi (and also in Kenya and Tanzania) the President acts in his discretion in all cases, in Jamaica and Barbados, for instance, the Governor - General acts on the advice of the Prime Minister and the Leader of the Opposition (except for 7 of the 21 Senators in Barbados).

6. In Malawi the nomination powers have been used by the President to grant Europeans five seats in the National Assembly where they would otherwise have no representation. The five Europeans act as a created opposition⁽³⁸⁾ in a National Assembly comprising 60 Members of the one permitted party in the country - the Malawi Congress Party. In Zambia the powers have been used so far to swell the benches of the ruling party although in doing so white and black supporters of the party have been appointed. The spirit of Section 60 (of the Constitution of Zambia) and Section 20 (of the Constitution of Malawi) seems, however, not to be nomination of Members to increase the numbers of the ruling party but to give certain interests representation or to benefit the country by having in the Assembly persons with special knowledge.

In size the National Assemblies of Zambia and Malawi are very small when compared with such Assemblies as the British House of Commons (625-630 Members), the French National Assembly (482 Members), the Indian House of the People (500 Members), the Italian Chamber of Deputies (596 Members), the German Bundestag (499 Members) and the United States House of Representatives (437) Members.⁽³⁹⁾ Even in Africa alone the two Assemblies can still be regarded as small when compared with Tanzania's, which has 304 Members,⁽⁴⁰⁾ Nigeria's under the 1963 Constitution, which had 312 Members,⁽⁴¹⁾ and Kenya's, which has a maximum membership of 150.⁽⁴²⁾ Zambia and Malawi are, of course, very small in terms of population when compared with any of the countries mentioned above.⁽⁴³⁾ Zambia's population of 4,000,000 is, in fact, over-represented with a National Assembly of 110 Members when compared with any of the countries given above. Uganda, with a population of 7,551,000,⁽⁴⁴⁾ has a National Assembly of 62 Members, with a possible addition of another 10 specially elected Members under certain circumstances.⁽⁴⁵⁾ Ghana, with a population of the same size as that of Uganda had, under the 1960 Constitution, a National Assembly of 104 Members.⁽⁴⁶⁾ The 1969 Constitution has, however, raised the membership to not less than 140 and not more than 150.⁽⁴⁷⁾ Malawi's National Assembly is, on the other hand, commensurate with the country's population of 4,000,000. However, when compared with Malta (population: 317,000) which has a House of Representatives of 50 Members⁽⁴⁸⁾ and Singapore (population: 1,890,000) with a Parliament of 51 Members,⁽⁴⁹⁾ it could be argued that Malawi's population is under-represented.

Taking Zambia and Malawi alone, it will be seen that the membership of the National Assembly of the latter is exactly half of that of the National Assembly of the former. Two

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7. Two factors make it desirable that Malawi should maintain a smaller National Assembly than Zambia's. The first is that Malawi is not as rich as Zambia and cannot afford maintenance of a large Assembly without causing an unnecessary strain on the country's resources. Secondly, Malawi's area is only about one-eighth that of Zambia⁽⁵⁰⁾ and the density of the population is 37.5 persons to a square mile as compared with Zambia's 13.0 persons.⁽⁵¹⁾ The fifty elected Members of the Malawi National Assembly could, therefore, easily cover their constituencies. On the other hand, it would be extremely difficult for fifty Members (if Zambia were divided into fifty constituencies) adequately to do the same in Zambia. The large area, the sparseness of the population and an inadequate communication system justify the maintenance of a large National Assembly in Zambia, so that Members could easily cover their constituencies.

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38. Some of the nominated Members are those who were Members of the Legislative Council before independence and were in political conflict with Dr. Banda, e.g. Michael Blackwood who was the leader of the United Federal Party in the country during Federation days and who is now the Leader of the Opposition. This device of a nominated Opposition is working remarkably well.
39. Figures of membership are as given in Wheare, K.C. Legislatures (Oxford, University Press, 1963) p.4. For membership figures of other legislatures, see p.5.
40. S.24 of the Constitution.
41. S.43 of the Constitution. There was also a Senate.
42. S.49 of the Constitution as amended by Act, No.40 of 1966.
43. The population figures as given in Britannica Book of the Year, 1967, p. 636, are as follows: Britain 54,436,000; France - 49,157,000; India - 500,000,000; Italy - 52,931,000; West Germany (including West Berlin) 59,297,000; United States - 200,000,000; Tanzania - 10,515,000; Nigeria - 57,500,000; Kenya - 9,643,000.
44. Figure obtained from the source cited in Note 43 above.
45. Article 40 (1) - (3) of the Constitution. The party with the biggest number of seats after a general election is empowered, if it has a majority of less than ten over all the other parties, to elect special members so as to give it a majority of ten.
46. Article 2 (1).
47. Article 70.
48. S.53 (1) of the Constitution.
49. Article 23 (1) of the Constitution. Together, with a population of 1,000,000 had under the 1966 Constitution a National Assembly of 60 and a Senate of 33.
50. See Chapter 1.
51. See source cited in note 43 above.

For the purposes of elections to the National Assembly Zambia and Malawi are divided into constituencies and each constituency returns one Member.⁽⁵²⁾ Multiple member constituencies as found on the Continent of Europe do not exist in Zambia and Malawi.⁽⁵³⁾ Zambia is divided into 105 constituencies⁽⁵⁴⁾ and Malawi into 60.⁽⁵⁵⁾ The nominated Members in both countries do not represent constituencies. The boundaries of the constituencies are, in both countries, fixed by an Electoral Commission provided for in the Constitution.⁽⁵⁶⁾ Similar bodies exist in most of the Constitutions of the new countries of the Commonwealth.⁽⁵⁷⁾ The names vary although "Electoral Commission" seems the most popular.⁽⁵⁸⁾

In Zambia the Commission consists of a chairman and two other Members appointed by the President.⁽⁵⁹⁾ The Chairman must be a person who has held or who holds high judicial office.⁽⁶⁰⁾ This requirement is also found in the Constitution of Botswana.^(60a) It also existed in the 1966 Constitution of Lesotho.⁽⁶¹⁾ The latter Constitution went further by requiring that all the three members of the Commission should be judicially qualified.⁽⁶²⁾ In Bermuda the Chairman need not be judicially qualified but one of the four members (excluding the Chairman) must be judicially qualified.⁽⁶³⁾ In Malawi the Commission comprises a Chairman and not less than two and not more than four other Members appointed by the President.⁽⁶⁴⁾ There is no requirement that the Chairman or any of the members should be judicially qualified. This is also the position in the majority of the Constitutions of the Commonwealth countries.⁽⁶⁵⁾ The necessity of having a judicially qualified Chairman is, however, recognized in most of these countries and such a Chairman is often appointed.

Members of the National Assembly are disqualified from membership of the Commission in both Zambia and Malawi.⁽⁶⁶⁾ The Malawi provision also specifically disqualifies Ministers and Parliamentary Secretaries from membership.⁽⁶⁷⁾ This specific mention of Ministers and Parliamentary Secretaries, in addition to Members of the National Assembly, must have been necessitated by the fact that a provision also exists in the Constitution which permits Ministers (but not Parliamentary Secretaries) to be non-Members of the National Assembly.⁽⁶⁸⁾ Members of the National Assembly are also disqualified in Trinidad and Tobago,⁽⁶⁹⁾ Malta,⁽⁷⁰⁾ Sierra Leone,⁽⁷¹⁾ Uganda,⁽⁷²⁾ Mauritius,⁽⁷³⁾ Malaysia,⁽⁷⁴⁾ Botswana,⁽⁷⁵⁾ Ghana⁽⁷⁶⁾ and Bermuda.⁽⁷⁷⁾

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9. In Malta, ⁽⁷⁸⁾Mauritius ⁽⁷⁹⁾ and Botswana ⁽⁸⁰⁾ candidates for election to the National Assembly are also specifically disqualified and so are members of local authorities in Uganda ⁽⁸¹⁾ and Mauritius. ⁽⁸²⁾ The Botswana Constitution further bars from membership any person who is or has been within the preceding five years actively engaged in politics. A person is deemed to be or to have been actively engaged in politics if (i) he is, or was at any time during the prescribed period, a Member of the National Assembly, Legislative Assembly or Legislative Council; or (ii) he is, or was at any time during the prescribed period, nominated as a candidate for election to the National Assembly, Legislative Assembly, or Legislative Council; or (iii) he is, or was at any time during that period, the holder of an office in any political organization that sponsors or supports, or has at any time sponsored or supported, a candidate for election as a Member of the National Assembly, Legislative Assembly or Legislative Council. ⁽⁸³⁾ In Kenya and Tanzania, while ordinary Members of the National Assembly are disqualified from Membership, ⁽⁸⁴⁾ the Speaker is ex-officio Chairman of the Electoral Commission. ⁽⁸⁵⁾ On the other hand, the Constituency Boundaries Commission of Saint Christopher, Nevis and Anguilla and the Standing Committee on Constituency Boundaries of the Jamaican House of Representatives are composed wholly of Members of the Legislature. ⁽⁸⁶⁾

52. S.63 (2)(Zambia); S.2(1) (Malawi.)

53. The system of multiple member constituencies does not exist anywhere in the Commonwealth or in non-Commonwealth countries following the British pattern of election - e.g. South Africa or the United States.

54. Ss.63 (1)(a) and 53 (1)(a)(Zambia).

55. S.31(1)(Malawi).

56. Ss.67(1) and 63 (1)(b)Zambia; Ss.30(1) and 31(1) (Malawi).

57. See e.g. S.43 (1). Kenya Constitution; S.32 (1) Tanzania Constitution; S.47 (1) Uganda Constitution; S.53 (1) Trinidad and Tobago Constitution; S.61 (1) Malta Constitution; S.53 Bermuda Constitution; S.30. Ghana Constitution; S.37 Sierra Leone Constitution; S.36 (1) Mauritius Constitution; S.65 (1) Botswana Constitution; S.40 (1) Ceylon Constitution; S.52 (1) 1966 Lesotho Constitution; S.50 1963 Nigeria Constitution. In some Constitutions only a Commission dealing with elections and not delimitation is included - e.g. those of India (pp.324) (1); Malaysia (Art. 114 (1); and the 1962 Pakistan Constitution (Arts. 147-153).

58. The term "Electoral Commission" is used in the Constitutions of Kenya, Uganda, Tanzania, Malta, Sierra Leone, Ghana, Nigeria (the 1963 Constitution), Zambia and Malawi. Other terms are used in some Constitutions - e.g. Boundaries Commission (Trinidad and Tobago); Delimitation Commission (Botswana and Ceylon); Constituency Boundaries Commission (Bermuda); Electoral Boundaries Commission (Mauritius); Constituency Delimitation Commission (Lesotho, 1966 Constitution).

59. S.67 (3) (Zambia).

59a. Where judges are barred from public office a retired judge may be appointed.

Other footnotes on next page.

60a. S. 65 (3) (a) of the Constitution.

61. S. 52 (1) of the Constitution.

62. Ibid. The Chairman had to be a serving judge while the other two could be serving or retired.

63. S. 53 (4) of the Constitution.

64. S. 30 (1) and (2) (Malawi).

65. See, e.g., the Constitutions of Uganda (Art. 47 (1)); Ceylon (S. 40 (1)); Trinidad and Tobago (S. 53 (2)); Mauritius (S. 35 (1)); Malta (S. 61 (2)); Ghana (Art. 30 (3)). See also S. 50 (2) of the 1963 Nigerian Constitution.

66. S. 67 (5) (Zambia); S. 30 (β) (Malawi).

67. S. 67 (5) (Malawi).

68. See Chapter 13 below. Such specific mention, however, also appears in the Constitutions of e.g. Malta (S. 61 (4)); Sierra Leone (S.37 (4)) and Trinidad and Tobago (S. 53 (4)).

69. S. 53 (4) of the Constitution.

70. S. 61 (4) of the Constitution.

71. S. 37 (4) of the Constitution.

72. Article 47 (2) of the Constitution.

73. S. 35 (3) of the Constitution.

74. Article 114 (4) of the Constitution.

75. S. 65 (3)(b)(i) of the Constitution.

76. Article 30 (3)(b) of the Constitution.

77. S. 53 (4) of the Constitution. See also S. 52 (2) of the 1966 Lesotho Constitution.

78. S. 61(4) of the Constitution.

79. S. 35 (3) of the Constitution.

80. S. 65 (3)(b) (ii). This was also the case under the 1966 Lesotho Constitution (S. 52 (2) (b)).

81. Article 47 (2) of the Constitution. Only Members and not Candidates are disqualified.

82. S.35 (3) of the Constitution. Candidates for election are also disqualified. Contrast with the Uganda provision—see Note 61 above.

83. S. 65 (3)(c). The provisions do not apply to persons who were speakers of the Legislative Council or of the Legislative Assembly or National Assembly who were so chosen without being Members. The 1966 Lesotho Constitution had similar but wider provisions. S. 52 (2) barred in addition to existing Members of the National Assembly, Members of past Legislatures, persons who at any time were nominated for election to the existing or past Legislatures, persons who, at any time, held office in a political organization that supported or sponsored a candidate for election to the existing or past legislatures or to a local government authority. The bar was for all time and not for a prescribed period as in Botswana.

84. See S. 62 (1) Constitution of Tanzania and S. 43 (2) Constitution of Kenya.

85. S. 62 (1) Constitution of Tanzania; S. 43 (1) Constitution of Kenya as amended by Act No. 40 of 1966.

86. See S.47 (1)(a)-(c) of the Constitution of Saint Christopher, Nevis and Anguilla and S.67 (2) of the Constitution of Jamaica.

Public officers are also disqualified from membership in Malawi⁽⁸⁷⁾ but no mention of this is made in the Constitution of Zambia. The disqualification was not included in the Zambian Constitution perhaps because of the requirement that the Chairman of the Commission must be a person who holds or who has held high judicial office. This permits the appointment of a serving judge of the High Court of Zambia or the Court of Appeal of Zambia.⁽⁸⁸⁾ The office of judge is an⁽⁸⁹⁾ office in the public service and, therefore, a public office. Judges are accordingly public officers. On the other hand, the Malawi provision disqualifies even judges. Judges and magistrates are included by the Constitution in the definition of "public officer".⁽⁹⁰⁾ Public Officers are also⁽⁹¹⁾ disqualified in Trinidad and Tobago,⁽⁹¹⁾ Malta,⁽⁹²⁾ Sierra Leone,⁽⁹³⁾ Uganda,⁽⁹⁴⁾ Mauritius,⁽⁹⁵⁾ Botswana,⁽⁹⁶⁾ Tanzania,⁽⁹⁷⁾ Kenya,⁽⁹⁸⁾ Bermuda⁽⁹⁹⁾ and Ghana.⁽¹⁰⁰⁾ In Malta, however, the Chairman of the Commission must be a person who holds office in the public service.⁽¹⁰¹⁾ This includes the office of judge.

A sharp distinction exists in regard to the duration of the Electoral Commissions in Malawi and Zambia. The Malawi Electoral Commission is a permanent body to which Members are appointed from time to time.

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87. S.30 (3) (Malawi).
 88. See, for instance, the first Commission appointed in February, 1968, which was headed by Mr. Justice Pickett, a judge of the High Court of Zambia (S.L. No.53 of 1968).
 89. S.125 (1) and (2) (Zambia) as amended by S.5 of Act No.1 of 1969.
 90. S.98 (1), (2) (Malawi).
 91. S.53(4) of the Constitution. Judges are, however, not included in the definition of public officer, S.105 (1). This was also the case under the 1966 Lesotho Constitution which barred public officers but excluded judges from the disqualification -- S.52 (2)(d) of the Constitution.
 92. S.61 (4) of the Constitution. Judges are also disqualified since they are included in the term "public officer" -- S.126 (2).
 93. S.37 (4) of the Constitution. Judges are also disqualified -- S.107 (2).
 94. Art. 47 (2) of the Constitution. Judges are also disqualified -- Art. 130 (2).
 95. S.38 (3) of the Constitution. Judges are also barred. S.112 (1).
 96. S. 65 (3)(b) (iii) of the Constitution. The Botswana Constitution poses a problem in that while it disqualified public officers, under which term judges and magistrates are included, it requires the chairman of the Commission to be a person who holds or who has held high judicial office. While a serving judge from elsewhere and a retired Botswana judge could be appointed, can a serving Botswana judge be appointed without infringing the Constitution?
 97. S.32 (2) of the Constitution.
 98. S.43 (2) of the Constitution.
 99. S.53 (3) of the Constitution.
 100. Art. 30 (3)(b) of the Constitution.
 101. S. 61 (2) of the Constitution.

The members are appointed for a period of four years and only vacate office at the end of that period (but may be re-appointed) or if circumstances arise which would disqualify a member from appointment if he were not a member already or if removed by the President on grounds of inability to discharge functions (whether arising from infirmity of body or mind or any other cause) or misbehaviour.⁽¹⁰²⁾ In Zambia, on the other hand, the Commission is not a permanent body to which members are appointed from time to time. It is appointed on an ad hoc basis - i.e. to carry out a required review. Once the review is completed the Commission and its membership come to an end.⁽¹⁰³⁾ When a Commission is again required fresh appointments are made. While the Commission exists, however, the Chairman or any other Member of the Commission could resign his appointment or be removed by the President if he became, for any reason, unable to discharge his functions.⁽¹⁰⁴⁾

The permanent Commission in Malawi is of the type found in the majority of Commonwealth countries. It is found, for instance, in Kenya,⁽¹⁰⁵⁾ Tanzania,⁽¹⁰⁶⁾ Uganda,⁽¹⁰⁷⁾ Trinidad, and Tobago⁽¹⁰⁸⁾ and Malta,⁽¹⁰⁹⁾ The terms of office range between three and five years in most cases.⁽¹¹⁰⁾ The ad hoc Commission in Zambia is also found in Botswana and Ceylon and in the older Commonwealth countries where the Delimitation Commission is often not included in the Constitution but is appointed periodically under a separate Act. It will be noted that because the Commission is appointed on an ad hoc basis in Zambia, no security of tenure is included in the Constitution. In Malawi, on the other hand, as mentioned above, a Commissioner can only be removed for inability to discharge his functions (whether arising from infirmity of body or mind or any other cause) or misbehaviour. These are the same grounds on which a judge may be removed. This same security is also found in, for instance, Kenya where the grounds of removal are identical except that, there, the grounds must be investigated first by a tribunal and the President acts in accordance with the recommendation of the tribunal.⁽¹¹¹⁾ Under the 1966 Lesotho Constitution, if a member of the Commission was a serving judge he could only be removed from the Commission if he could also be removed from the judgeship.⁽¹¹²⁾

102. S.30 (4) and (5).

103. This takes place, in the case of a Commission appointed to delimit constituencies, after it has handed its report, and, in the case of a commission appointed to conduct elections, when the new Parliament first sits-see S.67(7) (Zambia). 104. S. 67 (6) Zambia.)

105. S. 48 (3) of the Constitution.

106. S. 82 (3)9A) of the Constitution.

107. Art. 47 (3) of the Constitution.

108. S.53 (5) of the Constitution.

109. S.61 (5) of the Constitution. See also S.52(3)(a) of the 1966 Lesotho Constitution.

In Zambia the President must appoint an Electoral Commission to examine the boundaries of constituencies at intervals of not less than eight years and not more than ten years or after an alteration of the number of seats⁽¹¹³⁾ other than those of nominated Members or after a census of the population has been taken.⁽¹¹⁴⁾ He must also establish an Electoral Commission to direct and supervise the registration of voters and the conduct of elections whenever Parliament is dissolved or whenever he considers it necessary.⁽¹¹⁵⁾ In Malawi the Commission reviews constituency boundaries at intervals of not less than three and not more than five years.⁽¹¹⁶⁾ There is no provision for a review which is not within the stipulated period. This means that changes based on an increase or decrease of seats or a census of the population should be fitted into the stipulated period. The Malawi Electoral Commission also supervises and directs the conduct of elections and the registration of voters.⁽¹¹⁷⁾ The three-purpose Commission - i.e. one responsible for delimitation of constituencies, registration and direction and supervision of elections - is also found in, for instance, Malta,⁽¹¹⁸⁾ Kenya,⁽¹¹⁹⁾ Uganda,⁽¹²⁰⁾ Malaysia⁽¹²¹⁾ and Sierra Leone.⁽¹²²⁾ On the other hand, in Botswana, Mauritius and Trinidad and Tobago, for instance, in addition to the Commission responsible for delimitation of constituencies, there is a commission or supervisor responsible for elections.⁽¹²³⁾

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110. It is, for instance, three years in Malta (S.61 (5)); four years in Uganda (Art. 47 (3)); and five years in Kenya (S.43 (3)), Tanzania (S.32 (3A)), Trinidad and Tobago (S.53 (5)) and Mauritius. In Malaysia the appointments are permanent until a member retires at the age of 65 or is removed on the same grounds and in the same manner applicable to judges - Art. 114 (3) of the Constitution.
111. S. 43 (3) of the Constitution.
112. S. 52 (3) of the Constitution.
113. See Commission appointed after the increase of seats from 75 to 105 in 1963 - S.L. No. 53 of 1963.
114. S.67 (1) (Zambia).
115. S. 63 (2), (3) (Zambia.)
116. S.31(4) (Malawi). The periods of automatic review in other countries range from two to ten years. It is not less than eight and not more than ten years in Kenya (S.43 (4)), Tanzania (S.25 (3)), Malaysia (art.113 (3) Sierra Leone (S.33 (4)), Mauritius (S.39(2)-the interval in Mauritius is put at ten years). It was also not less than eight and more than ten years under the 1966 Lesotho Constitution (S.53 (3)(b)). In Botswana (S.65 (1)) and Uganda (art. 43 (3)) the period is not less than five and not more than ten years while in Trinidad and Tobago (S.54), Malta (S.62 (1)) and St. Christopher Nevis Anguilla (S. 40 (2)) it is not less than two and not more than five years.
117. S. 22 (Malawi).
118. S. 62 (6) of the Constitution (registration of voters not included).
119. S. 30 (4) of the Constitution.
120. Art. 45 (2) of the Constitution.
121. Arts. 113 and 114 of the Constitution.
122. S. 30 (3) of the Constitution.
123. See Botswana Constitution (S.67), Mauritius Constitution (S.11) and Const. of Trinidad and Tobago (S.54).

Both the Constitution of Zambia and that of Malawi lay down the formulae that must be followed by the Electoral Commission in delimiting constituencies. In Zambia the Commission is required to see that the boundaries of each constituency are such that the number of the inhabitants thereof is as nearly equal to the population quota,⁽¹²⁴⁾ as is reasonably practicable. The number of the inhabitants may, however, be greater or less than the population quota in order to take account of means of communication, geographical features and the difference between urban and rural areas in respect of density of population.⁽¹²⁵⁾ In Malawi, on the other hand, every constituency must, so far as appears to the Commission, contain the number of voters registered on the voters roll that is equal to the electoral quota⁽¹²⁶⁾ in respect of the voters roll.⁽¹²⁷⁾ As in Zambia, the Commission could depart from this formula to the extent it considers expedient in order to take account of the density of population, means of communication, geographical features and the boundaries of existing administrative areas.

Except in the case of an increase or a decrease in the number of seats, a change of boundaries of constituencies does not necessarily follow each review. Such changes will usually be more frequent in Malawi than in Zambia because of the shorter interval between reviews in the former country than in the latter. The Constitution of Zambia provides that where a review is necessitated by reasons of a census taken, the Commission may report without holding a review that the changes in population do not justify the alteration of constituency boundaries.⁽¹²⁸⁾ If alterations are, however, made in Malawi, they come into effect on a day set by the President,⁽¹²⁹⁾ and, in Zambia, on dissolution of the existing Parliament.⁽¹³⁰⁾

124. "Population quota" is defined as meaning the number obtained by dividing the number of the inhabitants of Zambia by the number of constituencies into which Zambia is divided - S. 63 (6). The formula of dividing the number of inhabitants by the number of constituencies to get the population quota is also used in, e.g. (Botswana (s. 66 (3) of the Constitution), Uganda (art. 43 (6) of the Const.) Tanzania (S. 25 (5) of the Constitution), Sierra Leone (S. 33 (6) of the Constitution) and Trinidad and Tobago (S. 54 (1) and 2nd Schedule to the Constitution). Under the 1966 Lesotho Constitution only, citizens of 21 years of age and above were taken into account on calculating the quote.

125. S. 63 (3) (Zambia).

126. Unlike in Zambia, the quota is not a population one, but an electoral one. Accordingly it is defined as "the number ascertained by dividing the number of voters for the time being registered throughout the Republic on that Roll by sixty" (the number of constituencies) - S. 31 (6) (Malawi). This is the formula also obtaining in Malta - S. 62 (5) of the Constitution.

127. S. 31 (2) (Malawi). 128. S. 63 (4) (Zambia).

129. S. 31 (5) (Malawi).

15. Although the wording of the two Constitutions is different and the Malawi one does not prevent changes being introduced without a dissolution, it is unlikely that this will ever be done.

The Constitution of Zambia specifically states that in executing its functions the Electoral Commission shall not be subject to the control of any person.⁽¹³¹⁾ Similar provisions are contained in the Constitutions of Kenya, Tanzania, Sierra Leone, Botswana, Malta and Mauritius.⁽¹³²⁾ There is, however, no similar provision in the Constitution of Malawi. The absence of such a provision does not mean that the Commission in Malawi has no independence in the execution of its work. The independence of the Malawi Electoral Commission is not only guaranteed by the way it operates in practice but by the security of tenure of office enjoyed by its members. There is, nothing in the Constitutions of both Zambia and Malawi excluding the conclusions of the Commission from challenge in the courts. In the absence of such a provision the assumption is that in both countries the decisions of the Electoral Commission can be questioned in Court if contrary to the Constitution. This position should be contrasted with that in Tanzania where Section 32 (3) of the Constitution provides that the question whether the Electoral Commission has validly performed the functions imposed upon it by the Constitution cannot be a subject of enquiry by the Courts. The Constitutions of Mauritius⁽¹³³⁾ and Saint Christopher, Nevis and Anguilla⁽¹³⁴⁾ also bar such enquiry. This exclusion of the power of enquiry by the Courts into the functions of so important a body in the political structure of a country is open to criticism.

130. S. 66 (5) (Zambia). This is also the wording in, for instance, Botswana (S. 66 (5) of the Constitution), Uganda (Art. 40 (5) of the Constitution), Mauritius (S. 39 (4) of the Constitution), Malta (S. 62 (3) of the Constitution), Sierra Leone (S. 30 (5) of the Constitution), Tanzania (S. 25 (4) of the Constitution) and Kenya (S. 49 (5) of the Constitution).

131. S. 67 (3) (Zambia).

132. See S. 40 (3) Constitution of Kenya; S. 32 (7) Constitution of Tanzania; S. 37 (3) Constitution of Sierra Leone; S. 66 (7) and 67 (6) Constitution of Botswana; S. 61 (2) Constitution of Malta; S. 40 (3) Constitution of Mauritius.

133. S. 41 (5).

134. S. 40 (7).

16.

The inclusion of an institution responsible for delimitation of constituencies and conduct of elections in the Constitutions of both Zambia and Malawi shows the importance attached to elections and the fact that they should be conducted fairly. In Zambia, attempts to make the Commission impartial are seen in the requirement that the Chairman of the Commission must be a person who holds or who had held high judicial office, in the disqualification of Members of the National Assembly, and in the provision stating that in the execution of its functions the Commission shall not be under the control of any person. Even in the case of the other two Members of the Commission, it appears that efforts will be made to appoint persons above political suspicion. For instance, the first Commission appointed in 1960 comprised, in addition to Mr. Justice Pickett (the Chairman), Sir John Moffat, a highly respected European who once represented African interests in the Northern Rhodesia Legislative Council and later in the Federal Assembly, and Mr. Edward Jack Shamba, an African practising lawyer. In Malawi similar attempts at impartiality are seen in the disqualification of Members of the National Assembly and public officers and in the security of tenure of office enjoyed by the members of the Commission. The possibility of the Government sitting over a review of constituencies is prevented by the mention of specific periods and occasions when a review should take place, while the possibility of gerrymandering is prevented by the inclusion of the formulae on which the constituencies must be delimited. It has been seen above that similar provisions aimed at securing impartiality are also found in the Constitutions of many Commonwealth countries.

In order to stand for election to the National Assembly in Zambia or Malawi, a person must satisfy certain qualifications. In Zambia the prospective candidate must be a citizen and must have attained the age of twenty-one ⁽¹³⁵⁾ years. Before the enactment of the Constitution Amendment (No. 3) Act, 1977, ⁽¹³⁶⁾ the minimum age for voting and for elections to the National Assembly was the same - i.e. twenty-one years. The amendment reduced the voting age to eighteen ⁽¹³⁷⁾ but left the age for membership of the Assembly unaltered. No other qualifications apart from the two mentioned are stipulated by the Constitution. The candidate is not even required to be a voter although those voting for him should be. The absence of this requirement is surprising although the same position is found in, for instance, the Constitutions of Uganda, ⁽¹³⁸⁾ Malaysia, ⁽¹³⁹⁾ Saint Christopher, Nevis and Anguilla, ⁽¹⁴⁰⁾ Bermuda, ⁽¹⁴¹⁾ Barbados ⁽¹⁴²⁾ and Jamaica. ⁽¹⁴³⁾ On the other hand, the Constitutions of Malawi, Botswana, Malta, Tanzania, Trinidad and Tobago, Sierra Leone and Ghana, for instance, specifically state that a person seeking election must be a registered voter. ⁽¹⁴⁴⁾

Although the language of the National Assembly is English and the greater part of the population is unable to speak or read this language, there is no requirement that a person seeking election must be able to speak and read English sufficiently well to be able to take an active part in the proceedings of the National Assembly. Such a requirement is found in the Constitutions of Malawi, ⁽¹⁴⁵⁾ Kenya, ⁽¹⁴⁶⁾ Uganda, ⁽¹⁴⁷⁾ Sierra Leone, ⁽¹⁴⁸⁾ Botswana, ⁽¹⁴⁹⁾ Mauritius, ⁽¹⁵⁰⁾ and Ghana. ⁽¹⁵¹⁾ The Constitution of Tanzania also does not have this requirement but the difference is that in Tanzania Swahili has been adopted as an official language in addition to English while in Zambia no vernacular has yet been adopted as an official language. ⁽¹⁵²⁾

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135. S. 61 (a) and (b) (Zambia).
 136. Act. No. 2 of 1977. 137. *Ibid.*, S.3.
 138. Art. 41 of the Constitution.
 139. Art. 47 of the Constitution.
 140. S. 25 of the Constitution. 141. S. 29 of the Constitution.
 142. S. 37 of the Constitution. 143. S. 39 of the Constitution.
 144. See S.23 (c) (Constitution of Malawi); S.62 (c) (Const. of Botswana); S.54 (Constitution of Malta); S.27 (2)(g) (Constitution of Tanzania); S.31(c) (Constitution of Trinidad and Tobago. The section states that the person should be qualified to register as a voter but does not say that he should be so registered, as do the Const. of Malawi and Botswana, for instance,); and S.71 (2) (f) Constitution of Ghana. The provision is similar to that of Trinidad and Tobago).
 145. See below. 146. S. 40 (1)(b). 147. S.41 (b).
 148. S. 31 (c). 149. S. 62 (d). 150. S. 33 (4).
 151. S. 71 (1)(d).

In Malawi a person seeking election to the National Assembly has more requirements to meet than his counterpart in Zambia. He must be a citizen of twenty-five years of ⁽¹⁵³⁾ age. In addition, he must be a member of the Party; be able to speak and read the English Language well enough to take part in the proceedings of the Assembly; and be a registered voter in any constituency. ⁽¹⁵⁴⁾ With regard to the age qualification, the President is empowered to permit a person who has not yet attained the age of twenty-five years but who is already twenty-one years of age or over to qualify for election. ⁽¹⁵⁵⁾ This was, no doubt, included in order to have in the Assembly, when necessary, the services of young men who have not yet attained the required age. This provision does not exist anywhere else in the Commonwealth. Membership of the Party as a qualification is also found in the Constitution of Tanzania. ⁽¹⁵⁶⁾ Tanzania, like Malawi, is a one-party State. The requirement that a candidate should be able to speak and read the English Language means that blind persons who are proficient in speaking the language cannot be Members of the Assembly since they cannot read the language. The question is whether the ability to read it in braille would satisfy this requirement. From the wording of the provision it appears it would not unless parliamentary proceedings were recorded in braille. It appears that the ability required is that which would enable the person concerned to read Parliamentary literature so as to take an active part in proceedings of the National Assembly. Since such proceedings are not recorded in braille, a blind person would be disqualified. Other Constitutions which have this reading requirement usually include a provision exempting persons incapacitated by blindness. The Constitutions of Uganda, Kenya, Mauritius and Sierra Leone are examples.

Compared with those demanded in some countries, the qualifications required of candidates in Zambia and Malawi can be said to be less restrictive. For instance, there is no difference between citizens by birth or descent, on the one hand, and citizens by registration or naturalization, on the other. There is also no requirement that a citizen by registration or naturalization should possess citizenship for a prescribed period before he can stand for election. In Mexico, for instance, a person standing for election to the Chamber of Deputies must, in addition to being a citizen of Mexico, be a native of the state where the constituency is situated. ⁽¹⁵⁷⁾ In France and the United Arab Republic a person who is not a citizen by birth must have been a citizen for at least ten years before seeking election to Parliament. ⁽¹⁵⁸⁾

11. In the United States a person must have been a citizen for seven years before seeking election to the House of Representatives and for nine years before seeking election to the Senate.⁽¹⁵⁹⁾ The citizenship requirements in Zambia and Malawi are, however, more restrictive when compared with those in Mauritius, Barbados and Jamaica. In all these countries only Commonwealth citizenship and a residence period are required.⁽¹⁶⁰⁾

- 152. The 1966 Lesotho Constitution required persons seeking election to be able to speak, write, and read either English or Sesotho sufficiently. In Singapore the candidate must be able to speak and read (unless incapacitated by blindness) English, Malay, Mandarin or Tamil - art. 28 (2).
- 153. S. 23 (a) (Malawi).
- 154. S. 23 (b) - (d) (Malawi).
- 155. S. 23 (a) (Malawi).
- 156. S. 31(1) Until the two parties are united, the party means in Tanganyika, the Tanganyika African National Union, and in Zanzibar, the Afro-Shiraz Party - S.3(2).
- 157. Article 55 of the Constitution.
- 158. Ameller, op.cit. p. 42.
- 159. Article 1, Sections 2 and 3 of the Constitution. Persons who are not natural citizens are, as will be seen, below in Chapter 13, barred altogether from election to the presidency.
- 160. S. 33 (1) - (3) (Constitution of Mauritius); S.37 (Constitution of Barbados; S.3) (Constitution of Jamaica)

The mere possession of the required qualifications for election to the National Assembly of Zambia or Malawi does not necessarily entitle one to stand for election. Certain persons who possess the required qualifications are disqualified. The disqualifications are mostly those found in other countries. Others are, however, peculiar to the two countries or to one of them. First, persons who are under a declaration of allegiance to another country are disqualified.⁽¹⁶¹⁾ Double citizenship is not permitted.⁽¹⁶²⁾ Second, persons adjudged or declared to be of unsound mind under the law of the country are disqualified.⁽¹⁶³⁾ A declaration or adjudgement under the law of a foreign country is accordingly not a disqualification. Third, persons under sentence of death or a sentence of imprisonment (by whatever name), imposed by any court in the country or substituted by a competent authority for some other sentence, are disqualified.⁽¹⁶⁴⁾ Both Constitutions do not say what term of imprisonment disqualifies under this provision.⁽¹⁶⁵⁾ Both, however, define sentence of imprisonment under this provision "as not including a sentence of imprisonment the execution of which is suspended or a sentence of imprisonment imposed in default of a fine."⁽¹⁶⁶⁾ In the absence of specified periods of imprisonment it must be presumed that any term of imprisonment which is not suspended or which has no option of a fine, disqualifies. This conclusion is strengthened by the fact that shortly after providing for the disqualification under consideration without specifying any period of imprisonment, Section 65 of the Constitution of Zambia and Section 28 of the Constitution of Malawi (which deal with the tenure of office of Members of the National Assembly) specify periods of imprisonment which disqualify a Member from continuing to hold his seat.⁽¹⁶⁶⁾

161. S. 62 (1)(a)(Zambia); S. 24 (1)(a)(Malawi).

162. See Chapter 19.

163. S. 62 (1)(b)(Zambia); S. 24 (1)(b)(Malawi).

164. S. 62(1)(c)(Zambia); S. 24 (1)(c)(Malawi).

165. The term of imprisonment is mentioned in other constitutions, e.g. Uganda (exceeding 6 months - Art. 42 (1)(e)); Malta (exceeding 6 months - S. 55 (1)(f)); Tanzania (exceeding six months - S. 27 (2)(c)(i); Botswana (exceeding 12 months - Art. 48 (1)(c); Trinidad and Tobago (exceeding 12 months - S. 31 (i)(d)).

166. S. 62 (6)(Zambia); S. 34 (Malawi). This provision should be contrasted with the position in Swaziland where a suspended sentence is included (S. 44 (1)(f) of the Constitution) and that in Jamaica and Barbados where only a sentence with the option of a fine is excluded (see S. 40 (3)(b) Constitution of Jamaica, and S. 33 (3)(b) Constitution of Barbados).

It has been seen above that the sentence of death or imprisonment which disqualifies is that which has been imposed by a court of the country concerned. A Zambian imprisoned in Malawi or a Malawian imprisoned in Zambia could, therefore, stand for election at home. This makes the disqualification narrower in extent than similar disqualifications in the Constitutions of Botswana, Jamaica, Barbados, Mauritius and Swaziland, for instance. The Constitutions of the first four countries include under the disqualification sentences passed by a court in any part of the Commonwealth.⁽¹⁶⁷⁾ The Constitution of Swaziland, on the other hand, includes under the disqualification a sentence passed by a court in any country.⁽¹⁶⁸⁾ The position in Zambia and Malawi of limiting the disqualification to sentences imposed by the local courts is, however, the most prevalent in the Commonwealth.

Fourth, persons who have been adjudged or declared bankrupt under any law in force in the country and are still undischarged are disqualified.⁽¹⁶⁹⁾ A person declared bankrupt by a foreign court is consequently not disqualified. Again this provision is narrower in extent than similar provisions in the Constitutions of Botswana, Jamaica, and Mauritius which apply to persons declared or adjudged bankrupt under any law in force in any part of the Commonwealth⁽¹⁷⁰⁾ and the provision in the Constitution of Swaziland which applies to persons adjudged or declared bankrupt under any law in force in any country.⁽¹⁷¹⁾

Fifth, in Malawi persons who are under a detention, restriction or control order are disqualified.⁽¹⁷²⁾ There was no such disqualification in Zambia until an amendment was made to the Constitution in 1969. The amendment disqualified restrictees and detainees from standing for election. The new law followed the election of Malumino Munda while he was under a twelve month restriction order.⁽¹⁷⁵⁾ Neither the Malawi provision nor that of Zambia stipulates the period of restriction or detention that disqualifies. This means that the disqualification begins immediately the person concerned is served with the order of detention or restriction. This differs from the provision in the Constitution of Tanzania which disqualifies only those detainees who have been held for a period exceeding six months.⁽¹⁷⁶⁾

166. Another interpretation could be that the periods mentioned in Sections 65 and 20 respectively are the periods applicable to Sections 62 (1)(c) and 24 (1)(c) respectively.

167. See Ss. 63 (1)(f), 40 (2)(d), 33 (1)(d) and 34 (1)(f) respectively.

168. S. 44 (1)(f).

169. S. 62 (1)(d)(Zambia); S. 24 (1)(e)(Malawi).

170. See S. 63 (1)(b), S. 40(2)(e) and S. 34 (i)(d) respectively.

171. S. 44 (1)(d). . 172. S. 24 (1)(d) (Malawi).

22. Sixth, in both countries the President is disqualified.⁽¹⁷⁷⁾ Only the holder of the office of President is disqualified in Zambia.⁽¹⁷⁸⁾ In Malawi, even a nominee for the presidency is disqualified.⁽¹⁷⁹⁾ This is also the position in Tanzania.⁽¹⁸⁰⁾ In Zambia, a presidential candidate who is not holder of the office of President is permitted, if he so wishes, to contest a seat in the National Assembly at the same time and then to resign it if he wins the presidency. Mr. Harry Nkumbula, the leader of the African National Congress, ran for the presidency as well as for a seat in the National Assembly during the 1968 elections. He lost the presidential election but won a seat in the National Assembly.

Seventh, in Malawi Parliament is empowered to pass a law disqualifying, for any period up to five years, a person who has been compelled to vacate his seat in terms of Section 23 (2)(g) of the Constitution.⁽¹⁸¹⁾ That section empowers Parliament to enact a law forcing Members of the National Assembly who have lost the confidence of the majority of the voters in their constituencies, to vacate their seats.⁽¹⁸²⁾ A law to this effect has been enacted. It disqualifies such Members from seeking election for a period of five years.⁽¹⁸³⁾

Finally, Parliament is empowered in both countries to make laws disqualifying persons convicted of offences connected with elections;⁽¹⁸⁴⁾ persons holding or acting in, prescribed offices or appointments;⁽¹⁸⁵⁾ and persons belonging to the armed and police forces.⁽¹⁸⁶⁾

175. Mumba had been restricted after his party, the United Party, (which he formed after leaving the ruling party - the United National Independence Party) - had been banned. He stood for election under the banner of the African National Congress and was appointed deputy leader of that organization immediately after winning the election. President Kaunda later released him to take his seat.

176. S. 27 (2)(c)(ii). ¹⁷⁸

177. S. 62 (2)(c)(Zambia); S. 24(2)(Malawi).

178. S. 62 (2)(c)(Zambia).

179. S. 24 (2)(Malawi).

180. S. 27 (3) of the Constitution.

181. S. 24 (3)(d)(Malawi).

182. See below in this Chapter.

183. S. 31 (4) Parliamentary Elections Act 1966 (Act No. 24 of 1966).

184. S. 62 (4)(Zambia); S. 24 (3)(c)(Malawi). The maximum period of disqualification Parliament can impose is five years in Zambia and seven years in Malawi.

185. S. 62 (5)(b)(Zambia); S. 24 (3)(b)(Malawi).

186. S. 62 (5)(b)(Zambia); S. 24 (3)(b)(Malawi).

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The Parliament of Zambia is further empowered to enact a law disqualifying persons holding any office connected with the conduct of elections or the compilation of any register of voters.⁽¹⁸⁷⁾ Laws regarding these matters have been enacted. For instance, Section 23 (1)(k) of Malawi's Parliamentary Elections Act,⁽¹⁸⁸⁾ in addition to providing other penalties, disqualifies a person convicted of an offence connected with elections from seeking election to the National Assembly for a period of seven years. Regulation 68 (3) of Zambia's National Assembly (Election) Regulations⁽¹⁸⁹⁾ empowers the High Court, inter alia to declare a person convicted of any corrupt practice in elections disqualified from seeking election to the National Assembly for a period of five years.

A person who satisfies the qualifications for election to the National Assembly mentioned above and who is not disqualified under any of the grounds also mentioned above is entitled to stand for election if he so wishes and completes the necessary papers for candidature. Neither the Constitution of Zambia nor that of Malawi contains the rules governing the filing of nomination papers, polling and the declaration of results. These are contained, in the case of Zambia, in the National Assembly (Election) Regulations,⁽¹⁹⁰⁾ and in the case of Malawi, in the Parliamentary Elections Act, 1966. It is not necessary here to go into the details of how elections are conducted in the two countries. The pattern is similar to that in Britain and other countries with election systems modelled on the British system.

187. S. 62 (3)(Zambia). There is no similar provision in the Constitution of Malawi.

188. See Note 183 above.

189. G/N, 396 of 1963 as amended by later notices and statutory instruments.

190. These regulations were first issued in terms of Section 4 of the Northern Rhodesia (Electoral Provisions) (No. 2) Order 1963. When the country attained independence they were perpetuated by Section 4 of the Zambia Independence Order, 1964.

24. Persons Entitled to Vote in National Assembly Elections

Persons voting in National Assembly elections must be registered voters although, as has been pointed out earlier in this Chapter, there is no requirement in the Constitution of Zambia that the candidates themselves should be voters. In Zambia, every citizen who has attained the age of eighteen years, unless disqualified by some other law, is entitled to registration as a voter.⁽¹⁹¹⁾ Every registered voter, unless disqualified on the grounds of having been convicted of an offence in connection with elections or of having been reported guilty of such an offence by a court trying an election petition or of being in lawful custody on the date of election, is entitled to vote.⁽¹⁹²⁾ The Constitution does not mention any residence qualifications to be met by an applicant for registration as a voter. There are also no disqualifications mentioned in the Constitution except those implicit in the fact that the vote is open to citizens of at least eighteen years of age. Residence requirements and disqualifications disentitling a person meeting the age and citizenship requirements from registration are, however, found in the Electoral Provisions (Qualifications of Voters) Regulations.⁽¹⁹³⁾ For a person meeting all the other qualifications to be registered he must have been resident in the country, for at least two years immediately before the date of registration.⁽¹⁹⁴⁾ Persons adjudged or declared to be of unsound mind under any law in force in the country or who are under a sentence of death or sentence of imprisonment (by whatever name called) imposed by an court in the country (or substituted by a competent authority for some other sentence) or who have been disqualified under any law in force in the country relating to offences connected with elections⁽¹⁹⁵⁾ are disqualified from registration.⁽¹⁹⁶⁾

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191. S. 66 (1) (Zambia) as amended by S. 3 of Act No. 2 of 1966. Registration of voters is governed by the Electoral Provisions (Registration of Voters) Regulations G/N, 301 of 1963 as amended by later notices and statutory instruments. The regulations were first made under S. 2 of the Northern Rhodesia (Electoral Provisions) Order, 1963, and were continued after independence by S. 4 of the Zambia Independence Order, 1964.
192. S. 66 (2) (Zambia).
193. G/N, 300 of 1963 as amended by later notices and statutory instruments. The regulations were first made under S. 2 of the Northern Rhodesia (Electoral Provisions) Order, 1963 and later continued by S.4 of the Zambia Independence Order, 1964.
194. Reg. 3 (3).
195. Regulation 63 (3) of the National Assembly (Election) Regulations empowers the High Court to declare a person convicted of such an offence incapable of being registered as a voter for a period of five years.
196. Reg. 3 (3) of the Electoral Provisions (Qualification of Voters) Regulations.

The Constitution of Malawi, unlike that of Zambia, contains not only the qualifications for registration as a voter but also the disqualifications. The franchise is open to all citizens who have reached the age of twenty-one years unless they are disqualified under any of the grounds which will be mentioned below.⁽¹⁹⁷⁾ Such citizens must be ordinarily resident in the country and must have been so resident at any time for a continuous period of two years.⁽¹⁹⁸⁾ In addition, they must be either ordinarily resident in the constituency in which they want to be registered or were born there or are carrying on business.⁽¹⁹⁹⁾ The disqualifications are similar to those in the Constitution of Zambia except that in Malawi Parliament is specifically empowered to enact a law disqualifying a person convicted of the offence of registering in two or more constituencies in which he is qualified to be registered.⁽²⁰⁰⁾

Four comparative observations should be made on the voting qualifications and disqualifications given above. First, it will be seen that neither the Constitution of Zambia nor that of Malawi prescribes any property, income or educational qualifications. There is full universal suffrage⁽²⁰¹⁾ in the two countries for those who have attained the voting age and are not disqualified under any of the grounds mentioned above. This should be contrasted with:

- (1) the position in such countries as Rhodesia and South Africa where property or income qualifications as well as a certain standard of education or literacy are still requirements for obtaining the vote,⁽²⁰²⁾ and
- (2) the position obtaining in such countries as Chile, the Philippines and the United States where, although property or income qualifications have been largely dispensed with, educational or literacy qualifications are still prescribed.

In Chile and the Philippines, for instance, the applicant must be able to read and write.⁽²⁰³⁾

197. S. 29 (1) (Malawi). See also the Registration of Voters Act (No. 27 of 1966).

198. S. 29 (2) (Malawi).

199. *Ibid.*

200. S. 29 (3).

201. Axeller says that "in an absolute sense there is no satisfactory definition of universal suffrage" because it is always limited by nationality, age, sex, or property qualifications - *op.cit.*, p. 14.

202. Liberia seems to be the only African ruled country with a qualitative franchise - see S.2 of Article 2 of the Constitution.

203. Axeller, *op.cit.*, p. 17.

In the United States the requirements vary from state to state. Some states require the production of a primary education certificate while others require the applicant to read or show knowledge of some part of the Constitution.⁽²⁰⁴⁾

Second, although the franchise is confined to citizens, there is no distinction between Zambian or Malawi citizens by birth and citizens by naturalization or registration. This should be compared, for instance, with the position in France and the United Arab Republic where a naturalized citizen is not entitled to the franchise until five years after naturalization.⁽²⁰⁵⁾ The confinement of the franchise to citizens only, however, makes the law in Zambia and Malawi on this subject more restrictive than those of such other Commonwealth countries as Trinidad and Tobago, Mauritius, Jamaica and Botswana. In the first three countries the franchise is open to citizens of the country as well as to Commonwealth citizens who satisfy the prescribed age and residence requirements.⁽²⁰⁶⁾ In Botswana it is open to Botswana citizens and to citizens of any country to which Section 63 of the Constitution (which contains the franchise provisions) is extended by Parliament.⁽²⁰⁷⁾ This provision enables the Botswana Legislature to grant the right to acquire the franchise to citizens of Commonwealth as well as non-Commonwealth countries.⁽²⁰⁸⁾ The Parliament of Malawi or Zambia cannot do this without first amending the Constitution. It should be noted, however, that while in Jamaica and Mauritius, Commonwealth citizens are eligible for both the franchise and election to the legislature,⁽²⁰⁹⁾ the acquisition of the vote by a Commonwealth citizen in Trinidad and Tobago, and by a citizen of a country to which section 63 of the Constitution of Botswana is applied, does not entitle such a person to stand for election to Parliament. Only citizens are eligible for election to the legislature in Trinidad and Tobago and Botswana.⁽²¹⁰⁾

204. Ibid.

205. Ibid., p. 15.

206. S. 34 (a) Constitution of Trinidad and Tobago; S.12 (1) (a) Constitution of Mauritius; S.37 (1) Constitution of Jamaica.

207. S. 63 Constitution of Botswana. Such persons must, however, satisfy the age and residence requirements.

208. The provision has been extended to several countries.

209. S.39 Constitution of Jamaica; S.33 (1) Constitution of Mauritius.

210. S. 30 (a) Constitution of Trinidad and Tobago; S. 62 (a) Constitution of Botswana.

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Third, the franchise is not denied to citizens, who would otherwise qualify, because of their sex, type of employment, social status or poverty. Women are not denied the vote as is the case in Switzerland.⁽²¹¹⁾ In Iran Members of the armed and police forces do not vote.⁽²¹²⁾ In Brazil and Turkey only members of the armed forces are so disqualified. Belgium, on the other hand, bars under-officers, corporals and troopers during their military service but permits members of the regular army to vote after three years' service.⁽²¹³⁾ In Switzerland persons who are in charge of public funds are disqualified and so are beggars in Iran.⁽²¹⁴⁾

Finally, it has been seen that both Malawi and Zambia have different minimum age requirements for the franchise and for election to the legislature. The Malawi position of twenty-one years of age for obtaining the vote and twenty-five years of age for election to the legislature is found in, for instance, the Commonwealth countries of India and Sierra Leone⁽²¹⁵⁾ and in the non-Commonwealth countries of Belgium, the United States, West Germany,⁽²¹⁶⁾ Italy, Japan, Lebanon, Luxembourg, Monaco, the Philippines and the Netherlands while that in Zambia of eighteen years for the franchise and twenty-one years for election to the legislature is found in, for instance, Poland, Czechoslovakia,⁽²¹⁷⁾ Britain and South Africa. In having the minimum voting age of twenty-one Malawi is in line with the majority of the countries not only of the Commonwealth but also of the world.⁽²¹⁸⁾ The reduction of the voting age to eighteen years is, however, becoming popular and already exists in a good number of countries.⁽²¹⁹⁾

211. *Meller, op.cit.* p. 14-15. In some cantons they have the franchise. In Monaco and Libya they only acquired the franchise in 1962 and 1963 respectively - *ibid.* In Northern Nigeria they still do not possess the franchise -- *ibid.*

212. *Ibid.*, p. 16.

213. *Ibid.*

214. *Ibid.*, p. 17.

215. See Article 34 (a) Constitution of India; S.31 (b) Constitution of Sierra Leone (for the minimum age for election to Parliament; the franchise qualifications are included in the Constitution. See, however, *Meller, op.cit.*, p.41. The same age requirements were contained in the 1962 Pakistan Constitution (Arts. 103 (1)(b) and 157 (a) and the 1960 Ghana Constitution.

216. Article 33 (2) of the Constitution.

217. *Meller, op.cit.*, p. 41.

218. See, for instance, countries listed in *ibid.*, p. 16 (footnote).

219. *Ibid.*

In both Zambia and Malawi disputes concerning the validity of a Member's election or appointment or the vacation of his seat by a Member are determined by the respective High Courts.⁽²²⁰⁾ In Zambia the decision of the High Court in such matters is final except where it concerns interpretation of the Constitution and the Court of Appeal has granted leave of appeal.⁽²²¹⁾ In Malawi there are no such exceptions. All decisions of the High Court in such matters are final.⁽²²²⁾ This arrangement of leaving the determination of membership disputes in the hands of the⁽²²³⁾ ordinary courts is the most prevalent in the Commonwealth. In some of these Commonwealth countries decisions of the High Court are, as in Malawi, final,⁽²²⁴⁾ while in others they are subject to appeal with or without restrictions.⁽²²⁵⁾

The system of determination of membership disputes by the ordinary courts as found in Zambia and Malawi should, however, be contrasted with the systems existing in some Commonwealth and non-Commonwealth countries where membership disputes are not determined by the ordinary courts, or by any court at all. In India disputes regarding elections are decided by tribunals appointed by the Election Commission while disputes on whether a member has vacated his seat are decided by the President of the country in accordance with the advice of the Election Commission which he is required to obtain before making a decision.⁽²²⁶⁾ In Malta membership disputes are, as other constitutional matters, determined by the Constitutional Court.⁽²²⁷⁾ In France they are determined by the Constitutional Council.⁽²²⁸⁾ A real departure from the system in Zambia and Malawi is, however, found in such Commonwealth countries as Malaysia and Singapore⁽²²⁹⁾ and in such foreign countries as Albania, Bulgaria, Czechoslovakia, Poland, Rumania, Russia, Yugoslavia, Belgium, Denmark, Italy, Luxembourg, the Netherlands, Sweden and Switzerland where membership disputes are determined by Parliament.⁽²³⁰⁾

Compared with the determination of membership disputes by Parliament, there is no doubt that the system existing in Zambia and Malawi (and most of the Commonwealth countries) is more commendable, particularly where more than one party exists as in Zambia. A judge is more unlikely to be influenced by partisan interests than Members of Parliament who may be keen to see a Member belonging to a rival party lose his seat.

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29. Ameller aptly comments on the system of determination of such disputes by Parliament when he says: "...although it guarantees the independence of Parliament it does not offer Members any protection against lack of impartiality on the part of their political opponents if they are in the majority!"⁽²³¹⁾
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220. S.69 (1)(a)(Zambia); S. 32 (1)(Malawi) as repealed and replaced by S.6 of Act 39 of 1966.
221. S. 69 (3)(Zambia).
222. S. 32 (3)(Malawi).
223. See e.g. the Constitutions of Sierra Leone (S.40); Mauritius (S.37); Trinidad and Tobago (S.35); Botswana (S.70); Tanzania (S.36); Uganda (Art. 51); Kenya (S.50); Barbados (S.46); Swaziland (S.56); Ghana (Art.76); and Jamaica (S.44).
224. E.g. Tanzania, Uganada, Kenya, Mauritius, Barbados, and Swaziland.
225. E.g. Ghana, Jamaica and Trinidad and Tobago.
226. Arts. 324 (1) and 103 (1) of the Constitution. The decision of the President is final.
227. Ss. 64 and 96. The Court comprises the Chief Justice and four other judges of the Superior Courts. The Cyprus Supreme Constitutional Court has also the final jurisdiction over membership disputes - Art. 145 of the Constitution.
228. Art. 59.
229. Article 53 Constitution of Malaysia; Article 32 Constitution of Singapore. See also S. 47 Constitution of Australia (which empowers both the House of Representatives and the Senate to determine membership disputes until Parliament provides otherwise) and S.33 Constitution of Canada (which empowers the Senate to determine the qualifications of its members and whether they have vacated their seats.).
230. Ameller, *op.cit.*, p.38. The system also exists in for instance, the United States of America, Israel, Cameroon the United Arab Republic, Iceland, Lebanon. Iran and other countries.
231. *Ibid.* The justification of excluding the judiciary is, of course, to be found in the doctrine of separation of powers, the judiciary should not control Parliament - Parliament is master of its own house.
232. S.65 (1)(Zambia); S.28 (1)(Malawi). In Malawi this does not apply to persons who are Members in terms of S.50 (2) of the Constitution.
233. See below, Chapter 12.
234. S. 65 (2)(A)(Zambia); S.28 (2)(a) (Malawi)
235. See below, Chapter 19.
236. S. 65 (2)(b) Zambia); S. 28 (2)(b)(Malawi).
237. S. 35 (1)(b) of the Constitution.
238. Article 40 (4) of the Constitution.
239. See S.35 Constitution of Botswana; S.33 B Constitution of Kenya as amended by the Constitution of Kenya (Amendment) Act 1964 (Act.No.28 of 1964). This position whereby the President is both a limb of Parliament and a Member of the National Assembly is not of British origin. In the U.K. and the Commonwealth countries which are still under the British Crown, the Queen (or the Governor-General representing the Queen) is not a Member of Parliament, Only the Head of Government- the Prime Minister is a Member of Parliament.

A person who has been validly elected to the National Assembly of Zambia or Malawi may lose his seat under certain circumstances. Most of the grounds which may cause a member to forfeit his seat are the same in both countries, but there are some which exist only in Malawi. First, in both countries Members of the National Assembly lose their seats when Parliament is dissolved.⁽²³²⁾ In the event of an emergency, however, Members of a dissolved Parliament could be called to be legislators again for a specified period.⁽²³³⁾ Second, a Member loses his seat when he ceases to be a citizen.⁽²³⁴⁾ Termination of citizenship may come about by express renunciation of it by the Member concerned or by implied renunciation (e.g. by owing allegiance to a foreign power) or by being deprived of it by the authority concerned.⁽²³⁵⁾ Third, a Member loses his seat if he assumes the office of President.⁽²³⁶⁾ This is also the case in Tanzania⁽²³⁷⁾ but not in Uganda, Botswana and Kenya. In Uganda if a Member of the National Assembly is elected President he does not cease to be a Member. On the contrary, if a non-Member of the Assembly is elected President he becomes a Member ~~ex-officio~~.⁽²³⁸⁾ In Botswana and Kenya the President must be a member of the National Assembly and ceases to hold the office of President if he loses his membership of the Assembly through any way other than a dissolution.⁽²³⁹⁾ Fourth, a Member who is sentenced by any court in the country to death or to a term of imprisonment exceeding, in the case of Zambia, six months, and, in the case of Malawi, twelve months, loses his seat.⁽²⁴⁰⁾

240. S.65 (2)(c)(Zambia); S.28 (2)(d)(Malawi). Imprisonment in this respect does not include ~~and~~ the execution of which is suspended or that which has the alternative of a fine - S.65 (8)(a)(Zambia) as amended by S.3 (1)(b) of Act No. 47 of 1966; S.34 (Malawi). Two or more sentences of imprisonment that must be served consecutively are regarded in Zambia as separate sentences if none of them exceeds six months - S. 65 (9)(b)(Zambia). If anyone of them exceeds that period they are regarded as one. Nothing is said in this respect in the Constitution of Malawi despite the fact that there was such a provision in the 1964 Constitution - see S.39 (4) of that Constitution. The omission of this provision in the present Constitution was, it would seem, deliberate. The Courts are, however, unlikely to give the provision in the present constitution or interpretation which takes into account an aggregate consecutive sentence in the absence of express words to that effect. See the Constitutions of Botswana (S.63 (3) read with S.69 (1)(c) and Mauritius (S.34 (3)(a) read with S.35 (1)(f) which regard sentences to be served consecutively as one term for the aggregate period of those terms. The position in Zambia seems, however, to be the most prevalent in the Commonwealth - see, e.g., the Constitutions of Tanzania (S.27(7)); Uganda (Arts. 42 (5)(a) and 50 (2)(c)); Trinidad and Tobago (Ss. 31 (3)(a) and 32 (2)(d)); Malta (S.55 (2)(a) and S.56 (1)(g)); Barbados (Ss.45 (1)(f) and 44 (3)(a)) and Jamaica (S. 41 (3)(c).)

31. Fifth, a Member loses his seat if he suffers any of the disqualifications which would have disqualified him from election.⁽²⁴¹⁾ Under both the fourth and the fifth grounds, the Member concerned is not required to vacate his seat, if he lodges an appeal, until after the appeal has been determined and he has lost it.⁽²⁴²⁾ 456

Sixth, in Malawi a Member loses his seat if he ceases to be a Member of the Party.⁽²⁴³⁾ It has been seen above that Party membership is one of the qualifications for election. The Secretary-General of the Party in such cases informs the Speaker that the Member concerned has ceased to be a member of the Party.⁽²⁴⁴⁾ Soon after this communication the Member loses his seat. This ground of loss of membership also exists in the Constitution of Tanzania which, like that of Malawi, requires membership of the Party for election to the National Assembly.⁽²⁴⁵⁾ The Constitution of Zambia has also a provision which makes a Member who quits his party lose his seat.⁽²⁴⁶⁾ Such a member must have been elected to the National Assembly on the ticket of that political party. The method of removing the Member is, however, more complicated than that in Malawi. After such Member has resigned from the party concerned, a Member of the Assembly, recognized as leader of that party by the Speaker, must hand a notice in writing to the Speaker alleging that the elected Member concerned conducted his campaign for election to the Assembly as a member of his political party; and (b) that such Member has since his election ceased to be a member of his party. After the notice has been given the Speaker informs the Assembly and then hands a copy of it to the Chief Justice. The Chief Justice or a judge nominated by him investigates the matter as a one-man tribunal. The Member concerned has the right to argue his case, in person or by a representative before the tribunal. After the investigation a report of the findings is made to the Speaker stating whether the allegations have been substantiated. The Speaker thereafter reports the findings of the tribunal to the Assembly. If the allegations are substantiated the Member concerned is made to vacate his seat by the Speaker after the report to the Assembly.⁽²⁴⁷⁾

241. S.65 (2)(d)(Zambia); S.28 (2)(e)(Malawi).

242. S.65 (3) (Zambia). For similar provisions in other constitutions, see, for instance, those of Uganda (Art. 50 (3)); Sierra Leone (S.36 (2)); Swaziland (S.46); Botswana (S.69(2)); Malta (S.52 (6)) Trinidad and Tobago (S.32 (3)); Mauritius (S.36 (1)); Jamaica (S.41 (3)); and Barbados (S.45 (2)). Unlike the Constitutions of Zambia and Malawi, which leave it to Parliament to prescribe conditions of appeal and the suspension of the sentence in relation to vacation of the seat until the appeal is determined, the Constitutions here cited prescribe the conditions.

243. S. 28 (2)(h)(Malawi).

244. *Ibid.*

245. S. 35 (1) of the Constitution read with S.27 (1).

246. S. 65 (4) and (5) as amended by Act No. 47 of 1966.

This provision in the Constitution of Zambia is also found in the Constitutions of Kenya and Singapore. The provisions in the Zambia and Kenya Constitutions seem to have originated from the Constitution of Malawi (Amendment) Act, 1964,⁽²⁴⁸⁾ enacted after the Cabinet crisis of September of that year⁽²⁴⁹⁾. Section 4 of that Act provided that where a Member of the National Assembly had been elected as a candidate representing a political party established in Malawi and he subsequently ceased to represent or to be a member of that party, he must vacate his seat. A Member was deemed to have ceased to represent a political party if the Speaker certified that he was satisfied that the Executive Committee of the party concerned had by resolution declared that the Member no longer represented the interests of the party in the constituency concerned⁽²⁵⁰⁾. The provision, as was mentioned in Chapter Eight, was enacted to prevent the Ministers who had been expelled from the Malawi Congress Party from retaining their seats.

A similar provision appeared in the Constitution of Singapore when that country broke away from the Federation of Malaysia towards the end of 1965. Article 30(2)(b) of that Constitution provides that a Member of Parliament elected after the coming into force of the Constitution ceases to be a Member if he ceases membership of, or is expelled or resigns from, the political party under which he stood for election. In April, 1966, after division had developed in the ruling Kenya African National Union resulting in a group of Members of Parliament, including the country's Vice-President, Mr. Oginga Odinga, breaking away to form the Kenya People's Union, the Kenya Parliament enacted a similar provision. This provides that a Member of the National Assembly who, having at his election stood with the support of or as a supporter of a political party or who, having been appointed as a nominated Member supporting a party, resigns from that party at a time when it is a parliamentary party, or having been, after the dissolution of that party, a member of another parliamentary party, resigns from that other party at a time when it is a parliamentary party, must vacate his seat at the expiration of the session then in being or, if Parliament is not in session, then at the expiration of the session next following unless in the meantime that party of which he was last a member has ceased to exist as a parliamentary party or he has resigned his seat.⁽²⁵¹⁾

247. The first person on whom this provision was used was Nalumino Mundia.

248. Act No. 1 of 1964.

249. See Chapter 8.

250. It should be noted that this was before the creation of the present one-party system which came into effect only in 1966 with the republican constitution.

33. In September, 1966, the Zambian provision was enacted. Like 458
those of Kenya and Malawi in 1964, it was a result of
division in the ruling party, culminating in the expulsion of
Mr. Nalumino Mundia and the formation of his own party - the
United Party;

Several differences exist between the provision in Zambia
and that in Kenya. First, unlike that of Kenya, the Zambian
provision does not apply to nominated Members. Second,
unlike the Zambian provision, that of Kenya does not require
the matter to be investigated by a judge. Instead the
Speaker of the National Assembly decides on: (a) whether a
party is still a parliamentary party, (b) whether an elected
Member stood in the elections with the support of or as a
supporter of that political party, or whether he had joined
the parliamentary party he has now left after the dissolution
of the parliamentary party to which he had belonged; or (c)
whether the Member, if a nominated Member, had been appointed
as a supporter of that party or had joined that party after
his original party had been dissolved.⁽²⁵³⁾ A certificate under
the Speaker's hand is conclusive on the matter.⁽²⁵⁴⁾ Third,
while the Zambian provision mentions the manner in which the
matter is communicated to the Speaker, that of Kenya does not.
Fourth, in Zambia, the Member concerned vacates his seat as
soon as the Speaker has reported the findings of the tribunal
to the House. In Kenya, on the other hand, the Member con-
cerned does not vacate his seat until the end of the session
or the session next following. Fifth, in Kenya a Member whose
original party (i.e. the party that sponsored him or which
he supported during the election) is dissolved and consequently
joins another, is affected by the provision if he resigns from
that party. The Zambian provision does not cover cessation
of membership of a party of which the Member concerned was not
a member when he conducted his election campaign. Sixth,
while the Zambian provision uses the words "has ceased to be
a member of such a political party" that of Kenya uses the
words "resigns from that party.....".

251. S.42 A (1) Constitution of Kenya as added by S.3 of the
Constitution of Kenya (Amendment)(No.2) Act, 1966
(No. 17 of 1966) and as amended by the Schedule to the
Constitution of Kenya (Amendment) (No.2) Act, 1968 (Act
No. 45 of 1968). As a result of this amendment the
defectors vacated their seats but contested them in a
subsequent by-election. The majority of them lost their
seats.

253. S. 42A (2) as amended by Act No. 45 of 1968.

254. Ibid.

The words of the Zambian provision cover termination of membership brought either by resignation or expulsion of the Member concerned from the party. The words of the Kenyan provision, on the other hand, unless given a wide interpretation, would not cover termination of membership by expulsion. The wording of the Zambian and Kenyan provisions should, however, be contrasted with that of the provision in the Constitution of Singapore which removes all difficulties of interpretation by using the words "ceases to be a member of, or is expelled or resigns from, the political party...."

Finally, the provisions in the Constitutions of Zambia and of Kenya pose different problems in the event of all members of a party in the Assembly resigning at the same time to join another party or to be independents without the party being dissolved. Taking Kenya first, would such Members be required to vacate their seats as having resigned from a party that is a parliamentary party? It is at the time of resignation the party would be a "parliamentary party" and their act would, therefore, be one of resigning from a parliamentary party. The cessation of the party as a parliamentary party would be a later event than that of resignation. However, such Members would not be required to vacate their seats since the provision.

In Zambia, on the other hand, such Members would not be saved from vacating their seats because the party will have ceased to be a parliamentary party. However, a procedural technicality in the Zambian provision may produce the same result as in Kenya. It has been seen that in order to put the machinery of removing a Member under the provision into motion the matter must be raised in the Assembly through a notice in writing signed by a Member of the Assembly recognised by the Speaker as leader in the Assembly of the party concerned. In the event of all the members of a party in the Assembly having resigned or having been expelled, there would be no one in the Assembly to raise the matter. The leaders of the party who are not Members of the Assembly cannot do so. The absence of anyone to raise the matter would consequently enable the Members concerned to keep their seats. The positions in Zambia and Kenya should, however, be contrasted with that in Singapore. There the question is whether the Member or Members who have resigned or have been expelled from membership of the party concerned were elected under the banner of that party. If so, they lose their seats.

Although the inclusion of this clause in the constitution of Malawi of 1964 and in the Constitutions of Zambia and Kenya was intended to prevent Members of the Assembly from leaving the ruling party or from retaining their seats after having been expelled from the ruling party, there is no doubt

35. It prevents opposition Members from resigning and joining the ruling party. The provision is also of great importance to the electorate which might have elected the Member concerned because he belonged to a particular party. It is given the chance to re-elect the Member or throw him out in the light of his new political alignment.⁽²⁵⁵⁾

The Constitution of Malawi contains three further grounds on which a Member must vacate his seat. If a Member is absent from the sittings of the Assembly for such a period and in such circumstances as are prescribed in the rules of procedure, he loses his seat.⁽²⁵⁶⁾ Second, if, as a parliamentary candidate at the general election, a Member made a declaration that he supported the President as a presidential candidate, he would be required to vacate his seat if, in a motion of confidence in the Government, he voted against the President.⁽²⁵⁷⁾ This provision has far-reaching consequences for a Member who made such a declaration. It virtually compels him to vote in a certain way for the duration of that Parliament on all matters put by the Government as motions of confidence. He can only vote against the President if he is prepared to lose his seat and few, if any, would like to lose their seats that way. In the event of all the Members having made the declaration there would be no one voting against the Government in a motion of confidence. As will be seen in the next chapter, a motion of confidence in the Government could be used to thwart motions of no confidence. Third, a Member must vacate his seat if he has lost the support of the majority of his constituents.⁽²⁵⁸⁾ The process of unseating a Member under this provision is put into motion by the President once he is satisfied that a Member no longer commands the confidence of the majority of the voters in his constituency.⁽²⁵⁹⁾ A Commission of Inquiry, with all the powers conferred by the Commissions of Inquiry Act,⁽²⁶⁰⁾ is appointed to consider and report upon the confidence reposed in the Member concerned by his constituents.⁽²⁶¹⁾

255. See below for the provision in the Constitution of Malawi which requires a Member who has lost the confidence of the majority of his constituents to vacate his seat.

256. S. 28 (2)(c)(Malawi).

257. S. 28 (2)(f)(Malawi). Since the President is the head of Government, a vote on such a motion is looked upon as a vote for or against the President. A motion of confidence in the Government must be distinguished from a vote of no confidence - See below Chapter 12.

258. S. 28 (2)(g)(Malawi).

259. S.30 (1) Parliamentary Elections Act, 1966.

260. Cap, 18:01.

261. S. 30 (1) and (2) Parliamentary Elections Act, 1966.

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The Commission reports back to the President. If, after considering such report, the President is satisfied that the Member no longer commands the confidence of the majority of his constituents, he reports the matter to the Speaker of the National Assembly and thereupon the Member must vacate his seat(262). No other country in the Commonwealth has a provision similar to this. There is, however, a similar provision in the Constitution of Yugoslavia. Article 170 of that Constitution provides for the recall of a deputy of the Federal Assembly if the majority of his constituents so decide. A provision of this nature is very important and useful to the electorate in that it enables the voters to get rid of their Member if they no longer have confidence in him. It saves them from the embarrassment of continuing to be represented by such a Member until a dissolution of Parliament.

In both Zambia and Malawi a nominated Member loses his seat when his appointment is revoked by the President(263). This fits also the position in other countries where provisions exist for nominated Members(264). Finally, both elected and nominated Members can vacate their seats by addressing a letter of resignation to the Speaker(265).

The Speaker and the Deputy Speaker

Both the Constitution of Zambia and that of Malawi provide for the offices of Speaker, Deputy Speaker and Clerk of the National Assembly(266). Only the offices of Speaker and Deputy Speaker will be dealt with here. In Zambia the Speaker is elected by Members of the National Assembly from Members or non-Members of the National Assembly(267). Non-Members of the National Assembly must, however, be persons who qualify for election to the National Assembly(268). The Deputy Speaker is also elected by the National Assembly but, unlike the Speaker, he cannot be elected from non-Members of the Assembly.⁽²⁶⁹⁾ In Malawi the original provisions of the Constitution on the appointment of the Speaker were identical to those of Zambia.⁽²⁷⁰⁾ A change was, however, made to the provisions a month after the coming into operation of the Constitution. The Republic of Malawi Constitution (Amendment) Act, 1966(271), removed the power of appointing the Speaker from the National Assembly and conferred it on the President(272). The President now appoints the Speaker from among Members of the National Assembly or persons qualified to be elected to the National Assembly(273). This form of appointment seems not to exist anywhere else in the Commonwealth. The Deputy Speaker, on the other hand, still elected by the National Assembly from among members of the National Assembly (274).

The position both in Zambia and Malawi of extending the election⁴⁶² of the Speaker to non-Members of the Assembly and restricting the election of the Deputy Speaker to Members of the Assembly, is also found in such other Commonwealth countries as Botswana, Ghana, Tanzania, Malta, Uganda, Sierra Leone and Trinidad and Tobago.⁽²⁷⁵⁾ This differs, however, from the position existing in, for instance, Jamaica, Canada, Australia, Mauritius, Malaysia and India where the Speaker and the Deputy Speaker must be Members of the Legislature.⁽²⁷⁶⁾ The position should also be compared with that obtaining in Swaziland where both the Speaker and the Deputy Speaker of the House of Representatives could be elected from non-Members.⁽²⁷⁷⁾ If a non-Member of the National Assembly is elected Speaker in Zambia or Malawi, he automatically becomes a Member of the Assembly until he relinquishes the office.⁽²⁷⁸⁾ The President, Vice President,⁽²⁷⁹⁾ Ministers, Junior Ministers and persons holding or acting in certain offices⁽²⁸⁰⁾ are disqualified from election or appointment as Speaker or Deputy Speaker⁽²⁸¹⁾.

Whether a non-Member of the National Assembly has been validly elected as Speaker or whether such Speaker has vacated his office is, in Zambia, determined by the High Court in the same manner as it deals with disputes concerning membership of the Assembly.⁽²⁸²⁾ On the other hand, disputes concerning a Speaker elected from among Members of the Assembly or the Deputy Speaker are settled by the Assembly itself. In Malawi, disputes concerning the election of a non-Member of the Assembly as Speaker or his vacation of office were under the original provisions of the Constitution decided by the High Court as in Zambia⁽²⁸³⁾. The present provisions on the appointment of the Speaker say nothing about determination of such disputes. The President should now be the sole judge in such disputes. It may, however, be possible to bring the dispute before the High Court where, for instance, the President acts unconstitutionally by appointing a person who is disqualified under the Constitution.

In both Zambia and Malawi the Speaker's or Deputy Speaker's office may become vacant on several grounds. Taking the Speaker first, if he was elected or appointed from among Members of the National Assembly, he loses his office if he ceases to be a Member otherwise than by reason of the dissolution of the Assembly.⁽²⁸⁴⁾

262. S.30 (3) Ibid. Such a Member, as has been seen above, is disqualified from election to the Assembly for five years.
263. S. 65 (4)(Zambia); S.28 (2)(i)(Malawi).
264. See e.g. S.35 (i)(d) Constitution of Tanzania; S.26-(2) (e) Constitution of Trinidad and Tobago; and S.39 (i)(f) Constitution of Barbados.
265. S. 123 (i)(Zambia); S.96(Malawi).
266. S. 70 (1)(Zambia); S.33 (1)(Malawi). Other staff may also be appointed - ibid. In Zambia the Clerk is appointed by the Speaker after he (the Speaker) has submitted a proposal for such an appointment to the Assembly and the Assembly has resolved that the appointment should be made - S.70 (2). The Speaker also appoints the other staff but does not consult the Assembly in this case - S. 70 (5) and (6)(a). He, however, consults the Public Service Commission although he is not bound by their advice - S.70 (6)(a). Where the Speaker does not follow the advice of the Commission he must as soon as possible inform the Assembly that he so acted - Ibid. Consultation of the Commission is only required in the case of employees earning emoluments above a certain amount. In cases below that amount the Speaker acts without consultation - S.70.(6)(b). Apart from resigning on his own accord the Clerk can be removed by a resolution of the Assembly on grounds of inability to discharge his functions (whether arising from infirmity of body or mind or any other cause) or misbehaviour - S.70 (4). The other staff may be removed from office or disciplined by the Speaker after consultation with the Public Service Commission - S.70 (5) and (6)(a). If he does not act in accordance with the advice of the Commission he must inform the Assembly why he so acted - S.70 (6)(a). In Malawi both the Clerk of the Assembly and his Staff are appointed by the Public Service-Commission in consultation with the Speaker - S.87 (7). The Clerk and his staff are also removed and disciplined by the Commission in the same manner as other public officers.
267. S.63 (1)(Zambia).
268. Ibid.
269. S.64 (1)(Zambia).
270. See the original S. 25 (1) of the Constitution.
271. Act No. 39 of 1966.
272. S. 4 ibid.
273. Ibid.
274. S. 26 (1)(Malawi).
275. See Ss. 60 (1) and 61 (1) Constitution of Botswana; Arts. 72 (1) and 74 (1) Constitution of Ghana; Ss. 37 (1) and 38 (1) Constitution of Tanzania; S.60 (2) and (3) Constitution of Malta; Arts. 43 (1) and 44 (1) Constitution of Uganda; Ss. 33 (1) and 34 (2) Constitution of Sierra Leone; and S. 33 (2) and (3) Constitution of Trinidad and Tobago.
276. See S. 43 Constitution of Jamaica; S.44 Constitution of Canada - refers only to the Speaker; S.35 Constitution of Australia - refers only to the Speaker; S.32 (1) Constitution of Mauritius; Art. 57 (1) Constitution of Malaysia; and Art. 93 Constitution of India. Note that the State Vice-President is ex-officio the Chairman of the Upper House The Vice-Chairman is, however, a Member of the House).
277. S. 48 (3) of the Constitution.
278. S. 58 (2)(Zambia); S.19 (2)(Malawi). See also, for instance, the Constitutions of Uganda (Art. 40 (4); Malta (S.53 (2)); Trinidad and Tobago (S.29 (3)) which have the same provision.
279. This office exists only in Zambia. Malawi has a Presidential Commission.
280. This applies only to appointment as Speaker since the Deputy Speaker must be a Member of the Assembly and persons holding public offices cannot be Members.
281. S. 64 (1)(Zambia). 282. S. 69 (1)(b)(Zambia).
283. S. 69 (1)(b)(Zambia).

39. Second, he loses his office if circumstances arise which⁽²⁸⁵⁾ would have disqualified him from being elected or appointed. Third, in Malawi he may also be removed by the President, being his appointed.⁽²⁸⁶⁾ Fourth, in Zambia he is required to vacate his office when a new National Assembly first sits in order to allow the election of a new Speaker⁽²⁸⁷⁾ (the outgoing Speaker is eligible for re-election). This was also the position in Malawi before the enactment of the Constitution of Malawi (Amendment) Act, 1966.^(287a) The present provisions do not say whether the Speaker should be appointed every time a new Assembly is elected. While, therefore, the President may appoint the Speaker for the duration of a Parliament, it appears that there is nothing to stop him appointing such speaker for an indefinite period until he revokes the appointment. Fifth, in Zambia the Speaker may be removed by a resolution of the National Assembly supported by two-thirds of all the Members.⁽²⁸⁸⁾ This was also the position in Malawi before the changes.⁽²⁸⁹⁾ The existing provisions do not give the Assembly the power to remove the Speaker. It may, however, still be possible for the Assembly to pass a resolution requesting the President to remove the Speaker. Such a resolution would not, however, bind the President to accede to the request. Finally, the Speaker may, in both countries, vacate his office by tendering his resignation to the National Assembly.⁽²⁹⁰⁾

The Deputy Speaker must vacate his office if he (a) ceases to be a Member of the Assembly; (b) assumes an office which would have disqualified him from election; (c) is appointed or elected Speaker; or (d) the Assembly resolves that he should be removed.⁽²⁹¹⁾

283. See S.32 (1)(6) of the original Constitution.

284. S.63 (3)(a)(Zambia); S.25 (3)(a)(Malawi) as repealed and replaced by S. 4 (3)(a) of Act No. 39 of 1966.

285. S.63 (3)(c)(Zambia); S. 25 (3)(6) (Malawi) as repealed and replaced by S. 4 (3)(6) of Act No. 39 of 1966.

286. S. 25 (3)(c) as introduced by S. 4 (3)(c) of Act No. 39 of 1966. In 1970 Dr. Banda removed the Speaker, Ismail Surtee.

287. S. 63 (3)(c) (Zambia).

287a. See S. 25 (3)(c) of the original Constitution.

288. S. 63 (3)(d)(Zambia)

289 See S. 25 (3)(d) of the original Constitution.

290. S. 123 (1)(Zambia); S. 96 (Malawi).

291. S. 64 (3)(a) - (d)(Zambia); S. 26 (3)(a) - (d) (Malawi).

In Malawi a resolution for the removal of the Deputy Speaker must be supported by not less than two-thirds of all the Members of the Assembly. There is no such requirement in the Constitution of Zambia. The omission of this requirement after it had been included in reference to the Speaker, must mean that the removal of the Deputy Speaker is governed by Section 79 of the Constitution which states that "save as otherwise provided in this Constitution, any question proposed for decision in the National Assembly shall be determined by a majority of the votes of the members present and voting."

THE HOUSE OF CHIEFS

It has already been mentioned at the beginning of this Chapter that Zambia has a House of Chiefs which is not part of Parliament although it does some legislative work.⁽²⁹²⁾ The House was first established under the 1962 Constitution. It is doubtful whether such an institution would have been established had it not already been established when the independence Constitution was adopted. Having been established by the Colonial Administration, the African Government could not have argued against the retention of the House without incurring the displeasure and suspicions of the Chiefs. They might have felt that the Colonial Administration had more regard for them than the new African Government. The view that a House of Chiefs would not have been established had it not been ⁱⁿ existence at the time of the Independence Conference is supported by the fact that when a similar proposal was made for neighbouring Malawi, Dr. Banda rejected it on the grounds that it would amount to a Second Chamber.⁽²⁹³⁾

The House has very little to do and can be described as an impotent institution. Its functions will, however, be discussed in the next Chapter. In this Chapter only its composition, the election of its Members and their tenure of office will be dealt with. The House has a maximum membership of twenty-six distributed as follows:⁽²⁹⁴⁾

Southern Province	4
Northern Province	4
Eastern Province	4
Barotseland	4
Nth. Western "	3
Luapula Province	3
Central Province	3
Western Province	1

292. See S. 85 (1) (Zambia).

293. See Cmd. 1887 of 1962, p. 20.

294. S. 85 (2) (Zambia).

The qualification required for election to the House is that of being a Chief in the province where election is sought. There is no mention in the Constitution that the chief must be a citizen or a registered voter or that he must have attained a certain age. It is, of course, unlikely that a non-citizen or a minor could be appointed a chief. This absence of additional qualifications in the Constitution of Zambia should be contrasted with the provisions in the Constitution of Botswana which require elected sub-chief Members^(294a) of the House of Chiefs, in addition to being sub-chiefs, to be (a) citizens of Botswana of at least twenty-one years of age; (b) registered voters; (c) able to speak and, unless incapacitated, read the English Language⁽²⁹⁵⁾. A Member of the Zambian National Assembly cannot be at the same time a Member of the House of Chiefs.⁽²⁹⁶⁾ It should be noted that there is nothing to stop a chief becoming a Member of the National Assembly.

The Election of chiefs representing provinces other than Barotseland is governed by provisions contained in the Schedule to the Constitution and in the House of Chiefs Regulations made under Section 72 of Schedule 2 to the Northern Rhodesia (Constitution) Order in Council, 1962, and continued in force by Section 4 of the Zambia Independence Order, 1964.⁽²⁹⁷⁾ Each of the provinces mentioned above (except Barotseland) has a provincial council which consists of all the chiefs in that province recognized under the Native Authority Ordinance. It is this council which elects Members of the House of chiefs allocated to that province. The election takes place at a meeting of the council convened specially for that purpose.⁽²⁹⁸⁾ Once elected a Member has a tenure of office of three years.⁽²⁹⁹⁾ He must, however, vacate his seat if he ceases to be a chief or if circumstances arise which would have disqualified him from election.⁽³⁰⁰⁾ He may also resign.

294a. The House has eight other Chiefs who are Members ex-officio and three other Members - see below.

295. S. 80 (4).

296. S. 85 (3) (Zambia). See also S. 63 (1) (d) of the Constitution of Botswana which has the same provision.

297. See G/N. 394 of 1962 and 497 of 1964.

298. For the rules and procedure governing elections, see the Schedule to the Constitution and the regulations referred to in the last note.

299. S. 85 (5) (a).

300. S. 85 (5) (b) and (c).

42. The House has, instead of a Speaker and a Deputy Speaker, a President and a Deputy President. The President is elected by the House.⁽³⁰¹⁾ He may, however, be appointed by the State President if the House resolves on a motion supported by two-thirds of all its Members to request him to do so.⁽³⁰²⁾ The President may be appointed or elected from among the Members or from among non-Members.⁽³⁰³⁾ The Constitution does not say whether an appointment or election from outside the House should be made from among persons who are chiefs.^(303a) It may be that a commander could be appointed. This seems so because the only persons who are specifically disqualified from holding the office are the State President, the State Vice-President, a Minister or a Junior Minister.⁽³⁰⁴⁾ If a non-Member is elected he is deemed, as long as he holds that office, to be a Member of the House.⁽³⁰⁵⁾ The Deputy President is appointed from among the Members of the House by the State President after consultation with the President of the House.⁽³⁰⁶⁾

Both the President of the House and the Deputy President must vacate their offices under certain circumstances. The President must vacate his office if, having been elected from among the Members, he ceases to be a Member or if circumstances arise which would have disqualified him from election or appointment.⁽³⁰⁷⁾ He must also vacate his office at each first sitting of the House held after the expiration of twelve months from the date of his election or appointment.⁽³⁰⁸⁾ The Deputy President vacates his office when his appointment is revoked by the State President in consultation with the President of the House.⁽³⁰⁹⁾ Both the President and the Deputy President may also vacate office by resignation in accordance with section 123 (1) of the Constitution.

301. S. 88 (1) (Zambia).

302. *Ibid.*

303. S. 88 (2) (Zambia). Contrast with S. 10 of the 1963 Constitution of Northern Nigeria which required that he should be elected from among Members.

303a. Contrast with S. 7 (2) of the 1963 Constitution of Nigeria and S. 9 (2) of the 1963 Constitution of Mid-Western Nigeria which specifically stated that such person had to be a chief qualifying for membership of the House.

304. S. 88 (2) (Zambia).

305. S. 85 (4).

306. S. 89 (1) and (3).

307. S. 88 (3).

308. *Ibid.*

309. S. 89 (2) and (3).

310. S. 78 (1) of the Constitution.

311. Art. 154 (1) and 155 (1) of the Constitution. See also Art. 49 of the previous Constitution - i.e., the 1960 Constitution.

the recommendations given to British rulers in the legislative work of the country is also found in one form or another in several Commonwealth countries. Botswana has a House of Chiefs.⁽³¹⁰⁾ Ghana has a National House of chiefs and several regional Houses of Chiefs.⁽³¹¹⁾ Under the 1963 Constitutions of the Nigerian regions, each region had a House of Chiefs.⁽³¹²⁾ Under the 1966 Constitution of Lesotho, all the twenty-two principal and ward chiefs in the country were ex-officio Members of the Senate together with eleven other Senators appointed by the King.⁽³¹³⁾ In Sierra Leone a paramount chief is elected from each district to sit in the House of Representatives together with commoners.⁽³¹⁴⁾ In Malaysia there is a Majlis Raja - Raja (Conference of Rulers)⁽³¹⁵⁾ in which all rulers of the country sit ex-officio. In Rhodesia ten chiefs sit in the Senate together with thirteen other senators.⁽³¹⁷⁾

The functions of the House of Chiefs existing or which existed in the countries given above will be discussed in comparison with the functions of the Zambian House of Chiefs in the next Chapter. In the meantime, a comparison should be made between the composition of the Zambian institution and those of the institutions existing or which existed in the countries given above. The arrangement in Zambia differs from that in Sierra Leone and from that which existed in Lesotho in that in Sierra Leone there is no House of Chiefs just as there was none in Lesotho. The Chiefs in Sierra Leone sit, as did those in Lesotho, with commoners. The manner in which the chiefs secure their seats in Sierra Leone, and did so in Lesotho, also differs from that obtaining in Zambia. In Lesotho all the Chiefs were ex-officio Members of the Senate. In Sierra Leone they are elected in the same manner as commoners and are subject to the same qualifications and disqualifications. The Zambian arrangement also differs from that in Rhodesia in that in Rhodesia the Chiefs have no House of their own. They sit in the same House with thirteen commoner senators. As in Zambia, however, the ten chiefs are elected by an electoral college of chiefs.⁽³¹⁸⁾ The Malaysian Conference of Rulers differs from the Zambian House of Chiefs in that all rulers in Malaysia are ex-officio members of the Conference while not every chief in Zambia is a Member of the House of Chiefs.

310. See S.4 of the Constitution of Mid-Western Nigeria (Act. No. 3 of 1964); S.4 of the Constitution of Western Nigeria (Act No. 26 of 1963); S.4 of the Constitution of Northern Nigeria Law (Act No. 33 of 1963). See also Constitution of the Eastern Region. The Oba of Lagos and a chief selected by the White-Cap Chiefs and war chiefs of Lagos also sat in the Federal Senate, the Oba as an ex-officio Member.

313. S.41 of the Constitution.

314. S. 30 (1)(a) of the Constitution.

It is the institutions in Ghana and Botswana and those which existed in Nigeria under the 1963 Constitutions which resemble more closely the Zambian arrangement. First, the institutions in Botswana and Ghana and those which existed in Nigeria, are, and were, styled "House of Chiefs". Second, membership of the National House of Chiefs in Ghana and the House of Chiefs in Botswana is, as in Zambia, not open to all chiefs. This was also the case in Nigeria. Membership of the regional Houses of Chiefs in Ghana is, however, open to all chiefs of the region. There is a further similarity between the National House of Chiefs in Ghana and the House of Chiefs in Zambia. The entire membership of both Houses is elected. However, while Members of the Zambian House are elected by provincial councils of chiefs which do not have the status of Houses of Chiefs, those of the Ghanaian House are elected by regional Houses of Chiefs. Each regional House of Chiefs elects five chiefs from the region.⁽³¹⁹⁾ On the other hand, while all the Members of the House of Chiefs in Zambia are elected, some of the chiefs in the Nigerian Houses of Chiefs secured their seats ex-officio.⁽³²⁰⁾ Others were elected or appointed.⁽³²¹⁾ A similar position obtains in Botswana. The Botswana House of Chiefs has a membership of fifteen.⁽³²²⁾ Eight of these are ex-officio Members by virtue of their being paramount chiefs of the eight dominant tribes in the country - i.e. Bamangwato, Bakgatla, Bakwena, Baroleke, Bangwaketse, Barolong, Botswana and Batlokwa.⁽³²³⁾ Four of the remaining seven are elected by sub-chiefs from among their number,⁽³²⁴⁾ while the remaining three are elected by the ex-officio and sub-chief Members from persons who have not been actively engaged in politics in the past five years.⁽³²⁵⁾ There is no mention that these three members should be chiefs or non-chiefs. It appears, however, that the purpose of the provision is to place commoners in the House. This presents another difference between the Botswana House of Chiefs and that of Zambia which is not open to commoners. In this respect the Zambian House also differs from that which existed in the Mid-Western Region of Nigeria. The 1963 Constitution of that region provided for the appointment of four commoner Members to the House of Chiefs to represent interests in special areas which were not adequately covered in the constituencies of the House of Assembly.⁽³²⁶⁾

Footnotes 315 - 326 on page 470.

315. A ruler is defined as the Yang di-Pertuan Besar, ruling chiefs and any other person exercising the functions of a ruler - Art. 160 (2) of the Constitution. Other persons referred to here are Governors of States, which have no rulers - see Fifth Schedule to the Constitution.
316. Art. 38 of the Constitution.
317. Ten of the thirteen Senators are Europeans elected by European Members of the Lower House. Three are appointed by the Head of State from persons of any race. The term "European" includes Coloureds and Asians in this respect.
318. The electoral college is made up of members of the Chiefs Council - a body of twenty-six Chiefs which acts as the mouth-organ of the chiefs of the country and a consultative organ between the Government and the chiefs. The body was established by statute several years ago.
319. Art. 154 (2) of the Constitution.
320. See S.5 of each of the three Regional Constitutions cited in Note 312 above.
321. Ibid.
322. S. 78 (2)(a) of the Constitution.
323. Ss. 78 (2)(a) and 79.
324. Ss. 78 (2)(b) and 80 (1).
325. Ss. 78 (2)(c) and 80 (2). For the definition of being "actively engaged in politics" - see S.80 (3) read with S. 65 (3)(b)(ii). See also above in this Chapter where the definition is given.
326. Ss. 5 (1)(d) and 14 (4).
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CHAPTER TWELVE

PARLIAMENT - ITS FUNCTIONS AND POWERSLEGISLATIVE POWERS

The chief function⁽¹⁾ of Parliament in both Zambia and Malawi is that of making laws. All legislative power is vested in Parliament.⁽²⁾ Any other authorities derive whatever legislative powers they may possess from Parliament. In both countries, as will be seen later in Chapter Fourteen, the President has no original legislative power. All legislative powers he exercises are delegated to him by Parliament, just as such powers are delegated to Cabinet Ministers, statutory boards and local government authorities. These powers can be withdrawn at any time.

