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FOUNDATIONS OF ZAMBIA'S CONSTITUTIONAL CHALLENGES: A
DIAGNOSIS

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“Ladies and gentlemen, we must tell the white settlers in our protectorate and the British government that we cannot trust them anymore. We have been much humiliated. We have almost lost confidence in ourselves because of the bad treatment we have suffered from the hands of our supposed partners. Perhaps this is a blessing in disguise. There is now a rising tide of nationalism among our people. Our national spirit, now rife, is an upshot of our long suffering. There is no going back.”² Harry Mwaanga Nkumbula, 1951.

Introduction

Zambia has had several unsuccessful constitution-making processes. It lacks a popularly articulated constitution that speaks to the collective democratic values and aspirations of the people. The deep structural constitutional issues have yet to be thoroughly, openly debated and settled. This paper highlights how its history shapes the current constitutional issues. It argues that to redress these, it is not enough to clarify language in the constitution. The power map of the state has to be re-imagined, institutions re-engineered and underlying incentives recreated.

The paper begins by highlighting the foundations of the state. It then discusses challenges arising from the design of the state from start, which continue to affect the current constitutional order. These include national cohesion, the instrumentality of law as a tool of repression and lack of state legitimacy. The nature of these weaknesses embedded in the

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² Cited in Giacomo Macola, “Harry Mwaanga Nkumbula and the Formation of ZANC/UNIP: A Reinterpretation,” in Jan-Bart Gewald, Marja Hinfelaar and Giacomo Macola (eds), *Living the End of Empire: Politics and Society in late Colonial Zambia* (Brill, 2011)

current constitutional order entail that the country needs fundamental constitutional reforms in order to create a more democratic state.

Foundations of the State

The current geographical territory of Zambia is a colonial construct. Prior to colonial rule, the territory was inhabited by various ethnic groups, each with its own governance system. The governance systems varied greatly from group to group. Some, like the Bemba, Ngoni, and Lozi, had strong centralised monarchs, while others, like the Tongas, were decentralised and organised largely on a system of clans and kinship.³ Many of these ethnic groups had evolved complex systems of governance, social justice and dispute resolution mechanisms. Notably, the Barotse had hitherto evolved an advanced judicial process that has been recognised for dispensing justice fairly. A 1932 colonial report noted that “the majority of cases dealt with in Native Courts are fairly dealt with.”⁴ The anthropologist Max Gluckman who studied the traditional Barotse judicial process, was impressed by its sophistication, comparing it to that of any advanced nation.⁵ Despite the formality of the judicial process, it was largely tailored to ensure that, as much as possible, social and family relations were preserved and not broken. He observed that “throughout a court hearing... the Judges try to prevent the breaking of relationships and to make it possible for the parties to live together amicably in the future.”⁶ Gluckman was particularly impressed by the competence and the reasoning of the Barotse judges:

“The process of judicial reasoning begins with pleadings of the parties and the judges’ examination of the evidence, which at every point is evaluated against moral norms. Nevertheless, the process is controlled by logical reasoning, which proceeds from the premises of fact and premises of law (“reasons” as the Lozi called them) to certain conclusions, and the Lozi have a developed vocabulary to evaluate the skills or clumsiness of judicial analysis. Judges also try to develop the law by reasoning by analogy and logical development to meet new situations.

³ McSamuel Richmond Dixon-Fyle, *Politics and Agrarian Change Among the Plateau Tonga of Northern Rhodesia* (PhD Thesis, University of London, 1976), 48

⁴ Memorandum on Barotseland Colonial Office Report No. 1146 (1932), 14.

⁵ Max Gluckman, *The Judicial Process Among the Barotse of Northern Rhodesia*, in Vilhelm Aubert (ed), *Sociology of Law: Selected Readings*, Penguin Education (1969) 163.

