

# **CHANGING PERSPECTIVES ON CHIEFTAINCY IN ZAMBIA'S PUBLIC LAW HISTORY**

**A Thesis submitted for the award of Doctor of Philosophy in Law**

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## Summary

The thesis studies chieftaincy in the post-independence public law history of Zambia. Chieftaincy is an important empirical phenomenon for the study of public law in Zambia because of the country's history, constitutional recognition of chiefs, and the role of chiefs in the local governance. The study is guided by two research questions. Firstly, how has chieftaincy evolved under the post-independence constitutional law history of Zambia? Secondly, how has case law on chiefs influenced the development of public law in Zambia?

With regards to the first question, the thesis finds that because of their position in the colonial government, chiefs had considerable influence in the constitutional processes leading to the adoption of the independence constitution. They, however, lost this influence shortly before independence which resulted in their exclusion from mainstream government structures and constitutional developments in the post-independence period until the late 1990s. Chiefs nevertheless continued to perform governance functions in their local communities. Following the re-introduction of plural politics in 1991, chiefs regained influence in the constitutional processes. This culminated in the 2016 constitutional amendment which, among other provisions, revokes the presidential authority to recognise chiefs. These increased guarantees to chieftaincy are, however, not accompanied by corresponding limits or provisions to improve access to justice for people adversely affected by chiefly power.

With regards to the second question, the thesis finds that jurisprudence on judicial review or constitutional challenges against chiefs is underdeveloped. The available cases, however, demonstrate willingness by courts to control the public power of chiefs. The slow pace of development of public law jurisprudence on chieftaincy can be attributed to the reluctance by people to sue chiefs, limited access to justice by rural communities, and unwillingness by courts to determine claims against chiefs whom they perceive as traditional rulers and therefore outside the domain of public law.

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## **Acronyms**

ANC	African National Congress
ACHPR	African Charter on the Human and Peoples Rights
BASMO	Barotse Anti-Secession Movement
BSAc	British South African Company
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Constitutional Review Commission
CRPD	Convention on the Rights of Persons with Disabilities
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
MMD	Movement for Multiparty Democracy
MP	Member of Parliament
NCC	National Constitutional Conference
PF	Patriotic Front
TC	Technical Committee drafting the Constitution of Zambia
UNIP	United National Independence Party
UNZA	University of Zambia
UPND	United Party for National Development
ZANC	Zambian African National Congress

## **List of Cases**

### **Zambia**

Amos Musuba and Others v Lackson Muntanga and Another Appeal No 97 of 2012 (SC) (unreported)

C and S Investments Limited, Ace Car Hire Limited and Sunday Maluba v The Attorney General SCZ Judgment No 24 Of 2003 (unreported)

Chief Chipepo (also known as Chilufya Mwamba) v Senior Chief Mwamba (also known as Paison Chilejwa Yamba Yamba) SCZ Judgment No 25 of 2008 (unreported)

Chief Mwanatete v Innocent Munyikwa Lushato and Mweene Mutondo 2014/HP/1043 (unreported)

Duncan Silembo (S/A Next of kin of the late Silembo being his son) v Roman Shaloomov (S/A Sekelelea Farm) CAZ Appeal No 44 of 2018 (unreported)

Everson Mumba (suing in his capacity as Senior Chief Kalindawalo) v The Attorney General Appeal No 207/2013 (unreported)

Frederick Jacob Titus Chiluba v Attorney General (2003) Z.R. 153

Gordon Mwewa and 2 Others v The Attorney General and Another 2017/HP/204 (unreported)

Henry Mpanjilwa Siwale and Others v Ntapalila Siwale (1999) Z.R. 84

His Royal Highness The Litunga and 3 Others v The Attorney General 2020/CCZ/009 (unreported)

John Chisenga Kapabila and 3 Others v Nicole-Nkalonga Investment Company Limited and 5 Others 2017/HP/2088 (ongoing)

John Malokotela v Majaliwa Sitolo Muwaya and Thaya Odemy Chiwala (2010) Z.R. 357

Julius Chilipamwawo Sinkala v Bornface Simbule and Two Others Appeal No 153 of 2016 (unreported)

Kelvin Fungwe and 7 Others v Lackson Muntanga (Sued as His Royal Highness Chief Nyawa IV of the Tonga-speaking people of Kazungula District Southern Province) 2013/HP/1778 (unreported)

Kelvin Hang'andu v Law Association of Zambia (2012) 3 Z.R. 181

Kilolo Ng'ambi v Opa Kapijimpanga Appeal No 210/2015 (unreported)

Mandalena Mungalaba and 94 Others v Elizabeth Mwachikoka Mulenje (sued in her capacity as her Royal Highness Senior Chieftainess Nkomeshya Mukamambo II) 2019/HP/0383 (ongoing)

Matthew Namhalika Musokotwane v George Simundu Simukali and 7 Others Appeal No 97/2015 (unreported)

Mike M Phiri and Anor v Registered Trustees of the Catholic Diocese of Mpika 2017/HP/587 (H.C) (unreported)

Molosoni Chipabwamba and 12 Others v Yssel Enterprises Limited and 7 Others Appeal No 104/2020 (CA) (unreported)

Molosoni Chipabwamba and 12 Others v Yssel Enterprises Limited and 7 Others 2017/HP/2201 (HC) (unreported)

Nabiwa Imikendu and 3 Others v Edwin Lubosi Imwiko (sued in his capacity as the Litunga of Western Province) 2017/HK/03 (unreported)

New Plast Industries v The Commissioner Of Lands And The Attorney-General (2001) Z.R. 51

Sara Longwe v Intercontinental Hotel 1992/HP/65 (unreported)

Silas Ngowami and 6 Others v Flamingo Farms Limited SCZ Judgment No. 5 of 2019 (unreported)

Still waters Limited v Mpongwe District Council and Others SCZ Appeal No 90 of 2001 (unreported)

Ted Chisavya Muwowo alias Chief Dangolipya Muyombe v Abraham Muwowo Temwani and Winston Muwowo (suing in his capacity as chairman of the Uyombe Royal Establishment Committee) SCZ/8/50/2014 (unreported)

The Attorney-General (1982) Z.R. 75 (H.C.)

The Attorney General v Roy Clarke (2008) 1 Z.R. 38

The People v Minister of Information and Broadcasting Services ex parte Francis Kasoma 1995/HP/2959 (unreported)

Webby Mulubisha v The Attorney General 2018/CCZ/0013 (unreported)

Village Headman Mupwaya and Another v Mbaimbi SCZ Appeal No 4 of 1999 (unreported)

**Foreign Cases**

Dominic Liswaniso Lungowe and Ors v Vedanta Resources Plc and Konkola Copper Mines Plc [2016] EWHC 975 (TCC)

Shilubana and Others v Nwamitwa 2009 (2) SA 66 (CC)

Pilane and Another v Pilane and Another 2013 (4) BCLR 431 (CC)

# **List of Statutes**

## **Zambian and applied English Statutes and Regulations**

Appropriation Act No 26 of 2020

Chiefs Act Chapter 287 of the Laws of Zambia

Commission for Investigations Act (repealed)

Constitution of Zambia 1964 (repealed)

Constitution of Zambia Act No 27 of 1973 (repealed)

Constitution of Zambia 1991 amended by The Constitution of Zambia (Amendment) Act 18 of 1996 and the Constitution of Zambia (Amendment) Act No 2 of 2016

Constitution of Zambia (Amendment) Bill No 10 of 2019

English Law (Extent of Application) Act Chapter 11 of the Laws of Zambia

High Court Act Chapter 27 of the Law of Zambia

Inquiries Act Chapter 41 of the Laws of Zambia

Land (Conversion of Titles) 1975 (repealed)

Lands Act Chapter 184 of the Laws of Zambia

Lands (Customary Tenure) (Conversion) Regulations, SI No 89 of 1996

Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia

Liquor Licencing Act No 20 of 2011

Local Courts Act Chapter 29 of the Laws of Zambia

Local Government Act 1965 (repealed)

Local Government Act 1991 (repealed)

Local Government Act No 2 of 2019

Mines and Minerals Act 1969 (repealed)

National Constitution Conference Act 2007

Northern Rhodesia (Crown Lands and Native Reserves) Order in Council 1928

Northern Rhodesia (Constitution) Order in Council 1963

Royal Charter of Incorporation of the British South Africa Company 1889

Rules of the Supreme Court of England 1999

Subordinate Courts Act Chapter 28 of the Laws of Zambia

Statute of Frauds 1677

Urban and Regional Planning Act No 3 of 2015

Western Province (Land and Miscellaneous Provisions) Act 1970 (repealed)

Zambia Independence Act 1964 (repealed)

## **Africa**

Constitution of The Republic of Ghana 1992 amended in 1996

Constitution of Kenya 2010

Constitution of the Republic of South Africa 1996

Uganda Land Act 1998

Tanzania Village Land Act 1999

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# Chapter One: Introduction

## 1.1 Introduction

This thesis seeks to understand public law in Zambia in its social context by studying chieftaincy, one of the key societal institutions with public power in Africa. The thesis describes public law as the law that relates to the regulation of the state rather than between citizens, which is the domain of private law.<sup>1</sup> It limits its scope of analysis to constitutional and administrative law, which are the accepted divisions of public law.<sup>2</sup> The thesis studies chieftaincy under public law by pursuing two related research objectives. The first is to study the evolution of chieftaincy in the post-independence constitutional law history of Zambia. Studying chieftaincy in the post-independence constitutional law history helps us to understand the social and political context within which the constitutional provisions on chieftaincy have evolved. The second objective is to analyse court cases involving chiefs to assess the extent to which litigation has influenced the development of public law in its social context. The analysis of cases helps us to understand the character of legal pluralism in public law from case law, which is an important source of law in the Common Law legal tradition under which Zambia falls.

Through this study, the thesis seeks to understand and explain the absence of chieftaincy in existing literature on public law in Zambia. The justification for using chieftaincy as the relevant study phenomenon is based on three reasons. The first is the country's colonial history whereby chiefs were incorporated in the administrative governance through the policy of indirect rule. The second is the recognition of chiefs under the constitution and statute. The third is the nature of the power and functions of chiefs under customary law. I discuss these characteristics of chieftaincy in further detail in chapter three which introduces the study phenomenon. Zambia has been selected as the relevant case study for the study of chieftaincy for two reasons. The first lies in the convenience of conducting the research based on my knowledge of Zambia's legal system and experience as a legal practitioner and

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<sup>1</sup> Hilaire Barnett, *Understanding Public Law* (Routledge-Cavendish 2010) 1.

<sup>2</sup> George Whitecross Paton, *A Textbook on Jurisprudence* (4<sup>th</sup> Edition, Oxford University Press 1972) 329.

lecturer of public law in Zambia, which eased the accessibility of data sources. The second and more important reason is that Zambia's public law, like other former British colonies in Africa, is based on the English Common Law which tends to assume legal centralism, by which is meant the existence of a unitary sovereign state which enjoys monopoly over the making and administration of law.<sup>3</sup> This is notwithstanding the social reality of the existence of plural legal and governance orders. The findings of this research are generalisable to other countries where chieftaincies exist and have plural legal orders. As Katharina Holzinger and others have observed, customary and traditional political institutions are prevalent in Sub-Saharan Africa.<sup>4</sup>

As chapter four of the thesis will show, existing literature on Zambia's public law has tended to focus on centralist state institutions which comprise of elected officials and statutory institutions and neglected chiefs. The literature review also shows that although chieftaincy has been neglected in legal research, it has been studied by other social science-based literature, which offers useful perspectives for a socio-legal study of chieftaincy under public law. The thesis hopes to contribute to scholarship in two main ways. Firstly, by producing descriptive and analytical literature on chieftaincy in the post-independence constitutional and administrative law history of Zambia. Secondly by offering a unique perspective for understanding customary land regulation by focusing on the powers of chiefs, which the thesis argues are of a public law nature.

## **1.2 Background To Identification Of The Research Problem**

Zambia recognises customary law, which exists alongside the general law – made up of statutes, common law, and case law.<sup>5</sup> However, Zambian lawyers are not expected to know customary law as it primarily only applies in the Local Courts

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<sup>3</sup> John Griffiths, 'What is Legal Pluralism' (1986) 24 J Legal Pluralism & Unofficial L 1, 3.

<sup>4</sup> Katharina Holzinger and Others, 'The Constitutionalization of Indigenous Group Rights, Traditional Political Institutions, and Customary Law,' (2019) 52 (12) Comparative Political Studies 1775.