Even the people, in whom, both in Zambia and Malawi, sovereignty lies, do not, as do those of Switzerland and Italy, for instance, have power to curtail the legislative power of Parliament. In Switzerland 50,000 voters may demand a revision of the Constitution either in general terms (in which case they ask the Federal Assembly to formulate the amendment in a certain way) or in particular terms (in which case they draft the amendment themselves and submit it to the Federal Assembly for reference to the electorate).⁽³⁾ With regard to ordinary legislation, 30,000 voters may demand that a law before the Federal Assembly be submitted to a referendum.⁽⁴⁾

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1. See below for other functions.
 2. S. 57 (Zambia); S. 18 (2) (Malawi).
 3. Where the demand is in general terms, if the Federal Assembly is in agreement with the demand, it passes the amendment and then submits it to the people for approval. If it is not in agreement, it submits to the electorate the question whether the amendment should be made. If the electorate votes in favour of such an amendment, the Federal Assembly enacts it. Where the voters formulate the amendment themselves, the Federal Assembly puts it to the electorate for approval. If approved it becomes law. The Federal Assembly may submit such an amendment to the electorate with its own amendment or with a recommendation that the amendment be rejected. For the procedure in amending the Swiss Constitution, see Articles 118 - 123 of the Constitution.
 4. Article 89 of the Constitution.
 5. Ameller, *op.cit.*, p. 136.
 6. The Constitution was suspended after a military *coup d'etat* in 1968.
 7. Article 60 of the Constitution.
 8. See, for instance, Article 2 of the Constitution of Senegal and Article 4 of the Constitution of the Ivory Coast which state that sovereignty belongs to the people and that they exercise it through their representatives or by means of a referendum.

2. If the law is rejected by the electorate, it cannot be proceeded with. In Italy 500,000 voters may demand that a partial or a complete repeal of an Act be submitted to a referendum.⁽⁵⁾ If the electorate votes for the repeal Parliament must effect it. In Somalia, under the 1960 Constitution,⁽⁶⁾ 10,000 electors could initiate any legislation except that concerning taxation.⁽⁷⁾ The people of Zambia and Malawi do not possess powers of this nature. They do not have even the right to a referendum which, in some former French-African countries, is specifically given to the people by the Constitution.⁽⁸⁾ The people of Zambia had, however, this right in regard to the amendment of certain sections of the Constitution until the enactment of the Constitution (Amendment)(No. 3) Act, 1969,⁽⁹⁾ which repealed it.⁽¹⁰⁾

The extent of the legislative powers of Parliament in Zambia and Malawi is undefined. There is no enumeration of the subjects on which Parliament may make laws. This should be contrasted with provisions in the Constitutions, for instance, of France,⁽¹¹⁾ most of the French speaking States in Africa⁽¹²⁾ and most Federal States. The Constitution of France and those of the French speaking African States based on it, enumerate all the subjects on which Parliament can make law and then state that those subjects not enumerated are subject to regulation by decree.⁽¹³⁾ Federal Constitutions enumerate matters on which the Federal or the State legislatures may make law.⁽¹⁴⁾

9. Act No. 10 of 1969.

10. See below. Referenda could still, however, be conducted if Parliament passes an Act to that effect. This also applies in the case of Malawi. In fact, this is the practice used in those Commonwealth countries whose Constitutions have no referendum provisions. See e.g. the South African Referendum Act No. 52 of 1960, which preceded the adoption of a republican Constitution.

11. Article 84 of the Constitution.

12. See e.g. Art. 41 Constitution of the Ivory Coast; Art. 41 Constitution of Niger, 1960; Art. 56 Constitution of Senegal; Art. 32 Constitution of Malagasy; and Art. 33 Constitution of Mauritania.

13. See e.g. Art. 44 Constitution of the Ivory Coast; Art. 44 Constitution of Niger; Art. 65 Constitution of Senegal; Art. 33 Constitution of Malagasy; and Art. 35 Constitution of Mauritania.

14. See e.g. Art. 14 Constitution of the Soviet Union; Art. 16 Constitution of Yugoslavia; Art. 73 Constitution of the Mexican United States; Art. 1 Constitution of the United States; S. 51 Constitution of Australia; and Arts. 5, 7 Constitution of the Cameroon. But contrast the Canadian Constitution which defines the powers of the provinces and allocates the remainder to the Federal Government.

The Constitution of Malawi, however, provides that Parliament "may make laws for the peace, order and good government of the Republic."⁽¹⁵⁾ This phrase (i.e. "may make laws for the peace, order and good government of...") has been used by British constitutional draftsmen for years to define powers of colonial legislatures and later those of independent states of the Commonwealth. It is found, for instance, in the Constitutions of Canada, Australia, South Africa, Ceylon, Malta, Trinidad and Tobago, Sierra Leone, Mauritius, Botswana and Jamaica.⁽¹⁶⁾ Its scope is so wide that it enables the legislature to enact any law that is not specifically prohibited by the Constitution. It, therefore, gives the Parliament of Malawi virtually undefined powers. The phrase does not, however, appear in the Constitution of Zambia. Nor does it appear in, for instance, the Constitutions of Tanzania, Malaysia, Singapore and India. Its absence in the Constitution of Zambia and its presence in that of Malawi is not in any way significant in so far as the powers enjoyed by the two Parliaments are concerned. The Parliament of Zambia cannot be said to have wider powers because of the absence of the words under consideration. These words are not intended to confer the power of review on the courts: Parliament is the sole judge of what is conducive to peace, order and good government.^(16a)

While the Parliaments of both Zambia and Malawi have wide and undefined powers, the powers are not as unlimited as those of the British Parliament. First, laws must be enacted in accordance with the procedure laid down by the Constitution. An amendment to the Constitution, for instance, cannot have the force of law unless it is passed in the National Assembly by the required two-thirds majority at the second and third readings.⁽¹⁷⁾ Second, laws must not violate in content certain provisions of the Constitution. For instance, the Constitution of Zambia contains a Declaration of Rights which outlines the rights of the people. Any law enacted by Parliament in violation of those rights is of no effect although it may, in fact, operate until declared ultra-vires the Constitution by the Courts. In Malawi there is no Bill of Rights but the Constitution contains what are called "principles of government," two of which seem to grant definite rights which cannot be violated by an enactment of Parliament unless such enactment is required in the interests of defence, public safety, public order or the national economy.⁽¹⁸⁾ The absence of a Bill of Rights in the Constitution of Malawi gives the country's Parliament wider legislative powers than those which can be exercised by the Zambian Parliament.

Unlike in France and some of the African States whose Constitutions are modelled on that of France, Parliament in Zambia or Malawi cannot deprive itself of the power to make legislation in favour of the Executive^(18a) nor can it be deprived of its legislative powers by a presidential action. The French Government may, if it wants to carry out an important programme, seek authorization from Parliament, for a limited period of time, to issue ordinances regulating matters normally falling under the jurisdiction of Parliament in terms of Article 34 of the Constitution.⁽¹⁹⁾ This provision also exists in, for instance, the Constitutions of the Ivory Coast,⁽²⁰⁾ Senegal,⁽²¹⁾ Mauritania⁽²²⁾ and Gabon.⁽²³⁾ Under Article 16 of the Constitution of France, the President may assume the powers of Parliament without first seeking authorization. The Article provides that in the event of a serious and immediate threat to the institutions of the Republic, the independence of the nation, the integrity of its territory or the fulfilment of its international obligations or the interruption of the regular functioning of the constitutional public authorities, the President may take whatever measures are necessary to meet the circumstances after consulting officially the Prime Minister, the Presidents of the Assemblies (i.e. the National Assembly and the Senate) and the Constitutional Council.⁽²⁴⁾ After making these preliminary consultations and the declaration, the President becomes empowered to assume the powers of the Government and those of Parliament and the public authorities until the situation returns to normal.⁽²⁵⁾ The only protection given to Parliament during such period is that it meets, as of right to deliberate (although it cannot abrogate the powers assumed by the President) and that it cannot be dissolved. It will also be seen in Chapter Fourteen that in India and Uganda the President is empowered, when Parliament is not in session, to promulgate original legislation in the form of ordinances if circumstances require that such measures be taken. Even this form of exercise of Parliament's functions by the President is not permissible in Zambia or Malawi.

Footnotes 15 - 25 on page 475

15. S. 35 (1) (Malawi).
16. S. 91 Constitution of Canada; S.51 Constitution of Australia; S.29 Constitution of Ceylon; S. 66 Constitution of Malta; S.36 Constitution of Trinidad and Tobago; S.42 Constitution of Sierra Leone; S.45 Constitution of Mauritius; S.87 Constitution of Botswana; S. 48 (1) Constitution of Jamaica.
- 16a. *R. v. McClery*, 1912 A.D. 196 at 213 (per Innes J.): "power given to a legislative authority to make Ordinances for peace, order and good government must mean a power to make such Ordinances as to that authority shall seem necessary in the interests of peace, order and good government. Always assuming that the restrictive limits of the empowering documents are observed, the discretion to judge what measures are conducive to peace, order and good government lies with the law giver, and not with the Courts."
17. See below.
18. S. 2 (1) (iv) and (v) and (2) (Malawi). See also Chapter 21.
- 18a. Parliament can, however, delegate to the Executive the power to make subsidiary legislation. There is nothing in the Constitutions of Zambia and Malawi which forbid Parliament to delegate the power to make principal legislation to the Executive but it is unlikely that such delegation would often be made. Section 5 (2) of the Republic of Malawi (Constitution) Act which empowered the President "by an order under his hand made at any time before the 6th July, 1967, (to) make such amendments to any existing law as may appear to him to be necessary or expedient for bringing that law into conformity with the provisions of this Act or the Constitution, or otherwise, for enabling effect to be given to those provisions."
19. Article 38 of the Constitution.
20. Article 45.
21. Article 66.
22. Article 36.
23. Article 42.
24. The Constitutional Council must in such case give reasoned opinion but the President is not bound by such opinion.
25. For similar powers, see, e.g. Article 15 of the Constitution of the Cameroon; Article 47 of the Constitution of Senegal; Article 19 of the Constitution of the Ivory Coast; Article 19 of the Constitution of Gabon and Article 14 of the Constitution of Chad. Provisions of some of the Constitutions here cited differ in material respects from Article 16 of the French Constitution. For instance, in Senegal, while the President assumes the powers in the same manner as the French President, the decrees he makes must be approved by the National Assembly within fifteen days or they lapse.
Article 16 of the French Constitution has not been used often. Ex-President De Gaulle, however, used it during the Algerian crisis in 1962. For a discussion of article 16, see Pickles, W. "Special Powers in France: Article 16 in Practice" (Public Law, Spring, 1963).
- 25a. Formerly, Ministers who were appointed from outside the National Assembly were not regarded as Members of the National Assembly although they could participate in its proceedings.

INTRODUCTION OF BILLS

The initiation of legislation in Zambia and Malawi is in the hands of the Cabinet. Members of the National Assembly may also introduce Bills but such Bills have little chance of becoming law unless backed by the Government. Because all the Cabinet Ministers are elected Members of the National Assembly in Zambia and because even those members of the Cabinet in Malawi who are appointed from outside the National Assembly become Members of the National Assembly during their term of office, they personally introduce Government Bills in the Assembly.^(25a) This should be contrasted with the position in the United States of America where, because Members of the Cabinet are not Members of Congress, a Bill is introduced in Congress by the chairman of the committee responsible for the Bill.

Legislation is introduced in the National Assembly either in the form of a Bill or as a statutory instrument. The manner in which the National Assembly deals with statutory legislation depends on the statute under which the instrument is made. In both Zambia and Malawi Bills are divided into three classes - Ordinary Bills, Financial Bills and Constitutional Bills. An Ordinary Bill is one that is neither a Financial Bill nor a Constitutional Bill. A Financial Bill is one that provides for: (a) the imposition of taxation or the alteration of taxation otherwise than by reduction; (b) the imposition of any charge upon the General Revenues or Consolidated Fund⁽²⁶⁾ or the alteration of any such charge otherwise than by reduction; (c) the payment, issue or withdrawal from the General Revenues or the Consolidated Fund of any moneys not charged thereon or an increase in the amount of such payments, issue or withdrawal; or (d) the composition or remission of any debt due to the Government.⁽²⁷⁾ Whether a Bill is a financial one is determined by the person presiding. A Constitutional Bill is one amending the Constitution, including, in Zambia, the Zambia Independence Act, 1964, in so far as it forms part of the law of Zambia.⁽²⁸⁾

While an Ordinary Bill or a Constitutional Bill can be introduced by a Minister or a private Member, a Financial Bill cannot be introduced by a private Member. In Zambia the National Assembly cannot discuss a Financial Bill unless it is introduced by the Vice-President or a Minister on the recommendation of the President.⁽²⁹⁾

26. "General Revenues" is the term used in the Constitution of Zambia while that of Malawi uses "Consolidated Fund."

27. S.74 (a)(i)-(iv)(Zambia); S.36 (a)(i)-(iv)(Malawi).

28. S.72 (1)(Zambia).

29. S.74 (Zambia).

In Malawi, on the other hand, the National Assembly can only discuss a Financial Bill if it is introduced on the recommendation of the Minister for the time being responsible for finance which recommendation must be signified in writing.⁽³⁰⁾ This restriction applies, in both Zambia and Malawi, to the introduction of motions (including any amendment to such motions) which, in the opinion of the person presiding, would provide for any of the purposes mentioned above that make a Bill a financial one.⁽³¹⁾ The Constitution of Malawi specifically includes under these restrictions petitions with financial implications submitted to the National Assembly.⁽³²⁾ This is also the case in the Constitutions of, for instance, Sierra Leone, Trinidad and Tobago, Mauritius and Malta.⁽³³⁾ No mention of petitions is, however, made in the Constitution of Zambia. This is also the position in the Constitutions of Botswana, Uganda, Tanzania and Kenya. These restrictions (found in Zambia and Malawi) on the introduction of financial measures are virtually universal. The Executive introduces the measures and Parliament approves or rejects them.

30. S. 36 (Malawi).

31. S. 74 (b) (Zambia); S. 36 (b) (Malawi).

32. S. 36 (c) (Malawi).

33. S. 52 (c) Constitution of Sierra Leone; S. 45 (2) (C) Trinidad and Tobago; S. 74 (c) Constitution of Malta; S. 54 (c) Constitution of Mauritius.

GENERAL PROCEDURE
AND THE
PROCEDURE REGARDING ORDINARY AND FINANCIAL BILLS.

Apart from the restrictions on introduction of Financial Bills in the National Assembly, Financial and Ordinary Bills pass through the Assembly in the same manner except that the right of the Members to effect amendments is limited in the case of Financial Bills. General procedure and debate in the National Assembly, both in Zambia and Malawi, is modelled on that of the British House of Commons. The Speaker controls the debates and enforces the procedure except when he is absent or in respect of committees of the whole House, when the Deputy Speaker presides. Bills go through the same stages as in the House of Commons - i.e. first reading, second reading, committee stage, report stage and third reading. At the end of every reading an Ordinary or Financial Bill must be supported by the majority of the Members present and voting.⁽³⁵⁾ The Members present and voting could, in fact, be no more than the bare quorum which is, in both countries, one-fourth of the total membership of the House.⁽³⁶⁾ The Speaker has no original vote but does have a casting vote.⁽³⁷⁾ A person other than the Speaker if presiding, however, retains his original vote in addition to a casting vote.⁽³⁸⁾

Before becoming law an Ordinary or a Financial Bill must receive the presidential assent. Discussion of this stage must, however, be deferred until after consideration of the process through which a Constitutional Bill passes in the Assembly.

35. S. 79 (1) (Zambia); S. 41 (1) (Malawi).

36. S. 78 (Zambia); S. 40 (Malawi).

37. S. 79 (2) (Zambia); S. 41 (2) (Malawi).

38. S. 79 (3) (Zambia); S. 41 (3) (Malawi).

The Constitution of Malawi specifically provides that the National Assembly shall not pass a Bill to amend the Constitution unless it (the Bill) expresses in its title that it is "an Act to amend the Constitution."⁽³⁹⁾ There is no similar provision in the Constitution of Zambia but in practice such Bills always bear the same words as prescribed by the Constitution in Malawi. In Zambia the Constitution provides that the text of a Bill seeking to amend the Constitution must be published in the Gazette not less than thirty days before the first reading is taken.⁽⁴⁰⁾ This requirement serves two important purposes. First, it gives the Members sufficient time to study the Bill. Secondly, it safeguards the people from sudden constitutional changes. The Constitution of Malawi does not, however, contain a similar provision.

The Constitutions of Zambia and Malawi are, as stated in Chapter Nine, rigid. A constitutional Bill (or one amending the Zambia Independence Act, 1964) must, in both countries, receive the support of two-thirds of all the Members of the Assembly on its second and third readings.⁽⁴¹⁾ This has been the procedure in Malawi since the coming into effect of the Constitution. On the other hand, until 1969 when changes were made, the provisions of the Constitution of Zambia were divided into ordinary and specially entrenched provisions. Bills amending the ordinary provisions required only the support of two-thirds of all the Members of the Assembly at the second and third readings. A Bill amending any of the specially entrenched provisions - i.e. Chapter III (Fundamental Rights), Chapter VII (the Judicature), Section 71 (2) (reference of Bills to the President for assent), Section 73 (the power of Parliament to confer on any person or authority the power to make statutory instruments) and section 72 (alteration of the Constitution) - required, in addition, approval by a majority of the registered voters as a whole (and not merely those voting) in a referendum.⁽⁴²⁾ Such an amendment could, therefore, be defeated not only by a majority of the voters voting against it but also by abstention of the majority of the voters from voting.

39. S. 97 (2)(a) (Malawi).

40. S. 72 (2)(A) (Zambia). By convention ordinary Bills are also published in the Gazette 30 days before the first reading but this can be dispensed with without violating the Constitution.

41. S. 72 (2)(b) (Zambia) as amended by Act No. 10 of 1969; S. 97 (2)(a) (Malawi).

42. S. 72 (3) (Zambia).

The Government considered this procedure dilatory and also capable, in a country which still had an opposition

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party with a large following, of satisfying required amendments. It, therefore, sought to abolish this procedure. Two reasons were given for this move. The first was that the Government wanted to amend the provisions of the Declaration of Rights with ease so as to enable it to take over the unused lands of absentee owners for the benefit of the people. The second was that the Government wanted to amend the provisions regarding the judiciary with ease so as to enable the "Zambianisation" of the Bench. With its large majority in the National Assembly, the Government could always be certain of a two-thirds majority. Parliament consequently enacted the Constitution (Amendment) (No. 3) Act, 1969,⁽⁴³⁾ which came into operation after approval by voters in a referendum. The Act repealed section 72 (3) which contained the referendum provisions. This made all the provisions of the Constitution equal and subject to alteration by the two-thirds majority of the Assembly. The Government was perhaps influenced to make these changes by the fact that the two-thirds procedure of amendment for all provisions of the Constitution existed in the neighbouring states of Malawi and Tanzania, and in Uganda (another neighbouring state) for amendment of the specially entrenched provisions.

Compared with the Constitutions of other Commonwealth countries, the Constitutions of Zambia and Malawi are less rigid than some and more rigid than others. Only the Constitution of Tanzania, among the Constitutions of the Commonwealth countries, it seems, has provisions on amendment that are almost identical to those of the Constitutions of Zambia and Malawi. The only difference is that the Constitution of Tanzania does not require the two-thirds majority support to the second and third readings. The Bill must receive the support of at least two thirds of all the Members of the National Assembly on not less than two of its readings.⁽⁴⁴⁾ The two-thirds majority procedure is also found in the Constitutions of other Commonwealth countries but only in the case of two or more procedures.

43. Act No. 10 of 1969.

44. S.51(1) of the Constitution. See also the Constitutions of such foreign countries as Russia, Yugoslavia, Guinea and Mauritania, which require for all amendments a majority of two-thirds of the House or each House in the case of Russia and Yugoslavia - see Art. 46 Constitution of Russia; Art. 213 Constitution of Yugoslavia; Art. 49 Constitution of Guinea; Art. 54 Mauritania, the two-thirds requirement could be dispensed with by putting the amendment to a referendum.

The constitutions of Zambia and Malawi are more rigid than the Constitutions, for instance, of Uganda and Singapore. The provisions of the Constitution of Uganda are divided into ordinary and specially entrenched provisions. A Bill amending any ordinary provision requires only a simple majority. But a Bill amending a specially entrenched provision requires a two-thirds majority. In each case the majority is that of all the Members of the National Assembly and must be secured at the second and third readings.⁽⁴⁵⁾ The entrenched provisions are those concerning supremacy of the Constitution; republican status; alteration of the Constitution; citizenship; fundamental rights; vote of no confidence in the Government; removal of the President for incapacity; components of Parliament - i.e. President and the National Assembly; constituencies; exercise of legislative power; districts of the country; the High Court; the appointment of puisne judges and their tenure of office; and the Judicial Service Commission.⁽⁴⁶⁾ The Constitution of Singapore provides that "the provisions of this Constitution may be amended by a law enacted by the legislature."⁽⁴⁷⁾ There being no special procedure prescribed for enacting such amendments, Article 4 (1) of the Constitution, therefore, applies. That Article provides that unless "otherwise provided in this Constitution, all questions proposed for decision in Parliament shall be determined by a majority of the votes of the Members present and voting...."

On the other hand, the Constitutions of Zambia and Malawi are less rigid than the Constitutions, for instance, of Sierra Leone, Botswana, Malta and Ghana. In Sierra Leone a Bill amending an ordinary provision requires the support of at least two-thirds of all the Members of the House of Representatives at its final reading.⁽⁴⁸⁾ On the other hand, a Bill to amend any specially entrenched provision - i.e. those on fundamental rights; establishment of Parliament; office of paramount chief; sessions, prorogation and dissolution of Parliament; general elections; office of the Director of Public Prosecutions; establishment of the Supreme Court and the Court of Appeal and the appointment of judges and their tenure of office; appeals to the Judicial Committee of the Privy Council; the Judicial Service Commission; appointment of judicial officers; finance; the Public Service Commission; appointment of public officers, representatives abroad, permanent secretaries, the Director of Public Prosecutions and the Director of Public Audit; powers and procedure of Commissions and their protection from legal proceedings, interpretation of the above provisions and alteration of the Constitution must be supported by the votes of at least two-thirds of all

12. the Members of the House on the final reading in two successive sessions of Parliament with a dissolution between.⁽⁴⁹⁾ In Botswana a Bill amending Chapter II (fundamental rights), sections 31-42 (concerning the office of President, election of President, qualifications, tenure of office, vacancy in office of President, discharge of functions of the President during illness, oath of the President and the returning officer at elections of the President, Vice-President, salary and allowances of the President and protection of the President from legal proceedings), sections 43 - 45 (concerning Ministers and Assistant Ministers, their tenure of office, constitution of the Cabinet and presiding at its meetings), sections 48 - 52 (functions of the President, Vice-President, Cabinet Ministers and Assistant Ministers, and the office and functions of the Attorney - General), section 57 (constitution of offices), sections 78 - 80 (establishment of the House of Chiefs and its composition), section 86 (functions of the House of Chiefs), chapter VIII (the Public Service), sections 119 - 122 (Public Revenue) and Section 129 (interpretation of the above provisions) must, at the final reading (taken after not less than three months after the previous voting on the same Bill) receive the support of not less than two-thirds of all the Members of the Assembly.⁽⁵⁰⁾ On the other hand, a Bill amending sections 58 (establishment of Parliament), 64 - 68 (constituencies, Delimitation Commission, Supervisor of Elections and franchise), 87-90 (powers of Parliament and exercise of such powers and introduction of Bills in Parliament), 91 (2) and (3), 92 (2) - (5) and 93 (sessions, prorogation, and dissolution of Parliament and provisions on the vote of no confidence), Chapter VI (the Judicature) and 129 (interpretation of the above provisions) must, in addition to getting the majority mentioned above, be submitted to a referendum of the electors before being submitted to the President. In such a referendum the Bill must receive the support of the majority of the voters casting their votes.⁽⁵¹⁾

45. Article 3 of the Constitution.

46. Ibid. read with Arts. 1 and 2, Chaps. 11 and 33, Arts. 30, 31, 39, 48, 58, 80, 83, 84, 85, 90 and Schedules 1 and 2 of the Constitution respectively.

47. Article 90 (1).

48. S. 43 (3) of the Constitution.

49. S. 43.

50. S. 90 (3).

51. S. 90 (3) and (4).

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13. This should be contrasted with the now repealed provision of the Constitution of Zambia which required the Bill in such a referendum to be supported by a majority of the registered voters and not of those voting.⁽⁵²⁾ Bills amending provisions of the Constitution of Botswana which do not come under the two procedures mentioned above are subject to the procedure applicable to non-Constitutional Bills. The Constitution of Malta has also three procedures, each applying to a set of provisions. Bills amending, for instance, provisions on Maltese as the national language, voting at elections, freedom of speech in Parliament, finance, the Public Service and the Broadcasting Authority, require the support of not less than two-thirds of all the Members of the Assembly at the final reading.⁽⁵³⁾ Bills amending, for instance, provisions on the Roman Catholic Apostolic Religion as the religion of Malta, the National Flag, National Anthem, establishment of Parliament, qualifications of voters and general elections, establishment, sessions, prorogation and dissolution of Parliament, must, in addition to receiving the above majority, be submitted to a referendum in no less than three months and not more than six months and receive approval from a majority of the electors as a whole and not only of those voting.⁽⁵⁴⁾ Provisions not coming under these two procedures are subject to the simple majority procedure, but that simple majority is a majority of all Members.⁽⁵⁵⁾

Of the four constitutions selected as being more rigid than those of Zambia and Malawi, that of Ghana is the most rigid. Parliament is barred from amending Chapter One (containing provisions on the supremacy of the Constitution, enforcement of the Constitution and defence of the Constitution), Articles 127 (prohibiting imposition of taxation otherwise than by or under the authority of an Act of Parliament), 149 (prohibiting the raising of any armed force save by or under the authority of an Act of Parliament), 153 (guaranteeing the institution of chieftaincy and traditional councils as established by customary law and usage) and Clauses (1), (2) and (3) of Article 169.⁽⁵⁶⁾

52. See above.

53. S. 67 (2).

54. S. 67 (3).

55. S. 67 (5).

56. Article 169 contains provisions on the amendment of the Constitution. Clause (1) authorizes Parliament to amend the Constitution. Clause (2) provides that amendments of the Constitution must be made in accordance with the procedure laid down. Clause (3) contains the unamendable provisions.

14. It can, however, amend other provisions of the Constitution. These provisions are divided into three groups, each amended by a different procedure. Any Bill amending Clauses (4) - (9) of Article 169,⁽⁵⁷⁾ Chapter Four (liberties of the individual), Chapter Five (representation of the people), Clauses (1), (2) and (3) of Article 102,⁽⁵⁸⁾ Clauses (1), (2) and (6) of Article 115,⁽⁵⁹⁾ Clauses (3), (4) and (5) of Article 116⁽⁶⁰⁾ and Article 117 (except clause (2)),⁽⁶¹⁾ must be preceded by a proposal to introduce such Bill.⁽⁶²⁾ The proposal must be debated on and accepted by a resolution of the Assembly.⁽⁶³⁾ The proposal and the Bill must then be published in the Gazette by the Speaker not less than six months before introduction in the Assembly.⁽⁶⁴⁾ In the Assembly the Bill must be supported by at least two-thirds of all the Members.⁽⁶⁵⁾ On the other hand, any Bill seeking to amend Articles 5 (persons who became citizens on coming into operation of the Constitution), 6 (citizenship of persons born in or outside Ghana after the coming into force of the Constitution) and 9 (provisions on dual citizenship), Clause (3) of Article 10 (deprivation of citizenship acquired by means other than birth), Articles 36 - 56,⁽⁶⁶⁾ Clause (2) of Article 59 (ratification of treaties by the National Assembly), Articles 60-77,⁽⁶⁷⁾ 84 (mode of exercising legislative power), 85 (restrictions on introduction of financial Bills), 87-99,⁽⁶⁸⁾ 128-141,⁽⁶⁹⁾ Clauses (1) and (2) of Article 151 (appointment of the Chief of Defence Staff of the Armed Forces and his functions), Clause (1) of Article 156 (establishment of local councils, district councils and regional councils), Clauses (1) and (2) of Article 157 (membership of local councils), Clauses (1) and (2) of Article 157 (membership of local councils), Clauses (1) and (2) of Article 158 (membership of district councils), Articles 159 (membership of regional councils), 160 (local government finance), 164 (stool and skin lands and other property)⁽⁷⁰⁾ and 170-174,⁽⁷¹⁾ must be introduced in the same manner as a Bill in the last instance but the period between publication in the Gazette and introduction in the Assembly is, instead, twelve months.⁽⁷²⁾ In the Assembly the Bill must be supported at the second and third readings by not less than two-thirds of all the Members of the Assembly.⁽⁷³⁾ The Bill does not, however, come into effect after this. It must thereafter be approved by a resolution of a National Assembly elected after dissolution of the Assembly that passed it in the manner mentioned. This resolution by the new Assembly must be supported by at least two-thirds of all the Members.⁽⁷⁴⁾

57. Clauses (4) - (9) contain the provisions on amendment of the amendable provisions of the Constitution.
58. Clauses (1), (2) and (3) of this Article vest judicial power in the Judiciary, invest it with all civil and criminal jurisdiction (including matters on the Constitution) and independence from control.
59. Clauses (1) and (2) relate to appointments of the Chief Justice and judges of the Superior Courts of Judicature by the President while clause (6) prohibits abolition of the office of a judge with a substantive holder.
60. Relate to removal of judges.
61. Relate to salaries of judges.
62. Article 169 (5) (a).
63. Ibid.
64. Article 169 (5) (b).
65. Article 169 (5) (c).
66. Provisions covered by these Articles are: office of President; vesting of executive authority in the President; functions of the President; public and presidential seals; qualifications of President; election of President and other matters pertaining thereto; term of office; presidential messages; conditions of office; removal of President; appointment of Auditor-General, Chairman and Members of Commissions, Members of statutory bodies; the appointment of the Governor and other Members of the governing body of any bank, banking or financial institution, the Chairman and other Members of the Council for higher education or corporation (in each case the institution must be one established by Act of Parliament, a statutory instrument or out of public funds); prerogative of mercy; professional organizations; determination of emoluments of Judges, the Auditor-General, the Electoral Commissioner, Members of the Public Service Commission, and the Ombudsman; the Council of State; the National Security Council and establishment of security services.
67. Articles 60-64 relate to the Cabinet and other incidental matters; Article 65 relates to Ministerial Secretaries; Article 66 to votes of confidence; 67 to declaration of assets by the Prime Minister, Ministers and Ministerial Secretaries; 68 to the office of Attorney General and the functions of the holder of that office; 69 - 77 to Parliament, its election, etc. the Speaker and the Deputy Speaker and the clerk of the National Assembly and his staff.
68. Articles 87 and 88 relate to summoning, prorogation and dissolution of Parliament; Article 89 to declaration of assets by Members of the Assembly; 90 to allowances for Members of the Assembly; 91-99 privileges and powers of the Assembly and those of Members.
69. Articles 128 - 137 concern finance, including the functions of the Auditor-General; and 138-141 the Public Service Commission.
70. These are tribal lands and property.
71. These Articles relate to claims against the Government, interpretation of the Constitution, and legal aid.
72. Article 169 (6)(a) and (b).
73. Article 169 (6) (c).
74. Article 169 (6) (d).

16. Finally, any Bill that seeks to amend any provision of the Constitution that does not come under the groups of provisions given above must be supported in the Assembly by not less than two-thirds of all the Members at the second and final readings.⁽⁷⁵⁾

In addition to the above restrictions, Article 169 (8) provides that "Parliament shall have no power to amend any provision of this Constitution in any manner which is, by itself or in its effect, against the spirit of this Constitution." This provision is capable of very wide interpretation. The spirit of the Constitution, being wider than its letter, an amendment, not directly violating any provision of the Constitution, could be declared unconstitutional by the Supreme Court for violating the spirit in wording or effect.

It can be seen that even before the 1969 changes, the Constitution of Zambia was still less rigid than those of Sierra Leone, Botswana, Malta and Ghana. The only important specially entrenched provisions were those on fundamental rights and the judiciary. The important Section I, for instance, which declares Zambia a republic, was not entrenched. Parliament could have, therefore, turned Zambia into a monarchy or a colony by a two-thirds majority in the Assembly. This is still the position, and the same obtains in Malawi. The Parliament of Zambia or Malawi could, by a Bill supported by not less than two-thirds of all the Members of the Assembly, turn the country into a protectorate again under Britain. This should be contrasted (a) with the provisions of the 1966 Lesotho Constitution, and (b) with those in most of the Constitutions of the French speaking states in Africa and that of France itself. Section 1 (1) of the 1966 Lesotho Constitution, which declared the country a sovereign and democratic Kingdom, was specially entrenched. A Bill amending the provisions had, in addition to getting the necessary majority in the Assembly and Senate, to be submitted to a referendum of the voters and approved by the majority of the electorate as a whole and not only of those voting. Article 89 of the Constitution of France bars Parliament from making amendments affecting the republican form of government. This is also found in the Constitutions, for instance, of the Ivory Coast,⁽⁷⁶⁾ Senegal,⁽⁷⁷⁾ Malagasy,⁽⁷⁸⁾ Mauritania,⁽⁷⁹⁾ Chad⁽⁸⁰⁾ and Gabon.⁽⁸¹⁾ In these countries the republican form of government cannot, therefore, be constitutionally abolished except by a juridical fact independent of the Constitution - i.e. people demanding the change and setting up machinery outside the Constitution to introduce a new Constitution - or a revolution that overthrows the Constitution.

75. Ibid. 76. Article 73. 77. Article 79.
 78. Article 66. 79. Article 54. 80. Article 192.
 81. Article 69. See also the Constitution of Morocco (Art.108) and the Constitution of Senegal.

No Bills - Ordinary, Financial or constitutional - passed by the National Assembly in Zambia or Malawi become law until they have been assented to by the President.⁽⁸²⁾ After a Bill has been passed by the National Assembly it is, therefore, presented to the President for his assent. In Zambia such presentation can be delayed, in the case of Bills, other than those appropriating the general revenues or containing only proposals to amend the Constitution or the Zambia Independence Order, by the Bill being challenged for inconsistency with the Declaration of Rights. The Constitution authorizes at least seven Members of the National Assembly to request the Speaker by a notice in writing that a Bill be presented to a tribunal for consideration of whether it is not inconsistent with the Declaration of Rights.⁽⁸³⁾ This request must be made within three days of the final reading of the Bill in the Assembly.⁽⁸⁴⁾ The Speaker passes the request to the Chief Justice who appoints a tribunal comprising two persons selected by him from among persons who hold or have held the office of judge of the High Court.⁽⁸⁵⁾ The tribunal considers the Bill and then presents a report to the President and to the Speaker within thirty days or such period as may be extended by the Speaker, stating whether or not in its opinion any of the provisions (and if so which) would be inconsistent with the Declaration if enacted.⁽⁸⁶⁾ If the tribunal's opinion is that if enacted the Bill or certain of its provisions would be inconsistent with the Declaration, it must give reasons of how it arrived at that conclusion.⁽⁸⁷⁾ Where the tribunal is of the opinion that a request is frivolous or vexatious, it may so report to the President without first considering whether the Bill would be inconsistent if enacted.⁽⁸⁸⁾

There is no express provision in the Constitution to the effect that if a Bill is reported upon adversely by the tribunal it should not be assented to. This should, however, be implied, since the purpose of having the tribunal examine the Bill is to avoid inconsistent provisions becoming law. This provision is very important in that it protects the citizen before he suffers any damage from the unconstitutional law.

82. S. 71 (1) (Zambia); S. 35 (2) (Malawi).

83. S. 27 (1) and (2) (a) (Zambia).

84. S. 27 (2) (a).

85. S. 27 (1).

86. S. 27 (2) (a) and (7) (a).

87. S. 27 (3).

88. S. 27 (3).

The small number of Members of the Assembly required to put the process in motion enables even a small group of opposition Members in the House to arrest the coming into operation of what they consider to be an unconstitutional Bill. The consideration of the Bill by judges or ex-judges guarantees a sound examination of the principles and arguments involved.

This provision seems to exist only in Zambia among the Commonwealth countries. The common practice in the Commonwealth is to have the law enacted and leave it to individuals to challenge it in the courts when their interests are affected. The procedure of referring Bills to courts before they come into effect is, however, found in a number of European countries and some French speaking states in Africa. In France all Bills on what are called organic laws must be submitted to the Constitutional Council before promulgation for a decision on their conformity with the Constitution.⁽⁸⁹⁾ Other Bills could also be referred to the Council if the State President or the President of either House so directs. In each case the decision of the Council is final.⁽⁹⁰⁾ This procedure has been copied, in a modified form, by most of the French speaking States in Africa. For instance, in Senegal,⁽⁹¹⁾ the Ivory Coast,⁽⁹²⁾ Gabon,⁽⁹³⁾ Chad⁽⁹⁴⁾ and Cameroon⁽⁹⁵⁾ the President may, before promulgating a law, send it to the Supreme Court for an opinion on its consistence with the Constitution. In Morocco organic laws cannot be promulgated until the Constitutional Chamber of the Supreme Court has pronounced on their constitutionality.⁽⁹⁶⁾ In Eire the President may, before assenting to a Bill (other than a money Bill or one amending the Constitution or one certified urgent) submit it to the Supreme Court within seven days of presentation for a decision on its constitutionality.⁽⁹⁷⁾ The Attorney-General and counsel appointed by the Court respectively argue for and against the validity of the Bill.⁽⁹⁸⁾ If the court decides that the Bill or some of its provisions are unconstitutional then it is not assented to.⁽⁹⁹⁾

89. Article 46.

90. It should be noted that in France, once laws are enacted, they cannot, unlike in Zambia, be challenged later for inconsistency with the Constitution. The only time a law could be prevented from operation is, therefore, before promulgation. In fact, before promulgation, it is not yet law. The position is, therefore, that a law cannot cease operation because it is unconstitutional but a Bill can be prevented from becoming law because it is unconstitutional.

91. Article 63. 92. Article 23. 93. Article 23.

94. Article 55. 95. Article 13. 96. Article 63.

97. Article 26.

98. *Ibid.* 99. *Ibid.*

19. Excluding the procedure relating to organic laws in, for instance, France and Morocco, whose constitutionality must, in every case, be pronounced upon before promulgation, the procedure in Zambia appears preferable to those in the countries mentioned above in that the initiative is taken by the Members of Parliament and not by the President or the Speaker. Since the President in all the countries mentioned above (except Eire) is an executive President and is, therefore, as Head of the Government, very often involved in the decisions regarding the introduction of legislation in the National Assembly by the Ministers, he would rarely disagree with such legislation unless the text as originally introduced has been greatly altered by the Assembly. He may readily refer Bills initiated by Members of the Assembly. The procedure in these other countries may, however, be regarded as superior to that in Zambia, first, in that, except in Eire, it applies to all Bills and secondly, in that the determination is done by the regular courts.

In Zambia, a Bill, other than one appropriating the general revenues of the Republic or one containing only proposals seeking to alter provisions of the Constitution or the Zambia Independence Order, cannot be presented to the President for assent until after the expiration of⁽¹⁰⁰⁾ three days from its third reading in the National Assembly. Nothing is said about this in the Constitution of Malawi. It will be noted that the period of three days (in Zambia) within which a Bill cannot be presented to the President is the period within which a request that a Bill be referred to a tribunal should be made to the Speaker. It should also be noted that Bills appropriating the revenues or solely amending the Constitution or the Zambia Independence Order cannot be referred to a tribunal. It is for this reason that they are exempt from the three days rule. Neither the Constitution of Zambia nor that of Malawi lays down the period within which the President must assent to the Bill or return it to the National Assembly if he withholds his assent. The Constitutions of most Commonwealth countries do not, also, fix a period.⁽¹⁰¹⁾ On the other hand, the Constitutions of many non-Commonwealth countries give the Head of State a definite period within which to assent to a Bill or veto it. In the United States, for instance, the President has ten days (Sunday excepted) within which to veto a Bill or give his assent.⁽¹⁰²⁾

100. S, 71 (2) (Zambia).

101. Under the 1962 Constitution of Pakistan, however, the President was required to assent or withhold assent to a Bill within 30 days. If he failed to do so the Bill automatically became law.

102. Article I, Section 7.

20. If he fails to do either within that period the Bill becomes law without his assent.⁽¹⁰³⁾ The period of ten days also obtains in Algeria,⁽¹⁰⁴⁾ Mexico,⁽¹⁰⁵⁾ Argentine, Brazil, Turkey and the Philippine,⁽¹⁰⁶⁾ In France the period is a fortnight⁽¹⁰⁷⁾ while in Senegal,⁽¹⁰⁸⁾ the Ivory Coast,⁽¹⁰⁹⁾ Gabon,⁽¹¹⁰⁾ Tunisia,⁽¹¹¹⁾ Chad⁽¹¹²⁾ and Mauritania⁽¹¹³⁾ it is fifteen days or five days in urgent cases. Very short periods are given in Liberia and Eire - five and seven days respectively.^(113a) On the other hand, the Presidents of the United Arab Republic⁽¹¹⁴⁾ and Chile,⁽¹¹⁵⁾ for instance, have thirty days in which to assent to or veto a Bill. In all the above countries,⁽¹¹⁶⁾ if the President does not assent to the Bill or withhold his assent or request a second reading (where this is permitted) within the prescribed time, the Bill becomes law without his assent.⁽¹¹⁷⁾

In Zambia and Malawi the President must either assent to the Bill or withhold his assent and send the Bill back to the National Assembly (the Speaker in Malawi).⁽¹¹⁸⁾ He cannot, therefore, "kill" a Bill by retaining it without giving or withholding his assent. Where, in Zambia, a Bill is referred to a tribunal and the tribunal reports adversely on its provisions, it could only be returned to the National Assembly if the President so directs.⁽¹¹⁹⁾ This should mean that he has discretion and not an obligation, as in the case of a Bill to which he has withheld assent, to return such Bill. Neither the Constitution of Zambia nor that of Malawi requires the President when returning a Bill to attach reasons why he has withheld his assent or to make suggestions for amendments which, if made, would remove his objection to the Bill.

103. Ibid. It does not, however, become law if Congress adjourns within those ten days - ibid.

104. Article 49.

105. Article 72.

106. Ameller, op.cit., p. 216. In the Philippines the ten days must be sitting days.

107. Article 10.

108. Article 61.

109. Article 13.

110. Article 12.

111. Article 44.

112. Article 55.

113. Article 44.

113a. Article 2 Constitution of Liberia; Article 25 (2) (1) Constitution of Eire. The President in Eire cannot assent to a Bill in earlier than five or later than seven days after its presentation - ibid.

114. Article 117.

115. Ameller, op.cit. p. 126.

116. Except in Eire where the President cannot refuse to assent to a Bill within the prescribed period.

117. In Mexico and the United Arab Republic, for instance, the Bill automatically becomes law. In the Ivory Coast Gabon, Chad and most of the French speaking States in Africa, the President of the National Assembly promulgates it.

118. Ss. 71 (4) (Zambia); S. 35 (4) (Malawi).

119. S. 71 (4) (Zambia).

This position should be contrasted with that in India, for instance, where the President, before assenting or withholding his assent to a Bill, other than a money Bill, may return it to the Houses with a message requesting them to reconsider the whole Bill or any of its provisions or such amendments as he may have recommended.⁽¹²⁰⁾ In Tanzania and Ghana the President must give his reasons when returning the Bill.^(120a) In practice it is perhaps unlikely that the President in Zambia or Malawi would, despite the absence of a provision in the Constitution compelling him to do so, return a Bill without indicating the reasons why assent has been withheld.

A Bill sent back to the National Assembly does not lapse unless the Assembly allows it to do so. In Zambia such a Bill cannot, however, again be presented to the President within six months of its return unless the National Assembly resolves upon a motion supported by the votes of not less than two-thirds of all the Members that it be presented again.⁽¹²¹⁾ This procedure applies only to a Bill which the National Assembly decides to have presented again without amendments. If amendments were made to such Bill, it would not be regarded as the same Bill and would not, therefore, be subject to the above rules. In Malawi a returned Bill cannot be debated by the Assembly until after twenty-one days from the date of withholding assent,⁽¹²²⁾ that is if the Assembly wants to send it back to the President. After twenty-one days and within six months of that period the Assembly could again debate and pass the Bill and then have it presented to the President. The Constitution does not say whether the debate should be on the merits (involving taking the Bill through all the stages again) or merely on the question whether the Bill should be presented to the President again. The words used - i.e. "if the Bill is debated again and passed by the National Assembly..." - however, seem to mean that the Bill should go through all the stages again and be passed at each stage. There is no voting procedure prescribed for this second consideration of a Bill. This means that such Bill goes through the same procedure as previously used in passing it - i.e. a simple majority for Ordinary and Finance Bills and a two-thirds majority of all the Members of the National Assembly for Constitutional Bills.

120. Article 111 of the Constitution.

120a. S. 50 (3) Constitution of Tanzania; S.84 (7) and (8) Constitution of Ghana.

121. S. 71 (5) (Zambia).

122. S. 35 (4) (Malawi).

If the Bill is presented the second time the President must, both in Zambia and Malawi, assent to the Bill within twenty-one days unless he dissolves Parliament before the expiration of that time.⁽¹²³⁾ In the event of the President not assenting to the Bill and not dissolving Parliament, a constitutional crisis would arise. Unlike in the United States and the other countries mentioned above, where such Bill would become law without the President's assent, in Zambia and Malawi it cannot become law without that assent. In the meantime, Parliament would not be able to dissolve itself so as to force the President to face the electorate in a general election. Only the President has the power to dissolve Parliament. Such behaviour by the President would, of course, amount to a violation of the Constitution, and, in Zambia could result in an attempt to remove him from office in terms of Sections 36.⁽¹²⁴⁾ In Malawi it is difficult to see what the National Assembly could do in such circumstances. The Constitution has no provision for the removal of the President from office by the National Assembly or any other body for violation of the Constitution or any other reason.

It can be seen that the President in Zambia and Malawi cannot "kill" a Bill which the National Assembly is determined to enact unless he dissolves the National Assembly. But even then the Bill could still be submitted to the new National Assembly, passed through all the stages and then presented again to the President. The President could again withhold his assent and the National Assembly could again have the Bill presented after employing in each case the re-presentation procedure given above. The President would then be required to assent to the Bill or again dissolve Parliament. The President, would not, in such situation, be able to go on dissolving Parliament unless the electorate happens to remain on his side, in which case the crisis would be brought to an end by the electorate electing new men to the Assembly. The President's lack of power to "kill" a Bill by withholding his assent should be compared with the power reposed in this respect in Governor-Generals and other Heads of State of some Commonwealth countries. The Dominions of Australia, Canada, Trinidad and Tobago, Ceylon and Mauritius and the Kingdom of Malaysia can be taken as examples.

123. S. 71 (6) (Zambia); S. 35 (6) (Malawi).

124. See below.

23. If a Bill is refused assent it lapses.⁽¹²⁵⁾ By convention, however, the Governor-Generals in Australia, Canada, Trinidad and Tobago, Ceylon, Mauritius and other Dominions cannot withhold assent to a Bill submitted by the Government save in exceptional circumstances.

The provisions of the Constitutions of Zambia and Malawi on assent to Bills should be compared with provisions on the same subject in the Constitutions of (a) Tanzania and Botswana; (b) the United States, the Ivory Coast and Senegal; and (c) Uganda, Ireland, and Malta. These constitutions have been selected at random to show a few possible different approaches to this question. The provisions of the Constitution of Botswana⁽¹²⁶⁾ are identical to those of the Constitution of Zambia. In Tanzania a Bill not assented to is sent back to the National Assembly with a message on why assent has been withheld.⁽¹²⁷⁾ Such Bill cannot be presented again within six months unless it goes through the Assembly again and is supported at the final reading by two-thirds of all the Members of the Assembly.⁽¹²⁸⁾ The President must then assent to the Bill within twenty-one days unless he dissolves Parliament within that period. These provisions differ from those of the Constitution of Zambia in that the latter do not require the Bill to go through the stages again. Only a resolution that the Bill be presented again is passed. The provisions of the Tanzanian Constitution also differ from those of the Constitution of Malawi in that there is no prescribed period which must elapse between the return of the Bill and its being debated the second time, and in that a majority of two-thirds of all the Members must support the Bill at the final reading regardless of whether the Bill was previously passed by a simple majority or by a two-thirds majority.

125. Ss. 58, 59 and 60 Constitution of Australia; Ss. 55, 56 and 57 Constitution of Canada; S.44 Constitution of Trinidad and Tobago; S.36 Constitution of Ceylon; S.36 Constitution of Mauritius; and Art. 68 Constitution of Malaysia. Note, however, that in Sierra Leone, while other Bills lapse if not assented to by the Governor General, those aimed at the enactment of a new constitution can become law without the Governor's assent if passed by two-thirds of all the Members at the final reading in two sessions punctuated by a dissolution of Parliament - S. 51 (4) and (5) of the Constitution.

126. Ss. 82 (2) - (4).

127. S. 50 (3) of the Constitution.

128. Ibid.

In the United States, if the President withholds his assent to a Bill he sends it back with his objections to the House from which it originated.⁽¹²⁹⁾ The House concerned may pass the Bill again, this time by a two-thirds majority, and send it to the other House to be passed in like manner.⁽¹³⁰⁾ The Bill then becomes law without being sent to the President again.⁽¹³¹⁾ In the Ivory coast and Senegal, as in most of the other French speaking countries in Africa,⁽¹³²⁾ the President does not have the power to withhold assent as such. He has, however, in addition to the powers to refer the Bill to a referendum or to the Supreme Court, the power to refer the Bill back to the National Assembly for a second consideration. In this second consideration the Bill must be supported, in Senegal, by a three-fifths majority of the Members,⁽¹³³⁾ and, in the Ivory Coast, by a two-thirds majority of the Members.⁽¹³⁴⁾ The Bill does not, however, as in the United States, automatically become law. It must again be sent to the President who is required to promulgate it within the prescribed period. If, however, he fails to promulgate it within that period, then it is promulgated by the President of the National Assembly. It can be seen that the President in Zambia and Malawi has more effective power than the President of the United States, the Ivory Coast and Senegal in that no Bill can become law without his assent.

Finally, the provisions of the Constitutions of Uganda, Ireland and Malta differ from those of the Constitutions of Zambia and Malawi in that they do not, as do the latter, allow the Head of State to withhold assent. Article 58 (2) of the Constitution of Uganda provides that "when a bill passed by the National Assembly...is presented to the President for assent, he shall signify that he assents to the Bill." Article 25 (2)(1) of the Constitution of Ireland states: "Save as otherwise provided by this Constitution, every Bill...presented to the President for his signature and for promulgation by him as a law shall be signed by the President not earlier than the fifth and not later than the seventh day after the date on which the Bill shall have been presented to him." Section 73 (2) of the Constitution of Malta states: "When a bill is presented to the Governor-General for assent, he shall without delay signify that he assents."

129. Article 1, Section 7 of the Constitution.

130. *Ibid.*

131. *Ibid.*

132. These Constitutions follow that of France.

133. Article 62 of the Constitution.

134. Article 13 of the Constitution.

25.

In addition to consideration of legislation in the form of Bills the National Assembly, both in Zambia and Malawi, also considers legislation in the form of statutory instruments or other delegated legislation. Although all legislative power is vested in Parliament, some of that power could be delegated. The Constitution of Zambia specifically provides that nothing in Section 57 (which vests legislative power in Parliament) shall prevent Parliament from conferring on any person or authority power to make statutory instruments. There is no similar provision in the Constitution of Malawi but its absence does not mean that the Parliament of Malawi cannot delegate legislative powers. It does not require a provision in the Constitution to the effect to enable Parliament to delegate some of its legislative power. Such power is inherent in all Parliaments today because of the complexities involved in running a modern state.⁽¹³⁵⁾ As in other countries, there is no uniformity in the methods Parliament in Zambia or Malawi uses to control delegated legislation. It depends on the wording of each statute. Some instruments become law as soon as they are made and gazetted while others must be approved by Parliament before they come into effect.

In Zambia seven Members of the National Assembly may, within fourteen days of the gazetting of a statutory instrument, make a request to the authority that made the instrument that a report be made on such instrument regarding its consistence with the Declaration of Rights.^(135a) The instrument is then referred to a tribunal, constituted and operating in the same way as that in connection with Bills.⁽¹³⁶⁾ The only difference is that a tribunal reporting on a statutory instrument must make its report within forty days.⁽¹³⁷⁾ There is no provision for extension of that time.⁽¹³⁸⁾ If the instrument is reported upon adversely the President annuls it by Order.⁽¹³⁹⁾

135. See Ameller, *op.cit.*, pp. 151 - 159, for the exercise of delegated legislation in the world.

135a. S. 27 (1)(a) and (2)(b)(Zambia).

136. *Ibid.*

137. S. 27 (1)(a) (2)(b) and (3)(b).

138. *Ibid.*

139. S. 73 (3).

Although legislation is the chief function of Parliament both in Zambia and Malawi, it is not the only function. A great deal of the time of the National Assembly in both countries is spent, not in discussing legislation, but in discussion of motions, reports, and other matters and on questions by Members and replies thereto by Ministers. In fact, more time is spent on matters of this nature than on legislation. This is not surprising for, as Friedrich puts it: "The political function of Representative Assemblies today is not so much the initiation of legislation as the carrying on of popular education and propaganda and integration and co-ordination of conflicting interests and viewpoints!" (140)

The second main function of Parliament⁽¹⁴¹⁾ in both Zambia and Malawi is, however, that of being a watchdog of the people over the activities of the Government. The Government in both countries is responsible to the National Assembly. The Ministers account to the National Assembly for the political and administrative activities of the Government. Their responsibility is collective. They are also responsible to the President for their individual departments. This should be compared with the position in the United States where the Secretaries (as Ministers are there called) are responsible only to the President and not to the Congress. The President in Zambia and Malawi is also responsible to the National Assembly. This responsibility is discharged through his Ministers and occasionally by himself in person or through a message to the House. The President may at any time attend and address the National Assembly or send messages to it.⁽¹⁴²⁾ In Malawi he can attend and speak in either of two capacities - i.e. as Head of State and as leader of the Government. In the latter capacity he can take active part in the Assembly's proceedings as if he were a Member but without a vote.⁽¹⁴³⁾ The Constitution of Malawi specifically provides that the President may assign to himself the administration of a Government department.⁽¹⁴⁴⁾ There is no similar provision in the Constitution of Zambia, but the President has assumed departmental responsibilities on several occasions. When the President, assumes such responsibility a Minister of State is appointed to be responsible for the department in the National Assembly.

140. Friedrich, Cool J. Constitutional Government and Democracy, p. 297.

141. The term here refers to the National Assembly.

142. S.75 (Zambia); S.37 (a) and (b) (Malawi).

143. S. 37 (c) (Malawi).

144. S. 54 (Malawi).

Although Ministers have collective responsibility to the National Assembly, the President is not included in that collective responsibility to the National

Assembly. Being an executive President, not bound to follow the advice of his Cabinet, he has individual responsibility to the National Assembly and to the nation for his actions and those of his Ministers. The actions of his Ministers finally rest on his shoulders and he must account for them and his own actions to the National Assembly when necessary.

There are, in the main, five occasions when Ministers are required to account to the National Assembly in regard to their respective departments and to Government policy as a whole. The first is the President's message at the opening of each session and the debate that follows it. This was formerly the Speech from the Throne and is still sometimes anachronously referred to as such. The debate that follows the message is conducted on the same pattern as the debate after the speech from the Throne in the United Kingdom. The second occasion is during the debates on supply votes. Members criticise ministries and make Ministers explain and account for the administration of their departments on the threat of withholding a supply vote for the department concerned. The debate on supply votes is made more lively by the fact that departmental reports are tabled at the same time. The third occasion is during question time which is available every day of sitting. Because Ministers in both Zambia and Malawi (including, in Malawi, those who are not ^{elected} Members of the National Assembly) sit in the National Assembly, they personally answer the questions. This should be contrasted with the position in the United States and countries following that pattern where, because members of the Cabinet are not Members of Congress and cannot, therefore, sit in either House of the Legislature, they cannot be called upon to account in the same manner as in Parliaments based on Westminster model. Members of the Cabinet in the United States account for the administration of their departments before Committees of the Senate or the House of Representatives on particular subjects. In Zambia and Malawi, as in the United Kingdom and other Commonwealth countries, if more information than can be supplied in an answer to a question is required on a certain matter the Minister can be asked to make a statement to the National Assembly.

Fourthly, the National Assembly may use motions introduced by its Members (including motions of no confidence in the Government) to make the Government as a whole account for its policies or administration or the Ministers account for their respective departments. The fifth occasion is during investigations conducted by select committees of the National Assembly and the debates that usually follow the reports of such committees.

These methods of compelling the Government and the Ministers to account for their policies and administration can be backed by effective power to make the Government as such or the Ministers comply with the National Assembly's demands. At this stage it is appropriate to ask and answer two questions. What powers does the National Assembly in Zambia and Malawi have over the Government and the President? What are the powers of the Government and the President over the National Assembly?

POWER OF THE NATIONAL ASSEMBLY OVER THE EXECUTIVE

The National Assembly has several powers over the Government and the President but these are less effective than the powers the President has over the National Assembly. The first and most effective power the National Assembly has over the Government is that only the National Assembly can authorize the raising of revenue and the appropriation of such revenue to various Government departments. Without a law passed by the National Assembly the Government cannot tax the people or raise revenue in any manner. Without a law passed by the National Assembly the Government cannot appropriate moneys to the various Government departments. An angry National Assembly can, therefore, bring the Government to its knees by refusing to grant it taxing powers or powers to withdraw money from the Consolidated Fund or the General Revenues (the term used in Zambia). This is a power enjoyed by most Parliaments in the world although in differing degrees. It cannot, in Zambia and Malawi, be effectively blunted by the powers of the President or the Government over the National Assembly. In Zambia, however, the President can withdraw money from the General Revenues not appropriated yet for the new Financial year for a period of up to four months.⁽¹⁴⁵⁾ But, Parliament lays down the manner and circumstances in which such withdrawals can be made. The President can also answer a recalcitrant National Assembly by a dissolution but it is unlikely that a Government with no money could afford to plunge the country into a general election. In a real showdown on finance it is likely to be the Government that would give in.

145. See below, Chapter 19.

The weak position of the President in Zambia and Malawi in finance matters vis-a-vis the National Assembly may be compared with that of the President of Gabon, the Ivory Coast, Malagasy, Senegal and Chad, for instance. In Gabon, the Ivory Coast and Malagasy the Assembly is required to pass a balancing budget within a specified time (70 days in Gabon, 60 in Malagasy and end of session in the Ivory Coast¹⁴⁶.) If it fails to do so the budget is enforced by an ordinance decreed by the President. The Assembly is then informed and must ratify the budget within fifteen days. If it fails to do so, the budget becomes permanently established by ordinance. In Senegal the Assembly must pass the Bill within sixty days⁽¹⁴⁷⁾. If it fails to do so the President effects it by decree, taking into account amendments made in the course of the debate which he accepts. In Chad the Assembly is required to pass the budget at the end of the budget session⁽¹⁴⁸⁾. If it fails the President enforces it by ordinance. If the Assembly modifies the Finance Bill in such a manner that revenue does not balance expenditure, the Government may by decree reduce credits or create new revenues to the necessary amount. Such ordinance is then put before the Assembly for ratification during the same session or at the next session if the session that failed to pass the budget has already adjourned. If the Assembly fails to ratify the budget then it becomes permanently established by ordinance. It can be seen that unlike the National Assemblies of Zambia and Malawi, the Assemblies of the countries mentioned above have no power completely to deny the Government finance completely. They may debate and amend the budget but they are required to pass it. If they fail, it has been seen, the President effects it by ordinance. This makes the President in these countries stronger vis-a-vis the National Assembly than the President in Zambia and Malawi.

Second, the Assembly could refuse to pass legislation required by the Government. This power is, however, blunted by the President's power to dissolve the Assembly if he is determined to have the legislation passed. The power of dissolution can be more readily used in cases of ordinary legislation than in cases of financial legislation

146. Article 38 of the Constitution of Gabon; Article 51 of the Constitution of the Ivory Coast; Article 40 of the Constitution of Malagasy.

147. Article 57 of the Constitution.

148. Article 38 of the Constitution.

Third, both in Zambia and Malawi the National Assembly can pass a vote of no confidence in one or more Ministers or in the Cabinet as a whole or in the Government as a whole, including the President. The Constitution of Malawi contains provisions on the effect of the passage of a vote of no confidence in the Government by the National Assembly. There are no such provisions in the Constitution of Zambia. The matter is governed by convention. This power is weakened by the fact that in Malawi the passage of such a motion is followed by a dissolution of Parliament while in Zambia it is almost certain that it would equally be followed by a dissolution. The Constitution of Malawi specifically provides that the President must dissolve the National Assembly within three days of its passing a vote of no confidence in the Government.⁽¹⁴⁹⁾ This is followed by an election of both the Members of the National Assembly and the President. The Members can never be certain of retaining their seats in such election. If the purpose of the vote of no confidence was to remove the President, the position of the Members of the dissolved Assembly is weakened by the fact that they cannot directly prevent his nomination in the Electoral College. Although Members of the National Assembly are members of the Electoral College (the body that nominates the presidential candidate) in cases where the election of the President is not coupled with a dissolution of Parliament, their membership ceases on dissolution of Parliament. The Government has also another effective weapon against a motion of no confidence in the Government. It can forestall such motion by introducing a motion of confidence in the Government which, even if defeated, would not result in a dissolution of Parliament. The motion has, however, serious consequences to those Members who vote against it. If such Members declared their support for the President's candidature at the time he was nominated as a candidate, they lose their seats in terms of section 28 (2)(f) of the Constitution. Members could, of course, vote for the motion, bide their time and then introduce a motion of no confidence in the Government but such second attempt could again be forestalled. In Zambia a vote of no confidence directed only at the Cabinet may not result in a dissolution of Parliament. The President may dismiss the whole Cabinet and appoint a new one. In cases where the vote of no confidence is directed not only at the Cabinet but also at the President, it is almost certain that a dissolution of Parliament would follow. Such dissolution, as in Malawi, would be followed by a general election of Members of the National Assembly and the President.

149. S. 45 (3).

31. Fourth, in Zambia the National Assembly could remove the President from office for violation of the Constitution or gross misconduct.⁽¹⁵⁰⁾ The process followed in effecting removal in such circumstances will be discussed in the next Chapter when dealing with the President's tenure of office. The National Assembly's power in this respect is, however, weakened by two factors. The first is that the President is empowered to dissolve Parliament before or after the motion to remove him has been passed. The second is that the National Assembly does not handle the matter alone. After passing a motion that the President's conduct be investigated, a tribunal is appointed by the Chief Justice to do the investigation. The findings of the tribunal determine the National Assembly's next step. If the allegations are substantiated the Assembly may, on a motion supported by not less than three quarters of all the Members, resolve that the President has been guilty of violation of the Constitution or gross misconduct incompatible with his continuing in office.⁽¹⁵¹⁾ If the tribunal finds the allegations not substantiated the matter is terminated. The Constitution of Malawi has no similar provisions.⁽¹⁵²⁾

Fifth, in Zambia the National Assembly elects a successor if the President dies, resigns or is removed from office owing to incapacity, violation of the Constitution or gross misconduct.⁽¹⁵³⁾ It is also charged with the responsibility of electing a person to the office of President where a presidential candidate who would have won dies before declaration of the winner or before taking office.⁽¹⁵⁴⁾ These are, however, not real powers over the President since they are not exercised on a ruling President.

Sixth, both in Zambia and Malawi the National Assembly prescribes the salary of the President.⁽¹⁵⁵⁾ This power is, however, not useful in controlling a President in office for his salary cannot be reduced during his term of office.⁽¹⁵⁶⁾

150. S. 36. See next Chapter.

151. After passage of such motion the President must resign in three days unless he dissolves Parliament before then. See next Chapter.

152. See next Chapter on the significance of the absence of such provisions.

153. S. 37 (2) and (3) (Zambia).

154. S. 33 (7) (Zambia).

155. S. 42 (1) (Zambia); S. 16 (1) (Malawi).

156. S. 42 (2) (Zambia); S. 16 (1) (Malawi).

32. The last but very important power the National Assembly in both Zambia and Malawi has over the President and the Government is that it can by legislation curtail their powers. Both the Constitutions of Zambia and of Malawi, while vesting executive power in the President, provide that nothing shall prevent Parliament from conferring the power vested in the President on other persons or authorities.⁽¹⁵⁷⁾ Such legislation could be introduced in the form of a Private Member's Bill. This power is, however, weakened by the fact that the President could refuse to assent to such Bill. If passed a second time he could dissolve Parliament.

Apart from the limitations placed on the powers of the National Assembly in both Zambia and Malawi by the Constitution, there are others which arise from the political structure in each country. In Malawi, where there is only one party, it is unlikely that Members of the National Assembly could ever come to a showdown with the Government. Both the Government and the Assembly are not likely to allow things to develop to such proportions as would require the latter to demonstrate the effectiveness of its powers. In Zambia the overwhelming majorities the United National Independence Party has had in the past two elections make the country almost a one-party state. Relations between the ruling party and the African National Congress opposition are so strained that violence frequently occurs between the two parties. Under such circumstances it is unlikely that Members of the ruling party in the National Assembly could ever combine with the opposition Members in an effort to bring down the Government.

POWERS OF THE EXECUTIVE OVER THE NATIONAL ASSEMBLY

While the National Assembly in both Zambia and Malawi has power over the Executive, it has been seen that most of these powers are neutralised by powers of the President. At this stage it is necessary to examine in full the powers of the Executive over the Assembly. The Cabinet,⁽¹⁵⁸⁾ on its own, has, in both countries, very little power over the National Assembly. Apart from controlling the business of the National Assembly, it has no other power over the Assembly. Unlike the Cabinets in the United Kingdom and other Commonwealth countries with constitutional Heads of State which have power to effect a dissolution of Parliament by asking the Head of State (who cannot refuse except under special circumstances) to do so, the Cabinet in Zambia and Malawi does not possess such power. It is only advisory to the President, but the President is not under legal or conventional obligation to take the advice.

157. S. 48 (3) (Zambia); S. 47 (2) (Malawi).

33. The Cabinet in Zambia and Malawi cannot, therefore, be described in the words Walter Bagehot used in describing the British Cabinet - i.e: "It is a creature but it has the power of destroying its creators. It is an executive which can annihilate the legislature, as well as an executive which is the nominee of the legislature. It was made, but it can unmake...."⁽¹⁶⁰⁾ It is not, however, as impotent as the United States Cabinet. While it lacks power, it has tremendous influence on the behaviour of the Assembly in that it controls the business of the House and could persuade the President to dissolve Parliament. The United States Cabinet does not control the business of Congress and neither it nor the President has the power to dissolve Congress.

Unlike the Cabinet, the President in Zambia and Malawi has wide powers over the National Assembly. He summons, prorogues and dissolves Parliament. These powers should be examined separately.

The President decided the place where, and the time when, Parliament must meet.⁽¹⁶¹⁾ There is no provision in the Constitution of Zambia or that of Malawi empowering Parliament to meet on its own without being summoned by the President, except, in Zambia, when the National Assembly is summoned by the Speaker to consider the removal of the President in terms of Section 36 of the Constitution or to elect a successor where the President dies or resigns or is removed from office owing to incapacity or violation of the Constitution or gross misconduct and there is no Vice-President to assume the office⁽¹⁶²⁾ or to elect a person to the office of President where a presidential candidate who would have won dies before declaration of the winner or before taking office.⁽¹⁶³⁾ In these cases the Assembly cannot, however, transact any other business. This position in Zambia and Malawi - i.e. that Parliament cannot meet without being summoned by the Head of State - is found in all the countries following the British system.^(163a)

158. While in Zambia the Cabinet does not include the President, in Malawi it does. The term is, however, used here without including the President in the Cabinet in Malawi.

159. Italics author's.

160. *op.cit.*, p. 15.

161. S. 82 (1) (Zambia); S. 44 (1) (Malawi).

162. S. 37 (2) (b).

163. S. 33 (7).

163a. Note that Cyprus, among the Commonwealth countries, does not follow the British system. Parliament convenes itself.

164. S. 2 of Amendment XX of the Constitution.

165. Article II, Section 3 of the Constitution.

21. This should be compared with the positions in the United States and France and the countries following their systems. In the United States Congress convenes on its own on January 3 of every year unless a different date is set by law.⁽¹⁶⁴⁾ The President is empowered to convene both or one of the Houses only on extra-ordinary occasions⁽¹⁶⁵⁾ - e.g. the outbreak of war. In France and the African States whose Constitutions are based on that of France, the National Assembly meets in two ordinary sessions a year. The durations of the sessions are prescribed in the Constitution. For instance, in Senegal the first session opens during the first two weeks of April and the second during the last⁽¹⁶⁷⁾ quarter of the year.⁽¹⁶⁶⁾ Each lasts not more than two months. In the Ivory Coast the first session begins on the last⁽¹⁶⁸⁾ Wednesday of April and lasts not more than three months. The second session begins on the first Wednesday of October and ends, at the latest, on the third Friday of December.⁽¹⁶⁹⁾ In each case the Assembly meets without the intervention of the President.⁽¹⁷⁰⁾ However, as in the United States, the President could cause the Assembly to be summoned for an extra-ordinary session and so could a prescribed number of Members of the Assembly.⁽¹⁷¹⁾ In such cases the request of the President or of the Members is put to the President of the Assembly to effect the summoning.

Although Parliament in Zambia and Malawi cannot, without being summoned by the President, hold a regular or extra-ordinary session, the President cannot dispense with Parliament for twelve months. Both the Constitution of Zambia and that of Malawi stipulate that there must be at least a session of Parliament every year, calculated in such a manner that twelve months do not intervene between the last sitting in one session and the first sitting in the next session.⁽¹⁷²⁾ This provision assures the country of at least one meeting every year - i.e. that which opens the session. The requirement of at least one session of Parliament every year is found in many other Constitutions.⁽¹⁷³⁾ Some Constitutions, as has been seen above, require two ordinary sessions per year.⁽¹⁷⁴⁾

166. Article 52 of the Constitution.

167. Ibid.

168. Article 31 of the Constitution.

169. Ibid.

170. The President of the Assembly convenes the sessions.

171. See Articles 52 and 31 of the Constitutions of Senegal and the Ivory Coast respectively. A majority of the Members is the prescribed number in Senegal and the Ivory Coast.

172. S. 82 (2) (Zambia); S. 44 (2) (Malawi). This is also the position in, for instance, Uganda (Art. 6) (2); Swaziland (58 (1)); and Ghana (Art. 87 (2)).

Footnotes 173 - 174 on page 505.

35. These stipulations of how often Parliament should meet are no doubt the result of knowledge of the days when the English Kings dispensed with Parliament for many years until they needed revenue. After a general election the President must, in Zambia, summon Parliament within three months of the dissolution.⁽¹⁷⁵⁾ In Malawi, on the other hand, it must meet within forty-five days of the date of polling or the last day of polling (where it took two days).⁽¹⁷⁶⁾

The National Assembly in Zambia and in Malawi has no means of effectively countering the President's power of summoning. It cannot meet on its own. The most it could do is to pass a vote of no confidence in the Government (including the President) when it has been summoned to meet but as has been seen above, this power is weakened by the fact that such a vote would result in a dissolution of Parliament and a general election in which Members might lose their seats.

While the President is required to hold at least one session of Parliament every twelve months, the length of a session is not proscribed. Both the Constitutions of Zambia and Malawi empower the President to prorogue Parliament at any time.⁽¹⁷⁷⁾

173. Article 25 of the Constitution of the People's Republic of China; Article 65 of the Constitution of Mexico; Section 2 of Amendment XX to the Constitution of the United States; and Article 87 (2) of the Constitution of Ghana.
174. Compare also this provision of at least one session within every twelve months and the provision in some Commonwealth countries such as Botswana, Jamaica, India, Barbados, for instance, that six months should not intervene between the end of one session and the first sitting in the next session - see S. 91 (2) Constitution of Botswana; S. 63 (2) Constitution of Jamaica; Article 85 (1) Constitution of India; S. 60 (2) Constitution of Barbados.
175. S. 32 (3) (Zambia).
176. S. 44 (3) (Malawi). The Electoral Commission fixes the date or dates of polling by Order. In Uganda and Tanzania Parliament must meet 30 and 21 days respectively after the election - Art. 61 (3) of the Constitution of Uganda and S. 40 (1) of the Constitution of Tanzania.
177. S. 83 (1) (Zambia); S. 45 (1) (Malawi).
178. Article 11, Section 3 of the Constitution. Note that one House cannot adjourn for a period of more than three days without the consent of the other - Article 1, Section 5 of the Constitution.

36. A President unwilling to work with Parliament or faced with a hostile Parliament could, therefore, prorogue it after a short session and not summon it for, say, ten months. The National Assembly cannot effectively counter this power of the President. It cannot continue to meet as a legislative authority after prorogation. The Presidents of Zambia and Malawi, therefore, enjoy more power in this respect than the President of the United States. The latter has no power to prorogue Congress. He can, however, adjourn the two Houses if they fail to agree on a date of adjournment.⁽¹⁷⁸⁾ This position also obtains in, e.g., the Philippines which follows the United States system. In France and the countries that follow the French system, the President also has no power to prorogue the National Assembly since the durations of meetings are prescribed by the Constitution. The President in Zambia and Malawi even enjoys more power than the British Sovereign in this regard. Although legally the Queen can prorogue Parliament at any time, conventionally she does so on the advice of her Ministers. It is the Ministers, therefore, who decide on prorogation just as they do on summoning. This position also exists in all the Commonwealth countries with constitutional Heads of State.

It should be noted, in concluding the discussion on this power, that while the session lasts - i.e. before prorogation - the times at and the days on which the Assembly sits are determined by the Assembly itself and not by the President.⁽¹⁷⁹⁾

The most potent weapon the President in Zambia and in Malawi has over the National Assembly is dissolution. This power, which Ameller says "has become one of the essential cogs in the Parliamentary machine"⁽¹⁸⁰⁾ but which is criticized as undemocratic by the U.S.S.R. and other socialist countries "on the grounds that it subordinates Parliament to the executive and traverses the sovereignty of representative assemblies,"⁽¹⁸¹⁾ is unrestricted in Zambia and Malawi. The President can at any time dissolve Parliament.⁽¹⁸²⁾ The National Assembly has no means of challenging this power.

179. S. 84 (2) (Zambia); S 46 (2) (Malawi). The power of the Assembly to determine its own sittings is, however, subject to the right of the President to summon a meeting at any time during the session - S.84 (1) (Zambia); S.46 (1) (Malawi).

180. Ameller, *op.cit.* p. 286.

181. *Ibid.*

182. S. 83 (2) (Zambia); S. 45 (2) (Malawi).

37. However, although this is the strongest weapon the President has, it is also the most precarious in that unlike the powers of summoning and proroguing, it affects his position in the same manner as it does that of Members of the National Assembly. He must seek re-election at the ensuing general election. In Malawi a general election must be held within sixty days of dissolution.⁽¹⁸³⁾ In Zambia, on the other hand, it must be held within such period as to allow the first session of the new Parliament to be held within three months of dissolution.⁽¹⁸⁴⁾ The President would, therefore, use this weapon only if he were quite certain that he would be re-elected.⁽¹⁸⁵⁾

The powers of dissolution possessed by the Presidents of Zambia and Malawi should be compared with, for instance, those of the Presidents of the United States and France (and the countries that have the same constitutional systems), the British Queen (and similar Heads of State) and the Presidents of Uganda, Kenya and Tanzania. The President of the United States has no powers of dissolution and is, therefore, in a weaker position. The Zambian and Malawian Presidents are also in a stronger position than the French President and the British Queen in that the French President can dissolve the House of Representatives only once a year,⁽¹⁸⁶⁾ and the British Queen dissolves Parliament only on the advice of the Prime Minister.⁽¹⁸⁷⁾ The Zambian or Malawian President is not limited in regard to the number of times he can dissolve Parliament in a year, nor does he act on the advice of his Ministers. On the other hand, the positions of the President of France and the British Queen are stronger in that they are not affected by a dissolution.⁽¹⁸⁸⁾

183. S. 44 (3) (Malawi).

184. S. 82 (3) (Zambia).

185. See the next Chapter for the methods of election of the President in Zambia and Malawi.

186. Article 12 of the Constitution. The Senate is never dissolved. The Senators are elected for nine years and a third are elected every three years.

187. In exceptional circumstances the Queen (or a Governor-General or a Constitutional Head of State in the Commonwealth) may refuse to grant a dissolution.

188. The President of France is elected for seven years and the election takes place independently of parliamentary elections. The Queen is an hereditary ruler.

36. The Presidents of Kenya, Uganda and Tanzania have powers similar to those of the Presidents of Zambia and Malawi.

In addition to the powers over the National Assembly, the President in Zambia and in Malawi has indirect powers which can be used against individual Members of the Assembly. In both countries a Member of the National Assembly who loses his party membership must vacate his seat.⁽¹⁸⁹⁾ A President who has the complete loyalty of the party (as Dr. Banda apparently has) can cause recalcitrant Members of the Assembly to be expelled from the party, thereby losing their seats. Fear of falling into disfavour with the hierarchy of the party (which in most cases forms the Government) in circumstances that might result in expulsion from the party, helps to keep Members of the Assembly (of the governing party in Zambia) loyal to the Government. In Malawi the President can also deal with those Members who supported his candidature at the election by introducing a motion of confidence in the Government. If such Members vote against the motion they would lose their seats in terms of Section 28 (2)(f) of the Constitution.⁽¹⁹⁰⁾ Further, the President could use the machinery of the Party to organize the constituents of a Member against him. If that were to happen the President would then in terms of Section 31 of the Parliamentary Elections Act, 1966, appoint a Commission to investigate and report on the confidence reposed in that Member. If the Commission confirms the constituents' loss of confidence, the Member would then be required to vacate his seat in terms of Section 28 (2)(g) of the Constitution.⁽¹⁹¹⁾

Finally, the messages and addresses of the President have tremendous influence on the behaviour of the National Assembly. The President could at any time, in both Zambia and Malawi, address or send messages to the National Assembly.⁽¹⁹²⁾ In Malawi he can also, as leader of the Government, participate in the Assembly's proceedings as if he were a Member (but without a vote).⁽¹⁹³⁾ The effect of speech was shown in 1964 when Dr. Banda, through his addresses, swayed the Assembly against his dissident Cabinet Ministers.⁽¹⁹⁴⁾

189. See the previous Chapter - i.e. Chapter 11.

190. Ibid.

191. Ibid.

192. S. 75 (Zambia); S. 37 (Malawi).

193. S. 37 (Malawi).

194. See Chapter Eight.

Unless dissolved earlier Parliament in both Zambia and Malawi has a life of five years.⁽¹⁹⁵⁾ This can, however, be extended if the country is at war by twelve months at a time up to five years.^(195a.) The period of five years is found in most of the Commonwealth countries^(195b) and in former Commonwealth countries, e.g. South Africa.⁽¹⁹⁶⁾ It is also found in such other countries as France (the lower House only), Ivory Coast,⁽¹⁹⁷⁾ Algeria,⁽¹⁹⁸⁾ Gabon,⁽¹⁹⁹⁾ the United Arab Republic,⁽²⁰⁰⁾ Tunisia,⁽²⁰¹⁾ Chad⁽²⁰²⁾ and Guinea.⁽²⁰³⁾ This should be compared with the period of four years which obtains in Senegal,⁽²⁰⁴⁾ West Germany,⁽²⁰⁵⁾ Japan,⁽²⁰⁶⁾ Russia⁽²⁰⁷⁾ and the People's Republic of China,⁽²⁰⁸⁾ for instance. On the other hand, the United States House of Representatives has a lifetime of only two years⁽²⁰⁹⁾ while that of the Mexican Chamber of Deputies is three years.⁽²¹⁰⁾ In Malawi Parliament is also dissolved if the President dies or resigns. - With regard to the death of the President, Malawi adopted the old constitutional position in England that Parliament demised with the King. This is no longer the constitutional position in England today. On the death of the Sovereign, if Parliament is sitting, it proceeds with its business; if prorogued or adjourned, it meets immediately without the usual form of summons.⁽²¹¹⁾

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195. S. 83 (3) (Zambia); S. 45 (5) (Malawi).
 195a. S. 83 (4) (Zambia); S. 45 (6) (Malawi).
 195b. In a few countries the period is shorter. It is four years in New Zealand and Cyprus.
 196. S. 47 of the Constitution.
 197. Article 29 of the Constitution.
 198. Article 27 of the Constitution.
 199. Article 26 of the Constitution.
 200. Article 51 of the Constitution.
 201. Article 22 of the Constitution.
 202. Article 22 of the Constitution.
 203. Article 4 of the Constitution.
 204. Article 49 of the Constitution.
 205. Article 39 (1) of the Constitution. This applies to the Bundestag only.
 206. Article 45 of the Constitution.
 207. Article 36 of the Constitution.
 208. Article 24 of the Constitution.
 209. Article 1, Section 2, of the Constitution.
 210. Article 51 of the Constitution.
 211. Succession to the Crown Act, 1707. If such demise takes place during the duration of a Parliament, it continues its term until dissolved but the Members take a new oath to the new sovereign - Representation of the People Act, 1867.

40. If it has been dissolved, the old Parliament meets and continues for six months unless dissolved earlier.⁽²¹²⁾ In Zambia Parliament is not dissolved on the death or resignation of the President. Instead the Vice-President assumes the office.⁽²¹³⁾ If there is no Vice-President, the duties of President are performed by a Minister chosen by the Cabinet and Parliament, unless dissolved, meets within seven days (or earlier as may be directed by the Speaker) to elect a new President.⁽²¹⁴⁾

In both Zambia and Malawi, a dissolved Parliament could be recalled if the President considers that, owing to the existence of a state of emergency or war in the country, it is necessary to do so. The general election preparations, however, proceed and the recalled Parliament continues to exercise power (unless sooner dissolved) until nomination day for the general election when it automatically dissolves. In Malawi, however, the life of the recalled Parliament could be extended in terms of section 45 (6) of the Constitution, which, as seen above, provides for the extension of the life of a Parliament by twelve months at a time, up to a maximum period of five years, in the event of war.⁽²⁰⁹⁾ There is no similar provision in the Constitution of Zambia. Such recalled Parliament cannot, therefore, be extended. The wording of the provision - ".....but the general election of members of the National Assembly shall proceed and the Parliament that has been recalled shall, if not sooner dissolved, again stand dissolved on the day appointed for the nomination of candidates in that general election" — bars such extension.⁽²¹⁰⁾ Identical wording is contained in the Malawi provision, but the provision also includes the words: "unless the life of Parliament is extended under the provisions of section 45 (6)", which constitutes the difference between the two provisions. In the event of circumstances developing which make the holding of an election impossible, the only way, it seems, a recalled Parliament in Zambia could prolong its life would be by amending the provision before nomination day to give it (the provision) the scope of that of the Constitution of Malawi.

212. Meeting of Parliament Act, 1797. For a discussion on the demise of the sovereign and Parliament, see Hood Phillips, *op.cit.*, p. 84.

213. S. 37 (1) (Zambia).

214. S. 37 (2).

209. S. 44 (4) (Malawi).

210. S. 83 (5).

The functions of the House of Chiefs in Zambia are very limited. It is competent to consider and discuss any Bill introduced into or proposed to be introduced into the National Assembly that is referred to it by the President or any other matter that is referred to it by the President or approved by the President for consideration.⁽²¹¹⁾ It can be seen that there is no restriction on the Bills which may be considered by the House. Any Bill could be considered and discussed by the House provided that the Bill has been referred to it. It is not clear, however, whether the House could request the President to refer the Bill for discussion. Such a request, it appears, could only be informal and the House would discuss such Bill not on the grounds of the request but on the grounds that it has been referred to it. After considering a Bill or any other matter, the House may submit a resolution or resolutions on it to the President.⁽²¹²⁾ The President is then required to lay such resolution or resolutions before the National Assembly,⁽²¹³⁾ but the latter is not bound to adopt such resolutions or amendments to a Bill contained therein.

The procedure of the House is governed by the House of Chiefs Rules of Procedure, made in terms of the House of Chiefs Regulations, Regulations 19 and 20. After a Bill has been referred to the House by the President, the Minister responsible for it is required to supply to the Clerk of the House, not later than seven days before the date set down for consideration of the Bill, copies of the Bill and an explanatory memorandum, sufficient for each Member to receive a copy.⁽²¹⁴⁾ On the day the Bill is introduced in the House the Minister concerned or his representative moves a motion, not subject to amendment or debate, in the following words: "That the House do now resolve into Committee to consider the clauses of the Draft Bill entitled (short title)."⁽²¹⁵⁾

211. S. 86 (Zambia).

212. Ibid.

213. Ibid.

214. Rule 122.

215. Rule 123.

42. The House then resolves into Committee of the Whole House^(215a)
 The Minister or his representative remains in the House through-
 out the proceedings and is regarded as a Member of the House
 for all purposes except voting and forming the quorum.⁽²¹⁶⁾
 The debate is conducted on lines similar to those in the
 National Assembly.^(216a) With the President of the House
 (in ordinary debates) or the Chairman (in debates of the
 Committee of the Whole House) controlling the proceedings.⁽²¹⁷⁾
 During the debate Members may suggest amendments. At the
 end of the debate the Chairman, without putting the question,
 reports the Bill to the House with or without recommendations.⁽²¹⁸⁾
 The President of the House then formally moves "that the
 House do approve of the Draft Bill, subject to the
 recommendations (if any) of the Committee of the Whole House."⁽²¹⁹⁾
 This motion is debated as well as amendments made to it
 subject to the approval of the President of the House.⁽²²⁰⁾
 The Minister or his representative may reply to the debate
 on the motion.⁽²²¹⁾

In the case of matters other than Bills, the considerat-
 ion and discussion of the matter is introduced in the House
 as a motion. Such motions are restricted to matters which have
 been referred to the House by the President or which have been
 certified by him to be of public importance.⁽²²²⁾ The only
 motions which can be raised in the House without satisfying
 these requirements are those seeking to amend a motion before
 the House; to resolve the House into Committee or to suspend
 a Member; or those moved while the House is in Committee.⁽²²³⁾
 Motions moved by Members require a seconder but not those
 moved by a Minister or his representative or by the President
 of the House.⁽²²⁴⁾

215a. Rule 124.

216. Rule 125.

216a. The language of the House is English but vernacular could
 be used after due notice - Rules, 70, 71, 72, 76.

217. Rules 83-100 (for conduct of debate) and 138-147 (for
 power of the President).

218. Rule 126.

219. Rule 127.

220. Rule 128.

221. Rule 129.

222. Rule 102.

223. Rule 111.

224. Rules 103 and 104.

Motions raised by Members on matters of public importance are first filed with the Clerk of the House who refers them to the House's Standing Committee.⁽²²⁵⁾ If the Standing Committee resolves that the motion should be recommended to the President for debate, it is then sent to him by the Clerk.⁽²²⁶⁾ If the President approves, the motion is then put on the business list of the House⁽²²⁷⁾ and thereafter debated in the manner given above.

From the outline of the procedure given above, it can be seen that the House is a legislative body although it is not part of Parliament. Its powers are however, very limited. It is not free to discuss any matter in which it is interested. It has no power to initiate Bills although legislation may result from its motions. It cannot force amendments to legislation it considers. If its recommendations are turned down by the National Assembly, there is nothing it can do. It has not the power of a second chamber which, for instance, in the United States, Holland and Switzerland, would, in such cases, bring about negotiations between the two Houses and lapse of the Bill if no agreement is reached.

225. Rules 105 and 106. The Standing Committee consists of the President of the House (as Chairman) and one Member from each of the provinces. The Committee meets from time to time even when the House is not in session and must meet seven days before each meeting of the House after the initial sitting. The duties of the Committee are to consider the business of the House before it meets and to make recommendations if necessary on the arrangement of business in the list received from the President and inclusion in such list of matters of public importance approved by the President. The Committee also advises the President of the House and the House on any matter relating to the comfort and convenience of Member or on the rules and procedure of the House - see Rules 60-69. The House may also appoint ad hoc committees from time to time.

226. Rule 107.

227. Rule 108.

The House has no real power over the President and the Government. It cannot pass a vote of no confidence in the Government, nor can it force the Government to comply with its (the House's) demands through the methods used by the National Assembly. The President of the House at his own initiative or that of a Member may, however, invite a Minister under whose department a matter before the House falls, to address or enlighten it on certain points.⁽²²⁸⁾ The Minister may, instead of doing so personally, send a representative.⁽²²⁹⁾ Members of the House may also seek information from Ministers on any matter falling under the Minister concerned.⁽²³⁰⁾ On application for such information is addressed in writing to the Clerk of the House who forwards it to the Minister concerned.⁽²³¹⁾ The Clerk may reject any question which is frivolous or which in his opinion (after consultation with the Minister concerned) would be against the public interest to answer. Where an answer is given the Minister addresses it to the Clerk who communicates it to the Member concerned. The House has, therefore, some form of power to make the Government account for its administration and policies. Although not provided for in the Constitution or the Rules, there is nothing to prevent the House from asking the President to address it on any matter. The President as will be seen below is entitled to address the House at any time.

While the House has no real power over the President Government, the President has considerable power is the House. He summons it and provides it with s.⁽²³²⁾ It cannot meet without being summoned or any matter that has not been referred to it by the nt or approved by him. The President may address the t any time.⁽²³³⁾ Ministers may also address the House cessary or when attending its proceedings.⁽²³⁴⁾ The nt controls the duration of the meetings by the amount ness he provides. Unlike the National Assembly, the annct, however, be dissolved by the President. Members their seats only at the end of the full term of the i. three years.⁽²³⁵⁾

. 94(3) of the Constitution and Rule 79.
le 79.
le 35.
le 36.
e above and Rule 6.
le 77.
les 78 and 80 and S. 94 (3) of the Constitution.
81 (5)(a) of the Constitution.

The House of Chiefs wields no power over the National Assembly. Its resolutions do not bind the Assembly. On the other hand, the National Assembly could initiate legislation, not only to reduce the powers of the House, but also to abolish it altogether. Such legislation would, of course, require the assent of the President before coming into effect.

If the House has no power, it has, however, influence, particularly in matters concerning tribal life, customs and law. Because of the tremendous power and respect the chiefs still command in tribal areas, the Government or the National Assembly cannot easily ignore the views of the House.

The functions of the House should now be compared with those of (a) the Botswana House of Chiefs; (b) the Ghana Houses of Chiefs under the present Constitution and under the 1960 Constitution; (c) the Conference of Rulers in Malaysia; and (d) the Houses of Chiefs in Nigeria under the regional constitutions of 1963. The Botswana House of Chiefs considers any Bill (including an amendment to a Bill) that in the opinion of the person presiding in the National Assembly would, if enacted, alter any of the provisions of the Constitution or affect the designation, recognition, removal or powers of Chiefs, sub-chiefs or headmen; the organization, powers or administration of African Courts; African customary law or recording of African customary law; or tribal organization or tribal property.⁽²³⁶⁾ The National Assembly cannot proceed on such Bill unless a copy of it has been referred to the House immediately after introduction in the Assembly and a period of thirty days, counted from the sending of the copy, has elapsed.⁽²³⁷⁾ In matters other than Bills the House can discuss any matter within the executive or legislative authority of Botswana which it considers desirable to take cognizance of in the interests of the tribes and tribal organizations it represents and make representations thereon to the President or send messages thereon to the National Assembly.⁽²³⁸⁾ These are specific powers allocated to the House. It cannot be denied exercise of them. This makes the Botswana House more powerful than that of Zambia. The later House has nothing specifically allocated to it. Although Bills it may consider are not restricted to certain subjects, it cannot claim to be entitled to discuss any Bill. The House's jurisdiction on Bills is dependent on what Bills the President decides to refer to it. In the case of matters other than Bills, the Botswana House is also in a stronger position. It does not require the approval of the President before discussing a matter.

236. S. 89 (2) read with S. 86 (1)(a) Constitution of Botswana.

237. S. 89 (2).

238. S. 86 (3) of the Constitution.

While, therefore, the President of Zambia can starve his House of business by not referring Bills or other matters to it or approving matters submitted to him, the President of Botswana cannot do so since his House is entitled to discuss certain classes of Bills and does not require his approval before discussing a matter. The Botswana House also has jurisdiction over matters arising from circumstances other than those given above. Any Minister can directly consult the House on any matter which, in his view, requires its opinion.⁽²³⁹⁾ In Zambia Ministers can do the same, but the matter goes through the President.

Unlike the Zambian House, the Botswana House does not send all its resolutions through the President for submission to the Assembly. Resolutions on Bills are sent direct to the Assembly.⁽²⁴⁰⁾ Resolutions on other matters are sent either to the President or to the Assembly.⁽²⁴¹⁾ However, like those of the Zambian House, the resolutions do not bind the Assembly.

Major differences exist between the functions of the Zambian House and those of the present Ghanaian Houses. These Houses, under the 1960 Constitution, were charged with the responsibility of considering matters and legislation concerning customary law.⁽²⁴²⁾ They could also discuss other matters prescribed by law. They were, therefore, legislative in character. The present Houses appear to be judicial rather than legislative institutions. The functions of the Regional Houses of Chiefs are: (a) to have original jurisdiction in all matters relating to a paramount Stool⁽²⁴³⁾ or the occupant of a paramount Stool; (b) to hear and determine appeals from the highest Traditional Councils within the area of authority of the Traditional Authority within which they are established, in respect of the nomination, election, installation or deposition of any person as a chief; and (c) to perform in and for the region such other functions as may be conferred upon them by or under the authority of an Act of Parliament.⁽²⁴⁴⁾

239. S. 86 (2).

240. S. 86 (1).

241. S. 86 (3).

242. Article 50 of the 1960 Constitution.

243. "Stool" means Chief.

244. Article 154 (3).

47. The functions of the National House of Chiefs, on the other hand, are: (a) to hear an appeal on any matter relating to Chieftaincy which has been determined by the House of Chiefs in a Region (appeal lies thereafter to the Supreme Court with the leave of the Court or of the House); (b) to advise any person or authority charged with any responsibility under the Constitution or any other law for any matter relating to or affecting chieftaincy; (c) to undertake the progressive study, interpretation and codification of customary law with a view to evolving, in appropriate cases, a unified system of rules of customary law; and (d) to perform such other functions, not being inconsistent with any function performable by the House of Chiefs of a Region which Parliament may, by or under an Act of Parliament, confer on it or otherwise refer to it.⁽²⁴⁵⁾ The legislative work the Regional Houses or the National House may do is, therefore, only that which may be conferred by Parliament. This makes the Houses rather weaker than the Zambian House of Chiefs in so far as legislative power is concerned.

The House of Chiefs in Zambia however, appears weaker than the Malaysian Conference of Rulers in that it has no exclusive functions. The Conference of Rulers elects and removes the Yang di-Pertuan Agong - the country's Head of State - and the Deputy Head of State.⁽²⁴⁶⁾ In addition it may discuss any matter, including matters of policy.⁽²⁴⁷⁾ It must be consulted before any changes in policy are made affecting administrative action regarding safeguards of the special position of Malays and the legitimate interests of the other communities.⁽²⁴⁸⁾ The Conference has an absolute veto over the enactment of laws directly affecting the privileges, position, honours or dignities of the Rulers; alteration of the boundaries of any state; or extension of any religious acts, observances or ceremonies to the Federation as a whole.⁽²⁴⁹⁾ Unlike, therefore, the position of the chiefs in Zambia which can be changed without the consent of the House of Chiefs, that of the Malaysian Rulers cannot be so changed except by a revolution staged by the Government.

245. Article 154 (3) and (4) of the Constitution.

246. Article 38 (2) (a) of the Constitution and the third Schedule to the Constitution. Although Governors of Federal States with no traditional rulers, are members of the Conference for other purposes, they are not members for the purposes of electing the Yang di-Pertuan Agong and the Deputy Head of State or in matters relating to privileges, position, honours or dignity of their Highnesses or to religious acts, observances, or ceremonies - S.7 of the Fifth Schedule to the Constitution.