⁶ Ibid 164

Thus, they employ Cardozo's methods of philosophy, evolution and tradition. They also employ his so-called "method of sociology," by which they import equity, social welfare and public policy into their applications of the law. They are able to do so because the main certainty of the law consists in certain general principles whose constituent concepts are "flexible"-as law itself, right and duty, good evidence, negligence, reasonableness. The Judge's task is to define the concepts for a particular set of circumstances, and in this process of specification they introduce into judgement through the flexible concepts of social values and prejudices and indeed personal prejudices and values."⁷

Although precolonial systems of governance had their own limitations, they had their own ways of limiting the arbitrary use of power and holding leaders accountable. The Bemba kingdom, for example, was divided into semi-autonomous districts, each governed by a semi-autonomous chief, thereby limiting the paramount chief from being an absolute ruler.⁸ Among some groups, the chief was often blamed for calamities and would be strangled to prevent consequential disasters. ⁹ Among the Ila, for example, to avoid a sense of entitlement to leadership and accumulation of power, when a chief died, most of his cattle were killed, and his successor was another man who might not be a kinsman.¹⁰ The rationale was that no single family should be allowed to accumulate exceptional power and wealth. Similarly, the Lozi king never had absolute power. Power was diffused and shared across a network of interests and structures.¹¹

An impression, however, should not be created that precolonial society was flawless. There were occasional inter and intra-group conflicts. Often, the death of a chief led to outbreaks of civil war and instability, as succession processes were not well developed for many groups.¹²

⁷ Ibid 169.

⁸ Henry S Meebelo, *Reaction to Colonialism: A Prelude to the Politics of Independence in Northern Zambia 1893-1939* (Manchester University Press, 1976), 81

⁹ Andrew Roberts, *A Political History of Zambia* (Heinemann, 1976), 81

¹⁰ Ibid, 137

¹¹ John Indakwa, *King Lewanika and the Expansion of British Rule in Barotseland: 1890-1923* (PhD Thesis, Rice University, 1974) 11

¹² Ibid, 81

Although Africa's contact with the West goes back many centuries, it was in the 15th century that, with the new developments in shipbuilding and ocean navigation, Europe began to explore the interior of the African continent systematically. The penetration of Africa was influenced by European beliefs about Africa's wealth, such as gold and ivory, as well as the search for slave labour. For many years, these were extracted either through conquest or trade.

It was in the second half of the 19th century that European powers decided to take full control of the continent by demarcating territories into specific countries under specific European rule. Starting around 1875, European powers began to partition and share African territories without the slightest regard for those living within those areas.¹³ Thus colonialism disrupted the existence of African states as they were known then. The national boundaries created by colonial powers were arbitrary, ignoring existing state boundaries and the harmonious existence of the people.¹⁴ As Garth Abraham has stated, the colonial boundaries inherited by African countries "united those who should be divided and divided those who should be united."¹⁵ The boundaries adopted by colonial powers never respected or reflected the way African states were spread. This is evident from the well-known words of Lord Salisbury in 1890 when commenting on how the territorial boundaries were drawn in Africa by colonial powers:

"We have been engaged in drawing lines upon maps where no white man's feet have ever trod; we have been giving away mountains and rivers and lakes to each other, but we have only been hindered by the small impediment that we never knew exactly where those mountains and rivers and lakes were."¹⁶

After independence, African states decided to maintain the inherited territorial boundaries under the doctrine of *uti possidetis*. *Uti possidetis* is the international law doctrine to the effect that "colonial frontiers [borders] existing at the date of independence constituted a tangible

¹³ Crawford Young, *The Postcolonial State in Africa: Fifty Years of Independence 1960-2010* (The University of Wisconsin Press, 2012), 120

¹⁴ Abraham, *Lines Upon Maps: Africa and the Sanctity of African Boundaries*, (61) *Journal of International and Comparative Law*, (2007) 61- 84

¹⁵ *Ibid*

¹⁶ *Ibid* 62

reality” that all states had to respect.¹⁷ In 1964, the OAU, at its first ordinary session in Cairo, adopted a resolution to maintain the colonial state boundaries as they existed when independence was achieved.¹⁸

Two factors explain the European colonisation of Africa. First, it was the increased industrialisation and a growing population which, in turn, provided markets for luxurious and exotic goods from Africa, such as ivory, cotton and sugar.¹⁹ This led to growing rivalry among European powers. As Hannah Arendt has argued, “imperialism was born when the ruling class in capitalist production came up against national limitations to its economic expansion.”²⁰ The second is that due to increased industrialisation and the expansion of local markets, Europe was in search of raw materials from Africa.²¹ Thus, colonialism was deemed necessary to control the steady flow of African goods into Europe. These objectives were at variance with the idea of African political independence.²²