<sup>5</sup> The Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No 2 of 2016 (Constitution of Zambia), art 7.

where lawyers do not have audience.<sup>6</sup> Further, customary law is not taught to law students in universities and has received little scholarly attention by legal scholars, except in matters relating to personal law, such as family law and succession. When applied in higher courts, where lawyers appear, customary law is received as evidence to be assessed with the help of court assessors.<sup>7</sup> To be admitted, customary law must pass the repugnancy test, namely, it must be compatible with the written law and must not be repugnant to justice, equity, and good conscience.<sup>8</sup> This is a legacy of colonialism whereby indigenous norms were recognised by British courts as being applicable to Africans provided they were satisfied that the norms passed the repugnancy test stated above.<sup>9</sup> The thesis does not attempt to define customary law or discuss its historical foundations as this is well covered by other scholars.<sup>10</sup> It nonetheless adopts the broader concept of customary law which includes the “official,” comprised of customary law codes and judicial precedents, and “living” customary law, which “regulates the day-to-day lives of people on the ground.”<sup>11</sup>

Before its latest amendment in 2016, the Constitution of Zambia did not contain any provision listing the laws of Zambia including customary law. Customary law was however recognised as a lawful exception to the protection against the application of discriminatory laws whenever it was applied to people of the same tribe, race, or with respect to “matters of personal law.”<sup>12</sup> In 2016, the Constitution was amended to, among other things, expressly list customary law as forming part of the laws of Zambia in addition to the above provision. This constitutional amendment arguably

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<sup>6</sup> Muna Ndulo, ‘Legal Education in Zambia: Pedagogical Issues’ (1985) 35 J Legal Educ 445, 446.

<sup>7</sup> The Subordinate Courts Act Chapter 28 of the Laws of Zambia, s 8; High Court Act Chapter 27 of the Laws of Zambia, s 34.

<sup>8</sup> Local Court Act Chapter 29 of the Laws of Zambia, s 12.

<sup>9</sup> Richard Roberts and Kristin Mann (eds) *Law in colonial Africa* (NH: Heinemann 1991) 13.

<sup>10</sup> Ibid 4; Julie E Stewart, ‘Why I can’t Teach Customary Law’ (1997) 14 The Zimbabwe Law Review 18.

<sup>11</sup> Chuma Himonga and Fatimata Diallo, ‘Decolonisation and Teaching Law in Africa with Special Reference to Living Customary Law’ (2017) 20 (1) PER / PELJ 1, 6 – DOI <http://dx.doi.org/10.17159/1727-3781/2017/v20i0a3267>.

<sup>12</sup> The Constitution of Zambia 1991 as amended by The Constitution of Zambia (Amendment) Act 2016 (Constitution of Zambia), art 23(4).

provides an explicit basis for the application of customary law in all fields of law beyond “personal law” to include public law.

Another interesting change that was introduced by the 2016 constitutional amendment is that it prohibits Parliament from making any law that provides for the recognition of a chief by any authority.<sup>13</sup> Before this amendment, the Republican President was empowered by the Chiefs Act to recognise or withdraw the recognition of a chief.<sup>14</sup> This power of the president provided a mechanism for control of the powers of chiefs by affording people who were adversely affected by the conduct or decision of a chief an opportunity to present their grievances to the President who could in turn use this power to threaten or actually withdraw the recognition of an erring chief following an inquiry. Another important provision under the 2016 constitutional amendment is the express recognition of the role of chiefs in the management, control, and sharing of natural resources in their chiefdoms.<sup>15</sup> These constitutional developments have resulted from a historical process of social and political changes and negotiations over time which merit research to understand how the law has evolved.

The above constitutional changes notwithstanding, as chapter four of this thesis will show, existing literature on public law in Zambia has tended to concentrate on the analysis of constitutional documents and the administrative practice of statutory institutions and elected government officials and neglected chiefs. The existing public law literature can be placed under two categories. The first comprises of mostly doctrinal work which analyses statutes and case law on constitutional law and the administrative practice of centralist state institutions. Examples of such works include those that discuss constitutional law principles and analyse legislation and case law on constitutional and administrative law.<sup>16</sup> The second category comprises

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<sup>13</sup> Ibid, art 165.

<sup>14</sup> Chiefs Act Chapter 287 of the Laws of Zambia, s 3.

<sup>15</sup> Constitution of Zambia, art 165.

<sup>16</sup> For instance, Mulenga Besa, *Constitution, Governance and Democracy* (Mission Press 2011); Felicity Kayumba Kalunga and O'Brien Kaaba, 'The State of Administrative Justice in Zambia' in Hugh Corder and Justice Mavedzenge (ed) *Pursuing Good Governance*

of the more analytical type which mostly discuss the constitutional law history but has also tended to focus on elected officials and centralist state institutions. Where chiefs have been studied, these studies have been limited to their role within the central government, such as, Native Authorities during colonial administration, or the House of Chiefs in the post-independence period. Notable among these are the works by Ngenda Sipalo,<sup>17</sup> Alfred Chanda,<sup>18</sup> John Sangwa,<sup>19</sup> Muna Ndulo,<sup>20</sup> and Muna Ndulo and Robert Kent.<sup>21</sup>

Although chieftaincy appears to be absent in existing public law research, social science-based literature such as history, anthropology, political and development science has studied it. This literature may be placed under two categories. The first category represents research in history, anthropology, and political and governance administration which studies chieftaincy as a governance institution and its relation to the central government. A notable example of this strand is Carolyn Logan's work<sup>22</sup> which explores the interaction between African traditional governance institutions and the politically elected organisations in enhancing democratic processes.<sup>23</sup> Other examples include studies by anthropologists who have studied

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*Administrative Justice in Common-Law Africa* (Siber Ink 2019) 26; and Muna B Ndulo and Robert B Kent, 'The Constitutions of Zambia' (1998) 30 Zam LJ 1.

<sup>17</sup> Ngenda Sipalo, 'Constitutional Development in Zambia 1890 -1975' (LLM Dissertation, University of Zambia 1978).

<sup>18</sup> Alfred W Chanda, *Constitutional Law in Zambia: Cases and Materials* (UNZA Press 2007).

<sup>19</sup> John P Sangwa, 'The Making and Remaking of Constitutions in Zambia: The Need for a New Perspective' (LLM Dissertation, University of Zambia 1994).

<sup>20</sup> Muna Ndulo, 'Constitution-Making in Africa: Assessing Both the Process and the Content' (2001) 21 Public Admin. Dev. 101-117, 106.

<sup>21</sup> Muna B Ndulo and Robert B Kent, 'The Constitutions of Zambia' (1998) 30 Zam LJ 1.

<sup>22</sup> Carolyn Logan, 'Selected Chiefs, Elected Councillors and Hybrid Democrats: Popular Perspectives on the Co-Existence of Democracy and Traditional Authority,' (2009) 47(1) The Journal of Modern African Studies 101.

<sup>23</sup> Other scholars include Bornwell Chikulo, *Democratic Local Governance in Southern African Community Development Region: Some Emerging Issues and Challenges*, (2010) *Special Issue, Commonwealth Journal of Local Governance*

<<http://epress.lib.uts.edu.au/ojs/index.php/cjlg>> accessed 19 February 2019; Katharina Holzinger and others, 'The Dualism of Contemporary Traditional Governance and the State: Institutional Setups and Political Consequences' (2016) 69 (3) Political Research Quarterly 469; and Privilege Haang'andu and Daniel Beland, 'Democratisation Without Westernisation? Embedding Local African Cultures' (2019) 46 (2) Politikon 219.

land ownership and administration under customary land tenure.<sup>24</sup> The second category represents research that uses development theories and indicators as the prism through which to study the role of traditional governance institutions in the delivery of public goods aimed at enhancing social and economic development in African countries.<sup>25</sup> A good example of research that employs this approach is the study conducted by the United Nations Economic Commission for Southern Africa, entitled "Harnessing Traditional Governance in Southern Africa."<sup>26</sup> These works provide useful insights and perspectives for a socio-legal study of chieftaincy under public law.

The above notwithstanding, none of the identified literature has analysed chiefs or traditional governance institutions from a public law perspective. Apart from Jennifer Corrin<sup>27</sup> and Aninka Claassens and Geoff Budlender<sup>28</sup> who have used the case analysis method to study how courts have decided cases involving chieftaincy and customary law in Papua New Guinea and South Africa respectively, no scholarly work has attempted to analyse public law by studying chiefs in public law history. Similarly, there is yet to be any study that analyses public law from the perspective of chieftaincy using the example of Zambia.

### **1.3 Research Questions and Objectives**

Having identified the absence of chieftaincy in public law as a gap in existing literature, the thesis seeks to contribute towards filling this research gap by asking two research questions. The first is, how has chieftaincy evolved in the post-independence constitutional law history of Zambia? The second question is, how has

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<sup>24</sup> Pauline E Peters, *Challenges in Land Tenure and Land Reform in Africa: Anthropological Contributions*, (2009) 37 (8) *World Development* 1317.

<sup>25</sup> Stelios Michalopoulos and Elias Papaioannou, 'Pre-colonial Ethnic Institutions and Contemporary African Development,' (2013) 81(1) *Econometrica* 113.

<sup>26</sup> United Nations Economic Commission for Africa Southern Africa Office, *Harnessing Traditional Governance in Southern Africa*, ECA/SA/TPUB/GOVERNANCE/2007/1 (November 2007) <[repository.uneca.org/bitstream/handle/10855/14940/bib.56966\\_i.pdf](http://repository.uneca.org/bitstream/handle/10855/14940/bib.56966_i.pdf)> accessed 19 February 2019.

<sup>27</sup> Jennifer Corrin, 'Administrative Law and Customary Law in Papua New Guinea,' (2018) 18 (2) *Oxford University Commonwealth Law Journal* 123.

<sup>28</sup> Aninka Claassens and Geoff Budlender, 'Transformative Constitutionalism and Customary Law' (2013) 6 *Const Ct Rev* 75.

litigation involving chiefs influenced the development of public law in Zambia? The thesis attempts to answer these research questions by pursuing the following three objectives.

### **1.3.1 To understand the evolution of chieftaincy in Zambia's post-independence constitutional law history**

To meet this objective, the thesis studies the post-independence constitutional law history of Zambia with the view to understand the position of chiefs in the various constitutional developments. The scope of analysis is limited to the post-independence constitutional developments, beginning with the making of the independence constitution in 1964 to 2016 when the Constitution was last amended. The rationale for limiting the study to this period is based on the identified gaps in the existing literature, as I demonstrate in chapter four of this thesis, which establishes two factors. Firstly, that the development of pre-independence constitutional documents has been adequately studied, and secondly, that Africans hardly participated in these constitutional processes. With regards to chieftaincy as a study phenomenon, existing literature which has studied the post-independence constitutional law history of Zambia has tended to focus on constitutional documents, central government institutions, and the position of elected officials or politicians in constitutional developments.

Studying the evolution of chieftaincy in Zambia's constitutional law history helps us to understand why chiefs have been neglected by existing public law literature. It also helps us understand the role played by traditional leaders in the development of the constitution and the subsequent constitutional amendments. In this way, the thesis employs a sociological approach to the study of law which seeks to understand how rules shape social action and vice versa.<sup>29</sup> The thesis adopts a broader concept of law, using legal pluralism as the underlying analytical concept. This broader concept of law admits the study of legal texts and other norms, as well as the political and social forces which have shaped the development of public law. It also enables us to study chieftaincy as a governance institution based on the

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<sup>29</sup> John Griffiths, 'What is Sociology of Law? (On Law, Rules, Social Control and Sociology)' (2017) 49 (2) The Journal of Legal Pluralism and Unofficial Law 93, 114; Roberts and Mann (n 9) 8.

powers and functions of chiefs and their relationship to society without being incumbered by the jurisprudential challenges of conceptualising law in a country with plural normative orders. As I show in chapter five of this thesis, which discusses the analytical perspective adopted by this thesis, legal pluralism enables us to study public law empirically by focussing on the constitutionalising norms regulating societal institutions with public power. This is difficult to do under analytical and theoretical perspectives which conceptualise law in relation to a unified sovereign state with monopoly over the maintenance of law and order. Such perspectives pose challenges when it comes to conceptualising non-state legal orders in society because they tend to fall short of some of the qualities of law. Legal pluralism also helps us understand the social and political context within which the constitution has evolved.

Understanding constitutional law from a historical context also helps to minimise hasty law reforms, which may result from copying legal provisions of one country into another out of context. A good example of such hasty reforms is article 165 of Zambia's 2016 constitutional amendment which prohibits Parliament from making any law that provides for recognition or withdrawal of recognition of a chief. Prior to this constitutional amendment, this power was given to the president of the republic by the Chiefs Act.<sup>30</sup> This constitutional amendment was largely influenced by the provisions of the Constitution of Ghana.<sup>31</sup> However, although the Constitution of Ghana excepts from its application, laws that make provision for the determination of the validity of the nomination, installation of chiefs under customary law and establish procedure for registration and public notification of the status of chiefs, the Zambian version is silent on these aspects.<sup>32</sup> This has resulted in controversy after the Constitutional Court declared the provisions of the Chiefs Act on recognition of chiefs as unconstitutional.<sup>33</sup> For instance, upon realising that the amendment could

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<sup>30</sup> Chiefs Act, s 4.

<sup>31</sup> Mung'omba Constitution Review Commission, *Report of the Constitution Review Commission* (Lusaka 2005) (Mung'omba CRC Report) 540.

<sup>32</sup> Constitution of Ghana, s 270.