247. Article 38 (2) of the Constitution. Matters of policy are discussed on Cabinet advice. Article 38 (3).

248. Article 38 (5) as read with Article 153.

249. Article 38 (2) (b), (4) and (6) (c) and (d). Appointments of certain officers require consent of the Conference. Any law changing this position can be enacted only with the consent of the Conference - Article 38 (2) (c) and (6) (b).

The lack of power of the Zambian House of Chiefs is more clearly shown when it is compared with the Houses of Chiefs which existed in the Nigerian Regions under the new discarded 1963 Constitutions. Each House acted as a Second Chamber in its region. The Houses took in the Regions the place of the Senate at the Federal level. The Legislature of every Region comprised the Governor, the House of Chiefs and the House of Assembly.⁽²⁵⁰⁾ The Houses had all the powers of a Second Chamber, with the usual restrictions in the case of money Bills.⁽²⁵¹⁾ If a Money Bill was not passed by the House of Chiefs without amendments or with amendments acceptable to the House of Assembly within one month of its being sent to it, it could, in Mid-Western and Western Nigeria, unless the House of Assembly resolved otherwise, be presented to the Governor.⁽²⁵²⁾ In Northern Nigeria such Bill became subject to special procedure (see below). Where, in Mid-Western and Western Nigeria, a Bill other than a Money Bill was not passed by the House of Chiefs within one month of its being sent to it, without amendments or with amendments acceptable to the House of Assembly, the latter could again pass the Bill after six months and if the House of Chiefs did not pass it within one month, it could be presented to the Governor for assent.⁽²⁵³⁾ In Northern Nigeria the House of Chiefs had six months in which to pass such Bill.⁽²⁵⁴⁾ If not passed within that period it became subject to special procedure.⁽²⁵⁵⁾ This also applied to a Bill originating in the House of Chiefs and not passed by the House of Assembly within six months.⁽²⁵⁴⁾ The special procedure, which applied to both money and non-money Bills, involved a joint sitting of both Houses chaired by the President of the House of Chiefs.⁽²⁵⁷⁾ If the joint sitting passed the Bill, it was then presented to the Governor;⁽²⁵⁸⁾ if not, it lapsed. In so far as money Bills were concerned, this procedure gave the Northern Nigerian House of Chiefs powers not usually enjoyed by second chambers in enacting such legislation.

The Nigerian Houses of Chiefs were subject to summoning, prorogation and dissolution at the same time as the Houses of Assembly.⁽²⁵⁹⁾ In this respect their position was weaker than that of the Zambian House, which cannot be dissolved. It should also be noted that although the Botswana House of Chiefs cannot be dissolved, elected Members and specially elected Members and specially elected Members of the House vacate their seats on dissolution of Parliament.⁽²⁶⁰⁾

250. See S.4 of the Constitution of Mid-Western Nigeria; S.4. Constitution of Western Nigeria; S.4 Constitution of Northern Nigeria.

251. See Ss.26, 26 and 27 respectively of the Constitutions of Mid-Western, Western and Northern Nigeria.

252. S.27 (1) Constitution of Mid-Western Nigeria; S.27(1) Constitution of Western Nigeria.

253. S.27 (2); 2.27(2). 254. S.28 of the Constitution.

255. Ibid. 256. Ibid. 257. Ibid. 258. Ibid.

The National Assembly in Zambia and Malawi and the House of Chiefs in Zambia enjoy parliamentary privileges and powers similar to those enjoyed by the British Parliament.⁽²⁶¹⁾ While in Britain these powers are based on the lex et consuetudo Parlamento, in Zambia and Malawi (as in other Commonwealth countries) they are based on statutory law. Their difference in sources of privilege, and powers between the British Parliament and the legislatures of former (and existing) British possessions dates back to the nineteenth century when the Privy Council rejected the claim of the Canadian legislatures that they were in the same position as the House of Commons and the House of Lords and could, therefore, impeach offenders by the procedures of those Houses. It held in a series of cases that a legislature in the dominions had such power only where they were conferred by statute and that in the absence of such statute the legislature could exercise only the powers necessary to preserve decorum and good order;⁽²⁶³⁾ that it was not able to commit officials for refusing to appear before it;⁽²⁶⁴⁾ nor to punish its Members by commitment for insulting behaviour and though it might exclude a Member for disorderly behaviour or expell a Member.⁽²⁶⁵⁾

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259. Ss.30 and 31 (1) Constitution of Mid-Western Nigeria; Ss.30 and 31 (1) Constitution of Western Nigeria, and Ss.31 and 32 (1) Constitution of Northern Nigeria.
260. S.83 (1)(a) and (2)(a) Constitution of Botswana.
261. May defines parliamentary privilege as "the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament and by members of each House individually, without which they would not discharge their functions and which exceed those possessed by other bodies or individuals." Parliamentary Practice (15th Edition by Lord Campion) p.41. For an exposition on the privileges of the United Kingdom Parliament, see Chapters 3 - 10.
262. Doyle v. Falconer (1886) L.R. 1 P.C. 328; Wills v Perry (1912) 43 C.L.R. 592; Barton v. Taylor (1886), 11 App.cas. 197; Hornett v. Crick (1908) A. C. 470.
264. Kielley v. Carson (1842) 4 Moo P.C. 63; Fenton v. Hanton (1858) 11 Moo. P.C. 347.
265. See obiter, Doyle v. Falconer, 4 Moo. P.C. (N.S.) 219.

50. In Zambia the privileges of the National Assembly and its Members and of the House of Chiefs and its Members ~~are~~ ~~contained in the~~

National Assembly (Powers and Privileges) Ordinance.⁽²⁶⁶⁾ The Ordinance, is extended to cover the House of Chiefs by Regulation 22 of the House of Chiefs Regulations. In Malawi the privileges are contained briefly in the Constitution⁽²⁶⁷⁾ and in detail in the National Assembly (Powers and Privileges) Act.⁽²⁶⁸⁾ Members enjoy freedom of speech and debate and freedom from arrest.⁽²⁶⁹⁾ In Zambia freedom from arrest applies only to arrest for civil debts and lasts for the duration of the meeting.⁽²⁷⁰⁾ In Malawi, on the other hand, it applies to Members going to, returning from, or in the precincts of, the National Assembly, except in cases of treason felony or breach of the peace.⁽²⁷¹⁾ In so far as duration of immunity is concerned, a Member of the National Assembly in Malawi is therefore, less protected than his Zambian counterpart since the latter's immunity lasts right through the period of the meeting and not merely when going to, returning from, or in the precincts of, the Assembly. However, the Malawian Member is, unlike his Zambian counterpart, protected from both civil and criminal arrests except in the case of treason, felony or breach of the peace. In Britain, this protection covers both civil and criminal arrests except those for treason, felony and breach of the peace.⁽²⁷²⁾ The immunity of the Members lasts for the duration of a meeting and for forty days before and after a session.⁽²⁷³⁾ Official reports and publications of the Zambian and Malawian Houses are also privileged, as are those of the British Parliament.

Like the House of Commons and the House of Lords in Britain, the National Assembly in Malawi and the House of Chiefs and the National Assembly in Zambia have the power to obtain oral and documentary information from persons and to deal with persons who violate their (the Houses') privileges.⁽²⁷⁴⁾ "As every court of justice", says Coke, "hath laws and customs for its direction, some by the common law, some by the civil law and common law, some by peculiar laws and customs, etc., so the High Court of Parliament sui propriis legibus et consuetudinibus subsistit. It is lex et consuetudo parliamenti that all weighty matters in any Parliament assembled ought to be, adjudged and discussed by the course of the Parliament, and not by the civil, nor yet by the Common laws of this realm used in more inferior courts."⁽²⁷⁵⁾ This passage is, of course, not wholly applicable in defining the powers of the Zambian and Malawian Houses since, as already mentioned above, their powers are based on statute and not on the custom of Parliament. It should also be mentioned that, unlike the British Parliament, Parliament in both Zambia and Malawi does not possess the status of a High court.

51. While a person who has committed a breach of privilege or contempt of the House may be brought before the National Assembly or the House of Chiefs and receive, say, a reprimand from the Speaker or the President (of the House of Chiefs), he cannot be fined or imprisoned by order of the House concerned. Offences against the National Assembly or the House of Chiefs in Zambia or the National Assembly in Malawi or against Members of any of these Houses are tried by the ordinary courts and the necessary punishment imposed. (276)

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266. Cap. 71.
 267. S. 46 (3) and (4).
 268. Cap. 2: 04.
 269. Ss. 3 and 4 N.A. (Powers and Privileges) Ord. (Zambia); S. 46 (3) Constitution of Malawi.
 270. Ss. 5 and 9; S. 46 (3).
 271. S. 46 (3) (Malawi).
 272. The Commons never claimed immunity in these matters. In 1763 the House of Commons resolved that their immunity did not apply to seditious libel, a misdemeanour. The resolution was, however, passed after the Member concerned, John Wilkes, had been released by the King's Bench on grounds of privilege. In 1831 the Committee of Privileges reported that "privilege is not claimable for an indictable offence; This has since been regarded by the House (of Commons) as extending to contempt of Court. Accordingly, in Long Wellesley's Case (1839) - see May, Parliamentary Practice (15th Ed.), p. 82 - the House did not ask for the release of one of its Members who had been committed by the Court of Chancery for taking one of its wards (his daughter) out of the Court's jurisdiction. Note also the case of Captain Ramsay who was detained during the Second World War under Regulation 18 B of the Defence (General) Regulations, 1939, where the Committee of Privileges reported that the preventative detention was not a violation of privilege - see 1939 - 40 H.C. Pap. 164.
 273. For cases in which the privilege was claimed in Britain, see Prior of Melton's Case (1315) 1 Rot. Parl. 61, Speaker Thorpe's Case (1452) 5 Rot. Parl. 239; Ferrer's Case (1543) Tanner, Tudor Constitutional Documents, pp. 580 - 583 and Taswell-Lonsdale, Constitutional History (10th Ed. by Plucconette) p. 280; Smalley's Case (1575) Tanner, pp. 584 - 5; Shirley's Case (1603) 1 Hortsell 107; Gondy v. Duncombe (1847) 1 Exch. 430.
 274. see the National Assembly (Powers and Privileges) Ordinance (Zambia) and the National Assembly (Powers and Privileges) Act (Malawi).
 275. 4 Institutes 15.
 276. For conflict between the Courts and the House of Commons on punishment of offences regarding parliamentary privilege, see e.g. Wade and Phillips, op.cit., 161-3 and the cases there cited.

1.

CHAPTER FOURTEENTHE EXECUTIVE - ITS FUNCTIONS AND POWERSA. THE PRESIDENT

In both Zambia and Malawi all executive power is vested in the President who combines powers similar to those exercised by the President of the United States of America, the British Queen and the British Prime Minister and who is, therefore, relatively speaking, more powerful than any of the three. The President of Zambia or Malawi is more powerful than the President of the United States in that although the latter is, like the former, both Head of State and Head of Government, he is unable, as Head of State, to dissolve or prorogue the legislature or to exercise real control over it,⁽¹⁾ whereas the President of Zambia or Malawi can dissolve or prorogue Parliament at any time.^(1a) Unlike the British Queen, who is a mere constitutional Head of State, acting only on the advice of her Cabinet or Ministers, the President of Zambia or Malawi is an executive President exercising both the powers of Head of State and those of Head of Government. He is more powerful than the British Prime Minister in that he is not only Head of Government but also Head of State. Unlike the British Prime Minister, the President of Zambia or Malawi is not a mere primus inter pares in relation to his Ministers. There is no equality between him and his Ministers. The Ministers are mere subordinate officers of the President.

From what has been said above, it is clear that the Presidents of Zambia and Malawi rank among the most powerful Heads of State in the World. Unless otherwise provided in the Constitution or in an Act of Parliament, in exercising the functions conferred upon him, the President in both Zambia and Malawi, is not obliged to follow advice rendered by any other person or authority.⁽²⁾

1. For powers of the President of the United States, see Schwartz, op.cit., Vol. 11, which is devoted to this subject and is entitled: Powers of the President. See also Tresolini, op.cit., Chap. 7.

1a. See Chapter 12.

2. S. 43 (2) (Zambia); S. 3 (3) (Malawi).

2. This includes advice rendered by the Cabinet. The Cabinet, as will be seen below, is only advisory to the President. This is similar to the position in the United States,⁽³⁾ Uganda,⁽⁴⁾ Kenya,⁽⁵⁾ Botswana⁽⁶⁾ and Tanzania,⁽⁷⁾ for instance, where the Cabinet is also advisory.⁽⁸⁾

The Constitution of Zambia makes no attempt to enumerate the functions of the President. They are found scattered throughout the Constitution while others are found in Acts of Parliament. The Constitution of Malawi, on the other hand, attempts such enumeration under Section 8 (2). However, after mentioning a few functions, the last clause empowers the President:

"generally to exercise all such other functions as are by this Constitution or by any Act of Parliament conferred upon or vested in the President."

Apart from the functions enumerated under section 8(2) of the Constitution, there are, therefore, other functions scattered throughout the Constitution and in Acts of Parliament. In addition to the functions found in the Constitution and in Acts of Parliament the President has, in both Zambia and Malawi, functions that arise from prerogative powers. Every Head of State has powers, particularly in international affairs, which are inherent in his position and could be exercised when necessary.

The most important functions of the President found in the two Constitutions are those of Head of State;⁽⁹⁾ Head of Government;⁽¹⁰⁾ administration of a Government department or departments;⁽¹¹⁾ appointment and removal of Ministers (including the Vice-President in Zambia) and of Junior Ministers;⁽¹²⁾ constitution of the Cabinet,⁽¹³⁾ allocation of departmental responsibilities to Ministers;⁽¹⁴⁾ appointment and removal of judges;⁽¹⁵⁾ appointment and removal of public officers;⁽¹⁶⁾ constitution and abolition of offices;⁽¹⁷⁾ commanding the armed forces and appointing officers of such forces;⁽¹⁸⁾ exercising the prerogative of mercy and appointing members of the Advisory committee in connection with this function;⁽¹⁹⁾ summoning, proroguing and dissolving Parliament;⁽²⁰⁾ assenting to Bills;⁽²¹⁾ addressing the National Assembly or sending messages to it;⁽²²⁾ and enacting regulations.⁽²³⁾

The Constitution of Malawi also specifically mentions that the President has the power to appoint, accredit, receive and recognize ambassadors and other diplomatic representatives and to confer honours.⁽²⁴⁾ In Zambia the power to receive, accredit and recognize ambassadors and other diplomatic representatives is governed by prerogative. The power to appoint Zambia's diplomatic representatives is, however, supplied by the Constitution.⁽²⁵⁾

most of the functions enumerated above have already been discussed. The appointment and removal of Ministers and Junior Ministers, the Cabinet and public officers have been dealt with in the last Chapter. Summoning, prorogation and dissolution of Parliament; assenting to Bills; and addressing of and sending messages to, the National Assembly (and the House of Chiefs in Zambia) have been discussed in Chapter Twelve. The appointment and removal of judges will be dealt with in the next Chapter. This leaves for discussion under this section the functions of Head of State and Government; legislation; commanding the armed forces; exercising the prerogative of mercy, constitution and abolition of offices and those functions which emanate from the exercise of prerogative powers.

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3. Article 11, Section 2, of the Constitution.
 4. See Article 65 (1) and (2) of the Constitution.
 5. S. 72 (1) of the Constitution as amended by the First Schedule to Act No. 23 of 1964.
 6. S. 48 (2) of the Constitution.
 7. S. 12 (1) and (2) of the Constitution.
 8. The provision that in carrying out his functions the President "shall not be obliged to follow advice tendered by any other person or authority" was no doubt derived from Article 3 of the 1960 Constitution of Ghana. In the Constitutions of Zambia and Malawi this wording seems merely to emphasize in clearer terms the meaning of the provision which immediately precedes it in the same section, stating that executive power is vested in the President and that it "shall be exercised by him either directly or through officers subordinate to him" - S. 48 (1) (Zambia) S. 47 (1) (Malawi). The corresponding provision is not qualified or supplemented in the Constitution of Uganda (Art. 65 (1)), Kenya (S. 72 (1) as amended by Act No. 23 of 1964) and Tanzania (where the wording is: "either directly or through persons holding office in the service of the United Republic" - S. 12 (2)). The Constitution of Botswana, on the other hand, has, like those of Zambia and Malawi, the two provisions - S. 48 (2).
 9. S. 31 (Zambia); S. 3 (1) (Malawi).
 10. This is contained in several sections of the two Constitutions.
 11. S. 54 (Malawi). This is not specifically mentioned in the Constitution of Zambia but the provision vesting executive power in the President authorizes him to exercise it personally or through subordinate officers.
 12. Ss. 41 (1) and (2) and 44 (2) and (3) (Zambia); Ss. 49 (1) and (4) and 50 (Malawi).
 13. S. 45 (Zambia); S. 53 (1) (Malawi).
 14. S. 41 (2) (Zambia); S. 54 (Malawi).
 15. Ss. 99 (1) and (2) and 100 (2)-(5) (Zambia); Ss. 63 (1) and (2)-(4) (Malawi).
 16. See e.g. S. 115 (Zambia); S. 37 (Malawi).
 17. S. 56 (Zambia); S. 32 (2) (a) (Malawi).
 18. S. 49 (Zambia); S. 43 (Malawi).
 19. Ss. 53 and 54 (Zambia); Ss. 60 and 61 (Malawi).
 20. Ss. 32-34 (Zambia); Ss. 44-46 (Malawi).
 21. Ss. 71 (Zambia); Ss. 35 (Malawi).
 22. Ss. 75 and 94 (Zambia); S. 37 (Malawi).
 23. This power depends on the Act granting the power.
 24. S. 3 (2) (b) and (c).
 25. S. 115.

1. Head of State and Government,

It has already been mentioned that the President in Zambia and Malawi is both Head of State and Head of Government. Although the two offices are fused in the same person the functions that fall under each are quite distinct. It is, therefore, not difficult to know when the President is exercising power as Head of State and when Head of Government. When he, for instance, dissolves, summons and prorogues Parliament; assents or withholds assent to Bills; constitutes and abolishes offices; appoints Ministers and public officers; confers honours; and accredits, receives and recognizes diplomatic representatives, he does so as Head of State. On the other hand, when he formulates Government policy, selects persons to be appointed as Ministers or public officers or allocates departmental responsibilities to Ministers, he does so as Head of Government.

As Head of State the President is guardian of the nation and the protector of its institutions and integrity.⁽²⁶⁾ As Head of Government he has overall responsibility for all Government activities. The Cabinet and other officers of the State are mere advisers to him. He is accountable to the nation for his own actions and those of his Ministers. This should be contrasted with the position of the British Queen, the President of India or South Africa or other constitutional sovereigns. The Queen is not responsible for the actions of Her Ministers, nor are the Presidents of India and South Africa. A fall of the Government in Britain, India or South Africa does not affect the Queen or the President. In Malawi, as has been seen in Chapter Twelve, a vote of no confidence in the Government would result in a dissolution of Parliament and elections for the President and Members of the National Assembly. In Zambia such a vote may result in a dismissal of the Cabinet by the President or in a dissolution of Parliament and elections for the President and a new Assembly. Because of these implications the President, in both Zambia and Malawi, keeps a close watch on the activities of all sectors of Government.

The President's control over his Government is effected in several ways. He appoints and removes Ministers. He allocates functions to Ministers and can remove such functions from one Minister to another. He appoints some of the public officers personally. Ministers report to him individually and at Cabinet meetings.

26. See below under "The President's Prerogative Powers."

5.

As mentioned in the last Chapter, in both Zambia and Malawi, the President presides at Cabinet meetings although in Zambia he is not part of the Cabinet. In Malawi, on the other hand, the President is a member of the Cabinet. The President, in both countries, can increase his grip on the Government by assuming responsibility of a Government department or departments. Section 54 of the Constitution of Malawi provides that "the President may, by directions in writing assign to himself or any Minister responsibility for any business of the Government, including the administration of any department of the Government." The Constitution of Zambia does not specifically mention this. The President, however, assumes responsibility of departments in terms of Section 48 (1) of the Constitution which provides that "the executive power of the Republic shall vest in the President and, subject to the provisions of this Constitution, shall be exercised by him either directly or through officers subordinate to him." The President can, therefore, instead of exercising his executive power over a department through a Minister, assume it directly. This power to assume departmental responsibilities enables the President, both in Zambia and Malawi, to take over functions from a Minister or Ministers when necessary for good government. (27)

2. Legislative Power.

It was briefly mentioned in Chapter Twelve that the President in Zambia and Malawi has no original legislative powers. Whatever legislative powers the President has are delegated to him by Parliament. Many Acts of Parliament, in both Zambia and Malawi, authorize the President to make regulations.

This constitutional position in Zambia and Malawi also obtains in Botswana, Kenya, and Tanzania, for instance. In all these three countries the President has no original legislative power. This position should be compared with that in the United States of America, France and some African States following the French constitutional precedent, India and Uganda. In the United States of America the President has no original legislative power. His treaty making powers are, however, semi-legislative. (28)

27. In both Zambia and Malawi the President has from time to time taken charge of one or more Ministries.

28. For the treaty power of the President and the Senate, see Schwartz, op.cit., Vol. 11, pp. 117-122, 129-133.

6. The President negotiates treaties and the Senate ratifies them. Once ratified a treaty becomes part of the law of the land. Article VI of the Constitution provides that "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." What makes a treaty supreme law of the land is not, however, its conclusion by the President but its ratification by the Senate. Internally - i.e. in the United States - a treaty stands on a par with an Act of the Congress. It can repeal an earlier Act of Congress inconsistent with it and it can be repealed by a later Act of Congress inconsistent with it.⁽²⁹⁾ In addition to treaties the President can also conclude what are called executive agreements⁽³⁰⁾ with other nations. These agreements are divided into two classes - those concluded on the strength of an Act of the Congress authorizing the President to do so and those concluded without such prior authorization. Executive agreements, unlike treaties, do not require ratification by the Senate. If ratified by the Senate they become indistinguishable from treaties. Agreements that fall under the first class mentioned above have the same legal effect in the United States as ratified treaties.⁽³¹⁾ Those which come under the second class, on the other hand, have no effect on Federal Statutes.⁽³²⁾ State law, however, gives way to such agreements.⁽³³⁾ In this respect, therefore, the United States President can be said to have original legislative power.

Unlike in the United States, treaty-making power in Zambia and Malawi is governed by prerogative as in Britain and most Commonwealth countries.⁽³⁴⁾ The President is⁽³⁶⁾ solely responsible for negotiating⁽³⁵⁾ and ratifying treaties. However, such treaties do not become part of the law of Zambia or Malawi internally unless Parliament so enacts. This is also the position in Britain.⁽³⁷⁾ The President in Zambia and Malawi cannot, therefore, even by treaty, legislate for the country without authorization from Parliament.

In France and all the African States following the French constitutional pattern, the President has original legislative power by decree. All matters on which Parliament may make law are enumerated. Those not included in the enumeration are legislated upon by the President by way of regulation or decree.⁽³⁸⁾

Footnotes 29 to 38 on page 567.

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29. For the legal effect of treaties, see ibid., pp. 122-129; 133-142.
 30. see ibid., pp. 142-143. For a comparison of treaties and Executive Agreements, see pp. 143-151.
 31. Ibid., pp. 156-157.
 32. See United States v. Guy W. Capps, Inc., 204 F. 2d. 655 (4th Cir. 1953) where it was held that an executive agreement concluded on the authority of the President alone, unlike a treaty, could not contravene the provisions of an existing federal statute. The decision was affirmed in the Supreme Court (348 U.S. 296 (1955) on other grounds. "Both reason and authority", writes, Schwartz, "militate against the notion that the President, acting solely on his own authority, can alter an act of Congress merely by entering into an agreement with some other country." - ibid., p. 155.
 33. See United States v. Belmont 301 U.S. 324 (1937), United States v. Pink 315 U.S. 203 (1942). "Plainly the external powers of the United States are to be exercised without regard to state laws or policies." United States v. Belmont, at p. 331.
 34. In Uganda, however, treaty-making powers are derived from the Constitution - Article 74. The President or a person authorized by him negotiates such treaties but the Cabinet must approve and ratify them. Treaties, conventions, agreements or other arrangements relating to armistice, neutrality or peace must, however, be ratified by the National Assembly.
 35. He may, of course, delegate the negotiations to any other person but he remains responsible. This should be contrasted with the position in Britain and other Commonwealth countries with constitutional sovereigns where, although the treaties are concluded in the name of the sovereign, the Government is responsible for their conclusion.
 36. The National Assembly could, of course, discuss and pass resolutions on a treaty but that has nothing to do with ratification.
 37. "At first sight the treaty-making power appears to conflict with the constitutional principle that the Queen by prerogative cannot alter the law of the land, but the provisions of a treaty duly ratified do not by virtue of the treaty alone have the force of municipal law. The assent of Parliament must be obtained and the necessary legislation passed before a court of law can enforce the treaty, should it conflict with the existing law." - Wade and Phillips, op.cit. p.274.
 38. See e.g. Article 37 Constitution of France; Article 44 Constitution of the Ivory Coast; Article 41 Constitution of Gabon. See also Constitutions of other French speaking States in Africa.

6. The President and the Government may, whenever it is necessary to execute a certain programme, ask Parliament for powers to legislate on matters normally falling within its law making powers for a specified period.⁽³⁹⁾ Ordinances made under this power must be laid before the Assembly within a prescribed period for approval.⁽⁴⁰⁾ Failure to do so makes the ordinances lapse. The French President, as was seen in Chapter Twelve, can also assume legislative powers in terms of Article 16 which authorizes him to do so whenever there is a serious and immediate threat to the institutions of the Republic, the independence of the nation, the integrity of its territory or the fulfilment of its international obligations, and the regular functioning of the constitutional public authorities has been interrupted. During that period he legislates to the exclusion of Parliament (although it meets as of right and cannot be dissolved.)⁽⁴¹⁾ This power, with modifications in some cases, is also possessed by the Presidents of some French speaking African States.⁽⁴²⁾

In India the President is authorized by the Constitution to promulgate ordinances when both Houses of Parliament are not in session and he is satisfied that circumstances have arisen which render it necessary for him to take immediate action.⁽⁴³⁾ Such ordinances have the same force and effect as an Act of Parliament.⁽⁴⁴⁾ They are, therefore, not subsidiary legislation. Every such ordinance must, however, be laid before both Houses of Parliament within six weeks of the Houses' re-assembly.⁽⁴⁵⁾ If this is not done the ordinances lapse.⁽⁴⁶⁾ They can, however, be withdrawn by the President at any time and, in any case, after disapproval by both Houses.⁽⁴⁷⁾ If approved by both Houses the ordinances remain law as Acts of Parliament. Provisions in the Constitution of Uganda must have been derived from these provisions of the Constitution of India. The President of Uganda can, if advised by the Cabinet while the National Assembly is not sitting that exceptional circumstances exist which render it necessary for him to take immediate action, promulgate such Ordinances as the circumstances appear to him to require.⁽⁴⁸⁾ This can also be done whenever such circumstances arise during the period when Parliament is dissolved.⁽⁴⁹⁾ The ordinances have the same force and effect as an Act of Parliament.⁽⁵⁰⁾ They must, however, be approved by the National Assembly within six weeks of its re-assembling.⁽⁵¹⁾ The ordinances may be repealed by the President or by Parliament.⁽⁵²⁾

39. See e.g. Article 38 Constitution of France; Article 45 Constitution of the Ivory Coast; Article 42 Constitution of Gabon.
40. See e.g. Article 38 Constitution of France; Article 66 Constitution of Senegal.
41. The powers under article 16 were invoked in 1962 in connection with the Algerian crisis. See, also Pickles, W. "Special Powers in France: Article 16 in Practice" (Public Law, Spring, 1963).
42. See e.g. Article 47 Constitution of Senegal; Article 19 Constitution of the Ivory Coast; Article 19 Constitution of Gabon; Article 15 Constitution of Cameroon; Article 14 Constitution Chad.
43. Article 123 (1) of the Constitution. The ordinances cannot be made on subjects falling outside the legislative competence of Parliament. Article 123 (3).
44. Article 123 (2).
45. Ibid.
46. Ibid.
47. Ibid.
48. Article 64 (1) of the Constitution.
49. Article 64 (2).
50. Article 64 (3).
51. Ibid.
52. Ibid.
53. President Lincoln of the United States personally ordered a military advance in 1862 - Schwartz, op.cit., Vol. 11, p. 217. President Roosevelt mapped the grand strategy of his forces from the White House - ibid. President Truman made the final decision to bomb Japan - ibid. King Hussein of Jordan went to the front with his troops during the Arab - Israel six - day war in 1967.

Subject matter for footnote 53 on page 570 .

3. Commanding the Armed Forces.

That the Head of State should also be the Commander in Chief of the armed forces has become a universal constitutional arrangement. The reason for this is clear. The armed forces are the most effective instrument of power in every country and cannot, therefore, be divorced from the control of the Head of State.

In Zambia and Malawi the President's functions as Commander in chief include determining the operational use of the forces and appointing, removing and promoting the personnel (including the commanding officer). Although in practice the forces are commanded by a commanding officer, assisted by other officers, the President retains real control over them. He can order them to carry out any operation anywhere in or outside the country and there is nothing (53) that prevents him from taking actual command in the field.

4. The Prerogative of Mercy

In most States of the world today the Head of State possesses the power to pardon offenders. (59) The contention by Blackstone that the "power to extend mercy" is one of the great advantages of monarchy over other forms of government and that "in democracies, this power of pardon can never subsist for there nothing higher is acknowledged than the magistrate, who administers the laws," is no longer a valid statement, for the prerogative of mercy now exists in monarchies as well as in republics. (60)

Although it is not necessary for the Head of State to have this power, that it should be included in the Constitution, Constitutions of the new Countries of the Commonwealth contain provisions on this subject. (61) Section 60 of the Constitution of Malawi and Section 54 of the Constitution of Zambia spell out the President's powers of mercy. The powers can be exercised (a) to grant to any person convicted of any offence a pardon, either free or subject to lawful conditions; (62) (b) to grant any person a respite, either indefinite or for a specified period of the execution of any punishment imposed for any offence; (63) (c) to substitute a less severe form of punishment for any offence; (64) (d) to remit the whole or part of any punishment imposed for any offence or of any penalty or forfeiture due to the Government on account of any offence. (65) These powers are the same as those exercised by the Queen through the Home Secretary in Britain except in one respect. It can be seen from the powers enumerated above that the President in Zambia and Malawi (unless it can be argued that the enumeration of the powers above is not exhaustive) has

11. no power to exercise the prerogative of mercy in respect of a person who has not yet been convicted. In Britain, on the other hand, the prerogative can be exercised at any stage - before or after conviction.⁽⁶⁶⁾ It is unlikely that if the power to pardon before conviction had been intended for the President in Zambia or Malawi it was not found necessary to include it in the Constitution. The enumeration of the powers given above appears exhaustive. The wording of the relevant sections is not permissive like that of Article 11, Section 2, of the Constitution of the United States. Article 11, Section 2, states that the President "shall have the Power to grant Reprieves and Pardons for offences against the United States, except in cases of Impeachment." It has been accepted by the courts that these powers can be exercised before or after conviction.⁽⁶⁷⁾

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59. In Switzerland and China the Federal Assembly and the National People's Congress respectively grant amnesties and pardons - Article 35 Constitution of Switzerland; article 27 Constitution of the People's Republic of China. In the Soviet Union the Presidium exercises the powers - Article 49 of the Constitution.
60. Quote by Schwartz, *op.cit.*, Vol. 11, p. 85. Schwartz, in fact, thinks Blackstone was incorrect in his assertion: "In truth, Blackstone's assertion never had any basis other than his extreme desire constantly to recommend a kingly form of government" - Vol. 11, p. 85. For the exercise of the prerogative in the United States, see pp. 85-90.
61. See e.g. the Constitutions of Barbados (S.78); Ghana (Article 50); Jamaica (s.90); Swaziland (S.92); Uganda (Article 73); India (Article 72); Tanzania (S. 22); Botswana (S.54); Trinidad and Tobago (S.80); Sierra Leone (S.70); Kenya (S.88); Malta (S.94); and Mauritius (S.75).
62. S. 54 (a) (Zambia); S. 60 (a) (Malawi).
63. S. 54 (b) (Zambia); S. 60 (b) (Malawi).
64. S. 54 (c) (Zambia); S. 60 (c) (Malawi).
65. S. 54 (d) (Zambia); S. 60 (d) (Malawi).
66. For the exercise of the prerogative power in Britain, see Wade and Phillips, *op.cit.*, pp. 317-319; Marshall G. "Parliament and the Prerogative of Mercy" (1961) *Public Law* 8; Brett, P. "Conditional Pardons and the Commutation of Death Sentences" (20 *M.L.R.* 131).
67. See *Ex parte Garland*, 4 Wall 333, 380 (U.S. 1867). In the same case it was also held that a pardon can only be granted for a completed offence and not for one contemplated or still to be committed.

The reason why the power to pardon an unconvicted offender was not included in the Constitutions of Zambia and Malawi may be traced to the practice in Britain today. Although an offender can be pardoned at any time there, in practice, today, the "prerogative is only exercised by the sovereign after conviction and sentence"(68). The Colonial Office draftsmen apparently, therefore, decided to provide for powers equal to those currently exercised and practised in Britain rather than those possessed by the Crown in theory. Their draft provisions on this subject in the 1964 Constitution of Malawi were included in the present Constitution with only minor alterations(69). The omission of this power is also found in the British granted Constitutions of, for instance, Botswana(70), Kenya(71), Trinidad and Tobago(72), Mauritius(73), Barbados (74), Jamaica(75) and Swaziland(76) and in the self-granted Constitutions of Tanzania(77) and India(78). The Constitutions of Uganda(79), Ghana(80), Sierra Leone(81) and Malta(82) have wording which may be interpreted as including pardons before conviction. While the Constitutions of the countries first given above provide that the President or the Governor-General or the King may "grant to any person convicted of any offence a pardon, either free or subject to lawful conditions", those of the latter countries provide that the President or the Governor-General may "grant to any person concerned in(83) or convicted of any offence a pardon, either free or subject to lawful conditions". The words - i.e. "concerned in" - are not in the Constitutions of the other countries mentioned above. These words seem to cover even pardons before conviction.

68. Wade and Phillips, *op. cit.*, p. 317.

69. See S. 72(1) of the 1964 Constitution.

70. S. 54.

71. S. 88.

72. S. 70.

73. S. 75.

74. S. 78.

75. S. 90.

76. S. 92.

77. S. 22.

78. Article 72.

79. Article 73.

80. Article 50.

81. S. 70.

82. S. 94.

83. Italics supplied.

It has been mentioned above that a Head of State does not require a provision in the Constitution to exercise the prerogative of mercy. Can the President in Zambia and Malawi, therefore, use his residual power to pardon unconvicted persons in spite of the absence of such power and the enumeration of the other powers in the Constitution? The answer should be in the negative, which would be in accordance with the law laid down in Attorney-General v. De Keyser's Royal Hotel.⁽³⁴⁾ It was decided in that case that where a statute covered the field of a prerogative, the power could only be exercised in accordance with the statute. The President in Zambia and Malawi cannot, therefore, exercise powers of mercy which are not found in the constitutional provisions spelling out his powers on this subject.

If the interpretation given above of the powers of mercy of the President in Zambia and Malawi is correct, then the President is seriously handicapped. He cannot, for instance, grant amnesty to persons who have committed offences, say against the State, but have repented and are seeking reconciliation. Such persons would have to be charged and convicted first before he could pardon them. Alternatively, Parliament could be persuaded to enact a law freeing such persons from liability or the Director of Public Prosecutions could be persuaded not to prosecute.

In Britain the prerogative of mercy is exercised on the recommendation of the Home Secretary. In fact, the Home Secretary decides and the Queen only gives the decision the formality it requires before becoming effective. Before making the recommendation the Home Secretary may refer the petition for mercy to the courts to advise him on the whole case or on specific points.⁽³⁵⁾ In the older members of the Commonwealth the Governor-General exercises the power on the advice of his Council - i.e. the Cabinet. In the United States the President may consult others if necessary but he is not under any obligation to do so. In the new Commonwealth countries the traditional practice of the Governor or Governor-General exercising the power in Council has been abandoned in most cases in favour of the Governor-General or the President or the King acting on the advice of a committee of specially appointed persons.

34. (1920) A.C. 508. The prerogative is, however, merely suspended while the statute is in operation. As soon as the statute is repealed it becomes resuscitated.

35. See The Queen v. Podola (1960) 1 Q.B. 325.

14. The Committees bear different names e.g. "Advisory Committee on the Prerogative of Mercy,"⁽⁸⁶⁾ "Committee on the Prerogative of Mercy,"⁽⁸⁷⁾ "Pardons Committee on Prerogative of Mercy,"⁽⁸⁸⁾ and "Commission on the Prerogative of Mercy!"⁽⁸⁹⁾ Membership of the Committees differ from country to country. In Jamaica and Barbados the Governor-General acts on the advice of the British Privy Council⁽⁹⁰⁾ while in Ghana the President acts on the advice of the Council of State.⁽⁹¹⁾

In Zambia and Malawi the Advisory Committee on the Prerogative of Mercy consists of such persons as may be appointed by the President.⁽⁹²⁾ Different persons may be appointed for cases arising from ordinary courts and those arising from courts-martial.⁽⁹³⁾ The Members are appointed at the President's pleasure.⁽⁹⁴⁾ The President refers to the Committee all those cases in which he may want to exercise the prerogative of mercy.⁽⁹⁵⁾ All death sentences must be referred to the Committee.⁽⁹⁶⁾ In Zambia it is specifically provided that whenever the President is present at the Committee's meetings he presides.⁽⁹⁷⁾

86. See e.g. S.55 Constitution of Zambia; S.61 Constitution of Malawi; S.55 Constitution of Botswana; Article 74 Constitution of Uganda; S. 71 Constitution of Sierra Leone; S. 89 Constitution of Kenya; S. 71 Constitution of Trinidad and Tobago.

87. See e.g. S. 92 (2) Constitution of Swaziland.

88. See e.g. S. 87 of the 1966 Constitution of Lesotho.

89. See e.g. S. 75 Constitution of Mauritius.

90. S. 78 Constitution of Barbados; Ss. 90 and 91 Constitution of Jamaica.

91. Article 50 of the Constitution. The Council of States consists of the Prime Minister; the Speaker of the National Assembly; the Leader of the Opposition; the President of the National House of Chiefs; not more than four persons each of whom has held the office of President of the Republic under the Constitution, or Chief Justice or Speaker of the National Assembly, or Prime Minister and left office not under disreputable or other circumstances importing moral turpitude; and not more than eight other persons, at least two of whom should be women, and not more than four of whom should be Chiefs - Article (53 (1).

92. S. 55 (1) (Zambia); S. 61 (1) (Malawi).

93. S. 55 (2) (Zambia); S. 61 (2) (Malawi).

94. S. 55 (3) (Zambia); S. 61 (3) (Malawi).

95. S. 55 (4) and (5) (Zambia); S. 61 (4) and (5) (Malawi).

96. S. 55 (4) (Zambia); S. 61 (4) (Malawi).

97. S. 55 (6) (Zambia).

15. This implies that the Committee could meet in the absence of the President. There is no provision in the Constitution of Malawi on the attendance or non-attendance of the President at the Committee's meetings.

A comparison of the Committees in Zambia and Malawi, on the one hand, and those in some Commonwealth countries, on the other, shows some significant differences. In both Zambia and Malawi the number of members who comprise the Committee is not prescribed. This differs from the position in, for instance, Trinidad and Tobago,⁽⁹⁸⁾ Botswana,⁽⁹⁹⁾ Kenya,⁽¹⁰⁰⁾ Mauritius,⁽¹⁰¹⁾ Uganda⁽¹⁰²⁾ and Swaziland.⁽¹⁰³⁾ In Trinidad and Tobago the maximum membership is six.⁽¹⁰⁴⁾ In Botswana and Mauritius the membership is three.⁽¹⁰⁵⁾ In Kenya the minimum membership is five and the maximum is seven.⁽¹⁰⁶⁾ In Uganda the Committee has ten members.⁽¹⁰⁷⁾ Secondly, the President in Zambia and Malawi is not restricted in his choice of members. There is nothing in the constitution preventing the President from appointing Ministers, Members of the National Assembly or other persons to the Committee. This absence of restriction is also found in Mauritius where the Governor-General appoints the Members in his own discretion and not on the advice of the Prime Minister.⁽¹⁰⁸⁾ In Trinidad and Tobago the six members include a Minister (who acts as Chairman) and the Attorney-General.⁽¹⁰⁹⁾ In Botswana the three members are a Minister or the Vice-President, the Attorney-General and a medical practitioner qualified to practise in Botswana.⁽¹¹⁰⁾ In Kenya the membership includes the Minister responsible for justice (who acts as Chairman), at least two other Ministers, the Attorney-General and a medical practitioner qualified to practise in Kenya.⁽¹¹¹⁾ In Uganda the Attorney-General is the Chairman of the Committee and the other nine members are chosen from persons who are not Members of the National Assembly or of a District Council.⁽¹¹²⁾ The position in Zambia and Malawi should also be contrasted with the position in Sierra Leone where the entire committee is composed of Cabinet Ministers appointed by the Governor-General on the advice of the Prime Minister.

98. See S.71 of the Constitution.
99. See S.55 (1) of the Constitution.
100. See S. 89 of the Constitution as amended by Act 28 of 1964.
101. See S. 75 (2) of the Constitution.
102. See Article 75 of the Constitution.
103. See S. 92 (2) of the Constitution.
104. See S. 71 of the Constitution.
105. See S.55 (1) of the Constitution.
106. See S. 89 as amended by Act 28 of 1964.
107. See Article 75 of the Constitution.
108. S. 75 (2) of the Constitution.
109. S. 71 of the Constitution.
110. S. 55 (1) of the Constitution.
111. S. 89 of the Constitution.
112. Article 75 of the Constitution.

5. Creation and Abolition of Offices

In both Zambia and Malawi the President may constitute and abolish offices. This power is, however, subject to the provisions of the Constitution or those of an Act of Parliament to the contrary. A similar situation exists in Britain where the Queen constitutes and abolishes offices⁽¹¹³⁾ subject to limitation of that power by Acts of Parliament. This position may be compared with that obtaining in the United States. There, Congress establishes and abolishes offices and the President, with the consent of the Senate, appoints the personnel to such offices.⁽¹¹⁴⁾ Madison defined the position as follows: "The powers relative to offices are partly legislative and partly executive. The Legislature creates the office, defines the powers, limits its duration, and annexes a compensation. This done, the legislative power ceases. They ought to have nothing to do with designating the man to fill the office!"⁽¹¹⁵⁾ Article 11, Section 2, however, empowers Congress to vest by law "the Appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law or in the Heads of Departments." Congress has used this provision to empower the President to create offices despite doubt on the legality of such delegation.⁽¹¹⁶⁾ This has been done both in wartime and in peacetime. Although the President cannot create offices he can appoint personal emissaries to undertake certain missions for him or commissions to advise him in his work. Such appointments do not amount to offices in terms of the Constitution.⁽¹¹⁷⁾

113. "The King of Great Britain is emphatically and truly styled the fountain of honour. He not only appoints to all offices, but can create offices" - Hamilton, The Federalist, No. 69, as quoted in Schwartz, op.cit., Vol. 11, p. 40.

114. Article 11, Section 2, of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law."

115. Quoted in Myers v. United States, 272 U.S. 52, 128 (1926).

116. "Though there is no judicial authority on the subject, one wonders - whether such delegation to the President should be upheld in time of peace. The establishment of 'offices' is assigned by the Constitution to the Congress. To permit such power to be transferred to the extent done in the Recovery Act is to countenance a concentration of the power both to create and appoint offices in the executive." - Schwartz, op.cit., Vol. 11, p. 42. The National Recovery Industrial Act of 1933 authorized the President to create the Federal Emergency Administration of Public Works to be headed by an Administrator and to "establish such agencies..to appoint without regard to the civil service laws, such officers and employees..as he may find necessary" and to prescribe their authority, duties and compensation - See ibid., pp. 42-43, 45-47. See also pp. 235-238.

17. The President of the United States cannot abolish an office that was not created by him. He can only abolish those offices created by him on delegation by Congress. Those created by Congress can only be abolished by Congress. The same position applies in Zambia and Malawi where an office is created by the Constitution or by an Act of Parliament. Because the President has no legislative power to repeal provisions of the Constitution or of an Act of Parliament, he cannot abolish such office. He can, however, dismiss the holders of such office subject to the provisions of the Constitution or the Act. In the United States it has been accepted that although the President requires the consent of the Senate in making appointments to offices (except in those cases where he has been given full powers), in dismissing the appointees he does not require the concurrence of the Senate. (113)

6. Prerogative Powers.

Blackstone defined prerogative as that "special pre-eminence which the King hath, over and above all other persons, and out of the ordinary course of the Common law, in right of his legal right." (117a) The stubborn Stuart King took an extreme view of their prerogative powers. In an address from the throne in 1609 James I declared:

"If you will consider the attributes to God, you shall see how they agree in the person of the King. God hath power to create or destroy, make or unmake at his pleasure, to give life or send death, to judge all and to be judged nor accountable to none. Kings make and unmake their subjects; they have power of raising and casting down; of life and death, and make of their subjects like men at the chess" (119)

The Stuarts saw in royal prerogative a means of doing whatever they wanted to do. The Courts, although more restrained than the Stuarts, accepted prerogative power as being very wide and almost without limits. In the celebrated case of Rex v. Hampden, popularly known as the Case of Ship Money, the Court described prerogative power as power "innate in the person of an absolute King, and in the person of the Kings of England, the majestical right, and power of a free monarch." (120)

117. In Employers Group of Motor Freight Carriers v. National War Labour Board, 143 F. 2nd 145 D.C.Cir. 1944, a case concerning a presidentially created War Agency, it was held that because the Board was only advisory, membership of it was not an office under the Constitution.

117a. 1 Blackstone, Commentaries, 232.

118. See the leading cases of Myers v. United States, 272 U.S. 52, 117 (1926); Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935); Weiner v. United States 357 U.S. 349, 351 (1958). See also Schwartz, op.cit., Vol. 11, pp. 47-56.

119. Quoted in Bowen, The Lion and the Throne, (1937), p. 313 but quoted here as in Schwartz, ibid., p. 56-57.

The destruction of the pretensions of the Stuarts and the evolution of the monarchy into the constitutional position it is today has shaped prerogative power in Britain from an instrument of tyranny into one of smooth government, exercised, except in very few exceptions (such as the choice of the Prime Minister) by the government of the day. The Powers based on prerogative are still, however, very intensive. What has only changed is the mode of exercising them. Ministers exercise them on behalf of the Queen.

Although of monarchical origin and nature, prerogative power has found its way into the presidential system of Government. Even the Americans who tried to cut themselves completely from anything resembling monarchical powers have found it impossible to deny the President as Head of State, certain inherent powers which he can exercise under certain circumstances.⁽¹²¹⁾

The inadequacy of written Constitutions necessitate the acceptance of prerogative power in order to deal with aspects of government not covered in the Constitution or Acts of Parliament. In Zambia and Malawi, unlike in the United States where the Constitution is silent on prerogative, the President is specifically authorized to exercise prerogative powers. Section 18 of the Zambia Independence Order provides: "Where under any law in force in Northern Rhodesia immediately before the commencement of this Order any prerogative or privileges are vested in Her Majesty those prerogatives and privileges, shall from the commencement of this Order, vest in the President." Section 10 of the Republic of Malawi Constitution Act states: "Where under any existing law, constitutional custom or convention any prerogatives or privileges are vested in Her Majesty in respect of Malawi or in the Governor-General on behalf of Her Majesty, they shall with effect from the appointed day vest in the President and, subject to the provisions of the Constitution or any other law, the President shall have power to do all things necessary for the exercise thereof." These two sections were intended to enable the President to exercise powers not enumerated in the Constitution but which on the date of coming into operation of the Constitution could be exercised as prerogative.

120. 3 Howell's State Trials 326, 1017, 1099 (1637).

121. See Schwartz, op.cit. Vol. 11., pp.56-35 for an excellent discussion of the prerogative powers of the President of the United States. See also the inconclusive but far-reaching case of Youngstown Steel & Tube Co. v. Sawyer, 343 U.S.579 (1952) popularly known as the Steel Seizure Case. See Schwartz, ibid., for an analysis of the case and references to it in connection with various aspects of prerogative power.

19. It was clear that the field of prerogative power in Zambia and Malawi would be small because most of what are prerogative powers in Britain had been included in the Constitution or were already contained in other legislation. These included such important matters as summoning, prorogation and dissolution of Parliament; assenting or withholding of assent to Bills; exercise of the power of mercy; appointment of Ministers, etc. It was also clear, however, that the Constitution and other legislation could not cover all the powers which the Head of State might exercise under certain conditions. Prerogative power was, therefore, necessary.

One important field in which powers of the President, in both Zambia and Malawi, are not spelt out or fully spelt out in the Constitution, is foreign affairs. While the Constitution of Malawi mentions accreditation, receiving and recognition of ambassadors and other diplomatic officers as some of the functions of the President,⁽¹²²⁾ that of Zambia does not. Both constitutions say nothing about the President's power to conclude treaties and to declare war. These powers are left to prerogative and come under Sections 18 and 10 respectively as prerogative powers exercised by the Queen before the coming into operation of the Constitution.

While foreign affairs may be the most fertile ground in Zambia and Malawi for the President's exercise of prerogative powers, this does not mean the powers do not exist in respect of internal affairs.⁽¹²³⁾ It has not been found easy to map out the extent of prerogative power. Its content cannot be precisely defined. To return to Blackstone's definition, prerogative is "that special pre-eminence which the King hath, over and above all other persons, and out of the ordinary course of the common law, in right of his legal dignity."⁽¹²⁴⁾ The definition no doubt contains more than what is inherent in the position of a presidential Head of State of a country with a written Constitution but one important thing emerges from it which applies even to Presidents - i. e. the pre-eminence of the Head of State over and above all other persons in the country. As Head of State the President in Zambia and Malawi is the embodiment of the nation. He is its protector and the guardian of its Constitution, institutions and territorial independence and integrity.

122. S. 3 (2) (b) and (c).

123. For instance, the conferring of honours in Zambia is a matter of prerogative.

124. 1 Blackstone, Commentaries, 232.

40. In some Constitutions these responsibilities are specially entrusted to him⁽¹²⁵⁾ but it is not necessary to do so specifically. The President assumes them by virtue of his office. It is common practice to include in the oath of the Head of State that he shall preserve and defend the Constitution.⁽¹²⁶⁾

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The role of the President as guardian and protector of the nation and its institutions and territory gives him, in both Zambia and Malawi (as in other countries), some powers and functions which cannot be precisely enumerated or defined. It remains to be seen whether the present Presidents of Zambia and Malawi or future Presidents will follow the Alexander Hamilton and Theodore Roosevelt or the William Taft theories of presidential power. Hamilton wrote: "The general doctrine of our Constitution (the United States Constitution)...is, that the EXECUTIVE POWER of the nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instruments"⁽¹²⁷⁾ This means that the President can do anything for the good of the nation, which is not prohibited by the Constitution. Theodore Roosevelt advocated the "stewardship theory," which he later explained as follows:-

"My view was that (the President) was a steward of the people bound actively and affirmatively to do all he could for the people...I decline to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it"⁽¹²⁸⁾

125. See e.g. the Constitutions of France (Art. 5); Chad (Art. 5); Mauritania (Art. 11); Senegal (Art. 36); and Cameroon (Art. 3).

126. The oath taken by the President of Malawi, for instance, reads: "I....., do solemnly swear that I will well and truly perform the functions of the high office of President of the Republic of Malawi, and that I will preserve and defend the Constitution, and that I will do right to all manner of people according to law without fear or favour, affection or ill-will. So Help me God," - S.17 (1) (Malawi). Italics supplied.

127. 7 Works of Alexander Hamilton, 76 (Hamilton Ed. 1851) as quoted by Schwartz, op.cit., Vol. 11, p. 59.

128. Roosevelt, T. Autobiography, 372 (1914), as quoted, ibid.

21. He argued that "Executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress under its constitutional powers" and that it was not only the President's right " but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws!"⁽¹²⁹⁾ This theory was followed by later Presidents, particularly Wilson, Franklin Roosevelt, Truman and Kennedy. It was, however, attacked by Theodore Roosevelt's immediate successor, William Taft. He rejected the views that the President had any "undefined residuum of power which he can exercise because it seems to him to be in the public interest!"⁽¹³⁰⁾ He described Roosevelt's theory as "unsafe"⁽¹³¹⁾ and put his own view in these words: "The true view of the Executive function is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise!"⁽¹³²⁾

The debate is still not settled in the United States. " A Century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other!"⁽¹³³⁾ However, once it is accepted that the President is the embodiment of the nation and the protector and guardian of its Constitution, institutions, independence and territorial integrity, it becomes difficult to disagree with the theories of Hamilton and Roosevelt. An ill-defined, though obviously limited, residuum of power is necessary to discharge these responsibilities. Holders of the office may differ in their use of the residuum but it remains. Locke's statement: "He that will look into the history of England will find that prerogative was always largest in the hands of our wisest and best princes,"⁽¹³⁴⁾ has *mutatis mutandis* proved to be true of the United States and should equally be so in Zambia and Malawi. Such Presidents as Washington, Lincoln, Wilson and Franklin Roosevelt employed the residual powers without hesitation. President Kaunda (of Zambia) and President Banda (of Malawi), because they are hailed as the liberators of their respective countries, can use wide powers without much opposition, if any, in the country.

129. *Ibid.*

130. Taft, *Our Chief Magistrate and His Powers* (1925 Ed.), p. 140, as quoted, *ibid.*

131. p. 144, as quoted, *ibid.*

132. pp. 139 - 140 as quoted, *ibid.*

133. Justice Jackson in the *Steel Seizure Case*, at 634-5.

134. Locke, *Two Treatises of Government*, ss. 160.

22, In conclusion it should be pointed out that although all executive power is vested in the President to be exercised by him (subject to the provisions of the Constitution) directly or through officers subordinate to him,⁽¹³⁵⁾ both the Constitution of Zambia and that of Malawi specifically state that "nothing...shall prevent Parliament from conferring⁽¹³⁶⁾ functions on persons or authorities other than the President!"

B. THE VICE - PRESIDENT, THE PRESIDENTIAL COMMISSION AND THE PRESIDENTIAL COUNCIL.

"His superfluous Excellency" was the title suggested for the Vice-President of the United States by one delegate at the Philadelphia Convention after another delegate had suggested that the President should be addressed as "His Excellency".⁽¹³⁷⁾ This was because some of the delegates had argued against the inclusion of such an office and the office, when finally included, had not been given any specific functions while the President functioned,^(137a) except that the holder of the office would be the President of the Senate.⁽¹³⁸⁾ The President is, therefore, not under any obligation to give him work. In practice, however, the President uses the services of the Vice-President extensively, particularly in foreign affairs, but he cannot make his head of any of the State Departments which under the Constitution are supposed to be under officers styled "Heads of Departments" -- i.e., the eight Secretaries, the Attorney-General and the Postmaster-General.

The position of the Vice-President in Zambia is quite different. The Constitution provides that "the Vice-President shall be the principal assistant of the President in the discharge of his executive functions and the leader of government business in the National Assembly" and that he "shall be responsible, under the directions of the President for such business of the Government of Zambia (including the administration of any department of Government) as the President may assign to him."⁽¹⁴¹⁾

135. S. 46 (1) (Zambia); S. 47 (1) (Malawi).

136. S. 46 (3) (Zambia); S. 47 (2) (Malawi).

137. Corwin, The President: Office and Powers 4th Ed. 1957) p.60, as quoted by Schwartz, op.cit., Vol. 11, p.15. From that day, the Vice-Presidency has been a constant thorn of disparagement - ibid.

137a. While Article 3c, Section 1, of the Constitution provided that "in case of the Removal of the President from office, or of his Death, Resignation, or Inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President..", no function other than that of presidency of the Senate was given to the Vice-President while the President functioned.

138. Article 1, Section 3, of the Constitution.

141. S. 50 (Zambia).

23. The President is obliged to use the services of the Vice-President, but he is not obliged to give him a Government department.⁽¹⁴²⁾ Because he is the leader of government business in the National Assembly, the Vice-President commands great influence both in the Assembly and in the Cabinet.

In addition to the functions mentioned above, the Vice-President has the duty/^{to}act for the President when the latter is ill or absent.⁽¹⁴³⁾ If the President dies, resigns or is removed he succeeds to the office.⁽¹⁴⁴⁾ This cannot, however, be taken as part of the Vice-President's functions since at that stage he ceases to be Vice-President. The Vice-President's powers when acting for the President depend on the President and the circumstances that make him unable to perform his functions. Where the President intends to be absent from the country or becomes ill without losing the ability to assign his functions to the Vice-President, the latter does not automatically act in his stead. Before acting he must be authorized by the President in writing to exercise such functions of the office as are specified in the document of authorization.⁽¹⁴⁵⁾ Any exercise of a power outside the document of authorization would be unconstitutional. The fact that his powers depend

on authorization makes them uncertain. They vary according to what the President is prepared to authorize on each occasion. It is probable that in such delegation the Vice-President would rarely, if ever, be authorized to dissolve, prorogue or summon Parliament or to dismiss or appoint Ministers. A question that may be asked is whether the President is under obligation whenever he goes abroad or is ill to authorize the Vice-President to perform some of his functions. The wording of the relevant provision seems not to place him under obligation.

142. While Rouben Kamanga was Vice-President he was not assigned a department. He assisted the President in his many functions. When Kapwepwe assumed the Vice-Presidency, he was also made responsible for finance - see Constitution (Amendment)(No.2) Act, 1969 (Act No. 2 of 1969) enacted to make reference to "Minister" under Chapter VIII of the Constitution (concerning Finance) apply also to the Vice President. After Kapwepwe had tendered his resignation from the Vice-Presidency and all other responsibilities, financial responsibility was given to another Minister but the President did not accept Kapwepwe's resignation from the Vice-Presidency.

143. S. 30 (Malawi).

144. S. 37.

145. S. 35. The authorization comes to an end when the President revokes it - S. 30 (3).

24. It reads: "Whenever the President is absent from Zambia or considers it desirable so to do by reason of illness or any other cause he may by directions in writing, authorize the Vice-President to discharge such of the functions of the office of President as he may specify."⁽¹⁴⁶⁾ Even if this wording is permissive, in practice it is unthinkable that the President could go abroad for a long period without authorizing the Vice-President to act for him. It would lead to paralysis of the administration. Another aspect to be looked at is whether the President, since the word "may" is used, could authorize a Minister and not the Vice-President to act for him. It is submitted that the President cannot do so unless the Vice-President is unable to act. Once the President decides to authorize a person to act for him, that person must be the Vice-President unless he is unable to act because of absence, illness or any other cause. Section 30 (2) which deals with the assumption of the President's duties by the Vice-President while the former is incapacitated in such a manner as to be unable to authorize the latter, makes the position clear by stating that a Minister would only assume the functions of the President if there is no Vice-President or if the Vice - President is absent from Zambia or is by reason of physical or mental infirmity unable to perform the functions.

The position that the Vice-President only exercises those functions which he has been authorized to perform during the President's absence or illness also obtains in Kenya⁽¹⁴⁷⁾ and Botswana⁽¹⁴⁸⁾ where the wording of the relevant provisions of the Constitution is similar to that of the Constitution of Zambia. In the United States the authorization is complicated by the uncertainty on whether the Vice-President, in terms of the Constitution, acts for the President or assumes the office of President. This has resulted in anomalous situations. During President Wilson's illness his family and entourage exercised his functions.⁽¹⁴⁹⁾ During the illnesses of President Garfield and President Eisenhower the Cabinet and not the Vice-President acted in each case.⁽¹⁵⁰⁾ In 1950 President Eisenhower, however, concluded an agreement with his Vice-President to enable him to act during the former's absence or illness.⁽¹⁵¹⁾

146. S.30 (1)(Zambia). Italics supplied.

147. S.33 D. of the Constitution as introduced by the Constitution of Kenya (Amendment No. 2) Act, 1960 (Act No. 45 of 1960).

148. S. 37 (1) of the Constitution.

149. Schwartz, *op.cit.*, Vol. 11, p. 10.

150. *Ibid.*

151. *Ibid.*, p. 19.

25. President Kennedy made a similar agreement with his Vice-President in 1961.⁽¹⁵²⁾ These agreements assured the President that the Vice-President would only be acting and not succeeding to the office of President.

The Zambian provision could also be compared with the provisions of the Constitutions of Uganda, Tanzania and India. The Constitutions of Uganda and Tanzania do not state that the President should authorize the Vice-President before the latter can act. They merely provide that if the President is absent or ill, his functions shall be performed by the Vice-President.⁽¹⁵³⁾ This can only mean that the Vice-President assumes all the powers in that case. The Constitution of India, on the other hand, makes it clear that the Vice-President when acting exercises all the powers of the President. Article 65 (2) states that "when the President is unable to discharge his functions owing to absence or illness or any other cause, the Vice-President shall discharge his functions until the date on which the President resumes his duties." Section 65 (3) then adds that "the Vice-President shall, during, and in respect of, the period while he is so acting as, or discharging the functions of, President, have all the powers and immunities of the President and be entitled to such emoluments, allowances and privileges...." This position also obtains in other countries with constitutional Presidents whose functions, when absent or ill, are performed by the Vice-President or Speaker of the Senate or House of Assembly. Further, it obtains in those Commonwealth countries where the Queen is represented by Governor-Generals. In such countries the Chief Justice usually acts as Governor-General during the absence of the Governor-General and while so acting exercises all the powers of the Governor-General. The reason why there is no limitation on the powers of a constitutional Vice-President or Acting Governor-General is no doubt that he acts on the advice of the Government.

The third situation in which the Vice-President in Zambia may act for the President is when the latter is physically or mentally too ill to assign his duties in writing to him. In that case the Vice-President assumes the President's functions without being authorized by the President but on the strength of a certificate issued by the Chief Justice stating that the President is unable to discharge his functions because of mental or physical infirmity.⁽¹⁵⁴⁾ The certificate of the Chief Justice under this provision should be distinguished from that which he issues to remove the President from office after the Board has reported that he (the President) has become so incapacitated as to be unable to continue in office. That certificate terminates the President's term of office.

40. The consideration under consideration here is a temporary one whose effect comes to an end as soon as the President (155) notifies his intention to assume the functions of his office.

While the Vice-President, when authorized to act by the President, exercises only those powers specified in the document of authorization, if he assumes functions without authorization by the President but on the strength of a certificate issued by the Chief Justice, he exercises all powers of the President except that of dissolving Parliament. (156)

As pointed out in the previous Chapter, the functions which in Zambia are performed by the Vice-President while the President is absent or ill are, in Malawi, performed by a Presidential Commission or Presidential Council, depending on the circumstances. If the President is ill or is absent from the Republic or is prevented by any other cause from carrying out his functions, he may, by directions in writing, appoint three Cabinet Ministers to act as a Presidential Commission and perform such functions of the office of (156) President as may be specified in the document of authorization. The Commission cannot be given the power to dissolve Parliament. (156a) Except that in Malawi the authorization is made to a Presidential Commission and not to a Vice-President, the wording of the provision is similar to that of the Constitution of Zambia. The President in Malawi seems equally not to be under any obligation to appoint a Presidential Commission since the word "may" is used. (157) In practice, of course, the President normally appoints a Presidential Commission. The President appoints the Chairman of the Commission and may specify that the chairmanship shall rotate between the Members. (158) The Commission may act by any two of its members. (159) Its functions and existence come to an end when the President resumes his functions. (160) The acts of the Commission could, however, be revoked or varied by the President within thirty days of his resumption of duty. (161) The President can, therefore, annul for instance, assent given to a Bill by the Commission. The President of Zambia cannot do the same to acts of his Vice-President.

If the office of President becomes vacant while a Commission is functioning, it continues until a Presidential Council is appointed. (162) During that period, it is not clear, whether the Commission's powers continue to be based on the document of authorization or on Section 15 (6) of the Constitution which states:

Footnotes 152 to 162 found on page 2587.

152. Ibid., Note 86 of Chapter 9. For a critical comment on the erroneous interpretation given to the Constitution that the Vice-President succeeds to the office, see pp. 17 - 25.
153. Article 79 (2) Constitution of Uganda; S.9 (1) Constitution of Tanzania. In Tanzania the First Vice-President in his absence the Second Vice-President and in the absence of both, a Minister, acts.
154. S.38 (2)(a) and (4)(a). If the Vice-President is unable to act because of absence or illness, the Cabinet appoints one of their number - S.38 (2)(b). Although it is not specifically so mentioned the appointment of such Minister must no doubt come to an end as soon as the Vice - President is able to act. Compare this with the position in Tanzania where the Constitution specifically provides that a Minister other than the First Vice-President exercises functions until a Minister with prior right is able to act. This means that the Vice-President or any other Minister must give way to the First Vice-President; any other Minister must give way to the Second Vice-President in the absence of the First Vice-President; and any other Minister appointed by the Cabinet must give way to the Minister appointed by the President to act because of the inability to do so of the First and Second Vice-President and who was not able to do so at the time of his appointment, enabling the Cabinet thereby to appoint one of their number - S.9 (1) of the Constitution.
155. S.38 (3) and (4) (Zambia).
156. S. 38 (2). Where a Minister acts, in addition to being unable to dissolve Parliament, he cannot revoke the appointment of the Vice-President. See Chapter 13 for the reasons why the powers of the Vice - President and such a Minister are limited. Identical limitations are found in the Constitution of Botswana - S. 37 (2).
- 156 . S. 15 (1) (Malawi).
- 156a. S. 15 (7).
157. See above for a discussion on the Zambian provision.
158. S. 15 (2) (Malawi).
159. S. 15 (3).
160. S. 15 (4).
161. S. 15 (5).
162. S. 15 (6).

28. "Where a Presidential Commission has been appointed and is still in being when a vacancy occurs in the office of President, then until a Presidential Council is appointed, the Presidential Commission shall continue to exercise the functions of the office of President.

In accordance with the provisions of this Section! If it continues to function on the document of authorization, then those functions not included in the document would not be performed until after the appointment of a Presidential Council. If its authorization terminates with the death or resignation of the President,⁽¹⁶³⁾ then until the appointment of a Presidential Council it would exercise all the powers of the President except that of dissolution of Parliament, which is prohibited by the Constitution.⁽¹⁶⁴⁾

The Malawi Presidential Commission has fewer powers than the Presidential Commission which existed under the 1960 Constitution of Ghana.⁽¹⁶⁵⁾ The Ghana Presidential Commission did not derive its powers from a document of authorization. It was a permanent body that assumed all the powers of the President when that became necessary. Unlike the Malawi Commission, however, the Ghana Commission acted on the advice of the Cabinet. It, therefore, had the powers of a constitutional Head of State. In this respect it can be said that it was weaker than the Malawi Commission which has the powers of an executive President in those matters which fall within its competence. Like the Malawi Commission, the Ghana Commission acted by any two of its members.

Where the President is unable to perform his functions and is unable to appoint a Presidential Commission, a Presidential Council⁽¹⁶⁶⁾ assumes the functions.⁽¹⁶⁷⁾ The powers of a Presidential Council are not limited like those of a Presidential Commission. A Presidential Council also assumes the duties of the office of President if the President dies or resigns or is rejected by the electorate in a bid for re-election, until a new President takes over.⁽¹⁶⁸⁾

163. Under the law of agency, an agent's authority terminates, when the principal dies or changes his status in such a manner that his principalship terminates. There are a few exceptions.

164. S. 15 (7) (Malawi).

165. S. 13 of the 1960 Constitution as amended by S. 8 of the Constitution (Amendment) Act, 1964 (Act, 224 of 1964).

166. For the appointment and composition of a Presidential Council, see Chapter 13.

167. S. 13 (1) (Malawi).

168. S. 13 (2).

Walter Bagehot described the English Cabinet as "a combining Committee - a hyphen which joins, a buckle which fastens, the legislative part of the State to the executive part of the State. In its origin it belongs to the one, in its functions it belongs to the other."⁽¹⁶⁹⁾ This can also be said of the Cabinet in Zambia and Malawi. It connects the National Assembly and the officers in the various Government departments who together with the President and the Cabinet make up the executive in its wider sense.

The Cabinet in both Zambia and Malawi is responsible for advising the President with respect to the policy of the Government and in such other matters as may be referred to it by the President.⁽¹⁷⁰⁾ This is the work of the Cabinet in most countries. Even in those States where the Head of State is not also the Head of Government, the work of the Cabinet is still defined as that of advising the sovereign. Wade and Phillips write about the English Cabinet as follows: "The Cabinet consists of those Ministers whom the Prime Minister invites to join him in tendering advice to the sovereign on the government of the country."⁽¹⁷¹⁾ In Malaysia where the Yang di-Pertuan Agong (Head of State) is like the English Queen, not the Head of Government, he appoints "a Juflah Mentri (Cabinet of Ministers) to advise him in the exercise of his functions."⁽¹⁷²⁾ In India where also the Head of State (the President) is not the Head of Government the Cabinet's function is "to aid and advise the President in the exercise of his functions."⁽¹⁷³⁾

The difference between the role of the Cabinet of a Head of State who is not also the Head of the Government and that of the Cabinet of a Head of State who is also the Head of Government is, therefore, in the effect given to the advice. In countries with Heads of State who are not also Heads of Government the advice tendered by the Cabinet cannot be rejected. The Head of State must follow the advice except in a few cases. It is not necessary to mention in the Constitution that the President or the Governor-General shall act on the advice of the Cabinet if the relationship between the Head of State and the Government is to be based largely on the British pattern.

169. The English Constitution (London, Kegan, Paul, 1896) p. 14.

170. S. 51 (1) (Zambia); S. 53 (2) (Malawi).

171. Op. cit., p. 191.

172. Article 43 (1) of the Constitution.

173. Article 74 (1) of the Constitution. See also the Constitutions of Sierra Leone (S. 60.); Mauritius (S. 61 (2)); Canada (S. 11); and Australia (S. 62).

30. The Constitution of India does not state that the President must act on the advice of the Cabinet but in practice he does follow its advice. The Constitutions of Malaysia,⁽¹⁷⁴⁾ Sierra Leone,⁽¹⁷⁵⁾ Malta,⁽¹⁷⁶⁾ Canada,⁽¹⁷⁷⁾ Australia⁽¹⁷⁸⁾ and South Africa, on the other hand, specifically mention that the sovereign shall act on the advice of the Cabinet except in certain cases.⁽¹⁷⁹⁾ In Zambia and Malawi (and other countries with executive Heads of State) the Cabinet is "advisory" in the true sense of the word. In performing his functions the President in Zambia and Malawi is not obliged to follow advice tendered by any other person.⁽¹⁸⁰⁾ This includes advice tendered by the Cabinet.

The weak position of an advisory Cabinet is best illustrated by an incident (perhaps apocryphal) at a meeting of the United States Cabinet. After all the Ministers had voted against his draft Emancipation Proclamation, President Lincoln is reported to have said: "Seven against; one for. They ayos gave it".⁽¹⁸¹⁾ The position of the Cabinet in Zambia and Malawi is not, however, as weak as that of the United States. While in Zambia and Malawi the Constitution provides that "the Cabinet shall be responsible for advising the President with respect to the policies⁽¹⁸²⁾ of the Government and with respect to such other matters as may be referred to it by the President,"⁽¹⁸²⁾ that of the United States merely provides that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective offices."⁽¹⁸⁴⁾ This "appears to contemplate only that the President is to consult each department head separately and individually⁽¹⁸⁵⁾ and solely as to matters relating to his respective office."

174. Article 40 (1).

175. S. 64.

176. S. 64 (1).

177. S. 13.

178. S. 63.

178a. S. 16.

179. E.G. The Governor-General may refuse to dissolve Parliament under certain circumstances.

180. S. 48 (2) (Zambia); S. 3 (3) (Malawi).

181. Schwartz, *op.cit.* Vol. 11, p. 39.

182. The Constitution of Zambia uses "policy".

183. S. 51 (1) (Zambia); S. 53 (2) (Malawi).

184. Article 11, Section 2, of the Constitution.

185. Schwartz, *op.cit.* Vol. 11, p. 38. "If this provision had been literally complied with, the development of the Cabinet as a collegiate executive body could not have taken place" - *ibid.*

31. Constitutionally, this places Ministers in the United States in almost the same position as Permanent Secretaries in Zambia and Malawi. In practice, however, the President and the Ministers operate on Cabinet lines and this has been the case since the days of George Washington, the first President.⁽¹⁸⁶⁾ The Cabinet has, however, less responsibility than those of Zambia and Malawi. The Cabinet in Zambia and Malawi is specifically entrusted by the Constitution with the responsibility of advising the President on Government policy. The President cannot act without consulting the Cabinet or receiving advice from it. On the other hand, because it is specifically entrusted with the task of advising the President in all matters of policy, the Cabinet cannot escape from being part and parcel of Government policy. The Cabinet in Zambia and Malawi is, therefore, accountable not only to the President but also to the National Assembly⁽¹⁸⁷⁾ and the nation. In the United States the President can dispense with the advice of the Cabinet, if he so wishes. Ministers are responsible only to the President and not to the Congress or the nation although they may be required to give evidence before Congressional committees from time to time. "The members of the Cabinet are merely the instruments by which the policy of their chief is carried out. They are not accountable to the Congress, but only to the President, their master; they must obey him or retire."⁽¹⁸⁸⁾ Only the President is responsible to the Congress and the nation for all the policies of the Government. This relationship between the President and his Cabinet prompted Bryce to write: "An American administration resembles not so much the Cabinets of England and France as the group of Ministers who surround the Czar or the Sultan or who executed the bidding of a Roman Emperor like Constantine or Justinian."⁽¹⁸⁹⁾

186. "From the very beginning....the President has gone beyond the bare organic language and constituted the Cabinet as a collective organ, both for consultative purposes and to give effect to his position as chief of the executive branch. Regular meetings of the Cabinet were initiated by the first President and have ever since remained a salient feature of the executive process" - *ibid* pp.38-39. For a discussion of the Cabinet in the United States, see *ibid.*, pp. 38-40.

187. If a Minister (or the Cabinet as a whole) fails to discharge his functions to the President, the President may dismiss him. If a Minister (or the Cabinet) fails to discharge his responsibilities to the Assembly or the nation, the Assembly may dismiss him through a vote of no confidence.

188. Schwartz, *op.cit.*, Vol. 11, p. 39.

189. I Bryce, *The American Commonwealth*, (1917 Ed.) p.94.

32. This cannot be said of the Cabinet in Zambia and Malawi. The President cannot easily reject its advice since it bears most of the criticism levelled against the Government. Ministers answer for Government policy both in the National Assembly and to the nation. They do so collectively and individually. The President cannot, therefore, very often reject the Cabinet's advice, force his own measures against their will, and then ask them to defend the measures and bear whatever criticism is levelled against the Government.

The power of the President to reject the advice of the Cabinet is, in both Zambia and Malawi, further curtailed in practice by the fact that a crisis ensuing from such rejection could result in the President's term of office being cut short by new elections. In the United States the President could dismiss his Cabinet without his term of office being affected. The whole Cabinet could also resign on its own without affecting the President's term of office. The Congress cannot pass a vote of no confidence in the President for dismissal or resignation of his cabinet. In Zambia resignation or dismissal of the entire Cabinet as such does not automatically result in a dissolution of Parliament and new elections for the President and the National Assembly. This could, however, be brought about by the National Assembly passing a vote of no confidence in the Government. In Malawi it has been seen in Chapter Twelve that in such event the President must dissolve Parliament within three days of the vote.⁽¹⁹⁰⁾ With regard to Zambia it has been mentioned that although the Constitution does not state that Parliament must be dissolved after such a vote, practice as copied from Britain would make dissolution of Parliament inevitable.⁽¹⁹¹⁾

In both Zambia and Malawi the Cabinet operates on the same pattern as the British Cabinet and Cabinets of other Commonwealth countries. Cabinet meetings are held frequently. At these meetings the Ministers discuss policies of the Government, legislation to be introduced and other matters. Ministers, it has been seen in Chapter Twelve, are responsible for introducing all Bills initiated by the Government in the National Assembly. This should be contrasted with the position in the United States where Ministers cannot introduce legislation in either House of Congress. In both Zambia and Malawi the Cabinet can set up as many committees as it finds necessary to facilitate its handling of certain matters. Senior civil servants can be included in such committees to give the Ministers expert advice.

departments allocated them by the President. Occasionally a Minister without Portfolio may be appointed to handle such matters as the President may from time to time assign to him. Some Ministers are assisted in their departments, by one or more Junior Ministers or Parliamentary Secretaries.⁽¹⁹²⁾ Most Ministries in both countries bear the familiar names that are also found in other countries, e.g. Foreign Affairs; Justice; Home or Internal Affairs; Information; Agriculture; Finance; Commerce and Industry; Education; Local Government; Labour; Transport; Mines. Occasionally some odd Ministries have been created. An example of such Ministries is Zambia's Ministry of National Guidance.⁽¹⁹³⁾ Unlike in the United States where the number of departments is limited and the names are specified by a law of Congress, in Zambia and Malawi there is no limit to the number of departments that may be created and their names are not governed by law. In Zambia, however, the number of Ministers is limited to fourteen⁽¹⁹⁴⁾ but scores of departments could be created to be manned by the fourteen Minister. The President, in both Zambia and Malawi, can create and abolish Ministries at any time. Ministers can also be moved from one Ministry to another.

190. S. 45(4) (Malawi). See also Chapter 12. 191. See Chapter 12.

192. S. 51 (3) (Zambia); S. 49 (3) (Malawi).

193. This Ministry has been a subject of much criticism because of the vagueness of its functions.

194. S. 44 (1) (Zambia).

34. D. THE SECRETARY TO THE CABINET AND THE SECRETARY-GENERAL
TO THE GOVERNMENT

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In Malawi the Secretary to the Cabinet is in charge of the Cabinet office.⁽¹⁹⁵⁾ He is responsible, in accordance with such instructions as may be given by the President, for arranging the business for, and keeping the minutes of, the Cabinet and for conveying the decisions of the Cabinet to the appropriate persons or authorities.⁽¹⁹⁶⁾ The President could entrust other functions to him.⁽¹⁹⁷⁾ The Secretary - General to the Government of Zambia is also in charge of the Cabinet office and is responsible, in accordance with such instructions as may be given by the President, for arranging the business for, and keeping the minutes of, the Cabinet and for conveying the decisions of the Cabinet to the appropriate persons and authorities.⁽¹⁹⁸⁾ In addition to these functions the Secretary-General has the important function of securing the general efficiency of the public service.⁽¹⁹⁹⁾ He is, therefore, head of the civil service. This important function necessitated the appointment of a senior Cabinet Minister - Mr. Mwanakatwe - to the post after its creation. It can be seen that the Secretary - General combines the functions of a Secretary to the Cabinet and those which would normally fall under a Minister of the Public Service. The President could also entrust other functions to him.⁽²⁰⁰⁾ It is too early at the time of writing to say whether this innovation - a departure from the general pattern in the Commonwealth - will prove more efficient.

195. S. 55 (2) (Malawi).

196. Ibid.

197. Ibid. For functions of Secretaries to the Cabinet in other Commonwealth countries, see e.g., S.19 Constitution of Tanzania; Article 20 (2) Constitution of Singapore; S.35 (2) Constitution of Kenya; S.70 (2) Constitution of Mauritius.

198. S. 47 (3) (b) (Zambia) as amended by S. 2 of Act 1 of 1969.

199. S. 47 (3) (a).

200. S. 47 (3) (c).

The Attorney-General is, in both Zambia and Malawi, the principal legal adviser to the Government.⁽²⁰¹⁾ Occasionally he may appear in the superior courts on behalf of the State, particularly in important civil cases. In certain circumstances he may issue directives to the Director of Public Prosecutions.⁽²⁰²⁾

F. THE DIRECTOR OF PUBLIC PROSECUTIONS.

The Director of Public Prosecutions is, in both Zambia and Malawi, the principal prosecutor. He has the power (a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence; (b) to take over and continue proceedings that have been instituted or undertaken by himself or any other person or authority; (c) to discontinue at any stage before judgment is delivered any proceedings instituted by himself or any other person or authority.⁽²⁰³⁾ The powers under (b) and (c) are conferred exclusively on the Director although where proceedings have been instituted by a private person or authority that private person or authority may withdraw them.⁽²⁰⁴⁾ Such withdrawal can, of course, only be done while the private person is still the prosecutor and not after the proceedings have been taken over by the Director of Public Prosecutions. It should be noted that the Director is concerned only with criminal cases.

In performing his functions the Director is assisted by a host of subordinate prosecutors who act on his general or special instructions.⁽²⁰⁵⁾ The Constitution of Zambia specifically mentions that the Director of Public Prosecutions may be represented by a private practitioner.⁽²⁰⁶⁾ The Constitution of Malawi says nothing about this but in practice the position is the same as that in Zambia. It does not require a provision in the Constitution to enable the Attorney-General or the Director of Public Prosecutions to retain the services of private practitioners.

201. S. 52 (1)(Zambia); S.55 (1)(Malawi). This is also the case in other countries - see the Constitutions of Singapore (Art. 19 (7)); Uganda (Art. 35 (2)); India (Art. 76 (2) and (3)); Trinidad and Tobago (s.62); Botswana (S.52 (2)); Kenya (S. 36 (2)).

202. See below under "The Director of Public Prosecutions".

203. S. 53 (2)(a)-(c) (Zambia); S. 53 (2)(a)-(c)(Malawi).

204. S. 53 (4)(Zambia); S. 53 (4)(Malawi).

205. S. 53 (3) (Zambia); S. 53 (3) (Malawi).

206. S. 53 (3)(Zambia).

36. In Zambia the independence of the Director of Public Prosecutions in performing his functions is guaranteed by the Constitution. Section 53 (6) provides that "in the exercise of the powers conferred on him....., the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority". This means that no one, from the President downwards, can order him to prosecute or not to prosecute or to prosecute in a certain manner or to substitute one type of charge for another. This also prohibits the Director from seeking advice on whether to prosecute or not. The only occasion when he is permitted and required to seek advice on whether to prosecute or not is when he thinks, in his own judgment, that a case involves general considerations of public policy. In that case he must bring the matter to the notice of the Attorney - General and act in accordance with instructions of the latter.⁽²⁰⁷⁾ If the Director does not think the case involves public policy the Attorney-General (or any other person) cannot intervene as that would amount to controlling him.

The Malawi Director of Public Prosecutions does not enjoy the independence his counterpart in Zambia has. In exercising his functions he is "at all times...subject to the general or special directions of the Attorney-General."⁽²⁰⁸⁾ If the Attorney-General is not a Minister, "the Minister for the time being responsible for the administration of justice may at any time require such case or class of case as he may specify to be submitted to him for the purpose of giving a direction as to whether or not criminal proceedings be instituted or discontinued."⁽²⁰⁹⁾ This greatly fetters the powers of the Director. Not only is he subject to the directions of the Attorney-General but also to those of the Minister of Justice if the two posts are not held by the same person. He may be told to prosecute where he did not want to prosecute; not to prosecute where he wanted to prosecute; or to discontinue proceedings he had already begun and wanted to reach the judgment stage.

The position in Zambia is obviously preferable to that in Malawi. It (the position) cannot be easily abused for political or other reasons. The Director is the sole judge of whether to prosecute or not in Zambia. Even in those instances where he is required to refer a case to the Attorney-General he is the sole judge on whether such reference is necessary. The Malawi position, while not being abused at all at present, is open to such abuse by an unscrupulous politician holding the office of Minister of Justice.

207. S. 53 (6) (Zambia).

37. Control of the Director by an Attorney-General who is not a politician is less objectionable. It is, in fact, the practice in several countries in the Commonwealth.

The independence enjoyed by the Zambian Director of Public Prosecutions is also enjoyed by those, for instance, of Sierra Leone,²¹⁰ Mauritius,⁽²¹¹⁾ Jamaica⁽²¹²⁾ and Barbados.⁽²¹³⁾ In all these countries, however, there is no proviso in the Constitution requiring the Director to submit cases which involve general considerations of public policy to the Attorney-General. In Kenya,⁽²¹⁴⁾ Botswana,⁽²¹⁵⁾ Trinidad and Tobago,⁽²¹⁶⁾ and Malta,⁽²¹⁷⁾ where the work done by the Director of Public Prosecutions in Zambia is performed by an Attorney-General who is a civil servant, a provision also exists in the Constitution of each that the Attorney-General shall not be subject to the control or direction of any person or authority in performing his functions. None of these Constitutions, however, has a proviso that matters involving general considerations of public policy must be submitted to another authority. The position in Malawi is partially found in Uganda where the Director is "subject to the direction and control of the Attorney-General."⁽²¹⁸⁾

208. S.53 (6) (Malawi). This was first introduced after the Cabinet crisis of 1964 - see Act. No. 1 of 1964.

209. Ibid.

210. S. 73 (6) of the Constitution.

211. S. 72 (6) of the Constitution.

212. S. 94 (6) of the Constitution.

213. S. 79 (5) of the Constitution.

214. S. 36 (7) of the Constitution.

215. S. 52 (7) of the Constitution.

216. S. 62 (4) of the Constitution.

217. S. 92 (3) of the Constitution.

218. Article 71 (5) of the Constitution.

Although the provisions of the Constitution of Zambia concerning the functions of the Auditor-General are more detailed than those of the Constitution of Malawi, the functions of the two officers are the same - i.e. to audit and report on the public accounts of the Republic and of such other public authorities and bodies as may be prescribed by Parliament.⁽²¹⁹⁾ The Auditor-General and his staff have access to all records of Government departments and public authorities and bodies pertaining to finance in compiling the report.⁽²²⁰⁾ The auditing exercise must be done at least once every year.⁽²²¹⁾ In Malawi the Auditor-General's report is submitted to the Minister for the time being responsible for finance.⁽²²²⁾ The Minister must lay such report before the National Assembly not later than the first meeting of the Assembly after receipt of the report.⁽²²³⁾ In Zambia the report is submitted to the President who must, not later than seven days after the first sitting of the National Assembly following the receipt of the report, cause it to be laid before the Assembly.⁽²²⁴⁾ If the President defaults in laying the report, the Auditor-General will then submit it to the Speaker or the Deputy Speaker (if the Speaker is not performing his functions at the time).⁽²²⁵⁾ The speaker or the Deputy Speaker must then cause the report to be laid before the Assembly.⁽²²⁶⁾

In exercising his functions the Auditor-General is not subject to the direction or control of any other person or authority.⁽²²⁷⁾ This independence is necessary if the Auditor-General is to execute his functions without favour and efficiently. In Zambia his position is strengthened by the fact that his tenure of office is specially safeguarded.⁽²²⁸⁾ Constitutions of other Commonwealth countries also provide that the Auditor-General shall not be subject to the control of any person or authority in the exercise of his functions. Instances in this respect are the Constitutions of Tanzania,⁽²²⁹⁾ Uganda,⁽²³⁰⁾ Botswana,⁽²³¹⁾ Kenya,⁽²³²⁾ Malta,⁽²³³⁾ Mauritius,⁽²³⁴⁾ Trinidad and Tobago⁽²³⁵⁾ and Sierra Leone.⁽²³⁶⁾ Even in those Commonwealth countries where no provision is included in the Constitution on the functions of the Auditor-General, he is never interfered with in his work.

It is not necessary to deal at length with the functions of Permanent Secretaries and other officers who are part of the Executive. In both Zambia and Malawi Permanent Secretaries are the chief administrative officers of departments, coming immediately below the Minister and his Assistant Minister or Ministers. They are the chief advisers of their respective Ministers. Without them Ministers would find it impossible to run their departments effectively and efficiently. A Permanent Secretary is usually a public officer of long standing in the department while his Minister may have little knowledge of the working of the department. A Permanent Secretary could be made to supervise two or more departments while one department could be placed under the supervision of two or more Permanent Secretaries.⁽²³⁷⁾

With regard to the myriad of other officers below Permanent Secretaries, their functions, depending on their departments, are similar to those performed by like officers in other countries.

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219. S.113 (2) and (6) (Zambia); S.35 (2) and (3) (Malawi).
 220. S.113 (3) (Zambia). The Constitution of Malawi does not specifically mention this.
 221. S.113 (4) (Zambia); S.95 (4) (Malawi).
 222. S. 35 (4) (Malawi).
 223. Ibid.
 224. S.113 (4) (Zambia).
 225. Ibid.
 226. Ibid.
 227. S. 113 (6) (Zambia); S.35 (5) (Malawi).
 228. See last Chapter.
 229. S. 73 (4).
 230. Article 99 (4).
 231. S. 126 (5).
 232. S. 123 (7).
 233. S. 111 (7).
 234. S. 110 (4).
 235. S. 90 (5).
 236. S. 92 (4).
 237. For the functions of Permanent Secretaries in Malawi, See S. 57 (Malawi). The Constitution of Zambia has no such provision but the functions are the same.

CHAPTER FIFTEENTHE JUDICIARY - 1.INTRODUCTION

A High Court and magistrates courts were established in both Northern Rhodesia and Nyasaland soon after the introduction of European administration in the two territories. These courts had jurisdiction over persons of all races. African chiefs, however, continued to administer justice among their people. At first they had no official recognition to do this although the Administration did not interfere. Later, however, official recognition was accorded. Native courts were established in both territories as part of the policy of indirect rule.⁽¹⁾ This created two systems of courts. One catered for all races and administered mainly the common law of England, equity and statutory law enacted in the territory or in the United Kingdom but extending to the territory. The other catered only for Africans and administered mainly African customary law.

When the two territories attained independence the two systems of courts were retained. No intention was expressed to abolish the African courts. Instead steps were taken, particularly in Malawi, to re-organize them and increase their jurisdiction. As a result of the re-organization and increase of jurisdiction the newly created Regional Courts in Malawi can now impose the death penalty.

Although the differences between the two systems continue to be based mainly on the law administered by, and the persons subject to the jurisdiction of, each system, in Malawi these differences have been considerably narrowed, for some traditional courts now have the jurisdiction to try persons of all races and offences under most statutes, including all offences under the Penal Code.

To distinguish it from the "Traditional System" of courts, the other system of courts sometimes referred to as the "European System", will be referred to in this and the next Chapters as the "Ordinary System". This Chapter will deal with the Ordinary System of Courts only. The other System will be dealt with in the next Chapter.

1. See Chapter 5.

The Courts may also impose sentences of corporal punishment, or any other punishment permitted by law including ^{an order} to pay compensation or to keep the peace.⁽²⁷⁷⁾

Courts of the Third Grade in Malawi have no appellate jurisdiction but those of Zambia can have appellate jurisdiction conferred upon them if there is no local appellate court in the area to deal with appeals from local courts in the area.⁽²⁷⁸⁾

Courts of the Third Class or Grade also have jurisdiction to hold preliminary inquiries into offences to be tried by the High Court.⁽²⁷⁹⁾

v. Courts of the Fourth Class.

Courts of this class were abolished in Malawi and, therefore, remain only in Zambia. The Courts have no civil jurisdiction whatsoever⁽²⁸⁰⁾ although they had such jurisdiction in Malawi.⁽²⁸¹⁾ Unless otherwise provided by the Penal Code Courts of the Fourth Class may try any offence specified in the Fifth Schedule to the Code or in any other law and impose sentences of imprisonment not exceeding three months; fines not exceeding K50; or corporal punishment (on juveniles only) not exceeding eight strokes.⁽²⁸²⁾ A Court of the Fourth Class may have appellate jurisdiction conferred upon it if there is no local appeal court in the area.⁽²⁸³⁾ The Courts are also empowered to hold preliminary inquiries into offences to be tried before the High Court.⁽²⁸⁴⁾

Practice and Procedure

Procedure and practice in subordinate courts of all classes or grades resemble closely that obtaining in the county courts and magistrates' courts of England. In Zambia the Subordinate Courts Ordinance and the Criminal Procedure and Evidence Code and the rules and orders made under these laws⁽²⁸⁵⁾ govern practice and procedure but where they are silent the court is required to follow in substantial conformity "the law and practice for the time being observed in England in the county courts and courts of summary jurisdiction."⁽²⁸⁶⁾

As in Zambia, in Malawi practice and procedure are governed by the Courts Act and the Criminal Procedure and Evidence Code and the rules and orders made thereunder,⁽²⁸⁷⁾ but neither the Courts Act, the Code nor the rules provide whether in the event of there being no local rule of practice or procedure, the court should follow the law and procedure for the time being obtaining in England. The jury system which applies in trials before the High Court does not apply in trials before subordinate courts.

In both Zambia and Malawi parties may appear before subordinate courts in person or by a legal practitioner or practitioners.

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277. S. 14 (4) ibid. read with S. 25 (3), (5), (6) (8) and (9) of the Penal Code.
278. Such arrangements are, however, very few.
279. S. 200 Criminal Procedure and Evidence Code (Zambia); S. 262 Criminal Procedure and Evidence Code (Malawi).
280. S. 21A Subordinate Courts Ordinance.
281. See S. 59 (3) and (4) of the original Courts Ordinance (No. 1 of 1950).
282. S. 7 (2) Criminal Procedure and Evidence Code.
283. Such appeals can only be of criminal cases since a Court of the Fourth Class has no civil jurisdiction.
284. S. 200 Criminal Procedure and Evidence Code (Zambia); S. 262 Criminal Procedure and Evidence Code (Malawi).
285. The Chief Justice is empowered by S. 61 of the Subordinate Courts Ordinance to make rules of procedure and practice - see the Subordinate Courts (Civil Jurisdiction) Rules - G/N 212 of 1940 as amended by later notices and instruments.
286. S. 13 Subordinate Courts Rules - G/N 95/1950 as amended by later notices. The Chief Justice is empowered to make rules of practice and procedure - S. 59 Courts Act.
287. See Subordinate Courts Rules - G/N 59/ 1958 as amended by later notices The Chief Justice is empowered to make rules of practice and procedure - S. 59 Courts Act.
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THE JUDICIARY -IITHE TRADITIONAL SYSTEM OF COURTS

Native courts were first established in Northern Rhodesia (Zambia) in 1929 by the Native Courts Ordinance(1) of that year as part of the system of indirect rule. In 1933 similar courts were established in Nyasaland (Malawi) by the Native Courts Ordinance(2) of the same year, again as part of the system of indirect rule. In 1936 the Northern Rhodesian Native Courts Ordinance was replaced by the Native Courts Ordinance 1936(3). At the same time similar legislation was enacted for Barotseland(3a) which had not been covered by the 1929 legislation.

Amendments to the legislation were made from time to time, including that which altered the name of the courts in Nyasaland to "African Courts". In 1962 the name of the Nyasaland courts was again changed to "Local Courts"(4). The Local Courts (Amendment) Act 1969⁽⁵⁾ once more altered the name to "Traditional Courts."

At present native courts in Zambia are based on the Local Courts Act 1966⁽⁶⁾. This Act changed the name of the courts to "Local Courts". Until then they were called "Native Courts"⁽⁷⁾. In Malawi traditional courts are established in terms of the Traditional Courts Act(8).

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1. No. 33 of 1929.
 2. No. 14 of 1933.
 3. No. 10 of 1936.
 - 3a. Barotse Native Courts Ordinance (No. 26 of 1936).
 4. See the Local Courts Ordinance (No.8 of 1962).
 5. Act No. 31 of 1969.
 6. Act No. 20 of 1966. Before the enactment of this Act, the courts were based on two ordinances - the Native Courts Ordinance and the Barotse Native Courts Ordinance.
 7. See the replaced ordinances.
 8. Cap 3.03.

ESTABLISHMENT

In Zambia local courts are established or recognized by the Minister, as he may think fit, by a warrant under his hand(9). The Minister prescribes the grade of each court and such court exercises only jurisdiction permitted for such grade(10).