It is argued that the currency or ideology of colonialism was racism. Hannah Arendt has demonstrated that European racism towards Africa was necessitated by colonialism in order to justify its misdeeds on the African continent.²³ As a result, various European scholars developed a plethora of theories justifying racism, purportedly based on scientific footing, such as the doctrine of natural selection, or religion.²⁴ Alfred Wallace, for example, claimed: “If my conclusions are just, it must inevitably follow that the higher- the more intellectual and moral- must displace the lower and more degraded races....”²⁵

As a result of racism, Europeans believed that inferior races would either face extinction (so ill-treating them was no big deal) or that it was their duty to save and civilise such races.²⁶ It

¹⁷ Shaw MN *International Law* 4th edition Cambridge University Press Cambridge (1997),356

¹⁸ OAU Resolution on Border Disputes Among African States AHG/Res.16(I) Adopted 17-27 July 1964

¹⁹ Andrew Robers, *A Political History of Zambia* (Heinemann, 1976), 118

²⁰ Hannah Arendt, *The Origins of Totalitarianism* (Penguin Random house, 1951), 163

²¹ *Ibid*, 149

²² *Ibid*, 149

²³ *Ibid*, 209

²⁴ See Sven Lindqvist, *Exterminate All the Brutes* (Grauta, 1992), 10

²⁵ Alfred R Wallace, *The Origin of Human Races and the Antiquity of Man Deduced from The Theory of Natural Selection,* (1864) 2 *Journal of The Anthropological Society of London*, clxix

²⁶ Sven Lindqvist, *Exterminate All the Brutes* (Grauta, 1992), 13

is under such misconceptions, for example, that an obituary for the missionary explorer, David Livingstone, condescendingly refers to Africa as a dark continent being opened up to civilising light:

“...a man whose name will ever be a glory to his country, and a portion of the unwritten history of Africa. The best and truest friend whom that dark continent ever possessed... has perished, opening up her unknown regions to light and knowledge.²⁷

In the case of Zambia, the territory was colonised through two separate territories, which were merged in 1911. North- Western Rhodesia, comprising approximately North Western, Western, Southern, Central and Lusaka provinces was colonised by mutual agreement through a series of agreements with the Litunga. Confronted by external and internal threats to his power, King Lewanika of the Barotseland signed a several concessions or treaties in the late 1800s, heralding the onrush of colonial rule.²⁸ These include the Ware Concession (1889), the Lochner Concession (1890), the Lawley Concessions (1898 and 1900), the Corydon Concession (1900), and the 1909 Concession with the British South African Company (BSA).

On the other hand, North- Eastern Rhodesia, covering Muchinga, Luapula, Northern, Eastern and parts of Central provinces, was largely colonized through conquest of the Bemba and Ngoni.²⁹ The two territories were merged in 1911, establishing Northern Rhodesia, now Zambia. The territory was under the administration of the British South African Company (BSA) until 1924 when the Crown took control of the territory. Colonial rule lasted until 1964 when Zambia was granted independence.

²⁷ JE Lewis, “Empires of Sentiment; Intimacies from Death: David Livingstone and Africa Slavery at the Heart of the Nation,” (2015) 43 *Journal of Imperial and Commonwealth History*, 5

²⁸ John Hogan, *‘What Then Happened to Our Eden?’: The Long History of Lozi Secessionism, 1890-2013*, 40(5) *Journal of Southern African Studies* (2014) 909

²⁹ Henry S Meebelo, *Reaction to Colonialism: A Prelude to Politics of Independence in Northern Zambia 1893-1939* (Manchester University Press, 1971), 8

Challenges

Zambia's constitutional and democratic challenges cannot be fully understood without appreciating the impact of colonialism on governance. The country's constitutional order, the laws, relevant legal practices and public law culture originate from colonial administration. The country's independence from colonial rule in 1964 did not mark any radical departure from the colonial constitutional order. Instead, the newly independent state inherited the gamut of laws, practices, judicial precedents and cultures that survived political emancipation.³⁰

Thus, although independence was underpinned by a new constitution, its implementation was predicated on the pre-existing constitutional and legal order. Andras Sajó was correct when he observed: "A constitution is what it becomes during its life; but if we wish to define it, we must recognise that its creation is of utmost importance, and what happened before its adoption is at least as crucial as its later vicissitudes."³¹ Therefore, to understand the democratic and constitutional challenges of postcolonial Zambia, one has to delve into its colonial past. The goal or objective should not be to escape responsibility by fashioning excuses for failure to craft a more democratic constitution. Indeed, postcolonial leaders bear significant responsibility for many excesses and missed opportunities to establish a better constitutional order. However, as Prempeh has argued, the failure of constitutionalism in postcolonial Africa cannot be fully understood without properly considering the African state in its historical context.³² In view of this, this section highlights some structural challenges arising from colonial rule, which continue to predispose the country to various constitutional challenges.