<sup>33</sup> Provisions on the recognition of chiefs were declared unconstitutional by the Constitutional Court on 27 November 2019 in the case of *Webby Mulubisha v The Attorney General* 2018/CCZ/0013 (unreported).

result in increasing the maximum number of chiefs, the central government attempted to circumvent the provision by deciding to discontinue paying allowances to new chiefs who are not recognised under the Chiefs Act, a decision which was successfully challenged in the Constitutional Court.<sup>34</sup> Further, in 2019, the government sought to repeal these provisions and restore the power of the president to recognise chiefs in a failed attempt to amend the constitution.<sup>35</sup> This shows that the amendment could have been rushed or copied into Zambia out of context. These developments are discussed further in chapter seven of this thesis.

### **1.3.2 To assess the extent to which case law involving chiefs has influenced the development of public law**

To meet this objective, the thesis analyses decided cases and ongoing litigation involving chiefs to assess the extent to which these cases have influenced the development of public law. From the analysis of cases, the thesis seeks to understand the development of public law in Zambia from law practice. It also seeks to understand how lawyers who have represented claimants in cases against chiefs perceive public law and chiefly power and how their perception influences their choices in litigating their clients' claims. Brian Tamanaha highlights the importance of studying the role of lawyers in the development of law and jurisprudence by arguing that "legal knowledge has its own internal logic and demands that constantly push it to develop in directions that differ from commonsense notions."<sup>36</sup> Since lawyers are instrumental in law reform and constitutional processes, their concept of law influences the development of law and practice. Lawyers' actions and processes should therefore be studied to effectively understand the development of constitutional and administrative law in context. Applying a similar approach, Ambreena Manji used what she described as a law lab perspective to analyse the role played by legal experts in the African land law reform efforts spearheaded by the World Bank.<sup>37</sup>

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<sup>34</sup> *His Royal Highness The Litunga and 3 Others v The Attorney General* 2020/CCZ/009 (unreported).

<sup>35</sup> Constitution of Zambia (Amendment) Bill No 10 of 2019.

<sup>36</sup> Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (OUP 2001) 73.

<sup>37</sup> Ambreena Manji, *The Politics of Land Reform in Africa: From Communal Tenure to Free Markets* (Zed Books, 2006).

Building on these studies, the thesis analyses decided cases and ongoing litigation involving claims against chiefs or challenges to decisions made by a chief to assess the extent to which litigation has contributed to the development of jurisprudence on the regulation of chiefs under public law. In so doing, the thesis also assesses the state of access to justice for people who are adversely affected by the exercise of public power by chiefs. The case analysis is supplemented by qualitative interviews with selected lawyers who represented claimants in the analysed cases. From these interviews, I seek to understand the factual and social context of the cases as well as obtain the lawyers' views on the public power of chiefs.

### **1.3.3 Apply the findings and analytical insights from the study to analyse customary land tenure law from a public law perspective**

The thesis applies the findings and analytical insights from the study to the analysis customary land tenure regulation in Zambia from a public law perspective by focusing on the powers of chiefs. Through this analysis, the thesis hopes to demonstrate the wider implications of the research by illustrating how using legal pluralism as an analytical concept, we could extend public law to the study of public power in society such as the power of chiefs in administering customary land. In so doing, the thesis offers a unique perspective for analysing Zambia's land law and reforms from a public law lens. By applying a public law perspective to the analysis of the role of chiefs in customary land regulation, the thesis demonstrates how a broader concept of public law enables us to study non-state institutions and authorities that exercise public power in society.

## **1.4 Structure of Thesis**

This thesis contains ten chapters. This introductory chapter has outlined the research aims and objectives and explained the background to the identification of the research problem, namely the absence of chiefs in public law literature. The next chapter explains the design and methodology adopted for conducting the research. The third chapter introduces the study phenomenon of the thesis, chieftaincy, and provides a justification for its study under public law. It does this by briefly discussing the historical development of the institution of chieftaincy in Zambia and

some of the characteristics which make it an important empirical phenomenon for the study of public law.

Chapter four conducts a thematic review of literature on chieftaincy and public law in Zambia with the view to identify gaps in knowledge to which this thesis contributes. The key themes identified by the literature review are, research by public law scholars and social science based research on chieftaincy. It demonstrates that existing literature by legal scholars has tended to focus on central state institutions occupied by elected officials and statutory bodies and has neglected chieftaincy as a study phenomenon under public law. The literature also shows that although other social science research has engaged with chieftaincy as a governance institution, there is a dearth of literature focusing on the post-independence period in Zambia. In addition, the little social science-based literature on the subject hardly links its findings to public law. Chapter five discusses the analytical framework adopted by the thesis, namely, legal pluralism. In so doing, it justifies the research design of the current study which conducts a socio-legal study of the chieftaincy under public law.

Chapters six and seven discuss the constitutional law history of Zambia with a focus on chieftaincy. Chapter six focuses on the independence constitution and the changes that were implemented under the leadership of the first republican president, Kenneth Kaunda, and his United National Independence Party (UNIP). Notable among these changes was the abolition of Native Authorities which were headed by chiefs during the colonial period and their replacement by a bureaucratic local government. The first major constitutional change under the UNIP administration was in 1973 which introduced one-party rule Zambia. Throughout this period, chiefs were accommodated in the constitutional law through provisions on the House of Chiefs which had advisory powers to the central government. In addition, chiefs were free to participate in the political governance of the country, both at the national and local government level, within the ruling party structures.

Chapter seven focuses on the constitutional changes from 1991, when a new constitution was enacted to end one-party rule and re-introduce multi-party politics,

to 2016, when the constitution was last amended. The key events under this period were the abolition of the House of Chiefs in 1991 and its re-instatement in 1996. Another notable development during this period is that the 1996 constitutional amendment banned chiefs from participating in elective politics. The period also coincides with the time when chiefs have taken a more active role in constitutional affairs and the local governance of rural communities, and renewed interest in research and policy on chieftaincy. These developments culminated in the 2016 constitutional amendment, referred to above, which has given chiefs greater autonomy by abolishing the authority of the president to recognise or withdraw the recognition of chiefs, among other provisions.

Chapter eight analyses selected decided cases and ongoing litigation involving chiefs to assess the extent to which case law has influenced the development of public law on the regulation of chieftaincy in Zambia. The chapter also discusses results of the qualitative interviews conducted with selected lawyers who represented the claimants in the analysed cases. The aim of the research interviews was to understand the context of the cases and obtain the views of the lawyers on chiefly authority and public law. In this way, the chapter seeks to understand the development of public law from law practice and litigation. It also evaluates the state of access to justice for people who are adversely affected by the exercise of public power by a chief.

Chapter nine analyses Zambia's land tenure law and law reforms from a public law perspective by focusing on the power of chiefs in administering customary land. In this way, the chapter applies the findings and conceptual perspectives from public law to analyse the power of chiefs over customary land as a public power. The power of chiefs in administering land held under customary tenure is one of the most visible and contentious powers of chiefs as can be deduced from research and the volume of disputes involving customary land. The chapter advances legal pluralism as a useful analytical concept for the study of public law which would be applied to the study of the public power of traditional leaders and other institutions

in society which have been neglected by public law literature which unduly focuses on central state institutions.

The concluding chapter summarises the findings of the study and highlights the contribution of this thesis to the existing literature on chieftaincy and public law. It also offers reflections on the research process and identifies some interesting topics for future research. Having analysed chieftaincy as an important state institution under public law, the thesis contributes to existing scholarship on legal pluralism under public law. It argues that public law has not been fully explored by legal pluralism studies owing to its nature and foundational origins that are rooted in state centralism. While the thesis focuses on the study of chieftaincy in public law in Zambia, the broader concept of public law adopted by in this thesis has wider implications for the study of public power in society.

## **Chapter Two: Methodology**

### **2.1 Introduction**

The previous chapter introduced the research and gave an overview of the study which seeks to answer two research questions. The first question seeks to understand how chieftaincy has evolved in the post-independence constitutional law history of Zambia. The second question seeks to assess how case law on chieftaincy has influenced the development of public law in Zambia. Each of these questions prompt qualitative responses. This determined the design of the research as a historical study of chieftaincy under public law using qualitative research methods. The study employs two research methods, namely, desk-based research and qualitative interviews. This chapter explains the methodological decisions that guided the research and describes the steps taken in conducting the study. The remainder of the chapter is divided in four sections. The first section discusses the research design of the study. The second and third sections discuss the research methods adopted by the study starting with desk-based methods followed by qualitative interviews, respectively. The chapter ends with a conclusion.

### **2.2 A Socio-legal Study of Chieftaincy in Zambia's Constitutional and Administrative Law History**

This study is located within socio-legal studies. Socio-legal studies describe research that examines "how law, legal phenomena and/or phenomena affected by law and the legal system occur in the world, interact with each other and impact upon those who are touched by them."<sup>38</sup> Sociological paradigms perceive law as "a social institution with manifold consequences that must be apprehended holistically and empirically."<sup>39</sup> Socio-legal research is therefore the most appropriate design for answering the questions posed by this study which seeks to understand the institution of chieftaincy as an empirical phenomenon under constitutional and administrative law. Socio-legal research aids researchers interested in answering

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<sup>38</sup> Lisa Webley, 'The Why and How To of Conducting a Socio-Legal Empirical Research Project' in N Creutzfeldt, M Mason, and K McConnachie, *Routledge Handbook of Socio-Legal Theory and Methods* (1<sup>st</sup> ed, Routledge 2019) 59.

<sup>39</sup> Brian Z Tamanaha, *A Realistic Theory of Law* (Cambridge University Press 2017) 29.

questions which seek answers beyond “what the law is.”<sup>40</sup> The theoretical and conceptual perspectives adopted for this study are discussed in further detail in chapter five of this thesis.

The thesis studies chieftaincy in Zambia’s post-independence constitutional and administrative law history. The justification for limiting the scope of analysis to the post-independence period is explained by the review of literature, in chapter four, which establishes that there was considerable research interest in indigenous African political institutions before and during colonial rule for purposes of incorporating chiefs into the colonial local government under the policy of indirect rule.<sup>41</sup> This research interest however declined after independence in the late 1950s to 60s until the late 1980s and early 1990s when chieftaincy regained prominence in research and social policy after many African countries embraced plural politics following the defeat of one-party states and military governments.<sup>42</sup>

Public law scholars emphasise the importance of history to the study of public law.<sup>43</sup> Martin Loughlin, for instance, uses a historical approach to demonstrate how modern public law derives its theoretical foundations from the juristic thought about politics in Europe from the medieval period onwards involving developments by which political power emerged with capacity to absorb competing societal power leading to the dissipation of religious power, its major competitor in earlier centuries, and the withdrawal of the societal power of individuals.<sup>44</sup> Lewis LaRue justifies the use of the historical method to study constitutional law by arguing that it enables us to move

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<sup>40</sup> Webley (n 38) 59.

<sup>41</sup> Jan-Bart Gewald, ‘Researching and Writing in the Twilight of an Imagined Conquest: Anthropology in Northern Rhodesia 1930–1960’ (2007) 18 (4) *History and Anthropology*, 459; Lynette Schumaker, ‘A Tent with a View: Colonial Officers, Anthropologists and the Making of the Field in Northern Rhodesia, 1937-1960’ (1996) 11 *Osiris* 237.

<sup>42</sup> Donald I Ray, ‘Rural Local Governance and Traditional Leadership in Africa and the Afro-Caribbean: Policy and Research Implications from Africa to the Americas and Australasia’ in Donald I Ray and PS Reddy (ed) *Grassroots Chiefs in Africa and the Afro-Caribbean Governance?* (IASIA, 2003)10.

<sup>43</sup> Martin Loughlin, *Public Law and Political Theory* (Clarendon Press 1992) 2; Julius Goebel Jr, ‘Constitutional History and Constitutional Law’ (1938) 38 *Colum L Rev* 555; Lewis H LaRue, ‘Constitutional Law and Constitutional History’ (1987) 36 *Buff L Rev* 373.

<sup>44</sup> Martin Loughlin, *Foundations of Public Law* (OUP 2010) ch 1.

away from “excessive legalism” and understand case law (the subject of his analysis) from the prevailing social, economic and political contexts at the time the matters were decided.<sup>45</sup> Another notable example of the use of the historical approach to study constitutional law is an article by Patrick Matibini which uses the historical approach to study the constitutional amendment process in Zambia from 1964 to 1996 to understand why the country has failed to enact a durable constitution.<sup>46</sup> Based on his analysis of the amendment process used in enacting the successive constitutional changes, Matibini argues that Zambia has failed to adopt a durable constitution because the process used to enact the constitution and its subsequent amendments have not been participatory and are driven by the government.<sup>47</sup> The thesis engages with this literature further in chapter four, which discusses existing literature on chieftaincy under public law.

The thesis adopts a historical approach to study chieftaincy under public law in Zambia because it enables us to understand how the institution has evolved in the period under review. By studying chieftaincy as an empirical phenomenon under public law, the thesis contributes to the existing literature by producing analytical and descriptive literature on the position and regulation of chiefs under constitutional and administrative law. It also enables us to understand Zambia’s public law in its social context using legal pluralism as the relevant analytical concept which enables us to study public law empirically and beyond the doctrinal analysis of constitutions and legal texts.