In Malawi traditional courts are established by the Minister, as he thinks fit, by warrant under his hand(11).

A court established in Zambia or in Malawi may be abolished or suspended from operation by the Minister(12).

HIERARCHY

In Zambia local courts are divided into two grades - A and B. Grade A courts have higher jurisdiction than Grade B courts. When establishing a court the Minister must prescribe in the warrant the grade to which it belongs.(13)

In Malawi traditional courts are divided into the following classes - (a) Traditional Courts, which are sub-divided into Grade B Courts; Grade A Courts; Grade AI Courts and Urban Courts, (b) Traditional Appeal Courts; (c) Regional Traditional Courts; and (d) the National Traditional Appeal Court. Grade B and Grade A Courts have the same general jurisdiction (14)

14. See, e.g., note on the establishment and areas of jurisdiction of traditional courts put as a preface to subsidiary legislation bound together with the Act and the Traditional Courts (Criminal Jurisdiction) Order, G/N 185/1967 as amended by later notices.

9. S. 4 (1) Local Courts Act, 1966.

10. S.4 (3).

11. Ss. 3 (1) and 33 (1) Traditional Courts Act,

12. S. 4 (3) Local Courts Act, Ss. 3 (5) and 33 (7) Traditional Courts

13. See S. 5 (2) Local Courts Act Rule 3 of the Local Courts Rules 1966 made under the Local Courts Act S. 1. No. 293 of 1966.

and are lower than Urban Courts or Grade A.1 Courts but the latter courts have no power over the former. Urban courts and Grade A.1 courts have generally the same jurisdiction⁽¹⁵⁾ and are of the same status as the Traditional Appeal courts although the former do not hear appeals. Traditional Appeal Courts hear appeals from Grade B and Grade A Courts but not from Grade A.1 or Urban Courts. Appeals from Traditional Appeal Courts, Grade A.1 Courts and Urban Courts lie to the National Appeal Court. The Regional Traditional Courts, although only courts of first instance, have higher jurisdiction than all the other courts except the National Traditional Appeal Court. Their jurisdiction is equivalent to that of the High Court of the Ordinary System of Courts. Appeals from Regional Traditional Courts go to the National Traditional Appeal Court, which is the highest traditional court in the land.

Regional Traditional Courts and the National Traditional Appeal Court were established in Malawi only in 1970. This followed Dr. Banda's dissatisfaction with the way judges of the High Court were dismissing cases on technicalities.⁽¹⁶⁾ The then Local Courts Act was amended⁽¹⁷⁾ to empower local courts to try all forms of criminal offences including those punishable by death. Regional Courts were created to exercise this extended jurisdiction and the National Traditional Appeal Court was created to hear appeals from these courts.

CONSTITUTION

In Zambia a local court consists "of a president either sitting alone or with such number of other members as may be prescribed by the Minister in the court warrant."⁽¹⁸⁾ Every local court in Zambia may use assessors.⁽¹⁹⁾

(15) - See *ibid.*

(16) - See *Hansard* (Unrevised Edition) 28 July, 1970, pp. 498-502.

(17) - See Act 31 of 1961.

(18) - S.6(1) Local Courts Act.

(19) - S.60 Local Courts Act.

In Malawi a traditional court comprises a chairman and such other members as may be appointed.⁽²⁰⁾ Courts of first instance (excluding Regional Traditional Courts) sit with at least one assessor unless the Minister by order in writing addressed to the particular court directs that it may, at the discretion of the chairman, sit without any assessor for the hearing of such cases or classes of case as may be specified in such order.⁽²¹⁾ The Minister may also direct that no member of a court other than the chairman shall sit on such court except in the absence of the chairman and on such conditions as may be laid down in the order.⁽²²⁾

The present membership of a Regional Court is five - the chairman and four others. The National Traditional Appeal Court has the same membership. The membership may, however, be varied from time to time.

APPOINTMENT OF MEMBERS

In Zambia the president and members of a local court are appointed by the Judicial Service Commission.

Section 72 of the Constitution of Malawi empowers Parliament to prescribe that the power to appoint chairmen and members of traditional courts shall vest in the President in terms of that Section. If Parliament did this, the President would be required before making any such appointments, to consult the Judicial Service Commission. The President would also be able to delegate the power to make such appointments to the Judicial Service Commission. No law to this effect has yet been enacted and accordingly appointments to the office of chairman or member of a traditional court are still the responsibility of the Minister administering the Traditional Courts Act.⁽²³⁾

(20) - Ss. 4(1) and 33(2) Traditional Courts Act.

(21) - S.4(1) and (4)(a).

(22) - S.4(4) (b) and (c).

(23) - Ss. 4(1) and 33(2) Traditional Courts Act.

QUALIFICATIONS OF MEMBERS

Neither the Zambian law nor the Malawian law lays down the qualifications appointees to local courts or traditional courts should possess. In Malawi, however, although no qualifications are laid down in the Act, it has become the practice at least to appoint as chairman persons who have received legal training(24). In the case of Regional Courts and the National Traditional Appeal Court a composition which includes persons versed in traditional law and persons versed in European law has been adopted. A Regional Court, for instance, comprises three chiefs, a barrister and a chairman of a traditional court. Explaining his reasons for adopting this form of composition, Dr. Banda said:

"I felt that the new Traditional Court should be so composed that within it, there could be those who steeped in the Malawi law and the Malawi sense of justice and those who have or had acquired some knowledge at least of the other kind of sense of justice. To achieve this aim, I felt that the best way was to appoint some of the experienced traditional rulers, some of the existing traditional court chairmen trained at Mpemba in this country and some of the barristers trained overseas. In this way, I felt at least we could effect a marriage -- a loose marriage of convenience, if you like -- between the Malawi sense of justice and the other kind of sense of justice."(25)

Because of the unlimited jurisdiction the Regional Courts have (including jurisdiction to impose the death penalty), it is essential to appoint chiefs and chairmen of traditional courts of long experience and high competence and barristers who would qualify for judgeship of the High Court. The Government

24. Chairmen, members and other personnel of traditional courts are trained at Mpemba Law School, specially opened for this purpose.

25. Hansard (Unrevised Edition) 28 July, 1970, p.501.

acknowledges this fact. Introducing the second reading of the Local Courts (Amendment) Bill, the Minister of Finance, Information and Tourism (A.K.Banda) said: "The Government recognizes that as far as the more serious criminal offences are concerned, every effort must be made to ensure that the Local Courts before which these cases come, must be composed of persons with the requisite degree of maturity, knowledge and experience to be able to judge the cases fairly, efficiently and impartially."⁽²⁶⁾

REMOVAL OF MEMBERS

In Zambia the power to suspend, discipline, or terminate the appointment of, any member of a local court is vested in the Judicial Service Commission⁽²⁷⁾ acting in the name and on behalf of the President.

As in the case of appointment, although the Constitution of Malawi authorizes Parliament to vest in the President the removal of persons from the offices of chairman or member of a subordinate court (including traditional courts),⁽²⁸⁾ this has not been done with regard to traditional courts.⁽²⁹⁾ Such investiture would enable the President to delegate the removal of chairmen and members of traditional courts to the Judicial Service Commission or to exercise the power after consultation of the Commission as required by the Constitution.⁽³⁰⁾ It would also automatically invest the Judicial Service Commission with disciplinary control over these office holders.⁽³¹⁾ At present the power to remove or discipline chairmen and members of traditional courts is in the hands of the Minister responsible for

(26) - Ibid (Revised Edition) 12 - 21 November, 1969 p.57.

(27) - S.2(2) Local Courts Act read with S.105 of the Constitution of Zambia.

(28) - S.72(1) and (5)(c) Constitution of Malawi.

(29) - The Chairmen and Members of traditional courts are appointed by the Minister of Justice who at present happens to be the President.

(30) - S.72(2) and (3).

(31) - S.72(4). Such power would, of course, be exercised subject to general or special directions of the President.

traditional courts.⁽³²⁾ The Minister may exercise the power if a member has abused his office or is unworthy or incapable of exercising the same justly or for any other sufficient reason.⁽³³⁾

In both Zambia and Malawi members of local courts or traditional courts are not as well protected as judges of the High Court or the Appellate Court respectively. Not only are they removable for the specified reasons but also for any other sufficient reason. Because the power of removal is, in Zambia in the hands of the Judicial Service Commission, it can be said that the members of the Zambian courts are more secure in their positions than the members of the Malawian Courts.

JURISDICTION

The jurisdiction of local courts in Zambia and of traditional courts in Malawi has five aspects - territorial jurisdiction, personal jurisdiction, law jurisdiction, subject matter jurisdiction and enforcement jurisdiction.

i. Territorial Jurisdiction

In both Zambia and Malawi a local court or traditional court exercises jurisdiction specified in its warrant.⁽³⁴⁾ The area of jurisdiction is sometimes very small in view of the fact that there could be as many as ten or more courts of first instance in a district.⁽³⁵⁾ The areas of jurisdiction of regional Traditional Courts and the National Traditional Appeal Court are, however, wider. Each of the three Regional Traditional Courts covers a region of the three regions into which Malawi is divided - i.e. Southern Region, Central Region and Northern Region. The National Traditional Appeal Court has jurisdiction over the whole of Malawi.

(32) - Ss. 5 and 33(7) Traditional Courts Act.

(33) - Ibid. The Act does not require the holding of an inquiry before exercising the power.

(34) - S.8 Local Courts Act; Ss. 3(2) and 33(4) Traditional Courts Act.

(35) - Mzimba District in Malawi, for instance, has eleven courts.

8.

ii. Personal Jurisdiction

Formerly, in both Zambia and Malawi, the personal jurisdiction of native courts was limited to Africans.⁽³⁶⁾ The position in Malawi was changed by the Local Courts Act, 1962. The Act, while maintaining the courts as principally for Africans, introduced a provision which authorized the Governor, with the approval of a Secretary of State, to direct by order published in the Gazette "that the jurisdiction of any Local Court, either civil or criminal or both, shall extend to the hearing of causes and matters in which any or all of the parties are non-Africans."⁽³⁷⁾ This is still the position. Traditional courts of all levels have jurisdiction only in "matters in which all the parties are Africans" unless the Minister has extended to a court the provisions of Section 10⁽³⁸⁾ of the Act (the Traditional Courts Act). The provision has been extended to many courts, particularly in the urban areas.⁽³⁹⁾

(36) - See S.5(1) Native Courts Ordinance; S.3 Barotse Native Courts Ordinance; African Courts Act.

(37) - S.10(1). A proviso was added "that in respect of any cause or matter involving an issue to be determined by African law and custom, any jurisdiction conferred under this section shall extend to the determination of such cause or matter only where it is shown that every non-African who is a party has voluntarily assumed a right, liability or relationship which is the subject matter of the dispute and which would have been governed by the African law and custom concerned if all the parties had been Africans!"

(38)- The section is no longer subsectioned, but the proviso quoted above remains.

(39) - The jurisdiction has been extended so far to forty-six traditional courts of first instance - see G/Ns. 109/1963, 183/1963, 172/1964(N), 204/1964(N), 48/1964(M), 114/1965 and 161/1967.

The Zambian position was altered by the Local Courts Act, 1966. The Act does not state whether the personal jurisdiction of the new courts is limited to Africans or is extended to non-Africans.

For a defendant to be amenable to the jurisdiction of a court in a civil cause or matter he must be ordinarily resident in the area of jurisdiction of the court or the cause of action must have arisen within such area of jurisdiction.⁽⁴⁰⁾ In criminal causes the defendant must have wholly or in part committed the crime in the area of jurisdiction of the court.⁽⁴¹⁾ In civil cases concerning immovable property proceedings can only be instituted in the court of the area where the property is situated.⁽⁴²⁾

iii. Law Jurisdiction

Although, formerly, native courts administered mainly African customary law, this is no longer the position. A large number of Acts, regulations and orders are now being administered by local or traditional courts. This is to a greater extent the case in Malawi.

In Zambia local courts are empowered to administer:

- (a) African customary law (provided it is not repugnant to natural justice or morality or incompatible with the provisions of any written law);
- (b) the provisions of all by-laws and regulations made under the provisions of the Local Government Act and in force in the area of jurisdiction of the court;
- (c) the provisions of any written law which the court is authorized to administer under the provisions of Section 13 of the Act (Local Courts Act).⁽⁴³⁾

(40) - S.8 Local Courts Act; S.8 Traditional Courts Act.

(41) - Ibid. S.9 Local Courts Act; S.9 Traditional Courts Act.

(42) - S.8 Local Courts Act; S.8 Traditional Courts Act.

(43) - S.12 Local Courts Act.

Section 13 of the Act empowers the Minister to confer by order "upon all or any local courts jurisdiction to administer all or any of the provisions of any written law specified in such order" subject to such restrictions and limitations as may be contained in such order.

In Malawi traditional courts are empowered to administer:

- (a) the provisions of any Act which the court is by or under such Act authorized to administer;
- (b) the provisions of any law which the court may be authorized to administer by an order of the Minister made under Section 13 of the Traditional Courts Act (The Section empowers the Minister by order published in the Gazette to confer upon all or any traditional courts jurisdiction to enforce all or any of the provisions of any law specified in such order, subject to such limitations and restrictions, if any, as the Minister may specify);
- (c) the provisions of all rules, orders, regulations or by-laws made under the Local Government (District Councils) Act or the Chiefs Act and in force in the area of the jurisdiction of the court;
- (d) the customary law prevailing in the area of the jurisdiction of the court, so far as it is not repugnant to justice or morality or inconsistent with the Constitution or any written law.⁽⁴⁴⁾

The Traditional Courts Act prohibits any traditional court in Malawi from taking criminal proceedings or imposing a criminal penalty except for an offence constituted under an Act or under any rule, regulation, order or by-law made under an Act.⁽⁴⁵⁾ This means that no criminal proceedings can be based on customary law. This should be compared with Section 12(2) of the Zambian Local

(44) - S.12(a) - (d) Traditional Courts Act.

(45) - Ibid.

Courts Act which permits a local court to deal with any offence under customary law as an offence under that law, notwithstanding that such offence is also recognized under the Penal Code or any other law, provided the law is not repugnant to natural justice or morality. If such an offence is also an offence under the Penal Code the court cannot, however, impose a penalty in excess of the maximum imposed by the Penal Code or that other law.

iv. Subject Matter Jurisdiction

Subject to the provisions of the Local Courts Act and the Traditional Courts Act local courts and traditional courts respectively have a general jurisdiction to try and determine such civil and criminal causes as are permitted by the warrant establishing the court.⁽⁴⁶⁾ In Malawi, notwithstanding anything in the Act or in any other law, the civil jurisdiction of the courts is deemed to extend to the hearing and determination of suits for the recovery of civil debts due by Africans to the Government under the provisions of any law.⁽⁴⁷⁾ The jurisdiction extends to suits or debts due to any local authority or to the office of any chief under any law.⁽⁴⁸⁾

Local courts and traditional courts are specifically barred from dealing with certain matters. In Zambia local courts are barred from hearing and determining cases in which a person is charged with an offence in consequence of which death is alleged to have occurred or which is punishable by death.⁽⁴⁹⁾

In Malawi the then local courts were formerly all excluded from exercising jurisdiction (a) in any proceedings in which death occurred or which were punishable with death or imprisonment for life; (b) in any proceedings in connexion with marriage, other than a marriage contracted under or in accordance with Islamic or customary law or the African Marriage (Christian Rites) Registration Act, except

(46) - Ss. 8 and 9 Local Courts Act; Ss. 8 and 9 Traditional Courts Act.

(47) - S.8 Traditional Courts Act.

(48) - S.8 Traditional Courts Act.

(49) - S.11 Local Courts Act.

where both parties were of the same religion and the claim was one for bride-price founded on customary law only; (c) in any other class of proceedings which the Minister might, by notice published in the Gazette, exclude from the jurisdiction of local courts or any particular local court or class of local courts specified in such order.⁽⁵⁰⁾

The prohibitions, except that under (a), remain. The prohibition in regard to offences punishable by death or imprisonment for life was removed by the Local Courts (Amendment) Act, 1969.⁽⁵¹⁾ Some traditional courts - i.e. the Regional Traditional Courts - can now impose the death penalty or imprisonment for life.

By using the provisions of Section 13 of the Local Courts Act and Section 13 of the Traditional Courts Act, the respective Ministers have conferred on the respective courts the power to administer a large body of statutes, regulations and orders, particularly in Malawi.

Subject to the provisions of the respective Act under which it is established the provisions of any other law and the provisions of its warrant, a local court in Zambia or a traditional court in Malawi has a general jurisdiction in civil cases to order: (a) the payment of compensation (including costs); (b) the specific performance of a contract; (c) the restitution of property; (d) any other remedy which the justice of the case may require (including a combination of these orders).⁽⁵²⁾ Local courts of both grades - i.e. A and B - have no jurisdiction to determine any matrimonial or

(50) - S.11 Traditional Courts Act. By Government Notice No. 167 of 1962 the Minister excluded from the jurisdiction of all traditional courts any proceedings involving chieftainship or headmanship or involving the allocation of land under local custom.

(51) - The Act also changed the name "Local Courts" to "Traditional Courts."

(52) - S.35 (1) Local Courts Act; S.17 (1) Traditional Courts Act.

inheritance claim which is not based on African customary law. Further no local court of either grade has jurisdiction to determine any civil claim other than a matrimonial or inheritance claim based upon African customary law, which is greater in value than K200, in the case of Grade A Courts and K100, in the case of Grade B Courts. There is no such limit in matrimonial and inheritance cases based on African customary law.

In criminal cases courts of all grades have a general jurisdiction to order: (a) the imposition of a fine; (b) the infliction of a term of imprisonment; (c) the administration of corporal punishment; (d) the payment of compensation or restitution of property or any other order including, in Malawi, performance of public work; (e) a combination of these orders.⁽⁵³⁾

In Malawi traditional courts also have a general jurisdiction to impose the death sentence⁽⁵⁴⁾ and imprisonment for life (although this is at present confined to Regional Traditional Courts and the National Traditional Appeal Court)⁽⁵⁵⁾

Unless otherwise provided in the Act or any other law, the fines and terms of imprisonment imposed by the local courts in Zambia must be in accordance with the respective tables below:

<u>Fines</u>	<u>Imprisonment</u>
Not exceeding K1	14 days
Exceeding K1 but not exceeding K2	1 month
Exceeding K2 but not exceeding K10	3 months
Exceeding K10 but not exceeding K40	4 months
Exceeding K40 but not exceeding K100	6 months
Exceeding K100	9 months (55a)

(53) - Traditional Courts Act as amended by Act 31 of 1969, S. 7; Local Courts Act, S.39

(54) - S.14 Traditional Courts Act as amended by Act 31 of 1969, S.7.

(55) - See below under jurisdiction of Regional Traditional Courts.

(55a) - S.42(1) Local Courts Act.

Subject Matter Jurisdiction of Particular Courts(a) Zambian Local Courts

As mentioned earlier, Zambian local courts are classified as of Grade A or B. In addition to causes under customary law and any law that may directly confer power, local courts of both grades in Zambia are empowered by the Local Courts (Jurisdiction) Order, 1966, as amended, to administer many statutes listed in the schedule to the Order.

While the two grades of courts may administer the same criminal laws, their powers of punishment differ as shown below:-

Fines

Grade A Courts	up to K100
Grade B Courts	up to K50

Terms of Imprisonment

Grade A courts	up to 12 months
Grade B Courts	up to 6 months

Corporal Punishment

Grade A Courts	up to 12 strokes
Grade B Courts	up to 6 strokes

(b) Malawian Courts of First Instance

It has already been indicated that traditional courts of first instance in Malawi are divided into Grade B Courts, Grade A Courts, Grade A.1 Courts, Urban Courts and Regional Courts. Neither the Traditional Courts Act nor the regulations made thereunder specify the maximum civil and criminal jurisdiction of each grade of court but jurisdiction has been uniformed by warrants establishing courts of various grades.

Grade B and Grade A Courts.

The Civil jurisdiction of these courts in matters to be determined according to customary law is unlimited. In all other matters it is limited to causes in which the subject matter in dispute does not exceed K150. (56)

(56) - See note on establishment and areas of jurisdiction of traditional courts bound together with the Traditional Courts Act.

15.

Grade B and Grade A courts administer a large number of statutes, including many sections of the Penal Code and the Road Traffic Act.⁽⁵⁷⁾ The courts may impose maximum penalties of a fine of K50, imprisonment for six months, corporal punishment of twelve strokes, or a combination of these punishments. They may also order payment of compensation.⁽⁵⁸⁾

Grade A.1 and Urban Courts

The civil jurisdiction of these courts is the same as that of Grade B and Grade A Courts.⁽⁵⁹⁾ In criminal cases, however, the jurisdiction is higher. They try a large number of offences under the Penal Code⁽⁶⁰⁾ and the Road Traffic Act⁽⁶¹⁾ and under many other statutes.⁽⁶²⁾ The maximum punishments that may be imposed are: a fine of K150; imprisonment for twelve months and corporal punishment of twelve strokes. Payment of compensation may also be ordered.⁽⁶³⁾

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- (57) - For the complete list of 18 statutes that may be administered by the Grade B and Grade A Courts, see the Traditional Courts (Criminal Jurisdiction) Order, G/N 185 of 1967. The order lists 64 offences under the Penal Code and 66 under the Road Traffic Act as triable by Grade B and Grade A Courts.
- (58) - See Statute Law (Miscellaneous Amendments) Act, 1970 (No. 23 of 1970).
- (59) - See note on establishment and areas of jurisdiction of traditional courts.
- (60) - The Traditional Courts (Criminal Jurisdiction) Order lists 105.
- (61) - The Traditional Courts (Criminal Jurisdiction) Order lists 63.
- (62) - The Order lists 27 statutes.
- (63) - See Statute Law (Miscellaneous Amendments) Act, 1970.

Regional Courts

It appears that Regional Traditional Courts will be concerned principally with criminal offences.⁽⁶⁴⁾ The Courts have jurisdiction to hear and determine all offences over which Urban Traditional Courts have or shall have jurisdiction and, in addition, offences under the Witchcraft Act and the following Chapters of the Penal Code: XV (Offences against morality); XIX (Murder and Manslaughter); XX (Duties Relating to the Preservation of Life and Health); XXI (Offences connected with Murder and Suicide); XXVIII (Robbery and Extortion); and XXIX (Burglary, Housebreaking and Similar Offences).⁽⁶⁵⁾ Accordingly Regional Traditional Courts can impose the death penalty in addition to the other sentences. The punishments that may be inflicted are unlimited.

The conferment on Regional Traditional Courts of the power to impose the death penalty caused a rift between the Judiciary and the Executive.⁽⁶⁶⁾ Four judges of the High Court decided to relinquish their positions on the ground that they did not think that justice would be adequately safeguarded in these new courts without the provision of an appeal to the High Court or the Supreme Court of Appeal. Two expatriate lawyers working for the State also resigned.⁽⁶⁷⁾ One of the reasons why the Government decided to increase the jurisdiction of the traditional courts to impose the death penalty

(64) - In the absence of an order conferring upon them higher civil jurisdiction, their jurisdiction in this respect would be that of the other traditional courts.

(65) - Regional Traditional Courts (Criminal Jurisdiction) (No. 2) Order, 1970, G/N 198/1970.

(66) - See the Rhodesia Herald, 23, 25 and 26 November 1969

(67) - See the Rhodesia Herald, 22 November, 1969.

Ch.16.

17.

was mentioned when considering the jury system in the last Chapter.⁽⁶⁸⁾ The second argument was that expatriate judges did not understand African superstition and customs and were not, therefore, competent to try cases involving these matters. Courts presided over by Africans were considered better qualified.⁽⁶⁹⁾

Appeals from Zambian Local Courts

In Zambia a person aggrieved by a decision of a local court may appeal to a subordinate court of the first or second class in the area.⁽⁷⁰⁾ Where a person intends to appeal against a judgment, order or decision, including an order on review made with or without submissions under Section 54 of the Act, the court to which he must appeal will depend on the officer who exercised the power of revision. In the case of a review by a local court officer or a magistrate empowered to hold a subordinate court of the third class, the appeal is to a subordinate court of the first or second class within the area of jurisdiction of the court of trial.⁽⁷¹⁾ In the case of any other officer, the appeal is to the High Court.⁽⁷²⁾ If the revision was by the Local Courts Adviser, the appeal is also to the High Court.⁽⁷³⁾ Appeals can further be made from a subordinate court of the first or second class to the High Court.⁽⁷⁴⁾ With leave of the High Court or the Court of Appeal,

(68) - See also Hansard (Revised Edition containing the debates of 12, 17, 18, 19, 20 and 21 November 1969) pp. 56-57, 219-24. Hansard (Unrevised Edition) 28 July, 1970, pp. 499 et. seq.

(69) - See Hansard (Revised Edition) 12-21 November 1969, pp. 56-57 (A.K. Banda); 222-223 (Dr. Banda).

(70) - S.56(1) Local Courts Act.

(71) - S.56(2)(a)(i)

(72) - S.56 (2)(a)(ii)

(73) - S.56(2)(b)

(74) - S.56(2)(c).

a further appeal can be made to the Court of Appeal.⁽⁷⁵⁾
 In land matters no appeal lies from the decision
 of a court situate in the Western Province (formerly
 Barotse Province).⁽⁷⁶⁾ The Saa-Sikalokuta may,
 however, grant leave to appeal to the High Court
 in such matters.⁽⁷⁷⁾

Any court hearing an appeal may exercise any
 powers normally possessed by an appellate court
 including that of setting aside the proceedings,
 and ordering a retrial, dismissing the appeal or
 varying the judgment.⁽⁷⁸⁾

Malawian Traditional Appeal Courts

Under the original 1962 Local Courts Ordinance
 any person aggrieved by an order or decision of a
 local court of first instance could appeal to the
 Local Appeal Court having jurisdiction in the area.⁽⁷⁹⁾
 If there was no such court of appeal, the Minister
 could direct that in any particular case or class
 of case appeals should lie to a Resident Magistrate
 having jurisdiction in the area.⁽⁸⁰⁾ A further
 appeal could be made to the High Court from a decision
 of a Local Appeal Court or a Resident Magistrate.⁽⁸¹⁾
 The Statute Law (Miscellaneous Amendments) Act, 1969,⁽⁸²⁾
 altered this position. Under the new position any
 person aggrieved by any final judgment in any criminal
 proceedings before an Urban Local Court or a Grade
 A.1 Local Court could appeal to the High Court.⁽⁸³⁾
 In civil causes before these courts and in criminal
 and civil causes before the other local courts,
 appeals still lay to the Local Appeal Court with
 jurisdiction in the area.⁽⁸⁴⁾ A further appeal lay
 to the High Court.⁽⁸⁵⁾

(75) - S.56(2)(d).

(76) - S.56A(1).

(77) - S.56(2).

(78) - S.57.

(79) - S.33(1).

(80) - Ibid.

(81) - S.33(2).

(82) - Act 1 of 1969.

(83) - S.33 as deleted and replaced by Act 1 of 1969.

(84) - Ibid.

(85) - Ibid.

The Local Courts (Amendment) Act, 1969⁽⁸⁶⁾ (which also changed the name "Local Courts" to "Traditional Courts") drastically changed the position in criminal appeals from the Urban and Grade A.1 Local Courts to the High Court and from the Local Appeal Courts to the High Court. The Act added a provision which empowered the Minister to declare certain proceedings of Urban and Grade A.1 Courts and of Local Appeal Courts to be proceedings from which no appeal would be made to the High Court.⁽⁸⁷⁾ In the event of such a declaration the highest court of appeal was to be a traditional court. In pursuance of this provision the Minister declared proceedings in Regional Courts to be proceedings which could not be appealed against to the High Court.⁽⁸⁸⁾

The provisions of the Statute Law (Miscellaneous Amendments) Act, 1969, and the Local Courts (Amendment) Act, 1969, were replaced by the provisions of the Traditional Courts (Amendment) Act, 1970,⁽⁸⁹⁾ which presently governs the subject of appeals from decisions of traditional courts. The present position is that any person aggrieved by any judgment in any proceedings, civil or criminal, before a Traditional Appeal Court, a Regional Traditional Court, an Urban Traditional Court or a Grade A.1 Traditional Court may appeal to the National Traditional Appeal Court.⁽⁹⁰⁾ No appeal lies from any judgment of this Court.⁽⁹¹⁾ On the other hand, any person aggrieved by any judgment in any proceedings, civil or criminal, before any Traditional Court (other than a Court referred to above) may appeal to the Traditional Appeal Court having jurisdiction

(86) - Act No. 31 of 1969.

(87) - See S.9 of the Local Courts (Amendment) Act, 1969.

(88) - See Traditional Courts (Appeals) Order, 1970, G/N No. 160/1970. Note that S.33 was later renumbered S.34.

(89) - Act No. 38 of 1970

(90) - S.34(1) as repealed and re-enacted by S.3 of the Traditional Courts (Amendment) Act, 1970.

(91) - Ibid.

to hear such an appeal.⁽⁹²⁾

In determining an appeal an appellate court may - (a) make any such order or pass any such sentence as the court of first instance could have made or passed in such cause or matter; or (b) order any such cause or matter to be retried before the court of the first instance.⁽⁹³⁾

The abolition of appeals from Traditional Courts to the High Court was part of the process to establish an independent Malawian system of justice which would not be hindered by the technicalities of the English form of justice administered in the Supreme Court of Appeal, the High Court and the Magistrates' Courts and by the ignorance of African superstition and custom of the judges and magistrates. If appeals had continued to lie to the High Court the purpose of increasing the jurisdiction of traditional courts to enable them to try serious cases (including murder cases) without being bound by the technicalities of English law and procedure would have been defeated. "As far as appeals are concerned the Government consider that there would be little purpose as far as cases involving complicated issues of African tradition and customs are concerned, in allowing such cases to be tried by the Local Courts with the right to appeal to expatriate judges who have no familiarity with the customary aspects of the issues involved."⁽⁹⁴⁾

Enforcement Jurisdiction

Every local or traditional court has jurisdiction to carry into execution any decrees or orders of the High Court or of any subordinate court or of any other or traditional court directed to the court and to execute all warrants and process directed to it.⁽⁹⁵⁾

(92) - S.34(2) as amended by Act 38 of 1970.

(93) - S.35 Traditional Courts Act as amended by S.4 of the Traditional Courts (Amendment) Act, 1970.

(94) - Hansard (Revised Edition) 12-21 November, 1969, p.57 (A.K. Banda).

(95) - S.38 Traditional Courts Act; S.19 Local Courts Act.

SUPERVISORY MACHINERY OVER TRADITIONAL AND
NATIVE COURTS

The Constitutions of both Zambia and Malawi grant supervisory powers over subordinate courts to the High Court.⁽⁹⁶⁾ Subordinate courts as already seen in the last Chapter include local courts in Zambia and traditional courts in Malawi. Unless, therefore, the supervisory jurisdiction of the High Court is specifically excluded, it would apply, in Zambia, to the local courts, and, in Malawi, to the traditional courts. In Malawi, however, the Constitution specifically excludes the supervisory jurisdiction of the High Court from the traditional courts until Parliament prescribes otherwise.⁽⁹⁷⁾ Parliament is unlikely to do this now that the Traditional System of Courts has been completely divorced from the Ordinary System of Courts. Emphasizing the independence of the new system of traditional courts, Dr. Banda told the National Assembly:

"Under the new law, the Traditional Courts are not subordinate to any other court outside of the Traditional Courts themselves. Appeal from any Traditional Court no longer lies with any other Court, outside the Traditional Courts system itself. Outside and above the Traditional Courts, there is no other Court now in this country, once the Traditional Court has tried a case and passed judgment.

This is now the law of the land. The Traditional Court system is an entity on its own. It is not subordinate to any other Court system in the country. It is co-equal with whatever any other Court system there is here.

(96) - S.98(5) Constitution of Zambia; S.70(1) Constitution of Malawi.

(97) - S.70(3) of the Constitution of Malawi.

- This should and must be clearly understood not only in this House, but also outside this House, for all concerned."⁽⁹⁸⁾

The Zambian Constitution, on the other hand, has no provision that excludes the local courts from supervision by the High Court. Accordingly the High Court "may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by any such court."⁽⁹⁹⁾

In Zambia magistrates and other authorized officers also have supervisory jurisdiction over local courts.

In Zambia an authorized officer (e.g. a local courts officer, a senior resident magistrate, a resident magistrate or such other magistrate as the Chief Justice may designate) have at all times access to the records of local courts within their respective areas of jurisdiction.⁽¹⁰⁰⁾ In the case of the Local Courts Adviser, he has access to the records of all local courts of the country.⁽¹⁰¹⁾ Any of these officers may send for and inspect the record of any proceedings before any such court and require the production to him of such other

(98) - Hansard (Unrevised Edition) 28 July, 1970, p.500. See further his other speech on the same subject - Hansard (Revised Edition) 12-21 Nov., p 222. See also the speech of A.K. Banda (Minister of Finance, Information and Tourism) while introducing the second reading of the Local Courts (Amendment) Bill, 1969 - Hansard, (Revised Edition) 12-21 Nov., 1969, pp. 56-57.

(99) - S.98(5) Constitution of Zambia. See also S.62 of the Local Courts Act which subjects proceedings before local courts to orders and directions of the High Court.

(100)- Ss. 53(5) and 54 Local Courts Act.

(101)- Ss. 54 and 55, ibid.

evidence as he may deem necessary for the purpose of satisfying himself as to the correctness, legality or propriety of any judgment, order or sentence recorded, made or imposed by such court or as to the regularity of such proceedings.⁽¹⁰²⁾ If no appeal is pending on the judgment, order or sentence, the officer may exercise the powers an appeal court may exercise.⁽¹⁰³⁾ In doing so he may hear evidence or receive submissions.⁽¹⁰⁴⁾ If after exercising revisionary power without hearing evidence or receiving submissions, a valid appeal is entered against the judgment, order or decision in respect of which the officer exercised his revisionary powers, he must proceed to hear submissions by the parties and thereupon revise the act, order or decision already made by him by either confirming it or substituting therefor another act, order or decision as he may think proper and such appeal would be deemed to be disposed of.⁽¹⁰⁵⁾ An appeal could be made thereafter only to the High Court as an appeal against a decision of the class of court the officer is empowered to hold.⁽¹⁰⁶⁾

In Malawi Magistrates do not supervise traditional courts but there are, as in Zambia, a Chief Traditional Courts Commissioner, a Senior Traditional Courts Commissioner and such other Commissioners as may be appointed.⁽¹⁰⁷⁾ The Chief Traditional Courts Commissioner has at all times access to traditional courts and to the records of such courts. This power does not, however, extend to Regional Traditional Courts and the National Traditional Appeal Court.⁽¹⁰⁸⁾ On the application of the person concerned or of the court or on his own motion, the Commissioner may:

(102) - S. 54(1)

(103) - S. 54(3).

(104) - S. 54(2)

(105) - Ibid.

(106) - S. 54(7) and S. 56(2).

(107) - S. 25(1) Traditional Courts Act.

(108) - S. 32(6) as introduced by S. 2 of the Traditional Courts (Amendment) Act, 1970 (Act No. 38 of 1970).

- (a) Order any case to be retried either before the same traditional court or before any other traditional court;
- (b) Order the transfer of any cause or matter either before trial or at any stage of the proceedings, whether before or after sentence is passed or judgment given to a subordinate court having jurisdiction in the area;
- (c) in respect of any sentence or order passed or made, set aside such sentence or order and substitute therefor any other sentence or order which was within the competence of the traditional court to pass or make, provided that the new sentence must not be to the prejudice of the accused unless he has been given an opportunity of making representations on his behalf. (109)

In cases involving an issue of customary law, the Commissioner may order that the matter: (a) be transferred to another traditional court for the purposes of taking evidence relating to an issue specified in the order of transfer and of determining such issue; or (b) be transferred to such other traditional court for final determination of the matter. (110)

(109) - S. 32 (1) Traditional Courts Act.

(110) - S. 32(2)

APPOINTMENT OF THE COMMISSIONERS

In Zambia the Local Courts Adviser and local courts officers are appointed by the Judicial Service Commission.⁽¹¹¹⁾ No qualifications are laid down for any of these offices but legally trained persons are often appointed to the first office .

In Malawi the Chief Traditional Courts Commissioner, the Senior Traditional Courts Commissioner and such other Commissioners as may be found necessary are appointed by the Minister.⁽¹¹²⁾ As in Zambia, no qualifications are prescribed for appointments to any of these offices but the practice is to appoint legally qualified persons to the posts.

The appointment of the Commissioner and the Deputy Commissioner by the Judicial Service Commission is a better arrangement than that in Malawi in view of the important judicial functions these officers exercise.

OTHER FUNCTIONS OF THE COMMISSIONERS

The Local Courts Act does not spell out other powers of the Local Courts Adviser and the local courts officers except those already mentioned. It, however, provides that the "Adviser and local courts officers shall exercise such powers and perform such duties as are conferred or imposed upon them by or under the provisions of this Act."⁽¹¹³⁾ This provision enables various functions to be given to the Adviser and the local courts officers.

The Traditional Courts Act, on the other hand, specifies other functions for the Chief Traditional Courts Commissioner in addition to that of reviewing decisions of the courts. He is responsible for the following:

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- (111) - S.3 Local Courts Act.
 (112) - S.25(1) Traditional Courts Act.
 (113) - S.4(3).

- (a) the advising of the Minister in respect of the constitution, jurisdiction and membership of traditional courts and traditional appeal courts;
- (b) the organization, guidance and supervision of traditional appeal courts;
- (c) the organization and supervision of courses of instruction for members, officers and staff of traditional courts;
- (d) such other powers and duties as may from time to time be assigned to him by the Minister.⁽¹¹⁴⁾

The other Commissioners perform such functions as may be assigned to them from time to time by the Chief Traditional Courts Commissioner subject to the general and special directions of the Minister.⁽¹¹⁵⁾

PRACTICE AND PROCEDURE

The practice and procedure of local courts is regulated in accordance with such rules as may be made in that behalf by the Chief Justice under Section 67 of the Act.⁽¹¹⁶⁾

In Malawi the practice and procedure are more uniform. They are regulated solely by such rules as may be made by the Minister⁽¹¹⁷⁾ and not by native law or custom. The procedure in civil and criminal proceedings in courts of first instance is based on the Traditional Courts (Procedure) Rules⁽¹¹⁸⁾ while that in appellate courts is governed by the Traditional Courts (Appeals) Rules.⁽¹¹⁹⁾ The Minister is also empowered by Section 371 of the Criminal Procedure and Evidence Code to specify from time to time by notice published in the Gazette that any provisions of the Code shall apply to criminal

(114) - S.26(1)(c) - (d) Traditional Courts Act.
 (115) - S.26(2).
 (116) - See the Local Courts Act,
 (117) - S.23 Traditional Courts Act.
 (118) - G/N 175 of 1962 as amended by later notices
 (119) - G/N 112 of 1962 as amended by later notices.

proceedings in any traditional court. (120)

When native courts were introduced one of the fundamental objects the Administration intended to achieve was the dispensation of justice in the simplest form - a form not too technical for Africans. It was, therefore, essential that these courts should follow simple practice and procedure not encumbered by the technicalities of English practice and procedure. Legal practitioners were prohibited from appearing before the courts and so were state prosecutors. Rules of court were made in the simplest form.

This simplicity of practice and procedure has substantially remained but several aspects have been modified. In Malawi, for instance, it has been eroded in several respects because of the increased jurisdiction of some courts and the permission of legal practitioners to appear in these. Section 37 of the Traditional Courts Act, however, still requires proceedings before traditional courts (including review decisions by the Chief Traditional Courts Commissioner) to be decided "according to substantial justice without undue regard to technicalities."

(120) - See, e.g., G/N 161 of 1970, which applied the following sections of the Code to traditional courts of all grades: 77 (relating to Discontinuance by Director of Public Prosecutions); 81 (withdrawal of prosecutions); 152 (conviction of attempt); 153 (alternative verdicts); 158 (construction of sections 152 and 153); 176 (confessions); 179 (admissibility of photographs and plans); 180 (admissibility of medical reports); 181 (admissibility of scientific reports); 194 (evidence of husband or wife of accused); 337 (conditional or absolute discharge, probation of offenders, etc.); 339 (suspended sentences); 340 (imprisonment of first offenders); and 341 (consequence of breach of conditions).

In Malawi, where the rules of procedure were first made uniform while those in Zambia were still mainly based on customary law of the area of jurisdiction of the court, proceedings take briefly the following procedure:⁽¹²¹⁾ A civil or criminal case is originated by a summons after a complaint has been lodged with the clerk of court. Criminal proceedings may also be commenced by arrest of the offender. The usual consequences of disobeying a summons apply. Witnesses may also be summoned with the usual consequences for disobeying a summons. In criminal cases the accused may be admitted to bail. Although an accused must normally be present at his trial, the court may, however, in those cases where a magistrate's court may dispense with the attendance of the accused, also do the same. Proceedings of the court are recorded in writing but the language of the court is decided upon by the Chief Traditional Courts Commissioner.

Unlike in non-traditional courts, in cases before traditional courts (except in Regional Traditional Courts) there is no prosecutor to put forward the State's case. The chairman of the court explains to the defendant the case against him and asks him whether he admits committing the acts alleged and has contravened the law concerned. If the defendant admits, a plea of guilty is entered; if he denies, a plea of not guilty is entered.

If the defendant pleads guilty the complainant informs the court briefly the facts of the case. The chairman then asks the defendant whether he admits the facts given. If the defendant admits the facts the chairman informs him that he may address the court on those facts if he so wishes and say anything that may lessen the gravity of the facts. If the defendant denies the facts the chairman alters the plea of guilty to one of not guilty and proceeds with the trial.

If the defendant pleads not guilty, the complainant should then call his witnesses, if he has

(121) See Traditional Courts (Procedure) Rules.

any, to prove his case. If he wants to give evidence himself he must do so before calling his witnesses. After being sworn the witness gives his evidence and is then subjected to cross-examination by the defendant. The court may also ask questions. At the end of the complainant's case the court considers whether the evidence is sufficient to require a reply from the defendant.⁽¹²²⁾ If a reply is required from the defendant, the procedure given above with regard to the complainant's evidence applies.

At the end of the defendant's case, the court may give its judgment then and there or it may do so at a later date. Where the court is constituted of more than two members, the decision of the majority is the judgment of the court. The judgment is recorded in writing and signed by the chairman who must deliver it in open court. Where the court sits with assessors, the assessors give their opinions but the opinions do not bind the court.

Insanity may be pleaded and the court deals with the plea in the same manner as it is dealt with before courts of the Ordinary System.⁽¹²³⁾

(122) - Note that the dismissal of cases for insufficiency of evidence was the main reason for the re-organisation of the traditional courts to enable a grade of them, the Regional Courts, to impose the death penalty. The amendment to the Criminal Procedure and Evidence Code preventing the High Court from dismissing a case on insufficiency of evidence referred to in the Last Chapter does not apply to traditional courts. Accordingly traditional courts can still dismiss cases for insufficiency of evidence at the end of the prosecution's case. This is also the case with magistrates' courts - see S. 254 Criminal Procedure and Evidence Code.

(123) - See Rules 30A, 30B, 30C and 30D as introduced by G/N 124 of 1970.

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Civil trials follow substantially the same procedure in so far as presentation of evidence is concerned.

Appeals, as mentioned above, are governed by the Traditional Courts (Appeals) Rules, but where the rules do not provide the procedure, the court may apply any appropriate provision thereof by construing the same with such modification not affecting the substance as may be necessary or proper to adapt the same to the matter before it. Where this is not possible the court may give such orders and directions as appear proper to do substantial justice between the parties, having regard to the summary settlement of matters in issue and to the saving of costs.

Although an appeal hearing is based on the record of the court of first instance, the appellate court may in any civil appeal, if it considers it necessary so to do in the interests of justice, direct that the appeal should be conducted by way of a re-hearing and that all or any of the witnesses should be recalled to give evidence. The court may admit fresh evidence but not on behalf of the prosecution in a criminal appeal.

With the increased jurisdiction that has been given to some traditional courts in Malawi in regard to both subject matter and the persons they may try, and with the admission of legal practitioners to these courts, the present simple practice and procedure prevailing in these courts cannot continue indefinitely. In fact, it appears to be the aim of the Government to change the rules from time to time to suit the circumstances. When introducing the second reading of the Local Courts (Amendment) Bill, 1969, the Minister of Finance, Information and Tourism (A.K. Banda), for instance, hinted that "Where it is felt desirable, such Local Courts will in future be empowered to sit with a Jury to assist them, as is the case already in the High Court."⁽¹²⁴⁾ The appearance of defence counsel is likely to be followed by the appearance of State counsel. If

(124) - Hansard (Revised Edition) 12 - 21 November, 1969, p.57.

this happened there would be little to distinguish traditional courts from the courts of the Ordinary System, particularly in procedural matters.

APPEARANCE BY LEGAL PRACTITIONERS

As already indicated earlier, formerly, both in Zambia and in Malawi, legal practitioners were barred from all native courts. The parties appeared in person or could be represented by a spouse, guardian, servant or master who proved that he/she had authority to appear or act for such plaintiff or defendant. In Malawi the position was altered by the Local Courts Ordinance, 1962. As mentioned earlier in this Chapter, that Ordinance authorized the Governor to declare that a local court would have the jurisdiction to try cases concerning non-Africans. In making such an extension of jurisdiction, the Governor could also make an order permitting legal practitioners to appear in the court or courts whose jurisdiction had been extended.

Extension of jurisdiction to try cases concerning non-Africans was made to several Urban Local Courts in 1964⁽¹²⁵⁾ but no order was made at the same time permitting legal practitioners to appear in these courts. In 1967, however, the Local Courts (now Traditional Courts) (Appearance by Legal

(125) - G/Ns 109 and 183 of 1964.

Practitioners) Order⁽¹²⁶⁾ permitted persons entitled to practice as legal practitioners in the High Court to "appear and act in proceedings other than in matters to be tried solely in accordance with Customary Law in the Local Courts specified as being Urban Local Courts or Grade A.1 Local Courts in Schedules III and IV to the Local Courts (Terms and Conditions of Service, Rules as amended from time to time". Further, legal practitioners could appear and act in Local Appeal Courts in appeals from decisions in cases in which a legal practitioner was or would have been entitled to appear in the Local Court from whose decision the appeal was made.

The present position in Malawi is, therefore, that a legal practitioner cannot appear in a traditional court unless it is a court to which the Traditional Courts (Appearance by Legal Practitioners) Order as amended from time to time has been extended. At present the Order applies to every Urban Traditional Court, Grade A.1 Traditional Court, Regional Traditional Court and Traditional Appeal Court (including the National Traditional Appeal Court) in all matters except those to be tried solely in accordance with customary law. In Grade B and Grade A Traditional Courts the parties must appear in person or be represented by the party's husband, wife, guardian, servant or master⁽¹²⁷⁾ unless the Minister has by

(126) - G/N 187 of 1967. The order was made in terms of S.22(1), now S.24(1), which provides that "no legal practitioner may appear or act for any party in any matter before a Traditional Court unless the Minister has by order in writing, authorized legal practitioners to appear or act in respect of proceedings before the court concerned either generally or in any particular case or class of case, and any such order may at any time be revoked by the Minister".

(127) - S.24(2) Traditional Courts Act.

order in writing authorized legal practitioners to appear in a particular case or class of case. An order permitting legal practitioners to appear in a traditional court can be revoked by the Minister at any time.⁽¹²⁸⁾

In Zambia the position was changed by the Local Courts Act 1966. Section 15 of that Act permits legal representation in criminal charges under by-laws and regulations made under the provisions of the Local Government Act or of any written law which a local court is authorized to administer under Section 13 (of the Act).

CONCLUSION

In concluding the discussion of the Judiciary as given in this and the last Chapters, four subjects relevant to the administration of justice in both Zambia and Malawi ought to be dealt with briefly.

i. Independence of the Judiciary and the Executive

Although the tenures of office of magistrates and chairmen and members of local and traditional courts are not as well safeguarded as those of judges, the Judiciary as a whole, in both Zambia and Malawi, enjoys an independent administration of justice, free from interference by the Executive. Incidents such as the demonstration in Zambia against the judges in 1969 are unlikely to occur often. Although President Kaunda had precipitated the situation by his denunciation of the judgment of Justice Evans, he was quick to react sharply against the demonstration which he said had been staged without his knowledge. He publicly declared that the reaction of the people had taught him a lesson and that he would not like

(128) - S.24(1).

to see a similar incident in the future.⁽¹²⁹⁾

Similarly when Dr. Banda announced that he would not release the persons who had been acquitted of the charges of murder by the High Court on a technicality and that he would introduce legislation to increase the jurisdiction of traditional courts to impose the death sentence and legislation to prevent the dismissal of cases on technicalities, he did not consider it interference with the work of the Judiciary or a defiance of the Judiciary. He held the opinion that the English judges did not understand the complexities of African superstition as were present in the case concerned and that there would be better justice if such cases were in future tried before courts presided over by Africans.

The two incidents have, however, not been part of the pattern of things. There has never been a repetition, either in Zambia or Malawi, of these incidents. The Executive in both countries executes and obeys decisions of the Judiciary.

In order to maintain the independence of the Judiciary, it will be essential for the Executive to continue to observe three things. Firstly, the Executive should continue to refrain from interfering with the manner in which the courts make their decisions on the ground that they are unfavourable to the Executive or to the public or with the decisions of the courts by refusing to give

(129) - Justice Evans and the Chief Justice, James Skinner, resigned their posts after the demonstration. For reports on the incident, see Rhodesia Herald, issues of 16, 19 and 20 July, 1969. The two Portuguese soldiers who had been the subject of the row after their acquittal by Justice Evans were detained under emergency regulations but later exchanged for Zambian citizens who had been detained by the Portuguese as a reprisal.

effect to them. Secondly, appointments to the bench should continue to be free from political considerations. "Africanization" of the bench should not mean "politicising" it. Thirdly, the Executive should act to restrain the legislative and the public from criticising the Judiciary. Accordingly, the incidents quoted above in which the Chief Executive in each case initiated the attack ought to be regretted.

Finally it should be added that independence of the Judiciary can be lost by the inaction of the Judiciary itself. If the present expatriate judges took the view that they were judges in an African ruled country and should not, therefore, give judgments that might be construed and interpreted as an attempt to undermine the Government, the independence of the Judiciary would be lost. Equally, if after "Africanizing" the bench the African judges took the view that they should not give judgments that would appear to be against the aspirations of the Government or the nation, independence of the Judiciary would be lost.

ii. Members of the Judiciary and Administrative Functions

As in the United Kingdom and the other countries of the Commonwealth, the doctrine of the separation of powers is not observed in Zambia and Malawi to the extent of completely excluding judges and other members of the Judiciary from administrative assignments. Magistrates often sit on licensing boards or commissions. Judges often act as chairmen or single commissioners of commissions investigating

important administrative or political issues.⁽¹³⁰⁾

The objection to this practice is that it places members of the Judiciary in a position where they must make administrative or political decisions or recommendations. Such decisions or recommendations may be very unpopular with the public and accordingly subject the judge or magistrate to criticism. Such criticism indirectly undermines the independence and integrity of the Judiciary and the confidence of the public in it.

In the United States of America judges at the Federal level are not supposed to perform administrative functions outside those concerning the court.

(130) - For instance, the then Chief Justice of Zambia, Blagden, was appointed to investigate allegations that voting in the election of office-bearers at the United National Independence Party Conference of 1967 had been rigged. In the then Nyasaland, the then Chief Justice, Southworth, was appointed to investigate an incident at a demonstration in 1960 while the British Prime Minister, Macmillan, was in the country.

In the United Kingdom, see investigations conducted by Lord Radcliffe in 1960 and 1962 into the working of the Security Services; the inquiries conducted by the then Master of the Rolls, Lord Evershed, with a view to the resolution of industrial disputes - Wade and Phillips, op.cit., p322. See also the report of the controversial inquiry conducted by Lord Denning into the security aspects arising out of the resignation of a Minister of the Crown - Cmnd. 2152 of 1963. In connection with Nyasaland, see also the Devlin Report on the emergency in Nyasaland referred to in Chapters 7 and 8 of this study.

This rule has, however, been violated on many occasions.⁽¹³¹⁾ During the debate on the appointment of Chief Justice Jay to carry out an executive function a resolution was offered in the Senate that "to permit judges of the Supreme Court to hold at the same time any other office of employment emanating from and held at the pleasure of the Executive is contrary to the spirit of the Constitution."⁽¹³²⁾ In 1800 proposed constitutional amendments and Bills were introduced to bar judges from holding other appointments or offices. Judges (in the United States) have expressed disapproval of the practice.⁽¹³³⁾

(131) - As early as 1795 Chief Justice Jay (the first Chief Justice of the Supreme Court) was sent to England to negotiate a treaty that today bears his name. In 1799 Chief Justice Ellsworth went to France to negotiate a treaty with Britain - Vanderbilt, op.cit., p.119; Schwartz, op.cit., Vol.I, p.346. Justice Jackson acted as prosecutor at the Nuremberg trials - Schwartz, p.346; Vanderbilt, p.119

(132) - I. Warren, The Supreme Court in the United States History (1924) p.119

(133) - Justice Roberts wrote after he had undertaken an executive assignment: "I have every reason to regret that I ever did so. I do not think it was good for my position as a justice nor do I think it was a good thing for the court!" - Roberts, "Now is the Time: Fortifying the Court's Independence (35 A.B.A.J., 1, 2(1949)). Chief Justice Hughes expressed the same view - Schwartz, Vol. I, p.347, note 148; and so did Justice Jackson - (32 A.B.A.J., 862 - 3 (1946)). Generally, see Schwartz, Vol.I, pp. 346 et seq.

Even in the United Kingdom, the practice has not been free from criticism. The investigation carried by Lord Denning in 1963 was highly political and criticism was heard that the Government was using the Judiciary for its own ends.⁽¹³⁴⁾

iii. The Legal Profession

To be admitted to practice law in Zambia or in Malawi a person must satisfy prescribed requirements.⁽¹³⁵⁾

Application for admission is made to the Chief Justice by way of petition.⁽¹³⁶⁾ A person who has the qualifications may be refused admission because of, for instance, bad character. A person may also be admitted for the purposes of appearing in a particular case or cases. This is done with legal practitioners from other countries who come to appear in a particular case or in cases from time to time.

The profession is not divided into two as in England, South Africa or Rhodesia. Practitioners appear before all courts (excluding some traditional courts in Malawi and where a civil matter under an unwritten law is before a local court in Zambia). All practitioners are governed by one Law Society established under the relevant statute.⁽¹³⁷⁾

Legal education in each country is in the hands of the Council of Legal Education.⁽¹³⁸⁾ In Zambia the Council comprises the Chief Justice; the Attorney-General; two practitioners nominated by the Society and appointed by the Minister; and two members with experience of education appointed by the Minister. In Malawi, on the other hand, the Council is composed of the Chief Justice; the Attorney General or a representative appointed by him; a judge of the

(134) - Wade and Phillips, op.cit., p.322.

(135) - See S.7(1) and (2) Legal Practitioners Ordinance (Cap.144) (Zambia) and Ss.9(1) and (2) and 13(1) Legal Education and Legal Practitioners Act (Cap.3:04) (Malawi).

(136) - S.7(3) Legal Practitioners Ordinance; S.12(1) Legal Education and Legal Practitioners Act.

(137) - See the Legal Practitioners Ordinance and the Legal Education and Legal Practitioners Act.

(138) - Ibid. S.7B; Part II, respectively.

High Court appointed by the Chief Justice; a magistrate of a subordinate court appointed by the Chief Justice; two persons in the legal service of the Government appointed by the Minister; two persons who are registered legal practitioners nominated by the Law Society and appointed by the Minister; and two law teachers appointed by the Minister.

iv. Legal Aid

When considering the Zambian Declaration of Rights it was mentioned that a person who claims that his right or rights under the Bill have been violated but has no funds to prosecute his claim before the High Court could be granted aid after investigation of the matter by a tribunal comprising two persons who hold or have held high judicial office and appointed by the Chief Justice to whom the request for aid is made.⁽¹³⁹⁾ There is no similar provision in the Constitution of Malawi, which has no Declaration of Rights.

Legal aid in Zambia in cases not concerning the Declaration of Rights is governed by the Poor Persons Defence Ordinance.⁽¹⁴⁰⁾ In Malawi legal aid in all cases is regulated by the Legal Aid Act.⁽¹⁴¹⁾ In Zambia the aid under the Ordinance is restricted to criminal cases. In Malawi, on the other hand, the aid can be given in both criminal and civil cases.

Aid is not granted in trials for every type of offence. The determining factor is whether it is in the interests of justice to provide the aid. It is of course, as a matter of fact, given in connection with prosecutions for serious offences before the High Court, such as murder. Aid may be applied for from the magistrate trying

(139) - S.27 of the Constitution of Zambia. See also Chapter 21.

(140) - Cap. 42.

(141) - Cap. 4:01.

the case or committing the accused to the High Court or from the judge of the High Court or from the presiding officer of any other court to which the Ordinance or the Act applies or from the Chief Legal Aid Counsel. The court may also on its own initiative grant legal aid.

In Zambia defence of persons granted legal aid is handled by the Public Defender's Office while in Malawi it is handled by the Chief Legal Aid Counsel's Office. Both are Government Departments staffed by legal practitioners whose main function is defence of persons granted legal aid.

While the day when legal aid will be given to all those who need it may be still far off, the Zambian and Malawian Governments have gone a long way in meeting the needs of defence of poor persons at public expense.

THE JUDICIAL SERVICE COMMISSION

The Judicial Service Commission is, like the tribunal on the removal of judges,⁽¹⁾ another ingenious invention of the legal draftsman of the British Colonial Office. Although older than the tribunal, its history also begins with the emergence of the new States of the Commonwealth. The Constitutions of the older Commonwealth states, e.g., Canada and Australia, do not contain this institution. It made its first appearance in the Constitutions of the Commonwealth states of the generation beginning in the second half of the forties. It is found, for instance, in Part VI of the Ceylon (Constitution) Order in Council, 1946.⁽²⁾ When the Constitutions of the many dependencies which gained independence from the late fifties were drawn up, the Judicial Service Commission was included in most of them.

The Public Service Commission (whose history in Britain dates back to 1855)⁽³⁾ was found not suitable to handle judicial appointments. Offices of a judicial nature had been found, even in Britain itself, to belong to a special category. They had not been included among the offices, appointments to which were made by the Public Service Commission. Judges of the High Court and of the Appeal Courts were appointed by the Queen on the advice of the Prime Minister.⁽⁴⁾ Judges of the county courts and magistrates were appointed by the Queen on the recommendation of the Lord Chancellor. In the older overseas Commonwealth countries, e.g., Canada, Australia, New Zealand and South Africa judges were or are appointed by the Governor-General or the Governor-General in Council on the advice of the Prime Minister. The appointment of magistrates, on the other hand, varied.

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1. See last Chapter.
 2. Ceylon gained independence in 1947 - see the Ceylon Independence Act, 1947, (C.7, 1947).
 3. See the next Chapter.
 4. It should be noted that the nine Lords of Appeal in Ordinary who sit on the Appellate Committee of the House of Lords are appointed not as judges but as life peers to enable them to sit in the House of Lords and do the House's court work. The other members of the House's Appellate Committee are the Lord Chancellor, former Lord Chancellors and other peers who have held or are holding high judicial office in a superior court in the United Kingdom or in the Judicial Committee of the Privy Council. In most cases the work of the Appellate Committee is done by the nine Lords of Appeal in Ordinary and the Lord Chancellor.

The system existing in the older Commonwealth countries could have been adopted without difficulty in the new non-republican countries of the Commonwealth. In the republican countries with executive Presidents, the absence of a Prime Minister to advise the President on the appointments made it impossible, of course, to adopt the systems in exactly the same form. However, this was not, the reason why the Colonial Office invented the Judicial Service Commission. It was the desire to maintain the existing independence of the judiciary. As Britain was pulling out of her colonies and protectorates, leaving the inhabitants to run their own affairs, the Colonial Office and the new political masters were agreed on the necessity for an independent judiciary. To bring this about it was necessary, not only to leave the courts alone in their dispensation of justice and to safeguard the tenure of office of the judges, but also to have a system of appointment of judges that guaranteed that independence. The inclusion of a Judicial Service Commission in the Constitution to do in the judicial service what the Public Service Commission does in the regular civil service was thought the best method of achieving this end.

Accordingly in both Zambia and Malawi (and in most of the new States of the Commonwealth) a Judicial Service Commission is included in the Constitution.⁽⁵⁾ In both countries the Commission comprises the Chief Justice (who acts as Chairman), the Chairman of the Public Service Commission or such other member of the Commission as he may designate, and a Justice of Appeal or puisne Judge designated, in Zambia, by the Chief Justice, and, in Malawi, by the President after consultation with the Chief Justice.⁽⁶⁾ The Zambian Commission has a fourth member appointed by the President from among persons who hold or have held high judicial office.⁽⁷⁾ It can be seen that the membership of both commissions is dominated by judges. This is understandable in view of the functions entrusted to the Commission in both countries. The compositions of the two Commissions are similar to those of Commissions in other Commonwealth countries. The Chief Justices are ex-officio members of the Commissions of most of these countries. Even in those countries where the Chief Justice has no ex-officio membership, one or more judges are included among the members.

5. S.104 (4)(Zambia); S.71 (Malawi). See also, for instance, the Constitutions of Uganda (art.90); Tanzania (S.60); Mauritius (S.85); Trinidad and Tobago (S.83); Sierra Leone (S.85); Malaysia (art. 138); Kenya (S.184); Botswana (S.104).

6. S. 104 (1)(Zambia); (S. 71(1)(Malawi).

7. S. 104 (1)(Zambia).

To take a few countries for comparative purposes, in Tanzania the membership of the Commission is made up of the Chief Justice (Chairman), a puisne judge designated by the President after consultation with the Chief Justice and a member appointed by the President.⁽⁸⁾ There are no qualifications laid down for this third member. In Botswana, in addition to the Chief Justice (Chairman) and the Chairman of the Public Service Commission or any member of the Commission he may designate, a third member, with no specified qualifications, is appointed by the Chief Justice and the Chairman of the Public Service Commission acting together.⁽⁹⁾ In Trinidad and Tobago⁽¹⁰⁾ the membership of the Commission comprises the Chief Justice (Chairman), a Judge of the Court of Appeal or of the High Court designated by the Governor-General on the advice of the Prime Minister, the Chairman of the Public Service Commission and two other members appointed by the Governor-General on the advice of the Prime Minister. One of these two members must be a person holding or who had held high judicial office.⁽¹¹⁾ The composition of the Sierra Leone⁽¹²⁾ Commission is the same as that of the Zambian Commission except that the members other than the Chief Justice and the Chairman of the Public Service Commission^(12a) are designated by the Governor-General on the advice of the Prime Minister.⁽¹³⁾ In Mauritius the Commission consists of a senior puisne judge (who acts as chairman), the Public Service Commission and a member appointed by the Governor-General on the advice of the Prime Minister from persons who hold or have held high judicial office.⁽¹⁴⁾ In Uganda the Chief Justice and the Attorney-General are ex-officio members of the Commission.⁽¹⁵⁾ The Chief Justice acts as Chairman.⁽¹⁶⁾ Three other members are appointed by the President from persons who are qualified to be appointed to the office of judge of the High Court.⁽¹⁷⁾ In Malaysia the membership of the Commission comprises the Chairman of the Public Service Commission (Chairman), the Attorney-General and one or more other members appointed by the Yang di-Pertuan Agong after consultation with the Lord President of the Federal Court from among persons who are or have been Judges of the Federal Court or a High Court of a State.⁽¹⁸⁾

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8. S.60 (1) of the Constitution. Such member must not, however, be a member of the National Assembly-S.60 (2).
9. S.104 (1) of the Constitution.
10. S. 83 (2) of the Constitution.
11. S. 83 (3) of the Constitution.
12. S. 85 (2) and (3)(a) of the Constitution.
- 12a. There is no provision that the Chairman can designate another person.
13. S. 85 (2) and (3)(a) of the Constitution.
14. S. 85 (2) of the Constitution. There is no provision that the Chairman of the Public Service Commission can designate another person.
15. Article 90 (1) of the Constitution. 16. Ibid.

4. In Kenya the Commission is composed of the Chief Justice, two persons who are Justices of Appeal or puisne Judges of the Supreme Court designated by the President on the advice of the Chief Justice and two members of the Public Service Commission appointed by the President on the advice of the Chairman of the Public Service Commission.⁽¹⁹⁾

It will be noted that of the ten countries (including Zambia and Malawi) whose commissions have been dealt with above, all, except two - Uganda and Tanzania - have representation from the Public Service Commission. In seven of the countries, Zambia, Malawi, Botswana, Trinidad and Tobago, Sierra Leone, Mauritius and Malaysia, the Chairman of the Public Service Commission is an ex-officio member.⁽²⁰⁾ In Kenya two ordinary members of the Public Service Commission are appointed. The Chairman, it appears, cannot be appointed since he is the person who advises the President before the two appointments are made. In Tanzania and Uganda it is possible for the President to appoint a member of the Public Service Commission to the Judicial Service Commission, provided, in the case of Uganda, such person meets the qualifications laid down. The presence of members of the Public Service Commission in the Judicial Service Commission serves to co-ordinate the activities of the two institutions.

Since, in both Zambia and Malawi, the Chief Justice and the Chairman of the Public Service Commission are ex-officio members of the Judicial Service Commission, no question of their tenure of office in the Commission arises. As long as they continue to hold the offices of Chief Justice and Chairman of the Public Service Commission respectively, they remain members. In the case of a member of the Public Service Commission appointed by the Chairman to represent the Commission, his membership, although not specifically so stated in the Constitution, should come to an end if terminated by the Chairman. With regard to the Justice of Appeal or puisne Judge of the High court designated, in Zambia, by the Chief Justice, and in Malawi, by the President after consultation with the Chief Justice, neither Constitution has a provision on his term of membership. It can be assumed that the designating authority - i.e. the Chief Justice in Zambia and the President in Malawi - could terminate the membership.

17. Article 90 (2)(a) read with Article 84 (3).

18. Article 138 (2) of the Constitution.

19. S. 184 (1) of the Constitution.

20. In Zambia, Malawi and Botswana, however, he could be represented by a member of the Public Service Commission designated by him.

5. The provision could also be interpreted as giving such Justice of Appeal or puisne Judge a permanent appointment until he resigns on his own accord or until he resigns or is removed from judgeship. In Zambia, the fourth member of the Commission who is appointed by the President has a term of office of two years but he can be removed by the President before the expiration of this period on the grounds of inability to discharge his functions (arising either from infirmity of mind or body or any other cause) or for misbehaviour.⁽²¹⁾

Stipulated terms of office for an appointed member or appointed members are also found in the Constitutions of Uganda, Sierra Leone, Trinidad and Tobago and Botswana, for instance. The periods are four years in Uganda,⁽²²⁾ five years in Sierra Leone⁽²³⁾ and three years in Botswana⁽²⁴⁾ and Trinidad and Tobago.⁽²⁵⁾ The Constitutions of Kenya, Tanzania and Mauritius do not, however, mention any specific term of office. As in Zambia, an appointed member in Uganda,⁽²⁶⁾ Sierra Leone,⁽²⁷⁾ Trinidad and Tobago,⁽²⁸⁾ and Botswana⁽²⁹⁾ can be removed for inability to discharge his functions or for misbehaviour. Neither in Zambia nor, in any of those countries is there a requirement that a tribunal should first investigate the matter before the removal could be effected. This should be contrasted with the position in the 1966 Constitution of Lesotho. Before the King could remove an appointed member⁽³⁰⁾ for inability to discharge his functions or for misbehaviour, he was required to appoint a tribunal, consisting of a chairman and two members chosen by the chairman from among persons who hold or have held high judicial office, to investigate the matter first.⁽³¹⁾ The King could thereafter dismiss the member only if the tribunal so recommended.⁽³²⁾

21. S. 104 (2)(c).

22. Article 90 (2)(b).

23. S. 85 (3) (b).

24. S. 104 (2).

25. S. 83 (3)(e).

26. Article 90 (2)(c).

27. S. 85 (3)(c) and (d).

28. S. 83 (3)(c).

29. S. 104 (2).

30. There was one such member appointed by the King after consultation with the Chief Justice from persons who held or had held high judicial office. The other members were the Chief Justice (Chairman) and the Chairman of the Public Service Commission or a person designated by him -- S. 125 (1) of the Constitution.

31. S. 125 (6) and (7).

32. S. 125 (8). The member could, however, be suspended during the investigation but such suspension, if not revoked earlier, came to an end if the tribunal did not recommend removal of the member.

Although the functions of the commissions in Zambia and Malawi are similar, their powers differ in origin. In Zambia the Constitution directly invests the Commission with the powers of appointing persons to, and removing them from, the offices of Registrar or Deputy Registrar of the High Court; Senior Resident Magistrate; Resident Magistrate; Magistrate;⁽³³⁾ President or Member of a subordinate Court; or such other offices of President or Member of any subordinate court of law⁽³⁴⁾ as may be prescribed by or under an Act of Parliament.⁽³⁵⁾ It also invests the Commission with the powers of exercising disciplinary control over the holders of these offices.⁽³⁶⁾ These functions are exercised by the Commission on behalf of the President⁽³⁷⁾ but the President cannot withdraw the delegation since it is made by the Constitution. The Commission can delegate its functions in writing, whenever necessary, to any member of the Commission, any judge of the Court of Appeal or of the High Court or to any person holding any of the offices mentioned above.⁽³⁸⁾

While the President is permitted, when necessary, to give general directions to the Commission or to any person delegated to do its work and the Commission or such person is bound to follow such directions, the Commission (including its delegates) is not subject to the direction or control of any other person in the actual exercise of its functions.⁽³⁹⁾ The President cannot, therefore, for instance, order the Commission to appoint this or that person. Such a direction would not qualify as a general one. It would be a specific direction and, therefore, not in accordance with the Constitution.

Unlike the Constitution of Zambia, the Constitution of Malawi vests in the President the appointment, confirmation of appointment and removal of the Registrar and Deputy Registrar of the Supreme Court of Appeal or of the High Court; Resident Magistrates; Magistrates; and such officers as chairman or member of any court of law as may be prescribed by Parliament.⁽⁴⁰⁾ The exercise of disciplinary control over these officers is, however, vested in the Judicial Service Commission, subject to general or special directions of the President.⁽⁴¹⁾ The President may, however, subject to such conditions as he thinks fit, delegate, by direction in writing, his powers of appointment, confirmation of appointment or removal to the Judicial Service Commission or any member thereof or any judge or person holding any of the offices mentioned above.⁽⁴²⁾ In the absence of such delegation the Commission's only function with regard to the appointment, confirmation or removal of the officers mentioned above is to advise the President.⁽⁴³⁾ The President is required to consult the Commission but he is not bound to
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7. In addition to the functions mentioned above, the President, in both Zambia and Malawi, consults the Judicial Service Commission before appointing judges other than the Chief Justice. In Zambia the President acts in accordance with the advice of the Commission.⁽⁴⁶⁾ In Malawi, on the other hand, the President is not bound by such advice.⁽⁴⁷⁾

For comparative purposes, consideration of the Commissions of Uganda, Tanzania, Sierra Leone, Mauritius, Trinidad and Tobago, Botswana and Kenya will suffice. The offices with which the Commissions in these countries are concerned are generally the same as those coming under the jurisdiction of the Commissions in Zambia and Malawi except that in Mauritius and in Trinidad and Tobago the Commission is also responsible for the appointment, confirmation of appointment, removal and disciplinary control of the holders of the offices of solicitor-General, Senior Crown Counsel, Crown Counsel, Crown Attorney and Assistant Crown Attorney.⁽⁴⁸⁾ The powers of the Commission in Malawi are very similar to those of the Commissions in Tanzania, Uganda and Botswana although there are also distinct differences. In Tanzania, as in Malawi, the power to appoint (including the power to confirm appointment and effect promotion of) the officers concerned is vested in the President⁽⁴⁹⁾ but disciplinary control over them and termination of their appointments are vested in the Judicial Service Commission.⁽⁵⁰⁾

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33. Office of magistrate does not include an administrative office the holder of which is entitled to hold court under the subordinate courts ordinance - S.105 (4) (Zambia). See Last Chapter.
34. This does not include a court - martial - *ibid.*
35. S. 105 (1) and (3).
36. *Ibid.*
37. S. 105 (1).
38. S. 105 (2).
39. S. 104 (4).
40. S. 72 (1) and (5).
41. Contrast this with provision in the Constitution of Zambia which restricts the President to general directions.
42. S. 72 (4).
43. S. 72 (2).
44. S. 72 (3).
45. *Ibid.*
46. S. 99 (2) (Zambia).
47. S. 63 (2) (Malawi) read with S. 67 (5).
48. S. 86 (2)(6) Constitution of Mauritius read with Schedule 2 to the Constitution; S. 84 (2) and (3) Constitution of Trinidad and Tobago.
49. S. 61 (1)(a) of the Constitution.
50. S. 61 (1)(6).
51. See above.

8. In Malawi only disciplinary control over the officers is directly vested in the Commission.⁽⁵¹⁾ The Constitution of Tanzania, unlike that of Malawi, says nothing about the President being able to delegate to the Commission his powers of appointment, confirmation of appointment and promotion. The Tanzanian Commission, like that of Malawi, is not protected from interference. In Uganda the power to appoint the officers concerned, confirm their appointments, remove them from office or discipline them is vested in the President acting on the advice of the Judicial Service Commission.⁽⁵²⁾ This differs from the position in Malawi in that the President of Malawi is not bound to follow the advice of the Commission.⁽⁵³⁾ Unlike the Constitution of Malawi, the Constitution of Uganda says nothing about the President being able to delegate his powers to the Commission. There was perhaps no need for including such a provision since the President acts on the advice of the Commission. The Commission is also not protected from interference. Such protection was not necessary since the Commission is not empowered to make appointments, remove officers from office or discipline them without the participation of the President. The powers of the Botswana Commission are the same as those of that of Uganda.⁽⁵⁴⁾ The Botswana Commission is, however, unlike that of Uganda, protected from the direction or control of any person or authority.⁽⁵⁵⁾

It can be seen that the powers of the Zambian Commission are stronger than those of the Commissions in Malawi, Uganda, Tanzania and Botswana in that, although it acts on behalf of the President, its powers are directly granted by the Constitution. It is not an advisor to the President but a permanent agent of the President acting without being required to consult the President or to submit its decisions to him although, when necessary, the President issues general directions for the guidance of the Commission. Its powers are, however, almost the same as those of the Commissions of Sierra Leone, Mauritius, Trinidad and Tobago and Kenya.

52. Article 91 (1) of the Constitution.

53. See above.

54. S. 105 (1) and (2) of the Constitution.

55. S. 104 (4) of the Constitution.

9.

In all these countries the Commission is not an advisor to the Head of State or the Head of Government in the appointment or removal of the officers concerned. It is not even mentioned in the respective Constitutions that the Commission acts on behalf of the Head of State.⁽⁵⁶⁾ The Commission in each of these countries operates as an independent body entrusted with the powers of appointing, dismissing, promoting and disciplining the officers concerned.⁽⁵⁷⁾ In Trinidad and Tobago, however, before appointing a person to the office of Solicitor-General, Chief Legal Draftsman, Registrar-General or Crown-Solicitor, the Commission is required to consult the Prime Minister.⁽⁵⁸⁾ If the Prime Minister objects to the appointment it cannot be made.⁽⁵⁹⁾ This is a power of veto and not of direction.

56. All executive organs are, of course, agents of the Head of State.

57. See S. 86 Constitution of Sierra Leone; S. 86 Constitution of Mauritius; S. 84 Constitution of Trinidad and Tobago; S. 185 Constitution of Kenya.

58. S. 84 (3) Constitution of Trinidad and Tobago.

59. Ibid.

THE PUBLIC SERVICE AND THE PUBLIC SERVICE COMMISSION.A. THE PUBLIC SERVICE

The constitution of Zambia defines the "public service" as "the civil service of the Government".⁽¹⁾ That of Malawi defines it as "the service of the Government in a civil capacity."⁽²⁾ Any office of emolument in the public service is a "public office"⁽³⁾ and any holder of such office is a "public officer"⁽⁴⁾ or civil servant. Both Constitutions include among offices in the public service the offices of Judge of Appeal, Judge of the High Court and all offices in the Police Force.⁽⁵⁾ The Constitutions of Malawi specifically includes the office of magistrate but this mention was perhaps not necessary⁽⁶⁾ since magistrates had never been placed in a special category of the public service, even under the Colonial Administration. The Constitution of Zambia does not, therefore, specifically mention the office of magistrate as being included in the public service. Its inclusion was taken for granted. Both Constitutions specifically exclude certain offices from the public service. The Constitution of Zambia excludes the offices of Attorney-General, Secretary General to the Government,⁽⁷⁾ member of any Commission established under the Constitution and any office in the department of the Clerk of the National Assembly.⁽⁸⁾ The Constitution of Malawi, on the other hand, excludes the offices of President, Speaker or Deputy Speaker of the National Assembly, Minister or Parliamentary Secretary, Member of the National Assembly, member of any Commission established under the Constitution and chief or sub-chief.⁽⁹⁾ Mention of the offices of President, Speaker or Deputy Speaker of the Assembly, Minister or Parliamentary Secretary, and Member of the Assembly was not necessary. These are political offices which, even without specific exclusion, cannot be regarded as falling under the public service. The Constitution of Zambia does not, therefore, specifically exclude them. With regard to the office of chief, although

1. S. 125 (1).

2. S. 93 (1).

3. S. 125 (1)(Zambia); S. 93 (1)(Malawi).

4. Ibid.

5. S. 125 (2)(Zambia); S. 93 (2)(Malawi).

6. See also S. 110 (2) of the Constitution of 1964 which in addition to including Judges, included members of all subordinate courts other than courts - martial or local courts.

7. These two offices are political - see Chapter Thirteen.

8. S. 125 (3).

9. S. 93 (3).

10. S. 33 (Malawi).

11. S. 125 (4)(Zambia); S. 93 (4)(Malawi).

the Constitution of Zambia does not specifically exclude it from the public service, chiefs are not members of the public service

The Constitution of Malawi does not exclude the office of Attorney-General from the public service because the office can also be held by a public officer.

Unlike the Clerk of the National Assembly of Zambia and his staff, the Clerk of the National Assembly of Malawi and his staff are public officers.⁽¹⁰⁾ Both Constitutions provide that "a person shall not be considered as holding a public office by reason only of the fact that he is in receipt of a pension or other like allowance in respect of service under the Government."⁽¹¹⁻⁾

The organization of the public service in both Zambia and Malawi is based on the British pattern⁽¹²⁾ the pattern that is prevalent in all the Commonwealth States. The whole public service structure is based on departments which are under the charge of Ministers. A department may have sub-departments. Each department is under the supervision of a Permanent Secretary or Permanent Secretaries, assisted by one or more Deputy Permanent Secretaries. Below the Permanent Secretaries come the numerous public officers who man the various sections of a department. The civil servants themselves can be classified in either of two ways. The first is according to office grades and the salaries to such offices. In Zambia, for instance, there are four divisions - Division I - comprising persons who are on the A Scale and earning over, K2,400.00; Division II - all officers earning K740.00 and over;⁽¹³⁻⁾ and Divisions III and IV - all officers earning less than K740.00. The second way of classification is by the type of work they do. This can be done by placing all the civil servants in three divisions - (1) non-industrial (excluding the manipulative grades); (2) minor and manipulative grades; and (3) industrial.

12. On the British civil service, see Mustoe, N.E. Law and Organization of the British Civil Service (Pitman); Wade and Phillips, op.cit., pp. 221 - 227.

13. Excluding District messengers and Members of the Police Force.

3.

Very few major changes have been made to the structure left by the Colonial Administration in both countries. The most important noticeable change that has taken place has been the abolition of the differences between European and African civil servants which existed under the Colonial Administration. This has changed the complexion of the public service in both countries. Most of the posts formerly held by Europeans and closed to Africans are now held by Africans. The distinction between European and African civil servants has now been replaced by one between local and expatriate civil servants. Local civil servants⁽¹⁴⁾ could be Africans, Europeans or Asians and so could be expatriate civil servants.

When Zambia and Malawi became independent they were faced by the same problem that had been faced by most African States (including the former French dependencies) that had become independent earlier - i.e. shortage of local manpower for the civil service. The position in Zambia and Malawi was, in fact, worse than that in Ghana and Nigeria, for instance, where the British Colonial Administration had advanced the Africans to more responsible positions, although not in sufficient numbers.⁽¹⁵⁾ The shortage of local manpower in Zambia and Malawi, as in other countries, necessitated the retaining of a large number of expatriate civil servants, particularly in the senior ranks. This did not, however, solve the problem of shortage of manpower. President Kaunda summed up the position in Zambia in a speech to a Provincial Civil Servants' seminar in these words:

14. Only those who are citizens are classified as local civil servants. All others come under "expatriate civil servants."

15. Writing on the shortage of experienced civil servants in the former British territories, Mr. A. L. Adu, once head of the civil service in Ghana, states: "It is fashionable to blame the British Administrations for this lamentable state of affairs. No doubt they must accept a large part of the responsibility. But it has to be remembered that until the last war, no one - not even the most optimistic African politician - expected independence to come so quickly. Constitutional advancement has been so rapid as to outstrip the development of many national institutions including the Civil Service". Adu, L.A. The Civil Service in New African States. The differences in local manpower between Nigeria and Ghana, on the one hand, and Zambia and Malawi, on the other, can be instanced by the fact that while at independence the former countries had African judges, engineers, large numbers of lawyers and doctors, the latter countries had no African judge or engineer. Both had one lawyer and one or two doctors.

4. "Sound administrative background had been set in the colonial administration, but that administration was primarily intended for law and order, and only at the colonial twilight did development receive any attention, but before it even neared maturity political circumstances changed with the result that most members of that service decided to retire. The consequence has been a drastic skilled manpower shortage and recruitment as replacement in various government departments of locally-based men who undoubtedly have the potential for development but who are in many cases seriously handicapped by lack of the requisite experience. There are more vacancies than can be filled by the available Zambian man-power in addition to the existing expatriate manpower. (16)

The desire to have a non-expatriate permanent public service, national pride and political pressures demanded a policy of localization, popularly known as "Africanization" "Zambianization" or "Malawianization." This policy, which is a pre-occupation of most Governments in the new African States, has moved at a faster rate in Zambia than in Malawi. The policy of the Government of Zambia is revealed in the following words of President Kaunda:

"The uncertainty of retaining expatriate manpower makes it imperative for this government to plan for the future which it can only do by ensuring that in certain posts only those who can ensure continuity are appointed to them and appointed as soon as possible." (17)

The Government is implementing this policy with the speed that some critics consider as detrimental to efficiency and good administration. The Government of Malawi, on the other hand, is more cautious about the policy of "Africanization". President Banda has repeatedly told his African civil servants that he would not Africanize the top positions in the public service for the sake of Africanization or in order to please them; that only those who show ability equivalent to, or better than, that of the whiteman holding the position would be made to take over; and that he would not hesitate to replace those he has promoted by Europeans if they did not rise to the standard of efficiency he requires.

Localization results in replacement of expatriate officers by local men as they become qualified for the posts. It was anticipated the process would take place and provision was included in almost all the Independence Orders of the former British territories to facilitate such replacement and to safeguard the position of the expatriate officer. Section 16 of the Zambia Independence Order, 1964 and Section 12 of the Malawi Independence Order, 1964 (which was not repealed by the Republic of Malawi (Constitution) Act and is therefore, still in force) empower the President, in the event of there being more local candidates qualified for appointment, to, or promotion in, any branch of the public service than there are vacancies in that branch which could

5. appropriately to be filled by local candidates, to cause certain officers in that branch to be retired after six months' notice (unless the officer concerned agrees to an earlier date) so that the vacancies could be filled by local candidates. These provisions do not apply to all expatriate public officers. They apply only to officers who are the holders of a pensionable public office and (a) are designated under the Overseas Service Aid Scheme (b) were members of Her Majesty's Overseas Civil Service or Her Majesty's Overseas Judiciary immediately before independence day; (c) whose conditions of service include an entitlement to free overseas passages from the country for the purpose of leave of absence upon the completion of a tour of duty; or (d) are overseas officers⁽¹⁸⁾ appointed after independence to any public office (otherwise than on promotion or transfer from another public office) and who are or were notified at the time of appointment that these provisions applied to them.⁽¹⁹⁾

Section 15 of the Zambia Independence Order, 1964, and Section 11 of the Malawi Independence Order, 1964, protect pensions and like benefits of officers who are holders of a pensionable public office and (a) are designated under the Overseas Service Aid Scheme; (b) were immediately before independence members of Her Majesty's Overseas Civil Service or Her Majesty's Overseas Judiciary; (c) whose conditions of service include an entitlement to free overseas passages from Zambia for the purpose of leave of absence upon the completion of a tour of duty; or, (d) in Zambia only, are not citizens of Zambia.^(19a) Any of the above officers can appeal against any of the following decisions:

16. Speech by President Kaunda at a Provincial Civil Servants' Seminar, Ndola, 25 June, 1966.

17. Ibid.

18. An "overseas officer" is an officer in the public service who is, either individually or as a member of a class, declared by the appropriate Commission to be an overseas officer. The appropriate Commission means the Public Service Commission or the Judicial Service Commission or (in Malawi only) the Police Service Commission. S. 16 (6) Zambia Independence Order, 1964; S. 12 (4) Malawi Independence Order, 1964.

19. S. 16 Zambia Independence Order, 1964, S. 12 Malawi Independence Order, 1964.

19a. This provision although not so mentioned should equally apply in Malawi.

6. (a) A decision of the appropriate Commission⁽²⁰⁾ giving concurrence to a decision of an authorized person or authority in terms of Section 121 of the Constitution of Zambia and section 106 of the Constitution of Malawi, 1964 (not repealed by the Republic of Malawi (Constitution) Act, 1966) to refuse, withhold, reduce in amount or suspend any benefits due to such an officer for his service as a public officer;
- (b) A decision by any authority to remove such an officer from office if the consequence of the removal is that any benefits cannot be granted in respect of the officer's service as a public officer;
- (c) A decision by any authority to take some other disciplinary action in relation to such an officer if the consequence of the action is to reduce the amount of any benefits that may be granted in respect of the officer's service as a public officer. (2)

Where any of the above decisions is made the authority concerned must cause to be delivered to the officer concerned or his personal representative a written notice of the decision stating the time, not being less than twenty eight days from the date on which the notice is delivered, within which he or his personal representative may apply to the authority for the case to be referred to an Appeals Board.⁽²²⁾ If an application that the case should be referred to an Appeals Board is made within the time mentioned in the notice, the authority concerned notifies the President in writing that a Board be appointed.⁽²³⁾ The President then appoints a Board consisting of one member selected by him; one member selected by an association representative of public officers or a professional body, nominated in either case by the applicant; and one member selected by the other two members jointly (or in default of agreement between the two members, by the Chief Justice, in Zambia, and by the Judicial Service Commission in Malawi) who becomes the Chairman of the Board.⁽²⁴⁾ The Board may hear the applicant or his representative if he so requests in writing; hear any other person it thinks may be able to give it information; have access to, and consider, all documents possessed by the authority or produced by the applicant or his representative.⁽²⁵⁾ After considering the matter the Board may give any of the following decisions:

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20. The "appropriate Commission" means the Judicial Service Commission, the Public Service Commission or, in Malawi only, the Police Service Commission - S.121 (4) Constitution of Zambia; S.106 (4) Constitution of Malawi, 1964.
21. S. 15 (1) Constitution of Zambia; S.11 (1) Constitution Malawi, 1964. See also S. 121 and S. 106 respectively.
22. S. 15 (2) Zambia Independence Order, 1964; S. 11 (2) Malawi Independence Order, 1964.
23. S. 15 (3); S. 11 (3).
24. Ibid.
25. S.15 (4); S. 11 (4).

- (1) if the matter falls under (a) above, the Board may advise the appropriate Commission whether its (the Commissions) decision should be affirmed, reversed, or modified. The Commission must act in accordance with the Board's advice.
- (2) if the matter falls under (b) or (c) above, the Board has no power to advise the authority that made the decision to affirm, reverse or modify the decision but the Board may advise the authority responsible for granting the benefits in question (i) where the officer has been removed from office, to grant all or part of the benefits for which the officer concerned would have been eligible under any law if he had retired voluntarily at the date of dismissal; or (ii) where some other disciplinary action has been taken in relation to the officer, that on the grant of any benefits under law in respect of the officer's service such benefits shall be increased by such amount, or shall be calculated in such manner, as the Board may specify in order to offset all or any part of the reduction in the amount of such benefits that, in the opinion of the Board, would or might otherwise be a consequence of the action. The authority must act in accordance with the Board's advice and the provisions of the law concerned. (26)

Where benefits are granted to a public officer wholly for service as a public officer when that service commenced before independence day, the position is governed by the law that was in force immediately before independence.⁽²⁷⁾ On the other hand, where such benefits are wholly or partly in respect of service that commenced after independence, the position is governed by the law in force at the commencement of the service.⁽²⁸⁾ In both cases the position can be governed by a later law that is not less favourable to the officer concerned.⁽²⁹⁾ Where an officer is entitled to exercise an option as to which of two or more laws shall apply in his case, the law he opts for is deemed to be more favourable than the other law or laws.⁽³⁰⁾

It should be noted that the provisions of sections 120 and 121 of the Constitution of Zambia and of Sections 105 and 106 of the 1964 Constitution of Malawi, unlike the provisions of sections 15 of the Zambia Independence Order and 11 of the Malawi Independence Order, apply to all public officers and not only to the expatriate officers discussed above.

In addition to the provisions that are part of the Constitution, there are other laws which govern the position and conditions of both expatriate and non-expatriate civil servants or one of the two classes.⁽³¹⁾ As an inducement, in some cases expatriate public officers are paid more than their local counterparts.

As in Britain public offices in Zambia and Malawi are barred from active politics.⁽³²⁾ The role of the civil servant in this respect was aptly put by President Kaunda in these words:

"An old concept of established civil services is to ensure non-contamination of the service by politics, but this does not mean resistance to the political desires of the country. For example at policy making level it is the duty of civil servants to advise as honestly and candidly as possible both on the lines that if such an action were taken there would be a given state of advantages or disadvantages to the government as seen from an administrative angle and such advantages or disadvantages as could be seen by administrators from a political angle." (33)

The task of ensuring non-contamination of the civil service by politics is greater in Zambia than in Malawi because of the existence of a two party system.

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26. S. 15 (5) Zambia Independence Order, 1964; S. 11 (5) Malawi Independence Order, 1964.
 27. S. 120 (2) (a) Constitution of Zambia; S. 105 (2) (a) Constitution of Malawi, 1964. In the case of pensions granted before independence, the position is governed by the law in force when the pension was granted or by a law of a later date which is not less favourable.
S. 120 (1): S. 105 (1).
 28. S. 120 (2)(b); S. 105 (2)(b).
 29. S. 120 (2); S. 105 (2).
 30. S. 120 (3); S. 105 (3).
 31. See e.g. the Civil Service Ordinance (Cap. 57)(Zambia) and subsidiary legislation thereunder.
 32. On British civil servants and politics, see Wade and Phillips, *op.cit.*, pp. 224-225; Report of the Committee on the Political Activities of Civil Servants (the Masterman Committee)(Cmd. 7713 of 1949); Cmd 3783 of 1953. See also Servants of the Crown (Parliamentary Candidature) Order, 1950.
 33. Speech by President Kaunda at a Provincial Civil Servants Seminar, Ndola, 25 June, 1966.

B. The Public Service Commission

It has been mentioned in Chapter Thirteen that while the President appoints some public officers, others are appointed by the Public Service Commission, the Judicial Service Commission, any other authorized persons or, in Malawi only, the Police Service Commission. The composition and functions of the Judicial Service Commission have been discussed in the previous Chapter. Only the composition and functions of the Public Service Commission in both Zambia and Malawi, will be discussed here.

The history of public service commissions in the Commonwealth dates back to 1855 when the first Civil Service Commission was created in Britain following the Northcote - Trevelyan Report on the Civil Service.⁽³⁴⁾ That Report recommended that posts in the country's civil service should be filled through competitive examinations. At the time the Report was published filling of posts in the civil service was mainly done through patronage exercised either by a Minister of the Crown or a politically influential person.⁽³⁵⁾ This practice produced not only a poor and inefficient civil service, but also abundant corruption. Sons of important persons secured jobs not because they were the persons best fit for them but because they had the backing of their parents' influence or purses. Open competitive examinations were not, however, adopted until 1870 when an Order in Council of that year laid down that such examinations should be held for all branches of the civil service. Since then the British Civil Service and the Civil Service Commission have gone through many changes.⁽³⁶⁾

Once the institution of a public service Commission had been found to be the most effective solution to the problems of patronage and corruption in making appointments in the civil service, it was adopted in the self-governing Dominions.

34. White, L.W. and Hussey, W.D. Government in Great Britain, the Empire and the Commonwealth (Cambridge, University Press, 1966) p. 112; Wade and Phillips, op.cit., p.226.

35. White and Hussey, pp. 111-112.

36. At present the British Civil Service Commission derives its authority from an Order in Council of July 22, 1920, which states that "the qualifications of all persons proposed to be appointed, whether permanently or temporarily to any situation or employment in any of Her Majesty's establishments shall be approved by the Commissioners." - as cited at pp. 226-27 Wade and Phillips, op.cit.

10. In the non-self-governing territories, however, the Governor was responsible for the appointment of public officers other than those appointed from Britain. Zambia and Malawi had, therefore, no public service Commissions before independence. The Governor was responsible for appointments but he could delegate his powers.

In the older Commonwealth countries, e.g. Australia and Canada, the Public Service Commission is not covered by the Constitution.⁽³⁷⁾ It is established by an Act of Parliament. This practice was not followed in the framing of the constitutions of the new countries of the Commonwealth. The functions of a Public Service Commission were considered too important to be governed by ordinary legislation. The institution and its functions was accordingly written into the Constitutions of most of the newer countries of the Commonwealth,⁽³⁸⁾ including Zambia and Malawi. Writing the Commission into the Constitution makes it less easy for the Government to alter the structure and functions of the institution.

Both the Constitutions of Zambia and Malawi provide for a Public Service Commission consisting of a Chairman and not less than three or more than six (five in Malawi) other members.⁽³⁹⁾ The Chairman and members are appointed by the President.⁽⁴⁰⁾ Members of the National Assembly and public officers are disqualified from appointment.⁽⁴¹⁾ The Constitution of Malawi specifically disqualifies Ministers from appointment.⁽⁴²⁾ This additional provision was necessary because Ministers are not necessarily Members of the National Assembly.

37. See S. 67 of the Constitution of Australia and S. 131 of the Constitution of Canada which authorize Parliament to make arrangements on the appointment of civil servants.

38. See e.g. Constitutions of Uganda (Art. 101); Singapore (Art. 71); India (Art. 315); Malaysia (Art. 139); Kenya S. 106; Sierra Leone (S.94); Malta (S.112); Mauritius (S. 08); Botswana (S.110). Contrast Tanzania whose Commission is not included in the Constitution.

39. S. 114 (1)(Zambia); S. 06 (1)(Malawi).

40. S. 114 (2); S. 06 (2).

41. S. 114 (3); S.06 (3). In Ceylon the Constitution specifically states that a public officer could be appointed but that he must resign his public office. His term of office as a public officer, however, continues to run for the purposes of pension benefits - S.50. In Malaysia, on the other hand, the Constitution requires the Chairman or the Deputy Chairman to be appointed (and both may be appointed) from persons who are (or have at any time within the preceding five years been) members of any of the public services - Art. 139 (5). A person appointed from the Public Service as above, however, cannot continue holding his office - Art. 139 (6).