³⁰ Jeremy Gould, *Postcolonial Legality: Law, Power and Politics in Zambia* (Routledge, 2023), 16

³¹ Andras Sajó, *Limiting Government: An Introduction to Constitutionalism* (Central European University Press, 1999), 14

³² H Kwasi Prempeh, "Marbury in Africa: Judicial Review and the Challenges of Constitutionalism in Contemporary Africa," (2006) 80 *Tulane Law Review*, 35

Lack of National Cohesion

As already noted above, Zambia is a colonial construct. Prior to independence, various groups governed themselves on the basis of their own laws, customs and traditions. Ethnic identities were relatively fluid. The 19th century, when Zambia came under colonial rule, was a time of drastic change within Sub-Saharan Africa in terms of nation-building and migration of people. It was a period of disruption, merger of groups and re-alignment of kingdoms/chiefdoms and cultures. It was the time, for example, when the Ngoni broke away from Shaka Zulu and settled in Eastern Zambia; when Sebitwane and his group settled among the Lozi people in Western province, and when the Bemba people migrated from Congo and settled in Northern Zambia.

As a result of these disruptions and developments, ethnic identity was not a permanent or fixed feature. It was “fluid and situational” and not a coherent permanent feature.³³ That said, however, it does not follow that different groups of people were naturally compatible and able to co-exist peacefully. The various ethnic wars prior to colonial rule attest to that. It is significant that ethnic boundaries were permeable, and in extreme cases, those who were not content within a group could easily leave, as national borders were not as permanently fixed as they are today.

Colonialism had two significant impacts on ethnic identity, which have implications for national cohesion. First, it invented the “tribe” as an immutable, permanent characteristic of ethnic groups. Thus, as Macola aptly observed, the colonial system “popularized the view that African communities in Northern Rhodesia had always been organized along tribal lines,” and tribes had discernible features.³⁴ Consequently, the various groups within the territory were considered to be closed and distinct. Tribal histories, colonial reports and missionary descriptions served to crystallise these beliefs and put them into practice,

³³ Giacomo Macola, “The Historical and Ethnographical Publications in the Vernaculars of Colonial Zambia: Missionary Contribution to the Creation of Tribalism,” 11

³⁴ Ibid

especially in selecting people for employment in specific sectors. The effect of these stereotypes was to harden ethnic consciousness among various groups.

Second, the creation of one country from various groups brought together groups that may not have wished to live together. Since the boundaries were drawn arbitrarily, they also cut through and separated people who were once united.³⁵ Thus, without any inherent historical logic to the drawing of these borders, the colonial administration brought diverse groups under one territory diverse groups without regard to their underlining interest to co-exist. In effect, Zambia became a juridical state without its inhabitants having a sense of nationhood or unity. In fact, the drive towards nationalism was premised against the collective grievances against colonial rule and little else. The combined effect of these factors meant that at independence, the new Zambian leaders faced the challenge of welding together into one nation, the various groups in the country, in order to mould a viable state. This has had constitutional implications in at least two ways. First the process of nation building was driven from the centre by the new leaders based on top-down models of nation building. This largely resulted in the creation of a more centralised unitary state and the accumulation of power in the central government, predominantly in the President. An example of this is from 1972, when Kenneth Kaunda declared Zambia a one-party state under the United National Independence Party (UNIP) to promote national unity. However, this led to greater centralisation of power, limited political freedoms, and suppression of opposition. Any assertion of diversity was perceived negatively and seen as an obstruction to nation building. Diverse identities had either to be obliterated or subordinated to the national identity. Prempeh correctly captured this suspicion of sub-regional autonomy:

“Thus, demand for some degree of federalism, or a reasonable degree of provincial devolution to preserve some degree of local self-governance for the post-colonial states territorially based sub-national communities, or to check on the part of national elites, were disparaged as tribalism-inspired...under the conception of nationhood and national unity passed by Africa’s postcolonial elites, not only did national interests and national identity, even if

³⁵ For example, the Lozi kingdom extended into present day Angola, Botswana and Namibia; and the Chewa kingdom extended into Malawi and Mozambique.

inchoate, trump all local or subnational sentiments and identities but, more importantly, only claims on behalf of the national were considered valid.”³⁶

These views led to gross violation of human rights, limiting participation in public affairs and suppressing those with divergent views. Those opposed to the collectivist views of nation-building were seen as enemies of the state or anarchists. All other rights were subordinated to the idea of national cohesion. As Zambia’s first president, Kenneth Kaunda, firmly argued:

“For a nation can flourish and its people benefit under a strong government but anarchy is the basic denial of freedom because every aspect of the nation’s life is paralysed. National survival is the basic good; all other qualities such as unlimited freedom of expression are contingent upon it. the great enemy of freedom is not totalitarianism but chaos.”³⁷

These views permeated all government institutions, including the judiciary. For example, when Simon Mwansa Kapwepwe broke away from UNIP and formed his own party, the narrative was created by those in government that he intended to divide the country along tribal lines. As a result, he was arrested and detained without trial and his party was banned. When he challenged his detention, the then Court of Appeal simply echoed the narrative thus:

“As to the second, I consider that it is a notorious fact that the United Progressive Party is largely based on support from the Bemba and allied tribes and that the party is in the popular image a Bemba party. In this context it seems clear to me that this ground is an allegation that the detainee has been organizing the party as a tribal party which in the result is likely to cause conflict with other tribes and prejudice security.”³⁸

These views later crystalised into the one-party state constitution in 1973, effectively outlawing any other party apart from the ruling UNIP.

³⁶ H Kwasi Prempeh, “Africa’s Constitutionalism Revival: False Start or New Dawn?”(2007)5 International Journal of Constitutional Law, 476

³⁷ Kenneth Kaunda, *A Humanist in Africa* (Veritas, 1966), 99

³⁸ *In Re Kapwepwe and Kaenga* Court of Appeal 1972

It would be a mistake to think that reversion to multiparty democracy in 1991 resolved the challenge of ethnic identity and national cohesion. The competitive nature of multiparty elections might have worsened the problem. The question still begs an answer through appropriate constitutional mechanisms that can allow for harmonious co-existence while at the same time not freezing those identities. The suspicion of ethnic identity still characterises the various past constitution review processes. Although citizens have raised the issue and the need to directly redress it and design constitutional mechanisms for positive co-existence and accommodation, all previous constitution-making processes resorted to fear-mongering, conjecture, speculative reasoning and buck-passing in order to avoid dealing with the problem. This is perhaps best illustrated in the views of the Mung'omba Constitution Review Commission. The Commission received 187 submissions proposing turning Zambia into a federal state, as opposed to 10 against.³⁹ The reasons for supporting a federal State included perceptions of alienation from the central government, regional marginalisation, tribal imbalances in appointments, lopsided development, and control over local resources.⁴⁰ The Commission acknowledged these concerns raised by the petitioners, but instead of doing their bidding and drafting a constitutional framework that would address these concerns, the Commission resolved: "The commission feels that a federal system such as exists in the United States of America, India and Nigeria is not feasible for Zambia as it may alienate the people and breed disunity and division."⁴¹ Thus, previous constitution-making processes have chosen to bury their heads in the sand at the expense of facing the ethnic problem head-on and designing a constitutional framework that is inclusive and accommodating and celebrates the diversity of its people. Ignoring the problem only postpones it, allowing it to fester and increasing the likelihood of it exploding with intensity at some indeterminate future stage. This should be a matter of urgent constitutional design, which was born from the findings of the Commission of Inquiry, which President Lungu empanelled to look into the lopsided regional voting patterns and concomitant political violence in the country. The Commission found that the main driver of political violence was tribal inclination, where voters gave their support to the party led by candidates from their