The study employs qualitative research methods. Qualitative research methods are useful for purposes of understanding a particular social phenomenon.<sup>48</sup> Qualitative research provides unique perspectives for understanding research phenomena as no one viewpoint provides a comprehensive understanding. The value of qualitative

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<sup>45</sup> Lewis H LaRue, ‘Constitutional Law and Constitutional History’ (1987) 36 Buff L Rev 373, 390.

<sup>46</sup> Patrick Matibini, ‘Constitution Making Process: The Case of Zambia’ (2008) 39 Zam LJ 1.

<sup>47</sup> Ibid 30.

<sup>48</sup> Lisa Webley, ‘Qualitative Approaches to Empirical Legal Research’ in P Cane and H Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 926, 929.

methods lies in their capacity to understand “phenomena in their social setting and consider those phenomena in context.”<sup>49</sup> The study combines desk-based research methods with qualitative interviews conducted with selected lawyers who represented claimants in cases involving challenges to the exercise of power by a chief. The two research methods are discussed further below.

## **2.3 Literature Review and Doctrinal Study of Chieftaincy**

The thesis combines the study of the black letter law (doctrinal study) with the analysis of multidisciplinary literary sources which include books and journals in history, anthropology, political and development science, on chieftaincy in Zambia. Desk based research is useful for purposes of understanding the historical and conceptual perspectives on the research phenomena. The major limitation of using desk-based research methods to study legal pluralism is that they do not sufficiently capture the living customary constitutional norms and administrative practice regulating chieftaincies.<sup>50</sup> Such type of an inquiry would require extended periods of empirical observation of the various chiefdoms in Zambia to understand their respective constitutional and administrative norms and practice which would then inform the content of the analytical elements for evaluation. However, such extensive research was not feasible for purposes of the current study which was conducted within the limited time and resources required to complete the doctoral research. In any event, such a study is most suited for a study that seeks to produce descriptive data on the constitutional and administrative law norms regulating chiefs under customary law. This is beyond the scope of this thesis which is chiefly concerned with understanding the absence of chieftaincy in public law literature and the position of chiefs in the constitutional and administrative law history. That being the case, the methods used are rigorous enough to answer the questions posed by the study, as I demonstrate below.

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<sup>49</sup> Ibid 928.

<sup>50</sup> Himonga and Diallo (n 11) 11; Julie E Stewart, ‘Why I Can’t Teach Customary Law’ (1997)14 The Zimbabwe Law Review 18.

The desk-based research was applied in two main ways. The first was for purposes of developing a deep understanding of the research phenomenon and the key concepts to guide the research as well as to conduct a critical review of existing literature to identify the gap to which the thesis contributes. The second use of desk-based research was to conduct a doctrinal study of constitutional and administrative law regulating chiefs. Because this study was designed as a socio-legal study of constitutional and administrative law, the doctrinal study was combined with the analysis of multidisciplinary data such as books, journals, newspapers, and interpersonal communication such as letters, which proved useful for understanding law historically or sociologically.<sup>51</sup> These two uses of desk-based methods are discussed further below.

### **2.3.1 Literature Review and Conceptualisation of Research**

For the purposes of understanding the study phenomenon and developing the research questions for this study, a thorough review of existing literature was conducted. The first step towards this process was to come up with key words to guide the search for literary materials on Cardiff University's electronic library catalogue and online databases such as Google Scholar. I used Google Scholar to maximise the possible search results. Google scholar is reliable in ensuring that the search produces reliable sources.<sup>52</sup> The key words and phrases that I developed were informed by my knowledge of public law and experience from teaching and law practice. From my experience of teaching constitutional and administrative law at the University of Zambia (UNZA) for approximately five years and researching on the subject, I learnt that judicial review, which is the key mechanism for controlling public power in Zambia, largely depends on the English Common Law for substantive grounds and procedural rules.<sup>53</sup> My experience from law practice, particularly when litigating human rights claims based on statutory (and not constitutional) provisions

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<sup>51</sup> Chloë Kennedy, 'Sociology of Law and Legal History' in J Přibáň (ed), *Research Handbook on The Sociology of Law* (Edward Elgar Publishing 2020) 34.

<sup>52</sup> Webley (n 38) 60.

<sup>53</sup> Felicity Kayumba Kalunga and O'Brien Kaaba, 'The State of Administrative Justice In Zambia' in Hugh Corder and Justice Mavedzenge (ed) *Pursuing Good Governance Administrative Justice in Common-Law Africa* (Siber Ink 2019) 26 .

under which the mainstream administrative law practice falls, revealed a gap between the written law and the living experiences of most people. These experiences informed my assumptions concerning the nature of constitutional and administrative law and the plural character of Zambia's legal and governance orders, which I set out to test by studying public law empirically using the institution of chieftaincy. The justification for selecting chieftaincy as the relevant study phenomenon is given in the next chapter.

Having selected chieftaincy as my study phenomenon, the first step was to develop broad research questions to guide the gathering of relevant data. Based on these initial questions, I used a keyword search on electronic libraries and catalogues to locate relevant data. Keyword searches are useful for purposes of sorting through online databases due to their simplicity because "users do not need to know the database schema or use a structured query language."<sup>54</sup> Based on the words used, the search engine returns ranked documents based on relevance.<sup>55</sup> This maximises the chances of getting a wide range of results for the analysis. Their limitation, however, is that they have the tendency to overestimate the results by including irrelevant material.<sup>56</sup>

For purposes of this study, the following keywords, "chief," "chieftaincy," "traditional leaders," "local governance," "constitutional law," and "administrative law," were used. This search criteria enabled me to locate a wide range of materials on the topic from different scholars. I used Google Scholar to find scholarly articles and the university's online library catalogue to search for the relevant literature. To manage the scope of obtainable results, I added the location to the search such as "chiefs in Zambia" or "Africa." The other way of reducing the likelihood of obtaining useless results was by adding the word "and" to link the search words and phrases or using

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<sup>54</sup> Fang Liu and Others, 'Effective Keyword Search in Relational Databases' In Proceedings of The 2006 ACM SIGMOD International Conference on Management of Data, (June 2006) 563, 264.

<sup>55</sup> Ibid.

<sup>56</sup> Carol M Bast and Ransford C Pyle, 'Legal Research in the Computer Age: A Paradigm Shift' (2001) 93 Law Libr J 285, 293.

quotation marks “to ensure that certain words occur together in the search algorithm.”<sup>57</sup> The keyword search also pointed me to the relevant books held by the university library.

The next step was to skim through the results of the electronic search by reading the abstracts and first few sentences of the papers or lists of content for books to assess their relevance to answering my research questions. An illustrative sample of the literature gathered includes books, journals, and dissertations, among other literature, on the political history of precolonial polities in Africa in general and in the territory that became known as Zambia.<sup>58</sup>

The third step was to sort and analyse the data followed by a systematic review of the literature. Literature reviews provide a valuable means of assessing the state of existing knowledge and identifying research gaps in an efficient manner, both in terms of cost and time.<sup>59</sup> Data sorting and analysis was done with the help of NVivo 10 software to identify and code key themes.<sup>60</sup> The computer assisted analysis was followed up with actual reading of the documents to understand the key concepts and refine my research questions. This data informed the content of the thematic literature review discussed in chapters three and four of this thesis. The process also proved useful in identifying further resources, such as reports of constitutional review commissions, newspaper articles, and communications between chiefs and

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<sup>57</sup> Ibid 60.

<sup>58</sup> Audrey Isabel Richards, ‘The Political System of the Bemba Tribe –North-Eastern Rhodesia’ in AR Radcliffe-Brown, M Fortes and EE Evans-Pritchard (eds) *African Political Systems* (Oxford University Press, 1940); Mutumba Mainga Bull, *Bulozi under Luyana Kings: Political Evolution and State Formation in Pre-Colonial Zambia* (First Published 1973, Longman) 28; Max Gluckman, *The Ideas in Barotse Jurisprudence* (Manchester University Press 1965); Richard Hall, *Zambia* (Pall Mall Press, 1965); HS Mebeelo, *Reaction to Colonialism* (Manchester University Press, 1977); Samuel N Chipungu, ‘African Leadership Under Indirect Rule In Colonial Zambia,’ in Samuel N Chipungu (Ed) *Guardians In Their Time: Experiences Of Zambians Under Colonial Rule, 1890-1964* (MacMillan Press Ltd 1992).

<sup>59</sup> Benoit Guerin, Barbara Janta, and Anke van Gorp, ‘Desk-Based Research And Literature Review’ in Joanna Hofman and Alex Sutherland (eds) *Evaluating Interventions That Prevent Or Counter Violent Extremism* (RAND Corporation 2018) 63, 65.

<sup>60</sup> Webley (n 48) 938.

government officials, which I needed to understand the context of the legal texts analysed in the process that I discuss in the next subsection.

### **2.3.2 Doctrinal Analysis of Legal Texts**

The second use of the desk-based research method was to analyse constitutional texts, legislation, and cases on chieftaincy. This is called the doctrinal method and is the core method for legal research.<sup>61</sup> Although the doctrinal method remains a core component of legal research, legal scholars conducting interdisciplinary research endeavour to accommodate theoretical and analytical perspectives from other fields in their research frameworks.<sup>62</sup> The doctrinal method is typically a two-part process involving locating the law and then analysing or interpreting it.<sup>63</sup> This thesis applies the doctrinal method from a socio-legal perspective which combines insider perspectives (pure doctrinal) with perspectives from other multidisciplinary data.<sup>64</sup> The conceptual and analytical perspectives which informed the study are explained in chapter five of this thesis.

Researchers have used the doctrinal method to study public law in context. Jennifer Corrin, for instance, uses the doctrinal method to study the approach that the courts in Papua New Guinea take to decide judicial review cases, and other decisions involving customary law and finds that the English Common Law approach dominates administrative law compared to customary law.<sup>65</sup> Another notable example of the use of the doctrinal method is the research by Aninka Claassens and Geoff Budlender who analyse cases in which the Constitutional Court of South Africa has engaged with customary law to assess how the court has implemented its constitutional mandate to develop customary law.<sup>66</sup> In the context of Zambia,

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<sup>61</sup> Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin L Rev 83, 84.

<sup>62</sup> Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 8 Erasmus L Rev 130, 134.

<sup>63</sup> Hutchinson and Duncan (n 61) 110.

<sup>64</sup> Ibid 115; Theunis Robert Roux, 'The Incorporation Problem in Interdisciplinary Legal Research' (2015) 8 Erasmus L Rev 55.

<sup>65</sup> Corrin (n 27).

<sup>66</sup> Claassens and Budlender (n 28).

Carlson Anyangwe uses the doctrinal approach to analyse the 1996 amendment to the constitution of Zambia against the principles of constitutional autochthony and supremacy of the constitution.<sup>67</sup>

For purposes of studying chieftaincy under the post-independence constitutional law history of Zambia, the thesis focuses on the substantial constitutional changes during the study period as the key moments for understanding the position of chiefs in constitutional law history. The key dates are 1964 when the independence constitution was adopted, 1973 when the independence constitution was repealed to introduce one-party rule, 1991 when the one-party constitution was repealed to facilitate the re-introduction of multi-party politics, and its substantial amendments in 1996 and 2016, respectively. These dates provide the important contextual background to understand the social and political contexts within which the constitutional changes occurred including the power relations between chiefs and the central government during these landmark periods and how these relations were translated in resulting constitutional law text. In addition to the constitution, the research also analyses legislation on chiefs, land administration, and local governance, to understand the continuities and discontinuities in the regulation of the public power of chiefs in the local governance.

The process involved collecting, synthesising, and analysing the various constitutional and legislative documents. The first step was to collect soft copy versions of the relevant laws and related texts. For the independence constitution, I obtained scanned copies of the constitution, bills, and reports of the constitutional conferences from the UK Parliamentary papers accessible through Cardiff University library's online databases. To understand the context within which these processes occurred, the legal texts and reports were supplemented by literature and historical documents such as correspondence between chiefs and leaders of the United National Independence Party (UNIP) and African national Congress (ANC) in the run

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<sup>67</sup> Carlson Anyangwe, 'The Zambian Constitution and the Principles of Constitutional Autochthony and Supremacy' (1997) 29 Zam LJ 1.

up to independence and the government in the post-independence period. These archival documents were accessed from the electronic archives of the ANC (1948 – 1973) and UNIP (1949-1988) held by the British Library.<sup>68</sup>

The constitutional amendments and bills from 1965 to 1973 and old versions of laws such as local government legislation and amendments to it were accessed from the University of Zambia library, Special Collections Division. Current versions of the laws of Zambia were obtained from the National Assembly of Zambia website which contains a collection of the laws of Zambia.<sup>69</sup> The legal texts were supplemented by reports of the various constitutional review commissions which were obtained from the UNZA library.

The various documents were analysed using content analysis to understand the social context within which the constitutional developments occurred.<sup>70</sup> The constitutional law texts were analysed to understand causal links between the participation of chiefs in the constitution making process and the constitutional regulation of chiefs. I also sought to understand the social, political, and historical context within which the constitutional changes occurred to understand the legislative policy at the time of the relevant changes. The texts were also analysed chronologically to understand the changing perspectives on the constitutional regulation of chiefs and successive reforms in the land and local governance laws.