42. S. 06 (3).

In Zambia all Ministers are Members of the National Assembly and, therefore, come under the disqualification of Members of the National Assembly. Compared with the disqualifications in Constitutions of some of the Commonwealth countries, those in the Constitutions of Zambia and Malawi can be said to be less wide. Members of Parliament and public officers are disqualified by most Constitutions.⁽⁴³⁾ The Constitution of Uganda also disqualifies members of District Councils or Urban Authority Councils. The Constitution of Singapore disqualifies in addition to Members of Parliament and public officers, a duly nominated candidate for parliamentary elections;⁽⁴⁴⁾ a members of or a person in the employ of a corporation established by law; a member of a trade union or of any body or association affiliated to a trade union; and a holder of an office in a political association.⁽⁴⁵⁾ The Constitution of Malaysia, in addition to disqualifying Members of Parliament and public officers,⁽⁴⁶⁾ disqualifies, as does the Constitution of Singapore, officers or employees of a corporation established by law (including local authorities) and members of a trade union or of a body or association affiliated to a trade union.⁽⁴⁷⁾ In Kenya the Constitution in addition to disqualifying existing Members of Parliament (including members of the Regional Assemblies now abolished) and Members of any Legislative Council established in Kenya by an Order of Her Majesty in Council);⁽⁴⁸⁾ persons nominated or who were at any time nominated for any of the legislative bodies mentioned above; or persons holding or who have held at any time an office in a political party or organization that sponsors or sponsored at any time candidates for election to any of the legislative bodies mentioned above or to any local government authority established under any law.⁽⁴⁹⁾ An amendment to the Constitution in 1964 mitigated the position by providing that the disqualifications above would cease when Parliament has been dissolved on two occasions after the person concerned has ceased to be a member of any of the legislative bodies mentioned or a candidate for election thereto or holder of an office in such political party.⁽⁵⁰⁾

43. See, e.g. Constitutions of Botswana (S. 110 (3)); Uganda * Art. 103 (1); Singapore Art. 72; Kenya (Art. 106 (3)); Malta (S. 112 (3)); Mauritius (S. 38 (2)).

44. Even in Constitutions where this is not specifically mentioned it would be improper to appoint a person who has been nominated for election.

45. Article 72.

46. The Chairman or Deputy Chairman of the Commission must be a public officer or a person who has been in the public service within the five years immediately preceding. Both the Chairman and the Dep. Chairman could be appointed from among the persons just mentioned. A member of the public service appointed as Chairman or Deputy Chairman becomes ineligible for any appointment^{to} the service of the Federation, other than as member of the Commission. This means he must resign his other appointment. Art. 142 (2) bars public officers from membership of the Commission.

12. Similar disqualifications to those in the Constitution of Kenya also exist in the Constitution of Botswana but the period of disqualification is limited to two years after cessation of involvement in the disqualifying act and the disqualification does not extend to membership of, and election to, local authority councils.⁽⁵¹⁾

The disqualification of Members of Parliament, members of local authority councils and holders of office in political parties are attempts to cut down political influence in the Commission which could lead to patronage and corruption in the making of appointments. It is regrettable that in Zambia and Malawi the disqualification does not extend to members of local authority councils and to holders of office in a political party. The disqualification of Members of trade unions in Singapore and Malaysia appears surprising but the reason for this is clear. Being a champion of the workers, a trade unionist as a Member of the Public Service Commission would more likely be influenced by figures of unemployment than by the appropriation figures of Parliament.

Once appointed a Member of the Commission has, in Zambia, a term of office of two years, and, in Malawi, one of four years.⁽⁵²⁾ Zambia has one of the shortest terms of office when compared with other Commonwealth countries. In Sierra Leone⁽⁵³⁾ and Trinidad and Tobago,⁽⁵⁴⁾ for instance, the shortest period for which a member could be appointed is three years while the maximum period is five years. The period is three years in Botswana,⁽⁵⁵⁾ Kenya⁽⁵⁶⁾ and Mauritius⁽⁵⁷⁾ and five years in Singapore⁽⁵⁸⁾ and Malaya.⁽⁵⁹⁾ In Uganda⁽⁶⁰⁾ the period is four years while in India⁽⁶¹⁾ it is six years. Apart from resigning on his own accord⁽⁶²⁾ or because circumstances have arisen which, if he were not a member already, would have disqualified him,⁽⁶³⁾ a member of the Commission in Zambia or Malawi could be removed by the President.⁽⁶⁴⁾

47. Article 142 (2)

48. Nominated Members were and are exempted.

49. S. 136 (3). 50. S. 136 (3A) as added by Act No. 23 of 1964.

51. S. 110 (2) and (3) read with S. 65 (3)(b)(ii).

52. S. 114 (4)(a)(Zambia); S. 96 (4)(a)(Malawi).

53. S. 94 (5) of the Constitution.

54. S. 92 (5) of the Constitution.

55. S. 110 (5)(a) of the Constitution.

56. S. 136 (5)(a) of the Constitution.

57. S. 92 (1)(a) of the Constitution.

58. Article 73 (1) of the Constitution.

59. S. 112 (5) of the Constitution. A member could, however, be appointed for a shorter unspecified period.

60. Article 101 (5) of the Constitution.

61. Article 316 (2) of the Constitution.

62. This can be done in terms of S. 123 (Zambia) and S. 96 (Malawi).

63. S. 114 (4)(b)(Zambia); S. 96 (4)(b)(Malawi).

64. S. 114 (5); S. 96 (5).

The Constitution of Malawi does not mention the grounds on which which a member may be removed. The presumption is, therefore, that members are appointed at the President's pleasure and could be removed at his pleasure. Under the 1964 Constitution of Malawi a member of the Commission could only be removed for inability to perform his functions or for misbehaviour.⁽⁶⁵⁾ In Zambia a member of the Commission could only be removed for inability to discharge his functions (arising from infirmity of the mind or body or from any other cause) or for misbehaviour.⁽⁶⁶⁾ This is the position in most of the Commonwealth countries.⁽⁶⁷⁾ The procedure of removal in Zambia, however, differs from that existing in Kenya,⁽⁶⁸⁾ Mauritius,⁽⁶⁹⁾ Botswana⁽⁷⁰⁾ and Singapore,⁽⁷¹⁾ for instance. In all these countries the President or Governor-General appoints a tribunal to investigate the matter and then act in accordance with the tribunal's recommendation. In Zambia the President is not required to appoint such a tribunal before removing the member concerned. In India the President refers the matter to the Union Supreme Court and thereafter acts in accordance with the Court's recommendation.⁽⁷²⁾ The position in Zambia, however, also obtains in Uganda,⁽⁷³⁾ Trinidad and Tobago,⁽⁷⁴⁾ Malta⁽⁷⁵⁾ and Sierra Leone.⁽⁷⁶⁾ The tribunal procedure of removal is more preferable to that existing in Zambia in view of the very important role the Public Service Commission plays and the independence it should be accorded in the exercise of its functions.

Before dealing with the functions of the Public Service Commission, reference should be made to the composition of the Malawi Police Service Commission. The Police Service Commission has the same functions as the Public Service Commission except that those functions are limited to the Police Force. The Commission consists of three members - the chairman of the Public Service Commission (who is chairman), a judge designated by the President, and a member of the Public Service Commission also designated by the President.⁽⁷⁷⁾ There is no similar Commission in Zambia. A number of Commonwealth countries have, however, a Police Commission, e.g., Mauritius⁽⁷⁸⁾ and Trinidad and Tobago.⁽⁷⁹⁾

65. S. 94 (5) 1964 Constitution, 66. S. 114 (5) and 6) (Zambia).
 67. See e.g. Constitutions of Mauritius (S. 92 (2)); Kenya (106 (6)); Botswana (S. 110 (6)); Uganda (Art. 101 (6)); Trinidad and Tobago (S. 92 (6) and (7)); Malta (S. 112 (6)); Sierra Leone (S. 94 (6) and (7)).
 68. S. 106 (7)-(9) of the Constitution.
 69. S. 92 (3)-(5) of the Constitution.
 70. S. 110 (7) - (8) of the Constitution.
 71. Article 73 (2) of the Constitution.
 72. Article 317 (1) of the Constitution.
 73. Article 101 (6) of the Constitution.
 74. S. 92 (6) and (7) of the Constitution.
 75. S. 112 (6) of the Constitution.
 76. S. 94 (5) of the Constitution.
 77. S. 91 (Malawi). 78. S. 90 of the Constitution.
 79. S. 98 of the Constitution.

It has been indicated in Chapter Thirteen that in both Zambia and Malawi appointments fall under three categories - i.e. those made by the President; those made by the Commissions; and those made by public officers or other persons on authorization by the President or a Commission. The most important appointments are made by the President, some important and less important ones by the Commissions, and the least important ones by public officers or other authorized persons.

Generally, in both Zambia and Malawi, the power to appoint persons to hold or act in any office in the public service (including the power to confirm such appointments), to exercise disciplinary control over such persons and to remove them from office vests in the President.⁽³²⁾ Some of these powers are, however, delegated to the Commissions or to public officers or other persons by the President or the Constitution. In Malawi the President can delegate some of his delegable powers outside the jurisdiction of the Judicial Service Commission (discussed in the last Chapter) to the Public Service Commission or the Police Service Commission.⁽³¹⁾ In some cases the President is required to obtain the advice of the Public Service Commission or the Police Service Commission before exercising his powers.⁽³²⁾ While most of the powers exercised by the two Commissions are derived from authorization in writing by the President, in cases of disciplinary control over those officers whose appointment is not the sole responsibility of the President, the Commissions derive their powers directly from the Constitution.⁽³³⁾ While, therefore, the President can withdraw from any of the two Commissions the powers of appointment and dismissal of officers, he cannot do so with regard to powers of disciplinary action. Only a constitutional amendment can remove powers of disciplinary action from the Commissions.

30. S. 115 (1) (Zambia); S. 37 (1) (Malawi).

31. S. 37 (2) (Malawi). He cannot, however, delegate the appointment and dismissal of the following officers: Director of Public Prosecutions; Auditor-General; Attorney-General; Attorney-General (when a public officer); the Commissioner of Police; the Deputy Commissioner of Police; Ambassadors; High Commissioners or Secretaries; or Secretary to the Cabinet - see Chapter 13. Delegation of appointments and dismissals in the armed forces can only be delegated to officers in the armed forces - S. 43 (3) and 37 (b)(d).

32. S. 37 (3). He is not, however, bound to follow the advice.

33. S. 37 (4) read with S. 93.

In Zambia the President has non-delegable powers to appoint persons to, and to remove them from, the offices of Permanent Secretary, Commissioner of Police, ambassador, High Commissioner or principal representative.⁽⁸⁴⁾ He has also the sole power of disciplinary control over these officers.⁽⁸⁵⁾ However, in appointing a Permanent Secretary and the Commissioner of Police, the President is required to consult the Public Service Commission before making the appointment.⁽⁸⁶⁾ He is also required to consult the Commission where the person to be appointed to, or removed from, the office of Ambassador, High Commissioner or principal representative is an officer in the public service.⁽⁸⁷⁾ He must consult the Commission when exercising disciplinary action over such officer.⁽⁸⁸⁾ It should, however, be noted that the President is not required to consult the Commission before dismissing or exercising disciplinary action over a Permanent Secretary, the Commissioner of Police or diplomats appointed from outside the public service. The Public Service Commission has no jurisdiction to make appointments to judicial offices,⁽⁸⁹⁾ to any office in the Zambia Police Force below the rank of assistant superintendent or in the Zambia Prison Service below the rank of superintendent or to offices in the armed forces.⁽⁹⁰⁾ Powers to appoint, discipline or remove from office, officers in the Zambia Police Force below the rank of assistant superintendent and in the Zambia Prison Service below the rank of superintendent are vested in the Commissioner of Police and in the Commissioner of Prisons respectively and in such other officers as may be prescribed by an act of Parliament.^(92.)

With regard to other offices not mentioned above, the powers of appointment, disciplinary control and removal of the officers concerned are vested in the Public Service Commission which exercises them on behalf of the President.⁽⁹³⁾ In the case of the Director of Public Prosecutions and the Auditor-General, the Commission has only the power of appointment and not of disciplinary control or removal from office.⁽⁹⁴⁾

84. S. 115 (2)(a) and (b)(Zambia).

85. S. 115 (1) and (2)(C).

86. S. 115 (2).

87. Ibid.

88. Ibid.

89. These come under the jurisdiction of the Judicial Service Commission.

90. S. 115 (5)(Zambia).

91. Appointments in the armed forces are made by the President but the President may, however, delegate the powers to any other member of the armed forces. S. 49 (3).

92. Ss. 116 and 117 (Zambia).

93. S. 115 (3). The Commission could delegate its powers to any public officer or one of its members - S.115 (4).

94. See Chapter 13.

16. Compared with Public Service Commissions elsewhere, that of Malawi is similar to that of Uganda in that its powers are not derived directly from the Constitution. In Uganda the powers of appointment, removal and discipline of officers is vested in the President who may, if he so decides, delegate any of the powers to the Public Service Commission or the other Commissions.⁽⁹⁵⁾ As in Malawi, the President cannot delegate to the Commission or any other Commission the appointment and removal from office of Permanent Secretaries, the Auditor-General, the Inspector-General of Police, Heads of Departments, Ambassadors, High Commissioners or other diplomatic representatives.⁽⁹⁶⁾ On the other hand, the powers of the Zambian Public Service Commission are similar to those of, for instance, Kenya,⁽⁹⁷⁾ Botswana,⁽⁹⁸⁾ Sierra Leone⁽⁹⁹⁾ and Mauritius.⁽¹⁰⁰⁾

In conclusion it should be mentioned that the Public Service Commission in Malawi is not as independent of the President as is its counterpart in Zambia. While in practice the position in Malawi may not be different from that obtaining in Zambia owing to the wide delegation of presidential powers to the Commission, it would be preferable if the powers exercised by the Commission were derived directly from the Constitution as in Zambia.

95. Article 104 (1) and (2) of the Constitution.

96. Article 104 (3) and 105.

97. S. 103 of the Constitution.

98. S. 111 of the Constitution.

99. S. 95 of the Constitution.

100. S. 39 of the Constitution.

C. CORPORATIONS, BOARDS AND AGENCIES

In both Zambia and Malawi there exist numerous statutory bodies - i.e. Corporations, Boards and Agencies. In Zambia there are, among others, the Industrial Development Corporation, the Agricultural Rural Marketing Board, the Dairy Marketing Board and the Pneumoconiosis Compensation Board. In Malawi there are, among others, the Malawi Development Corporation, the Farmers Marketing Board and the Tobacco Control Commission. These Corporations, Boards and Agencies are established to serve a wide range of purposes - e.g. investment, control of production and marketing and welfare and social services. The Malawi Development Corporation and the Industrial Development Corporation of Zambia, for instance, are investment corporations. The Farmers Marketing Board in Malawi, for instance, and the Agricultural Rural Marketing Board in Zambia, for instance, are regulatory bodies. The Pneumoconiosis Compensation Board in Zambia, on the other hand, provides welfare and social services to victims of pneumoconiosis.

Although these statutory bodies are Government sponsored and, therefore, State organizations, they do not form part of the public service. Their employees are not public officers and accordingly are not bound by public service regulations. They are appointed by the statutory bodies themselves and not by the Public Service Commission. While it is improper for senior employees of these bodies to take part in active politics, the lower ranks can do so.

Every statutory body comes under the remote control of the Minister whose department has the closest relationship with the purpose being served by the body. The extent of the responsibility a Minister has over a statutory body is still a debatable question not only in Zambia and Malawi, but also in other Commonwealth countries.⁽¹⁰⁴⁾ The general view seems to be that a Minister is responsible only for a statutory body's broad policies and not for its day to day activities. The statutory bodies in Zambia and Malawi furnish annual reports which are laid before the National Assembly by the Ministers responsible.⁽¹⁰²⁾ In order to increase Government control over these bodies the Parliament of Malawi enacted the Statutory Bodies (Control of Contracts) Act, 1966.⁽¹⁰³⁾ The Act empowers the Minister under whose department a statutory body falls to control contracts entered into by it and to specify if necessary classes of contracts which may not be entered into without his approval.

100. The legislation was initiated after the President-elect had discovered that a public body had bound itself to purchase its total fuel oil requirements from a certain oil company for ten years.⁽¹⁰⁴⁾ The Act empowered the Minister concerned in each case to set up a Commission of Enquiry to look into existing contracts and make recommendations which could result in termination of a contract or contracts if necessary.

101. For a discussion of statutory bodies in the United Kingdom and the problems of control by Ministers that arise, see Wade and Phillips, op.cit., pp.281-294; Rolson, W.A. Nationalised Industries and Public Ownership (London, George Allen and Unwin).

102. This is also the practice in other Commonwealth countries.

103. Act No. 29 of 1966. The Act was later amended by Act No. 41 of 1966. The Act applies to all statutory bodies including municipalities and District Councils.

104. See the Speech of Dr. Danda during the debate on the Statutory Bodies (Control of Contracts) Bill - 6th Meeting of the 3rd Session of Parliament. See also Roberts, op.cit., pp. 310 - 312.

PUBLIC REVENUE

"No taxation, charges or loans can be authorised except by or under the authority of an Act (of Parliament)", write Wade and Phillips,⁽¹⁾ This power to tax which the British Parliament gained after a long-drawn struggle with the sovereign,⁽²⁾ is now possessed by the legislatures of most of the countries in the world. In countries with written ⁽³⁾ Constitutions the power is usually enacted in the Constitution. This is the case in Zambia and Malawi. The Constitution of Zambia provides that "no taxation shall be imposed or altered except by or under an Act of Parliament"⁽⁴⁾ while that of Malawi states that "no tax, rate, duty, levy or imposition shall be raised, levied or imposed by or for the purposes of the Government or any local authority otherwise than by or under the authority of law."⁽⁵⁾ The wording of both provisions prohibits any other body or authority from raising taxes without being authorized to do so by Parliament. Section 106, subsection (2) of the Constitution of Zambia states that except as provided under subsections (3) and (4) (of the same section) "Parliament shall not confer upon any other person or authority power to impose or to alter (otherwise than by reduction) any taxation." As will be seen below, subsection (3) permits Parliament to empower the President or a Minister to bring into operation provisions of a Bill on taxation by order before the Bill becomes law while subsection (4) permits Parliament to confer upon a local government authority power to impose taxation within its area and to alter taxation so imposed. The wording of the provision of the Constitution of Malawi, quoted above, also permits delegation of taxing powers to any local authority. There is no provision in the Constitution of Malawi prohibiting Parliament from authorizing any person or authority to raise taxes for the purposes of the Government or a local authority. All that is required is that Parliament should authorize that person or authority by law and that the taxes should be raised for the purposes of the Government or a local authority. This should be contrasted with subsection (2) of Section 106 of the Constitution of Zambia, quoted above, which specifically prohibits Parliament from conferring "upon any other person or authority power to impose or to alter (otherwise than by reduction) any taxation" except in the two instances given. In practice it is unlikely that the provision of the Constitution of Malawi would produce delegation of taxing power different from that permitted by the Zambian provision.

Footnotes 1 - 5 on page 711.

1. Co. 139.
2. By the time of Edward I (1272-1307) it had been conceded that the consent of Parliament was necessary for direct taxation. The struggle between the monarch and Parliament, with regard to indirect taxation, however, continued. By the time of the Wars of the Roses the monarch had conceded that the consent of Parliament was required for the taxation of certain commodities and foreign trade was considered as part of foreign affairs and therefore, subject to control by prerogative power. The distinction between taxation by imposition of customs duties and regulation of foreign trade was difficult to demarcate and as a result conflict arose occasionally between Parliament and the sovereign. This resulted in the two famous cases - the Case of Impositions (Bates' Case) 1606 2 St. Tr. 371 and the Case of Shipmoney (The King v. Hampden) 1637 3 St. Tr. 825. In the first case John Bates refused to pay a tax which had been imposed by the Crown oncurrants on the ground that it was contrary to the statute 45 Edw. 3. C.4 which prohibited indirect taxation without the consent of Parliament. The Court of Exchequer Chamber unanimously found in favour of the Crown, declaring that the King could impose what duties he pleased for the purpose of regulating trade and the Court could not go behind the King's statement that the duty was imposed for the regulation of trade. In the second case John Hampden refused to pay shipmoney, a tax levied for the purpose of furnishing ships in time of national danger. Hampden's counsel conceded that sometimes during the existence of danger the Crown could take the goods of the subject without his consent, but maintained that this was only so in actual as opposed to threatened danger. The Crown, on the other hand, conceded that the subject could not be taxed without the consent of Parliament under normal circumstances but contended that the King was the sole judge whether an emergency justified the exercise of his prerogative power to raise funds to meet the national danger. A majority of the Court of Exchequer Chamber gave judgment in favour of the King - for an analysis of the arguments of counsel and judgments in this case see Keir, Sir, D.L. "The Case of the Shipmoney" (152 (L.Q.R. 546)). The judgment was later reversed by the Long Parliament - see Shipmoney Act, 1640. In 1628 in the Petition of Right, Parliament had stated that taxation without the consent of Parliament was illegal but this had not deterred the Stuarts from raising or attempting to raise taxes without the consent of Parliament. The struggle was brought to an end in 1689 by the Bill of Rights which gave Parliament total supremacy in matters of taxation. The Bill, after stating, among other things, that the "late King James the Second, by the assistance of divers evil counsellors, judges, and ministers employed, did endeavour to subvert and extirpate . . . the laws and liberties of this Kingdom . . . by levying money for and to the use of the Crown, by pretence of prerogative, for other time, and in other manner, than the same was granted by Parliament" declared: "That levying money for or to the use of the Crown, by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal." - Clause 4 of the Bill read with the Preamble. The Bill was presented to William and Mary on February 13, 1689, and was enacted into law on December 1689 - see 1 Wm & Mary, 2nd Sess. C.2. See also Journals of the House of Commons, X, 28 - 29; Journals of the House of Lords, XLV, 572. For a short account on the struggle between Parliament and the King on finance, see Wade & Phillips, op.cit., pp.38-39.
3. See, for instance, the Constitution of the United States (Article I, Section 8); Tanzania (S.70); India (Article 265); Singapore (Article 32); Russia (Article 14); and Japan (Chapter VI).
4. S. 163 (1) (a) (i).
5. S. 76 (1) (a) (i).

3. In both Zambia and Malawi the preparation of the budget 712 and its presentation to the National Assembly follows the British pattern. The Minister responsible for finance prepares and lays before the National Assembly within, in Zambia, one month of the commencement of each financial year, and, in Malawi, before the commencement of the financial year, estimates of the revenues and expenditure.⁽⁶⁾ In Malawi, if the National Assembly does not propose to debate the estimates until after the commencement of the financial year to which they relate, the estimates of revenue could be laid before the National Assembly at any time before the commencement of the debate.⁽⁷⁾ The Constitution of Malawi requires the estimates of expenditure to show separately (a) the total sums required to meet expenditure charged on the Consolidated Fund and (b) the sums respectively required to meet the heads of other expenditure proposed to be met from the Consolidated Fund.⁽⁸⁾ The same arrangement is followed in Zambia although not required by the Constitution. The Constitution of Malawi also specifies sums which must not be included in the estimates of receipts and expenditure. The following should not be included:⁽⁹⁾

- (a) sums representing the proceeds of any loan raised by the Government for specific purposes and appropriated for those purposes by the Act authorizing the raising of the loan;
- (b) sums representing any money or interest on money received by the Government subject to a trust and to be held or applied in accordance with the terms of that trust;
- (c) sums representing moneys authorized to be advanced from the Consolidated Fund under the provisions of an Act of Parliament and repayments thereof;
- (d) sums representing moneys received for or to be applied from any special fund established and regulated by the Constitution or by an Act of Parliament which provides that the provisions of subsections (1)¹⁰ and (2)¹¹ shall not apply to that fund.

As in Britain and other Commonwealth countries the budget is, both in Zambia and Malawi, considered in two committees of the Whole House - i.e. Committees of the National Assembly as a whole. The estimates of revenue are considered by the Committee of Ways and Means. The Committee debates the proposals and passes resolutions on each (approving or disapproving). At the end of the debates the Chairman of the Committee (the Deputy Speaker or his deputy) reports to the House.

6. S. 109 (1)(Zambia); S. 77 (1)(Malawi).

7. S. 77 (1)(Malawi.)

8. S. 77 (2) ibid.

9. S. 77 (3) ibid.

10. See the paragraph above footnoted (6).

11. See the paragraph above footnoted (8).

4. After the report has been recorded the Speaker instructs the Minister responsible for finance to introduce the necessary legislation⁽¹²⁾ embodying the resolutions of the Committee of Ways and Means. The procedure through which a finance Bill passes has been discussed in Chapter Twelve.

As in Britain and other Commonwealth countries, taxation measures can be enforced in Zambia and in Malawi before the enactment of the Income Tax Act or the Customs and Excise Act. The Constitution of Zambia provides that "Parliament may make provision under which the President or a Minister may by order provide that, on or after the publication of a bill (being a bill approved by the President) that it is proposed to introduce into the National Assembly providing for the imposition or alteration of taxation, such provisions of the bill as may be specified in the order shall, until the bill becomes law, have the force of law for such period and subject to such conditions as may be prescribed by Parliament."⁽¹³⁾ An order made in pursuance of this provision, unless sooner revoked, ceases to have effect:

- (a) if the Bill is not passed by the National Assembly within the period prescribed by Parliament;
- (b) if, after the introduction of the Bill, Parliament is dissolved or prorogued;
- (c) if, after the passage of the Bill, the President refuses his assent thereto; or
- (d) at the expiration of a period of four months from the date it came into Operation or such longer period from that date as may be specified in any resolution passed by the National Assembly after the Bill has been introduced. ⁽¹⁴⁾

The Constitution of Malawi has no provisions of this nature. Collection of taxes before the enactment of the necessary legislation is, therefore, entirely governed by ordinary legislation. It should be noted that estimates of revenue are required to be laid before the National Assembly before the commencement of the financial year and could be debated before or after the commencement of the year.⁽¹⁵⁾

12. i.e. the Income Tax Bill and the Customs and Excise Bill.

13. S.106 (3).

14. S.106 (3).

15. S. 77 (1)(Malawi).

In Zambia laws enacted for the raising of revenue are subject to suspension if the Appropriation Act (see below) is not enacted within the prescribed time. Subsection (5) of Section 106 of the Constitution provides that "where the Appropriation Act in respect of a financial year has not come into force at the expiration of six months from the commencement of that financial year, the operation of any law relating to the collection or recovery of any tax upon any income or profits or any duty of customs or excise shall be suspended until that Act comes into force." If Parliament is dissolved at the beginning of a financial year, the period of six months begins from the day upon which the National Assembly first sits after the election.⁽¹⁶⁾ If Parliament is dissolved after estimates of revenue and expenditure have been laid before the National Assembly but before the Appropriation Bill relating to those estimates is passed, the provision quoted above does not apply.⁽¹⁷⁾

The estimates on expenditure are considered in the Committee of Supply. The Committee considers the estimates vote by vote. The debate offers a good opportunity to Members of the National Assembly to criticize the various Government departments and the Ministers in charge of them. Unless notice of amendment of a vote has been given, it is considered as passed. At the end of the debate the Chairman of the Committee reports that the Committee has passed the votes with or without amendment. The resolutions of the Committee are then embodied in an Appropriation Bill.⁽¹⁸⁾ The Bill passes through the National Assembly in accordance with the procedure discussed in Chapter Twelve. The Appropriation Act contains the heads of the estimates and the amounts approved in respect of each head and authorizes payment from the Consolidated Fund or General Revenues⁽¹⁹⁾ of the respective amounts.⁽²⁰⁾ In Zambia, as has been seen above, this Act must be passed within six months. If not, any law relating to the collection or recovery of any tax upon any income or profits or any duty of customs or excise is suspended until the Act comes into force.

The Constitution of Malawi specifically states that all revenues or other moneys raised or received for the purposes of the Government, unless otherwise provided, must be paid into the Consolidated Fund.⁽²¹⁾

16. S. 106 (5).

17. *Ibid.*

18. S. 109 (2) (Zambia); S. 78 (Malawi). Moneys charged directly on the Consolidated Fund are not included in the Bill - *ibid.*

19. "General Revenues", as mentioned elsewhere, is the term used in Zambia instead of "Consolidated Fund".

20. S. 109 (2) (Zambia); S. 78 (Malawi).

21. S. 78.

6. The Constitution of Zambia does not specifically state the same. Indirectly, however, it does so. Section 107 provides that money can only be expended from the General Revenues of the Republic.

Money placed in the Consolidated Fund can only be withdrawn for authorized purposes and through a defined procedure. In Zambia the President is the officer responsible for effecting withdrawals of money from the General Revenues. In Malawi it is the Minister of Finance. In Both countries, however, there are withdrawals which do not require the participation of the President or of the Minister of Finance.⁽²¹⁾ In Zambia money can be withdrawn from the General Revenues only if: (a) the expenditure is authorized by a warrant under the hand of the President; (b) the expenditure is charged by the Constitution or any other law on the General Revenues; or (c) the expenditure is of moneys received by a department of the Government and is so received under the provisions of any law authorizing that department to retain and expend the money on defraying its expenses.⁽²²⁾ The President can issue a warrant for the withdrawal of money only if (a) the expenditure is authorized by an Appropriation Act; (b) the expenditure is necessary to carry on the services of the Government in respect of any period (not exceeding four months of the commencement of the financial year) before the enactment of the Appropriation Act; (c) the expenditure has been proposed in a supplementary estimate (see below) approved by the National Assembly; or (d) no provision exists for the expenditure and the President considers that there is an urgent need to incur such expenditure and that it would not be in the public interest to delay authorization of the expenditure until such time as a supplementary estimate can be laid before and approved by the National Assembly.⁽²³⁾ The issue of warrants under (d) is subject to such limitations and conditions as may be laid by Parliament from time to time.⁽²⁴⁾ As soon as the President has signed a warrant authorizing expenditure he must cause a copy of the warrant to be transmitted to the Auditor-General.⁽²⁵⁾

In Malawi, as already indicated above, the withdrawal of money from the Consolidated Fund is authorized by the Minister responsible for finance. Money can only be withdrawn from the Fund; (a) to meet expenditure that is charged on the Fund by the Constitution or any other Act of Parliament; (b) where the issue of such money has been authorized by an Appropriation Act, a Supplementary Appropriation Act or by an Act of Parliament made in pursuance of Sections 80,²⁶ 81,²⁷ 82,²⁸ 83²⁹ or 84³⁰ of the Constitution or by a resolution of the National Assembly made in accordance with the provisions of Section 79⁽³¹⁾ of the Constitution.⁽³²⁾

Footnotes on page 711.

(b) of the Constitution of Zambia, makes possible the withdrawal of money from the Consolidated Fund before the enactment of the Appropriation Act. The Section empowers Parliament to make provision under which if it appears to the Minister responsible for finance that the Appropriation Act will not come into operation by the beginning of the financial year,⁽³³⁾ he may authorize withdrawal from the Fund of moneys to meet the expenditure necessary to carry on the services of the Government until the enactment of the Appropriation Act. As in Zambia, this can be done only for a maximum period of four months from the beginning of the financial year.⁽³⁴⁾ This means that the Appropriation Act should be enacted within that period. If not, Government services would come to a halt as it would not be possible to get money from the Fund. The moneys withdrawn before the enactment of the Appropriation Act must be included in the Act under the appropriate heads.⁽³⁵⁾

In both Zambia and Malawi, if expenditure exceeds or is going to exceed moneys allocated to a department or departments by the Appropriation Act, the Minister responsible for finance lays before the National Assembly for its approval supplementary estimates.⁽³⁶⁾ Such estimates must later be embodied in a Supplementary Appropriation Bill.⁽³⁷⁾ In Zambia such Bill must be introduced in the National Assembly within fifteen months of the end of the relevant financial year.⁽³⁸⁾ In Malawi it must be introduced as soon as practicable after the commencement of the financial year next following.⁽³⁹⁾

21a. Eg. Withdrawal of moneys charged on the General Revenues or Consolidated Fund.

22. S. 107 (1)(a) - (c) (Malawi).

23. S. 107 (2)(a) - (d). Investments or recoverable advances made from the General Revenues are not expenditure - S.107 (5).

24. S. 107 (4).

25. S. 107 (3).

26. This section concerns authorization of expenditure before appropriation - see next paragraph below.

27. This section concerns the Contingencies Fund - see below for the purposes of the Fund.

28. This section concerns the raising of loans by the Government - see below.

29. This section concerns special funds and trust moneys - see below.

30. This section concerns the Development Fund - see below.

31. This section concerns supplementary and excess expenditure - see below.

32. S.75 (1). Investment of money from the Fund is not withdrawal - S.75 (4). Money could also be advanced to persons as prescribed - S.75 (5).

33. It should be noted that in Malawi estimates must be laid before the National Assembly before the commencement of the financial year. Contrast with the position in Zambia - see above.

34. S.80 (Malawi). 35. Ibid.

36. S. 109 (3)(Zambia); S.79 (Malawi). 37. Ibid.

38. S. 109 (3)(Zambia).

39. S.79 (Malawi).

8. Withdrawal of supplementary moneys from the Consolidated Fund or the General Revenues is governed by the rules given above in respect of the moneys authorized by the Appropriation Act.

The systems of authorization of withdrawal of moneys in Zambia and Malawi differ from that in Britain. While in Zambia and Malawi authorization is made by the President and the Minister responsible for finance respectively, in Britain it is made by the Comptroller and Auditor-General. After the estimates of expenditure have been approved by Parliament the Treasury sends its financial requirements to the Comptroller and Auditor-General. After the latter has satisfied himself that the Treasury's requirements have been sanctioned by Parliament, he authorizes the Bank of England to pay out the money to the Paymaster-General (a post usually held by a Junior Minister). The Paymaster-General thereafter pays the moneys to the various departments and other persons authorized by the Treasury.⁽⁴⁰⁾ Authorization of payment of money from the Consolidated Fund by the Comptroller and Auditor-General is the practice in the older countries of the Commonwealth and in some of the newer ones. Most of the newer countries have, however, systems similar to that of Zambia or Malawi.

In both Zambia and Malawi certain financial obligations of the state are charged directly on the Consolidated Fund or General Revenues. Section 111 of the Constitution of Zambia charges the salaries of judges, the Director of Public Prosecutions and the Auditor-General on the General Revenues. The Constitution of Malawi contains no similar provision. Although Section 76 (1) states that "there shall be charged on the Consolidated Fund, in addition to any grant, remuneration or other moneys so charged by this Constitution or any other law....", there is no remuneration that is charged on the Fund by the Constitution. The salaries of judges, the Auditor-General and the Director of Public Prosecutions are, however, drawn from the Fund. The Constitutions of both Zambia and Malawi charge all debts for which the Government is liable on the Consolidated Fund and the General Revenues respectively.⁽⁴¹⁾ The Constitution of Malawi further charges on the Fund all pensions; compensation for loss of office and gratuities for which the Government is liable; any moneys required to satisfy any judgment, decision or award made or given against the Government by any Court or tribunal; and all moneys or debt charges charged before republican day upon the revenues or public funds of Malawi.⁽⁴²⁾

40. See Wade and Phillips, *op.cit.*, p. 230.
41. S. 112 (1)(Zambia); S. 76 (1)(a)(Malawi).
42. S. 76 (1) (b)(Malawi).

- 9. Debt charges in both Zambia and Malawi include interest; sinking fund charges; the repayment of amortisation of debt; and all expenditure in connection with the raising of loans on the security of the Consolidated Fund or the General Revenues and on the service of redemption thereby created.⁽⁴³⁾

The Constitution of Malawi has other financial provisions which are not contained in the Constitution of Zambia. The first provision is that relating to the Contingencies Fund. Parliament is empowered to make provision for the establishment of a Contingencies Fund.⁽⁴⁴⁾ Money placed in this Fund can be withdrawn by the Minister responsible for finance if he is satisfied that there has arisen an urgent and unforeseen need for expenditure for which no other provision exists.⁽⁴⁵⁾ If an advance is made from the Fund, a supplementary estimate must, as soon as practicable, be presented to and voted on by the National Assembly.⁽⁴⁶⁾ A supplementary Appropriation Bill or motion approving such expenditure must be introduced and passed in accordance with Section 79 (see above) for the purpose of replacing the money so advanced.⁽⁴⁷⁾ The Constitution of Zambia, as indicated above, has no provision for a Contingent Fund but subsection (2)(d) of section 107 of the Constitution, authorizes the President, where there is no provision for expenditure and he considers that there is such an urgent need to incur the expenditure that it would not be in the public interest to delay its authorization until such time as a supplementary estimate can be laid before and approved by the National Assembly, to issue a warrant for the withdrawal of the required money.⁽⁴⁸⁾ Thereafter the expenditure is embodied in a supplementary estimate and finally in a supplementary Appropriation Act. In effect there is, therefore, no real difference between the positions in Zambia and Malawi.

The inclusion of a provision on a contingencies Fund in the Constitution is quite fashionable in the Commonwealth. Such a provision is contained, for instance, in the Constitutions of the following States: Ghana,⁽⁴⁹⁾ Jamaica,⁽⁵⁰⁾ Mauritius,⁽⁵¹⁾ Malaysia,⁽⁵²⁾ Malta,⁽⁵³⁾ India,⁽⁵⁴⁾ Ceylon,⁽⁵⁵⁾ Trinidad and Tobago,⁽⁵⁶⁾ Sierra Leone,⁽⁵⁷⁾ Uganda,⁽⁵⁸⁾ Tanzania,⁽⁵⁹⁾ Kenya,⁽⁶⁰⁾ Singapore,⁽⁶¹⁾ Swaziland⁽⁶²⁾ and Botswana.⁽⁶³⁾ The withdrawal of money from the contingencies Funds of these countries is governed by conditions similar to those applying in Malawi.

43. S.112 (2)(Zambia); S.76 (2)(Malawi). 44. S. 81(1).
 45. Ibid. 46. S. 81 (2). 47. Ibid.
 48. Withdrawal of money under this provision is subject to such limitations and conditions as Parliament may from time to time prescribe.
 49. Article 132. 50. S.118. 51. S. 107. 52. Article 103.
 53. S. 108. 54. Article 103. 55. S. 68 56. S. 88.
 57. S. 90. 58. Article 96. 59. S. 75. 60. S.125.
 61. Article 87. 62. S. 130.
 63. S.123. See also the 1966 Constitution of Lesotho (S.106); 1963 Constitution of Nigeria (S.132); and 1962 Constitution of Pakistan (Article 45).

The second provision found in the Constitution of Malawi but not in the Constitution of Zambia is that relating to loans. Section 83 (of the Constitution of Malawi) provides that the Government can raise a loan only under the authority of an Act of Parliament and not otherwise.⁽⁶⁴⁾ In the Act authorizing the loan or by another Act, Parliament may appropriate the proceeds of the loan to a specific purpose or purposes as well as authorize the payment of such proceeds out of the Consolidated Fund.⁽⁶⁵⁾ In Zambia, authority to raise a loan is also derived from Acts of Parliament although no provision exists in the Constitution on the matter.

The inclusion of a provision regarding loans in the Constitution is not found in many Constitutions of Commonwealth states. There is no such provision, for instance, in the Constitutions of Mauritius, Malta, Trinidad and Tobago, Uganda, Tanzania, Kenya, Singapore, Botswana and Swaziland. The Constitutions of Ghana,⁽⁶⁶⁾ India⁽⁶⁷⁾ and Malaysia,⁽⁶⁸⁾ however, have such a provision.

The third provision is that referring to special Funds and Trust moneys. Section 83 empowers Parliament to provide for the creation of special funds (other than that which will be dealt with in the next paragraph) to be accounted within the accounts of the Consolidated Fund and for the regulation and management of such moneys. This provision is not contained in the Constitutions of other Commonwealth countries. If special funds are required, they are, however, as in Malawi, created by legislation, the only difference being that in Malawi the power of Parliament to do so is expressed in the Constitution.

The fourth provision concerns the Development Fund. Section 84 (1) provides that "there shall be a special fund within the Consolidated Fund to be known as the Development Fund." Receipts and expenditure of the Government relating to the development of the Republic, which have not been included in the annual estimates of receipts and expenditure are accounted in the accounts of the Development Fund.⁽⁶⁹⁾ Estimates of such receipts and expenditure must be submitted by the Minister responsible for finance to the National Assembly not less than once every year.⁽⁷⁰⁾

64. S. 82(1).
 66. Article 133.
 67. Articles 292 and 293.
 68. Article 111.
 69. S. 84 (1).
 70. Ibid.

65. S. 82(2).

When the estimates of expenditure to be met from the Fund have been approved by the National Assembly, a Bill known as an Appropriation (Development Fund) Bill is introduced in the National Assembly to enable the withdrawal of money from the Fund to meet the expenditure.⁽⁷¹⁾ The presentation of the estimates of receipts and expenditure of the Fund, their consideration and the embodiment of the estimates of expenditure in an Appropriation Bill, amount to a second, though miniature, national budget.

At this stage it is necessary to turn to the supervisory machinery over public revenues in both Zambia and Malawi. Supervision is of two kinds - parliamentary and extra-parliamentary. Parliamentary supervision is exercised in two ways. The first, as has been seen at the beginning of this Chapter, is that Parliament authorizes both the raising of revenue and the expenditure of such revenue. Without parliamentary authorization revenue cannot be collected and expenditure cannot be incurred except for very short periods.^(71a) Expenditure made before the Appropriation Act comes into force, it has been seen, must later be placed before the National Assembly for its approval. Secondly, Parliament exercises control on the spending of money already withdrawn from the Consolidated Fund or General Revenues. Members of the National Assembly may ask questions and seek explanations from Ministers on the spending of their departments. The Public Accounts Committee of the House probes the spending of the departments and tables a report in the National Assembly. If the spending of a department raises suspicions of grave corruption or other misuse of funds, an inquiry by a body other than the Public Accounts Committee could be instituted. In both Zambia and Malawi the report of the Auditor-General is laid before the National Assembly every year.⁽⁷²⁾ The Constitution of Zambia requires the Minister of Finance to prepare and lay before the National Assembly within nine months after the end of the financial year, a financial report in respect of that year showing revenue and other moneys received by the Government in that financial year, the expenditure of the Government within the same period, payments made during the period for purposes other than expenditure, a statement of the financial position, at the end of that year, and such other information as may be prescribed by Parliament.⁽⁷³⁾ There is no similar provision in the Constitution of Malawi.

12. The power of Parliament in controlling the raising of revenue and authorizing expenditure has, however, only deliberative value. The National Assembly rarely alters the ways and means of raising revenue or the estimates proposed by the Executive. This is also the case in other Commonwealth countries

In both Zambia and Malawi extra-parliamentary supervision is exercised by the Auditor-General. As has been seen in Chapter Fourteen, the Auditor-General has the function of auditing and reporting on the public accounts of the country and of such other public authorities and bodies as may be proscribed by Parliament.⁽⁷⁴⁾ This exercise is done at least once every year.⁽⁷⁵⁾ He and his staff have access to all records pertaining to finance. The Auditor-General's report is laid before the National Assembly⁽⁷⁶⁾ and this links the two machineries of supervision over public funds.

71. S. 84 (2).

71a. See above.

72. S. 113 (4) (Zambia); S. 85 (4) (Malawi). See Chapter 14.

73. S. 110.

74. S. 113 (Zambia); S. 85 (Malawi).

75. Ibid.

76. Ibid.

CHAPTER TWENTYCITIZENSHIP

When Zambia and Malawi adopted their present Constitutions in 1964 and 1966 respectively their constitutional positions with regard to citizenship differed. Zambia was until the midnight of October 23, 1964, in the same position Malawi was until the midnight of July 5, 1964. Malawi had no citizenship law of her own until July 6, 1964, when she became independent. Zambia, too, had no citizenship law of her own until October 24, 1964, when she became independent. Between the midnight of December 31, 1963, when the Federation came to an end⁽¹⁾ and independence the two countries reverted to the position in which they were before the enactment of the Citizenship of Rhodesia and Nyasaland and British Nationality Act, 1957⁽²⁾. Before the enactment of this Act the only citizenship law that applied to the two territories was the British Nationality Act, 1948⁽³⁾. This Act did not apply to the two territories in the sense that it made the indigenous inhabitants thereof citizens of the United Kingdom and Colonies or of Northern Rhodesia or Nyasaland. It applied in the sense that if any indigenous inhabitant wanted to become a citizen of the United Kingdom and Colonies - the only citizenship provided by the Act - he could do so. While the Act recognized the status of "protected person", it provided that a citizen of the United Kingdom and Colonies had to be a British subject. Northern Rhodesia and Nyasaland were protectorates and, therefore, not part of Her Majesty's dominions. The indigenous inhabitants were accordingly protected persons and not British subjects. Technically, the two territories were foreign territory and their inhabitants were aliens⁽⁴⁾. For an inhabitant of either of the two territories to become a citizen of the United Kingdom and Colonies he had, therefore, to be naturalized. Naturalization meant

(1) - See Chapter 7.

(2) - Act No. 12 of 1957.

(3) - 1948 c.56.

(4) - See Chapter 3 on the legal status of a colonial protectorate and of its inhabitants.

renunciation of the status of "protected person". Because of the value the indigenous inhabitants attached to their status as protected persons, very few of them sought citizenship of the United Kingdom and Colonies.

When the Federation was established in 1953 no citizenship law was immediately enacted by the Federal Legislature. The first Federal election was conducted in accordance with the electoral law in each territory⁽⁵⁾. Unlike the other two territories, Southern Rhodesia had a citizenship law of her own although she was not a full member of the Commonwealth. This right (of independent citizenship) passed to the Federation and resulted in the enactment of the Citizenship of Rhodesia and Nyasaland and British Nationality Act, 1957. This Act did not alter the position of the indigenous inhabitants in Northern Rhodesia and Nyasaland. They remained British protected persons. If they wanted to become Federal citizens they could do so by registration and after taking the oath of allegiance to Her Majesty the Queen⁽⁶⁾. Registration and taking the oath of allegiance made a protected person a British subject. The fact that a British protected person acquired Federal citizenship by registration and not by naturalization as under the British Nationality Act was of no material consequence. The difference was merely one of procedure. It should be noted that even under the British Nationality Act British protected persons enjoy certain advantages which real aliens do not. The introduction of a Federal citizenship did not in any way reduce the unwillingness of the Africans in Northern Rhodesia and Nyasaland to become British subjects. Because of their hatred of the Federation they were, in fact, even more unwilling to become British subjects through Federal citizenship.

As already indicated above, when the Federation disbanded the position of citizenship in Northern Rhodesia and Nyasaland reverted to that obtaining in the two territories before the establishment of the Federation and the enactment of the Citizenship of Rhodesia and Nyasaland and British Nationality Act, 1957. Persons who immediately before the dissolution of the Federation were Federal citizens but not at the same

(5) - See Chapter 7.

(6) - S.12(1) read with s.18 Citizenship of Rhodesia and Nyasaland and British Nationality Act, 1957.

time citizens of the United Kingdom and Colonies became, notwithstanding anything in the British Nationality Acts, 1948 and 1958, citizens of the United Kingdom and Colonies unless they became citizens of Southern Rhodesia⁽⁷⁾. Southern Rhodesia regained after the dissolution of the Federation the right to maintain a separate citizenship.

On July 6, 1964, Nyasaland became independent under the name Malawi and consequently acquired citizenship of her own. Certain persons became citizens automatically on independence day while others became so later by registration. Every person who, having been born in the former Nyasaland Protectorate, was on July 5, 1964, a citizen of the United Kingdom and Colonies or a British protected person, became a citizen of Malawi on independence day⁽⁸⁾. This did not apply where neither of the parents of the person concerned had been born in the former Protectorate⁽⁹⁾. Persons who became citizens under this provision included Africans who had become citizens of the United Kingdom and Colonies by naturalization. Non-Africans who had been born in the territory of parents both or one of whom had been born in the territory also became citizens. Persons born outside Malawi, whose parents became citizens under this provision or would have become such citizens but for their death, also became citizens.⁽¹⁰⁾

Persons who acquired citizenship by registration fell in two groups - former Federal citizens and others. Any person who was on December 31, 1963 (the day the Federation was dissolved) a citizen of the former Federation and who had a substantial connection with Malawi was entitled, upon application before July 6, 1965, to be registered as a citizen⁽¹¹⁾. A person had a substantial connection with Malawi if: (a) he was born in the former Nyasaland Protectorate; (b) his father was born in the former Nyasaland Protectorate; (c) he was immediately before he became a citizen of the former Federation a citizen of the United Kingdom and Colonies by virtue of his having been registered or naturalized

(7) - S.14(2) Federation of Rhodesia and Nyasaland
Dissolution Order in Council, 1963.

(8) - S.1(1) Constitution of Malawi, 1964.

(9) - Ibid

(10) - S.1(2) ibid.

(11) - S.2(1) ibid.

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as such citizen in the former Nyasaland Protectorate under the British Nationality Act, 1948, or his father had at the time of his (the applicant's) birth been registered or naturalized as a citizen under the Act in the Protectorate; (d) he was registered or naturalized as a citizen of the former Federation, having been ordinarily resident in the former Nyasaland Protectorate at the time of such registration or naturalization or his father had, at the time of his (the applicant's) birth, been registered or naturalized as a Federal citizen while resident in the Protectorate; (e) he or his father was, as a minor child, registered as a citizen of the former Federation, the responsible parent or the guardian upon whose application he was so registered being ordinarily resident in the former Nyasaland Protectorate at the time of the registration; (f) he was or his father was (his father also being or having been a citizen of the former Federation) the adopted child of a citizen or of citizens of the former Federation who was or both of whom were resident and domiciled in the former Nyasaland Protectorate at the time of the adoption; (g) he was or his father had, at the time of that person's birth, been registered by virtue of, inter alia, his possession of associations with the former Nyasaland Protectorate as a citizen of the former Federation under section 16A⁽¹²⁾ of the Citizenship of Rhodesia and Nyasaland and British Nationality Act, 1957; or (h) his or his father's name had been included by virtue of section 13(7) of the Electoral Act (Federal) 1958,⁽¹³⁾ in the list of general voters registered in the former Nyasaland Protectorate.⁽¹⁴⁾ Any woman who was on December 31, 1963, a citizen of the Federation and who did not become a citizen of Malawi on independence day under any of the other provisions was entitled upon making application before July 6, 1965, to be registered as a citizen if: (a) she was immediately before she became a citizen of the former Federation

(12) - Inserted by S.3 of the Citizenship of Rhodesia and Nyasaland and British Nationality Amendment Act, 1959.

(13) - Act No. 6 of 1958.

(14) - S.2(2)(a) - (h) Constitution of Malawi, 1964.

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married to a person who became or would but for his death have become entitled to registration as a citizen of Malawi under the terms that applied to Federal citizens; (b) she was immediately before she became a citizen of the Federation the widow of a person who would but for his death have become entitled to be registered as a citizen of Malawi by virtue of a connection with Malawi either through having been born in the former Protectorate or through having been immediately before he became a citizen of the former Federation a citizen of the United Kingdom and Colonies by registration or naturalization in the former Protectorate or through his father having been so registered or naturalized at the time of that person's birth; or (c) she was immediately before she became a citizen of the Federation the widow of a person whose father became or would but for his death have become entitled to be registered as a citizen of Malawi by virtue of a connection with Malawi through one of the two grounds given under (b) above.⁽¹⁵⁾

Although the Constitution used the words "shall be entitled" the Minister was not under absolute obligation to register an applicant satisfying one of the requirements of registration mentioned above. The wording in the original Constitution, however, seemed to place such an absolute obligation on the Minister. This necessitated an amendment of the provision soon after the coming into operation of the Constitution.⁽¹⁶⁾ The amendment empowered the Minister responsible, if he thought it fit, to order that registration be refused or that it be made subject to certain conditions as he might specify or as might be laid down by Parliament from time to time.

The other persons entitled to citizenship by registration were: (a) Any person who would have automatically become a citizen on independence day but failed to do so because neither of his parents had been born in the Protectorate; (b) any woman who, on July 5, 1964, was or had been married to a person who automatically became a citizen on independence day or who but for his death would have so become one; (c) any woman who, on July 5, 1964, was married to a person who subsequently became a citizen of Malawi by registration

(15) - S.2(4) ibid.

(16) - see Act No. 1 of 1964.

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in terms of the provision under (a) above or the provision under (e) below; (d) any woman who, on July 5, 1964, had been married to a person who became, or would, but for his death, have become entitled to be registered as a citizen of Malawi in terms of the provision under (a) above or the provision under (e) below but whose marriage had been terminated by death or dissolution; and (e) any person who, on July 5, 1964, was a citizen of the United Kingdom and Colonies, having become such citizen by virtue of his having been naturalized or registered in the Protectorate under the British Nationality Act, 1948.⁽¹⁷⁾ Persons below the age of twenty-one years (except a woman who was or had been married) could only have their applications made by a parent or a guardian.⁽¹⁸⁾ Provisions under (a), (b), (d) and (e) above were to operate until July 6, 1965, or such further date as might be prescribed by Parliament.⁽¹⁹⁾ The provision under (c) was to operate until the expiration of such period after the husband of the woman had been registered as Parliament would prescribe.⁽²⁰⁾

Three other provisions on citizenship were contained in the Constitution. The first concerned persons born in Malawi after July 5, 1964. Such persons became citizens of Malawi by birth.⁽²¹⁾ This provision did not, however, apply to persons, none of whose parents was, at the time of their birth, a citizen of Malawi or to persons whose fathers were diplomatic envoys enjoying immunity from suit and legal process or to persons whose fathers were, at the time of their birth, citizens of a country at war with Malawi and the birth took place in an area under the occupation of the enemy.⁽²²⁾ The second provision concerned citizenship by descent. Persons born after July 5, 1964, of fathers who were

(17) - S.3(1) - (5) Constitution of Malawi, 1964.

(18) - This applies only to provisions under (a) and (e) - S.3(1) and (5) ibid.

(19) - S.3(6) ibid. The period was later extended to July 6, 1966 - see Constitution (Amendment) (No.2) Act (No. 49 of 1965)

(20) - Ibid.

(21) - S.4 ibid.

(22) - Ibid.

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citizens of Malawi other than by descent or registration on the grounds of a connection with Malawi became citizens at birth.⁽²³⁾ The third provision concerned women married to citizens of Malawi after July 5, 1964. Such women could become citizens by registration on application.⁽²⁴⁾

No provisions were included in the Constitution on the acquisition of citizenship by persons other than those dealt with above or by some of the persons mentioned above who, at a later stage, were entitled to registration as citizens under provisions that were temporary. Such other methods of acquisition of citizenship were to be dealt with in an Act of Parliament on citizenship. Parliament enacted such an Act - the Malawi Citizenship Act, 1964⁽²⁵⁾ - soon after independence. It is not necessary to deal with the provisions of that Act since they are not very different from those of the present Act which will be discussed below.

When Malawi adopted her present Constitution on July 6, 1966, she had, therefore, citizens who became such in terms of the 1964 Constitution and the Malawi Citizenship Act, 1964. Section 7(1) of the Constitution maintained the previously existing citizenship by providing that "subject to the provisions of any law, any person who immediately before the appointed day was under any existing law a citizen of Malawi, shall continue to be a citizen of the Republic after the appointed day". Subsection (2) of the same section empowered Parliament to make provision "for the acquisition of citizenship, or loss of citizenship of the Republic by any person after the appointed day".

(23) - S.5 ibid.

(24) - S.6 ibid.

(25) - Act No. 2 of 1964.

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In pursuance of this provision Parliament enacted the Malawi Citizenship Act, 1966, which repealed the 1964 Act.^(25a) Section 3 of the 1966 Act also maintained the existing citizenship.

To-day, citizenship in Malawi is governed by section 7 of the Constitution and the Malawi Citizenship Act, 1966. However, before dealing with the present law in Malawi on the acquisition and loss of citizenship, one should first investigate the position in Zambia up to this stage.

As mentioned above, Zambia had no citizenship law of her own until the midnight of October 23, 1964. While the Constitution itself contains ten sections⁽²⁶⁾ on citizenship, the remaining law on citizenship is contained in the Citizenship of Zambia Ordinance⁽²⁷⁾ which was enacted by the Legislative Council before independence day and came into force on that day (independence day). The Zambia Independence Order (which incorporated the Constitution in Schedule 2) also had a section (section 6) on citizenship but this was a temporary provision.^(27a) The law on citizenship in Zambia is, therefore, now contained in the Constitution and in the Citizenship of Zambia Ordinance. The Ordinance deals with acquisition of citizenship by adoption, registration (only of minors and citizens of honour) and naturalization and with loss, renunciation and deprivation of citizenship. The Constitution, on the other hand, deals with automatic citizenship on

(25a) - All certificates, renunciations, declarations, orders or oaths granted, made or taken pursuant to the provisions of that Act or regulations thereunder, however, continued in full force and effect as if they were made, granted or taken under the new Act - S.35 Malawi Citizenship Act, 1966 (Act No. 28 of 1966).

(26) - Ss.3 - 12.

(27) - Cap. 273.

(27a) - Vide infra.

independence day; citizenship of persons entitled to be registered by virtue of their connection with Northern Rhodesia; citizenship of persons born in Zambia after independence; citizenship of women married to Zambian men after independence; citizenship of persons entitled to be registered as citizens by virtue of their connection with Zambia; citizenship of persons entitled to be registered as commonwealth countries. Provisions on citizenship by birth or descent after independence; by marriage; by connection with Zambia after independence; and by methods contained in the Citizenship of Zambia Ordinance will be discussed below together with provisions of the Malawi Citizenship Act, 1966. Provisions pertaining to persons who became citizens on independence day and to persons who after independence were entitled to certain privileges to register as citizens until a prescribed date will, however, be discussed immediately below.

Two classes of persons automatically became citizens on independence day. Every person who, having been born in the former Protectorate of Northern Rhodesia, was on October 23, 1964, a British protected person, became a citizen of Zambia on October 24, 1964.⁽²⁸⁾ This provision differs from that of Section 1(1) of the 1964 Constitution of Malawi in two respects. First, the provision in the constitution of Zambia does not, as did that in the Constitution of Malawi, include citizens of the United Kingdom and Colonies. It confines the right to British protected persons. Consequently it excludes Africans who had become citizens of the United Kingdom and Colonies. Secondly, the provision does not, as did the Malawian provision, require that not only must the person himself have been born in the country, but also one of his parents. Every person who, having been born outside the former Protectorate, was on October 23, 1964, a British protected person, became a citizen on October 24, 1964, if his father became a citizen under the last provision or would but for his death have become one.⁽²⁹⁾ This provision also differs from that in the 1964 Constitution of Malawi on the same grounds as those given above.

(28) - S.3(1) of the Constitution of Zambia.

(29) - S.3(2).

Wives, widows or divorced wives of Zambians and citizens of the United Kingdom and Colonies who became such citizens by virtue of having been registered or naturalized in the former Protectorate under the British Nationality Act, 1948, were entitled to be registered as citizens of Zambia on the grounds of their connection with Zambia.⁽³⁰⁾ The same right was accorded widows of persons who, but for their death, would have become citizens automatically on independence day, as well as to divorced wives of persons who became citizens on independence day or who, but for their death, would have become citizens.⁽³¹⁾ Similarly, any person who, on October 23, 1964, was a citizen of the United Kingdom and Colonies by virtue of having been naturalized or registered in the former Protectorate under the British Nationality Act, 1948, was entitled, upon application, to registration as a citizen.⁽³²⁾ This provision covered both non-indigenous and indigenous British subjects who possessed citizenship of the United Kingdom and Colonies. Women whose husbands became citizens after independence day or whose husbands became entitled to be registered as citizens but whose marriages were terminated by death or dissolution before the husband exercised his right to be registered as a citizen, were also entitled to registration as citizens on application.⁽³³⁾ The right was also extended to women married to persons who became or would, but for their death, have become entitled to registration as citizens by virtue of being citizens of the United Kingdom and Colonies registered or naturalized in the former Protectorate, but whose marriages were terminated by death or dissolution before independence day.⁽³⁴⁾

Section 6 of the Zambia Independence Order, 1964, provided for a temporary associate form of citizenship. The section declared that "any person who, at the commencement of this Order, is entitled to be registered

(30) - S.4(1).

(31) - Ibid.

(32) - S.4(2).

(33) - S.4(3).

(34) - S.4(4).

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as a citizen of Zambia under section 4⁽³⁵⁾ or 8⁽³⁶⁾ of the Constitution shall, until he becomes a citizen of Zambia or until 24th October 1966 (whichever is the earlier) --- have the status of a citizen of Zambia."⁽³⁷⁾ Citizens under this provision had all the rights under the Constitution (except those coming under Chapter II⁽³⁸⁾ or section 66 (1)⁽³⁹⁾ of the Constitution) and the provisions of any law in force in the country (except a law made or having effect as if made in pursuance of section 11⁽⁴⁰⁾ of the Constitution).⁽⁴¹⁾ This special citizenship could be terminated by the authority concerned in accordance with the provisions that governed deprivation of ordinary citizenship.⁽⁴²⁾

This concludes the discussion of the provisions relating to persons who automatically became citizens when Zambia and Malawi adopted their present Constitutions and the special provisions relating to the registration as citizens of persons who had a connection with Zambia before independence. General provisions on the acquisition, renunciation, deprivation and loss of citizenship in both Zambia and Malawi can now be considered.

(35) - Persons entitled to be registered by virtue of their connection with Northern Rhodesia.

(36) - Persons entitled to be registered by virtue of their connection with Zambia.

(37) - S.6(1) Zambia Independence Order, 1964.

(38) - This Chapter applies to full citizenship.

(39) - This section concerns persons entitled to the franchise.

(40) - Powers of Parliament to make laws on citizenship.

(41) - S.6(2) Zambia Independence, 1964.

(42) - S.6(3) ibid.

A. ACQUISITION OF CITIZENSHIP

There are in both countries four ways of acquiring citizenship. These are birth, descent, registration and naturalization.

1. Citizenship by Birth

Every person born in Zambia after October 23, 1964, and in Malawi after July 5, 1966, is a citizen by birth.⁽⁴³⁾ There are, however, exceptions to this general provision. In Zambia the provision does not apply to a person born of parents neither of whom is a citizen of Zambia; or to a person whose father (at the time of that person's birth) possessed such immunity from suit and legal process as is accorded envoys of foreign sovereigns⁽⁴⁴⁾ accredited to Zambia;⁽⁴⁵⁾ or to a person born in an occupied part of the country if the father⁽⁴⁶⁾ is a citizen of a country at war with Zambia. The Malawi provision also does not apply to a person born of parents neither of whom is a citizen of Malawi. Unlike in Zambia, however, it is not sufficient that one of the parents is a citizen of Malawi. Such a parent should be a citizen of Malawi of African race. A person of African race is defined in the Act as "a person who is a member of one of the indigenous peoples of Africa south of the Sahara."⁽⁴⁷⁾ This definition excludes Africans of Arab origin in the countries north of the Sahara. While a person born of European or Asian parents one of whom is or both of whom are citizens of Zambia would be a citizen of Zambia by birth, such a person would not be a citizen of Malawi until registered as one. The provision greatly restricts citizenship by birth. Further it creates two types of citizens - those whose off-spring are citizens by birth and those whose off-spring can only be citizens by registration - a position of first and second class citizens.

(43) - S.5 Constitution of Zambia; S.4(1) Malawi Citizenship Act, 1966.

(44) - The provision would also apply to children of persons working for international organizations and enjoying immunity from legal process or suit.

(45) - S.5 Constitution of Zambia.

(46) - Ibid.

(47) - S.2(1) Malawi Citizenship Act, 1966.

Writing on this restriction of citizenship by birth, Simon Roberts says:

"This is a surprising and unsatisfactory limitation, all the more disappointing on account of the successful attempts which have been made in Malawi to eliminate racial distinctions from other areas of the law. It also runs counter to the provision in the Constitution which states as a fundamental principle that "all persons regardless of colour, race or creed shall enjoy equal rights and freedoms""(48)

On the definition of "person of African race", he writes:

"This is an unhappy definition as it gives no clear indication of the characteristics which the person concerned must possess in order to fall within it. Does it demand membership of some ethnic group? or does it merely require membership of a tribal group such as may be acquired by the adoption of a particular mode of life and acceptance by other members of the community."(49)

The definition of "person of African race" is not perhaps as unclear as Roberts paints it. The definition is not as elastic as, e.g. that found in the South African Population Registration Act (30 of 1950) which includes in "Bantu" a person "who is, or is generally accepted as a member of any original race or tribe of Africa". The definition in the Malawi Citizenship Act requires the person to be a member of one of the indigenous peoples of Africa south of the Sahara. The term "member of one of the indigenous peoples of Africa", it is submitted, has the meaning of belonging to an ethnic group by being the off-spring of indigenous parents.

The definition does, however, raise problems with regard to the citizenship of the off-spring of a marriage between the off-spring of parents, one of whom is "indigenous" and the other "non-indigenous".

(48) - Op. cit., p.319.

(49) - Ibid; p.320.

While a child of a mother of African race and a father of non-African race and vice versa is a citizen by birth because one of the parents is of African race, the same cannot be said of a child born of parents both of whom are themselves the off-spring of mixed marriages. A coloured person with an African mother or father is certainly not a person of African race since he is of two origins and, therefore, not fully indigenous. A child born of Coloured parents who are citizens of Malawi would, therefore, be in the same position as the child of European or Asian parents who are citizens of Malawi. Such a child can only become a citizen through registration.⁽⁵⁰⁾

This restriction of citizenship by birth in Malawi should be compared with that in Sierra Leone. Section 1(3) of the Constitution of Sierra Leone confines citizenship by birth as from April 26, 1961 (independence day) to persons of negro African descent born while their fathers are or were citizens of Sierra Leone. A person of negro African descent is defined as a person whose father and whose father's father are or were negroes of African origin.⁽⁵¹⁾

As in Zambia, a person born in an occupied area of Malawi of a father who is a citizen of a country with which Malawi is at war is not a citizen.⁽⁵²⁾ The Malawi Citizenship Act, however, does not contain the exception regarding persons born of a father enjoying diplomatic immunity. Accordingly a person born of a father enjoying diplomatic immunity and of a mother who is a citizen of Malawi of African race would be a citizen by birth.

Compared with the positions in the United States and in the United Kingdom, for instance, citizenship by birth in Zambia and Malawi is more restricted. In the United States, Amendment XIV to the Constitution provides that "all persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

(50) - See S.15 Malawi Citizenship Act, 1966.

(51) - S.1(3) Constitution of Sierra Leone.

(52) - S.4(1) Malawi Citizenship Act.

they reside." This provision was held, in United States v. Wong Kim Ark,⁽⁵³⁾ to confer citizenship on all persons born in the United States except those born of alien enemies in hostile occupation; diplomatic representatives accredited to the United States; sovereigns; and persons born on foreign public ships. In the United Kingdom, section 4 of the British Nationality Act, 1948, confers citizenship by birth on any person born in the United Kingdom or the Colonies except children of enemy alien fathers and of non-citizen fathers enjoying diplomatic immunity.

The restrictions in the Constitution of Zambia are also found in the Constitutions of most of the newer countries of the Commonwealth.⁽⁵⁴⁾ Only the Constitution of Sierra Leone, among the Constitutions of Commonwealth countries, has, like the Constitution of Malawi, a racial requirement for citizenship by birth.

2. Citizenship by Descent

A person born outside Zambia after October 23, 1964, becomes a citizen by descent if the father is a citizen of Zambia but not also by descent.⁽⁵⁵⁾ In Malawi such a person born after July 5, 1966, also becomes a citizen by descent provided his mother or father is a citizen of Malawi by birth and is of African race. Apart from the requirement in Malawi (which does not exist in Zambia) that the parent through which citizenship is acquired must be a citizen of African race, there are

(53) - 169 U.S. 649 (1898). This case reversed the dictum of Justice Miller in the Slaughter House Cases 16 Wall 36 (1873) which had excluded from citizenship persons born in the country of alien parents. An attempt to challenge the decision in the Wong Kim Ark case failed during the Second World War when the citizenship of children of Japanese parentage was challenged. The Supreme Court declined to review the decision - see Regan v. King 319 U.S. 753 (1943).

(54) See, e.g. Constitutions of Mauritius (S.22); Kenya (S.3) and Trinidad and Tobago (S.12(1)).

(55) S.6 Constitution of Zambia. Citizens by descent include citizens who qualified on independence day (having been born outside Northern Rhodesia) on the grounds that their fathers became citizens automatically or would but for their death have done so - S.6.

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two other differences between the Zambian and Malawian provisions. The first of the two differences is that the acquisition of citizenship by descent in Zambia is determined only by the status of the father. A person born of an alien father and of a mother who is a citizen of Zambia does not become a citizen of Zambia by descent just as he cannot become one by birth. In Malawi, on the other hand, such a person would become a citizen provided the mother is a citizen by birth and is of African race. The second difference is that the Malawian provision confines citizenship by descent to children of citizens by birth. Consequently children of citizens of Malawi by descent, registration or naturalization born outside Malawi cannot be citizens of Malawi by descent. They can only become citizens through registration. The Zambian provision, on the other hand, excludes only children of citizens by descent. Accordingly children of citizens of Zambia by registration or naturalization born outside the country are citizens by descent.

Restrictions on citizenship by descent are a common feature in the Constitutions of many Commonwealth countries. In Sierra Leone,⁽⁵⁶⁾ Trinidad and Tobago,⁽⁵⁷⁾ Mauritius,⁽⁵⁸⁾ Uganda,⁽⁵⁹⁾ Malta,⁽⁶⁰⁾ Barbados⁽⁶¹⁾ and Jamaica,⁽⁶²⁾ for instance, the restrictions are identical to those in Zambia. Persons born outside these countries can only become citizens by descent if at the time of that person's birth the father is or was a citizen not by descent. In the United Kingdom, if the father acquired citizenship by descent his child can also acquire citizenship by descent under certain circumstances.⁽⁶³⁾ In Singapore the birth of such a

(56) - S.5 of the Constitution.

(57) - S.12(2) of the Constitution.

(58) - S.23 of the Constitution.

(59) - Article 4(c) of the Constitution.

(60) - S.6(2) of the Constitution.

(61) - S.5 of the Constitution.

(62) - S.6 of the Constitution.

(63) - S.5 British Nationality Act, 1948.

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child must be registered at a consulate of Singapore within one year or within such time as may be allowed by the Government.⁽⁶⁴⁾ The same provision exists in the Constitution of Malaysia but as in the United Kingdom the provision does not require such registration where the child is born to a person who is abroad on service of the Federation.⁽⁶⁵⁾

In Kenya, Swaziland and Botswana, on the other hand, there are no restrictions on citizenship by descent as found in Zambia. In Kenya a person born outside Kenya after December 11, 1963, of a Kenyan citizen is a citizen of Kenya by descent, regardless of how the father acquired his citizenship.⁽⁶⁶⁾ In Swaziland a child born outside Swaziland becomes a citizen by descent provided the father is a citizen and is still domiciled in Swaziland.⁽⁶⁷⁾ In Botswana a child born outside the country of a citizen father becomes a citizen by descent provided he does not become a citizen of the country where he is born.⁽⁶⁸⁾ This provision would deny citizenship by descent to a person born of a citizen of Botswana in, say, the United States or the United Kingdom where citizenship by birth would automatically be acquired by such a person.

3. Citizenship by Registration

Several classes of persons can acquire citizenship by registration in Zambia and Malawi.

(a) Women Married to Citizens.

In Zambia, any woman who is or has been married to a citizen of Zambia (the marriage having taken place after October 23, 1964) is entitled upon application to be registered as a citizen.⁽⁶⁹⁾ Women married

(64) - Article 55 of the Constitution.

(65) - Article 14(1)(b) read with Part II of Schedule 2, S.1(b) and (c), of the Constitution.

(66) - S.4 of the Constitution.

(67) - S.22 of the Constitution.

(68) - S.22 of the Constitution.

(69) - S.7 of the Constitution.

before October 23, 1964, it has been seen,⁽⁷⁰⁾ were entitled to registration as citizens under special provisions. In Malawi a woman (being a person of full capacity) who has been married to a citizen of Malawi or to a person who would but for his death have become a citizen on July 6, 1966, is, on application, entitled to registration as a citizen. In Zambia, apart from satisfying the Minister of her marriage and certain of her and her husband's personal particulars,⁽⁷¹⁾ as well renunciation of her existing citizenship,⁽⁷²⁾ the woman has no other requirements to meet. In Malawi, on the other hand, the woman must, in addition to giving particulars of her marriage, herself and her husband, satisfy the Minister (a) that she is ordinarily resident in Malawi and has been so resident for a period of five years; (b) that she has an adequate knowledge of a prescribed vernacular language or of the English language; (c) that she is of good character; and (d) that she would be a suitable citizen of Malawi.⁽⁷³⁾ She must also make a declaration in writing of (a) her willingness to take an oath of allegiance; (b) her willingness to renounce any other nationality she possesses.⁽⁷⁴⁾ In the case of a widow or a divorcee or a woman separated from her husband, she must also make a declaration of her intention to continue to reside permanently in Malawi.⁽⁷⁵⁾ Originally it appears, there was some doubt whether the Zambian Minister had the power to deny registration to a woman who satisfied the requirements. This also applied in the case of other applicants for registration

(70) - See above.

(71) - See Form C, First Schedule to the Citizenship of Zambia Regulations, G/N 498/1964.

(72) - S.10(2) Citizenship of Zambia Ordinance. If her existing citizenship cannot be renounced, she can make a declaration which would be deemed to be a renunciation. S.10(6).

(73) - S.16(1) read with S.13(1) Malawi Citizenship Act.

(74) - S.16 (2)(a) and (b).

(75) - S.16(2)(c).

as citizens. This doubt was, however, removed by an amendment to the Constitution. Section 2 of the Constitution (Amendment) Act, 1966,⁽⁷⁶⁾ added subsection (4) to Section 12 of the Constitution. The added subsection provides that "the provisions of ... (the Constitution) providing that a person shall be entitled to be registered as a citizen of Zambia shall be construed as conferring an entitlement to be so registered if, and only if, the Minister, acting in his discretion, agrees to such registration."

In granting the right to become citizens to wives of citizens, the citizenship laws of Zambia and Malawi are in line with the citizenship laws of most countries in the world. The requirements that the woman should fulfil before acquiring Zambian or Malawian citizenship are, details apart, similar to those obtaining in other Commonwealth countries.⁽⁷⁷⁾

(b) Persons with connection with the Country

In Zambia citizens of Commonwealth countries and of certain African States, and persons who have attained the age of twenty-one years (or women who are or have been married) born of parents one of whom is at the time of that person's birth a citizen of Zambia, are regarded as persons who have a connection with Zambia. The registration of Commonwealth citizens and of citizens of certain African states will be dealt with separately below. This leaves for discussion here, in connection with Zambia, persons who have attained the age of twenty-one years (or women who are or have been married) born of parents one of whom is a citizen of Zambia at the time of that person's birth. Such persons can acquire citizenship by registration on application.⁽⁷⁸⁾ In Malawi as well, certain persons may be registered as citizens on grounds of a connection

(76) - Act No. 30 of 1966.

(77) - See, e.g., Constitutions of Botswana (S.26); Uganda (Art. 4(4)); Swaziland (S.23(1)(a) and (c)); Singapore (Art.57(2)); Malta (S.27); Kenya (S.5); Mauritius (S.24); and Trinidad and Tobago (S.13).

(78) - S.8(2) of the Constitution.

with the country. There are three classes of such persons - (a) persons born in the country (or in the former Protectorate) who do not become citizens by birth; (b) persons who have been ordinarily resident in the country for a period of not less than twenty years; and (c) persons who are permanently resident in the country and were born in the former Protectorate or in Mozambique north of the Zambezi River and both of whose parents were born in either Mozambique north of the Zambezi River or in the former Protectorate.⁽⁷⁹⁾

In Zambia, before an applicant can be registered he must satisfy the Minister of his connection with Zambia.⁽⁸⁰⁾ After registration he must renounce whatever other citizenship he holds within a prescribed time.⁽⁸¹⁾ In Malawi, on the other hand, the applicant must satisfy the Minister: (a) that he is ordinarily resident in Malawi and has been so resident for a period of five years; (b) that he has an adequate knowledge of a prescribed vernacular language or of the English language; (c) that he is of good character; and (d) that he would be a suitable citizen of Malawi.⁽⁸²⁾ In addition, the applicant must make a declaration in writing (a) of his willingness to take an oath of allegiance; (b) of his willingness to renounce any other nationality or citizenship he may possess; and (c) of his intention to continue to reside permanently in Malawi.⁽⁸³⁾

(c) Minors

In both Zambia and Malawi a minor who is a child of a citizen may be registered as a citizen on the application of a parent or guardian.⁽⁸⁴⁾ In Zambia

(79) - S.15(2) Malawi Citizenship Act, 1966.

(80) - See Form D, First Schedule to the Citizenship of Zambia Regulations, G/N 498 of 1964.

(81) - S.10(2) Citizenship of Zambia Ordinance.

(82) - S.15 (2)(b) read with S.13(1) Malawi Citizenship Act, 1966.

(83) - S.15(3) read with S.13(2) ibid. Registration under these provisions does not exempt a person from the provisions regarding dual citizenship S.15(4). See below under "Loss of Citizenship".

(84) - S.4(1) Citizenship of Zambia Ordinance; S.17(1), Malawi Citizenship Act.

there are no requirements to be fulfilled in addition to that of supplying particulars of the father of the minor (and of the guardian where this applies) and of the minor himself.⁽⁸⁵⁾ Particulars regarding the minor include his knowledge of the English language or a vernacular language. In addition two certificates signed by two different sponsors and two different witnesses on the character of the minor and his suitability as a citizen of Zambia have to be submitted.⁽⁸⁶⁾ In Malawi the Minister must be satisfied that the minor child has adequate knowledge of a vernacular language or the English language; that he is of good character; that he would be a suitable citizen; and that he is ordinarily resident in Malawi.⁽⁸⁷⁾ There is no specified time of residence. In addition the parent or guardian must make on behalf of the child a declaration in writing of his (the child's) intention to continue to reside permanently in Malawi.⁽⁸⁸⁾

In both Zambia and Malawi, a minor, unlike a major, is not required to renounce whatever other citizenship he may hold after registration as a citizen of Zambia or Malawi. On reaching majority, however, he is required to renounce within a prescribed period such other citizenship.⁽⁸⁹⁾ In Malawi, the Act also requires a citizen who has become of age to take an oath of allegiance; make a declaration in writing of his intention to retain citizenship of Malawi and a similar declaration of his intention to reside in Malawi permanently.⁽⁹⁰⁾

(85) - See Form E, First Schedule to the Citizenship of Zambia Regulations.

(86) - Ibid.

(87) - S.17(1) Malawi Citizenship Act.

(88) - S.17(2) ibid.

(89) - S.10(1) Citizenship of Zambia Ordinance;
S.7(1)(c) Malawi Citizenship Act.

(90) - S.7(a), (b) and (d) Malawi Citizenship Act.

(d) Commonwealth Citizens

Both the Constitution of Zambia and the Malawi Citizenship Act have two sets of provisions relating to citizens of Commonwealth countries. The first set of provisions concerns the special treatment given to citizens of Commonwealth countries in becoming citizens of Zambia or Malawi. The second set of provisions concerns the status of "Commonwealth citizens" which is accorded citizens of Zambia and Malawi and of other Commonwealth countries. Only the first set of provisions will be discussed here. The second set of provisions will be discussed below.

While aliens, as will be seen below, can acquire citizenship of Zambia or Malawi only by naturalization, citizens of Commonwealth countries can do so merely by registration - a process easier than naturalization. A citizen of a Commonwealth country is not an alien in another Commonwealth country.⁽⁹¹⁾ In most Commonwealth countries citizens of other Commonwealth countries are, unlike aliens, entitled to acquire citizenship by registration. In Swaziland, however, Commonwealth citizens acquire citizenship not by registration but, like aliens, by naturalization, although the time of residence is three years for them as opposed to four years for aliens.⁽⁹²⁾

In Zambia a citizen of every Commonwealth country and of the Republic of Ireland who has attained the age of twenty-one years (or if a woman, one who is or has been married) and who has been ordinarily resident in Zambia for four years immediately preceding the application is entitled to registration on application as a citizen.⁽⁹³⁾ Registration is, however, subject to the Minister's discretion.⁽⁹⁴⁾ In Malawi an

(91) - See S.2(1) Malawi Citizenship Act; S.2(c) Aliens (Registration and Status) Act (Malawi); S.2 Aliens (Registration and Status) Act (Zambia).

(92) - S.24(1)(a)(ii) of the Constitution.

(93) - S.8(1) and (6) of the Constitution.

(94) - S.2 of the Constitution (Amendment) Act, 1966, amending S.12 of the Constitution.

applicant for citizenship under these provisions must satisfy the Minister that he is ordinarily resident in the country and has been so resident for a period of five years; that he has an adequate knowledge of a prescribed vernacular language or of the English language; that he is of good character; and that he would be a suitable citizen of Malawi.⁽⁹⁵⁾ The applicant must also make a declaration in writing (a) of his willingness to take an oath of allegiance; (b) of his willingness to renounce any other nationality or citizenship he may possess; and (c) of his intention to continue to reside permanently in Malawi.⁽⁹⁶⁾

(e) Citizens of Certain African States

Pan-Africanism must have been the influence behind the inclusion in the Constitution of Zambia and in the Malawi Citizenship Act of provisions regarding citizens of certain African States. Both the Constitution of Zambia and the Malawi Citizenship Act empower the Minister concerned to declare by notice in the Gazette that citizens of any country in Africa other than a Commonwealth country shall have the right to become citizens of Zambia or Malawi by registration.⁽⁹⁷⁾ The Constitution of Zambia specifically states that this can only be done where that other country permits citizens of Zambia to become citizens of that country by registration.⁽⁹⁸⁾ The Malawi Citizenship Act has no such specific restriction. The Malawian provision has an application far wider than that of the Zambian provision. It empowers the Minister "where he is satisfied that it is desirable so to do, by order in the Gazette (to) declare that citizens, or residents, or any class of citizens or residents, of any State or territory, or any part thereof, on the continent of

(95) - S.13(1) Malawi Citizenship Act.

(96),- S.13(2) ibid.

(97) - S.8(1)(b) and (4) Constitution of Zambia;
S.14(1) and(3) Malawi Citizenship Act.

(98) - S.8(4) Constitution of Zambia.

Africa shall be persons of a class" who can become citizens of Malawi by registration.⁽⁹⁹⁾ The prerequisite to the Minister's exercise of the power in Zambia is "reciprocity". In Malawi it is "desirability", prompted not necessarily by reciprocity. This significant difference deprives the Minister in Zambia of the power to grant the right to citizens of a country which does not give the same right to Zambian citizens or to persons of a territory which has no citizenship of its own which could be reciprocally granted to citizens of Zambia. Secondly, the Zambian Minister cannot grant the right only to a class of citizens of the other state unless that is what is being done by that other state.^(99a) On the other hand, since he does not act on reciprocity, the Malawian Minister can grant the right to citizens, residents, or any class of citizens or residents of another State regardless of whether that other state reciprocates unless an agreement to the contrary is first entered into with that other state.

Once a state has been declared to come under these provisions, the citizens of that state become entitled to acquisition of Zambian or Malawian citizenship on the same conditions as apply to citizens of Commonwealth countries.⁽¹⁰⁰⁾

Zambia and Malawi are not the only States in Africa whose citizenship laws have a provision enabling the Minister concerned to grant citizenship by registration to citizens of certain African States. Kenya and Botswana, for instance, have similar provisions which apply to citizens of States in Africa other than those which are members of the Commonwealth.⁽¹⁰¹⁾ As in Zambia

(99) - S.14(3) Malawi Citizenship Act.

(99a)- The Malawian Minister can, for instance, if he deems it desirable, grant citizenship by registration only to Africans from South Africa.

(100)- S.8(1) and(6) Constitution of Zambia; S.14(1) and (2) Malawi Citizenship Act. For conditions applying to Commonwealth citizens, see above.

(101)- See S.25 Constitution of Botswana; S.6(1) and (3) Constitution of Kenya.

and Malawi, the state to which the provisions are to apply must first be gazetted. In both countries the application of the provisions is, as in Zambia, based on reciprocity.

(f) Stateless Persons

Only the Malawi Citizenship Act makes provision for stateless persons. There is no similar provision in the Constitution of Zambia or in the Citizenship of Zambia Ordinance.^(101a) Section 18 of the Malawi Citizenship Act empowers the Minister concerned to register a stateless person as a citizen of Malawi if the latter satisfies the Minister (a) that he is and has always been a stateless person; (b) that he was born within Malawi or that one of his parents was a citizen of Malawi at the time when he was born; (c) that he is ordinarily resident in Malawi and has been so resident for a period of three years immediately before application; and (d) that he has neither been convicted of an offence nor detained for behaviour prejudicial to public security nor been sentenced to imprisonment for a term of five years or more on any criminal charge. In addition he must make a declaration in writing (a) of his willingness to take an oath of allegiance; and (b) of his intention to continue to reside permanently in Malawi. Registration as a citizen under this provision applies to persons born before or after the commencement of the Act and to persons born illegitimate or legitimate. In the case of a person who has not yet attained full capacity, the application must be made by a parent or a guardian.

(g) Citizens Registered in Special Circumstances

In Zambia the President may, as a token of honour, cause any person who, in his opinion, has done signal honour or rendered distinguished service to Zambia to be registered as a citizen.⁽¹⁰²⁾ He may

(101a) - See, however, below under "Citizens Registered on Special Circumstances."

(102) - S.4A(1) Citizenship of Zambia Ordinance.

also cause to be registered as a citizen any person not otherwise entitled to or eligible for citizenship of Zambia with respect to whom special circumstances exist which, in his (the President's) opinion warrant such registration.⁽¹⁰³⁾ This latter provision confers on the President the power to register as citizens persons who have no qualifications for citizenship. The citizenship granted under this latter provision must be distinguished from the citizenship of honour granted under the first provision. The second provision enables the President, for instance, to register as citizens stateless persons. Persons registered under this provision become, therefore, ordinary citizens.

In Malawi the Minister may, notwithstanding any provision in the Malawi Citizenship Act, in such special circumstances as he, in his discretion, thinks fit, confer upon any person citizenship of Malawi.⁽¹⁰⁴⁾ This provision is wide enough to enable the Minister to confer citizenship of honour and ordinary citizenship on persons who do not normally qualify for citizenship. However, the provisions of section 20(2) of the Act seem to suggest that citizenship granted under this provision is only that of honour. Section 20(2) exempts a citizen registered in terms of section 19 from (a) renouncing any other nationality or citizenship which he may possess; (b) taking an oath of allegiance; (c) making a declaration of his intention to reside permanently in Malawi. A person registered to become an ordinary citizen would not be exempted from renunciation of any other citizenship held and from taking the oath of allegiance.

Citizens of honour are normally not subjected to the obligations which apply to other citizens. Section 20(2) of the Malawi Citizenship Act, as has just been indicated above, exempts a citizen registered under Section 19 from renouncing his citizenship; taking the oath of allegiance; and making a declaration of his intention to reside in Malawi permanently. There is no similar provision in the Citizenship of Zambia Ordinance but in practice such citizens have the same exemptions as granted in Malawi. Neither the

(103) - S.4A(2) ibid.

(104) - S.19 Malawi Citizenship Act.

27.

Malawi Citizenship Act nor the Citizenship of Zambia Ordinance indicates that citizens of honour enjoy reduced rights. In practice, however, citizens of honour do not exercise such civic rights as the franchise and the subordinate rights that go with it.

Effect of Registration as a Citizen

A person registered as a citizen of Zambia or Malawi becomes a citizen as from the day of registration.⁽¹⁰⁵⁾ The new citizen enjoys as from that date all the rights conferred on citizens. He also becomes liable as from that date to all obligations that should be discharged by citizens. However, as will be seen later in this chapter, citizenship by registration is inferior to that by birth or descent in that a person can be easily deprived of it. A person who has been registered as a citizen, as will be seen below, loses his citizenship if he does not renounce his citizenship of another country or if he does not meet certain other requirements within three months of registration.⁽¹⁰⁶⁾ In the case of persons registered while minors the renunciation of any other nationality and the satisfaction of other requirements must be made, in Zambia, within three months of the minor attaining majority.⁽¹⁰⁷⁾ and, in Malawi, at any time before his twenty-second birthday.⁽¹⁰⁸⁾

4. Citizenship by Naturalization

While citizens of Commonwealth countries and those of certain prescribed African countries can only become citizens of Zambia or Malawi by registration, citizens of foreign countries (including non-prescribed African countries) can only do so by naturalization. The applicant must satisfy the Minister (a) that he is ordinarily resident in the country and has been so resident for the prescribed time - seven years in

(105) - S.5 Citizenship of Zambia Ordinance; S.20(2) Malawi Citizenship Act.

(106) - S.20(2) Malawi Citizenship Act; S.10(2) Citizenship of Zambia Ordinance. The Minister could extend the period if necessary.

(107) - S.10(5)(b) Citizenship of Zambia Ordinance.

(108) - S.20(2) Malawi Citizenship Act.

Malawi and five years in Zambia; (b) that he is of good character; (c) that he has an adequate knowledge of a prescribed vernacular language or the English language; (d) that he intends to continue to reside in the country, or, in Zambia only, that he intends to enter or continue in the service of the Government, if the application is granted; (e) that he is willing to renounce any citizenship which he may possess; (f) that he is willing to take the oath of allegiance; (g) (in Zambia only) that he has not been refused naturalization within the period of two years immediately preceding his application; (h) (in Malawi only) that he is financially solvent; and (i) (in Malawi only)⁽¹⁰⁹⁾ that he would be a suitable citizen.⁽¹¹⁰⁾ Most of these requirements are, details apart, derived from Section 10 of, and the Second Schedule to, the British Nationality Act, 1948.⁽¹¹¹⁾

If the application is granted, the applicant is issued a certificate of naturalization and is registered as a citizen. In Zambia the certificate (and accordingly the citizenship) does not come into force until the holder has taken the oath of allegiance.⁽¹¹²⁾ The holder becomes a citizen as from the day of taking the oath of allegiance.⁽¹¹³⁾ In Malawi, on the other hand, the applicant becomes a citizen as from the date of issue of the certificate.⁽¹¹⁴⁾ He must, however, produce to an officer authorized by the Minister within a period of three months or such longer period as the Minister or the officer may allow, satisfactory evidence (a) that

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- (109) - In Zambia two sponsors must certify regarding the character of the applicant and his suitability as a citizen - see Form H, First Schedule, Citizenship of Zambia Regulations.
- (110) - S.6(1) and(3) Citizenship of Zambia Ordinance; S.21(1) and(2) Malawi Citizenship Act.
- (111) - See also, e.g. the Constitutions of Malaysia (Art.19); Singapore (Art.57); Swaziland (S.24) Kenya (S.7) which also derived their provisions from S.10 of the British Nationality Act, 1948.
- (112) - S.6(3) Citizenship of Zambia Ordinance.
- (113) - Ibid.
- (114) - S.22(1) Malawi Citizenship Act.

he has renounced any other nationality or citizenship he may have possessed; (b) that he has taken an oath of allegiance; and (c) that he has made a declaration of his intention to reside permanently in Malawi.⁽¹¹⁵⁾ If he fails to meet these requirements his naturalization is cancelled and he is deemed never to have been naturalized.⁽¹¹⁶⁾ In Zambia too, after the naturalization has come into effect, the new citizen must renounce whatever other citizenship he holds within three months or such longer period as may be granted.⁽¹¹⁷⁾ If he fails to do so, he is deemed never to have become a citizen and his certificate of naturalization is cancelled.⁽¹¹⁸⁾ In both Zambia and Malawi, if the other citizenship held by a naturalized citizen cannot be renounced, the requirement can be satisfied by the naturalized citizen making a declaration of renunciation which, although of no effect in the other country, is deemed in Zambia or Malawi to free the declarant from the other citizenship.⁽¹¹⁹⁾

Once a naturalized citizen has met all the requirements he becomes entitled to all the rights enjoyed by other citizens. He also becomes liable to discharge all duties that are expected of citizens. However, his citizenship is inferior to that obtained by descent or birth in that it can be easily withdrawn by the Minister.⁽¹²⁰⁾

5. Citizenship by Adoption

In Zambia, a child adopted on or after the enactment of the Citizenship of Zambia Ordinance in terms of any law relating to the adoption of children, if not a citizen already, becomes a citizen on the date of the adoption.⁽¹²¹⁾ There

(115) - S.22(2) ibid.

(116) - Ibid.

(117) - S.10(2) and(5)(b) Citizenship of Zambia Ordinance.
In the case of a minor he must do so within three months of attaining majority - ibid.

(118) - S.10(2) ibid.

(119) - S.10(6) Citizenship of Zambia Ordinance; S.31 Malawi Citizenship Act.

(120) - See below.

(121) - S.3 Citizenship of Zambia Ordinance.

is no similar provision in the Malawi Citizenship Act. Such a child, it appears, would acquire citizenship of Malawi only by registration under the terms applying to minor children of citizens.⁽¹²²⁾

6. Commonwealth Citizenship

It has been indicated above under the section dealing with the registration of citizens of Commonwealth countries as citizens of Zambia or Malawi, that citizens of a Commonwealth country as well as citizens of Zambia and Malawi enjoy in Zambia and Malawi respectively the status of "Commonwealth citizen". Section 9(1) of the Constitution of Zambia and section 12(1) of the Malawi Citizenship Act declare, respectively, that every person who, under the Constitution or an Act of Parliament, is a citizen of Zambia or of Malawi or of any other Commonwealth country⁽¹²³⁾ has, in Zambia and in Malawi respectively, the status of "Commonwealth citizen." The status also extends to British subjects who have no citizenship under the British Nationality Act, 1948, or the law of any other Commonwealth country; other British subjects; and, in Malawi, British protected persons.⁽¹²⁴⁾ The provision of the Zambian Constitution strangely omits British protected persons.

It will be noted that both the Zambian and the Malawian provisions confer the status of Commonwealth citizen not only on citizens of other Commonwealth countries but also on citizens of Zambia and Malawi respectively. Zambians in Zambia and Malawians in Malawi accordingly enjoy citizenship of the country as well as that of the Commonwealth. However, while Zambians are in Zambia and Malawians are in Malawi, Commonwealth citizenship gives them no tangible benefits. The citizenship is only important to them when they travel to other Commonwealth countries, but in that case their status is not determined by Zambian or Malawian law but by the law of the other country.

(122) - See above. Where the adoptee has attained the age of twenty-one, he would personally seek registration as a citizen.

(123) - A Commonwealth country includes the dependencies of such a country - S.125(1) Constitution of Zambia; S.2(1) Malawi Citizenship Act.

(124) - S.9(2) Constitution of Zambia; S.12(2) Malawi Citizenship Act.

Conferment of Commonwealth citizenship on citizens of the country and on citizens of other Commonwealth countries is found in the Constitutions or citizenship laws of most Commonwealth countries. The Constitutions of, for instance, Sierra Leone,⁽¹²⁵⁾ Botswana,⁽¹²⁶⁾ Malta,⁽¹²⁷⁾ Mauritius,⁽¹²⁸⁾ Swaziland,⁽¹²⁹⁾ Trinidad and Tobago,⁽¹³⁰⁾ Kenya,⁽¹³¹⁾ Malaysia,⁽¹³²⁾ Jamaica⁽¹³³⁾ and Barbados⁽¹³⁴⁾ have such a provision. On the other hand in Ceylon, the Citizenship Act of 1948 has no clause on Commonwealth citizenship.⁽¹³⁵⁾ The Indian Citizenship Act of 1955 confers Commonwealth citizenship on citizens of other Commonwealth countries but not on Indian citizens.⁽¹³⁶⁾ The Pakistan Citizenship Act of 1951 confers such citizenship on citizens of Pakistan but not on those of other Commonwealth countries.⁽¹³⁷⁾

B. TERMINATION OF CITIZENSHIP

Citizenship of Zambia or Malawi may come to an end in three ways. First, the citizen may be deprived of his citizenship by the Minister. Secondly, the citizen may lose his citizenship automatically by operation of law. Thirdly, a citizen may renounce citizenship formally.