³⁹ Report of the Constitution Review Commission 29th December 2005, para1.2.1

⁴⁰ Ibid

⁴¹ Ibid

own tribe or region. According to the Commission, this explained “the teaming up of people from provinces on the south-western part of the country, on the one hand, and people from the provinces on the north-eastern side of the country, on the other hand” and that “politicians deployed tribal campaigns; whereby they used tribal tags to influence tribesmen and tribal cousins to garner votes to benefit their political parties.”⁴²

The issue of ethnic identity implicates many other aspects of constitutional interest, including the need for an inclusive electoral system; political mobilization and public participation in governance; devolution of power to subnational tiers of government; and patronage and corruption in public affairs. The current approach to national building, which relies on unitary nationalism and suspicion for diversity is not sustainable and can only persist through a mix of repression and patronage.

Command Based Legal order

Colonial administration was not based on personal whims of its administrators but was instead a system grounded in law. It was fairly progressive in that it was to some extent based on then contemporary liberal views and often times the law even came to the aid of indigenous people. The paradox, however lies in the fact that the colonial system was designed to maximise the exploitation of the country’s natural and human resources.⁴³ As a result, the legal order was skewed to protect the interests of the white settlers (ruling class), while the interests of the indigenous majority were largely secondary.⁴⁴

To accomplish the task of safeguarding the interests of the minority, a cocktail of repressive laws was passed in order to contain the rising discontent of the Africans. As result, the seemingly liberal constitutional order and its trappings were used to give a veneer of legitimacy to the dispossession and despoliation of Africans. The law thus, “was primarily a

⁴² Report of the Commission of Inquiry into voting Patterns and Electoral Violence (January 2019) xiv

⁴³ Jeremy Gould, *Postcolonial Legality: Law, Power and Politics in Zambia* (Routledge, 2023), 16

⁴⁴ Ibid

mechanism for asserting, enabling and legitimising state power, not for constraining or limiting it.”⁴⁵

Without containing the discontent of the majority and silencing them, the colonial state could not function. As a result, order and stability were considered paramount over citizen participation and human rights. In the words of Eghosa Osagahe, the colonial state was “primarily a law and order state” in that its primary concern for order and stability (preconditions for preserving colonial interests) meant heavy reliance on legal instruments of “coercion to sustain state power.”⁴⁶

As the indigenous streams of nationalism gained momentum in Zambia, the colonial administration responded by enacting further restrictive rules and pieces of legislation to contain them. Some key legislation passed in this context are still in use today either in their original or modified form. These include:

- The Printed Publications Act 1947, which limits and controls the publication and distribution of literature;
- The Emergency Powers Act 1957 and the Preservation of Public Security Act 1960, which allowed the suspension of human rights;
- The Societies Act 1957, which was “aimed at controlling nationalist political organisations by requiring them to register their branches and to supply the government with specific information about their activities and organisations,”
- The Public Order Act, which limited public assemblies, meetings and processions; and
- An amendment to the Penal Code to extend the definition of “seditious intention to include the bringing of any government into hatred or contempt.”⁴⁷

All institutions, including the judiciary, were co-opted to serve the colonial interests of order and stability. For example, in the case of *Queen v Chona (1962)*, Mainza Chona, the national secretary for UNIP had issued a document describing the evils of colonial rule and circulated it widely. He was charged with publication of a seditious publication under the Penal Code.

⁴⁵ H Kwasi Prempeh, “Marbury in Africa: Judicial Review and the Challenges of Constitutionalism in Contemporary Africa,” (2006) 80 Tulane Law Review, 24

⁴⁶ Eghosa E Osaghae, *Crippled Giant: Nigeria Since Independence* (Indiana University Press, 1998), 19

⁴⁷ David C Mulford, *Zambia: The Politics of Independence 1957-1964* (Oxford University Press, 1967), 66

In convicting him, the court noted that the publication “was a seditious publication because it intended to bring into hatred or contempt and to excite disaffection against the administration of justice in the territory.”⁴⁸ At the heart of the law-and-order approach was the office of the colonial governor who was the chief executive of the colonial administration. The colonial governor, subject to minor controls, had plenary powers over the territory.