The second component of the doctrinal research was the analysis of decided cases and ongoing litigation in which people who are adversely affected by the exercise of power by a chief have challenged the decision of a chief in the High Court using constitutional or administrative law litigation. The study included court records of ongoing litigation. Court records were included, not only because of the small number of decided cases on the subject area, but also because they contain source

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<sup>68</sup> United National Independence Party of Zambia Archives (UNIP) [1949-1988] (British Library) <<https://eap.bl.uk/project/EAP121>>.

<sup>69</sup> National Assembly of Zambia <<https://www.parliament.gov.zm/acts/volumes>>.

<sup>70</sup> Webley (n 48) 937.

documents such as pleadings and notes by judges which provide a fuller picture of the issues in dispute. This is an advantage over reported cases and judgments which tend to only focus on the facts that are relevant to the principle of law that the court established in the particular judgment.<sup>71</sup>

The case analysis was conducted to enable me to respond to the second research question which seeks to assess the extent to which litigation on chieftaincy has influenced the development of public law in Zambia in its social context. Judicial control of administrative action has emerged as the major mechanism for limiting public power in Zambia, in addition to statutory controls.<sup>72</sup> Court cases therefore present the best evidence for purposes of assessing the development of public law in its social context since the bulk of chiefs' powers are exercised pursuant to customary law which is unwritten. Writing in 1989, SKC Mumba noted a marked improvement in the population of Zambians who had sought judicial review of administrative practice in the two decades after independence, particularly during the one-party rule, to challenge preventive detentions under national security laws.<sup>73</sup> He compared this to the earlier post-colonial period when courts were only accessed by a limited urban middleclass population.<sup>74</sup> The thesis seeks to understand whether this increased use of judicial review to control public power has been extended to rural communities in relation to the public power of chiefs.

The initial focus of the case analysis was on constitutional and administrative law claims against chiefs. However, because of the paucity of cases involving constitutional and administrative law challenges against chiefs, the analysis was extended to cases involving the exercise of chiefly authority over customary land, including cases in which chiefs were not sued. The study was limited to judgments

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<sup>71</sup> LaRue (n 45) 379.

<sup>72</sup> Robert B Seidman, 'Administrative Law and Legitimacy in Anglophonic Africa: A Problem in the Reception of Foreign Law' (1970) 5 (2) Law & Society Review 161, 166; Kalunga and Kaaba (n 53).

<sup>73</sup> SKC Mumba, 'Legal Controls of Administrative Powers: Traditional Methods and Assumptions and Their Relevance and Application in Contemporary Zambia' (1986) 18 Zam LJ 1, 8.

<sup>74</sup> Ibid.

and ongoing litigation in the High Court, Court of Appeal, Supreme Court, and Constitutional Court. The justification for limiting the scope of analysis to these courts and excluding lower courts is because the High Court of Zambia is the one that possesses original and unlimited jurisdiction to hear civil and criminal matters, and to review decisions as prescribed.<sup>75</sup> It is also the court with the authority to hear cases alleging violation of human rights pursuant to article 28 of the Constitution of Zambia.

The analysed cases were obtained from two electronic databases, namely a CD produced by the Council of Law Reporting containing electronic copies of the Zambia Law Reports from 1963 to 2013<sup>76</sup> and Zambialii, a non-governmental website that provides free access to legal resources such as judgments and legislation in Zambia.<sup>77</sup> Electronic databases were used for three main reasons. The first relates to the ease of accessing the databases remotely.<sup>78</sup> Remote access to cases was especially important in the context of this research which was conducted at the time when travel restrictions were imposed in many countries following the outbreak of the global Coronavirus (COVID-19) pandemic which prevented me from accessing physical libraries and court registries in Lusaka. The second advantage of online databases is that they provide access to a wide range of results through the search of multiple sources for purposes of triangulating the results.<sup>79</sup> For purposes of this study, the inclusion of raw judgments from the Zambialii website which are not published in the Zambia Law Reports provided an added advantage for broadening the scope of the obtainable results. The third advantage relates to their capacity for defining the scope of research results using advanced search functions imbedded in the databases which eliminate irrelevant data.<sup>80</sup> The limitation of relying on electronic databases is that without the benefit of speaking to library or registry

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<sup>75</sup> Constitution of Zambia, art 134.

<sup>76</sup> Zambia Law Reports are produced by the Council of Law Reporting.

<sup>77</sup> Zambialii <<https://zambialii.org/judgments>>.

<sup>78</sup> Ellie Margolis and Kristen E Murray, 'Say Goodbye to The Books: Information Literacy As The New Legal Research Paradigm' (2012) 38 U Dayton L Rev 117, 118.

<sup>79</sup> Morris L Cohen, 'Researching Legal History in The Digital Age' (2007) 99 Law Libr J 377, 378.

<sup>80</sup> Ibid.

staff, some important cases which are not on the databases may be omitted from the results. I mitigated this by obtaining the important cases that I may have missed in the search from the lawyers who participated in the interviews which are discussed in the next section.

To identify the relevant cases on the Zambia Law Reports CD, I conducted a subject matter search on the electronic index for each law report. I combined this search with a keyword search on the database to maximise the accuracy of results. For judgments produced after 2013, I relied on the electronic database supplied by Zambialii. The Zambialii database contains reported cases and selected raw judgments from the various courts in Zambia for the period 1935 to 2022. Raw judgments helped to maximise obtainable results because they provide access to cases that may not be reported because they do not advance the existing precedents. The database also provides broader access to High Court judgments which are not ordinarily reported by the Council of Law Reporting. To access ongoing litigation, the relevant case records were obtained from the High Court Registry by searching the court's electronic database called HP Records Manager which stores all captured cases filed in the High Court and various courts in the country except the local courts from 2010 to date. Relevant permission to access the court records was obtained from the Chief Registrar of the Judiciary of Zambia. A copy of the relevant approval is exhibited in the appendix to this thesis. The copy has been redacted to remove personal information.

A keyword search was used on both the Zambialii database and HP Records Manager to identify relevant cases to be analysed. The words used to conduct the search are "chief," "judicial review," and "customary tenure." The choice of key words was informed by the systematic literature review discussed above. To limit the risk of getting false positives by bringing up irrelevant material, I used a combination of search criteria to show cases containing "any of the words," "all of the words" and "the exact phrases." To mitigate the risk of missing pertinent cases, I skimmed through all the cases that emerged from the search category showing all cases with

“any of the words” and carefully read the case summaries and introductory paragraphs of all the cases that contained “all the key words.” For the court records, I thoroughly read each originating process to determine the relevance of the case to the study.

The search criteria produced 39 cases in which a chief was either sued or was the subject of the decision in contention. Out of the 39 cases, 33 were decided cases while 6 were active cases either pending trial or awaiting judgment. The cases were analysed using a systematic review to identify cases that would help me answer the second research question. They were also used for purposes of identifying participants for the interview component discussed in the next section.<sup>81</sup> The systemic review of cases was focused on the subject matter of the suit, the nature of the defendant, and the relationship between the parties to the proceedings. These themes were chosen based on my conceptual understanding of public law as the law that is concerned with regulating the legal relationship between the state and citizens and controls the public power of the state.<sup>82</sup> These conceptual bases and assumptions are discussed in chapter five of this thesis.

The findings of the systematic review of the cases revealed that most of the cases, 19 in total, were disputes involving a decision of a chief in a customary land transaction, although in most of these cases, the chief was not a party to the proceedings. These were followed by disputes between contending heirs to chieftaincy including challenges to the recognition or withdrawal of recognition of a chief by the President (for cases decided before the power to recognise was abolished by the 2016 constitutional amendment) which stood at 16. The third highest number of cases were those in which claimants sued a chief. These were only three. Of the three cases, one was a human rights challenge against a decision of a chief and two were administrative law matters, although one was not

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<sup>81</sup> William Baude, Adam S Chilton and Anup Malani, ‘Making Doctrinal Work More Rigorous: Lessons From Systematic Reviews’ (2017) 84 U Chi L Rev 37, 38.

<sup>82</sup> Barnett (n 1); William Wade and Christopher Forsyth, *Administrative Law* (11<sup>th</sup> edn, OUP 2016) 4; Charles Sampford, ‘Law, Institutions and The Public/Private Divide’ (1991) 20 Fed L Rev 185, 186.

commenced as such and was dismissed on a preliminary point. There was also one tort case in which the claimant had sued the Attorney General on behalf of government seeking compensation for his detention by a chief in the exercise of statutory powers of a chief under section 11 of the Chiefs Act. The case analysis is discussed in chapter eight of this thesis.

For purposes of answering the second research question which seeks to assess the impact of case law on the development of public law in its social context, seven cases were analysed. These comprised of the three constitutional and administrative law claims against a chief and four cases involving customary land. Three of the four customary land disputes were human rights claims against unlawful eviction from customary land and one was a suit against a chief seeking to prevent the chief from evicting the plaintiffs from customary land and to stop them from erecting permanent structures on the land.

The exclusion criteria for the cases that were not analysed was determined by the research questions and the systematic review of the cases and existing literature. Customary land disputes in which chiefs were not sued and were commenced as common law claims seeking declarations against property owners were excluded because they are mostly decided based on the common law principles of property law and the interpretation of statutory provisions regulating land. These issues are remotely connected to the research aims of this study and are well analysed by other researchers.<sup>83</sup> Cases involving contending heirs to chieftaincy and challenges to the recognition or withdrawal of recognition of a chief by the president were excluded because they are concerned with disputes between chiefly elites and exercise of administrative authority by the republican president which fall outside the scope of this study which is concerned with the relationship between chiefs and citizens and control of the public power of chiefs under customary law. For similar reasons, the tort case was excluded because it was based on the exercise of power by a chief under the Chiefs Act.

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<sup>83</sup> Fredrick S Mudenda, *Land Law in Zambia: Cases and Materials* (UNZA Press 2007).

## 2.4 Qualitative Interviews

To address the limitations of the doctrinal method, the case analysis, used to assess the extent to which litigation involving chiefs has influenced the development of public law in Zambia, was supplemented by qualitative interviews with lawyers who represented the claimants in the analysed cases. The rationale for interviewing the lawyers who represented claimants in the analysed cases was firstly, to give context to the cases and secondly, to obtain their views on the public power of chiefs.

Although reported cases and court documents detail the nature of proceedings, the procedure for moving courts, and arguments presented by the parties, they are not capable of informing us about the “whys and wherefores of this procedure” and the cause generally.<sup>84</sup> Interviews with the legal actors such as lawyers tend to “shed light on the juristic thinking, the arguments that lawyers made in court and the actions of legal actors who exercised great discretion.”<sup>85</sup> The interviews conducted with the lawyers who represented claimants in the analysed cases therefore provided the necessary context to the cases.

Qualitative interviews are useful for purposes of exploring the views, beliefs, and experiences of individual participants on a chosen subject.<sup>86</sup> Interviews afford the researcher an opportunity to gain a deeper understanding of a phenomenon or how the research participants understand the world.<sup>87</sup> Interviews are therefore useful where the researcher requires to obtain insights from individual participants, which is what this research sought to obtain.<sup>88</sup> Interviews have been used by researchers to understand perceptions of law and the legal profession.<sup>89</sup> Since lawyers are

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<sup>84</sup> LaRue (n 45) 379.

<sup>85</sup> Kennedy (n 51) 33.

<sup>86</sup> Michael Sunday Afolayan and Omolade Adeyemi Oniyinde, ‘Interviews and Questionnaires as Legal Research Instruments’ (2019) 83 *JL Pol’y & Globalization* 51, 53.

<sup>87</sup> Webley (n 48) 932.

<sup>88</sup> Paul Gill and others, ‘Methods of Data Collection in Qualitative Research: Interviews and Focus Groups’ (2008) 204 (6) *British Dental Journal* 291, 291.

<sup>89</sup> Hilary Sommerlad, ‘Researching and Theorizing The Processes of Professional Identity Formation’ (2007) 34 (2) *Journal of Law and Society* 190; Margaret Thornton, ‘Work/Life Or Work/Work? Corporate Legal Practice in The Twenty-First Century’ (2016) 23 (1) *International Journal of the Legal Profession* 13.

instrumental in developing law through litigation, their conception of law and governance are important in shaping the ensuing law and practice. The role of lawyers is especially important in common law systems like Zambia where judicial precedent is an important source of law.

#### **2.4.1 Sampling**

The interview participants were selected using a purposive sampling method which targeted lawyers who represented the claimants in the cases that were analysed as stated above. Purposive sampling enables the selection of “information-rich cases to maximize effective use of limited resources.”<sup>90</sup> The participants for this study were identified from the court records and judgments which indicate the names of lawyers or law firms that represented parties. Approval of the ethics committee of the School of Law and Politics, Cardiff University, was obtained for the qualitative interviews after satisfying the requirements for conducting research with human participants. Further, all the participants gave their written consent to be interviewed.