(125) - S.7.

(126) - S.28.

(127) - S.29.

(128) - S.25.

(129) - S.25.

(130) - S.15.

(131) - S.9.

(132) - Article 29.

(133) - S.9.

(134) - S.8.

(135) - See Wade and Phillips, op.cit., pp. 252-253.

(136) - Ibid., p.253.

(137) - Ibid.

1. By Deprivation.

In both Zambia and Malawi the Ministers may deprive

a citizen by registration or naturalization of his citizenship if he is satisfied: (a) that the citizen has shown himself by act or speech to be disloyal or disaffected, in Zambia, towards the country and, in Malawi, towards the Government; (b) that the citizen has during a war in which the country was engaged unlawfully traded or communicated with the enemy or been engaged in or associated with any business that was to his knowledge carried on in such a way as to assist an enemy in that war; (c) that the citizen has been ordinarily resident outside the country for a continuous period of seven years without registering in the prescribed manner with a diplomatic or consular office of the country or without having notified the Minister concerned in writing of his intention to retain his citizenship,⁽¹³⁸⁾ or (d) that the registration or naturalization was obtained by fraud, false representation or the concealment of any material fact.⁽¹³⁹⁾ The Malawi Citizenship Act has three further grounds⁽¹⁴⁰⁾ on which a citizen by registration or naturalization may be deprived of his citizenship. The first ground is that the citizen is within seven years of being naturalized sentenced in any country to imprisonment for a term of not less than twelve months.⁽¹⁴¹⁾

(138) - The Citizenship of Zambia Ordinance states that absence does not include time spent outside on Government service or in the service of an international organization of which Zambia is a member. This should also be the case in Malawi although not specifically stated.

(139) - S.9(1) and (2) Citizenship of Zambia Ordinance; S.25 (1)(a), (b) and (d) Malawi Citizenship Act. The Minister must satisfy himself before depriving a person of his citizenship on any of these grounds that it is not conducive to the public good that that person should continue to be a citizen - S.9(3); S.25(3) *ibid.*

(140) - In Zambia these grounds come under loss of citizenship - see below.

(141) - S.25(2)(c) Malawi Citizenship Act.

This ground does not apply to citizens by registration. The second ground is that the Minister is satisfied that the person has at any time while a Malawi citizen of full age and capacity voluntarily claimed and exercised in another country any right available to him under the law of that country, being a right which is accorded only citizens of that country.⁽¹⁴¹⁾ It would, therefore, not be an infringement of this provision if a citizen of Malawi voted in a country such as Mauritius where the franchise is open not only to citizens of Mauritius but also to citizens of the Commonwealth who satisfy residence or domicile requirements⁽¹⁴²⁾ or in Botswana where the Constitution empowers Parliament to extend the franchise to citizens of States it may designate.⁽¹⁴³⁾ The exercise of the franchise in these countries would not amount to the exercise of a right open only to citizens of the country. Thirdly, the Minister may deprive any citizen of Malawi of full age and capacity of his citizenship if he is also to his own knowledge⁽¹⁴⁴⁾ a citizen of any other country.⁽¹⁴⁵⁾ This provision seems to apply only to

(141) - S.24. The Minister must before effecting the deprivation satisfy himself that it is not conducive to the public good for that person to continue to be a citizen - *ibid.*

(142) - S.42 of the Constitution.

(143) - S.68(1) of the Constitution.

(144) - "... such knowledge shall be presumed from the possession by that person of a passport or document of the like nature of any country, or the exercise in relation to any other country of any other right or privilege accorded exclusively to citizens of that country" - S.6(3) Malawi Citizenship Act.

(145) - S.6(1) and (2) read with S.24 *ibid.*: This provision also applies where a person who has attained the age of twenty-one and is a citizen of Malawi fails before his twenty-second birthday to renounce any other citizenship he may hold; to take an oath of allegiance; to make a declaration in writing of his intention to retain citizenship of Malawi; or to make a declaration in writing of his intention to reside permanently in Malawi.

citizenship acquired before, or simultaneously with, that of Malawi and to citizenship acquired by a citizen of Malawi before attaining his majority since there are other provisions dealing with cases of citizenship acquired voluntarily or involuntarily after that of Malawi.⁽¹⁴⁶⁾

In both Zambia and Malawi, before depriving a person of his citizenship on any of the grounds mentioned above (except two of the grounds applying in Malawi only - i.e. exercising rights in a foreign country open only to citizens of that country or remaining a citizen of another country), the Minister must notify such a person in writing of the ground on which it is proposed to deprive him of his citizenship and of his right, if he so wishes, to have the case referred, in Zambia, to a single Commissioner, and, in Malawi, to a Committee consisting of a chairman and an unspecified number of members.⁽¹⁴⁷⁾ If the person applies for an inquiry, the Minister appoints the Commissioner or the Committee.⁽¹⁴⁸⁾ In Zambia the Commissioner must be a person who is or has been a judge of the Court of Appeal or the High Court in Zambia or a prescribed country.⁽¹⁴⁹⁾ In Malawi the Chairman of the Committee must be a person with judicial experience.⁽¹⁵⁰⁾ Neither the Zambian nor the Malawian provision says anything about the Minister being bound or not being bound by the findings of the inquiry.

(146) - See Ss. 8, 9 and 10 Malawi Citizenship Act.

(147) - S.9(4) Citizenship of Zambia Ordinance;
S.25(4) Malawi Citizenship Act.

(148) - S.9(5); S.25(4) ibid.

(149) - S.9(6) Citizenship of Zambia Ordinance. A prescribed country here means any of the following: the United Kingdom and Colonies; any country listed under section 1(3) of the British Nationality Act, 1948; the Republic of Ireland; any other country that may be prescribed -
S.9(8) ibid.

(150) - S.25(4) Malawi Citizenship Act. A "person possessing judicial experience" should include even a magistrate.

The provision of an inquiry protects the citizen from losing his citizenship without a thorough examination of the matter by an independent authority. As Justice Goldberg of the United States of America Supreme Court observed, "deprivation of citizenship ... has grave practical consequences" in that unless the person has other nationality, he may become stateless.⁽¹⁵¹⁾

The Minister withdraws the citizenship by an order.⁽¹⁵²⁾ Such a person's citizenship comes to an end as soon as the order is put into effect. He, however, remains liable for any offences committed by him before the deprivation.

Significant differences exist between the powers of the Zambian and Malawian Ministers, on the one hand, and those of the British Home Secretary, on the other. The Zambian and Malawian Ministers can withdraw citizenship from both citizens by registration and citizens by naturalization. In the United Kingdom the Home Secretary's power to deprive citizens by registration of their citizenship is limited to cases where the registration was obtained by fraud.⁽¹⁵³⁾ A citizen of another Commonwealth country or a woman married to a citizen of the United Kingdom who has become a citizen of the United Kingdom cannot, therefore, be deprived of

(151) - Kennedy v. Mendoza-Martinez 372 U.S. 144 (1963); Tresolini, op.cit., pp. 388-394. Judgment is quoted here as reproduced in Tresolini, at p.389.

(152) - In Zambia such an order cannot be appealed against - S.13 Citizenship of Zambia Ordinance. In fact, decisions of the Minister under the Ordinance cannot be reviewed or appealed against in any court - ibid. The Malawi Citizenship Act mentions that the decisions of the Minister on granting or refusing an application are final and not subject to appeal or review in any court - S.29. This seems not to include decisions on deprivation of citizenship. The courts have, of course, inherent power to intervene if the Minister does not act in accordance with the Act.

(153) - S.20(2) British Nationality Act, 1948.

his/her citizenship on any ground other than the one just mentioned. Aliens and British protected persons, however, can have their letters of naturalization revoked not only if they obtained such naturalization by fraud but also if the Home Secretary is satisfied that such a person (a) has shown himself by act or speech to be disloyal or disaffected towards Her Majesty; (b) has, during any war in which Her Majesty was engaged unlawfully traded or communicated with any enemy or been engaged in or associated with any business that was to his knowledge carried on in such a manner as to assist an enemy in that war; or (c) has within five years after naturalization been sentenced in any country to imprisonment for a term of not less than twelve months.⁽¹⁵⁴⁾

2. By Operation of Law

In both Zambia and Malawi dual citizenship is not permitted.⁽¹⁵⁵⁾ Any citizen of Zambia, other than by registration or naturalization, who, immediately after becoming a citizen of Zambia or attaining majority (whichever is the later) remains a citizen of some other country ceases to be a citizen of Zambia on a specified date⁽¹⁵⁶⁾ unless before that date he has produced to a public officer, authorized in that behalf by the Minister, evidence sufficient to satisfy such

(154) - S.20(3) *ibid.* As in Zambia and Malawi the Home Secretary must be satisfied that it is not conducive to the public good that the person continues to be a citizen. There is also provision for a judicial inquiry.

(155) - S.6(1) Malawi Citizenship Act; see generally Ss. 10 and 11 Citizenship of Zambia Ordinance. See also the Constitutions of Kenya (s.12); Uganda (Art. 6); Sierra Leone (s.6); Malta (S.28); Trinidad and Tobago (S.14).

(156) - "Specified date" means the day following the expiration of a period of one year from the date on which such a person became a citizen of Zambia or attained full age (whichever is the later) or such later date as may be allowed by the Minister or the officer in respect of individual cases - S.10 (5)(a) Citizenship of Zambia Ordinance.

officer that he has renounced his citizenship of the other country.⁽¹⁵⁷⁾ In Malawi such a person's citizenship, it has been seen above, is terminated by deprivation. On the other hand, a naturalized or registered citizen of Zambia who, immediately after naturalization or registration or attaining full age (whichever is the later) remains a citizen of some other country and fails to produce before a specified date⁽¹⁵⁸⁾ satisfactory evidence that he has renounced his other citizenship, is deemed never to have become a citizen and his registration or his certificate of naturalization is cancelled.⁽¹⁵⁹⁾ Any citizen of full age who by voluntary and formal act (other than marriage) acquires the citizenship of another country ceases to be a citizen of Zambia on the date of his acquisition of the other country's citizenship.⁽¹⁶⁰⁾

With regard to Malawi, it has been mentioned above under "deprivation" that any citizen of full age who remains a citizen of another country or who exercises rights in a foreign country, being rights reserved to citizens of that country, may be deprived of his citizenship. This, it has also been mentioned, applies to a minor citizen of Malawi who on attaining majority fails before his twenty-second birthday (a) to renounce citizenship of any other country he may possess and has knowledge of; (b) to take the oath of allegiance;

(157) - S.10(1) ibid. However, if such a person satisfies the Minister that he was unaware that he was a citizen of another country, he is deemed to have never ceased to be a citizen of Zambia.
- S.10(4).

(158) - "specified date" means the day following the expiration of a period of three months from the date on which such a person became a citizen of Zambia or attained full age (whichever is the later) or such later date as may be allowed by the Minister or an authorized public officer -
S.10(5)(b) Citizenship of Zambia Ordinance.

(159) - S.10(2) ibid.

(160) - S.10(3) ibid.

(c) to make a declaration of his intention to retain citizenship of Malawi; and (d) to make a declaration of his intention to reside in Malawi permanently. It has been indicated also that these provisions seem to apply only to citizenship acquired before that of Malawi or simultaneously with that of Malawi and to citizenship acquired by a citizen of Malawi before attaining his majority. Citizens of Malawi who acquire citizenship of another country while still citizens of Malawi fall under different provisions - as stated below.

Every citizen of Malawi of full age and capacity who acquires by voluntary act other than marriage the citizenship of another country ceases to be a citizen of Malawi on the day when he acquires such citizenship.⁽¹⁶¹⁾ A woman who is a citizen of Malawi and who acquires citizenship of another country through marriage on the other hand, loses her citizenship only if, on the first anniversary of her marriage, she has not made a declaration in writing (a) of her intention to retain citizenship of Malawi; and (b) renouncing, so far as it lies within her power, citizenship of that other country.⁽¹⁶²⁾ In the case of a citizen of full age who acquires citizenship of another country by any means other than by voluntary act or by marriage, his citizenship of Malawi ceases on the first anniversary of the date of acquisition of the other citizenship unless before that date he makes a declaration in writing (a) of his intention to retain citizenship of Malawi; and (b) renouncing so far as it lies within his power citizenship of the other country.⁽¹⁶³⁾ A person who is not of full age must make the declaration before his twenty-second birthday.⁽¹⁶⁴⁾

It has been seen above that the Zambian provision on loss of citizenship by Zambian citizens who by a voluntary and formal act acquire foreign citizenship does not apply to women who acquire such citizenship by marriage. Unlike the Malawi Citizenship Act, the Citizenship of Zambia Ordinance says nothing about

(161) - S.8 Malawi Citizenship Act.

(162) - S.9.

(163) - S.10(1).

(164) - S.10(2).

such a woman being required to declare her intention to retain her Zambian citizenship or to renounce, so far as it lies within her power, citizenship of the other country. It should be presumed, therefore, that she retains her citizenship unless she formally renounces or is deprived of it (if she is a citizen of Zambia by registration or naturalization). Equally, citizens of Zambia who become citizens of another country involuntarily do not lose their citizenship. A citizen of Zambia loses his citizenship only if he voluntarily and formally acquires the citizenship of the other country.

The Citizenship of Zambia Ordinance has a provision on children born in Zambia which has no counterpart in the Malawi Citizenship Act. Any child born in Zambia after the commencement of the Ordinance⁽¹⁶⁵⁾ who is, in accordance with the law of a prescribed country, a citizen by descent of that country and whose father is at the time of his birth a citizen of that country, ceases to be a citizen of Zambia on the day following his birth.⁽¹⁶⁶⁾ If the father dies before the birth of the child, his citizenship at the time of death is taken into account; if the death occurred before the commencement of the Ordinance and the birth occurred after October 23, 1964, the citizenship the father would have had if he had died on the commencement would be taken into account.⁽¹⁶⁷⁾

3. By Renunciation

The citizenship of both Zambia and Malawi can be renounced. To renounce his Zambian or Malawian citizenship a citizen must be or must have become a citizen of another country or satisfy the Minister that after renouncing his citizenship he will become a citizen of another country.⁽¹⁶⁸⁾ The renunciation

(165) - The Ordinance came into force on October 23, 1964.

(166) - S.11(1) Citizenship of Zambia Ordinance.

(167) - S.11(2) ibid.

(168) - S.8(1) Citizenship of Zambia Ordinance;
S.23(1) Malawi Citizenship Act.

is made in the form of a prescribed declaration⁽¹⁶⁹⁾ which, in order to be effective, must be registered by the Minister.⁽¹⁷⁰⁾ The Minister may refuse to register the declaration if it is made during a war in which the country is engaged⁽¹⁷¹⁾ or, in Malawi only, if, in his opinion, it would be contrary to public policy. Once the declaration is registered the person ceases to be a citizen.⁽¹⁷²⁾ In Zambia, if a person whose renunciation has been registered by the Minister fails within six months to become a citizen of another country, he is deemed to have remained a citizen.⁽¹⁷³⁾ This is also the case in Malawi except that the period is three months.⁽¹⁷⁴⁾ In Malawi such a person must, however, take a new oath of allegiance.⁽¹⁷⁵⁾ If he fails to do so his citizenship is not restored.⁽¹⁷⁶⁾

(169) - See Form L, First Schedule to the Citizen of Zambia Regulations; Sixth Schedule, Malawi Citizenship Act.

(170) - S.8(1) Citizenship of Zambia Ordinance; S.23(1) Malawi Citizenship Act.

(171) - In The King v. Lynch, (1903) 1K.B.444, it was decided that a British subject who had taken the oath of allegiance to the enemy during the Boer War had not lost his British nationality and that his attempt to become naturalized as an enemy subject was ineffective. He was accordingly convicted of treason. The powers of the Zambian or Malawian Ministers to refuse registration (like those of the British Home Secretary) are not limited to cases where the person concerned wants to become a citizen of an enemy country.

(172) - S.8(3) Citizenship of Zambia Ordinance; S.23(1) Malawi Citizenship Act.

(173) - S.8(4) Citizenship of Zambia Ordinance.

(174) - S.23(1) Malawi Citizenship Act.

(175) - Ibid.

(176) - Ibid.

Restoration of Citizenship

Section 27(1) of the Malawi Citizenship Act provides that where the Minister considers it desirable, on taking into account all the circumstances of a case, he may restore citizenship to a person who has lost it whether voluntarily by a declaration of renunciation or involuntarily by deprivation or operation of law. Such a person must, however, within a period of three months or such further period as may be allowed by the Minister or an authorized officer, produce to an authorized officer satisfactory evidence that he has renounced any other citizenship he may have possessed and that he has taken the oath of allegiance.⁽¹⁷⁷⁾ If he fails to meet these requirements the restoration is cancelled.⁽¹⁷⁸⁾

The Citizenship of Zambia Ordinance has no provisions on restoration of citizenship. However, where a citizen of Zambia other than by registration or naturalization has lost his citizenship because he had remained a citizen of another country after becoming a citizen of Zambia, but explains to the satisfaction of the Minister that on the date when his citizenship ceased he was not aware of the other citizenship, he is deemed never to have ceased to be a citizen of Zambia.⁽¹⁷⁹⁾ He must, however, within three months of being notified that he had been deemed never to have ceased to be a citizen of Zambia, produce satisfactory evidence to an authorized officer that he has renounced the foreign citizenship.⁽¹⁸⁰⁾ If he fails to do so his citizenship ceases on the day following the end of the three-month period.⁽¹⁸¹⁾ It should also be noted here that, as mentioned above, a Zambian citizen who renounces his citizenship but fails to become a citizen of another country within six months is deemed to have remained a citizen of Zambia.

(177) - S.27(2).

(178) - Ibid.

(179) - S.10(1) and (4) Citizenship of Zambia Ordinance.

(180) - S.10(4) and (5)(c) ibid.

(181) - S.10(4).

RIGHTS AND OBLIGATIONS OF CITIZENS

Citizens in Zambia and in Malawi, whether they be citizens by birth, descent, registration or naturalization, are entitled to all the rights permitted them by law and are subject to all the duties imposed upon them by the law. Except that a citizen by registration or naturalization may be deprived of his citizenship under circumstances which do not apply to citizens by birth or descent, there are no distinctions in regard to the rights and obligations of citizens based on the mode of acquisition of citizenship. For instance, a naturalized citizen can become President of Zambia or Malawi. There is no law barring certain citizens for all time or for a specified period from assuming this highest office in the State. This should be contrasted with the position in the United States of America where only a natural born citizen of fourteen years residence in the country can become President.⁽¹⁸²⁾ In Mexico the qualifications are even tighter. Not only should the President be a Mexican by birth, but his parents must be or must have been Mexicans by birth.⁽¹⁸³⁾ There are also restrictions in Mexico in regard to election to the Congress. In addition to other qualifications (citizenship, age and residence), the person seeking election must be a native of the state in which his constituency is situated.⁽¹⁸⁴⁾ This means that a citizen by naturalization born outside Mexico and, therefore, not a native of any state, cannot seek election to the Congress. In the United States, before qualifying for election to the Senate or to the House of Representatives, a person must have been a citizen for nine and seven years respectively.⁽¹⁸⁵⁾

(182) - Article II, Section 1, of the Constitution.

(183) - Article 82 of the Constitution.

(184) - Article 55 *ibid.*

(185) - Article I, Sections 2 and 3, of the Constitution.

RIGHTS AND OBLIGATIONS OF CITIZENS
OF PRESCRIBED STATES

Citizens of other Commonwealth countries in Zambia or Malawi have no specified rights except those of not being treated as aliens and of obtaining citizenship of the country by registration. They cannot, for instance, acquire the franchise without becoming citizens. This should be compared with the position in Mauritius where Commonwealth citizens can acquire the franchise (but not the right to stand for election to the Legislative Assembly) without becoming citizens of Mauritius provided they satisfy the residential qualifications.⁽¹⁸⁶⁾ Section 10(1) of the Constitution of Zambia, however, empowers the Minister to grant by notice in the Gazette rights and privileges to citizens of a Commonwealth or non-Commonwealth country on a reciprocal basis. The rights that may be granted do not include those under sections 61(election to the National Assembly) and 66(1) (the right to vote) of the Constitution.

Persons who come under these provisions enjoy the protection of the law while in Zambia, but this also applies to aliens. There are, of course, certain laws which protect only citizens. Some provisions of the Declaration of Rights, for instance, protect only citizens. There are also laws which apply only to aliens but not to citizens of Commonwealth or prescribed countries.

While in Zambia, persons who come under these provisions have the paramount duty of obeying the laws of the land. Additional obligations may be placed on the citizens of a particular country as a result of an agreement between Zambia and that other country.

(186) - Ss. 42(1) and 33 of the Constitution. See also the provisions of Section 68(1) of the Constitution of Botswana which enable Parliament to grant voting rights to citizens of other countries (including Commonwealth countries) without requiring them to become citizens of Botswana.

ALIENS

In Zambia the position of aliens is governed by the Aliens (Registration and Status) Act.⁽¹³⁷⁾ In Malawi it is governed by an Act of the same title.⁽¹⁸⁸⁾ The Zambian Act defines an alien as a person who is not (a) a citizen of Zambia; (b) a Commonwealth citizen as described in section 9 of the Constitution; (c) a citizen of the Republic of Ireland; or (d) a citizen of a prescribed country in Africa.⁽¹⁸⁹⁾ The Malawian Act defines an alien as a person who is not (a) a British subject; (b) a British protected person; (c) a citizen of the Republic of Ireland; or (d) an African of a territory or state or such part of a territory or state as the Minister may prescribe.⁽¹⁹⁰⁾ There is a significant omission in the Malawian Act which was perhaps not intended. While the definition of an alien in the Zambian Act excludes all Commonwealth citizens, that in the Malawian Act does not. The latter definition, as can be seen above, excludes a British subject and this covers citizens of the United Kingdom, citizens of Commonwealth countries under the British Crown and British subjects without citizenship. It also excludes British protected persons. It does not, however, exclude citizens of Commonwealth republics, who are neither British subjects nor British protected persons. Citizens of such republican Commonwealth countries can only be excluded from the definition of alien if their country is a prescribed African State. The Malawi Citizenship Act, on the other hand, defines an alien as "a person who is not a Commonwealth citizen." This produces a position whereby citizens of republican Commonwealth countries are, technically, aliens under the Aliens (Registration and Status) Act, but not under the Malawi Citizenship Act.

(187) - Cap. A.L. 25. This is a modified Act of the former Federal Legislature.

(188) - I.e., Aliens (Registration and Status) Act (Cap 15.02). This is also a modified Act of the former Federal Legislature.

(189) - S.2.

(190) - S.2.

The Zambian Act technically includes British protected persons among aliens. It has been seen that the Act's definition of an alien excludes a Commonwealth citizen as defined in Section 9 of the Constitution. Section 9 defines a Commonwealth citizen as (a) a citizen of Zambia; (b) a citizen of any other Commonwealth country; (c) a British subject without citizenship under the British Nationality Act, 1948; (d) a British subject who continues to be one under section 2 of the British Nationality Act, 1948. This definition does not cover British protected persons, who, unless they become naturalized, have neither United Kingdom citizenship nor the status of "British subject". Under English law, British protected persons are technically aliens and a reference to British subjects does not cover them. The Malawi Act, as has been seen, specifically excludes British protected persons from the definition of alien. The definition of "Commonwealth" in section 125 of the Constitution of Zambia, which "includes any dependency of a country which is a member of the Commonwealth" and thus includes a British protectorate, has no effect on the definition of "Commonwealth citizen" given by section 9 of the same document. A British protected person can only become a non-alien in Zambia if he is an inhabitant of an African country and that country has been prescribed.⁽¹⁹¹⁾

In both Zambia and Malawi aliens live under close watch in that they are required to hold identity cards and to notify their movements in specified circumstances. Every alien who enters Zambia or Malawi (unless he is below eighteen years of age or already holds an identity card) must, within thirty days (or a shorter period as

(191) - The then Bechuanaland Protectorate (now Botswana), Basutoland Protectorate (now Lesotho) and Swaziland Protectorate (now Swaziland) for instance, were prescribed protectorates - see FGN 16 of 1955. The regulations in this notice were adopted when Zambia became independent.

may be required) of his entry, report in person to the registration officer nearest to his place of residence and make an application for an identity card.⁽¹⁹²⁾ Those who are unable to make an application within the specified time because of illness, injury or detention, must do so within fourteen days of removal of the disability.⁽¹⁹³⁾ Aliens exempted from applying for identity cards must do so within fourteen days after cessation of exemption.⁽¹⁹⁴⁾ In cases which do not fall under any of the above categories, the application must be made within such time as may be prescribed by an immigration officer, police officer or a registration officer.⁽¹⁹⁵⁾ The identity card is issued only if the Chief Registration Officer is satisfied that the applicant entered the country lawfully.⁽¹⁹⁶⁾ Once issued with his identity card the alien is deemed registered.⁽¹⁹⁷⁾

Certain aliens are exempted from applying for identity cards. Diplomats accredited to the country and members of their households; aliens in possession of temporary permits issued in terms of section 17 of the Zambian Immigration and Deportation Act^(197a) and section 18 of the Malawian Immigration Act,^(197b) aliens under eighteen years of age; (in Malawi only) aliens in lawful possession of a temporary residence permit issued in terms of section 27 of the Immigration Act or who are in lawful possession of a tourist permit issued under the same Act or who have lawful possession of a student's permit issued under provisions of section 34 of the same Act; aliens exempted by the Minister in terms of section 19 of

(192) - S.5 Aliens (Registration and Status) Act
(Zambia); S.5 Aliens (R. & S.) Act (Malawi).

(193) - Ibid.

(194) - Ibid.

(195) - Ibid.

(196) - Ibid.

(197) - Ibid.

(197a)- Cap. 15:03.

the Zambian Aliens (Registration and Status) Act and section 19 of the Malawian Aliens (Registration and Status) Act respectively; and aliens passing in direct transit, come under this category.⁽¹⁹⁸⁾ Once the exemption ceases, the alien, as mentioned above, must apply for an identity card within fourteen days.

An alien issued with an identity card is required to keep it with him. A police, immigration or registration officer may demand the production of the identity card from any person he suspects as an alien.⁽¹⁹⁹⁾ Failure to produce the card is an offence.⁽²⁰⁰⁾ The loss of the card must be reported in person immediately to an immigration, police or registration officer.⁽²⁰¹⁾ If the alien changes his address, he must report the change personally within seven days to an authorized officer nearest his new address.⁽²⁰²⁾ He may also be required, when necessary, to produce his identity card for alteration of particulars or for its replacement by the registration officer. After being issued with an identity card, an alien cannot change his surname except in circumstances permitted by the Act (e.g. taking the husband's name on marriage) or with the consent of the Minister.⁽²⁰³⁾ Where the Minister grants a change of name, the alien must report to the registration officer nearest his place of residence within fourteen days of the change.⁽²⁰⁴⁾

Hoteliers, in both Zambia and Malawi, are required to keep a register where they must record the name, nationality, last address, date of arrival at and departure from the premises of an alien given accommodation on such premises for not less than one night.⁽²⁰⁵⁾ The register must be preserved for twelve months and produced on demand to any police, immigration or registration officer.⁽²⁰⁶⁾

(198) - S.6 Aliens (Registration and Status) Act (Zambia);
S.6 Aliens (Registration and Status) Act (Malawi).

(199) - S.20; S.20.

(200) - Ibid.

(201) - S.5; S.5.

(202) - S.7; S.7.

(203) - S.10; S.10.

(204) - Ibid.

(205) - S.18; S.18.

(206) - Ibid.

RIGHTS AND DUTIES OF ALIENS

Aliens are entitled to certain rights while in Zambia or Malawi. Some of the rights are contained in the Alien (Registration and Status) Acts while others are conferred upon them by the common law or other Acts of Parliament. Section 15 of the Zambian Aliens (Registration and Status) Act and of the Malawian Aliens(Registration and Status) Act provide that an alien may purchase, acquire, own, mortgage, pledge, let, hire or dispose of movable and immovable property of any description.⁽²⁰⁷⁾ He may become a director of a company registered in Zambia but in that case the Company must immediately notify the Chief Registration Officer of the appointment.⁽²⁰⁸⁾ An alien's rights are, however, not as wide as those of a citizen. For instance, he is not entitled to hold any office, franchise, right or privilege which is not specifically granted him by law.⁽²⁰⁹⁾ In both Zambia and Malawi, for instance, aliens cannot acquire the vote or stand for election to Parliament.

While resident in Zambia or Malawi, aliens are entitled to the protection of the law and there is no difference between them and citizens before the courts except where a right is denied an alien by the law. Unlike citizens, however, aliens can be deported from the country. While an alien detained pending deportation can apply for habeas corpus, deportation being purely an executive act, the Minister concerned cannot be compelled to disclose

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- (207) - Compare with the position in Britain where an alien has all the proprietary rights except owning a British ship.
- (208) - S.15 Aliens (Registration and Status) Act (Zambia); S.15 Aliens (Registration and Status) Act (Malawi).
- (209) - Ibid.

to the Court the reasons that impelled him to make the deportation order.⁽²¹⁰⁾

For the protection he gets from the State, an alien owes some form of allegiance to the State. He must also obey the laws of the land. Failure to observe his allegiance or to obey the laws of the land would render the alien liable to prosecution.⁽²¹¹⁾

(210) - Cf. Kuchenmeister v. Home Office, (1958) 1Q.B.496, in which it was said an action of false imprisonment could result from a wrong interpretation of the Aliens Order, 1953. See also the decision in The King v. Supt. of Chiswick Police Station, ex parte Sacksteder, (1918) 1K.B.578 which seems to support the view that the courts can go behind an order for the arrest of an alien for deportation which, although valid on its face, was not made bona fide.

(211) - In Joyce v. Director of Public Prosecutions, (1946) A.C.347, it was held that an American alien who had obtained a British passport by false pretences and had gone to Germany where he committed treasonable acts was guilty of treason. See 9C.L.J. 330, for an article by Sir Hersch Lauterpacht, supporting the decision; and 10 C.L.J. 54, for an article by Prof. Glanville Williams, attacking the decision. In De Jager v. Attorney-General of Natal (1907) A.C. 326, it was decided that a resident alien's duty of allegiance under English law did not cease during the period when the Queen's protection was temporarily withdrawn because of enemy occupation of the area where the alien was resident. Accordingly an alien Boer who had joined the invading Boer forces was found guilty of treason.

Since English common law still operates in both Zambia and Malawi, aliens who fall under circumstances similar to those of Joyce and De Jager could, therefore, be convicted.

On leaving Zambia or Malawi permanently or temporarily, an alien is required to notify the registration officer at his port of exit of his intended departure and destination.⁽²¹²⁾ If leaving temporarily he must state the period he intends to be absent.⁽²¹³⁾ If he intends leaving permanently he must surrender his identity card to the registration officer.⁽²¹⁴⁾

(212) - S.16 Aliens (Registration and Status) Act (Zambia);
S.16 Aliens (Registration and Status) Act (Malawi).

(213) - Ibid.

(214) - Ibid.

CHAPTER TWENTY-ONEFUNDAMENTAL HUMAN RIGHTS - I

The discussion of the Declaration of Fundamental Human Rights in the Constitution of Zambia and the Fundamental Principles of Government in the Constitution of Malawi will be preceded by a brief account of the development of human rights in general and in the British Commonwealth in particular. The latter aspect is of great importance in that it will show the division of opinion among the Commonwealth countries on the value of including a Declaration of Fundamental Human Rights in a Constitution. This division of opinion is found even between the two countries whose Constitutions are the subject of this study. The Constitution of Zambia has a Declaration of Fundamental Human Rights while that of Malawi has none. The leaders of Malawi rejected the inclusion of such a Declaration on the grounds that it was an ineffective safeguard as well as a potential source of conflict between the Executive and the Judiciary.⁽¹⁾

ORIGIN OF HUMAN RIGHTS

Although their history can be traced back to the days of the Greek City States⁽²⁾ and to the

(1) - See Below.

(2) - Citizens of some of the Greek City States were entitled to isogoria (equal freedom of speech); isonomia (equality before the law); and isotimia (equal respect for all) - Ezejiofor, Gains Protection of Human Rights Under the Law (London, Butterworths, 1964) p.3.

Greek philosophers (the Stoics) who formulated natural law⁽³⁾ after the breakdown of the Greek City States, human rights as found in modern Constitutions have their origin in England. The English people who, in 1215, had concluded the Magna Carta and had later added to it the Petition of Right in 1628, the Agreement of the People in 1647 and the Bill of Rights in 1689, gave the lead in the movement for human rights. John Locke's writings⁽⁴⁾ and the 1689 Bill of Rights became the sources of the United States

(3) - The Stoics presented natural law as a law applicable to all states and the natural rights conferred by it as rights due to "every human being, everywhere, in virtue of the simple fact of being human and rational" - Ezejiofor, ibid., citing Cranston, M. Human Rights Today, (1962). For an account of the origin of human rights, see also Dash, The Constitution of India - A Comparative Study (Allahabad, Chaitanya Publishing House, 1968) pp. 429-440

(4) - Writing after the 1689 Bill of Rights, Locke stated that men being by nature all free, equal and independent, no one could be put out of his estate and subjected to the political power of another without his own consent - Treatise on Civil Government, Book II, para. 95.

Bill of Rights.⁽⁵⁾

While the Americans were formulating their Bill of Rights, the French were doing the same, influenced to some extent by ideas from England⁽⁶⁾ and the United States. After defying the King and the First and Second Estates, the third Estate proclaimed itself the National Assembly and

(5) - "These rights were founded essentially upon English traditions, and, indeed upon the Apologia of the Revolution Settlement by John Locke" - Jennings, The Law and the Constitution, p.260. See also Ezejiolor, op.cit., p.5; Dash, op.cit., p.431; Dumbauld, Edward, The Bill of Rights and What it Means Today (Norman, University of Oklahoma Press, 1957).

It should be noted that before the Federal Bill of Rights, some States had already included Bills of Rights in their Constitutions. For instance, Virginia, Pennsylvania and Massachusetts had adopted Bills of Rights in 1776, 1776 and 1780 respectively - Dumbauld, p.3. The Federal Bill of Rights was, in fact, drawn up mainly from that of the State of Virginia.

For a reproduction of the Federal Bill of Rights, see Tresolini, op.cit., Appendix I; McKay, op.cit., pp. 241 - 247; Dumbauld, pp. 50 - 55 (only the first ten Amendments are reproduced in this book); and Ezejiolor, Appendix I.

(6) - "...the French Declaration of the Rights of Man, promulgated by the Assembly of 1791, was also founded upon British traditions and experience, though moulded by political philosophy of the era that preceded the French Revolution" - Jennings, The Law and the Constitution, p.261.

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4.

produced the Declaration of the Rights of Man and Citizen on August 26, 1789.⁽⁷⁾ The Declaration was annexed to the Constitution of 1791 and that of 1793 after France had adopted a republican system of Government.

The American and French Declarations differed in material respects. Although influenced by English and American ideas and particularly by the fact of the implementation in statutory form, the French Declaration was heavily "permeated by the philosophy of Rousseau."⁽⁸⁾ It was lavishly sauced by high sounding phrases. The American Bill of Rights, on the other hand, was couched in the language of the Magna Carta, the Petition of Right and the Bill of Rights. While the French Declaration was intended to be a list of directive principles on government, not enforceable in the courts, the American Bill was to be enforceable in the Courts.

The American and French examples started off a new trend in the constitutional recognition of individual fundamental rights. What had started as philosophical theories had become translated into concrete constitutional provisions. The new fashion was soon copied by other States in America and Europe.

(7) - For a reproduction of the Declaration, see Ezejiolor, op.cit., Appendix II. For a short account of the events that led to the Declaration, see pp. 9 - 10

(8) - Ibid., p.12.

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5.

The movement to include Declarations of Human Rights in Constitutions received a boost after the Second World War as a result of the Atlantic Charter⁽⁹⁾ and the Charter of the United Nations.⁽¹⁰⁾ The adoption of the Universal Declaration of Human Rights by the United Nations General Assembly on December 10, 1948, gave a new impetus to the movement for human rights.⁽¹¹⁾ The impetus resulted in many states (particularly the newer ones) incorporating Declarations of Rights in their Constitutions⁽¹²⁾ and in some regional organizations including in their Constitutions a clause recognizing the sanctity of the United Nations Universal Declaration of Human Rights.⁽¹³⁾ For instance, the Council of Europe,⁽¹⁴⁾ of which the United Kingdom is a member, enacted the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁽¹⁵⁾

- (9) - The Charter was concluded on August 12, 1941, between the President of the United States and the Prime Minister of the United Kingdom at a secret meeting in Placentia Bay, Newfoundland. The Charter was later subscribed to by twenty-six nations and yet later by twenty-two other nations. For an account on the Charter, see Churchill, The Second World War, Vol. III, pp. 384 - 400; United Nations Year Book 1946 - 1947, p.1.
- (10)- Robinson, Human Rights and the Charter of the United Nations, pp. 3-4
- (11)- See The Impact of the Universal Declaration on Human Rights (1951) (Published by the United Nations)¹
- (12)- For Constitutions of the World with Declarations of Rights, see Peaslee, Constitutions of Nations, (2nd Ed. 1956) 3 Vols.
- (13)- See, e.g., the Charter of the Organization of African Unity.
- (14)- The Council was established in 1950. For the origin and the structure of the Council, see Robertson, The Council of Europe (London, Stevens, 2nd Ed., 1961).
- (15)- The Convention was signed as a protocol to the Statute of the Council of Europe. For an analysis of the Convention, see Ezejiofor, op.cit., pp97-135.

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6.

The British Colonial Office obtained material from the Convention for the Nigerian Bill of Rights⁽¹⁶⁾ - the first ever included in a Constitution granted by the British Government.

HUMAN RIGHTS IN THE COMMONWEALTH

The fashion of drawing up documents to create and guarantee rights of the individual had little appeal to the English constitutional lawyer or politician. When the Magna Carta (1215), the Petition of Right (1628), the Agreement of the People (1647) and the Bill of Rights (1689) were adopted, the purpose was not to create rights for the people but to affirm existing rights which were being violated by the monarch. The documents were to act as a reminder to the sovereign of the people's rights which existed under the common law as part of the ordinary law of the land. Paragraph 1 of the Petition of Right declared that the people derived their rights from their "good laws and the Statutes of the realm." The Agreement of the People after enumerating the rights of the people declared:

"These things are our native rights and therefore, we are agreed and resolved to maintain them with our utmost possibilities against all opposition whatsoever, being compelled thereunto not only by the examples of our ancestors, whose blood was often spent in vain for the recovery of their freedoms."

The 1689 Bill of Rights after also enumerating the rights of the people declared:

"That all and singular the rights and liberties asserted and claimed in the said Declaration, are the true, ancient, and inlubitable rights and liberties of the people of this Kingdom, and so shall be esteemed, allowed, adjudged, deemed and taken to be"

While the Americans, the French and others looked to their Constitutions for their rights, the English continued to look to the common law for theirs.

(16) - See below.

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7.

The English lawyer was, in fact, contemptuous of written declarations of rights and did not think that the guarantees proclaimed by them were as strong as the authors claimed.⁽¹⁷⁾

(17) - The attitude of an Englishman towards such declarations can be best illustrated by citing here a number of passages by English writers. Jeremy Bentham, commenting on the French Declaration wrote:

"Look to the letter, you find nonsense - look beyond the letter you find nothing Natural rights is simple nonsense; natural and imprescriptible rights, rhetorical nonsense - nonsense upon stilts. But this rhetorical nonsense ends in the old strain of mischievous nonsense: for immediately a list of the pretended natural rights is given, and those are so expressed as to present to view legal rights." ("Anarchical Fallacies" in Works (ed. by Bowring) VolIII, pp. 497 and 501)

Sir Ivor Jennings, in two of his works writes:

".... in Britain we have no Bill of Rights; we merely have liberty according to law; and we think truly, I believe - that we do the job better than any country which has a Bill of Rights or a Declaration of the Rights of Man."

.....

"In spite of the American Bill of Rights, that liberty is even better protected in Britain than in the United States....."

.....

"This idea of putting a formulated political philosophy into a Constitution may undoubtedly be regarded as un-British."

.....

"...the presumption is that the constitutional guarantee of principles of civil and political liberty is unnecessary." (Approach to Self - Government, op.cit., pp. 20, 19 and 100)

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8.

(17) Continued.

"....the English Constitutional lawyer has never tried to express, and does not think of expressing the fundamental ideas which are implicit in his constitution." (Some Characteristics of the Indian Constitution (1953) pp. 3 - 4

" An English lawyer is apt to shy away from a general proposition like a horse from a ghost." (Ibid).

.....

"On the whole the politician of tomorrow is more likely to be right than the constitutional lawyer of today." (ibid.)

Wheare writes:

"The ideal Constitution ... would contain few or no declarations of rights, though the ideal system of law would define and guarantee many rights. Rights cannot be declared in a Constitution except in absolute and unqualified terms, unless indeed they are so qualified as to be meaningless" (Modern Constitutions (1966) p.49).

Dicey declared that the Habeas Corpus Acts were "for practical purposes worth a hundred constitutional articles guaranteeing individual liberty" - (op.cit., 199) De Smith states that in saying this Dicey was speaking "for the mass of English constitutional lawyers" - "Fundamental Rights in the Commonwealth" (I) (I.C.L.C., Vol 10, Jan., 1961, p.87). De Smith himself writes that the English lawyer finds political manifestoes out of place in a legal document - (ibid, p.86). Clark described the 1919 Weimer Constitution as "the best textbook so far written on democratic ideas" - (The Fall of the German Republic (1935) p.81). The English lawyer, he wrote, "instinctively prefers tacks to noble phrases, pragmatism to metaphysics, and obstinately insists that the proof of the pudding is in the eating. (He is not at all) impressed by the history of liberty in the majority of

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9. (17) Continued.

countries which have had constitutional declarations or guarantees of rights.. (ibid). In the well known English case of Liversidge v. Anderson, (1942) A.C. 206, Lord Wright declared that the greatest "safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved " - At p.261 .

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10.

This attitude of the English lawyer found expression in Constitutions of the Empire.⁽¹⁸⁾

(18) - The lawyer in the Empire had equally no faith in the inclusion of a Declaration of Rights in a constitution. "True to the British tradition", wrote Keith in 1938, "the Dominion Constitutions ignore entirely the question of defining the rights to be enjoyed by the subjects" - (The Dominions As Sovereign States (London, Macmillan, 1938, p.557 . Writing on the older Commonwealth States, de Smith says these follow the British pattern "in so far as they eschew any general affirmation or guarantee of the liberties of the subject. Nor indeed are they concerned to prescribe standards of political behaviour; they elect a skeleton framework of the machinery of government and have something to say about the powers and interrelationship of the organs of government, but safeguards against the abuse of authority are primarily a matter for the ordinary law of the land, the crystallisation of political conventions and usages, and the ultimate verdict of the electorate " - "Fundamental Rights in the Commonwealth (I)", pp 89-90).

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Of the older Commonwealth countries, none was given a Constitution by Britain which contained a Bill of Rights. A few scattered provisions protected the rights of the individual. Canada's Constitution, the British North America Act, 1867, contained only clauses protecting denominational schools and separate schools for Protestants and Catholics⁽¹⁹⁾ in Quebec and the use of French or English in debates of the Federal Legislature and the Legislature of Quebec and in pleading and process in any Federal Court and in or from all or any of the courts of Quebec.⁽²⁰⁾ Other rights of the individual were safeguarded by the common law. The preamble to the Constitution was to be "similar in principle to that of the United Kingdom."⁽²¹⁾ The Australian Constitution, thirty-

(19) - S.93.

(20) - S.133. See also the British North America Act, 1949, Schedule, para. 17. The two sections - 93 and 33 are alterable only by an Act of the United Kingdom Parliament - see S.1 of the 1949 Act. Journals, records and Acts of the Legislatures of the Federation and Quebec must be printed in both languages.

(21) - Judges of the Federal Supreme Court, using this part of the preamble, often read into the Constitution implied prohibitions against provincial abrogation of fundamental civil liberties - see e.g., The Alberta Press Bill Case (1938) S.C.R. 100; Saumar v. Quebec (1953) 2 S.C.R. 249; Switzman v. Elbling (1957) S.C.R. 285. See also Scott, F.R. Civil Liberties and Canadian Federalism (1959); Laskin, in 37 Canadian Bar Review (1959) p.77. Canada, as indicated in Note 18 above, has now a Bill of Rights in the form of an Act of Parliament. It is not part of the Constitution.

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three years later, also did not incorporate a Bill of Rights. It, however, went further than the Canadian Constitution in protecting certain rights. Property could only be acquired by the Commonwealth (the Federation) on just terms.⁽²²⁾ Trials on indictment of any offence against any law of the Commonwealth were to be by jury.⁽²³⁾ Trade within the Commonwealth was to be free.⁽²⁴⁾ Section 116 prohibited the Commonwealth from making any law for establishing any religion or for imposing any religious observance, or for prohibiting the free exercise of any religion.⁽²⁵⁾ No religious qualification was to be required as a qualification for any office or public trust under the Commonwealth.⁽²⁶⁾ A subject of the Queen resident in any State was not to be subject in any other State to any disability or discrimination which would not equally be applicable to him if he were a subject of the Queen resident in such other State.⁽²⁷⁾ The prohibition was against discrimination based on residence and this meant that the section would not, for instance, apply where discrimination was based on domicile or birth.⁽²⁸⁾

(22) - S.51 (XXXI).

(23) - S.80. See the case of R.v. Archdall, ex parte Carnigan and Brown (1928) 41 C.L.R. 128

(24) - S.92. See also R. v. Smithers, ex parte Benson (1912) 16 C.L.R. 99.

(25) - This was no doubt taken from the First Amendment of the United States Constitution (or Article I of the Bill of Rights).

(26) - This provision too was no doubt copied from Article VI of the United States Constitution

(27) - S.117.

(28) - See Davies and Jones v. Western Australia (1904) 2 C.L.R. 29; and generally Wynes, Legislative, Executive and Judicial Powers in Australia, 2nd Ed., pp 142 - 149, 176 - 182, 325 - 395 and 581 - 2. See also Ezejiofor, op.cit., p.160. de Smith, "Fundamental Rights in the Commonwealth (I)" p.90.

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Although at the time when the Constitution of the Union of South Africa was being worked out, J.X. Merriman, one of the principal architects of the Constitution, suggested the inclusion of a Bill of Rights, which was not to be entrenched, the suggestion was not accepted.⁽²⁹⁾ The Constitution emerged without a Bill of Rights or clauses similar to those of the Australian Constitution. The only subjects that were entrenched were the two official languages - English and Dutch - and voting rights of certain non-whites. The provisions governing these two subjects could be altered only by a two-thirds majority of both Houses sitting together in a joint session.⁽³⁰⁾

Like the other Constitutions mentioned above, that of New Zealand included no Bill of Rights. The rights of the people depended on the common law and statutory law.⁽³¹⁾

(29) - De Smith, ibid., pp. 90 - 91; Thompson, L.M. The Unification of South Africa 1902 - 1910 (1960). For a plea for an entrenched Bill of Rights, see Cowen, D.V. Constitution Making for a Democracy (1960), pp. 25-32.

(30) - See South Africa Act, 1910, ss. 35, 137 and 152. In regards to bids by the Government to amend or remove the entrenched sections, see Ndlwana v. Hofmeyr (1937) A.D. 229; Harris v. Minister of the Interior (1952) (2) S.A. 428(a); Minister of the Interior v. Harris (1952) (4) S.A. 769 (a); Collins v. Minister of the Interior (1957) (1) S.A. 552(a). See also Marshall, Geoffrey Parliamentary Sovereignty and the Commonwealth Chap. 11; May, South Africa Constitution (3rd. Ed.) Introduction and Chapters 2 and 3.

(31) - See Scott, Constitution of New Zealand (1960); Ezejiofor, op.cit., p.159.

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14.

The first break with British tradition occurred in Ireland. The 1922 Constitution of the Irish Free State contained qualified rights of the liberty of the individual; the inviolability of the dwelling house; freedom of conscience and religion; freedom from religious discrimination; freedom of expression; and freedom of ~~public~~ association.⁽³²⁾ Earlier, in 1920, the Government of Ireland Act had prohibited the Northern Ireland Parliament from, among other things, establishing or endowing any religion or restricting the free exercise thereof or discriminating in favour of or against any person or group on religious grounds.⁽³³⁾ The Act had also forbidden the taking of property without compensation.⁽³⁴⁾ The 1922 Irish Free State

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- (32) - See Donaldson, Some Comparative Aspects of Irish Law (1957) pp. 139 - 141 and 147 - 150; Kohn, Leo. The Constitution of the Irish Free State (1932) Part IV; Keith, The Dominions as Sovereign States, pp. 558 - 9. The rights were subject to legislation enacted by Parliament and the Constitution was alterable by a simple Act of Parliament. The rights were later curtailed by Acts of Parliament, e.g., the Public Safety Act of 1927. See A.G. v. McBride (1928) 2 I.R. 451. For very wide discretion allowed under the Public Safety Act, see R. (O'Connell) v. Hare Park Camp (1924) 2 I.R. 104. The Act ceased to apply in 1928 but in the mean-time other measures had been introduced - see Keith, The Dominions as Sovereign States, pp. 558 - 9.
- (33) - S.5(1). See also Donaldson, op.cit., pp. 62, 64, 69 and 135.
- (34) - See O'Neill v. N.I. Transport Board (1938) N.I. 104; Ulster Transport Authority v. James Brown and Sons Ltd. (1953) N.I. 79; Belfast Corporation v. O.D. Cars Ltd (1960) A.C. 480.

Constitution was replaced by a new Constitution in 1937. The guarantees in the 1922 Constitution had been refashioned and the new constitution also contained a set of non-justiciable Directive Principles of State Policy.⁽³⁵⁾ Commenting on the 1922 and 1937 Constitutions, de Smith writes:

"The Constitutions made on the Liffey were far removed from the mainstream of British thought flowing through Westminster, but they were to influence the minds of Constitution-makers in New Delhi and Rangoon, and the clear cut of fundamental rights from directive principles was to be reproduced in the Constitutions of India, Burma and, later Pakistan."⁽³⁶⁾

The English lawyers and politicians did not, however, think the Irish example was suitable for export and adoption in other parts of the British Empire. Accordingly, when the Indians suggested the inclusion of a Bill of Rights in the Indian Constitution in 1930, the Simon Commission reported:

"Many of those who came before us have urged that the Indian Constitution should contain definite guarantees for the rights of individuals in respect of the exercise of religion and a declaration of the equal rights of all citizens. We are aware that such provisions have been inserted in many Constitutions, notably in those of the European States formed after the War. Experience, however, has not shown them to be of any practical value. Abstract declarations are useless, unless there exists the will and the means to make them effective."⁽³⁷⁾

(35) - The origin of these principles has been attributed to the Spanish Constitution of 1931 - See de Smith, "Fundamental Rights in the Commonwealth (I)", p. 92. For the 1931 Spanish Constitution, see Mirkiné - Gvorcevitch and Reale, L'Espagne (1933).

(36) - De Smith, ibid., pp 91 - 92.

(37) - Cmd. 3569 of 1930, pp. 22 - 23.

As a result of further arguments in favour of a Bill of Rights during three Round Table Conferences and the report⁽³⁸⁾ of the Joint Parliamentary Committee on Indian Constitutional Reform, the Government made a minor concession by including in the 1935 Constitution safeguards on property and against certain forms of discrimination.⁽³⁹⁾

In 1947 India attained independence on the 1935 Constitution as modified. In 1950 the country became a republic under a Constitution drawn up by Indians for Indians. The new Constitution contained a Bill of Rights⁽⁴⁰⁾ and a set of Directive Principles of State Policy.⁽⁴¹⁾

India's adoption of a Bill of Rights marked a turning point in the constitutional law of Commonwealth countries. It was a unique phenomenon in the

(38) - H.L.6 and H.C.5 of 1935, pp. 215 - 18.

(39) - See Bose, The Working Constitution of India (1938), pp. 447 - 480. See also Proposals on Indian Constitutional Reform (Cmd. 4268 (1933)).

(40) - See Articles 12 - 35. For an account of the introduction of the Bill, see Ezejiofor, op.cit., p.160; de Smith, "Fundamental Human Rights in the Commonwealth (I)", op.cit., p.92.

(41) - Articles 36 - 51

Commonwealth.⁽⁴²⁾ The Bill had an impact not only on India's neighbour, Pakistan, but the British Colonial Office. The revision of thinking among the Colonial Office Law officers was helped by the fact that at the time when India adopted the republican Constitution, Britain became a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁽⁴³⁾

(42) - De Smith, "Fundamental Rights in Commonwealth Constitutions" (Journal of the Parliaments of the Commonwealth, Vol. XLIII, 1962) pp. 10 - 19, at P.10. After labelling the Bill a breach with British tradition, Jennings says of it: "This is not so unBritish as it appears to be, for it comes from the United States (which framed its own Bill from) British Constitutional History." He thinks the Bill "is even more British (than that of the United States) in its texture, for it derives mainly from a book which three generations of Indian law students have had to read before they could pass their examinations, *The Law of the Constitution*, by A.V. Dicey What the Indian lawyers tried to do was to formulate that part of English constitutional law which dealt with personal and political liberty." - The Approach to Self-Government, p.20.

(43) - The Convention was signed on November 4, 1950 and came into force on September 3, 1953. The text of the Convention is contained in Cmd. 9221 of 1954. The United Kingdom extended the Convention to forty-two overseas territories - see Cmd. 9045 of 1953, pp. 7-8. India became a republic in January, 1950.

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In 1956 Pakistan followed the example of India and included in her republican Constitution of that year a Bill of Rights.⁽⁴⁴⁾ This Constitution was suspended in 1958 and replaced in 1962 by another Constitution also containing a Bill of Rights⁽⁴⁵⁾ and Directive Principles of State Policy.⁽⁴⁶⁾ In 1957 Malaya became independent and also adopted a Bill of Rights.⁽⁴⁷⁾

The change of attitude at the Colonial Office did not manifest itself until 1959. It was mentioned above that the Indian republican Constitution was the work of the Indians themselves. The Constitution of Pakistan was also home-made. The Malayan Constitution, although drafted at the Colonial Office, was based on recommendations of a Commission comprising members from the United Kingdom, an Australian, an Indian and a Pakistani. It was, therefore, not of United Kingdom making. The independence Constitution of Ghana adopted in the same year as that of Malaya - i.e., in 1957, contained no Bill of Rights.⁽⁴⁸⁾ The Constitution of Ghana was the work of the Colonial Office. Sir Ivor Jennings was still able to write as follows in 1958:

(44) - See Newman, Essays on the Constitution of Pakistan (1956); Gledhill, Pakistan - The Development of Its Laws and Constitution (1957), Chaps. 9 and 10.

(45) - Chap. I.

(46) - Chap. 2.

(47) - See S.L. 1957, No. 1533, Part II, Articles 5 - 13.

(48) - See S.L. 1957, No. 277. Only two rights, one of them on property, were protected on the pattern existing in the Constitutions of the older Commonwealth States. See Ss. 31 and 34.

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19.

"The conclusion to be drawn from the experience of India, Pakistan and Ceylon is . . . that one should not attempt to deal with the problem of minorities by Constitutional guarantees in Bills of Rights. One should try to find out where the shoe is likely to pinch and to provide the necessary flexibility at that point."⁽⁴⁹⁾

The first departure by the Colonial office from tradition as indicated above, occurred in 1959 when a Bill of Rights was incorporated in the Nigerian Constitution of that year.⁽⁵⁰⁾ In 1960 a Bill of Rights was also included in the country's independence Constitution.⁽⁵¹⁾ The 1959 Bill of Rights, which was incorporated in the 1960 Constitution with minor modifications, was based on the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁽⁵²⁾ with some additions from the Pakistani and Malaya Constitutions. The inclusion of the Bill in the Constitution was due to tribal fears by certain minority tribes and was accepted as a compromise over a demand by a number of minority tribes for the division of the country into more states linked in a Federation.⁽⁵³⁾ The matter had been investigated by a Minorities Commission which rejected the creation of new States in favour of a Bill of Rights.⁽⁵⁴⁾

(49) - Approach to Self-Government, p.110

(50) - See Nigerian (Constitution) (Amendment No. 3) Order in Council, 1959 (S.L. 1959, No. 1772).

(51) - See the Nigerian (Constitution) Order in Council (S.L. 1960, No. 1652, Second Schedule Chapter 111)

(52) - De Smith, "Fundamental Rights in the New Commonwealth (II)" (I.C.L.Q., Vol. 10, April, 1961) p. 216. For an analysis of the 1960 Bill, see Ezejiofor, op.cit., pp. 183 - 215; Grove, David Lovan "The "Sentinels" of Liberty? The Nigerian Judiciary and Fundamental Rights" (Journal of African Law, Vol. 7, No. 3) pp. 152-171; de Smith, "Fundamental Rights in the New Commonwealth (II)", pp. 215 - 237. Holland Denys C. "Human Rights in Nigeria" (Current Legal Problems, 1962) pp. 145 - 148.

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19. (53) - At the time the Federation was made up of three regions - Eastern, Western and Northern. For reasons that led to the inclusion of the Bill, see Report of the Commission Appointed to Enquire Into Fears of Minorities and the Means of Allaying Them (Cmd. 505 of 1958). See also de Smith, Fundamental Rights in Commonwealth Constitutions, p. 13; de Smith, "Fundamental Rights in the New Commonwealth (II)", pp. 215 - 216; Odomosu, op.cit., pp. 240-244; Ezejiofor, op.cit., pp. 178 et.seq; Ezeru, Kolu Constitutional Development in Nigeria (1960).
- (54) - See Report of the Commission Appointed to Enquire Into ~~Fears of~~ Allaying Them Minorities and the Means of Allaying Them (Cmd. 505 of 1958).

The Colonial Office was not only actively involved in drafting of the Bill but also in its initiation. Once granted to Nigeria, the arrangement could not be withheld from other territories. With regard to territories in Africa there was another reason that made the Colonial Office accept or even initiate the inclusion of Bills of Rights in the Constitutions of those attaining or about to attain independence. The Europeans, after years of being rulers and dominating the economy, were about to be subjected to African rule. There was a need to protect their rights as individuals, particularly their property rights, and there was no better way of doing so than through a Bill of Rights with detailed guarantees for property owners. That the provisions of most of the Bills of Rights regarding property were framed with expatriates in mind is shown by the following provision in the Zambian Bill of Rights: "No person who is entitled to compensation shall be prevented from remitting, within a reasonable time after he has received any amount of that compensation, the whole of that amount (free from any deduction, charge or tax made or levied in respect of its remission) to any country of his choice outside Zambia."⁽⁵⁵⁾ Similar clauses are found in other Constitutions.⁽⁵⁶⁾

The Nigerian pattern was followed in Cyprus in 1960.⁽⁵⁷⁾ In the same year Her Majesty's Government expressed its "firm view" that legal provisions were needed in the proposed new Constitution of Kenya for "the judicial protection of human rights."⁽⁵⁸⁾ The intended provisions were included in a new Constitution for Kenya of that year.⁽⁵⁹⁾ The independence Constitution of Sierra Leone, which was enacted in 1960 but came into force in April, 1961, also

(55) - S.18(2) Constitution of Zambia.

(56) - See, e.g., S.8(2) Constitution of Botswana; S.19(4) Constitution of Kenya.

(57) - See Constitution of Cyprus as contained in Cmnd. 1093 of 1960.

(58) - See Cmnd. 960 of 1960, p.9.

(59) - See S.1. 1960, No. 2201, Ss. 15 and 17 and Schedule.

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contained a Bill of Rights.⁽⁶⁰⁾ The year 1960 also saw a departure from tradition by an older member of the Commonwealth. Canada adopted a Bill of Rights. The Bill was not incorporated in the Constitution. It was enacted as an Act of Parliament.⁽⁶¹⁾ In 1961 Southern Rhodesia got a new Constitution with a Bill of Rights.⁽⁶²⁾ It will be recollected that the Monckton Commission had recommended that Bills of Rights be included in the Federal and Territorial Constitutions.⁽⁶³⁾

The same pattern was followed in the drawing up of later Constitutions.⁽⁶⁴⁾ The British Ministers and their advisers had accepted the fact that although it was essential to maintain the spirit of the British

(60) - Cmnd. 1029 of 1960, pp. 4, 7, 8, 16 - 21 and S.l. 1961, No. 741 (The Sierra Leone (Constitution) Order in Council, 1961).

(61) - The history of the Bill of Rights for Canada goes back to 1945 when a number of Members of Parliament called for the inclusion of a Bill of Rights in the Constitution - see House of Commons Debates (Canada) 1958, Vol. IV, p. 4639; (1949) 27 Canadian Bar Review, p.498, n.5; Report of the Proceedings of A Special Committee (King's Printer (Ottawa), 1950); Ezejiofor, op.cit., pp. 161 - 171; de Smith, "Fundamental Rights in the Commonwealth (I)", p.90.

(62) - See S.l. 1961, No. 2314 (Southern Rhodesia (Constitution) Order in Council).

(63) - See Chapter 7.

(64) - The only States in the Commonwealth whose Constitutions have no Bill of Rights are Malawi, Tanzania, the United Kingdom, Australia, New Zealand, Ceylon (although the Constitution contains several rights.

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Constitution overseas, the "object was unlikely to be realized by devotion to carbon copies of the British institutional forms or the very letter of English law. Empiricism, pragmatism, and flexibility were needed."⁽⁶⁵⁾ Malawi and Zambia also adopted Bills of Rights although Malawi dropped it later.⁽⁶⁶⁾ Malawi's action was the result of the still strongly held view among some of the Commonwealth lawyers and politicians that the common law is a better guarantee for the individual's rights than a Bill of Rights.

While states under British influence generally emerged with formal and enforceable Bills of Rights based upon the European Convention for the Protection of Human Rights and Fundamental Freedoms (to which the United Kingdom was a party), states under French influence emerged, generally, with mere references in the Preamble to the Declaration of the Rights of man and the Citizen and the United Nations Universal Declaration of Human Rights.^(66a) This is the case with, e.g., the Ivory Coast, Dahomey, Gabon, Mali, Niger, Senegal, and Togo.^(66b) The Constitution of the Ivory Coast (translation by Amos J. Peaslee)^(66c) states, for example, in its Preamble:

(65) - De Smith, "Fundamental Rights in Commonwealth Constitutions", p.12.

(66) - See below.

(66a)- Note that France is not a party to the European Convention.

(66b)- Cf. Salvatore Fodoraro, Le Costituzioni Africane (Magrelli Editore Roma, 1969).

(66c)- Constitutions of Nations (3rd Ed., Martinus Nijhoff, 1965) Vol I.

"The people of the Ivory Coast proclaims its attachment to the principles of democracy and the rights of man as defined by the Declaration of the Rights of Man and the Citizen of 1789, by the Universal Declaration of 1948, and as they are guaranteed by this Constitution."

MALAWI AND ZAMBIA

In 1960 it had been suggested at the Nyasaland Constitutional Conference that a Bill of Rights on the Nigerian model should be written into the revised Constitution.⁽⁶⁷⁾ The Conference had agreed that "while such a provision would not be appropriate to the next stage of constitutional advance a study of the matter might usefully be started so that when the time came suitable provisions could be included to this end!"⁽⁶⁸⁾ When in 1963 the Constitution was revised for the purposes of granting self-government, a Bill of Rights was included.⁽⁶⁹⁾ Dr. Banda and the Malawi Congress Party were, however, not keen on the inclusion of the Bill.⁽⁷⁰⁾ The Bill was included on the insistence of the United Federal Party which was apprehensive about the position of Europeans under an African Government.⁽⁷¹⁾ The Bill of Rights was carried over to the independence Constitution of 1964.⁽⁷²⁾

Dr. Banda's and the Malawi Congress Party's view that a Bill of Rights is unnecessary was adopted in 1965 when the republican Constitution was drawn up. It was decided not to include a Bill of Rights in the new Constitution. The

(67) - See Report of the Nyasaland Constitutional Conference - Held in London in July and August, 1960 (Cmd. 1132 of 1960) para. 11.

(68) - Ibid., para. 12.

(69) - S.L. 1963, No. 883, Schedule Ss. 1-16.

(70) - See Report of the Nyasaland Constitutional Conference, 1962. (Cmd. 1887 of 1962).

(71) - Ibid.

(72) - See Ss. 11 - 27 of the 1964 Constitution.

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arguments put forward by the Government against the inclusion of such a Bill were that such a safeguard was ineffective to protect the interests of a minority which had ceased to enjoy the goodwill of the people as a whole⁽⁷³⁾ and that formal guarantees were likely to result in harmful conflicts between the Executive and the Judiciary.⁽⁷⁴⁾ The latter argument was also advanced in excluding a Bill of Rights from the republican Constitution of Tanganyika.⁽⁷⁵⁾

Commenting on the arguments as advanced in Malawi, Roberts writes:

"There is some force in both these arguments; but it can be too easily forgotten that Bills of Rights are not only provided to shelter persecuted minorities, but also to ensure the rights and liberties of the people as a whole."⁽⁷⁶⁾

There is no doubt, however, that in young states which have just emerged from decades of colonialism and whose Governments may still be sensitive to adverse judgments, particularly from expatriate white judges, rows could more easily erupt between the Executive and the Judiciary where a Bill of Rights exists than where it does not.

Although the Government of Malawi and the Malawi Congress Party (the ruling Party) decided against a Bill of Rights in the republican Constitution, a set of Fundamental Principles of Government was included. Before discussing the content of these principles and their constitutional significance, the historical background of the Zambian Bill of Rights must be traced.

(73) - The best safeguard, it was argued was for the minority to align themselves with the majority.

(74) - See M.G. White Paper, No. 002 of 1965, para. 24. See also Roberts, op.cit., p. 321.

(75) - See Proposals for a Republic, Govt. Paper No. 1 of 1962, p. 6.

(76) - Roberts, op.cit., p. 321.

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The Northern Rhodesia Constitutional Conference of 1960 - 1961⁽⁷⁷⁾ agreed to the inclusion of a Bill of Rights in the new Constitution.⁽⁷⁸⁾ Unlike the Nyasaland Constitutional Conference of 1962, the Northern Rhodesia Conference did not disagree on the necessity of including a Bill of Rights in the Constitution. Consequently, such a Bill was written into the new Constitution. In 1964 the Independence Constitutional Conference^(78a) agreed that "the provisions of the independence constitution relating to human rights should be in the same form as those in Chapter I of the present Constitution...."⁽⁷⁹⁾ Accordingly such a Bill was written into the present Constitution.⁽⁸⁰⁾

PRINCIPLES OF GOVERNMENT AND
PROTECTION OF RIGHTS IN MALAWI

As mentioned above, the Constitution of Malawi has no Bill of Rights but a set of fundamental principles of government. Section 2(1) of the Constitution provides that "subject to the provisions of this Constitution, the Government of the Republic shall be founded upon the following principles" and then goes on to enumerate them. The first of these principles states that "the four corner-stones of the Government and the nation shall be Unity, Loyalty, Obedience and Discipline."⁽⁸¹⁾ The other principles are as following:

"(ii) The paramount duty of the Government shall be to promote, safeguard and advance the welfare of the people of Malawi;

(iii) The Government and the people of Malawi shall continue to recognize the sanctity of the personal liberties enshrined in the

(77) - See Chapter 8.

(78) - See Northern Rhodesia Proposals for Constitutional Change, 1960 (Cmd. 1295 of 1960).

(78a)- See Chapter 8.

(79) - Report of the Northern Rhodesia Independence Conference (Cmd. 2365 of 1964) p.2.

(80) - See below.

(81) - S.2(1)(i) of the Constitution.

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United Nations Universal Declaration of Human Rights, and of adherence to the Law of Nations:

- (iv) No person should be deprived of his property without payment of fair compensation, and only where the public interest so requires;
- (v) All persons regardless of colour, race or creed should enjoy equal rights and freedoms;
- (vi) Recognition of the need for the ultimate unification of the peoples of Africa, for their common welfare and advancement."⁽⁸²⁾

The first principle requires observance by both the Government and the people. It is an ideal and does not, therefore, create any rights for the individual which he can enforce against the Government. The only sanction the people can apply against the Government for violating this principle is political.⁽⁸³⁾ The second principle, although placing a duty on the Government to promote, safeguard and advance the welfare of the people of Malawi, is of an indefinite character. It also creates no tangible rights for the individual which he can enforce in the courts. The third principle places an obligation on both the Government and the people of Malawi to recognize the sanctity of the Universal Declaration of Human Rights and of the Law of Nations. It seems to be more of an assurance to other nations and their people of the good intentions of the Government and people of Malawi than anything else. The principle does not make the Universal Declaration of Human Rights part of the law of Malawi. Accordingly, a foreign national or Malawian meted treatment not in accordance with the Declaration has no remedy in the Courts.

(82) - S.2(1)(ii)-(vi).

(83) - Such sanction can operate only against the President and individual Ministers or Members of Parliament and not against the Party since it is the only party in the country.

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The sixth principle should perhaps be dealt with before the fourth and fifth principles. This principle must have been derived from the 1960 Constitution of Ghana. In terms of Article 2 of the Ghana Constitution, the people of Ghana, in expectation of an early surrender of sovereignty to a union of African States, conferred on Parliament the power to provide for the surrender of the whole or any part of the sovereignty of Ghana.⁽⁸⁴⁾ The Malawian principle, as can be seen does not specifically provide for the surrender of sovereignty. The wording of the provision is, however, wide enough to cover such an arrangement.

The fourth and fifth principles differ from the other four in that they refer to definite rights of the individual and not just mere policy guides. Taking the fourth principle first, the Government is prohibited (at least in principle) from depriving a person of his property without the payment of fair compensation. Even where it is intended to pay fair compensation, it is a prerequisite to deprivation that it should be for the purposes of public interest. Two questions arise. Can the Government be taken to Court on the ground that it has deprived the complainant of his property without compensation or for a purpose other than one of public interest in violation of this principle? Secondly, can a law enacted in violation of this principle be declared unconstitutional by the Courts? If an affirmative answer is given to each question, it would mean that the principle is legally enforceable and has, therefore, the effect of a provision in an enforceable Bill of Rights. First, two factors must be considered. The first factor is that in the absence of a statute granting compensation to a subject for deprivation of his property, such property can under English common law be taken without compensation only during an emergency. This is done under the

(84) - The power to alter Article 2 was reserved to the people. For a discussion of this provision, see Bennion, *op.cit.*, pp. 120-125.

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sovereign's prerogative powers.⁽⁸⁵⁾ Since English common law is still operative in Malawi, similar powers can be exercised by the President in the absence of a Statute granting compensation. Section 10 of the Republic of Malawi (Constitution) Act preserves for exercise by the President all the prerogative powers formerly exercised by Her Majesty or the Governor-General on behalf of Her Majesty which have not been affected by the Constitution or other statutory law. The second factor is that there is in Malawi the Lands Acquisition Act⁽⁸⁶⁾ which entitles the Minister concerned, whenever he is of the opinion that it is desirable or expedient in the interests of Malawi so to do, to acquire any land, either compulsorily or by agreement, paying compensation therefor as may be agreed or determined in terms of the Act. Consequently, even without the constitutional principle under consideration, the Government would still be required to pay compensation on taking a person's property. The question, however, is what the position would be if the Act just referred to were to be repealed and replaced by an Act authorizing the Government to take property without compensation. Would the constitutional principle under consideration entitle the owner of appropriated property to sue for compensation? It is submitted that the principle appears enforceable and could, therefore, be the basis of action for compensation. If the submission that the principle is enforceable is correct, then it follows that a law enacted by Parliament in contravention of this principle could be declared unconstitutional unless it were an amendment of the Constitution.

(85) - Att.-Gen. v. De Keyser's Royal Hotel Ltd., (1920) A.C. 508. See also the Case of Ship-money (The King v. Hampden) (1637) 3 St. Tr. 825.

(86) - Cap. 58:04.

(86a)- It should be noted that if there were to be no supplementing statute, the Common law would apply and compensation would have to be paid except during an emergency.

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The argument that the principle under consideration is enforceable is supported by the wording of subsection (2)⁽⁸⁷⁾ of Section 2 which states: "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) (listing the six principles) to the extent that the law in question is reasonably required in the interests of defence, public safety, public order or the national economy." This means that unless the inconsistency of a law with a principle can be justified in the interests of defence, public safety, public order or national economy, the courts are competent to declare it invalid for inconsistency with or contravention of the principle concerned. Although subsection (2) applies to all the six principles, it is difficult to see how a law could be challenged for being in contravention of the first, second, third and sixth principles.

With regard to the fifth principle, it is submitted that a law inconsistent with or in contravention of this principle can also be declared unconstitutional unless it be proved that the law is required in the interest of defence, public safety, public order or national economy.

Two laws which may appear to be inconsistent with the fourth and fifth principles respectively, should be briefly discussed here. Before the adoption of the republican Constitution on July 6, 1966, Parliament had in January enacted the Forfeiture Act.⁽⁸⁸⁾ The Act enables the Minister responsible for the administration of the Act to declare subject to forfeiture the property of any person he is satisfied "is, or has been, acting in a manner prejudicial to the safety or the economy of the State or subversive to the authority of the lawfully established Government irrespective of

(87) - As amended by S.2 of the Constitution (Amendment) Act, 1968 (Act No.6 of 1968).

(88) - Cap. 14:06.

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whether that person be within or without Malawi."⁽⁸⁹⁾
 Since the property is taken without any form of compensation being given the Act appears on the surface to be in direct conflict with the fourth principle. However, it cannot be assailed in the courts on the grounds of inconsistency with or violation of the principle in view of the fact that it is to be applied only in cases where the person concerned is acting or has acted in a manner prejudicial to the safety or the economy of the State or subversive to the authority of the lawfully established Government. It comes under the permitted exceptions.

The second law is the Citizenship Act discussed in the previous Chapter. It will be recalled that that Act restricts citizenship by birth or descent to persons one of whose parents is a citizen of African race. It, therefore, discriminates against citizens of non-African race and their children. This is in conflict with the provisions of the fifth principle which declares that "all persons regardless of colour, race or creed should enjoy equal rights and freedoms." Unlike the Forfeiture Act, the Malawi Citizenship Act cannot be justified, in so far as it discriminates, on grounds that it is in the interest of defence, public safety, public order or the national economy.

If the interpretation that in Malawi laws or actions which are inconsistent with the fundamental principles of government can be declared unconstitutional by the courts is correct, then the position differs from that in India and Malta. The Constitution of India has, in addition to a Bill

(39)- S.2 of the Act. The person concerned is barred from taking the matter to Court - S.3. For a detailed examination of this Act, see Roberts, Simon in the Journal of African Law, Vol. 10, No. 2, at p. 131. The original S.2 was repealed in 1968 by Act, No. 29 of that year. The new provisions included among persons whose property may be taken public servants who misappropriate or lose negligently or recklessly State money or property.

of Rights, a set of Directive Principles of State Policy.⁽⁹⁰⁾ The principles are numerous and cannot be reproduced here in full. The Government undertakes to direct its policy towards securing, for instance, adequate means of livelihood for all citizens; distribution of material resources and wealth in such a manner as best subserve the common good; equal pay for equal work for both men and women; protection of children against economic exploitation and moral and material abandonment; the right to work, education and public assistance in cases of unemployment, old age, sickness and disablement and in other cases of undeserved want; just and humane conditions of work; and maternity relief.^(90a)

The principles are couched in a language that would have given the courts a difficult task in interpretation had they been made enforceable. Article 37 of the Constitution, however, spared the courts the task by declaring that "the provisions contained in this Part shall not be enforceable by any court" ^(90b) This makes the principles of little value to the individual and prompted Jennings to write of them: "To the sceptical English lawyer

(90) - See Articles 36-51. See also Article 45 of the present Constitution of Eire, Articles 11-16 of the 1962 Constitution of Pakistan (now no longer in operation) and sections 7-22 of the Constitution of Malta which have similar principles. India copied the Directive Principles from the Constitution of Eire - Dash, p.449; Jennings, The Approach to Self-Government, op.cit., p.19. Eire had copied them from the Spanish Constitution of 1931 - ibid.

(90a)- See Articles 39, 41 and 42.

(90b) - See also Article 8(2) of the 1962 Constitution of Pakistan which stated, with regard to the Directive Principles in the Constitution, that "the validity of an action or of a law shall not be called in question on the ground that it is not in accordance with the Principles of Policy, and no action shall lie against the State, any organ or authority of the State or any person on such a ground".

which also means the sceptical Indian lawyer,
the Directive Principles are pieces of political
propaganda which may safely be ignored."⁽⁹¹⁾

Professor Wheare described them as "a manifesto of
aims and aspirations."⁽⁹²⁾

The principles in the Maltese Constitution ^(92a)
are less vague and some of them could have been
enforced easily had a provision not been included
stating that "the provisions of this Chapter shall
not be enforceable in any court...."^(92b)

Although not enforceable, the principles, in
both India and Malta, are not mere "pieces of political
propaganda" as Jennings suggests. Article 37 of the
Constitution of India and Section 22 of the Constitution
of Malta, after stating that the principles are not
enforceable, add that "they are nevertheless
fundamental in ^(92c) the governance of the country"
and that "it shall be the duty ^(92d) of the State to
apply these principles in making laws."⁽⁹³⁾ Writing
on the Indian principles, Gledhill, after expressing
the view that "even though these principles are not
enforceable in a court of law they are bound to affect
the decisions of the courts on constitutional
questions" adds:

(91) - The Approach to Self-Government, p.20.

(92) - Calcutta Weekly Notes (1950), No. 54, as
cited by Dash, op.cit., p.450.

(92a)- See Chapter II of the Constitution.

(92b)- Some of the principles are: compulsory
primary education; right to teach the Roman
Catholic Apostolic faith in all State schools;
an irrenounceable right of every worker to a
weekly day of rest and to annual holidays
with pay; social assistance for every citizen
incapable of work and unprovided with the
resources necessary for subsistence.

(92c)- The Constitution of Malta uses the preposition "to".

(92d)- The Constitution of Malta uses "aim".

(93) - See also Article 7(1) of the 1962 Constitution of
Pakistan which made it "the responsibility of each
organ and authority of the State, to act in accor-
dance with those Principles in so far as they
relate to the functions of the organ or authority"

"Many of the Fundamental Rights are subject to reasonable restrictions in the interest of the general public. In interpreting those rights the courts will be obliged to lay down canons for determining what is reasonable and it is improbable that a restriction should be deemed reasonable if it offends against these Directive Principles."⁽⁹⁴⁾

If it is necessary for the courts in India, where there is a Bill of Rights, to take note of the Directive Principles of State Policy when deciding cases, it should a fortiori be necessary to do so in Malawi, where there is no Bill of Rights. Accordingly, even if the fourth and fifth principles in the Constitution of Malawi do not have the binding effect of provisions of a Bill of Rights, the courts would still have to take them into account where the action of the Government is inconsistent with one or both of them.

Since the Malawian principles differ from those of India because the latter are specifically made unenforceable in the courts, the former should rather be compared with the Fundamental Principles contained in the 1960 Constitution of Ghana. The Malawian principles, in fact, appear to have been copied from the Ghanaian rather than from the Indian principles. The 1960 Constitution of Ghana had no Declaration of Rights. Section 13 of that Constitution, however, contained a Declaration of Fundamental Principles which the President had to make before the people on assumption of office. The Declaration contained, among other provisions, the following:

"On accepting the call of the people to the high office of President of Ghana, I solemnly declare my adherence to the following principles-

.....

That no person should suffer discrimination on grounds of sex, race, tribe, religion or political belief.

.....

(94) - The Republic of India, p.162.

That subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of freedom of religion or speech, of the right to move and assemble without hindrance or of the right of access to courts of law.

.....

That no person should be deprived of his property save where the public interest so requires and the law so provides."

Like that of Malawi, the Ghanaian Constitution did not state whether the principles were enforceable in the courts or not. They were, however, considered not directly enforceable⁽⁹⁵⁾ but the courts were expected to take note of them in interpreting laws and actions of the Government.

The absence of a Bill of Rights in Malawi does not, in practice, make the position of the individual there very different from that of his counterpart in Zambia. Most of the major rights protected by the Bill of Rights in Zambia are protected by the common law or statute law in Malawi. The individual in Malawi enjoys personal liberty and the freedoms of conscience, expression, assembly, association and movement. The English great writ, habeas corpus, is part of the law of Malawi.^(95a) The Criminal Procedure and Evidence Code⁽⁹⁶⁾ guarantees the accused a fair and speedy trial. The Code also regulates searches by police officers.⁽⁹⁷⁾ Personal liberty and the other freedoms mentioned above can, however, be curtailed by regulations made in terms of the Preservation of Public Security Act.⁽⁹⁸⁾ The Act authorizes the Minister concerned to make, inter alia, regulations for the detention

(95) - See Bennion, op.cit., pp. 213-256 for discussion of the Declaration.

(95a)- See Regina v. Damaseki, 1961,- 1963 A.L.R. Mal. 69, at 75-76.

(96) - Cap. 8:01.

(97) - There are also other Acts which authorize the police and other state officers to conduct searches.

(98) - Cap.14:02. There are also other Acts which place limitations on these freedoms.

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and restriction of persons without trial.⁽⁹⁹⁾

The right of association is severely limited by the fact that only one political party is permitted in the country.⁽¹⁰⁰⁾

Because the rights of the individual in Malawi are not protected by a Declaration of Rights they can easily be curtailed by an enactment of Parliament. In Zambia a right can only be curtailed by an amendment to the Constitution or by a statute that comes within the exceptions permitted by the Declaration.

THE ZAMBIAN DECLARATION OF RIGHTS

A. General

The Zambian Declaration of Rights, unlike that of the United States of America, is detailed and heavily qualified. The United States Declaration briefly narrates the protected rights and freedoms. It contains very few qualifications. The task of applying what they consider to be reasonable qualifications to the broad and vague principles is left to the courts. The courts in Zambia do not have such wide power. Each right or freedom in the Zambian Declaration has specific qualifications. This is the pattern in all the Constitutions of the Commonwealth countries with a Declaration of Rights except that of Canada.⁽¹⁰¹⁾ De Smith thinks "there is a great deal to be said for the view that in new States the scope of judicial discretion ought to be narrowed by giving the judges more clearly defined criteria for assessing the constitutionality of legislation."⁽¹⁰²⁾ Wheare, on the other hand, maintains that the qualifications produce a situation whereby the rights given by one hand are taken away by the other.⁽¹⁰³⁾ Little of substance remains after giving full effect to the qualifications.

(99) - S.3(2) Preservation of Public Security Act.

(100)- See Chapter 23.

(101)- The Canadian Declaration is modelled on that of the United States - de Smith, "Fundamental Rights in Commonwealth Constitutions", p.15.

(102)- Ibid.

(103)- Modern Constitutions (1966) p. 40.

The Declaration is enforceable by the High Court which has original jurisdiction to hear and determine any application made by any person and to determine any case referred to it by any subordinate court.^(103a) A person presiding in any proceedings in any subordinate court may, and must if any party to the proceedings so requests, refer to the High Court any question regarding the contravention^(103b) of any part of the Declaration, unless, in his opinion, the raising of the question is merely frivolous or vexatious.^(103c) The High Court may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any provision of the Declaration.^(103d) A person aggrieved by a determination of the High Court may appeal to the Court of Appeal but there is no appeal against the dismissal of an application (by the High Court) on the ground that it is frivolous or vexatious.^(103e)

The Declaration is not suspended by a declaration of a state of public emergency or of a situation threatening a state of public emergency. It continues to operate but the rights and freedoms can be derogated from in the interests of defence, public safety or public order.^(103f) It does not, however, require a declaration of a state of public emergency or of a situation threatening a state of public emergency to enact legislation affecting rights and freedoms. No law which is in the interests of defence, public safety, public order, etc. is affected by the provisions of the Declaration, unless it fails to meet certain standards.^(103g)

(103a) - S.28(2) Constitution of Zambia.

(103b) - "Contravention" includes a failure to comply with a requirement under the Declaration - S.30(1) *ibid.*

(103c) - S.28(3)

(103d) - S.28(2)

(103e) - S.28(4)

(103f) - There are other qualifications - see below.

(103g) - See below.

Locus Standi in matters arising from the Declaration is restricted. Only a person who alleges that any of the provisions has been, is being or is likely to be contravened in relation to him has a right to apply to the High Court for redress.⁽¹⁰⁴⁾ Such an application does not prejudice any other action which is lawfully available to the applicant with respect to the same matter.⁽¹⁰⁵⁾ A person cannot, however, make an application to the High Court regarding the provisions of a Bill that has not yet become law.⁽¹⁰⁶⁾ A member^(106a) of a disciplined force^(106b) raised under the law of Zambia has no remedy under the Declaration with respect to anything contained in or done to him under the authority of a disciplinary law of that force except in matters falling under Section 14 (right to life), Section 16 (protection from slavery and forced labour) and Section 17 (protection from inhuman treatment).^(106c) In the case of a foreign disciplined force lawfully present in Zambia, the denial of redress under the Declaration in matters coming under the disciplinary law of that force is total.^(106d)

The wording of the Zambian general provision on locus standi is wider than that found in some comparable Constitutions - e.g. the 1960 and 1963 Nigerian Constitutions and the 1961 Southern Rhodesian Constitution. Section 31(1) and Section 32(1) of the 1960 and 1963 Nigerian Constitutions respectively provided that "any person who alleges that any of the provisions of this Chapter has been contravened in any territory in relation to him may apply to

(104) - S.28(1) Constitution of Zambia.

(105) - Ibid.

(106) - S.28(5).

(106a)- A "member" of a disciplined force includes any person subject to the law regulating the discipline of that force - S.30(1).

(106b)- A "disciplined force" means a naval, military or air force, the Zambia Police Force or any other police force established by or under an Act of Parliament - ibid.

(106c)- S.30(2).

(106d)- S.30(3).

the High Court". The Rhodesian provision provided that any person who alleged that any of the provisions of the Declaration "has been or is being contravened in relation to him may apply to the High Court for redress."⁽¹⁰⁷⁾ Unless given an extended meaning, the Nigerian provision required the contravention to take place first before an application could be made to the High Court.⁽¹⁰⁸⁾ The Rhodesian provision, on the other hand, did not provide for an action on an anticipated violation of a person's rights. This made its scope narrower than that of the Zambian provision. Under both the Nigerian and Rhodesian provisions there was, however, no doubt that the court would entertain an application based on an anticipated violation of a person's right if the violation was to involve inhuman punishment or degrading treatment. The court could not

(107) - See Maluleke v. Minister of Law and Order & Another, 1963 (4) S.A. 206 (S.R.) at 214, where Beattie C.J. stated that the provision did not confer a general right of action to "any member of the Public: the Declaration envisages relief for particular grievances."

(108) - See Ezejiofor, op.cit., where the author expresses the opinion that an applicant had "sufficient interest if he was in imminent danger of coming into conflict with the law or if there was real or indirect interference with his normal business." See also Naish, in The Lawyer (April, 1963) pp. 31-34, at p. 34, where he expressed the opinion that an individual should have locus standi if in the Court's view he reasonably apprehended the likelihood of his coming into conflict with the law at some future date. Given the interpretation by Ezejiofor and Naish, the Nigerian provision would have the same effect as that of Zambia.

wait until the punishment or the degrading treatment had been inflicted.⁽¹⁰⁹⁾

Only a few cases have been decided on the Zambian Declaration. In these cases, particularly in Feliya Kachasu v. Attorney-General⁽¹¹⁰⁾ (the most controversial case so far decided under the Declaration) the judges have shown a willingness to take into account, if relevant, the decisions of foreign courts. In Kachasu's Case, the Court considered American, Indian and Nigerian cases. In doing so, Blagden C.J. did not, however, forget the words of Lord Radcliffe in the Privy Council that "it is in the end the wording of the Constitution itself that is to be interpreted and applied, and

(109) - In Gundu and Sambo v. Hayward and Bosman NN.0 A.D. 97/65, a Rhodesian Case, applicants who had been sentenced to death under S.37(1) of the Law and Order Maintenance Act, instituted action to prevent their execution on the grounds that it would be in contravention of S.60(1) of the Constitution, (prohibiting the subjection of a person to torture or to inhuman or degrading punishment or other treatment). The Court rejected the application on the grounds of lack of jurisdiction (having previously heard an appeal by the applicants and thereby exhausting the jurisdiction conferred upon it by Section 71 of the Constitution) but did not question whether a person sentenced to death could apply to the Court to test the law before he had actually been executed. Palley thinks it could be argued that a person's rights in a case of this nature are already infringed by the passing of such a sentence - op.cit., p. 586.

(110) - 1967/HP/273.

this wording can never be overridden by the extraneous principles of other Constitutions which are not explicitly incorporated in the formulas that have been chosen as the frame of this Constitution.⁽¹¹¹⁾

B. Contents of the Declaration

The Zambian Declaration of Rights is contained in Chapter III of the Constitution headed "PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL". It opens with a preamble which reads:

"Whereas every person in Zambia is entitled to the fundamental rights and freedoms of the individual, that is to say the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect the rights and freedoms of others and for the public interest to each and all of the following, namely -

- (a) life, liberty, security of the person and the protection of the law;
- (b) freedom of conscience, of expression, and of assembly and association; and
- (c) protection of the privacy of his home and property and from deprivation of property without compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, and being limitations designed to ensure that the enjoyment of the said rights and freedoms of others or the public interest!"⁽¹¹²⁾

This preamble is part of the Declaration and, is therefore, enforceable.⁽¹¹³⁾ It summarises the rights that are defined in detail later in the Chapter. It can be seen that the preamble makes the rights

(111) - Adegbenro v. Akintola (1963) A.C. 614, at 632. The case was an appeal from Nigeria. Blagden C.J. used these words after considering a long list of foreign cases - see p.11 of the Kachasu Case's judgment.

(112) - S.13 Constitution of Zambia.

(113) - S.28(1).

as contained in the Declaration open to all persons and not just to citizens only. The words "every person in Zambia" should, however, be restricted to those persons who are in the country legally. Certain rights, as will be seen below, are not extended fully to non-citizens.

(1) Right to Life

A person cannot be deprived of his life intentionally except where such deprivation is in execution of a sentence of a court passed against him in respect of a criminal offence under a law in force in Zambia.⁽¹¹⁴⁾ However, subject to any liability for contravention of any other law respecting the use of force, a person is not regarded as having been deprived of his life in violation of this right if he dies as the result of the use of force in such a manner as is reasonably justifiable in the circumstances (a) for the defence of any person from violence or for the defence of property; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) for the purpose of suppressing a riot, insurrection or mutiny; (d) in order to prevent the commission by that person of a criminal offence; or if he dies as the result of a lawful act of war.⁽¹¹⁵⁾

The content of this right is similar to that of similar rights in Constitutions of other Commonwealth countries.⁽¹¹⁶⁾ Its weakness is that while a person may not be deprived of his life save in accordance with the law, there is no restriction as to the laws which may carry a death penalty. The right can, therefore, seriously be impaired by the Legislature enacting

(114) - S.14(1).

(115) - S.14(2).

(116) - See, e.g., the Constitutions of Uganda (Art.9) Malta (S.34), Mauritius (s.4).

laws imposing the death penalty for offences that should appropriately be punished by imprisonment.⁽¹¹⁷⁾

(117) - S.37 of the Rhodesian Law and Order Maintenance Act is good example of such legislation.

The section imposes a mandatory death penalty on a y person who is found guilty of using or attempting to use, without lawful excuse (the proof of which lies on him), any inflammable liquid (e.g. petrol, benzine, paraffin, methylated spirits) or explosive for the purposes of setting on fire or causing damage or injury to any person, building, structure, vehicle, vessel, aircraft or railway engine, carriage, van or truck if (a) the offence was committed against a person; (b) in respect of a residential building or structure not owned, occupied or leased by the offender, whether there was a person or not in the building or structure at the time of the commission of the offence; or (c) in respect of any residential building or structure owned, occupied or leased by the person convicted of the offence, or any building or structure not used for residential purposes, or any vehicle, vessel, air-craft or railway engine, tender, carriage, van or truck, in which a person was present at the time of the commission of the offence whether the offender knew of such presence or not. The Court may impose a sentence of imprisonment where a person is under the age of 16 or is a woman with child of a quick child or where the person although over 16 has not attained the age of 19 in which case it may impose the death sentence or imprisonment of up to twenty years. In R.V. Mapolisa, (1963) R. and N 808 the first case decided under the section (it was then Section 33A) the accused had attempted to set on fire a dwelling house by using petrol. The act resulted in only slight damage to the carpet. Had ha been tried for the common law offence of arson, he would have probably got away with a moderate sentence of

(117) - Continued:

imprisonment. The accused was, in accordance with the law sentenced to death. An appeal was made to the Privy Council (P.C. Appeal No. 19 of 1964) but the applicant lost it. Later he was reprieved.

The position in Cyprus provides a better safeguard to the right to life. After stating that life can only be taken in execution of a sentence of a competent court following conviction on an offence for which such penalty is provided by law, the provision adds that a law may provide such a penalty "only in cases of premeditated murder, high treason, piracy, jure gentium and capital offences under military law."⁽¹¹⁸⁾

2. Right to Personal Liberty

No person may be deprived of his liberty except in accordance with the law.⁽¹¹⁹⁾ A person may, however, be deprived of his liberty - (a) in execution of the sentence or order of a court (whether established for Zambia or some other country) in respect of a criminal offence of which he has been convicted; (b) in execution of the order of a court of record punishing him for contempt of that court or of a court inferior to it; (c) in execution of the order of a court made to secure the fulfilment of any obligation imposed on him by law; (d) for the purpose of bringing him before a court in execution of the order of a court; (e) upon reasonable suspicion of his having committed, or being about to commit a criminal offence under the law in force in Zambia; (f) under the order of a court or with the consent of his parent or guardian, for his education or welfare during any period ending not later than the date when he attains the age of eighteen years; (g) for the purpose of preventing the spread of any infection or contagious disease; (h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community; (i) for the purpose of preventing the unlawful entry of that person into Zambia or for the purpose of restricting that person while he is being conveyed through Zambia for the

(118) - Article 7 of the Constitution.

(119) - S.15(1) Constitution of Zambia.

purpose of his extradition or removal as a convicted prisoner from one country to another; (j) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during any visit that he is permitted to make to any part of Zambia in which, in consequence of any such order, his presence would otherwise be unlawful.⁽¹²⁰⁾

The right is seriously curtailed by the President's power to detain or restrict persons without trial during a state of public emergency or a state threatening a state of public emergency. Section 29(1) of the Constitution empowers the President to declare at any time by proclamation in the Gazette that a state of public emergency exists^(120a) or that a situation exists which, if it is allowed to continue, may lead to a state of public emergency.⁽¹²¹⁾ Once the declaration has been made the Constitution permits derogation from fundamental rights and freedoms and the taking "of measures for the purpose of dealing with any situation existing or arising during that period."⁽¹²²⁾ No such measure is held to be in contravention of the Declaration "unless it is shown that the measures taken exceeded anything which, having due regard to the circumstances prevailing at the time, could reasonably have been thought to be required for the purpose of dealing with the situation in question."^(122a)

One of two Ordinances, depending on whether the declaration is one of a state of public emergency or of a situation threatening a state of public emergency, comes into effect together with the declaration. If the declaration is one of a state of public emergency,

(120) - Ibid.