The Northern Rhodesia Order in Council 1924, for example, endowed the office of the governor with imperial power “empowering and commanding the governor to exercise on His Majesty's behalf all such powers and jurisdiction as His Majesty at any time before or after the passing of this Order had or may have within the said Territory, and to do and execute all things that belong to his said Office....”⁴⁹ At independence, the president simply replaced the colonial governor, without any change in the underlying power structure. The president, therefore, could do whatever the colonial governor did. The Zambian presidency in its current form, is nothing more than a colonial artifact, an instrument and symbol of holding the nation together through a cocktail of repressive laws and patronage networks.

The repressive laws and judicial precedents did not vanish at independence. They were preserved and passed on to the indigenous government, which within a short period from independence, heavily relied on them to limit political space, suppress dissent and human rights. As Prempeh has noted:

“...the new Africa also received, as part of its colonial bequest, a command-based legal order- the full panoply of coercive legislation, orders, ordinances, by laws, and judicial precedents upon which colonial authority had been based. The inherited legal apparatus thus offered African elites’ real power and the bureaucratic machinery with which to exercise it effectively. By choosing the authoritarian model, Africa’s new managers would not have to reinvert the wheel, the structures, laws, and usages of the colonial state, were readily at hand.”⁵⁰

⁴⁸ Queen v Chona 1962

⁴⁹ Section 7 Northern Rhodesia Order in Council 1924

⁵⁰ H Kwasi Prempeh, Africa’s Constitutional Revival: False Start or New Dawn?” (2007) 5 International Journal of Constitutional law, 479

In the case of Zambia, the gamut of oppressive laws was preserved at independence by operation of section 2(1) of the Zambia Independence Act 1964. This provision enjoined that all law which was in force at independence would remain in force unless the legislature specifically repealed it. It is, therefore, hardly surprising that various post-colonial regimes continued on this path and enacted their own repressive or restrictive pieces of legislation. Recent examples of these are the Non-Governmental Organisations Act 2009 and the Cyber Crimes and Cyber Security Act 2021. In this context, the constitution hardly serves as a transformative tool. Rather it is often interpreted by the judiciary to fit the pre-existing order instead of transforming the pre-existing legal order. This explains the plethora of human rights and constitutional law cases where the judiciary simply surrenders its interpretive role to the discretion of the executive. The constitution itself becomes a tool for concealing illiberal exercise of power, as the resulting judicial interpretation, reconciles the supposedly progressive standards of the constitution with repressive subordinate laws. In this manner, abuse of power becomes difficult to detect as it occurs “through, and not against the prevailing constitutional order.”⁵¹

Legitimacy of the State

The manner in which the state was carved out caused a shift in the relationship between the leaders and the governed. A new power structure was superimposed on what held precolonial societies together. As a result, the incentive and motivation structure for responsive leadership were drastically altered. As Andrew Roberts noted, the full significance of colonial rule did not become apparent to the indigenous population “until it had set up a local administration and began collecting tax: it was this above all else which first showed the ordinary villager that both he and his chief had a new master.”⁵² This new master, however, had no mandate or consent of the people nor did he govern on the basis of pre-existing conventions. This broke the reciprocal relationship between the people and

⁵¹ Jeremy Gould, *Postcolonial Legality: Law, Power and Politics in Zambia* (Routledge, 2023), 43

⁵² Andrew Roberts, *A Political History of Zambia* (Heinemann, 1976), 170

their leaders turning the state into a colonial project for extracting resources, domination and control.

Cheeseman and Fisher have argued that colonial rule has had at least two negative impacts on the African state, which predispose it to authoritarian rule. First, the colonial system was based on systematically denying indigenous Africans political and economic rights, and second, in order to govern extensive territories, the government had to co-opt traditional leaders into serving its interests.⁵³

In relation to the first, there were many ways indigenous people were disempowered and denied participation in public affairs. However, the most glaring was their disenfranchisement. The Northern Rhodesia franchise was based on a common law since 1925. However, in practice, representation in the legislative council was based on racial divisions whereby whites directly elected their own representatives while Africans were marginalized or only had whites appointed by the governor to sit in the legislature to speak to the interests of the Africans.⁵⁴ The participation of Africans in the elections as candidates or electorates was only improved as the country moved towards independence. But even then, there were still restrictive property and literacy qualifications that tended to exclude them.⁵⁵ There was no universal suffrage for Africans until 1964.