Following the systematic analysis of the cases described above, six participants were selected. What constitutes a sufficient sample size in qualitative research depends on several factors including the aims of the study, the quality of the data, the research design, and sampling procedures, which in turn influence saturation.<sup>91</sup> For this reason, researchers shy away from estimating what constitutes an ideal sample size for qualitative interviews.<sup>92</sup> What is key is to justify the sample size to prove that “the dataset is sufficient to address research problems.”<sup>93</sup>

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<sup>90</sup> Naihua Duan and Others, ‘Optimal Design and Purposeful Sampling: Complementary Methodologies for Implementation Research’ (2015) 42 (5) *Adm Policy Ment Health* 524, 531. DOI 10.1007/s10488-014-0596-7.

<sup>91</sup> Mark Mason, ‘Sample Size and Saturation in PhD Studies Using Qualitative Interviews’ (2010) 11 (3) *Qualitative Social Research* 2. (ISSN 1438-5627) < <http://www.qualitative-research.net/>> Accessed 13 April 2020.

<sup>92</sup> *Ibid* 3.

<sup>93</sup> Bryan Marshall and Others, ‘Does Sample Size Matter in Qualitative Research?: A Review of Qualitative Interviews in is Research’ (2013) 54 (1) *Journal of Computer Information Systems* 11, 20. DOI: 10.1080/08874417.2013.11645667.

The number of participants in this study was determined by the outcome of the systematic analysis of cases, discussed above, using a purposive sampling method based on their involvement in litigating the discussed cases. A total of seven cases have been analysed representing three constitutional and administrative law cases and four cases involving administration of customary land. The same lawyer represented the claimants in two out of the three cases involving constitutional and administrative law challenges against a chief. The third case had no legal representation. Out of the four cases involving the exercise of power of a chief in land matters, three were represented by the same lawyer. I therefore interviewed all the lawyers who represented claimants in the cases that have been analysed. In addition to the three lawyers who represented the claimants in the analysed cases, I also interviewed three other lawyers who have experience with litigating customary land claims in the cases which were not included in the case analysis to obtain more perspectives on their involvement with customary land litigation and their views on chiefly authority. The participants were given a choice to be identified with their responses or to have their responses pseudonymised. For those who opted to have their responses synonymised, the risk of jigsaw identification was explained to them especially in view of the specific sampling criteria which depended on their having represented the claimant in the relevant cases.

The participants were contacted using their details contained in a directory of lawyers published by the Law Association of Zambia as well as through my personal networks. The participants were first contacted via email or text message to invite them to take part in the interview. After they agreed to participate in the interview, I sent them the participant information sheet, consent form, and interview schedule via email in advance of the interview. This gave the participants an idea of what to expect in the interview and an opportunity to give informed consent to participate in the study.<sup>94</sup> The interview times were agreed upon with the participants depending on their availability which gave them maximum flexibility to schedule the interviews at their convenience. I am acquainted with most of the participants through

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<sup>94</sup> Gill and Others (n 88) 292.

professional networks, which made it easy to overcome perceived challenges of building rapport which are sometimes associated with online interviews.<sup>95</sup>

### **2.4.2 Structure and Conduct of Interviews**

The interviews were conducted between 11 June 2021 and 30 June 2022. The interviews were semi-structured. The value of semi-structured interviews lies in their adaptability as they allow the interviewer or participants flexibility to pursue an idea or a response in a more detailed manner, which is not possible when the interview is structured.<sup>96</sup> Another advantage of semi-structured interviews is that they are easy to design and “require much less prior knowledge than designing a well constructed questionnaire.”<sup>97</sup> This flexibility allows the researcher to discover insights that they may not have thought about prior to designing the interview questions.<sup>98</sup>

The interviews for this study were conducted based on an interview schedule with seven questions. Interview questions may be informed by the research questions, theory, experience, previous research on the subject or a mix of these factors.<sup>99</sup> For purposes of this study, the interview questions were informed by the second research question, namely, to understand how litigation on chieftaincy has influenced the development of public law. The questions therefore sought to obtain the contextual details of the analysed cases to complement the doctrinal analysis and obtain the views of the lawyers about chiefly authority and public law. For this purpose, some of the questions sought responses from the lawyers about decisions that influenced their selected mode of prosecuting the relevant case. The questions were also informed by the literature review which revealed an absence of chieftaincy in public law literature in Zambia which in turn informed the research questions. The interview questions therefore also asked lawyers about how they met their clients to investigate the role of lawyers in developing law through litigation and evaluate the

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<sup>95</sup> Jennifer Rowley, ‘Conducting Research Interviews’ (2012) 35 (3/4) Management Research Review 260, 265.

<sup>96</sup> Gill and others (n 88) 291.

<sup>97</sup> Rowley (n 95) 262.

<sup>98</sup> Gill and Others (n 88) 291.

<sup>99</sup> Ibid 263.

state of access to justice for people who are adversely affected by the public power of chiefs. A copy of the interview schedule is exhibited in the appendix.

A preliminary pilot of the interview questions was conducted on three lawyers who did not form part of the interview sample to assess the suitability of the questions to obtain desirable responses from the participants. A preliminary pilot of the interview questions helps in assessing if the questions make sense.<sup>100</sup> The feedback from the three lawyers was useful in improving the clarity of the final questions. The questions were mostly open ended to give the respondents a chance to express their opinions and solicit further information from them on the research phenomenon. Open questions are particularly appropriate for interviews because they help to minimise interviewer bias which is associated with qualitative interviews.<sup>101</sup> The interview schedule also contained prompts on some questions to guide the discussions. The questions were adaptable with regards to the order and extent of probing to accommodate the participants.<sup>102</sup>

The interviews were conducted remotely using Zoom meeting forum. To ensure that the communications were secure, all interviews were conducted using my University Zoom account which is password protected. I also used the security features on Zoom by setting up separate meetings with each participant with a unique meeting ID and was password protected. The meeting links were only shared with the individual participant. One of the advantages of using online methods to conduct interviews is that they allow the researcher to transcend the geographical limitations associated with physical interviews.<sup>103</sup> This proved to be valuable for this study because the interviews were conducted during the COVID-19 pandemic when there were restrictions on travel and human contact. One of the disadvantages of online

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<sup>100</sup> Ibid 265.

<sup>101</sup> Afolayan and Oniyinde (n 86) 57.

<sup>102</sup> Ibid.

<sup>103</sup> Valeria Lo Iacono, Paul Symonds and David HK Brown 'Skype As a Tool For Qualitative Research Interviews' (2016) 21 (2) Sociological Research Online 103, 105.  
<<http://www.socresonline.org.uk/21/2/12.html>> DOI: 10.5153/sro.3952. Accessed 15 December 2020.

interviews relates to the challenges of accessibility and reliability of internet technologies.<sup>104</sup> Although accessibility was not a challenge for most of my participants, two of them experienced challenges which prevented them from turning on their video cameras during the interview. This had the effect of limiting my capacity to gather information from nonverbal communication which contributes to the richness of data and interpretation of participants' responses.<sup>105</sup> This challenge was, however, not fatal for the purposes of this study because the research interviews were concerned with the participants' views and opinions rather than their behaviour.

The interviews averaged 60 minutes each with some taking a shorter time of about 45 to 50 minutes. They were recorded using the audio/video recording facility provided by the Zoom platform. Consent of the participants to record the interviews was sought both before the interview through the consent form and at the start of each interview session. The voice and video recordings were safely stored on my personal laptop which is password protected and were deleted after they were transcribed. I personally transcribed the audio files into verbatim text form and stored the transcripts on the University's cloud storage per the University policy on storage of personal data. The interview transcripts were manually analysed using content analysis. Illustrative quotes of the participants' views are included in chapter eight of this thesis which discusses the findings of the interviews. Illustrative quotes allow the reader to see some raw data and draw their own conclusions on it.<sup>106</sup>

## **2.5 Conclusion**

This chapter has explained the design and methodology used to conduct the research. The research sits within socio-legal studies and was designed as a historical study of chieftaincy in Zambia's post-independence constitutional and administrative law. The study uses qualitative research methods by combining desk-

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<sup>104</sup> Ibid.

<sup>105</sup> Gina Novick, 'Is There Bias Against Telephone Interviews in Qualitative Research?' (2008) 31 (4) *Research in Nursing & Health* 391, 395.

<sup>106</sup> Webley (n 48) 942.

based research with qualitative interviews. The desk-based methods were used to understand the study phenomenon and develop the conceptual framework of the research as well as to study chieftaincy under public law using the doctrinal method. Qualitative interviews were used to supplement the doctrinal analysis of cases involving chiefs and to obtain the views of the lawyers who represented claimants in the analysed cases on chiefly power under public law. The methods used provided a rigorous means for obtaining information to respond to the research questions asked by the study. The next chapter introduces the institution of chieftaincy and explains why it is an important phenomenon for the study of public law in Zambia.

## **Chapter Three: Chieftaincy as a State Institution**

### **3.1 Introduction**

The previous chapter explained the research design and methodology adopted to study chieftaincy in Zambia's post-independence public law history. This chapter explains why chieftaincy is an important empirical phenomenon for the study of public law in Zambia. It does this by tracing the historical origins of chieftaincy in Zambia and highlighting some of the important characteristics of chiefs which justify their study under public law.

The chapter argues that chieftaincy in Zambia, like many other African countries where the institution exists, draws its legitimacy as a state institution from pre-colonial political institutions under which centralised African societies were organised. The institution has undergone several changes throughout history which began during the colonial period. One of the major changes introduced by the colonial administration was the incorporation of traditional leaders in the local governance of the indigenous people under the policy of indirect rule. In this role, chiefs were given administrative and judicial power over Africans in their territories under Native Authorities with the view of assimilating them into the bureaucratic local government that would evolve. However, chieftaincy did not evolve to form the post-independence local government following the abolition of Native Authorities by the post-independence government which were replaced by the elected local councils. These changes notwithstanding, chieftaincy has endured as an important state institution in society which performs various public law functions under customary law.

The remainder of this chapter is divided in four sections. The first section defines the concept of state as used by this thesis to provide the context for identifying chieftaincy as a state institution. The second section discusses the evolution of chieftaincy during the colonial administration of Northern Rhodesia, which is what Zambia was called before independence, when chiefs were incorporated in the local governance of natives under the policy of indirect rule. The third section explains the

rationale for studying chieftaincy under public law. It ends with a conclusion in the fourth section which summarises the content of the chapter.

### **3.2 The State and State Institutions**

The concept of state is essential to understanding public law. The term draws its foundation from European political history and philosophy.<sup>107</sup> Quentin Skinner argues that in its historical context, the term state as used by European medieval historians and philosophers, described the status of kings or their kingdoms.<sup>108</sup> The modern concept of state describes an apparatus of power which includes the mode of political association of people in a territory, including the constitution of institutions of governance.<sup>109</sup>

With regards to the mode of political association, political historians explain the organisation of the state within the historical context of European political philosophy where the concept is said to have evolved through three main stages or forms of association. The first stage is the community which is represented by an association of people who share kinship, ethnic or cultural ties, and are glued by rulers who draw their legitimacy to rule from the natural such as God, or other emotionally enforced authority such as charisma or ritual.<sup>110</sup> This type of association presents itself through the political notion of nationalism, representing similarity of culture or ethnicity as the basic social bond.<sup>111</sup> Many scholars have rejected the idea of a community as the organising concept for political association of the state because it is almost improbable for a nation state to exist in the ethnic sense.<sup>112</sup>

Anthropologists therefore described such societies as stateless or acephalus.

The second mode of association which is associated with the idea of state is a society which denotes an association of autonomous individuals who may be

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<sup>107</sup> Quentin Skinner, 'The State' in Terrence Ball, James Farr and Russell L Hanson (eds), *Political Innovation and Conceptual Change* (Cambridge University Press 1989) 90-131, 95.

<sup>108</sup> Ibid 96.

<sup>109</sup> Loughlin (n 44) 180.

<sup>110</sup> Ibid 199.

<sup>111</sup> Ibid 200.

<sup>112</sup> Ibid 200.

pursuing self-interest but interact in an environment through some agreed social rules for corporate living.<sup>113</sup> Under this organising mode, individuals are assumed to suppress their emotions for purposes of transacting with others in the common space.<sup>114</sup> These societal arrangements are stabilised by the adoption of formal mechanisms and agreements to manage the tensions between individual and corporate interests. The rulers under this organisation draw their legitimacy from a political agreement by the people who form part of the constitutive elements of the state. This form of political organisation or imaginary of the state was first credited to the political philosophy of the republican thinkers and opponents of absolutism around the seventeenth and eighteenth centuries.<sup>115</sup> This is the form with which the modern-day construct of the state is associated.