(120a) - S.29(1)(a).

(121) - S.29(1)(b).

(122) - S.26.

(122a) - Ibid.

the provisions of the Emergency Powers Ordinance⁽¹²³⁾ are brought into effect.⁽¹²⁴⁾ If the declaration is one of a situation threatening a state of public emergency, the provisions of the Preservation of Public Security Ordinance⁽¹²⁵⁾ are brought into effect.⁽¹²⁶⁾ The Emergency Powers Ordinance empowers the President to make such regulations as may appear to him necessary or expedient for securing the public safety, the defence of the Republic, the maintenance of public order and the suppression of mutiny, rebellion and riot and for the maintenance of supplies and services essential to the life of the community.⁽¹²⁷⁾ Such regulations may make provision for the detention of persons without trial.⁽¹²⁸⁾ Regulations made under the Ordinance and any orders or rules made under the regulations have effect notwithstanding anything inconsistent in any enactment.⁽¹²⁹⁾ Any enactment inconsistent with a regulation, order or rule is of no effect to the extent of the inconsistency as long as the regulation, order or rule is in operation.⁽¹³⁰⁾ The Preservation of Public Security Ordinance also empowers the President to make regulations for the preservation of public security.⁽¹³¹⁾ "Public security" is defined as including the securing of the safety of persons and property, the maintenance of supplies and services essential to the life of the community, the prevention and suppression of mutiny, rebellion and concerted defiance of, and disobedience to, the law and lawful authority and the maintenance of the administration of justice.⁽¹³²⁾ The regulations may provide for the detention of persons without trial.⁽¹³³⁾ In pursuance of powers under this

(123) - Cap. 268

(124) - See S.3(1) of the Ordinance.

(125) - Cap. 265

(126) See S.3(1) of the Ordinance.

(127) - S.3(1). The regulations must be approved or extended by a separate resolution at the same time the emergency is approved or extended by the National Assembly - S.5.

(128) - S.3(2)(a).

(129) - S.4.

(132) - S.2.

(130) - Ibid.

(133) - S.3(3).

(131) - S.3(2) of the Ordinance

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Ordinance the President made two sets of regulations in 1964 - the Preservation of Public Security Regulations⁽¹³⁴⁾ and the Preservation of Public Security (Detained Persons) Regulations.⁽¹³⁵⁾ Only the former regulations are relevant here. The latter are concerned with the administration of detention centres and the conditions of detainees. The regulations come into effect with the Ordinance and can be amended or repealed. Regulation 31A(1) of the Preservation of Public Security Regulations provides that whenever the President is satisfied that for the purposes of preserving security it is necessary to exercise control over any person, he may make an order for the detention of such a person. A police officer of or above the rank of Assistant Inspector may also, without a warrant, arrest any person in respect of whom he has reason to believe that there are grounds which would justify his detention and cause him to be detained for up to twenty-eight days pending a decision on whether a detention order should be made against him.⁽¹³⁶⁾

A person detained or restricted under any of the provisions given above must as soon as is practicable and, in any case, not more than fourteen days after the commencement of his detention, be furnished with a statement in writing in a language he understands "specifying in detail the grounds upon which he is detained."⁽¹³⁷⁾ A notice must be published in the Gazette within one month stating why the person has been detained and giving the provision of the law under which he has been detained.⁽¹³⁸⁾ The detainee's

(134) - G/N 375 of 1964.

(135) - G/N 412 of 1964.

(136) - Reg. 31A(b). Such a person must, however, be released even before a decision has been made if the police officer concerned finds that there are no grounds to justify his detention.

(137) - S.26A(1)(a) of the Constitution.

(138) - S.26A(1)(b).

case, if he so requests, must be reviewed by an independent and impartial tribunal not less than one year of his detention and thereafter at intervals of one year.⁽¹³⁹⁾ The tribunal is presided over by a person appointed by the Chief Justice and who is or is qualified to be a judge of the High Court.⁽¹⁴⁰⁾ The detainee is entitled to reasonable facilities to consult a legal representative of his own choice to make representations for him and to appear in person or through his representative to argue his case before the tribunal.⁽¹⁴¹⁾

The detainee's efforts to get freed and the tribunal's recommendations that he be freed may, however, end in vain for the authority making the order is not bound by the tribunal's recommendations. Section 26A(2) of the Constitution⁽¹⁴²⁾ provides that "the tribunal may make recommendations to the authority by which it was ordered concerning the necessity or expediency of continuing his (the restrictee's or detainee's) restriction^{or} detention but, unless it is otherwise provided by law, that authority shall not be obliged to act in accordance with any such recommendations." This makes the tribunal of very little value since the authority who is the author of the detention order, is the final judge on whether the detention or restriction should continue or not. Having made the decision to detain or restrict the person, it is unlikely that the authority would revoke the order as a result of recommendations by the tribunal unless the tribunal's enquiry has produced evidence of mistaken identity or facts or other evidence which would make the

(139) - S.26A(1)(c). See also Reg. 31A(8) Preservation of Public Security Regulations.

(140) - S.26A(1)(c). See also Reg. 31A(7)(a) Preservation of Public Security Regulations.

(141) - S.26A(1)(d) and (e). The detainee is not, however, entitled to representation at public expense - S.26A(3).

(142) - See also Reg. 31A(9) Preservation of Public Security Regulations.

continuation of the detention order insupportable. In subsequent reviews, however, the tribunal's recommendations could have greater influence.

The powers to detain persons without trial during periods of public emergency are found in the Constitutions of most of the newer member states of the Commonwealth.⁽¹⁴³⁾ The wording of the provisions is very similar and so are the facilities provided for the review of detainees' cases.

There is no case law yet in Zambia arising from the right of personal liberty. A considerable number of persons have, however, been restricted or detained from time to time since 1964 as a result of the existence of a declaration of a situation threatening a state of public emergency.⁽¹⁴⁴⁾ A few Indian cases arising from detention or restriction orders which would be relevant in Zambian Courts may, however, be discussed here. India has a detention law which authorizes detention of persons without there being a state of emergency. Article 22(1) and (2) of the Constitution protects the liberty of the person but subarticle (3) of the same Article excepts from that protection enemy aliens and persons arrested or detained under any law providing for preventive detention. Subarticle (4) provides that no law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, judges of the High Court has reported before the expiration of the three months that there

(143) - See, e.g., the Constitutions of Uganda (Art.21(b) and (7)); Kenya (s.27); Botswana (S.16); Swaziland (S.16); Ghana (Art.27); Trinidad and Tobago (ss. 4 and 7); Malaysia (Art.51); Mauritius (S.18).

(144) - Among those who have been restricted are Mr. Nalumino Mundia, the Deputy leader of the opposition African National Congress and Alice Lenshina, leader of the now banned Lumpa Church. Mr. Mundiya was later released after winning a parliamentary seat.

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is in its opinion sufficient cause for such detention.⁽¹⁴⁵⁾ The authority making the detention order is required as soon as may be to communicate to the detainee the grounds on which the order has been made and to afford him the earliest opportunity of making representations against the order.⁽¹⁴⁶⁾ The authority is, however, not required to disclose facts which it considers to be against the public interest to disclose.⁽¹⁴⁷⁾ Significant differences occur between the Zambian and Indian provisions on the information the authority should disclose to the detainee. The Indian provision requires the authority to disclose the grounds on which the order is made without saying that this should be done in detail. The Zambian provision requires the grounds to be specified in detail. The Indian provision distinguishes between grounds and facts and permits the authority to withhold facts which it considers to be against the public interest to disclose. In Bombay v. Atma Ram⁽¹⁴⁸⁾ It was pointed out that information that a person attended meetings and made speeches at such meetings fell under the category of "facts" while the conclusion from them that he was engaged or likely to be engaged in promoting sabotage on railway property in Greater Bombay was a "ground". The Zambian provision does not distinguish between facts and grounds. If, therefore, the term "grounds" in the provision is interpreted as including "facts", then the President is required to specify such facts in detail.

While detaining a person is a purely executive matter, the executive authority must comply with the Act or regulation authorizing the detention if the courts are to be excluded from interfering with the Order. The Indian cases following show how

(145) - Parliament is empowered to pass a law prescribing cases or circumstances under which a person may be detained for a longer period before getting the opinion of the Advisory Board - Article 22(7)(a).

(146) - Article 22(5)

(147) - This means he cannot withhold grounds.

(148) - A.I.R. (1951) S.C. 157.

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the courts would not hesitate to interfere with a detention order if certain requirements are not met.

The purpose of the Indian Preventive Detention Act is to prevent persons acting to the prejudice of the security of India or of a state or the maintenance of public order, essential supplies or services. In Sodhi Shamsher Singh v. Pepsu (148a) persons were detained on the ground that they had distributed pamphlets accusing the Chief Justice of Pepsu in abusive and filthy language for partiality in the selection of judicial officers and in his determination of cases. The Supreme Court held that while such conduct might undermine the confidence of the public in the administration of justice, it could not be said that the security of the State or the maintenance of public order had been endangered. The detention order did not conform to the statute.

In Bombay v. Atma Ram (149) a person was detained on the grounds that he was engaged or likely to be engaged in promoting sabotage on railway property in Greater Bombay. The detainee impugned the grounds as too vague to enable him to make representation and filed a habeas corpus application. The Government supplied supplementary grounds but the High Court refused to consider them and the detainee's application was granted. On appeal the Supreme Court held: that the grounds must be in existence when the order is made; that while the court could not enquire into the question whether the grounds were sufficient to justify the order, it could consider whether they were so vague and indefinite as not to enable the detainee to exercise his right of making a representation at the earliest opportunity; that the grounds must disclose sufficient information for this purpose. The court also pointed out that if the grounds were additional conclusions of

(148a) - A.I.R. (1954) S.C. 276.

(149) - (supra).

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fact to support the satisfaction the authority must have that the detention order was necessary before making it, then it was an infringement of Article 22(5), but that it would not be an infringement if the information was on particulars of facts indicated in the original order. Such information could be given provided the detainee had not been prevented from making his representations at the earliest opportunity.

In Ram Singh v. Delhi⁽¹⁵⁰⁾ the grounds on which a detention order was made were "that your speeches generally in the past, and particularly in August, 1950, at public meetings in Delhi, have been such as to excite disaffection between Hindus and Muslims and thereby prejudice the maintenance of public Order". It was contended that these were vague grounds. The Supreme Court, however, held that it was not necessary to indicate the objectionable passages in the speeches. If the time, the place and the general nature and effect were indicated so as to enable the detainee to make his representations, that would be sufficient. This statement should be compared with the Zambian provision which requires the grounds to be specified in detail.

In Re Lakshminarayan⁽¹⁵¹⁾ the court held that the grounds furnished must be relevant. There must be a logical connection between the grounds furnished and the professed purpose of the order of detention. In this case the court held invalid an order made for the expressed purpose of preventing the person concerned from acting to the prejudice of public order and safety in Madras, based on the grounds that the detainee was secretly sending explosives to Hyderabad.

In Dayanand v. State⁽¹⁵²⁾ it was held that the order must be made bonafide. If the grounds furnished do not exist or are not those on which the order is based or if there has been lack of due care and caution in collecting the grounds or making the

(150) - A.I.R. (1951) S.C. 270.

(151) - A.I.R. (1950) Mad. 266.

(152) - A.I.R. (1951) Pat. 47.

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Order so that the order is not based on materials of rationally probative value, the order, the court held, would be set aside.

If circumstances arose in Zambia similar to those in the Indian cases given above, it can be presumed that the courts would not hesitate to intervene. As the Chief Justice of Rhodesia (Sir Hugh Beadle) said in Maluleke v. Minister of Law and another,⁽¹⁵³⁾ where wide delegated powers are conferred "the legislature must have intended that when the Minister exercised his powers he would observe the Constitution and exercise the powers delegated to him lawfully and not unlawfully." If he fails to act lawfully the courts will intervene. It should be noted that the declaration of an emergency does not suspend the Declaration of Rights. It merely permits certain acts not normally permitted.

(3) Protection from Slavery and Forced Labour

A person cannot be held in slavery or servitude or required to do forced labour.⁽¹⁵⁴⁾ Forced labour does not, however, include: (a) any labour required in consequence of a sentence or order of a court; (b) labour required of any person while he is lawfully detained which, although not required in consequence of a sentence or order of a court, is reasonably necessary in the interests of hygiene or for the maintenance of the place at which he is detained; (c) any labour required of a member of a disciplined force in pursuance of his duties as such or, in the case of a person who has conscientious objections to service as a member of a naval, military or air force, any labour that the person is required by law to perform in place of such service; (d) any labour required during a period when the country is at war or when a

(153) - 1963 (4) S.A. 206(S.R.) at 211. See also Nkomo and Others v. Minister of Justice and Others, 1965 (1) S.A. 498 (S.R.A.D.) at p. 503.

(154) - S.16(1) and (2) Constitution of Zambia.

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declaration of a state of public emergency or a situation threatening a State of public emergency or in the event of any other emergency or calamity that threatens the life and well-being of the community to the extent that the requiring of such labour is reasonably justifiable in the circumstances of any situation arising or existing during that period for the purpose of dealing with the situation; or (e) any labour reasonably required as a part of reasonable and normal communal or other civic obligations.⁽¹⁵⁵⁾

Protection from slavery or servitude and forced labour is found in most Constitutions which have a Declaration of Rights⁽¹⁵⁶⁾ but it is a poor source of case law. No case law has yet arisen in Zambia under the provision.

(4) Protection from Inhuman Treatment

Inflicting of torture or inhuman or degrading punishment or other treatment is forbidden.⁽¹⁵⁷⁾

The prohibition does not, however, apply in cases where any law authorizes punishment of any description that was lawful in the former Protectorate of Northern Rhodesia immediately before the coming into force of the Constitution.⁽¹⁵⁸⁾

Prohibition against cruel and unusual punishment has its origin in clause 10 of the English Bill of Rights of 1689. The United States' Eighth Amendment which forbids cruel and unusual punishment was derived from this clause.⁽¹⁵⁹⁾ What is cruel and

(155) - S.16(3)

(156) - See, e.g., Constitutions of Sierra Leone (S.15); Mauritius (S.6); Uganda (Art.11) Malta (S.36); Kenya (S.17); Cyprus (Art.10); India (Art.23); Malaysia (Art.6)

(157) - S.17(1) Constitution of Zambia.

(158) - S.17(2)

(159) - "Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688" - Louisiana ex rel Francis V. Resweber, 329 U.S. 459 (1947).

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unusual punishment has not been precisely defined in the United States⁽¹⁶⁰⁾ and it is unlikely that torture, inhuman or degrading punishment would be precisely defined in Zambia.

The provision has not yet produced any case law in Zambia. Even in the United States it has proved a poor source of case law. The leading case in the United States on the provision is *Louisiana ex rel. Francis v. Resweber*.⁽¹⁶¹⁾

A young negro was sentenced to death for murder in Louisiana. When he was placed in the electric chair, death did not result because the chair was defective and did not work when switched on. Francis challenged a second attempt to execute him on the grounds that it amounted to

(160) - Tresolini thinks "some of the cruel and degrading punishments which the Eighth Amendment obviously bans include beheading and quartering, dragging through the streets to the place of execution, disembowelling alive, burning at the stake, mutilation by cutting off hands or ears, and the use of many barbarous forms of torture." - *op.cit.*, p.644. Some of these punishments were sometimes inflicted in England when the Bill of Rights was enacted in 1689.

These examples mentioned by Tresolini refer to methods of punishment which the Eighth Amendment at the time of its enactment was intended to prohibit. But it must be remembered that the words "cruel and unusual" set a variable standard. Today's norms differ from those of yesterday. Some forms of punishment which were permitted when the Eighth Amendment was adopted are no doubt now prohibited. Abolitionists argue strenuously that the death penalty must today be considered cruel and unusual punishment. This argument may eventually prevail.

(161) - 329 U.S. 459 (1947)

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double jeopardy or cruel and unusual punishment. The court rejected the argument, Justice Reed stating in part of his judgment:

"The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution." (162)

The same reasoning was followed in the Rhodesian Appellate Division when Gundu and Sambo v. Hayward and Bosman NN.O. (163) came before it under Section 60(1) of the 1961 Constitution which prohibited in words identical to those of the Zambian provision the infliction of torture, inhuman or degrading punishment or other treatment. The applicants had been sentenced under section 33A (now section 37) of the Law and Order Maintenance Act which imposed a mandatory death penalty for offences which until the enactment of the section carried no death penalty. They challenged their sentences as being inhuman and degrading. The Court, however, held that Section 60(1) related only to kinds, types or methods of punishment or treatment which are in themselves inhuman and degrading and not to the severity, quantum or appropriateness of a punishment under particular circumstances. It followed Louisiana ex rel. Francis v. Resweber and The Territory v. Ketchum (164) but rejected the majority decision in Weems v. The United States. (165) The Territory v. Ketchum is a Phillipine case decided on a

(162) - Francis was later executed. An interesting case history of the Francis Case is found in Prettyman Jr., Barret Death and the Supreme Court (New York, Harcourt, Brace and World, 1961) pp. 90 - 128.

(163) - Judgment No. A.D. 97/65

(164) - 10 N.M. 718

(165) - 217 U.S. 349.

provision identical to the Eighth Amendment of the United States Constitution. The Court held in that case that the provision only prohibited the legislature or the Judiciary from inflicting cruel bodily torture. If this view is correct, it could produce interesting results by having cases where a death penalty imposed for a minor offence would be considered not inhuman or degrading and, therefore, constitutional while a public flogging would be unconstitutional because of its degrading character.⁽¹⁶⁶⁾ The correct approach should be to interpret the word "punishment" as incorporating a reference to the offence in respect of which the punishment is being inflicted.⁽¹⁶⁷⁾ Regard should be paid to the relationship between the offence and the degree of punishment imposed - i.e. whether the punishment is excessive or commensurate to the offence. For instance, imposition of the death penalty for a traffic offence such as failure to observe a stop street, would amount to inhuman punishment. In the Gundu and Sambo Case, Lewis A.J.A. observed that the law under consideration (S.37(1)(c) of the Law and Order Maintenance Act) could result in cases "where the death sentence would be so disproportionate to the offence as to shock the public feeling."⁽¹⁶⁸⁾ He was of the opinion that in a wider sense (than the words were used in Section 60(1)) the sentence, though not necessarily degrading per se, might become inhuman or degrading if it was excessive in relation to the offence for which it was prescribed.

(166) - See Palley, op.cit., p. 598.

(167) - Ibid.

(168) - At p.17.

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(5) Right to Property

No person may be dispossessed of his property or deprived of any interest in or right over property, of any description except under an Act of Parliament which provides for payment of compensation for the property or interest or right to be taken possession of or acquired.⁽¹⁶⁹⁾

Property may be taken compulsorily where a law makes provision for the taking of possession or acquisition of such property (1) in satisfaction of any tax, rate or due; (2) by way of penalty for breach of the law, whether under civil process or after conviction of an offence; (3) as an incident of lease, tenancy, mortgage, charge, bill of sale, pledge or contract; (4) in the execution of judgments or orders of a court; (5) for the purpose of its administration, care or custody on behalf of and for the benefit of the person entitled to the beneficial interest therein; (6) by way of vesting of enemy property or for the purpose of the administration of such property; (7) for the purpose of - (i) the administration of the property of a deceased person, a person of unsound mind or a person who has not attained the age of eighteen years, for the benefit of the persons entitled to the beneficial interest therein; (ii) the administration of the property of a person adjudged bankrupt or a body corporate in liquidation, for the benefit of the creditors and other persons entitled, (iii) the administration of the property of a person who has entered into a deed of arrangement for the benefit of his creditors; (iv) vesting of any property subject to a trust in persons appointed as trustees by an instrument or a court; (8) in consequence of any law relating to the limitation of actions; (9) - in terms of any law relating to abandoned, unoccupied, unutilised or undeveloped land, as defined in such law; (10) in terms of any law relating to absent or non-resident owners, as defined in such law, of any property; (11) in terms of any

(169) - S.18(1) Constitution of Zambia as repealed and replaced by Act 33 of 1969.

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law relating to trusts or settlements; (12) by reason of the property in question being in a dangerous state or prejudicial to the health or safety of human beings, animals or plants; (13) as a condition in connection with the granting of permission for the utilisation of that or other property in any particular manner; (14) for the purpose of or in connection with the prospecting for or exploitation of minerals belonging to the Republic on terms which provide for the respective interests of the persons affected; (15) in pursuance of provision for the marketing of property of that description in the common interests of the various persons otherwise entitled to dispose of that property; (16) by way of the taking of a sample for the purpose of any law. (17) by way of the acquisition of the shares, or a class of shares, in a body corporate on terms agreed upon by the holders of not less than nine-tenths in value of those shares or that class thereof; (18) where the property consists of an animal, upon its being found trespassing or straying; (19) for so long as may be necessary for the purpose of any examination, investigation, trial or inquiry or, in the case of land, the carrying out thereon - (i) of work for the purpose of the conservation of natural resources of any description; or (ii) of agricultural development or improvement which the owner or occupier of the land has been required, and has without reasonable and lawful excuse refused or failed, to carry out; (20) where the property consists of any licence or permit. (21) where the property is held by a body corporate established by law for public purposes and in which no moneys have been invested other than moneys provided by Parliament; (22) where the property is any mineral, mineral oil or natural gases or of any rights accruing by virtue of any title or licence for the purpose of searching for or mining any mineral or natural gases - (i) upon failure to comply with any provision of such law relating to the title or licence or to the exercise of the rights accruing or to the development or exploitation of any mineral oil or natural gases; or (ii) in terms of any law vesting any such property

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or rights in the President⁽¹⁷⁰⁾ (23) for the purpose of the administration or disposition of such property or interest or right by the President in implementation of a comprehensive land policy or of a policy designed to ensure that the statute law, the Common Law and the doctrine of equity relating to or affecting the interests in or rights over land, or any other interests or rights, enjoyed by Chiefs and persons claiming through or under them shall apply with substantial uniformity throughout Zambia.⁽¹⁷¹⁾ (24) in terms of any law relating to the forfeiture or confiscation of the property of a person who has left Zambia for the purpose, or apparent purpose, of defeating the ends of justice.⁽¹⁷²⁾

An Act of Parliament authorizing compulsory acquisition of property must, *inter alia*, (i) provide that compensation shall be paid in money; (ii) specify the principles on which the compensation is to be determined; (iii) provide that the amount of the compensation shall in default of agreement to be determined by resolution of the National Assembly.⁽¹⁷³⁾ Compensation determined by the National Assembly cannot be called in question in any court on the grounds that such compensation is not adequate.⁽¹⁷⁴⁾

The provisions against deprivation of property were invoked together with others in the important case of Jashbai Umedbhai Patel v. The Attorney-General.⁽¹⁷⁵⁾ The applicant was charged before a magistrates court with doing an act preparatory to the making of a payment outside Zambia, contrary to Regulation 9 of the Exchange Control Regulations, 1965, and section 6 of the Exchange Control Act⁽¹⁷⁶⁾

(170) - S.18(2) Constitution of Zambia as repealed and replaced by Act 33 of 1969.

(171) - S.18(2) as amended by Act 44 of 1970.

(172) - S.18(2) as amended by Act 58 of 1970.

(173) - S.18(3) as amended by Act 33 of 1969.

(174) - S.18(4) as amended by Act 33 of 1969.

(175) - HP/Const/Ref.1/1968 - Selected Judgment of Zambia No.33 of 1968.

(176) - Cap.276.

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or, alternatively, attempting to export currency, contrary to Regulation 17(1) of the Regulations referred to, section 6 of the Act referred to and section 352 of the Penal Code.⁽¹⁷⁷⁾ The allegations against the accused were that between 3rd and 10th May, 1968, he had placed or caused to be placed in the post 65 airmail envelopes for transmission outside Zambia each containing eight ten-kwacha notes (making a total of K.5,200). Four of the envelopes were seized by a customs officer in the post office for examination. When the case came before a magistrate for trial, counsel for the accused asked for reference of the matter to the High Court in terms of section 28(3) of the Constitution on three grounds, one of which was: "that the opening, examination and seizure of the postal articles constitute a contravention of the Applicant's right to protection from deprivation of property as guaranteed by section 18 of the Constitution"⁽¹⁷⁸⁾ The applicant's argument was that his property had been taken in violation of Section 18. The State sought to justify its taking possession of the applicant's property under section 18(1)(a)(i) and (iii)⁽¹⁷⁹⁾ that it was done in the interests of public safety or, alternatively, that it was done in order to secure the development or utilisation of that or other property for a purpose beneficial to the community.

The court rejected the first ground of justification, Magnus J. stating:

"It could conceivably happen that complete financial anarchy might so weaken the economy that internal disaffection might be caused, leading to rioting and civil disobedience. So might widespread unemployment caused, say, by overpopulation. So

(177) - Cap. 6.

(178) - This ground was added when the hearing began before the High Court. Originally the matter had been referred to the High Court on two grounds - Section 19 (violation of the applicant's right to privacy of property) and section 22 (violation of applicant's right to freedom of expression). These two grounds will be dealt with below.

(179) - This was before the section was amended by Act 33 of 1969.

might prolonged drought which disrupted agricultural production. One might think of many things which could, ultimately, affect the public safety. None of them would, however, have the quality of proximitiness which would justify involving this exception. Nor do I think that exchange control is sufficiently proximate to public safety to warrant the present legislation being adopted "in the interests of" public safety. Nor do I think that, when the exchange control legislation was drafted, did the draftsmen have in mind that they were doing so in the interests of public safety, nor, for that matter, did the Minister of finance have this in mind in approving the Regulations." (180)

The Court, however, upheld the second ground of justification in these words:

"The nexus between this and exchange control is, to my mind, so clear that one could not reasonably argue to the contrary. I am satisfied, therefore, that the taking of possession, so far as it affects Section 18 was expedient for a scheme of exchange control was designed in order to secure the development of the nation's financial resources for a purpose beneficial to the community." (181)

The judge considered the criterion underlying the exception - i.e. that the taking possession or acquisition of such property must be "necessary or expedient". He came to the conclusion that under the circumstances it was not necessary for the State "to show that the taking of possession was necessary for the desired purpose, but merely that it was expedient". He adopted one of the three meanings given to the word "expedient" as an adjective in the Oxford English Dictionary - i.e. "conducive to advantage in general, or to a definite purpose; fit, proper or suitable to the

(180) - at p.32.

(181) - at p.33.

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circumstances of the case". He, however, narrowed the definition to "conducive to the purpose" or "suitable to the circumstances of the case" and came to the conclusion that the word (i.e. expedient) had a meaning far short of those of "necessary" or "reasonably required".⁽¹⁸²⁾

The judge also considered whether the question before the court could be answered under Section 18(4). He stated that if the taking of possession was for one of the purposes listed thereunder, and was, therefore, temporary, it would seem unnecessary to show that the taking of possession comes within paragraph (a) of subsection (1).⁽¹⁸³⁾ He did not think that Section 18 applied to the opening or examination of the letters for so long only as may be necessary for the purpose of any examination, investigation, trial or inquiry.

Jasbhai Umedbhai Patel v. The Attorney-General is the only case of legal importance that has been decided in connection with section 18. There are still, therefore, several questions the courts must answer under the section. For instance, what amounts to "taking possession or acquisition of property"? What is "adequate compensation"? What is "a purpose beneficial to the community"?

It remains to be seen whether the courts will answer these questions in the way they have been answered in the United States and India. With regard to the first question, taking possession or acquisition of property could be formal or informal. Where the taking is formal no problems of interpretation arise. It is where the acts of the state are not formal or are not clear that difficulties arise on whether a taking or acquisition of property has taken place or not. This has led to a wide interpretation of the taking of property in the United States. In the United States v. Dickinson,⁽¹⁸⁴⁾

(182) - at pp. 30-31

(183) - See above for provisions of paragraph (a) of subsection (1) of Section 18.

(184) - 331 U.S. 745 (1947).

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the Supreme Court stated that "property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private owners, a servitude has been acquired either by agreement or in the course of time."⁽¹⁸⁵⁾ "Formal condemnation proceedings are not necessary; the mere course of physical events can amount to a taking and by virtue of the constitutional requirement there is an implied obligation resting upon the Government under such circumstances to pay just compensation."⁽¹⁸⁶⁾

Two Indian cases illustrate what Government acts amount to a taking. In Chiranjit v. Union⁽¹⁸⁷⁾ a statute made shareholders' resolutions ineffective without Government approval and forbade winding up of the Company without sanction of the Government. A holder of a fully paid up ordinary share filed a petition under Article 32 of the Constitution alleging infringement of his proprietary rights under Article 31. Although the Supreme Court was inclined to the view that the Company's rights had been infringed, it dismissed the shareholder's petition on the grounds that his rights had not been infringed. The State had not taken his share. He still had his share and could dispose of it; he was still entitled to dividends and to participation in the distribution of any surplus on winding up. The Court accepted

(185) - At pp. 743-9

(186) - Dumbauld, op.cit., p.99. Accordingly where riparian property is flooded because of the rising of the level of a river caused by the construction of a dam by the Government, a taking of property has occurred - ibid. Equally, where airplanes flew so low over a farm that the owner's chickens were frightened and the value of the land became substantially diminished, it was held that a taking of the property had occurred - U.S. v. Causby 328 U.S. 256 (1946), at 261.

(187) -,A.I.R. (1951) S.C. 41.

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that some of his privileges had been suspended but added that the Government was not exercising those privileges. In Dwarkadas v. Sholapur S. and W. Co.⁽¹⁸⁸⁾, on the other hand, a company manufacturing textiles got into financial difficulties compelling it to give notice to its employees and to close its works. The State Government appointed a controller under the Essential Supplies (Temporary Powers) Act, 1946, who requested the Directors to call in sums unpaid on the preference shares. The Directors refused and the Governor-General promulgated the Sholapur Spinning and Weaving Company (Emergency Provisions) Ordinance, 1950, which was replaced in the same year by an Act of the Union Parliament of the same name and with the same provisions. The preamble of the Act stated that because of mismanagement and neglect of the Company's affairs, the production of an essential commodity had been prejudicially affected and serious unemployment caused. The operative part of the Act empowered the Central Government to appoint new Directors and a chairman who were to take custody and control of all the property, effects and actionable claims of the company. The former Directors were deemed to have vacated their offices and the shareholders were deprived of their right to nominate Directors. Shareholders resolutions were to be ineffective unless approved by the Government. Winding up of the Company or receivership proceedings were to be instituted only with Government sanction. A preference shareholder filed a representative suit against the company and the State Government, challenging a resolution of the new Directors calling in the sums unpaid on the preference shares on the ground that the Ordinance under which they were appointed was void. He failed in the Bombay High Court but succeeded on appeal to the Union's Supreme Court which distinguished the case from that of

(188) - A.I.R. (1954) S.C. 119.

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Chiranjit above. The Supreme Court held that the Company had been deprived of its property and that the persons in whose hands the Company was were not agents of the shareholders since they obeyed instructions of the State and not those of shareholders. Since the Ordinance made no provision for compensation it was held void for repugnancy to Article 31(2) of the Constitution.

With regard to the second question - i.e. what is adequate compensation? - in the United States, where the words used in the Constitution are "just compensation", the Courts have employed several criteria to determine what is "just compensation", but always guided by the basic principle that the owner ought to receive a "full and perfect equivalent" in money for the property taken.⁽¹⁸⁹⁾ "Market value" is the most used measurement but the courts have "refused to make a fetish" of this "since it may not be the best measure of value in some cases".⁽¹⁹⁰⁾ The Courts in India have also adopted the basic principle that compensation must be the equivalent in value of the property taken.⁽¹⁹¹⁾ The power of the Indian Courts to see that adequate compensation is paid is, however, curtailed by a provision under Article 31(2) which states that where a law fixes compensation "such law shall (not) be called in question in any court on the ground that the compensation provided by that law is not adequate." This means that an owner can only get compensation equivalent to the market value where the law does not fix compensation or where the fixed compensation

(189) - See U.S. v. Miller, 317 U.S. 369(1943) at p.373

(190) - U.S. v. Cors, 337 U.S. 325 (1949) at p.332.

(191) - Suryapalsingh v. U.P., A.I.R. (1951) All 674.

A provision in the West Bengal Land Developing and Planning Act, 1948, stating that the maximum compensation would be the market value on December 31, 1946, was held void - West Bengal Settlement Kanungo Co-op Credit Society v. Mrs. Bella Banerjee, A.I.R.(1951) Cal.111.

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is equivalent to the market value. In Zambia a law granting inadequate compensation can be challenged in the courts.

With regard to the third question (What is a purpose beneficial to the community?), the decision in Jashhai Umedbhai Patel's case indicates that the courts are going to give a wide interpretation to the words. In India where Article 31 of the Constitution permits compulsory taking or acquisition of property for "public purpose", the words "public purpose" have been defined as whatever favours the general interest of the community as opposed to the particular interest of an individual.⁽¹⁹²⁾ Accordingly, a law having as its object the pursuit of any of the Directive Principles was held to be for a public purpose.⁽¹⁹³⁾ In Md. Safi v. West Bengal,⁽¹⁹⁴⁾ a Calcutta law authorizing acquisition of property for settlement of refugees from Pakistan was held valid because the public benefited by the confinement of refugees to a suitable locality. In Padayachi v. Madras,⁽¹⁹⁵⁾ a co-operative society was formed to enable its members to buy houses and the Government issued a statutory notification to acquire land for the society. The notification was challenged on the grounds that the public had no interest in the land or buildings; that neither the public nor a considerable portion of it would benefit; and that the effect would be to take land away from one person only to give it to another. In upholding the acquisition the Madras High Court said that the society was constituted for the benefit of the public and that though the immediate beneficiaries were society members, the acquisition indirectly benefitted the public generally. The Court stated that "public purpose" included whatever resulted in advantage to the public, the advantage need not be available to the public as such; it

(192) - Bihar v. Kameshwar, A.I.R. (1952) S.C. 252

(193) - Suryapalsingh v. U.P., A.I.R. (1951) All. 674.

(194) - A.I.R. (1951) Cal 97.

(195) - A.I.R. (1952) Mad. 756.

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might be in favour of individuals, provided that they did not benefit as individuals but in furtherance of some scheme of public purpose because they promoted social welfare and prosperity. This decision shows how far the courts can go in determining what is beneficial to the community.

(6) Right to Privacy of Home and other Property

Except with his own consent a person may not be subjected to the search of his person or his property or to entry by others on his premises.⁽¹⁹⁶⁾ Nothing, however, done under the authority of any law can be said to be inconsistent with or to be in contravention of this provision to the extent that the law in question makes provision (a) that is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilisation of mineral resources or in order to secure the development or utilisation of the property concerned for a purpose beneficial to the community; (b) that is reasonably required for the protection of the rights and freedoms of other persons; (c) that authorizes an officer or agent of the Government, a local government authority or a body corporate established by law for a public purpose to enter on the premises of any person, in order to inspect those premises or anything thereon for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to the Government, local authority or body corporate as the case may be; or (d) that authorizes, for the purpose of enforcing a judgment or order of a court in any civil proceedings, the search of any person or property by order of a court or entry on any premises by such order.⁽¹⁹⁷⁾ These exceptions are, however, inoperative if the person concerned shows

(196) - S.19(1) Constitution of Zambia.

(197) - S.19(2).

that the provision or the thing done under that provision is not "reasonably justifiable in a democratic society".⁽¹⁹⁸⁾

There are many laws in Zambia that authorize searches of persons and property by police officers or other public officers with or without a warrant. For instance, under the Emergency Powers Ordinance⁽¹⁹⁹⁾ the President may, during the existence of a state of public emergency make regulations authorizing the entry and search of any premises. Similar regulations may also be made under the Preservation of Public Security Ordinance.⁽²⁰⁰⁾ Sections 111 and 113(3) of the Criminal Procedure Code⁽²⁰¹⁾ authorize search with a warrant of any building, vessel, carriage, box, receptacle or place or person therein reasonably suspected of being connected with the cause of the search. A search may, however, be conducted without a warrant if a person to be arrested is found in a place.⁽²⁰²⁾ Section 19A of the Code permits a police officer to stop, search and detain any vessel, aircraft or vehicle in or upon which there is reason to suspect that anything stolen or unlawfully obtained may be found or any person reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained. In each case he may seize the thing found. Forceful entry may be made into premises to be searched if entry is refused.⁽²⁰³⁾ Section 27 of the Societies Ordinance⁽²⁰⁴⁾ empowers an authorized officer with a warrant to enter (using force if necessary) any place represented to be or to have been used or to be about to be used as a place of meeting or business by a society (statutory or non-statutory) which is being used or has been used

(198) - S.19

(199) - Cap.268. See above.

(200) - Cap. 265. See above. See regulations made under the Ordinance G/N 375 of 1964 as amended, for powers of search given to police officers and army officers.

(201) - Cap. 7.

(202) - S.16 Ibid.

(203) - Ibid.

(204) - Cap. 262.

or is about to be used for purposes prejudicial to or incompatible with the maintenance of peace, order, or good government or which is being used or has been or is about to be used for purposes at variance with its declared objects. Similar powers may be given for the purpose of searching for books, accounts, writings, lists of members, banners, seals, insignia or other articles of such society.⁽²⁰⁵⁾ Section 10 of the Clubs Registration Ordinance⁽²⁰⁶⁾ empowers a constable with a search warrant to enter the premises of a club (if need be by force) and inspect them, take names and addresses of persons therein and seize any books and papers relating to the business of the club. Section 53C(1) of the Penal Code authorizes any officer of the General Post Office of the rank of postmaster and above, any officer of the Department of Customs and Excise of the rank of collector, and above, any police officer of the rank of Assistant Inspector and any other officer authorized by the President to detain, open and examine any package or article which he suspects to contain a prohibited publication. Regulations made under the Exchange Control Act, 1965, may authorize specified types of officers to open suspected postal articles.⁽²⁰⁷⁾

The Jasbhai Umedbhai Patel case discussed above also contained a question that had to be answered by the Court in relation to Section 19 of the Constitution. The question was: "Did the opening, examination and seizure of the postal article constitute a contravention of the applicant's right to privacy of property as guaranteed by Section 19 of the Constitution". The Court answered the question in the negative. The applicant's counsel had argued that neither Regulation 35 nor a search conducted thereunder was reasonably justifiable

(205) - The Minister may declare these provisions of the Ordinance to apply to any area of the country and when such declaration is issued the powers can be exercised in that area without a warrant being required - S.28 of the Ordinance.

(206) - Cap. 196.

(207) - See Exchange Control Regulations, 1965, as amended, Regulation 35. Jasbhai Patel's articles in the post office were searched and seized under Regulation 35.

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in a democratic society. He based this argument on the ground that the Regulation did not provide for a search warrant to be obtained before a search was made and that, in fact, the officer concerned did not obtain a warrant before opening, examining and seizing the postal articles concerned. He submitted that no democratic society could tolerate such search, particularly when it concerned a man's correspondence; the officer having formed his suspicion before going to the post office should have obtained a warrant. Among the cases cited by counsel was Wolf v. Colorado⁽²⁰⁸⁾ which the United States Supreme Court declared that "security of one's privacy against arbitrary action by the police is basic in a free society"⁽²⁰⁹⁾.

The Attorney-General, on the other hand, had argued that the search came under the derogations permitted under the Section and that it had, in fact, been carried out because it was "reasonably required" both in the interests of public safety and in order to secure the development or utilisation of the property for a purpose beneficial to the community. In support of the officer's action in searching the articles without a warrant, the Attorney-General pointed out that the Courts in the United States had ruled that there was a difference between searching premises or persons and searching motor-cars, ships, and other vehicles. He cited particularly the cases of Carroll v. U.S.⁽²¹⁰⁾ where it was held customs officers could without warrant search vehicles and ships to prevent the import and export of contraband (under which he included export of currency), and Frank v. Maryland⁽²¹¹⁾ where Frankfurter J. held that apart from customs laws, inspection was not unconstitutional when part of a regulatory scheme.

For the same reasons given when it was considering the case in relation to section 18, the court

(208) - 338 U.S. 25.

(209) - At p.27. Other United States cases cited on this point were MacDonald v. U.S., 335 U.S. 451 and Weeks v. U.S., 58 Law Ed. 652.

(210) - 69 Law Ed. 550

(211) - 3 Law Ed. 682.

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rejected the contention that Regulation 35 was reasonably required in the interests of public safety. Accordingly nothing done under the authority of the regulation could be reasonably required in this respect. The Court, however, held that the regulation was reasonably required for the development or utilisation of property for a purpose beneficial to the community. The action taken under the regulation in this respect was accordingly reasonably required. The judge accepted the interpretation that had been given by the Chief Justice in Feliya Kachasu's case⁽²¹²⁾ to the words "reasonably required". The Chief Justice had said that for a law to be reasonably required it did not need to be "necessarily required" or even "urgently required".⁽²¹³⁾

In regard to the question whether the act of the officer was "reasonably justifiable in a democratic society" the Court considered three lines of argument on what test should be used to interpret the words "reasonably justifiable in a democratic society". The Attorney-General had argued that the test should be that so long as Zambia remained a democracy, that which was reasonably required in Zambia was reasonably justifiable in a democratic society. The applicant's counsel had, on the other hand, contended that the Attorney-General's test was not correct since if what was reasonably required in Zambia was reasonably justifiable in a democratic society, the words "reasonably justifiable in a democratic society" would be a mere repetition of the words "reasonably required."

(212) - See below.

(213) - The Chief Justice had accepted with slight modification the interpretation given to the words in Atken v. Shaw, 1933 S.L.T. (Sh.Ct.) 21. The Court had said that the words meant "a genuine present need, something more than desire, although something less than absolute".

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The judge rejected both the argument of the Attorney-General (which had been accepted by the Court in Kachasu's case)⁽²¹⁴⁾ and that of the applicant's counsel and stated:

"If I decided that the Regulation or what was done under it was reasonably required in Zambia there would be nothing for me to decide on the issue of whether it was reasonably justifiable. To adopt the view submitted by the learned Attorney-General seems to me to be begging the question. It involves adopting an axiom, namely that Zambia is a democratic society, and to proceed from there to the assumption that "Zambia" must be equated with a democratic society. In rejecting this suggestion, I am not for a moment suggesting that Zambia is not a democratic society, but for the purpose of the Constitution, I think it is necessary to adopt the objective test of what is reasonably justifiable, not in a particular democratic society. I accept the argument that some distinction should be made between a developed society and one which is still developing, but I think one must be able to say that there are certain minima which must be found in any society, developed or otherwise, below which it cannot go and still be entitled to be considered as a democratic society."⁽²¹⁵⁾

(214) - The Court had accepted the argument in these words: "We should look to the democratic society that exists in Zambia and having found that these regulations are reasonably required in Zambia I have no hesitation in finding that they are reasonably justifiable in the democratic society that exists here." - at p.18.

(215) - At. p. 40.

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The judge, however, found both the Regulation and the action of the officer reasonably justifiable in a democratic society: "On the basis that the customs officer is duly authorised, that his reasonable suspicion is objective and not subjective, that he must form this suspicion in respect of a particular postal packet and before he enters the post office, and that he must satisfy somebody of the grounds of his suspicion, I cannot say that Regulation 35 is not reasonably justifiable in a democratic society. Again, I hold Mr. Hilditch's action in searching the Applicant's postal packets so justifiable on the basis that he acted in accordance with my interpretation of the Regulation."⁽²¹⁶⁾

More should be said about the words "reasonably justifiable in a democratic society". These words appear only in Section 19 of the Constitution but also in Sections 21, 22, 24 and 25. The phrase has its origin in the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁽²¹⁷⁾ It was included first in the Nigerian Declaration of Rights and thereafter in those of other territories. The phrase belongs more to the field of political science than to that of Constitutional law although of course, it has now become the concern of the Constitutional lawyer by its incorporation in statutory law. It is vague and therefore it is difficult to measure the extent of its meaning. Holland commented on the phrase:

"The words are ambiguous and difficult to interpret."⁽²¹⁸⁾

(216) - At pp. 44-45.

(217) - The wording in the Convention is, however, "necessary in a democratic society". De Smith contends that since the framers of the Nigerian Constitution copied much of the Convention verbatim, the alteration of the wording to "reasonably justifiable" instead of "necessary" must mean that some different power was intended - "Fundamental Rights in the New Commonwealth (II)", p. 223. He is of the opinion that it reduces the power of the courts in reviewing Government actions. This should be so for what is "reasonably justifiable" may not be "necessary".

(218) - Holland, Denys C. "Human Rights in Nigeria" (Current Legal Problems, 1962) p.145.

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Commenting on the fact that on the few occasions when the phrase had been a subject of interpretation by the courts the test followed in Kachasu's case had been adopted, Magnus J., in Jasbhai Umedbhai Patel's Case, said:

"I think that the difficulty, and indeed the obscurity, of the expression has somewhat encouraged this approach. I rather suspect that the Constitutional draftsmen included the expression more for its emotional effect than with any real regard to what it means. However, it is there and has to be given some meaning."⁽²¹⁹⁾

The difficulty lies in defining a "democratic society". "There are countries of greatly differing ideological character, all of whom claim that they are democratic although, as was stated in Jasbhai Umedbhai Patel's case, they often arrive at this conclusion by following Humpty Dumpty's principle, "When I use a word, it means just what I choose it to mean, neither more nor less."⁽²²⁰⁾ After consulting the meaning of "democracy" as given in the Oxford English Dictionary, the judge referred to two United States cases in which an attempt had been made to define a democratic country. In the first case - Speiser v. Randall⁽²²¹⁾ - a democratic country had been defined as "a free society in which government is based upon the consent of an informed citizenry and is dedicated to the protection of the rights of all, even the most despised minorities". In the second case - Yates v. U.S.⁽²²²⁾ a democratic country had been defined as one with "a free government - one that leaves the way wide open to favour, discuss, advocate, or incite causes and doctrines however abnoxious and antagonistic such views may be to the rest of us."⁽²²³⁾ The

(219) - At pp. 39-40

(220) - At p. 40.

(221) - 357 U.S. 513 (1958).

(222) - 354 U.S. 298 (1958).

(223) - At p. 344.

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judge also referred to an Indian case - Ramesh Thapper v. State of Madras⁽²²⁴⁾ - where the Court said: "Freedom of speech and of the press lay at the foundation of all democratic organisation, for, without free political discussion, no public education so essential for the properly functioning of the process of popular Government is possible."

While it is indeed, difficult to define a democratic country satisfactorily, in interpreting the phrase "reasonably justifiable in a democratic society", the approach of the court in Jasbhai Umedbhai Patel's Case is preferable to that of the court in Kachasu's case. The test applied in Kachasu's case, that because Zambia was a democratic society, what was "reasonably required" in Zambia was "reasonably justifiable in a democratic society is faulty. It is faulty because "a democratic society" is a wider concept than "democracy as practiced in Zambia". In creating a standard whereby the laws and executive acts of Zambia could be measured, the framers of the Constitution could surely not have intended that the standard should be found in the laws and executive acts of Zambia itself. They must obviously have intended the courts to find an objective standard outside Zambia. There are, as the Court pointed out in Jasbhai Umedbhai Patel's case, "certain minima which must be found in any society, developed or otherwise, below which it cannot go and still be entitled to be considered as a democratic society."⁽²²⁵⁾ Democracy in Zambia should, as far as possible, taking into account differences between conditions in the country and in other countries, be examined in the light of democratic standards prevailing in other countries.

The extent of control over legislative and executive powers that the courts in Zambia will derive from the phrase remains to be seen. Those

(224) - (1950) S.C. 594.

(225) - At p. 40.

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who have written about the phrase in relation to the Nigerian Constitution do not think that it gives the courts powers wider than those derivable from such other standards as "reasonable", "reasonably justifiable", "reasonably necessary", etc. De Smith thinks the standard of "reasonable" in the Indian Constitution confers a greater scope of review upon the judiciary than the words "reasonably justifiable in a democratic society".⁽²²⁶⁾ Grove, on the other hand, states: "On the verbal level there are differences between the various wordings employed, but beyond that they appear to be differences without distinction. . . . Thus the courts see no magic in the phrase "reasonably justifiable in a democratic society" and adopt the policy of judicial review which they do for reasons other than the dictates of that vague phrase."⁽²²⁷⁾ In the Nigerian case of *D.P.P. v. Obi*,⁽²²⁸⁾ the court seemed to see no difference at all between "reasonably justifiable" and "reasonably justifiable in a democratic society." It used the two phrases interchangeably. In another Nigerian case, *Cheranci v. Cheranci*,⁽²²⁹⁾ the court spoke of a "presumption of reasonable justifiability and necessity."⁽²³⁰⁾

While the vagueness of the phrase is its weakness, it could also be its strength. It could easily be used by the courts to exercise considerable control over the powers of the Legislature and the Executive. It is, however, unlikely that the courts in Zambia will want to take a more drastic view in interpreting the phrase than that taken by the Nigerian Supreme Court in *D.P.P. v. Obi*. Brett F.J. stated in that case:

(226) - "Fundamental Rights in the New Commonwealth (II)" p. 223.

(227) - *Op. Cit.*, p. 168

(228) - (1961) All N.L.R. 186.

(229) - (1960) N.R.N.L.R. 24.

(230) - At p. 28.

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"The Constitution entrusts the Courts with the task of deciding conclusively whether or not any legislative measure contravenes Chapter III of the Constitution, and I do not want to say anything which might suggest that the courts are evading their responsibilities. Nevertheless, it is right that the courts should remember that their function is to decide whether a restriction is reasonably justifiable in a democratic society, not to impose their views of what the law ought to be."⁽²³¹⁾

In another and earlier Nigerian case, Bate J. of the High Court of the Northern Region had said:

"It is the duty of the judges to determine finally the constitutionality of an impugned enactment. For this they must, after considering all the relevant factors, rely on their own judgment. It does not necessarily follow that because the legislature has passed a law that every provision of a law is reasonably justifiable. The courts have been appointed sentinels to watch over the fundamental rights secured to the people of Nigeria by the Constitution Order and to guard against any infringement of those rights by the State. If the courts are to be effective guardians, then the judges must not only act with self restraint and due respect for the judgment of the legislature but they must also use their own impartial judgment without undue regard for the claims either of the citizen or the State."⁽²³²⁾

The trend in Zambia has already been indicated in the case of Kachasu. There, the court stated: "..... in approaching its task the court must give due weight to the opinion of the Legislature, as expressed in the legislation."⁽²³³⁾ This hesitancy in declaring legislation unconstitutional is shared

(231) - (1961) All N.L.R. 186, ap p. 197.

(232) - Cheranci v. Cheranci, at p. 28.

(233) - At p. 16.

by Courts of other lands. In Missouri, Kansas and Texas Railroad v. May,⁽²³⁴⁾ Holmes J. of the United States Supreme Court said: "It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." In State of Madras v. Row,⁽²³⁵⁾ the Indian Supreme Court stated:

"In evaluating such elusive factors and forming their own conception of what is reasonable in all circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their own way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable."

7. Protection of the Law

Section 20 of the Constitution provides for a number of procedural rights headed "Provisions to Secure the Protection of the Law." The provisions are intended to protect persons arrested or charged with offences by the authorities. Similar provisions are contained in Constitutions of other Commonwealth countries with Declarations of Rights⁽²³⁶⁾

(234) - 194 U.S. 267 (1940).

(235) - (1952) S.C.R. 597.

(236) - See, e.g., the Constitutions of Malta (S.40); Mauritius (S.10); Uganda (Article 15); Kenya (S.21); Cyprus (Articles 11 and 12); India (Articles 20 and 22) and Sierra Leone (S.19).

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and in the Fifth and Fourteenth Amendments of the United States Constitution.

(i) Fair Hearing By Independent Courts

Every person charged with a criminal offence must be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law.⁽²³⁷⁾ What a fair hearing is cannot be precisely laid down. It depends on the circumstances of each case. In the United States it has been held that a fair hearing includes the right to know the claims of the opposing party and the right to get a decision from the court in accordance with the evidence given,⁽²³⁸⁾ but that it does not, in all cases, require the accused to be heard orally⁽²³⁹⁾ or to be heard at the outset of the matter. The hearing of the accused can be at any stage of the proceedings.⁽²⁴⁰⁾ In Nigeria, the High Court of the Northern Region agreed substantially with this point of view when it stated: "... we think that the question whether there has been a fair hearing is one of substance not of form, and must always be decided in the light of the realities in any particular case."⁽²⁴¹⁾

(237) - S.20(1) Constitution of Zambia.

(238) - Morgan v. U.S., 304 U.S.1, 18-19 (1938);
Twining v. New Jersey, 211 U.S. 78, 110-111 (1908)

(239) - F.C.C. v. W.J.R., 337 U.S. 265, 275-6 (1949).

(240) - Yakus v. U.S., 321 U.S. 414, 435-37, 442 (1944).

(241) - Olawoyin v. Commissioner of Police, (1962) N.N.L.R. 29 - High Court, Northern Region, at p. 33. Appellants in this case had been charged with disturbing the peace in a native court in Northern Nigeria. Before the appellants had been charged, the prosecution had presented its evidence. Thereafter the first accused had been asked whether he had anything to say or any witnesses to call. The question was not repeated to the others although they had no doubt heard the question being put to the first accused. They had been then found guilty and sentenced to terms of imprisonment ranging from three to

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(241) Continued.

six months. They appealed on the grounds that they had been denied a fair trial and set out their grounds of appeal as follows: (i) that they were denied the opportunity to call witnesses to testify on their behalf and to give the testimony under oath as required by the Constitution; (ii) that the judge had failed to ask the defendants the names of their witnesses as required by the Criminal Law Procedure Code Law, 1960 (N.R. Law No. 20 of 1960), omitting thereby an important procedural requirement which, therefore, invalidated the entire proceedings; (iii) that since the prosecution had entered its case before the appellants had been charged and pleaded, in effect they had been presumed guilty until they had introduced evidence to the contrary; (iv) that since they had been compelled to cross-examine the prosecution's witnesses before they had been charged and before issue had been joined in the case, they had in effect been denied their constitutional right to cross-examine witnesses against them. The appeal was dismissed. With reference to the first ground, the court held that there was no evidence that the appellants desired to testify or to call witnesses or that they had been prejudiced by their having failed to do so. On the second ground, the court held that the failure of the court to ask the appellants the names of the witnesses they wanted to call did not justify interfering with the judgment unless it had resulted in failure of justice. On the third ground, the Court held that pleading after the prosecution had presented its case did not indicate a disregard for the normal presumption of innocence and that this deviation from normal procedure had caused no substantial denial of the rights of the appellant. In respect of the fourth ground, the Court stated

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(241) Continued.

that the opening statement of the prosecution had, except for inconsequential exceptions, informed the appellants of the case against them so that they could have conducted a cross-examination of the witnesses if they had chosen to do so.

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In Gokpa v. Inspector-General of Police,⁽²⁴²⁾ another Nigerian Case, Appellant had asked for an adjournment of his case because his counsel was away but this had been refused and the trial had proceeded. The appellant had not cross-examined prosecution witnesses.

The High Court of the Eastern Region held that the decision of the Magistrate was unconstitutional because "in any case, the court should endeavour to see that the accused person is given a fair chance to defend himself with the aid of counsel when he is represented by one" and that in the absence of showing that the request to delay the case was deliberate or that the application was frivolous, the magistrate's desire to handle cases quickly could not override the individual's right to a fair hearing under Section 21(2) of the Constitution (similar to Section 20(1) of the Zambian Constitution)⁽²⁴³⁾.

It is unlikely that the Courts in Zambia will give the words "fair hearing" a wider or narrower meaning than that given them by the Courts in Nigeria and the United States. As in the Nigerian Regions, there is in Zambia a Criminal Procedure Code based on the procedural rules obtaining in England. The provisions of the Code ensure a fair hearing before the Courts. The Declaration of Rights provisions were drawn up with the provisions of the Code in mind.

The provision requiring the hearing of cases to be before independent and impartial courts established by law forbids the establishment of

(242) - (1961) 1 All N.R. 423.

(243) - See Joanou v. R., 1957 R. and N. 623; Baselo and Beston v. Reginam, 1923-1960 A.L.R., Mal. 996, at 998; Osman v. R., 1964-1966 ALR Mal. 595, at 615, in which it was held that a magistrate had a discretion in adjourning the cases because counsel for the accused was not present or because the accused wanted to employ counsel, provided that the exercise of his discretion did not result in injustice.

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courts not authorized by law in order to gratify a high-handed Executive. Although the provision does not prohibit the establishment of special courts, such courts must be independent of the executive in order to meet the constitutional requirements of fair hearing, independence and impartiality.

(ii) Presumption of Innocence.

Every person accused of an offence must be presumed innocent until he has pleaded or been proved guilty.⁽²⁴⁴⁾ This presumption is one of the cornerstones of English justice and is observed in all Commonwealth countries and dependencies irrespective of whether there is a Declaration of Rights or not.⁽²⁴⁵⁾

(iii) Accused to be Informed of Offence

A person arrested of an offence must be informed as soon as is reasonably practicable, in a language he understands and in detail, of the nature of the offence charged.⁽²⁴⁶⁾ The details referred to here are those necessary to acquaint the accused with the whole charge against him and not those that pertain to evidence. The requirement is not new. It existed before the introduction of the Declaration of Rights.

(iv) Right of Defence

An accused is entitled to adequate facilities for the preparation of his defence which he may conduct personally or by a representative of his

(244) - S.20(2)(a) Constitution of Zambia. This does not, however, invalidate a law placing the burden of proof in certain matters on the accused. - S.20(12)(a).

(245) - This rule, whether expressed in the form of a presumption or not, is basic to any civilized system of law. In fact, it is being promoted by the United Nations (see Article 11(1) of the Universal Declaration of Rights) and other bodies such as the International Commission of Jurists.

(246) - S.20(2)(b) Constitution of Zambia.

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own choice at his own expense.⁽²⁴⁷⁾ He must be afforded facilities to cross-examine prosecution witnesses personally or by his legal representative and to call witnesses in his behalf under the same conditions applying to prosecution witnesses.⁽²⁴⁸⁾ An interpreter must be provided without payment if the accused does not understand the language used at the trial.⁽²⁴⁹⁾ After judgment the accused is entitled to the record of the proceedings if he requests it and is prepared to pay the prescribed fee.⁽²⁵⁰⁾ Except with his own consent the trial must be conducted in his presence unless he conducts himself in such a manner as to render the continuance of the proceedings in his presence impracticable. In such circumstances the court may order his removal and continue with the trial in his absence.⁽²⁵¹⁾

(247) - S.20(2)(d). A law prohibiting legal representation before a subordinate court in respect of an offence under customary law is, however, not unconstitutional provided the person charged is subject to that law - S.20(12)(b).

(248) - S.20(2)(e). A law imposing reasonable conditions for witnesses called for the accused if they are to be paid from public funds does not infringe this provision - S.20(12)(c)

(249) - S.20(2)(f).

(250) - S.20(3).

(251) - The trial may also proceed in the absence of the accused if after adjournment of the trial subsequent to his plea, he fails to appear for the resumption and the court is satisfied that it is reasonable to proceed - S.20(12)(d)(i). The sentence must, however, be set aside if the accused satisfies the court without due delay that his absence was reasonable and that he had a valid defence to the charge - S.20(12)(d)(ii). A law providing that a corporation may be tried in the absence of its representative does not infringe the provision - S.20(12)(e).

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These provisions existed before the introduction of the Declaration of Rights. As indicated above, legal representation is still in most cases the responsibility of the accused. There is a legal aid scheme but such aid is based on the seriousness or merits of the case. Legal aid for all who cannot afford it, as now applied in the United States, cannot be introduced in a country such as Zambia at present because most of the accused persons are still persons who cannot afford legal representation on their own. Persons requiring such aid would be so numerous as to make the scheme unworkable. There is, of course, no doubt that lack of legal representation for the accused puts him at a disadvantage vis-a-vis the prosecution and may, in fact, result in an unfair hearing.⁽²⁵²⁾

(v) Retroactive Legislation and Punishment.

Section 20(4) (of the Constitution) provides that no person should be found guilty of a criminal offence on account of an act or omission that was not an offence when it was committed and that no penalty should be imposed that is severer in degree or description than the maximum penalty that might have been imposed for the offence at the time when it was committed. This provision is also not new in Zambian law. The courts had always followed the practice of the English courts not to give a statute retroactive effect disadvantageous to the accused unless there were specific provisions to that effect. The difference now between the position in England and that in Zambia is that while in the former country a statute with retroactive effect disadvantageous to the accused would be enforced, in the latter country it would not.

(252)- Cf. the remarks of Justice Sunderland in Powell v. Alabama, 287 U.S. 45 (1932) - reproduced in Tresolini, op.cit., p. 381-2.

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It should be noted that what is prohibited in Zambia is holding a person guilty of an offence that was not an offence when it was committed and imposing a severer sentence than that which existed at the time when the offence was committed, and not the enactment of a statute with such retroactive provisions. Of course, in effect there would be no point in enacting provisions which cannot be enforced by the courts. This provision should be compared with Section 9 of Article I of the United States Constitution, which prohibits Congress from passing ex post facto laws. It can be said, therefore, that in the United States an ex post facto law is null and void ab initio while in Zambia such a law is merely unenforceable. The final effect is, of course, the same.

In the United States an ex post facto law has been defined as one that (1) makes acts criminal which were innocent when committed; or (2) aggravates a crime or makes it greater than it was when committed; or (3) inflicts greater punishment; or (4) makes conviction easier.⁽²⁵³⁾ The Zambian provision specifically covers (1), (2) and (3) but not (4). Can it be said, therefore, that the provision does not cover a statute that makes conviction easier than when the offence was committed? It is submitted that such a law is, in fact, covered. Easier conviction increases the penal disadvantages against the accused and this would amount to increasing the penalty.

(vi) Trial for the Same Offence After Conviction or Acquittal.

A person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted cannot again be tried for that offence or any other offence for which he could have been convicted at the trial for that offence save upon the order of a superior court in the

(253) - Calder v. Bull, 3 Dall. 386 (1798)

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course of appeal or review of the proceedings relating to the conviction or acquittal.⁽²⁵⁴⁾ Equally, a person cannot be tried for an offence of which he has been pardoned.⁽²⁵⁵⁾ These provisions safeguard accused persons from what, in the United States, is called "double jeopardy". There is no double jeopardy, however, where a law provides for the trial of a member of a disciplined force by a civilian court for a criminal offence of which he has been tried and convicted or acquitted under disciplinary code of that force.⁽²⁵⁶⁾ The civilian court must, however, take into account the punishment already imposed under the disciplinary law.⁽²⁵⁷⁾

The prohibition against double jeopardy existed in Zambia before the introduction of the Declaration of Rights. Section 249 of the Criminal Procedure Code entitled (and still entitles) an accused to plead that he had been previously convicted or acquitted of the same offence or that he had been pardoned.^(257a) Production of a copy of an order of acquittal certified by the clerk or other officer of the court of trial was (and is still) a bar to prosecution of the person concerned for the same offence unless, in the meantime, the acquittal had been set aside by a competent court.⁽²⁵⁸⁾ These provisions did not apply to cases: (a) where a person was charged after acquittal or conviction for a crime that could have been included in the indictment or charge against him, but was not so included.⁽²⁵⁹⁾ (b) Where a person was charged with

(254) - S.20(5) Constitution of Zambia

(255) - S.20(6)

(256) - S.20(12)(f).

(257) - Ibid.

(257a)- See S.128 of the same Code which provides that a person who has been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such an offence cannot while that conviction or acquittal remains in force be liable again to be tried on the same facts for the same offence.

(258) - S.195 Criminal Procedure Code.

(259) - See S.129 - ibid.

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an offence and, later, information connected with that offence and unknown to the court at the time of the trial, emerges, indicating a new offence,⁽²⁶⁰⁾ (c) where a person convicted of an offence was tried for an offence constituted by the same facts but which the court that tried him had no competence to try.⁽²⁶¹⁾ These exceptions are still in operation and the provisions of the Constitution against double jeopardy have not altered the position, although they have, of course, entrenched existing rights.

(vii) Self-Incrimination

A person tried for a criminal offence is protected from being compelled to give evidence.⁽²⁶²⁾ This safeguard against self-incrimination is of ancient origin and was firmly established in England in the second half of the seventeenth century.⁽²⁶³⁾ It was extended to the overseas territories, including the then Northern Rhodesia and Nyasaland. Section 148 of the Criminal Procedure Code (which is still in operation) provided that a person charged with an offence "shall not be called as a witness except upon his own application" and that his failure "to give evidence shall not be made the subject of any comment by the prosecution." The Declaration of Rights, therefore, confirmed an existing right.

In the United States the provision against self-incrimination has been given a wide interpretation, extending to hearings that are not trials, such as hearings before Congressional Investigating Committees, despite the fact that the provision reads:

(260) - See S.130.

(261) - See S.131.

(262) - S.20(7) Constitution of Zambia.

(263) - This was as a result of the case of John Lilburne who refused to testify against himself before the notorious Star Chamber in 1637-38 - See Dumbauld, op.cit., pp. 70-82. For Lilburne's own account of the case, see 3 Howell, State Trials 1315 - 1367 (1637)

"No person shall be compelled in any criminal case to be a witness against himself" (264)

It remains to be seen whether the courts in Zambia will give the provision a similar wide interpretation.

(viii) Criminal Offence Must be Prescribed
By Written Law.

A person cannot be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed by a written law. (265) This does not, however, affect the power of a court of record to punish a person for contempt notwithstanding that the act or omission constituting the contempt is not defined in a written law and the penalty therefor is not so prescribed. (266) It should be noted that unlike in England where some of the crimes are governed by the common law, in Zambia there are no common law crimes. As in some overseas territories, the crimes governed by the common law in England were reduced into written form in the Penal Code. (267) Other crimes are contained in various other statutes, regulations, rules and orders. The provision must, therefore, have been drawn up with African customary law in mind. The provision is also contained in the Constitutions of Botswana (268) and Kenya, (269) for instance, but not in that of Swaziland. Both the 1960 and 1963 Nigerian Constitutions contained the provision. In Aoko v. Fagbemi, (270) decided under the 1960 Constitution, the High Court of the Western Region quashed a conviction as being in violation of the provision. The appellant had been convicted of adultery by a customary court. There was no written law defining this crime and prescribing a punishment.

(264) - Fifth Amendment to the Constitution.

(265) - s.20(8) Constitution of Zambia.

(266) - Ibid.

(267) - Cap. 6.

(268) - S.10(8)

(269) - S.21(8)

(270) - (1961) 1 All N.L.R. 400.

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(ix) Public Hearing

Except with the agreement of the parties thereto, all proceedings of every court or proceedings for the determination of the existence of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority, must be held in public.⁽²⁷¹⁾ The court or other adjudicating authority may, however, exclude from the proceedings persons other than the parties thereto and their legal representatives where (a) it considers it necessary or expedient to prevent publicity which might prejudice the interests of justice or the proceedings are only interlocutory; and (b) it is empowered to do so by law in the interests of defence, public safety, public order, public morality or the welfare of persons under the age eighteen years or protection of the private lives of persons concerned in the proceedings.⁽²⁷²⁾ The requirement of a public hearing is not new. Section 71 of the Criminal Procedure Code had provided that "the place in which any court is held, shall, unless the contrary is expressly provided by any Ordinance for the time being in force, be deemed an open court to which the public generally may have access." The section is still in operation.

(271) - S.20 (10) Constitution of Zambia.

(272) S.20 (11)

CHAPTER TWENTY-TWOFUNDAMENTAL HUMAN RIGHTS - II(8) Freedom of Conscience(a) General Provisions

Except with his own consent a person may not be hindered in the enjoyment of his freedom of conscience.⁽¹⁾ The freedom includes freedom of thought and of religion, freedom to change religion or belief, and freedom either alone or in community with others, and both in public and in private, to manifest and propagate one's religion or belief in worship, teaching, practice and observance.⁽²⁾ Not only, therefore, has a person the freedom to belong to any religion of his own choice but to no religion at all. An atheist or agnostic is protected to the same extent as a Christian, a Moslem, a Hindu, a Bahai, a Judaist or an ancestral worshipper. The freedom is wide but not unrestricted. It can be curtailed by any law which is reasonably required (a) in the interests of defence, public safety, public order, public morality or public health; (b) for the purpose of protecting the rights and freedoms of other persons, including the right to observe and practice any religion without the unsolicited intervention of members of another religion.⁽³⁾ A law enabling any of these exceptions or acts done thereunder must, however, be reasonably justifiable in a democratic society.⁽⁴⁾ The terms "reasonably required" and "reasonably justifiable in a democratic society" have been discussed in the previous chapter.

It is still too early to know what attitude the Zambian courts will adopt in interpreting this freedom. So far only one case has dealt with it.⁽⁵⁾

(1) - S.21(1) Constitution of Zambia.

(2) - Ibid.

(3) - S.21 (5).

(4) - S.21.

(5) - See below.

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It is, however, certain that the Zambian courts will not have the same latitude in interpreting this freedom as their counterparts in the United States. As in the case of the other freedoms, the United States Bill of Rights does not qualify the freedom of religion. The Congress is barred from making laws prohibiting the free exercise of religion.⁽⁶⁾ Qualification of the freedom is, therefore, left to the courts.⁽⁷⁾ In Zambia, on the other hand, the Legislature can translate the exceptions given above into legislation and severely curtail the free exercise of religion. In Zambia the State is not barred from establishing a State Church. In the United States, on the other hand, the Congress cannot make a "law respecting an establishment of religion....." This has been interpreted as building a "wall of separation between church and state" and as, therefore, not only preventing the State from establishing a church but also

(6) - First Amendment, Constitution of the United States.

(7) - See, e.g., Reynolds v. U.S., 98 U.S. 145 (1878), where the Supreme Court held to be constitutional a statute that prohibited polygamy and had been challenged by a Mormon, convicted under it, as violating his religious freedom to marry more than one wife (see also the Indian case of Bombay v. Narasu, (1952) A.I.R., Bomb. 84, where a similar decision was made); Cox v. New Hampshire, 312 U.S. 569 (1941), where the Supreme Court held that Jehova's witnesses could be required to secure a permit before holding a parade or procession on public streets; Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), where it was held that a Jehova's Witness could be punished for using "fighting" words in a public place.

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from aiding churches or church schools.⁽⁸⁾ If the State in Zambia were to establish a State Church or designate one of the existing churches as a State Church, the arrangement would not be incompatible with the existence of freedom of religion in the country as long as there would be no interference with other churches or faiths or compulsion that people join the State Church. The Constitutions of Ireland and Malta, for instance, recognize the Roman Catholic Church as the State Church but also provide for freedom of religion as a fundamental right. Unlike in the United States, in Zambia the State grants aid to church schools.

(b) Religious Instruction in Schools

The provision regarding religious instruction at schools has two aspects. The first aspect relates to the receiving of religious instruction by pupils at schools while the second relates to the right of religious communities or denominations to give religious instruction at schools they run. With regard to the first aspect, Section 21(2) provides that "except with his own consent (or, if he is a minor, that of his guardian) no person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if that instruction, ceremony or observance relates to a religion other than his own." The term "any place of education" applies to both Government and non-Government schools. However, in the case of non-Government Schools, the term should perhaps be limited to Government-aided schools although

(8) - See, however, the case of Cochran v. Louisiana State Board of Education, 21 U.S. 370 (1930), where the Supreme Court upheld a state law which authorized the distribution of free textbooks to children in both public and private schools. The Court's reasoning was that the books were to help the children and not the private schools.

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nothing in the words suggests this limitation. Schools not aided by the Government are strictly private property and it is difficult to see how the Declaration of Rights could be justifiably enforced against such institutions.^(8a) Most non-Government schools in Zambia are, however, aided.

The first major case under the Declaration of Rights arose from this provision.⁽⁹⁾ The case was set in motion by a young girl of between 11 and 12 years of age. The girl, Feliya Kachasu, was the daughter of a Jehova's Witness.⁽¹⁰⁾ She was suspended from school in terms of certain regulations which required school children, inter alia, to sing the National Anthem and salute the National Flag. The suspension was to remain until she complied with the orders. With the help of her father and next friend, she brought action against the Attorney-General on the following grounds:

(8a) - After holding that it was reasonable that pupils should sing the National Anthem and Salute the Flag, the judge, in Kachasu's Case, said: "I should add that the position might well be different if the requirement to sing the National Anthem and salute the National Flag went outside the Government and aided Schools. Then it might not be reasonable." - at p. 17

(9) - Feliya Kachasu v. Attorney-General, 1967/HP/273.

(10) - Justice Stone of the United States Supreme Court once remarked that the Jehova's Witnesses "ought to have an endowment in view of the aid which they give in solving the legal problems of civil liberties." - as quoted in Mason, Alphens T. Harlan Fiske Stone. Pillar of the Law (New York, Viking Press, 1956) p. 598.

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(a) that the suspension constituted a hindrance in the enjoyment of her freedom of conscience as provided in Chapter III of the Constitution; (b) that Regulation 25 was (i) ultra vires Section 12 of the Education Act, 1966; (ii) in conflict with Section 21 of the Constitution; (c) that Regulation 31(1)(d) was in conflict with Sections 24 and 25 of the Education Act, 1966, and Section 21 of the Constitution. The ground relating to Section 12 of the Education Act is not relevant to the subject under discussion.⁽¹¹⁾ Section 24 of the Education Act reads:

"No pupil shall be refused admission to any school on the grounds of his religion."

Section 25 reads:

"If the parent of the pupil attending any school requests that he be excused from taking part in or attending any religious ceremony or observance, then until the request is withdrawn, the pupil shall be withdrawn therefrom accordingly!"

(11) - The section empowers the Minister to make regulations "(b) ... prescribing and regulating ... the subjects of instruction to be provided ...". The argument of Applicant's counsel was that Regulation 25 did not prescribe any subject of instruction to be provided but a drill. The judge disagreed with this reasoning and held: "I do not agree. Regulation 25 (1)(a) clearly prescribes the provision of a subject of instruction - namely, "the singing of the National Anthem and the proper manner in which pupils should behave on formal occasions at which the National Anthem is played or sung or the National Flag is flown." That may not amount to a very extensive subject, but it is a subject and an important one." - at p. 6.

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The Court dismissed with little discussion the argument that the applicant's suspension and her continued suspension were unlawful because Regulation 31(1)(d) was in conflict with Section 24 of the Education Act. The judge stated:

"I do not think Section 24 affords the applicant any assistance here. She was not refused re-admission to the school because she was a Jehovah's witness but because she had been suspended for wilful refusal to sing the National Anthem and would not agree to do so or salute the National Flag in the future. It is true that her attitude in this regard was dictated by her religion. But this, at best, only makes her religion a remote cause of her suspension and failure to achieve re-instatement - a causal sine qua non perhaps, but not the causae causans, the proximate cause, which is what must be looked at here. That cause was the applicant's breach and indicated continued breach of regulation 25."⁽¹²⁾

It is submitted that this conclusion is correct.

The Court then turned to the validity of Regulation 31(1)(d) in relation to Section 25 of the Education Act. It accepted that the wording of Section 25 excused the applicant from participation or attendance at any religious ceremony if her father so requested and that her father had, in fact, made the necessary request in relation to the singing of the National Anthem and saluting the Flag. Having accepted this, the court proceeded to answer the question whether the singing of the National Anthem and the saluting of the Flag were ceremonies or observances. It defined the terms "ceremony" and "observance", the former as connoting "some continuity of performance" and the latter as relating "more to a specific Act", but did not think that the difference between the two terms was significant in the case under consideration; the terms could be interchanged. In answering the question

(12) - At p. 7.

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7. (i.e. whether the saluting of the Flag and the singing of the Anthem were ceremonies or observances) the court adopted an 'objective test. Counsel for the applicant had urged the court to adopt a subjective test. He had referred the court to, among others, Zavilla v. Masse⁽¹³⁾ and Donald v. Board of Education of the City of Hamilton⁽¹⁴⁾ in which the subjective test was used. Headnote 6 to the report of Zavilla v. Masse reads:

"A religious belief is purely subjective. Pupils may not rightfully be expelled from school for their refusal to pledge allegiance to the United States Flag and take part in patriotic exercises, where they entertain the opinion that such acts would be in violation of their religious beliefs, and courts may not by judicial pronouncement, determine that the beliefs so entertained are not religious opinions."

The facts in Donald v. Board of Education of the City of Hamilton were very similar to those in Kachasu's Case.⁽¹⁵⁾

(13) - (1944) 112 (Colo.) 183.

(14) - (1941) Ontario Reports, 518.

(15) - Jehovah's Witness pupils in this case refused to sing the National Anthem - God Save the King; to repeat the Pledge of Allegiance or to salute the flag. Regulations required the singing of the anthem daily at the beginning and the closing of the school day. As in Zambia, there was a legislative provision that no pupil should be required to take part in any religious exercises objected to by his parent or guardian.

The Court, however, professd to rely on Baxter v. Langley⁽¹⁶⁾ and Sheldon v. Fannin⁽¹⁷⁾ in which the objective test was adopted.⁽¹⁸⁾ The court opted for the objective test by asking itself and answering five questions - (1) by whom were these ceremonies instituted and with what object? (2) in the manner in which they were conducted, were they invested with any of the trappings of religious worship? (3) did the persons who attended these ceremonies regard them as religious? The court's answers were: (1) that the ceremonies were instituted on directions of the State and not of any church or religious organization; that they formed part of the instruction which was to be provided in Government schools in how to behave on formal occasions at which the Flag was flown; and that their object, together with that instruction, was to promote national unity and proper respect for the National Anthem and the National Flag as the secular, not religious, symbols of national consciousness; that this was evidenced by the fact that special provision had been made that no pupil shall be required to participate in these ceremonies as part of any religious ceremony or observance; (2) that the ceremonies of singing the National Anthem and saluting the National Flag were not invested with the trappings of religious worship; they were not conducted by a priest nor in a place of religious worship, nor was use made of any

(16) - (1969) Vol. 38, L.J.M.C. 1.

(17) - (1963) 221 F. Supp. 766.

(18) - The court accepted that from the cases cited by counsel for the applicant it was abundantly clear that where a religious opinion is in question a subjective test must be applied. "Indeed, it is impossible to test something so personal as an opinion in any other way." - at p. 10. After accepting this, the Court, however, decided to take a different view in these words: "When the nature of a ceremony or observance is in question it seems to me that a subjective test is inappropriate and its application could lead to anomalous results. The ceremony itself must be looked

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9. (18) - Continued.

at objectively as it was in Baxter v. Langley,
(supra) and Sheldon v. Fannin (supra)
This, is not to say the subjective views of
those attending the ceremony are not to be
taken into account. They will carry consider-
able weight; but they will not necessarily
be decisive. To take an objective view of
the religious nature or otherwise of a
ceremony or observance is not easy. A judge
charged with this duty must be careful not
to allow his own religious views to colour
his judgement." - at p. 10

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equipment or books associated with religious worship; (3) that some persons - notably the applicant and her Jehova's Witness colleagues - did genuinely and sincerely regard these ceremonies as religious. "Applying the objective test through the medium of these questions and answers, I hold that, notwithstanding the views of the applicant and her colleagues, the singing of the National Anthem and saluting of the National Flag are not religious ceremonies or observances."⁽¹⁹⁾ Consequently the applicant's claim was dismissed.

There can be no quarrel about the court's decision to adopt an objective test in this case. It must, however, be mentioned that the test cannot be applied in every case requiring the court to decide on what is a religious ceremony or observance without infringing the religious beliefs and practices of individuals which, although senseless to others, are cardinal to the persons concerned.⁽²⁰⁾

After disposing of what it termed the "legislative issue" the court turned to what it called the "constitutional issue" - i.e. whether the suspension of the applicant constituted a hindrance to the applicant's freedom of conscience and whether the regulations under which the applicant was suspended were concurrently in conflict with Section 21 of the Constitution. The court held that the applicant had been so hindered. The Chief Justice stated:

".... in my view, the applicant was hindered in the enjoyment of her freedom of conscience the moment she was put under coercion to sing the National Anthem against her religious beliefs. For at that moment she was not free to give expression to her religious convictions, albeit passively, by refraining from joining in what she considered to be a hymn of praise to other than Jehova God Himself. Furthermore, I think she is also both being presently hindered and likely to be hindered in the

(19).- At p. 11.

(20) - See remarks of Lehman J. in People of the State of New York v. Sandstrom, (1939) 279 N.Y. 523 at 535.

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future inasmuch as whilst she is free to enjoy her freedom of conscience in most of Zambia she is not so free on the premises of any Government or aided school to which she would ordinarily be entitled to admission; and she may anticipate that if she secures such admission she will be subject again to the same coercion which she has already experienced to act against her religious beliefs.

All this to my mind constitutes hindrance, and it follows that the applicant is entitled to redress in respect thereof unless that hindrance and the law which sanctions it come (22) within the ambit of subsection (5) of Section 21."

Applicant's counsel had submitted that once the applicant had proved hindrance the onus of showing that the situation fell within the ambit of subsection (5) rested on the State. The court did not, however, accept this argument. It, instead, accepted the reasoning of Bate J. in Arzika v. Governor, Northern Region (23) a Nigerian case, that there was a presumption that the Legislature had acted constitutionally and that the laws it had enacted were necessary and reasonably justifiable. Accordingly, following the reasoning in another Nigerian case - Cheranci v. Cheranci (24) - the court placed the onus on the applicant to show that Regulation 25 was not saved by any of the provisions of Section 21(5) and that things done under the authority of the regulation - i.e. the coercion exercised on her and her suspension and continued exclusion from school - were not reasonably justifiable in a democratic society. "If the applicant succeeds in establishing any one of these alternatives then she succeeds in her case, for I have already held that she has been hindered

(22) - At p. 14.

(23) - (1961) All N.L.R. 379, at 382.

(24) - (1960) N.R.N.L.R. 24.

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in the enjoyment of her freedom of conscience." (25)

To discharge the onus, counsel for the applicant had submitted that a law which compelled little children to sing the National Anthem and salute the National Flag on pain of suspension could not be said to be reasonably required in the interests of defence, public safety, public order or for the purposes of protecting the rights and freedoms of others. The Attorney-General, on the other hand, had submitted that the Regulation was reasonably required both in the interest of public safety and for the purpose of protecting the rights and freedoms of others and that if the Regulation was reasonably required then it followed that it was a reasonably justifiable measure in a democratic society. He had further argued that there was need for unity in the country.

The Court accepted the Attorney-General's argument, particularly that there was need for national unity in the country. After accepting Justice Frankfurter's words that "national unity is the basis of national security" (26) and adding that if national unity was essential in a mature and established nation, how much more necessary it was in a newly emergent nation, the court stated:

"Bearing in mind the compelling consideration, particularly at the present time, of national unity and national security, without which there could be no certainty of public safety nor guarantee of individual rights and freedoms, I think it is a reasonable requirement that pupils in Government and aided schools sing the National Anthem and salute the National Flag. I certainly cannot see that it is unreasonable - which is substantially what the applicant has to prove; and if a thing is not unreasonable

(25) - At p. 15. In Jasbhai Umedbhai Patel's Case Magnus J. disagreed with this reasoning and placed the onus to justify the legislation on the State - see below.

(26) - The statement was made in Minnersville School District v. Gobitis, 310 U.S. 586 (1940) - see below.

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then surely it must be reasonable. There is little, if any, room for anything between."⁽²⁷⁾

Accordingly the Court held that Regulations 25 and 31(1)(d) were reasonably required in the interests of public safety and that the enforcement of Regulation 25 by suspension was the most appropriate one,⁽²⁸⁾ (2) that Regulations 25 and 31(1)(d) were reasonably justifiable in a democratic society - the democratic society that existed in Zambia; and (3) that the action against the applicant was reasonably justifiable in a democratic society.

The court declined to follow the United States Supreme Court's decisions in similar cases. Although the Supreme Court had in Minersville School District v. Gobitis⁽²⁹⁾ sustained as constitutional a Pennsylvania school board's regulation which required school children to salute the flag and which had been challenged by children of Jehova's Witnesses as violating their religious beliefs,⁽³⁰⁾ it had, in West Virginia Board of Education v. Barnette,⁽³¹⁾ reversed the decision and held that Jehova's Witnesses' children could not be expelled from school because of their refusal to salute the flag.⁽³²⁾ Criticising the heart of the Gobitis case that "national unity is the basis of national security" and that the authorities had "the right to select appropriate means of its attainment", the court made

(27) - At p. 17. The Court took judicial notice of the disruptive consequences of disunity which had manifested themselves in other newly emergent Countries in Africa and of the fact that Zambia was a newly emergent State.

(28) - The Court thought that "chastising a child because it will not perform an act contrary to its religious conscience strikes me not only as unreasonable but as barbaric." - at p. 18.

(29) - 310 U.S. 586 (1940).

(30) - Tresolini thinks the decision was influenced by the fact that war had just broken out - op.cit. p. 445.

(31) - 319 U.S. 624 (1943); Tresolini, op.cit., pp 451-458.

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(32) - Justice Frankfurter who had delivered the judgment in Gobitis's case dissented. In Kachasu's Case, as has been seen above, the Court followed the overruled Gobitis's case.

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the following illuminating statement which it is essential to quote in full:

"National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement."⁽³³⁾

The Court in Kachasu's case appreciated the reasoning of the Supreme Court in Barnette's Case and in those that followed. It was, however, influenced to differ by the fact that the conditions in Zambia were completely different from those in the United States. The Barnette Case was decided 167 years after the declaration of independence by the American colonies and 152 years after the coming into force of the existing Constitution. On the other hand, the Kachasu Case was decided only three years after independence. The country had not even begun yet to feel its way as a nation. The dangers of disruption were indeed more prevalent and the need to foster patriotism more urgent in a three-year old nation than in a 152 - year old nation. If the decision in the Gobitis Case, as Tresolini says, was influenced by the outbreak of the war, then it does show that even in the United States, the Court's approach to matters of this nature is governed by the prevailing conditions.

With regard to the second aspect of religious instruction at schools, section 21(3) provides that "no religious community or denomination shall be prevented from providing religious instruction for persons of that community or denomination in the course of any education provided by that community or denomination." Where a school coming under this provision has pupils of other denominations or communities,⁽³⁴⁾ such pupils can only receive such instruction if they, or if they are minors, their

(33) - Tresolini, op.cit., pp. 456-457.

(34) - It should be noted that no school may refuse a person admission on grounds of religion - S.24 of the Education Act. See above.

parents, consent. They are protected from compulsion to receive such instruction by subsection (2) which, as already seen, provides that except with his own consent (or if a minor, that of his parents) no person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if that instruction, ceremony or observance relates to a religion other than his own. Although this provision seems to suggest that a person belonging to that religion or community can be compelled to receive religious instruction, etc., it should be noted that such person is always free to change his religion or belief, in which case he would no longer be compelled. (35)

While religious bodies are given the freedom to teach religion to pupils and to make them participate in observances and ceremonies, can Government schools do the same? For instance, can the Minister prescribe a prayer to be said by the pupils every morning before classes begin? In the United States, where separation of State and Church has been held to be embedded in the First and Fourteenth Amendments, the practice of reading passages of the Bible and prescribed prayers is unconstitutional.⁽³⁶⁾ It has been mentioned above that there is no separation of State and Church in Zambia. It would, therefore, not be unconstitutional to read passages of the Bible and prayers in Government schools as part of the school programme, provided pupils are not compelled to attend.

(35) - S.21(1). It should be noted that a person may change his belief in certain things but continue to be a member of a religious body.

(36) - Engel et al. v. Vitale, 370 U.S. 421 (1962); Tresolini, op cit., pp. 474-481; Abington School District v. Schemp and Murray v. Curlett (decided together), 374 U.S. 203; Tresolini, pp. 481-490.

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(c) Oaths Against a Person's Religion

A person may not be compelled to take any oath which is contrary to his religion or belief or to take any oath in a manner contrary to his religion or belief. This provision is unlikely to be a subject of controversy. It is, in fact, not new in Zambia. English law, which operates in Zambia, has, for many years, recognized the principle that a person should take an oath in a manner in conformity with his religion or make an affirmation. The Zambian Constitution does not, however, have a provision such as that found, for instance, in the Constitutions of the United States⁽³⁷⁾ and Australia⁽³⁸⁾ prohibiting a religious test as a qualification to any public office. Discrimination against a person on religious grounds is, however, prohibited by Section 25 of the Constitution.⁽³⁹⁾

(9) Freedom of Expression

"Without freedom of speech the appeal to reason which is the basis of democracy cannot be made."⁽⁴⁰⁾ In Zambia this freedom is protected by Section 22, subsection (1) of which provides that "except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with correspondence." The freedom may be exercised through speech or through the written word.

(37) - Article VI.

(38) - S.116.

(39) - See below.

(40) - Cabinet Government (Cambridge, Univ. Press, 3rd. Ed.) p. 14.

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"Liberty of speech and liberty of press are substantially identical. They are freedom to utter words orally and freedom to write, print and circulate words."⁽⁴¹⁾

Unlike in the United States where the courts are left to determine and define the limitations to the freedom, in Zambia the restrictions are defined in the Constitution. Section 22(2) provides that "Nothing contained in or done under the authority of the law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision - (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; or (b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of courts, regulating educational institutions in the interests of persons receiving instructions therein, or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless, broadcasting, or television; or (c) that imposes restrictions upon public officers; unless the provision or thing done is shown not to be reasonably justifiable in a democratic society." Many statutes restrict freedom of expression in Zambia. For instance, section 6 of the Public Order Ordinance⁽⁴²⁾ makes the use of threatening, abusive or insulting words in any public place or at any public meeting with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned, an offence. Section 3(9) of the same ordinance makes it an offence to utter words

(41) - Beard, Charles The Republic (New York, Viking, 1943) p. 155.

(42) - Cap 260.

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19. or to do any act or thing whatever with intent to excite enmity between tribes or between sections of the community or with intent to encourage any person or persons to do or to omit to do any act or acts so as to defeat the purpose or intention of any law in force in the country or in any part thereof. The Penal Code recognizes the following offences: incitement to mutiny,⁽⁴³⁾ sedition,⁽⁴⁴⁾ publication of false news with intent to cause fear and alarm to the public,⁽⁴⁵⁾ insulting the National Flag,⁽⁴⁶⁾ insulting the National Anthem,⁽⁴⁷⁾ defamation of the President,⁽⁴⁸⁾ expressing or showing hatred, ridicule or contempt of persons because of their race, tribe, place of origin or colour,⁽⁴⁹⁾ defamation of foreign princes,⁽⁵⁰⁾ proposing violence or breaches of the law to an assembly,⁽⁵¹⁾ wrongfully inducing a boycott (trade disputes excepted),⁽⁵²⁾ writing or uttering words with intent to wound religious feelings,⁽⁵³⁾ traffic in obscene publications,⁽⁵⁴⁾ and defamation.⁽⁵⁵⁾ Section 53 of the Code empowers the President to ban publications printed in or outside Zambia which are contrary to public interest. Section 3 of the Preservation of Public Security Ordinance⁽⁵⁶⁾ authorizes the President during a state

(43) - S. 50.

(44) - Ss. 53D and 53G.

(45) - S. 58A.

(46) - S. 58C.

(47) - S. 58D.

(48) - S. 58E.

(49) - S. 58F.

(50) - S. 59.

(51) - S. 77A.

(52) - S. 77B.

(53) - S. 112.

(54) - S. 156.

(55) - Ss. 168, 169, 170 and 173.

(56) - Cap. 265.

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of near emergency to make regulations prohibiting the publication and dissemination of matter prejudicial to public security and to control the production, publication, sale, supply, distribution and possession of such publications. The Printed Publications Ordinance⁽⁵⁷⁾ requires newspapers to be registered before beginning publication. The Official Secrets Ordinance⁽⁵⁸⁾ prohibits disclosure of state secrets. The Defamation Ordinance⁽⁵⁹⁾ makes certain statements civil wrongs. The Posts and Telegraphs Act, 1954, restricts mail that may be sent through the post. None of these statutory provisions is likely to be invalidated as being in contravention of Section 22(1). They can easily be justified as falling under one or more of the exceptions under Section 22(2).

The case of Jasbhai Umedbhai Patel v. The Attorney-General, discussed above in connection with other rights also raised a question that had to be resolved under Section 22. The question was whether the "opening, examination and seizure of the postal article constitute a contravention of the applicant's freedom of expression as guaranteed by Section 22 of the Constitution."⁽⁶⁰⁾ The envelopes seized contained notes of Zambian currency wrapped in brown paper. Each brown paper was marked with either one or three pencilled crosses. No other writing was contained in the envelopes. The crosses were, however, said by the applicant to be messages and it was on the basis that these crosses were messages that the matter was brought under Section 22. The applicant did not, however, explain the messages represented by the crosses. In the absence of such an explanation, the Court held that the packets did not constitute correspondence within the meaning of Section 22 "and that, therefore, their opening did not violate the Section. I think it would be stretching the English language too

(57) - Cap. 154
(58) - Cap. 38.
(59) - Cap. 257.
(60) - See p. 3 of the judgment.

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far to say that a pencilled cross or a series of pencilled crosses constitute a communication of ideas, even when they are described as "signs or symbols", especially when unaccompanied by any explanation of what they denote."⁽⁶¹⁾ After this ruling the court did not think it was necessary to decide on whether the derogations under Section 22 applied to the case. It, however, seemed to suggest that had it been necessary to decide the issue, it would have held the derogations under subsection (2), including that for public safety advanced by the Attorney-General, inapplicable. The court found it necessary to utter warning to customs officers acting by virtue of Regulation 35:

"If they do not obtain a search warrant before tampering with any postal packet, it will be their personal responsibility should they prove to have been wrong. In particular, if a postal packet turns out to be "correspondence" in the true sense, there will have been a breach of the sender's rights under Section 22, which, fortunately for the customs officer concerned in the present case, it has fortuitously turned out not to be here. It should be remembered, however, when dealing with a sealed packet, that the answer can only be obtained after it is opened and if a customs officer opened it, he does so at his own risk."⁽⁶²⁾

It should be noted that the court was not here issuing a general warning applicable to all cases, but only to those coming under Regulation 35 of the Exchange Control Regulations. The Court, it will be recalled, had already held that Regulation 35 had nothing to do with public safety. Actions under the Regulation cannot, therefore, be justified under this or any other derogation under Section 22(2). The seizure of the envelopes had been justified in relation to Section 18 and 19

(61) - At p. 46.

(62) - At pp. 46-47.

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as being within the derogation for developing or utilizing that property or some other property for a purpose beneficial to the community. Postal packets or correspondence can be opened without a warrant under any other law permitting such action provided the law or the action done thereunder falls within the derogations permitted under Section 22(2) and provided the law or the action is not shown not to be reasonably justifiable in a democratic society. In the Nigerian cases - D.P.P. v. Obi⁽⁶²⁾ and R. v. Amalgamated Press Ltd.⁽⁶³⁾ the defendants were charged with sedition under provisions of the Criminal Code similar to those of the Zambian Penal Code. They challenged the law under provisions of the Declaration of Rights similar to the Zambian provisions under consideration. The court upheld the law as coming within the derogation for public order and as reasonably justifiable in a democratic society. Dealing with the defendant's argument in the Obi case that the law could only be valid if the prescribed conduct was likely to lead directly to public order, the Chief Justice declared:

"It seems to me that this is taking too narrow a view of the provision, for it must be reasonably justifiable in a democratic society to take reasonable precautions to preserve public order, and this may involve the prohibition of acts of which, if unchecked and unrestrained, might lead to disorder, even though those acts would not themselves do so directly."⁽⁶⁴⁾

The Amalgamated Press Ltd Case had an additional element which was also challenged as unconstitutional in terms of Section 24 of the Constitution (guaranteeing freedoms of the individual). The defendant had been charged with publishing false news likely to cause fear and alarm - an offence identical to that under Section 50A of the Zambian Penal Code. The

(62) - (1961) 1 All N.L.R. 182.