In relation to the second, the colonial settlers were far outnumbered by indigenous Africans. For example, in 1924 there were only 4, 182 whites against 1, 100, 000 Africans.⁵⁶ In order to effect control over the territory, the colonial authorities relied heavily on African collaborators, mostly chiefs and the nascent civil service, who now became instruments of colonial rule. Co-optation of chiefs in this manner gave chiefs power they never had before and, therefore, strengthened their hold on power while undermining traditional mechanisms that were a fetter on arbitrary use of power. According to Cheeseman and Fisher, the co-optation of chiefs or “big men” played a cardinal role in “shaping the way in

⁵³ Nic Cheeseman and Jonathan Fisher, *Authoritarian Africa: Repression, Resistance and the Power of Ideas* (Oxford University Press, 2019), 57

⁵⁴ David C Mulford, *Zambia: The Politics of Independence 1957-1964* (Oxford University Press, 1967), 57

⁵⁵ Alfred Winstone Chanda, *Constitutional Law in Zambia* (University of Zambia Press, 2007), 118

⁵⁶ Jeremy Gould, *Postcolonial Legality: Law, Power and Politics in Zambia* (Routledge, 2023), 105

which leaders have had to operate ever since.”⁵⁷ This engendered the culture of exercising power without adequate countervailing mechanisms to contain that power.

This also led to the building up of a culture of a bureaucratic government that was insufficiently accountable to the people. The nascent civil service was beholden to the colonial administration and not answerable to the people. Due to inadequate control mechanisms, the nascent civil service often preyed on the people, establishing a culture of accumulation and illicit enrichment. The Boma class, as the nascent civil service was called, often misappropriated funds, would withhold revenue collected or would take advantage of the ignorance of the people by illegally introducing fines, levies and taxes and pocketing these proceeds.⁵⁸

Public resources were effectively used for personal enrichment. As Chipungu noted:

“when all forms of illicit access to the Native Treasury funds are considered, an impression that emerges is that of the Boma class consciously fraudulently turning the state resources into private capital. The class had the tendency of viewing the state resources, represented by the Treasury, as a target to rip off, regardless of personal consequences.”⁵⁹

This is still what characterizes the civil service today. It is not the president or the ministers an ordinary citizen meets every day. The average citizen the state are often at the point of seeking public services, such as at police stations, council offices, health facilities, road tax offices. The encounter of the citizen with the state at this level is often characterized by abuse of power, manifesting through demands for bribes, extortion, unjustified delays, and discrimination. The state is not conceptualized primarily as a mechanism for delivering goods to citizens but as something to milk for the private gain of those who hold office.

The root cause of this appears to be lack of legitimacy of the state in the eyes of the people. As a colonial construct, the state was an alien establishment not primarily intended for their well-being. The anti-colonial movements fought for independence on account that the state

⁵⁷ Nic Cheeseman and Jonathan Fisher, *Authoritarian Africa: Repression, Resistance and the Power of Ideas* (Oxford University Press, 2019), 14

⁵⁸ Samuel N Chipungu, “Accumulation from Within: The Boma Class and the Native Treasury in Colonial Zambia,” in Samuel N Chipungu, *Guardians in Their Time: Experiences of Zambians Under Colonial Rule, 1890-1964* (MacMillan, 1992), 85

⁵⁹ *Ibid*, 86

was alienating Africans. After independence, there was no moment of re-founding to reset the relationship between the state and the citizen. The new government simply carried on from where the colonial system left off. As a result, the perception of the state being alien to the citizen remains deeply ingrained in the popular consciousness. The consequence, it goes without saying, has been a failure to develop any strong bond or public interest in the affairs of the state, which has a consequence for the realisation of key constitutional values such as accountability, transparency, and government responsiveness to the people. Lacking a sense of duty and passion for the well-being of the state, public resources are easily plundered for private ends.

Conclusion

Constitutional reform in Zambia requires deep introspection and a revisiting of the very foundations of the Zambian state. Failure to do this, risks simply treating symptoms rather than the underlying cause for multiple constitutional challenges. It requires a reset of the state. The underlying incentive structure and power map must be understood and redesigned. There must be a fundamental change in the structure of incentives driving practices and key players in the political and legal arenas. Without this change, constitutional provisions, no matter how positive they may appear on the surface, will only be ritualistic and continue to mask where the real pockets of power and constitutional malaise reside.