The modern-day state, which is the third form of political association, represents an autonomous entity with a life of its own separate from its constitutive elements (the rulers and the ruled) which said elements must be studied for purposes of understanding the character of the state and public law.<sup>116</sup> It signifies an impersonal and autonomous self-governing institution notwithstanding its historical foundations which constructed the state in relation to the standing of the ruler or king.<sup>117</sup> The state integrates communities and societies and manages tensions between individuals and the corporate through the instrument of the law, public law.<sup>118</sup> The state encompasses three aspects of political organisation, namely, a territory within which the people are organised, the people themselves, and the ruling power organised through an imaginary of a political pact.<sup>119</sup> The concept of the state is therefore value ridden and does not reflect the real truth about the social and political organisation of a given society. It is an ontological concept which permits us to construe politics and is pivotal to the understanding of public law.<sup>120</sup>

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<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Skinner (n 107).

<sup>116</sup> Ibid 112.

<sup>117</sup> Ibid 104.

<sup>118</sup> Loughlin (n 44) 201.

<sup>119</sup> Ibid 195.

<sup>120</sup> Peter J Steinberger, *The Idea of the State* (Cambridge University Press 2005), 13 –14.

State institutions symbolise the mechanisms for organising power to rule the state.<sup>121</sup> They represent how the people express their power in an administratively convenient form.<sup>122</sup> This power could be vested in a sovereign ruler or divided between various institutions of governance such as the executive, legislature, judiciary, and the local government. Within this context, the term state is often used interchangeably with government as distinguished from private citizens.<sup>123</sup> The thesis uses the terms state and governance institution interchangeably to describe the ruling apparatus. State institutions are characterised by the presence of one or more of the following powers to – make and unmake rules that bind everyone, manage the common resources, maintain social order, and protect the society from external attacks, settle disputes, and be responsible for the ceremony and ritual functions of the state.<sup>124</sup> One of the key institutions which has traditionally exercised some or all these powers in many African societies, including Zambia, is chieftaincy. This therefore makes chieftaincy an important state institution.

### **3.3 Evolution of Chieftaincy in Zambia**

Chieftaincy as state institution in Zambia originates from pre-colonial political institutions that were centrally organised. Anthropologists described centralised societies in precolonial African societies as those which were comprised of complex social groups of more than one tribe with complex leadership structures.<sup>125</sup> The Lozi of Western Province (formerly Barotseland) and the Bemba in the North of Zambia provide good examples of such societies that have been extensively studied by scholars of pre-colonial Zambian states.<sup>126</sup> The governance structures of such

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<sup>121</sup> Loughlin (n 44) 187.

<sup>122</sup> Skinner (n 107) 113.

<sup>123</sup> Ibid 8.

<sup>124</sup> Loughlin (n 44) 187.

<sup>125</sup> Peter J Schraeder, *African Politics and Society: A Mosaic in Transformation* (Bedford/St. Martin's 2000) 71.

<sup>126</sup> See for instance, Audrey Isabel Richards, *The Political System of the Bemba Tribe – North-Eastern Rhodesia* in AR Radcliffe-Brown, M Fortes and EE Evans-Pritchard (eds) *African Political Systems* (Oxford University Press, 1940) and Akashambatwa M Lewanika, 'Indigenous African Nationalism Over Changing Times: Bastion of Resistance,' in AM Lewanika, *Freedom Park Inaugural Memorial Lecture on King Lewanika I of Barotseland 1842-1916* (Xlibris 2017).

societies took various forms including “centralised monarchs,” where the sovereign commanded absolute power, “pyramidal monarchs” in which non-royal clans enjoyed some administrative authority and reported to the monarch, and “associational monarchs” where associational power groups exercised limited administrative power that transcended tribal clans.<sup>127</sup> The thesis elaborates on these structures and their regulatory norms below using examples from Barotseland and the Bemba kingdom. These two kingdoms have been chosen not only because of the availability of literature on them, but also because they present a fair sample of common features of traditional governance institutions in many centralised societies of Central and Southern Africa.<sup>128</sup> More examples are drawn from other African societies, with similar governance structures, to provide a richer understanding of traditional African norms which governed state institutions before colonialism.

As above stated, not all pre-colonial societies in Africa had chiefs. Societies which did not have centralised rulers were organised differently, often in smaller kinship groups connected by blood, marriage, tribe, age sets or occupation.<sup>129</sup> The plateau Tonga of the Southern province of Zambia provide a notable example of such a society that was organised in smaller kinship groups.<sup>130</sup> This thesis does not discuss the various social groups in precolonial Zambia in further detail as this has been sufficiently covered elsewhere.<sup>131</sup>

There were approximately three societies which could be described as centralised in precolonial Zambia, namely, the Lozi, the Bemba, and the Ngoni.<sup>132</sup> Studies of Bantu ethnic groups with centralised governance institutions in the territory have shown that there were predominantly two types of monarchs, namely, centralised

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<sup>127</sup> Alfred Reginald Radcliffe-Brown, Meyer Fortes and Edward Evan Evans-Pritchard (eds), *African Political Systems* (Oxford University Press 1940) 72-73.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid 63-70.

<sup>130</sup> Elizabeth Colson, ‘Rain-Shrines of the Plateau Tonga of Northern Rhodesia’ (1948) 18 (4) *Africa: Journal of the International African Institute* 272.

<sup>131</sup> For instance, Radcliffe-Brown, Fortes and Evans-Pritchard (n127), and Schraeder (n 125).

<sup>132</sup> Alan Pim, ‘205. Anthropological Problems of Indirect Rule in Northern Rhodesia’ (1938) 38 *Man* 180.

monarchs, and pyramidal ones.<sup>133</sup> Centralised monarchs are those where political power was administered at the centre by the monarchy. The balance of power in such societies was predominantly achieved through controls by a council of non-royals who advised the king or through whom the king performed administrative functions.<sup>134</sup> The Lozi kingdom is a fitting example of such a constitutional arrangement. Another form of leadership that is said to have existed among centralised Bantu societies was the pyramidal monarch.<sup>135</sup> This system allowed semi-autonomous administrative institutions, like a federal government, to administer their territories with relative autonomy but they were subject to the monarch.<sup>136</sup> The Bemba are a fitting example of such a society. In such societies, the main form of control of the political and administrative power of the monarch was the deconcentrating of power from the capital.

### **3.3.1 Chieftaincy in Precolonial Zambia**

At the outset, it must be stated that the title of “chief” is a colonial one. African leaders were addressed by different titles which meant different things to their people. Some of these titles were translated to English by various scholars, depending on their perception of the leader, as king, chief, sultan, priest, witchdoctor, and so on.<sup>137</sup> The title of “chief” was adopted for all traditional leaders by the colonial administrators, and they used this title liberally when they implemented the system of indirect rule by which traditional leaders were recognised for purposes of administering African affairs.<sup>138</sup> The thesis uses the terms chief, king, and the traditional titles of the specific rulers, interchangeably to describe these state institutions wherever the context permits.

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<sup>133</sup> Schraeder (n 125).

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

<sup>137</sup> David M Gordon, ‘(Dis)Embodying Sovereignty: Divine Kingship in Central African Historiography’ (2016) 57 (1) *Journal of African History* 47. For instance, Richard Hall, *Zambia* (Pall Mall Press, 1965) 46 references the writings of an Arab Trader, Tippu Tib who, in his biography, described Bemba Chief, Mwamba, as “the Sultan.”

<sup>138</sup> Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press 1996) 52-61.

Most traditional leaders in the precolonial period did not assume office through popular elections but by heredity.<sup>139</sup> The identification of the royal family was a product of history. There was hardly a question as to who belonged to the royal family although there were often challenges concerning which royal is the rightful heir to the throne at a given time. In Barotseland, for instance, the king was chosen from amongst the princes of the dead king by the people in an assembly.<sup>140</sup> In the Bemba kingdom, succession to the throne was in the line of female royals.<sup>141</sup>

In many instances, the ruler combined executive, ritual, and judicial functions. For instance, a chief could determine disputes among the people, command the army or organised force for the protection of the community from external attacks, and in some instances impose sanctions on offenders or suppress revolution.<sup>142</sup> The ritual power lay in the belief of the divinity of the ruler. The Lozi, for instance, believe that the royal family has divine ancestry from God through his daughter, Mbuyu, whom God, Nyambe, had created for purposes of creation.<sup>143</sup> Lozi kingship therefore lay in this divine bloodline by agnatic descent.<sup>144</sup> A dead Lozi king was also believed to possess spiritual powers that governed the living in times of need through an intermediary, the "Namboti or Nameto," whose duty was to look after the grave and the needs of the dead king.<sup>145</sup> This priestly class also acted as a control on the reigning king.<sup>146</sup> Installation of the Lozi king involved a series of ritual ceremonies which resulted in the king being surrounded by mystery and ritual.<sup>147</sup> Similarly, the Lozi king was ritually buried. When a king died, the nation was said to be in a

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<sup>139</sup> Kate Baldwin, *The Paradox of Traditional Chiefs in Democratic Africa* (Cambridge University Press 2016).

<sup>140</sup> The Royal African Society, 'The Death of Lewanika' (1917) 16 (62) *Journal of the Royal African Society* 149.

<sup>141</sup> Andrew Roberts, 'Chronology of the Bemba (NE Zambia)' (1970) 11 (2) *Journal of African History* 221, 233.

<sup>142</sup> Radcliffe-Brown, Fortes and Evans-Pritchard (n 127).

<sup>143</sup> Mutumba Mainga Bull, *Bulozi under Luyana Kings: Political Evolution and State Formation in Pre-Colonial Zambia* (First Published 1973, Longman) 28.

<sup>144</sup> Max Gluckman, *The Ideas in Barotse Jurisprudence* (Manchester University Press 1965) 38.

<sup>145</sup> Bull (n 143) 29.

<sup>146</sup> *Ibid* 37.

<sup>147</sup> *Ibid* 28.

comma symbolised by the putting out of all fires until they are rekindled by a fire taken from the "hearth of the successor."<sup>148</sup>

Traditional rulers enjoyed significant powers including the power to negotiate and enter agreements with representatives of foreign powers. For instance, King Lewanika of Barotseland played an instrumental role in obtaining treaties with representatives of the British South Africa Company (BSAc) over his kingdom. He had actively sought the protection of Britain (mostly against internal and external threats to his kingdom) including by writing to the British High Commissioner in Cape Town in February 1889 inquiring about the possibility of such protection.<sup>149</sup> Lewanika enjoyed relative power to negotiate terms of the agreements that were signed notwithstanding the fact that he signed the treaties under misrepresentation of fact as to the nature of the agreement and the relationship between the Company and the British Crown as presented by the BSAc representatives.<sup>150</sup>

Economic privileges such as rights to tax, tribute and labour were the main rewards for political power and essential to maintaining it in most centralised states.<sup>151</sup> The king's entitlement to economic benefits under Barotse constitutional law, for instance, was justified on grounds of his ownership of land and natural resources.<sup>152</sup> In Barotseland, the king's title, Litunga, means "the earth and its riches: the trees, the wild creatures, and domesticated cattle."<sup>153</sup> The people derive their sustenance from these things and as such are obliged to give tribute to the king as they are indebted to him for their lives.<sup>154</sup> Anybody who settled in Barotseland was a subject of the king and bound to pay tribute.

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<sup>148</sup> Gluckman (n 144) 39.

<sup>149</sup> Northern Rhodesia (Zambia) White Paper on British South Africa Company's Claims To Mineral Royalties (Concession agreements; succession of states) (1964) 3 (6) International Legal Materials, 1133, 1139.

<sup>150</sup> Richard Hall, *Zambia* (Pall Mall Press 1965).

<sup>151</sup> Northern Rhodesia (Zambia) White Paper on British South Africa Company's Claims to Mineral Royalties (Concession agreements; succession of states) (1964) 3 (6) International Legal Materials 1133, 1139.

<sup>152</sup> Gluckman (n 144) 38.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

In almost all centralised African governments, there was a fair balance of power and administrative checks provided by constitutional conventions.<sup>155</sup> Institutions such as the king's council, spiritual officials, and queen mothers' courts, among others, worked for the protection of law and custom to control the centralised power of the ruler.<sup>156</sup> Civil war and insurrection were also another form of control of the political power of the chief. In some tribes such as the Lozi, for instance, civil war or revolt was legitimate and not punishable by law.<sup>157</sup> Another control on the power of a chief was through councillors, subchiefs, and ritual functionaries who represented interests of the communities in preserving the law and custom and observing rituals deemed necessary for the wellbeing of the community.<sup>158</sup> Royals were controlled by either a council of non-royals who advised the king or were assigned important duties such as collection of taxes, or through devolution of power.<sup>159</sup> In extreme cases, a chief could be removed from office through regicide.<sup>160</sup>

Historical accounts of European traders and missionaries who attempted to enter the interior of Africa around the 18<sup>th</sup> century and the first half of the 19<sup>th</sup> century indicate the presence of strong African governments who traded with the Europeans on their terms, including by requiring the visitors to respect African ways of worship.<sup>161</sup> For instance, Giacomo Macola records an incidence from his study of diaries of Portuguese traders who interacted with the Kazembe Kingdom in which they were required to pay respects to the spirits of the dead kings to seek passage

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<sup>155</sup> Radcliffe-Brown, Fortes and Evans-Pritchard (n 127).

<sup>156</sup> Ibid.