(63) - (1961) 1 All N.L.R. 199. The cases were decided on the same day.

(64) - At p. 196.

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judge upheld the provision and dismissed the defendant's contention briefly in these terms:

"I do not think it is necessary to enter into any length consideration of the question presumably posed. Suffice to say that Section 24 guaranteed nothing but ordered freedom and . . . cannot be used as a licence to spread false news likely to cause fear and alarm to the public."⁽⁶⁵⁾

While the courts in Zambia will find decisions of Nigerian Courts and of courts of other Commonwealth countries whose Constitutions guarantee freedom of expression applicable in most cases because the freedom is in these countries similarly worded and similarly qualified, they will, on the other hand, find a large number of the decisions of the Supreme Court of the United States inapplicable. As in the case of other freedoms, the United States Constitution does not qualify the freedom of speech and of the press. The First Amendment merely provides that "Congress shall make no law abridging the freedom of speech, or of the press" Not only, therefore, are there no specific qualifications of the freedoms, but Congress is also prohibited from making any law that may abridge the individual's enjoyment of them. In Zambia the freedoms are qualified and the Legislature is empowered to enact laws enforcing the permitted qualifications. In the United States the courts determine the qualifications and this has resulted in wider freedom of speech and of the press. For instance, although the Supreme court has not declared all laws regarding prior restraint of speech or censorship of obscene literature unconstitutional, it has laid down stringent standards which such legislation must

(65) - At p. 203.

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satisfy if it is not to be held unconstitutional.⁽⁶⁶⁾ Legislation regulating merely time, place and manner of speaking is constitutional⁽⁶⁷⁾ but that regulating the content of speeches to be made is unconstitutional.⁽⁶⁸⁾ In Near v. Minnesota,⁽⁶⁹⁾ a statute which provided for the ban through a court action of any "malicious, scandalous, and defamatory newspaper, magazine, or other periodical" was held to be unconstitutional because it provided for prior restraint; in Terminiello v. Chicago,⁽⁷⁰⁾ a statute which provided for the prosecution of a person making a speech which stirred people to anger, invited dispute or brought about a condition of unrest was held to be unconstitutional and to be violating the right to free speech;⁽⁷¹⁾ and in Kingsley International Pictures v. New York, refusal to grant licence to show a film version of Lady Chatterley's Lover because it was immoral in that it advocated that adultery is proper, was held invalid because the Constitution protected not only ideas that are conventional or shared by the majority but also "advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax." These cases would be decided differently in Zambia. In Zambia, it is not material that a law places prior restraint on speech or publication, ^{if} it falls within the permitted derogations and is reasonably justifiable in a

(66) - See the cases of Kunz v. New York, 340 U.S. 290, 293, 295 (1951); Niemotko v. Maryland, 340 U.S. 268, 271 (1951); Saia v. New York; 334 U.S. 558, 559-60 (1948); Winters v. New York, 333 U.S. 507 (1948); Butler v. Michigan, 352 U.S. 380 (1957); Cox v. New Hampshire 312 U.S. 569, 575-76 (1941); Paulos v. New Hampshire 345 U.S. 395, 403 - 408 (1953); Roth v. United States, Alberts v. California (decided together) 354 U.S. 476 (1957).

(67) - See Cox v. New Hampshire, 312 U.S. 569, 575-76 (1941) Paulos v. New Hampshire, 345 U.S. 395, 403-408 (1953) .

25. (68) - See Kunz v. New York, 340 U.S. 290, 3, 295 (1951); Niemotko v. Maryland, U.S. 268, 271 (1951); Sala v. New York, 4 U.S. 558, 559-60 (1948).
- (69) - 283 U.S. 1(1931); Tresolini, op. cit. pp. 416-420.
- (70) - 337 U.S. 1(1949); Tresolini, op. cit. pp. 420-425.
- (71) - 360 U.S. 684(1950).

democratic society. For instance, a regulating officer may designate in a permit to hold a meeting persons who may not speak at the meeting or matters which may not be discussed at the meeting.^(71a)

Under Section 53 of the Penal Code the President can, in his absolute discretion, ban any publication which contains matter contrary to the public interest. An assembly that provokes others (as did that in Terminiello's case) to commit a breach of the peace becomes unlawful even if it began lawfully.⁽⁷²⁾

Police officers above a certain rank are empowered to stop a meeting that is likely to be riotous or that has become riotous.⁽⁷³⁾ Refusal of a licence (under a law intended to protect morals)⁽⁷⁴⁾ to show a film like Lady Chatterley's Lover would certainly be upheld in Zambia.

The test of "clear and present danger", very often employed by the courts in the United States to determine punishable and non-punishable speech, is unlikely to be used in Zambia. Under the test, first enunciated in Schenk v. United States,⁽⁷⁵⁾ speech is only punishable if it is "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience,

(71a) - S. 4A(5) Public Order Ordinance.

(72) - See S.62 of the Penal Code.

(73) - See below.

(74) - See the Indian case of Fram Nusserwanji v. Bombay, (1951) A.I.R. Bomb. 210, where it was held that "morality did not mean an ad hoc morality created by the legislature but that accepted in all India;

(75) - 249 U.S. 47 (1919); Tresolini, op.cit., pp. 404-405.

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annoyance or unrest." (76) The test places emphasis not on what the statute prescribes but on whether the speech presented a clear and present danger. Accordingly, speech that would be punishable in Zambia could in the United States of America be considered permitted speech. Statutes that punish speech which is unlikely to produce a clear and present danger of a serious substantive evil that rises above public inconvenience, annoyance or unrest are declared unconstitutional. In Zambia the court would, in similar cases, not place emphasis (unless it is required to do so by

(76) - Terminiello v. Chicago, 357 U.S. 1 (1949), cited from judgment as reproduced in Tresolini, op.cit. p. 421. The test was later rivalled by the "remote possibility" or "bad tendency" test - which would be nearer to the method of interpretation in Zambia. The "bad tendency" test was used in Gitlow v. New York, 268 U.S. 652 (Tresolini, op.cit., pp. 405-410) where the court stated that a state "cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent or immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency." - as reproduced in Tresolini, pp. 408-9. In 1937 the "clear and present danger" test emerged as the more acceptable but it remained under criticism from some judges. Some judges preferred the "due process of law" test - Tresolini, pp. 398-399. This should be compared with the passage by a Nigerian judge cited above and footnoted (65).

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the law concerned) on whether the words were likely to produce a clear and present danger, but on whether the law punishing that type of speech or publication comes within the permitted derogations and whether it is reasonably justifiable in a democratic society. The statute involved in Terminiello's case, for instance, would not have been declared unconstitutional in Zambia since it could have been justified as necessary for public order.

(10) Freedom of Association and Assembly

The right to assemble and associate is protected by Section 23(1) which provides that "except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly or association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests." Nothing, however, "contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision - (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; (b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons; (c) that imposes restrictions on public officers; or (d) for the registration of trade unions in a register established by or under a law and for imposing reasonable conditions relating to the procedure for entry on such register (including conditions as to minimum number of persons necessary to constitute a trade union qualified for registrations". A law or act coming under these exceptions can, however, be declared unconstitutional if it is shown not to be reasonably justifiable in a democratic society.

A considerable number of statutes restrict freedom of assembly and association. The restrictions fall mainly under four groups - those concerning the formation and registration of organizations; those concerning the control of assemblies and processions; those concerning supply of information

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by certain organizations to certain authorities; and those empowering the President or an authorized officer to ban organizations.

A. Registration

Section 6(1) of the Societies Ordinance⁽⁷⁷⁾ requires every society⁽⁷⁸⁾ formed or established

(77) - Cap. 262.

(78) - Society means any club, company, partnership or other association of ten or more persons, whatever its nature or object formed in the country or having headquarters or chief place of business in the country or which is deemed to be an association established in the country under Section 5 of the Ordinance and any branch of such club, company, partnership or association - S.2(1). The definition does not however, include a company registered under the Companies Ordinance or which has complied with S.215 of that Ordinance and any building society; any company, council, authority, association, board, committee or other body lawfully constituted or established under Royal Charter, Royal Letters Patent, Act of the Imperial Parliament, Order in Council or any law for the time being in force in the country; any trade union registered under the provisions of the Trade Unions and Trade Disputes Ordinance; any company, association or partnership consisting of not more than twenty persons formed and maintained for the sole purpose of carrying on any lawful profession or business; any co-operative society registered under the provisions of the co-operative Societies Ordinance; or any society or class of society which the Minister may, by order published in the Gazette, declare not to be a society for the purposes of the Ordinance - Ibid.

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in Zambia⁽⁷⁹⁾ to apply for registration in the manner prescribed within twenty-eight days of its formation or adoption of the Constitution or rules or within such extended period as the Registrar of Societies may allow. An organization may, however, apply for exemption from registration.⁽⁸⁰⁾ The Registrar may refuse registration or exemption where it appears to him that the society has among its objects or is likely to pursue or to be used for, any unlawful purpose or for any purpose prejudicial to or incompatible with the peace, welfare or good order in the country or that the interests of the peace, welfare or good order in the country would otherwise be likely to suffer prejudice by reason of registration or exemption of such society.⁽⁸¹⁾ In the following instances the Registrar must refuse registration or exemption: (a) if the application does not comply with the prescribed rules; (b) if it appears to him that the terms of the Constitution or rules are in any respect repugnant to or inconsistent with the provisions of any law in the country; (c) if he is satisfied that the society does not exist; or (d) if the name under which the society is to be registered is identical with that of another society or so resembles it as likely to deceive the public or members of either society or is, in the opinion of the Registrar, repugnant or inconsistent with the provisions of any law in force in the country.⁽⁸²⁾ A society not registered

(79) - An association is deemed to be established in Zambia if it is organized and has its headquarters in the country or if any of its office-bearers or members reside in the country or are present therein; or if any person in the country manages or assists in the management of such association or solicits or collects money or subscriptions on its behalf - S.5.

(80) - S.6(1).

(81) - S.8.

(82) - S.9. Refusal of registration may be appealed against to the Minister.

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within the prescribed time becomes unlawful.⁽⁸³⁾ As indicated in Note 78 above, trade unions are not covered by the Societies Ordinance. They must, however, be registered under the Trade Unions and Trade Disputes Ordinance⁽⁸⁴⁾ within six months of formation.⁽⁸⁵⁾ If not registered, the Union must dissolve within that period⁽⁸⁶⁾ Registration may be refused and if so refused the Union must dissolve within six months of being informed of the refusal.⁽⁸⁷⁾ The Trade Unions and Trade Disputes Ordinance establishes the Zambia Congress of Trade Unions as an affiliate organization for registered trade unions in the country.⁽⁸⁸⁾ The Clubs Registration Ordinance⁽⁸⁹⁾ requires every club⁽⁹⁰⁾ to be registered.⁽⁹¹⁾ Such registration may be refused.⁽⁹²⁾

The requirement for registration of organizations in order to permit them to function is a severe restriction on the freedom of association. The Registrar has vast powers to decide whether an organization should be registered or not. For instance, under the Societies Ordinance, as stated above, the Registrar may refuse to register an organization if "it appears to him" that such society is likely to pursue or to be used for, "any purpose prejudicial to or incompatible with the peace, welfare or good order in the Territory, or that the interests of the peace, welfare or good order in the Territory

(83) - S.21(1). This does not, however, apply in the case of a society whose application is pending.

(84) - Cap. 25.

(85) - S.6(1)

(86) - Ibid.

(87) - S.6(1).

(88) - Ss. 21I and 21K.

(89) - Cap. 196.

(90) - A club is defined as any community or society consisting of not less than twenty-five members who assemble or meet together in pursuit of a common object.

(91) - S.3.

(92) - S.6(3).

would otherwise be likely to suffer prejudice by reason of the registration or exemption from registration of such society." This provision can be used at the instigation of the Government to refuse registration of opposition parties.

The restrictions, however, fall within the permitted derogations of freedom of association. It is unlikely that the courts could hold that any of these provisions are not reasonably required or are not reasonably justifiable in a democratic society. Things done under the authority of these provisions could, however, be held to be not reasonably required or reasonably justifiable in a democratic society.

B. Cancellation of Registration and Ban

Registration under the Societies Ordinance, the Trade Unions and Trade Disputes Ordinance and the Clubs Registration Ordinance could be cancelled under certain circumstances. For instance, registration made under the Societies Ordinance may be cancelled by the Registrar or the Minister if, in the case of the Minister, he is satisfied, again that it is expedient to do so on the grounds that the society has, in his opinion, among its objectives, or is likely to pursue, or to be used for any unlawful purpose prejudicial to or incompatible with the peace, welfare or good order in the country or on the grounds that, in his opinion, the interests of peace, welfare or good order in the country would be likely to suffer prejudice by reason of the continued registration of the society.⁽⁹⁴⁾ The Registrar may, in his discretion cancel registration if he is satisfied that it is expedient so to do on the grounds that the terms of the Constitution or rules of such society are, in his opinion, in any respect repugnant to or inconsistent with the provisions of any law in force in the country; the society has altered its objects or pursues objects other

(94) - S.12(1)

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than its declared objects; the society has failed to comply with order to supply information (see below); he has reason to believe that the society has ceased to exist; or the society has changed its name and the new name it has adopted is identical with that of an existing society or is in the opinion of the Registrar repugnant to or inconsistent with the provisions of any law in the country or is otherwise undesirable.⁽⁹⁵⁾ Although cancellation of registration is not the same thing as a ban, the effect is the same. A de-registered society becomes unlawful and cannot operate while so de-registered.⁽⁹⁶⁾ Instead of cancelling the registration of a society, the Minister may, in his absolute discretion, where he considers it to be essential in the public interest, by order declare to be unlawful any registered society which, in his opinion, is being used for any purpose prejudicial to, or incompatible with, the maintenance of peace, order and good government; or is being used for any purpose at variance with its declared objects.⁽⁹⁷⁾ An order made under these provisions could be revoked at any time but while it is in operation such organization cannot apply for registration or exemption. Any person who continues to be a member or officer of such organization or who promotes its activities, wears its badge or insignia or banner or writing, displays any sign or utters any slogan or attends its meetings or knowingly allows its meetings to be held on his premises, is guilty of an offence.⁽⁹⁸⁾

While the powers of the Registrar can only be exercised under well defined circumstances, those of the Minister (both in banning and cancellation

(95) - S.12(2)

(96) - S.21(1)

(97) - S.21(2)

(98) - Ss. 22 and 23

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of registration) are wide and vague, wrapped in such phrases as "essential in the public interest" and "prejudicial to or incompatible with the peace, order and good government." These phrases can be used by a Government bent on suppressing freedom of association to eliminate opposition.

C. Furnishing Information

Registered societies and trade unions are required to furnish certain information to the Registrar or to an authorized officer. Some information must be supplied as an annual requirement⁽⁹⁹⁾ or each time a prescribed event takes place.⁽¹⁰⁰⁾ An authorized officer may, however, demand information at any time. For instance, under the Societies Ordinance an authorized officer may at any time demand a true and complete list of office-bearers of a society and of any of its committees or governing body; a list of members of the society,⁽¹⁰¹⁾ or accounts, returns and other information that may be prescribed by the Minister.⁽¹⁰²⁾ Failure to comply with a demand is an offence.⁽¹⁰³⁾

While in Zambia the above provisions cannot be challenged as being unconstitutional, in the United States the Supreme Court has held in several cases that a demand for membership lists is a restraint upon freedom of association. The leading case in this respect is National Association for the Advancement of Colored People v. Alabama.⁽¹⁰⁴⁾ The association which was incorporated in New York State opened an agency in Alabama but did not comply

(99) - See, e.g. S.15 of the Trade Union and Trade Disputes Ordinance which requires audited accounts to be submitted by a certain date each year.

(100)- See Rule 15(1) of the Societies Rules and S.13B of the Trade Union and Trade Disputes Ordinance which require change of office bearers to be notified within a prescribed time.

(101)- Rule 4 of the Societies Rules requires a society to keep a register of members.

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(102) - S.17 of the Societies Ordinance and Rule
19 of the Societies Rules.

(103) - S.19

(104) - 357 U.S. 449 (1958); Tresolini, op.cit.,
pp. 436-9.

with a statute of the State requiring out of state corporations to register and meet certain requirements before conducting business. The Association thought itself exempt from the statute. The state Attorney-General brought action to enjoin the Association from conducting business in the State and to produce its records. The Association produced all the records required except the membership lists which it resisted on constitutional grounds. The Supreme Court held:

"We hold that immunity from state scrutiny of membership lists which the Association claims on behalf of its members to pursue their lawful private interest privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment. And we conclude that Alabama has fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have."⁽¹⁰⁵⁾

D. Control of Assemblies and Processions

Stringent restrictions are imposed upon the right to assemble by several Statutes. The most important in this regard are the Public Order Ordinance,⁽¹⁰⁶⁾ the Preservation of Public Security Ordinance,⁽¹⁰⁷⁾ the Emergency Powers Ordinance⁽¹⁰⁸⁾ and the Penal Code.⁽¹⁰⁹⁾ The restrictions can be put under four headings - restrictions on the convening of meetings and processions; control of an

(105) - Tresolini, op.cit., p. 439

(106) - Cap. 260.

(107) - Cap. 265

(108) - Cap. 268.

(109) - Cap. 6.

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already permitted meeting or procession; power to disperse assemblies and processions; and power to ban assemblies in an area or areas of the country or in the whole country.

(i) Restrictions on the Convening of Meetings and Processions

A person wanting to hold an assembly⁽¹¹⁰⁾ or a procession in a public place⁽¹¹¹⁾ must obtain a permit from the regulating officer of the area⁽¹¹²⁾ unless the organization is one that has been exempted from this requirement.⁽¹¹³⁾ The Minister is empowered to exempt, in his discretion, any religious organizations from the requirement.⁽¹¹⁴⁾ An exemption may cover the whole of a religious organization or some of its branches⁽¹¹⁵⁾ and may have conditions attached.⁽¹¹⁶⁾ The exemption can be varied or revoked.⁽¹¹⁷⁾ A regulating officer is any police officer of or above the rank of Assistant Inspector appointed by the Commissioner of Police but the duty can be delegated to other officers, including a Native Authority.⁽¹¹⁸⁾ Before issuing a permit a regulating officer is required to satisfy himself that the assembly or

(110) - An assembly is a gathering of three or more persons.

(111) - "Public place" is defined by the Public Order Ordinance as including a highway, market place, square, road, street, bridge or other way which is lawfully used by the public, and any place other than a building to which the public are for the time being entitled or permitted to have access either without any condition or upon the condition of making any payment" - S.2.

(112) - S.4A Public Order Ordinance.

(113) - S.4D(1)

(114) - Ibid.

(115) - S.4D(2).

(116) - S.4D(3).

(117) - S. Ibid.

(118) - S.4A.

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procession is unlikely to cause or lead to a breach of the peace.⁽¹¹⁹⁾ A permit may be issued subject to conditions including, in the case of assemblies, persons who must not address the gathering or matters which may not be discussed and the granting of adequate facilities for the recording of the proceedings by the police or other specified persons.⁽¹²⁰⁾ Any assembly or procession convened without a permit is unlawful and those who participate commit an offence.⁽¹²¹⁾ Regulations made by the President under the Preservation of Public Security Ordinance or the Emergency Powers Ordinance may equally restrict the right of assembly. Sections 62 and 63 of the Penal Code make assemblies convened with an intent to commit an offence and the persons who participate in them punishable.

(ii) Control of an already Permitted Meeting or Procession

Where a permit is issued with conditions, the assembly or procession must obey them. The police may warn the persons who are breaching the conditions or the whole gathering not to do so.⁽¹²²⁾ Failure to obey such warning may result in the arrest of the offenders or dispersal of the gathering.⁽¹²³⁾ During the meeting or the procession the police may give orders dictated by the circumstances of the time in the public interest, public peace or order. Such orders although not on the permit must be obeyed. Failure to do so may make the assembly or procession unlawful. During a state of emergency or a situation threatening a state of emergency more stringent powers could be conferred on the police by regulations made in terms of the Preservation

(119) - Ibid.

(120) - Ibid. The convener cannot, however, be required to supply recording equipment.

(121) - S.4C

(122) - S.4B

(123) - S.4A(7) and 4B.

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of Public Security⁽¹²⁴⁾ Ordinance or the Emergency Powers Ordinance.⁽¹²⁵⁾

(iii) Powers to Disperse Assemblies and Processions

Any police officer, magistrate, district messenger or (where a native authority has been made the regulating authority) any member of a native authority may stop a procession for which no permit has been issued or where the conditions of the permit have been contravened, and order it to disperse.⁽¹²⁶⁾ Section 65 of the Penal Code empowers a magistrate or, in his absence, any police officer of or above the rank of Inspector or any commissioned officer in the Defence Forces to disperse an assembly of twelve or more people convened unlawfully or which has become unlawful and is at the time riotously assembled or threatening a riot. The magistrate, police officer or defence officer reads a proclamation in the name of the President and then asks the assembly to disperse peaceably.⁽¹²⁷⁾ If the assembly does not disperse after the lapse of a reasonable time, the persons become rioters and can be dealt with in any way including infliction of death.⁽¹²⁸⁾ During an emergency or a situation threatening an emergency, the President can make regulations under the Emergency Powers Ordinance or the Preservation of Public Security Ordinance,

(124) - See, e.g., Regulation 4 of the Preservation of Public Security Regulations, G/N 375 of 1964.

(125) - The President is empowered by S.3 of the Ordinance to make such regulations

(126) - S.4A(7).

(127) - S.165 Penal Code.

(128) - S.166 Ibid.

respectively, regarding dispersal of assemblies.

(iv) Ban of Assemblies and Processions

If the Minister is of the opinion that by reason of certain circumstances existing in the country or part of the country, the powers conferred by any other law would not be sufficient to enable the police to prevent serious public disorder through the holding of public meetings and processions, he may by order published in the Gazette and in such other manner as he deems sufficient to bring it to the notice of the general public, prohibit such public meetings and processions as are specified **in the order for a period not exceeding three months.**⁽¹²⁹⁾ Violation of the ban is an offence.⁽¹³⁰⁾ Similar powers may be exercised under regulations made in terms of the Emergency Powers Ordinance or the Preservation of Public Security Ordinance.

CONCLUSION

The rights of free association and free assembly are the most stringently qualified at present of all the rights guaranteed by the Constitution. The qualifications, although stringent, are within the exceptions permitted by the Constitution. All the legislation discussed above would be upheld as reasonably required in the interests of public order or public safety and as reasonably justifiable in a democratic society. Acts of Ministers and officers under the legislation could, however, be challenged more successfully than the legislation itself. It should be noted that all the legislation discussed above was enacted before independence. The Public Order Ordinance, for instance, is based on the British Public Order Act.

(129) - S.7 Public Order Ordinance.

(130) - Ibid.

(11) Freedom of Movement

Although freedom of movement is covered in the right to personal liberty, the Constitution treats it separately. This is also the case in Constitutions of other Commonwealth countries. Section 24(1) provides that "no person shall be deprived of his freedom of movement" The freedom is defined as including "the right to move freely throughout Zambia, the right to reside in any part of Zambia, the right to enter Zambia and immunity from expulsion from Zambia."⁽¹³¹⁾ The freedom is not infringed by lawful detention of a person⁽¹³²⁾ or by anything contained in or done under the authority of any law to effect (a) reasonably required restrictions in the interests of defence, public safety, public order, public morality or public health or the imposition of restrictions on the acquisition or use by any person of land or other property in Zambia, unless the provision or the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society; (b) the imposition of restrictions on the movement of a person who is not a citizen of Zambia; (c) the imposition of restrictions upon the movement or residence within Zambia of public officers; or (d) the removal of a person from Zambia to be tried outside the country for a criminal offence or to undergo imprisonment in some other country in execution of a sentence imposed by a court in respect of a criminal offence under the law in force in Zambia of which he has been convicted.⁽¹³³⁾ It should be noted that only a provision made or a thing done under clause (a) can be challenged on the ground that it is not reasonably justifiable in a democratic society.

A person restricted in terms of clause (a) may, six months after the making of the order and thereafter at intervals of six months, request that his case should be reviewed by an independent and impartial tribunal presided over by a person qualified to be enrolled as an advocate and appointed by the

(131) - S. 24(2).

(132) - Ibid.

(133) - S. 24(3)(a)-(d).

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Chief Justice.⁽¹³⁴⁾ If the restriction is a general one applying to all persons, a person cannot ask for his case to be reviewed unless he obtains the consent of the High Court first.⁽¹³⁵⁾ Recommendations of the tribunal do not bind the authority who made the order.⁽¹³⁶⁾

Restrictive measures upon the freedom of movement may be imposed during a state of public emergency or a situation threatening a state of emergency in terms of regulations made under the Emergency Powers Ordinance or the Preservation of Public Security Ordinance respectively.

No case law has yet developed in Zambia on this freedom. A relevant Nigerian case may, however, be usefully discussed here. The case, William v. Majekodunmi,⁽¹³⁷⁾ arose from the crisis in the Western Region which resulted in a declaration of a state of emergency, a dissolution of the Region's Government and the placement of the administration under a Federal Administrator. The administrator, Majekodunmi, issued an order restricting the movement of Chief William in the Abeokuta area of the Region on the grounds that he was connected with the Action Group (the then ruling party in the Region). A sharp division in the ranks of the party had been the main contribution to the declaration of the state of emergency. Chief William challenged his restriction in the Federal supreme Court on several grounds, one of which was that the restriction was not reasonably justifiable in a democratic society due, particularly, to the fact that he had not been restricted to Ibadan where he resided or to Lagos where he carried on his law practice.

(134) - S.24(4).

(135) - Ibid.

(136) - S.24(5).

(137) - (1962) F.S.C. 166/1962 (Federal Supreme Court).

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The evidence placed before the court showed that instead of taking sides in the split the chief had, in fact, tried to bring about a conciliation between the warring factions of the party. On the evidence before it, the court came to the conclusion that there was no evidence from which it could be inferred that the plaintiff's restriction was reasonably justifiable. The ground that he had been restricted to an area away from his place of residence or his place of business was not, therefore, decided upon. Had there been evidence justifying the Chief's restriction, it is unlikely that he could have succeeded merely on the ground that he had been restricted in an area which was neither his place of residence nor his place of business. If it is in the interest of public safety or public order to restrict a person away from his place of residence or place of business, the order would certainly be upheld as reasonably justifiable in a democratic society. In Zambia Regulation 15(2) of the Preservation of Public Security Regulations⁽¹³⁸⁾ empowers the President to restrict a person from entering or leaving a prescribed area. If the person is not within the prescribed area when served with the order he may be removed thereto.⁽¹³⁹⁾ If he is within the area which he is not permitted to enter he may be removed therefrom.⁽¹⁴⁰⁾

(12) Protection from Discrimination

Subsection (1) of Section 25 provides that "no law shall make any provision that is discriminatory either of itself or in its effect". Subsection (2) provides that "no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority." In each case the word "discriminatory" means "affording different treatment to different persons attributable wholly or mainly to their

(138) - G/N 375 of 1964 as amended by later notices and Statutory Instruments.

(139) - Reg. 15(5)(b).

(140) - Reg. 15(5)(a).

respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description"⁽¹⁴¹⁾ This right is similar to that of "equality before the law" contained in some Constitutions and that of "equal protection of the laws" contained in section 1 of the Fourteenth Amendment of the Constitution of the United States, but it is narrower in scope. It does not, for instance, forbid discrimination based on sex^(141a) or rank in society. Inclusion of the right of equality between the sexes at the time the Constitution was drawn up would, however, have been premature, taking into account the structure of Zambian society. Such equality is not found in the Constitutions of most African States.

The wording of subsections (1) and (2) require discussion. Subsection (1) prohibits not only a law that is discriminatory in its wording but also that which is discriminatory in its effect. This safeguards the individual from discrimination emanating from legislation that is non-racial in its wording but which, when implemented, may affect only a particular racial, tribal, political or religious group.

Subsection (2) has three aspects. The first is that the provision does not prohibit discrimination based on an unwritten law, for instance, that based on African customary law, the English common law or equity. The question then arises: when does a person act under a written law? The provision poses no problem with regard to officers of the State, local authorities or statutory boards or corporations acting by virtue of certain laws.

(141) - Section 25(3).

(141a)- The provisions of the Preamble to the Declaration (S13) which confer rights under the Declaration to persons of all sexes do not apply in this case.

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Does the provision, however, extend to operators of private businesses serving the public such as restaurants; hotels, shops, cinemas, etc? It is submitted that it does. Although a shop or an hotel remains private property, it operates on the strength of a licence which requires it to serve the public and such licence invariably has a statutory origin.

It may be helpful to examine briefly the position in Bermuda and the United States on this question. The Bermuda Constitution⁽¹⁴²⁾ which like the Zambian Constitution, is a Colonial Office product has a provision on discrimination identical to that of Zambia. The provision has, however, an additional aspect stating that "no person shall be treated in a discriminatory manner in respect of access to any of the following places to which the general public have access, namely, shops, hotels, restaurants, eating houses, licensed premises, places of entertainment or places of resort."⁽¹⁴³⁾ The Bermudan Constitution was drawn up in 1968, four years after that of Zambia and those of the African and Carribean Commonwealth countries which became independent in the early sixties. It may be that the specific mention of shops, hotels, etc. was prompted by the vagueness of the provision that "no person shall be treated in a discriminatory manner by any person acting by virtue of any written law....." which had been used in earlier Constitutions. On the other hand, it may be that the specific mention was due to the fact that the wording used earlier had not included shops, hotels, etc.

In the United States the Supreme Court has been presented with cases of discrimination in shops, restaurants and other business premises or facilities but the situation differs from that in Zambia in that the Fourteenth Amendment which prohibits discrimination through the "equal protection" clause only covers discrimination by organs of State.

(142) - The Bermuda Constitution Order, 1968 (S.I. 1968 No. 132).

(143) - S.12(7) ibid.

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The Zambian provision, as stated above, extends to the acts of private individuals or entities where such acts are done by virtue of a written law. In each case the Supreme Court has been able to find in favour of complainants on grounds not requiring a ruling on whether operators of businesses open to the public are bound by the provisions of the Fourteenth Amendment. (144)

(144) - In Garner v. Louisiana, 368 U.S. 157 the first case to come before the Supreme Court on sit-ins by negroes, the Court set aside a conviction on breach of the peace arising from a sit-in in a restaurant for whites only on the grounds that there was no evidence to support a charge of breach of the peace and that, therefore, the conviction was a denial of the due process of law to the appellant. Justice Douglas, in a concurring opinion, however, thought the case should have been decided on the ground that the equal protection of the laws clause of the Fourteenth Amendment extended to public places owned privately. In Peterson v. City of Greenville, 373 U.S. 244 (Tresolini, pp. 631-634) one of six cases decided on the same day, the Supreme Court quashed convictions on the grounds that the State or its agencies - i.e. a municipality and the courts in this case - could not promote or support or enforce discrimination. Again the Court evaded the issue of whether shops, restaurants, etc. were covered by the Fourteenth Amendment.

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The second aspect is that the Constitutional protection covers discrimination "by any person acting in the performance of the functions of any public office" Section 125(1) of the Constitution as amended by Section 5 of the Constitution (Amendment) Act, 1969,⁽¹⁴⁶⁾ defines a "public office" as "an office of emolument in the public service" but not including "an office constituted by the President and declared by him under Section fifty-six of (the) Constitution not to be an office in the public service." This definition does not, for instance, include the office of Minister.

Where an individual is discriminated against by any person whatever (whether or not he performs the functions of a public office), that individual is protected if the discrimination stems from action based on a written law. That is the first aspect of Section 25 (2), discussed above. The present aspect of the Section is that it extends the protection to any acts done in the performance of the functions of a public office, regardless of whether such acts are based on written or unwritten law.

The third aspect is that the Section prohibits discrimination "by any person acting in the performance of the functions of any public authority." This has the same effect as the previous provision except that the protection is confined to acts by persons exercising the functions of a public authority.

Like the other rights, the right against discrimination is qualified. The qualifications fall into three groups - those qualifying subsection (1); those qualifying subsection (2); and those qualifying the whole section. The provisions of subsection (1) do not apply to any law making provision - (a) for the appropriation of the general revenues of the Republic; (b) with respect to persons who are not citizens of Zambia; (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (d) for the application in the case of members of a particular

(146) - Act No. 1 of 1969.

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race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; or (e) whereby persons of any particular race, tribe, place of origin, political opinions, colour or creed are subjected to any disability or restriction or are accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.⁽¹⁴⁷⁾ Accordingly a law, for instance, appropriating general revenues for scholarships open only to persons of a particular tribe which may be lagging behind in education; restricting the movement of, or the operation of businesses by, aliens;⁽¹⁴⁸⁾ prohibiting adoption of European children by Africans; preventing Europeans from marrying under African customary law; excluding non-Africans from the operation of customary law as a whole; or preventing non-Africans from settling in tribal areas, would not violate the provisions of subsection (1). The provisions of subsection (1) are equally not violated by any law making reasonable provision with respect to qualifications for service as a public officer or as a member of a disciplined force or for the service of a local government authority or a body corporate established directly by law.⁽¹⁴⁹⁾

All the exceptions mentioned above equally apply to the provisions of subsection (2).⁽¹⁵⁰⁾

(147) - S. 25(4)

(148) - Aliens are at present not permitted to operate businesses in certain areas, mainly in rural areas and small towns. This was done to give opportunities to citizens, mainly Africans. Non-African citizens cannot, however, be prevented from operating business anywhere in the country.

(149) - S. 25(5).

(150) - S. 25(6).

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Further the provisions of Subsection (2) do not affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under the Constitution or any other law.⁽¹⁵¹⁾

Both subsections (1) and (2) are not violated if discrimination occurs as a result of a law enacted to effect restrictions permitted - (a) by subsection (2) of Section 1) to the right of privacy of home and other property; (b) by subsection (5) of Section 21 to the freedom of conscience; (c) by subsection (2) of Section 22 to the freedom of expression; (d) by subsection (2) of section 23 to the freedom of association and assembly; or (e) by subsection (3) of Section 24 to the freedom of movement.⁽¹⁵²⁾ A law, therefore, enacted to affect only persons of a certain race, tribe, place of origin, political opinion, colour or creed in the interests of defence, public safety, public order public morality or public health would be constitutional. The two sections are equally not violated by anything contained in or done under any law which was in force immediately before the coming into effect of the Constitution and which has continued to be in force, or by anything done under any law repealing and re-enacting any provision of such law.⁽¹⁵³⁾ This provision was no doubt included to save the many laws that applied either to Africans or to Europeans before the coming into force of the Constitution. A provision with similar effect was included in the 1961 Southern Rhodesia Constitution to save the many discriminatory laws against Africans which were on the Statute Book.⁽¹⁵⁴⁾ The Zambian provision, like the Rhodesian provision, saves both the law that existed when the Constitution came into force and that which repeals and re-enacts a provision of such a law. The repeal and re-enactment must be contained in the same statute.

(151) - S.25(8).

(152) - S.25(7).

(153) - S.25(9).

(154) - S.70(1).

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If an existing law is repealed by one Act and thereafter the repealed law is re-enacted by another Act, the provision would not apply. Such a re-enacted law would be a new law subject to the provisions against discrimination.

CONCLUSION

Writing about the future of fundamental rights in India, Gledhill said: "It is to be hoped that Fundamental Rights are something more than a gesture of self-respect on emergence from colonial rule." As already seen in this and the last Chapters, the Zambian Declaration of Rights, like those of the other newer Commonwealth countries, is heavily qualified. These qualifications are likely to be increased and not reduced, particularly during these early stages when the problems of government are still numerous, demanding measures which were not anticipated when the Declaration was drafted. However, the process of qualifying should not go on indefinitely. A stage must be reached when the Declaration should attain, if not immutability, then semi-immutability. Some of the freedoms, in fact, cannot be qualified further without leaving them devoid of substance. An example is the freedom of association and assembly.

What effectiveness the Declaration will have remains to be seen as the country consolidates its nationhood. Its effectiveness will, however, depend on five factors. The first factor is the number of qualifications that may be made to the Bill. As indicated above, further qualifications could finally make some of the rights and freedoms lose all substance. Secondly, the attitude adopted by the Government in power to the Constitution as a whole - its letter and its spirit - can be decisive in regard to the effectiveness of the Declaration whether it is heavily qualified or not. A Government bent on thwarting the operation of the Declaration could use many tactics to achieve this. Thirdly, the attitude of the courts in interpreting the provisions of the Declaration could make it less protective even in the absence of the first and

second factors above. If the courts take a restrictive view, they accordingly diminish the rights of the individual. One form of restrictive interpretation is acceptance of the presumption that the Legislature has acted constitutionally. This presumption has been adopted, for instance, in the United States,⁽¹⁵⁵⁾ India⁽¹⁵⁶⁾ and Nigeria.⁽¹⁵⁷⁾ In one of the Nigerian cases - Arzika v. Governor, Northern Region⁽¹⁵⁸⁾ - Bate J. declared: "There is, however, a presumption that the Legislature has acted constitutionally and that the laws which it had passed are necessary and reasonably justifiable."⁽¹⁵⁹⁾ The presumption of constitutionality places the burden of proving that the law or act is unconstitutional or not "reasonably required", or not "reasonably required in a democratic society", or not "necessary or expedient" on the individual challenging the law. In Zambia the position is not yet very clear. In Kachasu's case, Blagden C. J.⁽¹⁶⁰⁾ cited and followed the above quoted passage in Arizika's Case and accordingly held that it was "part of the applicant's case that regulation 25 is unconstitutional and invalid. The onus is on her to prove it, and as part of that onus

(155) - In a number of cases the Supreme Court adopted the attitude that the First Amendment rights were preferred and that any law infringing any of them would be presumed invalid unless justified by "clear public interest, threatened not doubtfully or remotely, but by clear and present danger." - See, e.g. Thomas v. Collins, 323 U.S. 516 (1944). The doctrine is not, however, supported by the majority of the Court - Tresolini, op.cit., p.66.

(156) - See, e.g. the leading case of Madras v. Row (1952) S.C.R. 597.

(157) - See, e.g., Arzika v. Governor, Northern Region (1961) All N.L.R. 379 at 382; D.P.E. v. Obi, (1961) All N.L.R. 186, at 197.

(158) - Ibid.

(159) - At p. 382.

(160) - The Chief Justice sat alone in the case.

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she has to show that regulation 25 is not saved by any of the provisions of Section 21(5) of the Constitution Similarly, if the issue arises, it will be for her to show that "the thing done under the authority" of the regulations is not reasonably justifiable in a democratic society!"⁽¹⁶¹⁾ On the other hand, in Jasbhai Umedbhai Patel's Case, Magnus J.⁽¹⁶²⁾ cited both the passage from Arzika's Case as cited by Blagden C.J. and the conclusion reached by Blagden C.J. after citing the passage. He, however, disagreed and held that the State, in order to justify its action under Section 18 of the Constitution, must prove that its taking of possession was "necessary or expedient". "Here we are dealing with a requirement that a stated set of facts should exist, namely that certain conditions should be satisfied, and one of them is that the action taken (by the State) is "necessary or expedient" It is therefore a condition precedent to the existence of the exception that it should be "necessary or expedient." . . . I think the test of whether it is necessary or expedient is an objective one and must be proved I agree with Mr. Cave's⁽¹⁶³⁾ submission that the facts upon which a conclusion on this aspect must be based are peculiarly within the knowledge of the Government and this is a further reason why I think that the onus of proving their existence should be placed on the State!"⁽¹⁶⁴⁾ This reasoning appears to have more merit than that of Blagden C.J. in dealing with qualifications to the Declaration. It protects the individual more effectively.

The fourth factor is the attitude of the people to the Declaration. If the people are not vigilant in seeing that their rights are not whittled down, the Declaration would soon become ineffective either through amendments by the majority or as a result of a revolution. The people and not the courts

(161) - At. p. 14.

(162) - The Judge sat alone.

(163) - Mr. Cave was counsel for the plaintiff.

(164) - At p. 24.

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are, in fact, the ultimate guardians of their own rights. Justice Jackson of the United States Supreme Court recognized this point when he wrote:

"I know of no modern instance in which any judiciary has saved a whole people from the great currency of intolerance, passion, usurpation and tyranny which have threatened liberty and free institutionsI doubt that any court, whatever its powers, could have saved Louis XVI or Marrie Antoinette. None could have avoided the French Revolution, none could have stopped its excesses, and none could have prevented its culmination in the dictatorship of Napoleon. It is not idle speculation to enquire which comes first, an independent and enlightened judiciary and a free and tolerant society - it is my belief that the attitude of a society and of its organized political forces, rather than its legal machinery, is the controlling force in the character of free institutions." (165)

The fifth and final factor is the volume of cases that are taken to court by affected individuals. If the courts are not seised with cases they cannot interpret and enforce and thus strengthened. The sanctity that the United States Bill of Rights has attained has to a large extent resulted from the volume of cases regarding all aspects of the Bill which has been decided by the Courts. The Indian Bill of Rights has become only second to that of the United States because of the volume of decided cases. If the last few years are anything to go by, it is unlikely that the Zambian Declaration will produce much case law for many years to come. So far only a few cases have been decided under the Declaration. The Zambian Declaration indeed cannot be expected to produce as much case law as the American and Indian Bills. India and the United

(165) - Jackson, R.H. The Supreme Court in the American System of Government (Harvard University Press, 1955) pp. 80-81.

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States are large Federations comprising a large number of states with their own legislatures and High Courts. Laws enacted by both the Federal and State Legislatures are generally subject to the Federal Bill of Rights and decisions of State High Courts on constitutional matters can be taken to the Federal Supreme Court on appeal. The societies of the United States and India, particularly that of the former, have become very aware of their constitutional rights. Zambia, on the other hand, is a small unitary state with one Legislature and one High Court (including an Appeal Court) and a population still less conscious of its rights and less able to finance cases against the State. The assistance provided by Section 27(1)(b), (4), (5) and (6) of the Constitution to persons with no means to enable them to bring cases arising from the Declaration before the High Court involves a long procedure and its utilisation will be infrequent. This makes true of Zambia Gledhill's comment, made with reference to India, that "by and large the protection of a Fundamental Right is a privilege of the comparatively well to do."⁽¹⁶⁶⁾

(166) - Fundamental Rights in India, p. 120.

CHAPTER TWENTY-THREE

CHIEFS AND THEIR ROLE

INTRODUCTION

"I believe the chiefs have a part to play in the political and social life of our country." These words were spoken by the President of Malawi, Dr. Banda, at the installation of Paramount Chief Lundu of the Amang'anja in 1969.⁽¹⁾ They reflect the role of chiefs in independent African States and the attitude of African leaders towards these traditional rulers.

Although during the struggle against colonial rule the majority of the chiefs co-operated with the existing Administration, the fear that African nationalist leaders when in power would abolish chieftanship have not become true. The position and the role of chiefs are recognized in Constitutions of several African States. As stated in chapters Eleven and Twelve, chiefs sit in the Legislature or in a House of Chiefs in several countries (including Zambia). Although there is no House of Chiefs in Malawi, a writer has described the chiefs there as "one part of the triple alliance" that rules the country, the others being the President and the Malawi Congress Party.⁽²⁾

No African State has yet abolished the institution or announced plans to do so. Instead the institution is being modernised in order to function as an efficient arm of the Administration.

(1) - Rhodesia Herald, 25th July, 1969.

(2) - Simon Roberts, op.cit., p.305.

CHIEFTANSHIP IN ZAMBIA AND MALAWI

Although the text of the Zambian Constitution does not contain a provision on recognition of chieftaincy, Section 14 of the Zambia Independence Order (to which the Constitution is a Schedule) provides that "any person who, immediately before the commencement of this Order, was recognised by the Governor to be of Chiefly status in Barotseland or was recognised under any law as Litunga of Barotseland or as a Paramount Chief, Senior Chief, Chief or sub-Chief shall, until that recognition is withdrawn by the President, be deemed, from the commencement of this Order, to have received equivalent recognition by the President." Section 125(1) of the Constitution defines a Chief as "(a) the Litunga of Barotseland; (b) an African who is recognised by the Litunga and Council to be a member of a ruling tribal family in Barotseland and who is recognised by the President to be of Chiefly status in Barotseland; or (c) an African who is recognised by the President under the provisions of the Native Authority Ordinance or any law amending or replacing that Ordinance as a Paramount Chief, Senior Chief, Chief or sub-Chief or an African who is appointed as a Deputy Chief."

In Malawi, Section 6 of the Constitution provides that "the institution of Chieftaincy shall be recognized and preserved in the Republic so that the Chiefs may make the fullest contribution to the welfare and development of the country in their traditional fields."

The Malawi provision, therefore, goes further than the Zambian provision in that it not only recognizes the institution of Chieftaincy but guarantees the preservation of it. The Zambian provision, on the other hand, although explicitly recognizing the existing chiefs at the time of the commencement of the Order and implicitly recognizing the possible future appointment of new chiefs by defining a chief as including a person appointed by the President under the Native Authority Ordinance or who is recognized by the Litunga in Council and by the President to be of chiefly status in Barotseland, makes no declaration to preserve the institution.

From a constitutional point of view, however, there is no material difference between the two provisions. Chieftainship can be abolished in both countries by repealing the relevant provision by a two-thirds majority of all the Members of the National Assembly at the second and third readings of the repealing Bill. This would be followed by the repeal of the enactments under which chiefs are appointed and, in Zambia, the provisions of the Constitution regarding the House of Chiefs. In Malawi, while such abolition of chieftainship would in no way violate the letter of the Constitution, which permits repeal or amendment of any of its provisions, it would certainly violate the spirit of the Constitution, which envisages the preservation of the institution as long as the Constitution subsists. In Zambia repeal of the provision and abolition of the institution would not violate the letter or the spirit of the Constitution. Recognition of the institution by the Constitution does not necessarily envisage its retainment for the duration of the Constitution.

The Zambian and Malawian provisions may be compared with the provisions in the Constitution of Ghana. Article 153 of that Constitution declares that "the institution of chieftaincy together with its Traditional Councils as established by customary law and usage is hereby guaranteed." Parliament is barred from amending or repealing this provision(3). The only way in which chieftainship, therefore, can be abolished in Ghana is through a revolution either of the people or of the Government resulting in the overthrow of the Constitution and the adoption of a new one not recognizing the institution.

LAW RELATING TO CHIEFS

The appointment, functions, suspension, removal and other matters regarding chiefs are spelt out, in Zambia, in the Native Authority Ordinance(4) and the Barotse Native Authority Ordinance⁽⁵⁾ and, in

3. Art. 169(3) of the Constitution.

4. Cap. 157.

5. Cap. 159.

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Malawi, in the Chiefs Act,⁽⁶⁾ The Native Authority Ordinance applies in parts of Zambia other than Barotseland while the Barotseland Native Authority Ordinance applies only in Barotseland. Malawi also had a Native Authority Ordinance⁽⁷⁾ with provisions similar to those of the Zambian Ordinances. The Ordinance was replaced by the present Chiefs Act in 1967.

RANKS OF CHIEFS

In parts of Zambia other than Barotseland chiefs are of four ranks - Paramount Chiefs, Senior Chiefs, Chiefs and Sub-Chiefs.⁽⁸⁾ There is also the rank of Deputy Chief given to a person appointed to assist a chief of any rank.⁽⁹⁾ In Barotseland, on the other hand, chiefs are of three ranks - the Litunga (who is the only Paramount Chief), Chief and Sub-Chief.⁽¹⁰⁾ The ranks in Malawi are the same as those in Barotseland except that Paramount Chiefs are not limited to one.

A Sub-Chief is subordinate to a Chief and a Chief's area may have several Sub-Chiefs.⁽¹¹⁾ A Chief is subordinate, in Zambia, to a Senior Chief and a Senior Chief's area may have several Chiefs. Senior Chiefs in parts of Zambia other than Barotseland and Chiefs in Malawi and Barotseland are subordinate to a Paramount Chief. While a Chief may have no Sub-Chiefs under him, a Paramount Chief has always several Chiefs under him. The office of Paramount Chief cannot, in fact, be established unless there are several Chiefs or Senior Chiefs who would be subordinate to the holder of the office.

The offices are often established according to tribes. A Paramount Chief of the Ngonis, for instance,

(6) - Cap. 22:03

(7) - Cap. 73 of the Laws of Nyasaland 1957 Edition.

(8) - Ss. 2 and 2A(1) Native Authority Ordinance.

(9) - S.2A(3) *ibid.*

(10) - S.2 Barotse Native Authority Ordinance.

(11) - E.g. Chief Kawinga of Kasupe District in Malawi has six Sub-Chiefs under him.

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has paramountcy over Ngoni Chiefs while a Ngoni Chief has jurisdiction over Ngoni Sub-Chiefs. Not all tribes, however, have Paramount Chiefs.

A Chief or Sub-Chief may appoint Village Headmen but these are of no constitutional importance.

APPOINTMENT

In parts of Zambia other than Barotseland, Paramount Chiefs, Senior Chiefs, Chiefs and Sub-Chiefs are recognized by the President by notice in the Gazette⁽¹²⁾. It should be noted that recognition is acknowledgement of that which is already there. The Chief is nominated by the tribe or portion of the tribe or the other Chiefs, in the case of a Paramount Chief, under the law and custom of the tribe. The President either recognizes the nominee or declines to do so, but he cannot impose a person not nominated for recognition. If there is a doubt or dispute as to the proper person to be recognized, the President may, if he thinks it desirable so to do, direct that an inquiry be held into such matter and may provide for the manner in which and the person before whom such inquiry must be held.⁽¹³⁾

In Barotseland Chiefs and Sub-Chiefs are similarly recognized by the President.⁽¹⁴⁾ Before such recognition, however, the person must have been recognized by the Litunga and Council to be of a ruling tribal family in Barotseland.⁽¹⁵⁾ There is no provision in the Ordinance or in the Constitution of Zambia regarding the recognition of the Litunga. The Litunga's position was governed by the 1964 Barotseland Agreement.⁽¹⁶⁾

In Malawi Paramount Chiefs, Chiefs and Sub-Chiefs are also appointed by the President.⁽¹⁷⁾ In the case

(12) - S.2A(1) Native Authority Ordinance.

(13) - S.2A(2) ibid.

(14) - S.2 Barotse Native Authority Ordinance.

(15) - S.125 (1) Constitution of Zambia.

(16) - The Agreement has been terminated - Constitution (Amendment) (No. 6) Act (No. 12 of 1970). This will make the position of the Litunga the same as that of other chiefs.

(17):- Ss. 4 and 5 Chiefs Act.

of Paramount Chiefs and Chiefs the President can only appoint a person he recognizes as being entitled to hold the office under customary law and who has the support of the majority of the people in the area of jurisdiction of the office.⁽¹⁸⁾ These requirements do not apply in the case of the appointment of Sub-Chiefs since they are appointed at the request of the Chief.⁽¹⁹⁾ The President may order an inquiry with regard to the appointment of any Chief.^(19a)

REMOVAL, SUSPENSION, ETC

There is no provision for the removal of the Litunga in the Barotse Native Authority Ordinance or in the Constitution of Zambia. Other Chiefs, however, may have their recognition revoked, suspended, or varied by the President after consultation with the Litunga.⁽²⁰⁾ In other parts of Zambia the President can at any time by notice in the Gazette revoke, suspend or vary the recognition of any Chief or the appointment of any Deputy Chief.⁽²¹⁾ In exercising these powers the President is not required to hold any inquiry first. The reasons for which a Chief may be suspended are not specified.

In Malawi, on the other hand, a Chief may be removed only for the reasons specified in the Act. The President may remove a Paramount Chief, Chief or Sub-Chief "if after due inquiry he is satisfied that - (a) the person concerned has ceased to be entitled under customary law to hold such office; (b) the person has lost the confidence of the majority of the people residing in his area; or (c) such removal is necessary

(18) - S.4(2) ibid.

(19) - S.5 ibid.

(19a)- S.12 ibid.

(20) - S.21 Barotse Native Authority Ordinance.

(21) - S.2A(4) Native Authority Ordinance.

in the interests of peace, order and good government".⁽²²⁾
 Both the latter provisions are obviously somewhat flexible. A Chief may be suspended from performing his functions during the inquiry.⁽²³⁾

Although Section 11(1) by using the words, "if after due inquiry he is satisfied", seems to make the holding of an inquiry before removing a Chief compulsory, Section 12 seems to give the President discretion to appoint or not to appoint such an inquiry. It provides that "the President may appoint persons to inquire into any question relating to the removal from the office of Paramount Chief, Chief or Sub-Chief of any person and to report and make recommendations thereon to the President." The Section is margin-noted "Inquiries". Putting together the wording of the two provisions, that of Section 11(1) seems to override that of Section 12.

(22) - S. 11(1) Chiefs Act. A removed Chief may be banned from the area where he was chief if the President is satisfied that his presence in such area would be prejudicial to maintenance of public order - S.15(1). If, in the opinion of the President there is no other suitable person to replace a deposed Chief, he may appoint a Chief Council comprising a chairman and three or more members to perform the functions of such chief until a suitable person is appointed as Chief - S.13(1) and(3). The chairman and members of a Chief Council may be removed from time to time - S.13(2).

(23) - S.11(2) ibid.

RELATIONSHIP WITH THE ADMINISTRATION

Although Chiefs are appointed, suspended or removed by the President, they are not civil servants and do not, therefore, belong to the Public Service as defined in the Constitutions of Zambia and Malawi respectively. The Constitution of Malawi specifically excludes the offices of Chief or sub-Chief from the Public Service together with those of President, Speaker and Deputy Speaker of the National Assembly, Minister or Parliamentary Secretary, Member of Parliament or member of any Commission. The office of Chief is, however, in practice, in both Zambia and Malawi, usually permanent; it is more secure than the office of President or Minister or any other public office.

Chiefs are, however, part of the Central Administration as well as part of the Local Administration. Their functions are based on legislation enacted by the Central Administration, legislation enacted by the Local Authority and on traditional law. Their emoluments are paid by the Central Administration.

FUNCTIONS

Malawi

The Chiefs Act outlines the functions of Chiefs. The functions of a Paramount Chief are such as may be specified by the President in the appointment of the holder of the office.⁽²⁴⁾ Subject to the authority given to the Paramount Chief to whom he is subordinate, a Chief has the following functions:

- (a) to preserve the public peace;
- (b) to carry out the traditional functions of his office under customary law in so far as the discharge of such functions is not contrary to the Constitution or any written law and is not repugnant to natural justice or morality;
- (c) to assist in the collection of tax;

(24) - S.6.

- (d) to assist in the general administration of the District in which his area of jurisdiction is situate and for such purpose to carry out such functions as the District Commissioner may require;
- (e) for any of the purposes mentioned in (a), (c) and (d) to carry out and enforce any lawful directions of the District Commissioner.⁽²⁵⁾

A Sub-Chief's functions are such of the functions of the Chief (to whom he is subordinate) as may be delegated to him.⁽²⁶⁾ A Chief may not, however, delegate to the Sub-Chief any function which under customary law must be exercised by the Chief himself.⁽²⁷⁾ In carrying out his functions a Sub-Chief acts in accordance with the general or special directions of the Chief to whom he is subordinate.⁽²⁸⁾ A Chief may appoint counsellors or village headmen to assist him in his functions.^(28a)

It has been seen in Chapter Thirteen that Chiefs are members of the Electoral College which nominates the presidential candidate. They are also ex-officio members of District Councils which are the local authorities of rural areas. Further, they often sit on various statutory bodies and, as seen in Chapter Sixteen, on Regional Traditional Courts. They, however, do not sit on statutory bodies and Regional Traditional Courts by virtue of their office but as fit and suitable individuals.

Formerly the Chiefs possessed greater powers under the Native Authority Ordinance and the African Courts Ordinance. The Council of Chiefs in a District formed the native authority of the District while each Chief or Sub-Chief was the native authority of his area. As native authorities the Chiefs had extensive legislative and administrative powers. A native authority acted as the local government authority of the area. Under the African Courts Ordinance Chiefs presided over African Courts. Under both the Native Authority

(25) - S.7.

(26) - S.8(1).

(27) - Ibid.

(28) - S.8(1)

(28a)- Ss. 9 and 14.

Ordinance and the African Courts Ordinance, a Chief was permitted to execute his functions with the aid of councillors. The local government powers have now been transferred to the District Councils while the judicial powers are now being exercised by non-Chiefs presiding over traditional courts (except in the case of Regional Traditional Courts where Chiefs sit although not by virtue of their office).

The loss of legislative, judicial and wider administrative powers has, however, been compensated for by the increased respect which the Chiefs are now enjoying because they are no longer involved in matters that often caused controversy between them and their people and consequently made some of them unpopular.

Zambia

The Native Authority Ordinance and the Barotse Native Authority Ordinance do not spell out the functions of Chiefs as Chiefs but as Native Authorities - an office distinct from that of Chief. This was also the position in Malawi until the enactment of the Chiefs Act in 1967 which repealed the native authority system.

THE NATIVE AUTHORITY SYSTEM

It was pointed out in Chapter Five that the native authority system, together with the native courts system, was introduced to put into effect indirect rule. The native authorities became arms of the Central Administration as well as local government authorities in their respective areas.

Native authorities in Zambia are established by the President. In parts of Zambia other than Barotseland, the President may recognize any Chief or other native, whether by himself or in council or any native council or other group of natives as a native authority.⁽²⁹⁾ If a council is constituted as a native authority it must be a council known to and constituted under the native customary law proper to the area.⁽³⁰⁾ If there is no such council known to

(29) - S.3(1)(d) Native Authority Ordinance.

(30) - S.3(2) ibid.

the customary law of the area the Minister may recognize some other council and in that case may specify the manner in which it must be constituted.⁽³¹⁾

In Barotseland the President recognizes the Litunga and his council as the native authority for all Barotse-land, to which other native authorities are subordinate.⁽³²⁾ Other native authorities are appointed by the President if deemed necessary by the Litunga.⁽³³⁾ In each case the President takes into account the native law and custom proper to the area unless there is no such law and custom -- in which case the native authority would be established in such manner as the President may prescribe.⁽³⁴⁾

Every native authority is either a body corporate or a corporation sole with perpetual succession and a common seal.⁽³⁵⁾

It will be noted that a native authority could be the Chief of the area or other person (whether by himself or in council) or any native council or other group of natives. It does not, therefore, follow that a Chief would automatically become his area's native authority. However, even where the native authority is a council, the Chief or Chiefs of the area are always ex-officio members of such council. In cases where a Chief is the sole native authority he exercises all the powers accorded to a native authority by the respective Ordinance or by any other law.

The powers dealt with below should be looked upon as powers which may be exercised by a Chief alone as a native authority.

POWERS OF A NATIVE AUTHORITY

The powers of a native authority may be divided into three parts - administrative, legislative and financial.

(31) - Ibid.

(32) - S.3(2) Barotse Native Authority Ordinance.

(33) - Ibid.

(34) - Ibid.

(35) - S.3A(1) Native Authority Ordinance. The Barotse Native Authority Ordinance says nothing on this matter.

i. Administrative Powers

It is the duty of every native authority to perform the obligations imposed by the Ordinance or any other law and generally to assist the Government to maintain law, order and good government among the natives residing in the area over which its authority extends.⁽³⁶⁾ Every native authority must prevent to the best of its ability the commission of offences within its area.⁽³⁷⁾ The messengers of a native authority styled kapsus, exercise the powers of a regular police officer but these powers must be first conferred upon them generally or specially by a police officer of at least the rank of Assistant Superintendent.⁽³⁸⁾

ii. Legislative Powers

Native authorities have power to make legislation of two types - orders and rules. Subject to the provisions of any law for the time being in force and to the general or special directions of the Minister or the native authority to which it is subordinate, a native authority may issue orders binding on the natives within its jurisdiction.⁽³⁹⁾ Equally it may, subject to the provisions of any law in force and the concurrence of the native authority to which it is subordinate and subject to the approval of the Minister (in parts of Zambia other than Barotseland) or the President (in Barotseland), make rules to be obeyed by natives in the area.⁽⁴⁰⁾

(36) - S.4 Native Authority Ordinance; S.4 Barotse Native Authority Ordinance.

(37) - S.6 ibid.; S.6 ibid.

(38) - Ss. 4A and 4B ibid.; Ss. 4A and 4B ibid.

(39) - S.8(1) ibid.; S.8(1) ibid.

(40) - S.17(1) ibid.; S.19(1) ibid.

The subjects on which orders or rules may be made are numerous.⁽⁴¹⁾ The orders and rules are promulgated by being made known to the people of the area in such manner as is customary in the area.⁽⁴²⁾ After such notification they become effective.⁽⁴³⁾ The orders or rules must, however, be reported at the earliest possible moment to the native authority, if any, to which the native authority is subordinate and to the Provincial Local Government Officer.⁽⁴⁴⁾

(41) - See Ss. 8(1), 9(1) and 17(1) Native Authority Ordinance; Ss. 8(1), 9(1) and 19(1) Barotse Native Authority Ordinance. Some of the subjects on which rules and orders may be made are: imposition of rates and fees; manufacture, distillation, sale, transport, distribution, supply, possession and consumption of intoxicating liquors; gambling; carrying and possession of firearms; conduct which might cause a riot, disturbance or breach of the peace; sanitation; pollution of water; preservation of trees and other vegetation; spread of infectious and contagious diseases of human beings or animals; movement of natives within the area; reporting of births or deaths; manner of watering, pasturing, moving stock, cattle management and husbandry; maintenance of roads; compilation of the census and tax register and the collection of taxes; trade and industry; testamentary disposition of property.

(42) - S.10(1) ibid.; S.10(1) ibid.

(43) - Ibid.

(44) - S.10(2) ibid.; S.10(2) ibid.

The Provincial Local Government Officer or the President (after consultation with the Litunga) may, if he considers it necessary that an order should be made on a matter on which orders or rules may be issued by a native authority, ask the native authority concerned to issue the required order or rule.⁽⁴⁵⁾ If the native authority fails to make the order or rule the President or the Minister (in areas other than Barotseland) may issue the order himself.⁽⁴⁶⁾ The Minister makes the order or rule at the request of the Provincial Local Government Officer and must be satisfied before making the order or rule that the native authority concerned has had a reasonable opportunity of expressing itself and that the making of the order would be in the best interests of the natives of the area.⁽⁴⁷⁾

Contravention of the orders or rules is enforced through the native courts of the area or any subordinate court with jurisdiction in the area.⁽⁴⁸⁾

Orders or rules may be revoked by the native authority that made them or by the Minister or by the President (after consultation with the Litunga).⁽⁴⁹⁾ The Minister's or the President's power of revocation extends to orders or rules made by the native authority. Revocation of an order or rule must be communicated in the same manner as promulgation.

ii. Financial Powers

Every native authority has power to impose rates and taxes as a means of raising revenue to carry out its functions.⁽⁵⁰⁾ All revenue raised (including that paid as fines or court fees in native courts) is deposited in the native authority's treasury.⁽⁵¹⁾

(45) - S.11A(1) ibid.; S.11(1) ibid.

(46) - Ibid.

(47) - S.11A(1) Native Authority Ordinance.

(48) - S.12(3) Native Authority Ordinance; S.12(3) Barotse Native Authority Ordinance.

(49) - Ss. 11A(4) and 17(5) ibid.; Ss. 11(2) and 19(5) ibid.

(50) - S.17 (1) ibid.; S.19(1) ibid.

(51) - S.14(1) ibid.; S.14(1) ibid.

15. A native authority may obtain a loan from the Government.⁽⁵²⁾ The President pays every year to the Barotse central native authority - i.e. that comprising the Litunga and council - not less than seventy-five per centum of the native tax collected in each year in Barotseland or elsewhere in Zambia from natives of Barotseland.⁽⁵³⁾ Expenses of a native authority are met from its treasury.⁽⁵⁴⁾

iv. Judicial Powers

A native authority as such does not exercise judicial powers although it is responsible for the maintenance of the court houses, the remuneration of court staff and other expenses. The Chief or the members of a native authority may be members of the area's native court but their authority in that case does not arise from their native authority membership. It arises from their appointments as members of the court by the Minister or the President (in the case of courts in Barotseland). Where a native authority is also the area's native court, the court is not prevented from trying an offence because such an offence arose from an order or rule issued by the court as a native authority or by a member of the court as a native authority.^(54a)

WITHDRAWAL OF RECOGNITION

In parts of Zambia other than Barotseland, the Minister may, by notice in the Gazette, withdraw recognition or appointment of a person, council or group of persons as a native authority or of a person as a member of a council or group recognized as a native

(52) - S.14(3) ibid.; S.14(3) ibid.

(53) - S.15 Barotse Native Authority Ordinance.

(54) - S.15 Native Authority Ordinance; S.17 Barotse Native Authority Ordinance.

(54a)- S.18 ibid.; S.20 ibid.

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 authority.⁽⁵⁵⁾ In Barotseland the President may on the recommendation of the Litunga at any time by notice in the Gazette withdraw recognition from any native authority.⁽⁵⁶⁾ Once recognition has been withdrawn the person, council or group of persons concerned ceases to exercise the functions of a native authority.⁽⁵⁷⁾ The Minister or the President (on the recommendation of the Litunga) may appoint a new native authority.⁽⁵⁸⁾

It should be noted that where a chief is also the area's native authority, withdrawal of recognition from him as a native authority is not necessarily followed by his removal from chieftainship. The two offices are distinct. A chief whose recognition as a native authority has been withdrawn may remain a Chief while the functions of a native authority are entrusted to a council or to another person. The Chief would retain the traditional functions while the other functions are performed by the new native authority. Situations of

(55) - S.3(5) Native Authority Ordinance. A person who has been removed as a native authority or as a member of a native authority may be ordered in the interest of peace, order and good government to leave the area and not to re-enter it while the order subsists - S.3(9). A Local Government Officer may be ordered by the Minister to assume the functions of the native authority until a new one is appointed - S.3(12).

(56) - S.3(4) Barotse Native Authority Ordinance. A person who has been removed may be banned from the area - S.3(7). The Provincial Local Government Officer may on the recommendation of the Litunga appoint any native to be a native authority for a period not exceeding six months - S.3(9).

(57) - S.3(5) Native Authority Ordinance; S.3(4) Barotse Native Authority Ordinance.

(58) - Ibid.

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this nature may, however, never arise. If a Chief becomes unsuitable as a sole native authority or as a member of a native authority composed of a group of persons, he should be equally unsuitable to remain a Chief.

STAFF

Chiefs in Malawi and native authorities in Zambia employ staff remunerated, in Malawi, by the Central Government, and, in Zambia, by the native authority itself. The staff includes clerks and messengers (kapasus in Zambia). Because of its wide range of functions, a native authority in Zambia has a larger staff than a Chief in Malawi. Messengers possess powers of arrest which may be exercised by regular police officers.

CHAPTER TWENTY - FOUR

THE ONE-PARTY SYSTEM AND ITS CONSTITUTIONAL IMPLICATIONS.1. The Party System.

"Under representative forms of government parties have become the instruments for the expression of the people's will."⁽¹⁾ There is, however, no uniform party system applying in all countries. Three systems exist in the world today - the two-party system, the multi-party system and the one-party system. The United Kingdom and the United States are the two most important examples of countries with a two-party system. The system has also taken root in the Commonwealth countries of Canada, New Zealand and Australia. In all these countries there is no law preventing the formation of other parties. The attitude of the voters and the electoral system of single member constituencies in each country have, however, made it difficult for a strong third party to arise.⁽²⁾ In the United States the electorate votes either for the Republican Party or the Democratic Party. In the United Kingdom it votes either for the Conservative Party or for the Labour Party, with a small proportion voting for the Liberal Party and the small nationalist parties.

The multi-party system exists mostly in the countries of Western Europe - e.g. France, West Germany, Holland, Belgium, and Italy, where the system of proportional representation has tended to foster smaller parties. Outside Europe it exists in some Latin American countries where juntas are not in control. It is also found in Israel and a number of Asian States.

Until the last decade the one-party system was a constitutional device existing only in the communist countries of Eastern Europe and Asia.

1. Ameller, op.cit., p.97.

2. Writing about the United Kingdom, White and Hussey state: "The whole tradition of our political life has prevented the development of many groups and parties as in France, and has, also worked against coalitions, except in times of national stress and press." - op.cit., p. 40.

2. The device has, however, now spread to Africa. It has also been introduced by Cuba in the once impregnable - to - communism Western Hemisphere.⁽³⁾ The position in most African States today is either that of a de jure or a de facto one-party system. This Chapter is, however, only concerned with the former. The earliest States to adopt the system in Africa were Guinea,⁽⁴⁾ the Central African Republic,⁽⁵⁾ Algeria⁽⁶⁾ United Arab Republic,⁽⁷⁾ Chad,⁽⁸⁾ Ghana⁽⁹⁾ Tanganyika⁽¹⁰⁾ and Mauritania.⁽¹¹⁾ Since then others have followed the pattern, including Malawi.

The turning of Malawi into a one-party State was a de jure recognition of what had been the de facto position for several years. After the Malawi Congress Party had won all the lower roll seats and two upper roll seats in the 1961 election⁽¹²⁾ and all the fifty ordinary roll seats in the pre-independence election in 1964 opposition groups voluntarily disappeared from the political scene. The change to a one-party system was, therefore, a mere formality. The National Convention convened by the Malawi Congress Party to approve the draft republican Constitution also approved that the Malawi Congress Party be the only party in the country. This was implemented by Section 4 of the Constitution which provided that "there shall be in the Republic after the appointed day only one party" and that that party" shall be the Malawi Congress Party."

B. Powers of the Malawi Congress Party

The constitutional role of the Malawi Congress Party is very similar to that of the Tanganyika African National Union and the Afro-Shirzi Party in Tanzania. As noted in Chapter Thirteen, before a person becomes a presidential candidate he is nominated by an Electoral College.⁽¹³⁾

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3. After declaring itself a communist State, Cuba became a one-party State in 1962. The only party permitted is the Cuban Communist Party.
 4. The only party permitted is the Partie Democratique de Guinee.
 5. The country is under military rule at present. The only party permitted before the coup was The Movement for Social Revolution of Black Africa.
 6. The only party permitted is The National Liberation Front.
 7. The only party permitted is The Arab Socialist Union.
 8. The only party allowed is The Parti Progressiste Tchadien.
 9. Ghana is now no longer a one-party state. Before the military coup of 1966, the only party permitted was the convention People's Party.
 10. The Tanganyika African National Union, became the only party. TANU and the Afro-Shirazi Party form the one party permitted in Tanzania - a union of Tanganyika and Zanzibar. The Afro-Shirazi Party operate in Zanzibar and the Tanganyika African National Union in Tanganyika. The Constitution envisages a merger of the two - S.3 (2).
 11. The Party of the Mauritanian People is the only Party allowed in the country.
 12. See Chapter 3.
 13. S. 11 (1) of the Constitution.

3. Only members of the Party are eligible for nomination.⁽¹⁴⁾
 The Electoral College "comprises (a) members of the National Executive of the Party; (b) Members of the National Committee of the Party's League of Malawi Women; (c) Members of the National Committee of the Party's League of Malawi Youth; (d) Members of the Regional Committees of the Party; (e) chairmen, Secretaries and Treasurers of all District Committees of the Party; (f) Chairmen, Secretaries and Treasurers of all District Committees of the League of Malawi Women; (g) Chairmen, Secretaries and Treasurers of all District Committees of the League of Malawi Youth."⁽¹⁵⁾
 Only three classes of persons are members of the College by virtue of qualifications other than membership of the Party. These are: (a) All chiefs who are recognized as All Native Authorities, (b) All chairmen of District Councils (District Local Government authorities); (c) All members of Parliament except when Parliament has been dissolved.⁽¹⁶⁾ All elected Members of Parliament, it should be remembered, are members of the Party.⁽¹⁷⁾ Most Chairmen of District Councils are also members of the Party. Although, therefore, it is the voters who have the final decision on who should be President, the party wields considerable power in that it decides on the candidate. The voters are unlikely to reject the candidate.

As indicated above, similar powers are possessed by the Party in Tanzania. The Electoral Conference which nominates the presidential candidate is composed of those who are entitled to attend the National Conference of the Tanganyika African National Union and delegates from the Afro-Shirazi Party.⁽¹⁸⁾ Those entitled to attend the National Conference of T.A.N.U. are: (a) The President, the Vice-President, the Secretary-General and the National Treasurer of the party; (b) Two elected delegates from each district of the Party; (c) All members of Parliament or of a dissolved Parliament^(18a) (most of these are members of the Party or the Afro-Shirazi Party); (d) All Regional chairmen of the Party; (e) All District chairmen of the Party; (f) All District Secretaries of the Party; (g) Members of the Central Committee of the Party appointed by the President; (h) Members of the National Executive of the Party elected by the National Conference;

14. S. 10 (2)(d).

15. S. 11 (2)(a) & (g).

16. S. 11 (2)(h)-(i).

17. See S. 23 (d).

18. See S. 6 (3) and (4) Constitution of Tanzania.

18a. This differs from the position in Malawi where Members of a dissolved Parliament lose membership of the Electoral College.

4. (i) delegate from each of the affiliated organizations of the Party.⁽¹⁹⁾ As in Malawi, although the voters have the final decision on who should be President, the Party (the Tanganyika African National Union and the Afro-Shirazi Party together) is the real determining factor since the voters do not choose the candidates.

The power of the Party over the President in Malawi, as in Tanzania, is real and effective. Since the President must be a member of the Party, it follows that if he is dismissed from the Party he cannot continue to hold the office constitutionally. While this power may never be used as long as Dr. Banda is President because of his special position as the country's liberator, it would be easily used in future when men of lesser stature assume the office.

The Party also occupies an important role in relation to elected Members of the National Assembly in that membership of the Party is one of the qualifications for candidature.⁽²⁰⁾ If a Member of the National Assembly ceases to be a member of the Party, he also ceases to be a Member of the Assembly.⁽²¹⁾ Accordingly the Party can terminate a person's membership of the Assembly by dismissing him from its membership. This gives the Party real control over the Members of the Assembly. Similar powers are possessed by the Party in Tanzania.

The Malawi Congress Party also plays an important role regarding a temporary vacancy in the office of President. As already seen in Chapter Thirteen, if a vacancy occurs in the office of President or if the President is so incapacitated as to be unable to appoint a Presidential Commission, the functions of the office are discharged by a Presidential Council comprising the Secretary-General of the Party and two Cabinet Ministers who must also be members of the National Executive of the Party.⁽²²⁾ The two Cabinet Ministers are appointed by the Committee of Appointment convened by the Secretary-General of the Party and comprising members of the National Executive of the Party and Cabinet Ministers.⁽²³⁾ The Council acts until a new President is elected or until the President recovers, whichever is the case.⁽²⁴⁾ There are no similar provisions in the Constitution of Tanzania and accordingly the Party there has not similar powers.

19. See Constitution of the Tanganyika African National Union. It is minuted as an Appendix to the constitution of the Union.

20. S. 23 (d) Constitution of Malawi.

21. S. 28 (2)(h).

22. S. 13 (1).

23. S. 14 (1).

24. S. 13 (2) as amended by S. 2 of the Constitution Amendment Act, 1966 (No. 39 of 1966).

The powers mentioned above are the only ones conferred on the Party or its officers by the Constitution. They are, however, not its only powers. It exercised a great deal of extraconstitutional powers. Being the ruling Party it lays down the general policy of the Government at its annual conferences and influences every aspect of political life in the country. Its role in this respect is, however, inferior to that of the Party in Tanzania. The reason for this is that although both President Banda and President Nyerere enjoy indisputable leadership over their respective parties, the former is autocratic and, therefore, exercises a firmer hand on the Party, rendering it less likely to introduce controversial matters not backed by the President.

C. Constitutional Implications.

It is proposed to discuss the constitutional merits, demerits and implications of the one-party system in general and in Malawi in particular, in the form of answers to three questions.

1. Has the one-party system any constitutional advantages over the other two systems? The only one advantage the system has over the other two systems is that it produces stable Governments and continuity which cannot be attained by the two-party system. The President, Ministers, and Members of Parliament may change occasionally but the party remains the same. The policies are likely to remain largely the same for a long time. The violent changes in policy experienced in countries with a two-party or multi-party system owing to the defeat of the party in office or the replacement of one coalition Government by another do not arise in a one-party State.

2. Is the one-party system compatible with parliamentary democracy? A system that does not offer the electors an opportunity to place in office a party of their own choice cannot be said to be really democratic. The procedures of electing the President and Members of Parliament in Malawi and Tanzania can, however, be said to be democratic in the narrow sense in that ultimately the candidate must be the chosen representative of the people even though the people's choice may be somewhat limited. It has been seen in Chapter Thirteen that although one presidential candidate faces the electorate (in Malawi as well as in Tanzania) a contest between persons seeking candidature can take place in the Electoral College or the Electoral Conference, which nominates the presidential candidate. This was, however, unlikely to happen in Malawi as long as Dr. Banda continued to seek nomination. It should be noted that Dr. Banda is now life President. (25)

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6. It is unlikely to happen in Tanzania as long as Nyerere will continue to seek nomination for no one would think of challenging the "Mwalimu" (President Julius Nyerere) just as no one would have thought of challenging the "Ngwazi" (Dr. Kamuzu Banda). In future such contests could, however, be frequent. It has also been seen in Chapter Thirteen that although the voters are faced with one candidate they can defeat his bid for election by the majority of those voting casting their votes against him.

In the election of Members of Parliament, however, the procedure in Malawi and Tanzania is "more democratic." In this case the parliamentary candidate is not nominated by an electoral college or conference; He files his nomination papers with an authorized officer; In Malawi the nomination papers must be signed by at least two voters,⁽²⁶⁾ Although the candidate must be a member of the Party the voters who endorse his nomination need not be. This ensures nomination of a candidate even in a constituency where members of the Party are bent on supporting a particular candidate. There is no limit as to the number of candidates who may stand in a constituency. The Party does not use its machinery to support a particular candidate. The candidates have to rely on their personal popularity, as they do when contesting for a Party position. If only one candidate files his nomination papers, he is declared elected without a poll.⁽²⁷⁾ If two or more candidates are nominated, a poll is taken and the candidate polling the most votes is declared elected.⁽²⁸⁾

The first elections held under the system in Tanzania and in Malawi resulted in a considerable number of Members of the previous Parliament, including some Minister, being defeated. In Kenya the procedure produced startling results. Although the country is not yet a one-party State, the last general election in 1969 was held after the opposition Kenya People's Union had been banned and its leading members detained. Members of the ruling Kenya African National Union were to contest the election between themselves. Of the former 156 Members of Parliament, 100 (including 14 Ministers and Assistant Ministers) lost their seats.

25. Constitution (Amendment) (No. 3 Act)(No. 35 of 1970).

26. Sec 8, 9 (2)(b) Parliamentary Elections Act . . .

27. S. 15 ibid.

28. Ss. 16 et seq. ibid.

The results of the elections in Tanzania and Kenya show that given time to evolve, the one-party system obtaining in Malawi and Tanzania could even produce Members of Parliament of a higher quality than those produced under the two or multi-party system. With all candidates belonging to the same party, voters are bound to pay more attention to the quality of the various candidates than is done by voters in a two or multi-party system. Voters under the latter systems tend to cast their votes for the party they support rather than for the candidate.⁽²⁹⁾ For instance, in the United Kingdom voters who support the Conservative Party or the Labour Party usually vote for the candidate of that party irrespective of his personal qualities and those of his opponent. There are many members who sit in the House of Commons today who would not be there had they not sought election under the banner of their particular party.

The most serious demerit of the one-party system is that it does not produce real opposition to the Government in Parliament. Individual Members critical of the Government may emerge but they could never form a co-ordinated opposition. This demerit could be set-off by two arguments against opposition as found in a two or multi-party system. First, much of what a parliamentary opposition under a two or multi-party system says is not intended to benefit the people but the party itself. An opposition party may oppose or criticise an unpopular measure which is in the interests of the country (e.g., increased taxation to curb inflation) merely to gain popularity with the voters. Secondly, the two or multi-party system stifles criticism of the Government from within the governing party in crucial matters of policy or administration. Members very often vote for Government measures they dislike because they are afraid of damaging the image of the party in the eyes of the electorate and thereby bring about the defeat of the Government in Parliament.

It remains to be seen whether interest groups will emerge in the Malawi Parliament and in those of other one-party States in Africa. The emergence of such group interests in a number of Legislative Chambers of the socialist democracies of Eastern Europe and Asia has created in such chambers cleavages of interests similar to those one would encounter under a two or multi-party system. In Hungary, for instance, the Patriotic People's Front, the only party permitted in the country, comprises the Hungarian Socialist Workers Party, the National Peasant Party and the Smallholders Party.⁽³⁰⁾

Footnotes on page 943.

6. The Front of National Unity in Poland comprises the Polish United Workers Party, the United Peasant Party and the Democratic Party.⁽³¹⁾ There are also associations in the Polish Diet such as the Catholic Members Association and the Association of Pax.⁽³²⁾ Even in those countries where the Party has no distinct segments, the tendency is for urban Members, rural Members, Members representing the armed Forces or literary groups, etc. to come together and speak for their segment of the population.

If this group interest arose in Malawi it would greatly mitigate the lack of an opposition party. It should, however, be noted that Malawi has an opposition composed of Nominated Members, which is, therefore, a creature of the President. Although the Members are nominated by the President, they are allowed the latitude and privileges of a real opposition. Their leader is styled the "Leader of the Nominated Members."⁽³³⁾ The Members sit separately and are referred to as the "other side of the House." The only handicap of this "created opposition" is that it is at present wholly composed of Europeans. President Banda has used the provision empowering him to nominate Members to give representation in the National Assembly to Europeans.⁽³⁴⁾ In a country that was until a few years ago ruled by Europeans, the European Members are conscious of the fact that they should not be very critical lest they appear to be re-asserting colonial attitudes or lest they be told that "Malawi" was no longer "Nyasaland". African leaders are still very sensitive to European criticism. It was due to recognition of some of this sensitivity that the Progressive Party (formerly the Northern Rhodesian wing of the United Federal Party) in Zambia decided to disband soon after independence on the ground that there was no room for a European party in an African ruled country.

29. There are, of course, large numbers of voters under a two or multi-party system who are not committed to any party.

30. See Britannica Book of the Year 1967, pp. 631-633, where information on parties in the world is given.

31. Ibid.

32. Ameller, op.cit., pp. 98-99.

33. The present leader, Mr. Michael Blackwood, has been in the Chamber longer than any other Member, European or African.

34. The political interests of Asians and Coloureds are identified with those of Africans.

9. The main role of the nominated Members in Malawi, is, therefore, that of pointing out defects in legislation or Government policy without antagonizing the Government or standing as champions of a particular cause. While they may find it easy to criticize the Government to any length on matters affecting Africans or Africans and Europeans together, they would find it necessary to choose their words in opposing measures directed at interests which are largely European, for instance, ownership of large land estates.

3. Is the one party-system compatible with the rights of free association, expression, conscience, etc.? A system that channels all those interested in politics into only one party cannot be compatible with the enjoyment of these rights: "...it is inescapable that the adoption of such a system, whether by legislation or by the suppression of other political parties, cannot be consistent with the enjoyment of individual liberties. Besides being not conducive to the enjoyment of human rights in general, it also entails the denial of certain specific freedoms such as freedom of conscience, expression, assembly and association."⁽³⁵⁾

The system is not, however, inconsistent with the whole concept of human rights in a Constitution. While it greatly impairs the individual's freedom of association, expression, conscience and assembly, it does not affect his right to life, personal liberty, protection of the laws, free movement, etc. That the system is not incompatible with the existence of human rights in a Constitution is evidenced by the fact that although the Constitution of Malawi has no Bill of Rights, there are Bills of Rights in the constitutions of most socialist democracies of Eastern Europe and Asia. In Africa, Algeria is an example of a one-party State with a Constitution that contains a Bill of Rights. The Bills of Rights in the Constitutions of the Socialist democracies and that in the Constitution of Algeria protect, among other rights, those of free speech, association and assembly.⁽³⁶⁾ The only difference is that freedom of association in this case does not include the freedom to form opposition parties.

35. Ezejiofor, op.cit., p. 243.

36. See, e.g., Articles 10 Constitution of the Socialist Federal Republic of Yugoslavia; 37 Constitution of the People's Republic of China; 125-6 Constitution of the Union of Soviet Socialist Republics; and 12-22 Constitution of Algeria.

10. It merely covers the right to form economic, cultural, educational and social organizations within the framework of the national party.

Malawi could, therefore, adopt a Bill of Rights and still remain a one-party State. Presently, as already seen in Chapter Twenty/^{One}the individual's rights are protected by the common law and statutory law. The rights of free association, expression, conscience and assembly are, however, greatly curtailed by the one-party system.

CONCLUSION.

As indicated at the beginning of this Chapter, the one-party system is rapidly establishing itself in Africa. Leading African politicians think that the system is the best constitutional arrangement for African States.⁽³⁷⁾ President Nyerere of Tanzania, for instance, considers that "football politics" - the term he gives to politics under a two-party system - would be fatal to democracy in Africa. His argument is that the conditions of class conflict which necessitated the formation of two or more parties in European and American countries do not exist in Africa.⁽³⁹⁾ He sums up his argument against the two or multi-party system in Africa in these words:-

"...there can only be one reason for the formation of such parties in a country like ours - the desire to imitate the political structure of a totally dissimilar society. What is more, the desire to imitate where conditions are not suitable, for imitation can easily lead us into trouble. To try and impart the idea of a parliamentary opposition into Africa may very likely lead to violence - because the opposition parties will tend to be regarded as traitors by the majority of our people, or, at best, it will lead to manoeuvrings of "opposing" groups whose time is spent in the inflation of artificial differences into some semblance of reality For the sake of preserving democracy". The latter alternative, I repeat, is an over - sophisticated pastime which we in Africa cannot afford to indulge in; our time is too short and there is too much serious work to be done." (40)

Footnotes on page 944.

11. 37. See Nyere, Julius K. Democracy and the Party System (Dar es Salaam, 1963): Keita, Madcira "Democracy and the one-party State" (Fighting Talk) 1962, see also Andre Blanchet in Carter, Gwendolen M. (ed.) African One-Party States (New York, 1962): Davidson, Basil, Which Way Africa? (Harmondsworth, Middlessex, Penguin Books Ltd, 1964).
39. "The European and American parties came into being as the result of existing social and economic divisions - the second party being formed to challenge the monopoly of political power by some aristocratic or capitalist group. Our own parties had a different origin.
They were not formed to challenge any ruling group of our own people; they were formed to challenge the foreigners who ruled over us. They were not, therefore, political 'parties' - i.e. factions - but nationalist movements. And from the outset they represent the interests and aspirations of the whole nationa.
We in Tanganyika, for example, did not build TANU to oppose the Conservative (sic) of England, or to support the Labour Party. The division of English politics meant nothing to us. As far as we were concerned, they were all colonialists, and we built up TANU as a national movement to rid ourselves of their colonialism," - ibid., p. 15.
40. Ibid. It would be outside the scope of this study to discuss the merits and demerits of President Nyerere's argument. The quotation is merely intended to illustrate the thinking of African leaders on the one-party system as a constitutional arrangement.
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CHAPTER TWENTY-FIVE

EVALUATION

In concluding this study it is essential to ask one question: How long can a Constitution drawn up by a colonial power last after independence?

The Constitutions of Zambia and Malawi, like those of other former British dependencies, were formulated by the Colonial Office and were modelled as much as possible on the British Constitution. The unwritten principles of the British Constitution were put into written form for these new States. There was, of course, a great deal that was included in the Constitutions of these new Commonwealth States which was not found in the British Constitution. For instance, the Judicial Service Commission and the Tribunal to investigate the removal of judges and other important officers of the State, are institutions that are not found in the British Constitution. The two institutions were included in the independence Constitutions in order to maintain British principles on the independence of the Judiciary and important officers of the State.

Few expected the Constitutions drawn up by the Colonial Office to last for a long time without substantial changes or complete replacement. One of the first things to attract the attention of an African Government after independence would be the revision of certain provisions of the Constitution. This is evidenced by the numerous amendments that have been made to the Zambian Constitution and the replacement of the Independence Constitution by the Republican Constitution in Malawi and the many amendments which have already been made to the new Constitution.

Three factors influence the new Government to amend, revise or replace the Independence Constitution. First, the Constitution is viewed upon as a relic of colonialism. As de Smith says:

" A Constitution granted by Her Majesty in Council is in itself a sitting target for the legal nationalist. It can be readily represented as something extraneous, alien, even imposed....The result may well be that when the wind of change blows the Constitution may be overturned lock, stock and barrel, baby and bathwater."(1)

1. De Smith, "Westminster's Export Models: The Legal Framework of Responsible Government" (Journal of Commonwealth Political Studies, Vol. I, p.8).

Second, the provisions of the Declaration of Rights regarding expropriation of property are always couched in terms that are intended to protect property of expatriates. It will be recollected that Zambia had to amend its Declaration of Rights in this regard to enable the Government to take land belonging to absent owners. Third, the Constitution may not be suitable for the political conditions prevailing in the new State.

The sections of the Constitution which become first targets are those regarding powers of the Executive, the rights of the people and the Judiciary. The trend is often towards a concentration of power in the Executive, particularly the President. Such a concentration of power in the President is more obvious in Malawi than in Zambia or any other former British dependency. President Banda is life President of both the State and the only political party in the country -- the Malawi Congress Party. His powers of appointing State officers are wider than those of the Zambian President. The Constitution of Malawi has no clear provisions in terms of which the President could be removed or impeached.

An examination of the amendments which have been enacted in Zambia and Malawi and in other African States of the Commonwealth indicates that African States may end up with Constitutions that provide a political system which incorporates to some extent both the typically European executive government and the typically African government by chiefs. The appearance of a life President in Malawi tends to support this theory (A chief in Africa rules for life unless circumstances occur which render him unfit to remain a chief). Although the Malawi system has not yet been copied elsewhere, there is no doubt that more African States will sooner or later become attracted to the designation of a popular leader as life President. Many appeals have already been made to President Kaunda to accept the presidency for life. Presently ^{the} President is resisting the appeals but he may give in sooner or later.

While it should be appreciated that these new States have legitimate reasons to alter their Constitutions to suit their particular circumstances, one aspect of these constitutional changes

is disturbing. A large number of the amendments is aimed at the restriction of either the rights of the people or the powers of other State organs which protect those rights, e.g. of the Judiciary. The abolition of the referendum provisions and the amendment of important provisions of the Declaration of Rights in the Constitution of Zambia illustrates this point, as does the omission of a Declaration of Rights, the creation of a system of traditional courts independent of the High Court and the Supreme Court - with the competence to try any criminal case and to impose the death penalty - and the introduction of the one party ^{system} in the republican Constitution of Malawi. It should be noted that at the time of writing Zambia is preparing for the introduction of a one-party system.

It would be unrealistic to think that constitutional changes in these countries should be aimed at creating a political atmosphere similar to that prevailing in the United Kingdom or in the United States of America. The Independence Constitutions were modelled on the British constitutional system - a system that had gone through numerous upheavals before attaining the stability and liberalism it has today. Such stability and liberalism cannot be attained by the mere introduction of an Independence Order. First, the political problems in Zambia and Malawi are different from those prevailing in the United Kingdom. Secondly, there are aspects of the British Constitution which cannot be absorbed successfully in its former territories because the African's political temperament differs from that of the European.

Nevertheless, the fact that alterations are necessary and that conditions and temperaments differ, does not warrant a complete departure from the basic principles of good government which have been distilled from the many centuries of British experience. In particular it is hoped that the ultimate forms of government to be evolved for the two States which are the subject of this thesis will ensure adequate protection of the rights of the individual; and that the obvious need for a strong Executive will not result in a drift into complete totalitarianism.

ADDENDUM

Since this study was begun, several constitutional changes have taken place and accordingly some of the Constitutions or provisions of Constitutions referred to are no longer in operation. For instance, Sierra Leone and Ceylon are no longer Dominions but Republics. Some of the Constitutions have been suspended by military juntas, e.g. that of Uganda. Zambia has become a one-party state.

However, these changes have not affected the purpose of the study.

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(a) Commonwealth

Australia	Jamaica
Barbados	Ghana (1960)
Bermuda	Ghana (1968)
Botswana	India
Canada	Cyprus
Ceylon	Tanzania
Fiji	Tanganyika
Kenya	Trinidad and Tobago
Uganda	Singapore
Malta	Swaziland
Nigeria (Federal)	Sierra Leone (1961)
Western Nigeria	Mauritius
Northern Nigeria	Pakistan (1962)
Eastern Nigeria	St Christopher, Nevis & Anguilla
Midwestern Nigeria	Zambia
Malawi	United Kingdom

(b) African States Other than Commonwealth States

Malagasy	Morocco
Ivory Coast	Tunisia
Niger	Algeria
Senegal	United Arab Republic
Mauritania	Somalia
Gambia	Rwanda
Gabon	Guinea
Chad	Congo (Kinshasa)
South Africa	Congo (Brazzaville)
Dahomey	Burundi

(c) States Outside Africa Other than Commonwealth States

West Germany	Mexico
France	Argentina
United States of America	Brazil
Yugoslavia	Philippine
Turkey	Netherlands
Chile	U. S. F. R.
Switzerland	Japan
People's Republic of China	

7. CONSTITUTIONS OF ORGANIZATIONS USED

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 Constitution of the Tanganyika African National Union

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C.O. 806/372.

African 459, No. 38.

African 414, No. 1.

African (South) No. 426.

F. O. 84/21/4 (1891).

F.O. 83/1242.

F.O. 83/1241.

F.O. 83/1240.

F.O. 2/55.

F.O. 2/66.

African (South) No. 498.

African 461, No. 265.

African 461, No. 195.

African 461, No. 40.

African 461, No. 309.

African 517, Nos. 1, 92, and 117A.

African (South) 517.

African 517, No. 13.

African 484, No. 44.

African 484, No. 45.

African 484, No. 55.

African 484, No. 73.

African 498, No. 255.

African 517, No. 67.

African 555, No. 294.
 F.O. Conf. 6851.
 African (South) 686.
 African (South) 574, Nos. 114 and 203.
 African (South) 686, No. 116.
 African (South) 656, No. 65.
 F.O. 84/228.
 F.O. 84/2702.
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 F.O. 84/2113.
 F.O. 84/2113.
 F.O. 84/2114.
 F.O. 84/2197, No. 18.
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 F.O. 84/2196.
 F.O. 84/2198.
 F.O. 2/51.
 F.O. 2/65.
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 C.O. 626/6.
 A.P. 1890, 11.
 F.O. Conf. Print 6613.
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 F.O. 83/19.

16. RUSSIAN NATIONAL ARCHIVES DOCUMENTS

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Correspondence Relating to the Question of Ownership of Mineral Rights in Southern Rhodesia (Salisbury, Govt. Printer, 1933).

Memorandum on Constitutional, Financial and Other Questions Concerning Rhodesia by Fox H. Wilson.

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 African (South) No. 392.

17. PARLIAMENTS USED

Zambia (including those of the Northern Rhodesia Leg. Council).

Malawi (including those of the Nyasaland Legislative Council).

Canada

United Kingdom

Southern Rhodesia

Federation of Rhodesia and Nyasaland

African Representative Council (Northern Rhodesia).

African Protectorate Council (Nyasaland).

18. GOVERNMENT GAZETTES USED

Zambia (including those of the Northern Rhodesia Government).

Malawi (including those of the Nyasaland Government).

United Kingdom.

Malaysia.

19. CENTRAL AFRICAN COUNCIL PUBLICATIONS

Report by the Chief Secretary on Joint Services for European Education, 1946.

Report on Kariba Gorge and Kafue River Hydro-Electric Projects by the Inter-Territorial Hydro-Electric Projects Power Commission, 1951.

Council Report on Kariba Gorge (1951).

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20. REFERENCE WORKS

Britannica Book of the Year, 1967.