<sup>157</sup> Gluckman (n 144); Wim van Binsbergen, 'Aspects of Democracy and Democratisation in Zambia and Botswana: Exploring African Political Culture at the Grassroots' (1995) 13 (1) *Journal of Contemporary African Studies*, 3, 15 – Balance of power in the Nkoya traditional leadership of Western province included desertion, regicide, forced abdication and impeachment. The political structures allowed for participation in the administrative governance by mature men and in practice, senior headmen, reinforced by gender and age cleavages born out the exclusion of women and youth from the formal political institutions.

<sup>158</sup> Ibid.

<sup>159</sup> Schraeder (n 125).

<sup>160</sup> Mamdani (n 138) 45.

<sup>161</sup> Hall (n 150).

and transact with the king.<sup>162</sup> There are also accounts which demonstrate the political power of African rulers within their territories. For instance, Bemba chiefs would demand that European farmers and missionaries who visited them, even towards the end of the 18<sup>th</sup> century respect their customs on interacting with kings and dictated the terms of agreement upon which to admit or not admit them into their kingdom.<sup>163</sup> These accounts depict a situation in which African leaders with strong political institutions commanded substantial power over their own territories and largely dictated their relations with visitors with whom they traded. The situation, however, changed towards the second half of the 19<sup>th</sup> century, the eve of the colonialism, whereby many African societies lost their political and economic strength which in turn diminished their negotiation and military strength to contend with the 19<sup>th</sup> century imperial officers.<sup>164</sup>

### **3.3.2 Chieftaincy During Colonial Rule**

Chiefs played a vital role in the creation of the Northern Rhodesia as a British protectorate. Their role depended on the extent of their power and influence in the acquisition of territories by the BSAC representatives. The company combined a series of tactics which comprised of negotiation of treaties and conquest to acquire territory in Zambia. A good example of acquisition by negotiation is that of Barotseland or North Western Rhodesia where the Litunga (King) played an instrumental role of negotiating treaties under which he reserved substantive administrative authority to the traditional government for the duration of the colonial period.<sup>165</sup> A good example of acquisition of territory by conquest is Mpezeni's kingdom in the Eastern part of Zambia which had initially resisted company rule.<sup>166</sup> Other territories in the eastern part were acquired by obtaining treaties from some

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<sup>162</sup> Giacomo Macola, *A political History of the Kingdom of Kazembe (Zambia)* (PhD Thesis, SOAS 2000) 118.

<sup>163</sup> Henry S Mebeelo, *Reaction to Colonialism: A Prelude to the Politics of Independence in Northern Zambia, 1893-1939* (Manchester University Press 1971).

<sup>164</sup> Ibid 8 on the state of African societies in Northern Zambia on the eve of European rule; see also, William Gervase Clarence-Smith, 'Slaves, Commoner and Landlords in Bulozzi, c. 1875 to 1906' (1979) 20 JAH 219 – 234 on Lozi feudalism.

<sup>165</sup> Hall (n 150) presents a detailed account of the treaty negotiations between the Litunga and BSAC representatives. See also the account by Sipalo (n 17) on the BSAC and Barotseland concessions.

<sup>166</sup> Ibid 89.

rulers who could not negotiate fair terms and in some instances, imposters personating chiefs.<sup>167</sup>

After acquiring territory, the BSAC assumed the administrative authority of the territory, save for Barotseland where the Lewanika treaties reserved the administrative authority to the Litunga and his government. The assumption of administrative authority by the BSAC diminished some of the powers of traditional leaders. Traditional leaders were subsequently incorporated into the colonial administrative machinery following the implementation of the indirect rule policy.<sup>168</sup> With the implementation of indirect rule after 1929, the people of Northern Rhodesia became subject to plural legal and governance orders comprised of the central colonial administration and Native Authorities regulated under statutory law and traditional governance institutions regulated by customary law. The people were also subject to religious norms introduced by the Christian missionaries.<sup>169</sup>

The system of governance in Northern Rhodesia was created in response to the demands of European settlers for responsible government in the colony following the change of administration from the BSAC to the Colonial Office representing the British Crown in 1924.<sup>170</sup> The Colonial Office implemented a system of indirect rule which was first introduced by Frederick Lugard in Nigeria and later implemented in the central and eastern territory in Tanzania.<sup>171</sup> The policy of indirect rule introduced a system of local governance under which indigenous populations were governed by recognising the existing political and administrative institutions, namely traditional leaders. This was thought to not only be cheaper for the colonial administration, but also to prepare the local administrative institutions which would evolve into a modern bureaucratic system that would take over the governance of

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<sup>167</sup> Ibid 84.

<sup>168</sup> Gewald (n 41) 471.

<sup>169</sup> Roberts and Mann (n 9) 15.

<sup>170</sup> Bizeck Jube Phiri, 'Zambia' (2005) 12 (1) South African Journal of International Affairs 205.

<sup>171</sup> Margery Perham, 'Some Problems of Indirect Rule in Africa' (1935) 34 (135) Journal of the Royal African Society 1, 5; Frederick Dealtry Lugard, *The Dual Mandate in British Tropical Africa* (William Blackwood and Sons 1922).

the territory at the time that the country transitions to responsible government. The native administration was designed as an evolutionary system of local government based on indigenous and inherited traditions and modified by the advice of British supervisors to whom they reported under the central government.<sup>172</sup>

In Zambia, the policy of indirect rule was implemented through the promulgation of two ordinances, the Native Authorities and Native Courts ordinances of 1929 which were later amended in 1939. Barotseland had a separate system under which the local governance was reserved to the traditional government by virtue of the treaties negotiated by Lewanika.<sup>173</sup> The administrative arrangements were only extended to Barotseland in 1939 through the enactment of the Barotseland Native Authorities and Native Court Ordinances respectively, with modifications to accommodate the reserved powers of the traditional government. Native Treasuries were set up in 1939. Through Native Treasuries, Native Authorities could spend their revenue on the running of the Native Authorities and spend the surplus on developmental projects, especially after the second world war.<sup>174</sup>

In implementing the policy of indirect rule, the colonial administration recognised traditional leaders and gave them administrative and judicial functions over Native Authorities. The recognition of chiefs was often done without full appreciation of the African societies and without giving due regard to the local constitutional law of the communities.<sup>175</sup> Further, in communities where chieftaincy did not exist, the administrators identified personalities that fitted their concept of an African leader and named them as hereditary chiefs.<sup>176</sup> A good example of this, in Zambia, is the

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<sup>172</sup> W Ormsby-Gore, 'The Meaning of "Indirect Rule": The Principles of Native Administration and Their Application. By Sir Donald Cameron, G.C.M.G' (1935) 34 (136) Journal of the Royal African Society 283, 284.

<sup>173</sup> Pim (n 132) 182.

<sup>174</sup> Samuel N Chipungu, 'Accumulation from within: The Boma class and the Native Treasury in Colonial Zambia' in Samuel N. Chipungu (ed), *Guardians in Their Time: Experiences of Zambians under Colonial Rule, 1890-1964* (The MacMillan Press Ltd 1992) 74.

<sup>175</sup> Margery Perham, 'Some Problems of Indirect Rule in Africa' (1935) 34 (135) Journal of the Royal African Society 1, 7; Roberts and Mann (n 9)21.

<sup>176</sup> Dan O'Brien, 'Chiefs of Rain – Chiefs of Ruling: A Reinterpretation of Pre-Colonial Tonga (Zambia) Social and Political Structure' (1983) 53 (4) Journal of the International African Institute 23.

plateau Tonga where the British administrators identified some spiritual leaders and installed them as hereditary chiefs in disregard of the fact that installation to the spiritual office was by virtue of spirit possession.<sup>177</sup> As a result, these “government chiefs” did not command the same authority as the natural rulers.<sup>178</sup>

Chiefs headed the Native Authorities. Their roles included collecting tax on behalf of the central government and ensuring the good peace and security of their territories.<sup>179</sup> They also had authority to issue regulatory instruments for measures as to cleanliness and collection of levies in some instances, which power was not fully developed compared to their administrative and judicial functions.<sup>180</sup> Chiefs were also given judicial authority over civil matters and minor criminal disputes between Africans in accordance with customary law, provided that the law in question was not repugnant to natural justice and morality and did not contradict written law.<sup>181</sup> Some of these functions that chiefs were given under Native Authorities were not in concert with the original functions of traditional leaders and in some instances conflicted with their indigenous roles and positions.<sup>182</sup>

As elsewhere in Africa where indirect rule was implemented, the colonial administration manipulated chieftaincy to ensure that traditional rulers conformed to the expectations of the British administrators.<sup>183</sup> One of the undesirable consequences of indirect rule was that it elevated chiefs to despots partly due to the misconception of the despotic chief as being a necessary condition for the implementation of indirect rule and the “need of the political officer for rapid and

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<sup>177</sup> Dan O'Brien and Carolyn O'Brien, 'The Monze Rain Festival: The History of Change in a Religious Cult in Zambia' (1997) 29 (3) *The International Journal of African Historical Studies* 519.

<sup>178</sup> O'Brien (n 176) 36; Roberts and Mann (n 9) 21.

<sup>179</sup> Samuel N Chipungu, 'African Leadership under Indirect Rule in Colonial Zambia,' in Samuel N. Chipungu (Ed) *Guardians in their Time: Experiences of Zambians under Colonial Rule, 1890-1964* (1992, MacMillan Press Ltd) 55.

<sup>180</sup> Ibid 56.

<sup>181</sup> Earl L Hoover, John C Piper and Francis O Spalding, 'One Nation, one Judiciary': The Lower Courts of Zambia' (1970) 2 *Zam LJ* 4, 6-7.

<sup>182</sup> Perham (n 175) 11.

<sup>183</sup> Seidman (n 72) 170.

efficient response to his advice."<sup>184</sup> This had the effect of destroying the indigenous democratic institutions that balanced power and detracted from the legitimacy of chiefs. Zacharia Matthews emphasized the importance of other leadership institutions that were being ignored in the implementation of the policy of indirect rule using this old African saying, "a chief is a chief by virtue of his people."<sup>185</sup> He appealed to the framers of the system to take keen interest in the work of anthropologists who studied the African way of life, cautioning that such studies should not be so static as to freeze the African administrative institutions to a dead or dying past.<sup>186</sup>

With the erosion of the African systems for control of the governance powers of chiefs, the colonial administration introduced new methods for limiting the public power of chiefs. One of the ways through which the colonial administration controlled the Native Authorities was through tours to the administrative centres locally referred to as *ulendo*.<sup>187</sup> For instance, to control the revenue collection function of Native Authorities, district officers in collaboration with native authority staff would estimate how much revenue would be collected annually and apprehend tax defaulters or obtain arrears during the *ulendo*.<sup>188</sup> During these tours, Native Authority staff who were found guilty of embezzlement of funds were dismissed from employment, imprisoned or told to reimburse the missing amounts to the treasury.<sup>189</sup> Another way by which the colonial authorities controlled Native Authorities was by abolishing smaller authorities and merging others for administrative efficiency. Another way was by interfering in the succession of chiefs through the recognition and withdrawal of recognition of chiefs that were found wanting.<sup>190</sup>

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<sup>184</sup> Ibid.

<sup>185</sup> Zacharia Keodirelang Matthews, 'An African View of Indirect Rule in Africa' (1937) 36 (145) *Journal of the Royal African Society* 433, 434.

<sup>186</sup> Ibid.

<sup>187</sup> Chipungu (n 179) 55.

<sup>188</sup> Ibid 56.

<sup>189</sup> Ibid.

<sup>190</sup> Ibid 53.

Although national courts were responsible for controlling governmental actions, they were largely ineffective owing to the fact that they were not accessible to the vast majority of Africans due to their impoverished state and incapacity to afford services of lawyers.<sup>191</sup> Apart from being inaccessible to Africans, Robert Seidman notes that “administrative decisions with respect to chieftaincy, land and deportation, and the detention of Africans were all insulated from challenge.”<sup>192</sup> The exclusion of judicial control of administrative decisions of chiefs was partially based on the English law principle which excluded purely administrative decisions from the scope of judicial review, notwithstanding the absence of other controls such as parliamentary control in the African context.<sup>193</sup>

Chiefs were by no means mere puppets or passive agents of the central government. Samuel Chipungu argues that traditional leaders maintained a level of autonomy which was subject to the extent of supervision by British administrators.<sup>194</sup> Where the colonial administrators rarely made visits, a chief had more autonomy in dealing with local issues.<sup>195</sup> For instance, Native Authority officials were generally reluctant to enforce unpopular measures such as “dog and gun licences, and fish and livestock slaughter levies.”<sup>196</sup> Another instance is the reluctance of Native Courts to prosecute unpopular offences such as failure to comply with the Compulsory School Attendance Order which required parents to enrol and ensure regular attendance of their children in primary schools and other Native Authority Orders.<sup>197</sup>

One of the major challenges to the administrative authority of chiefs was how to govern people in urban societies over whom they could not directly preside because they fell outside the geographical territories of chiefs. The Copperbelt offers a notable example of such urban communities. One of the ways by which the BSAC officials tried to extend traditional leadership to the urban population was through

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<sup>191</sup> Mumba (n 73) 7.

<sup>192</sup> Seidman (n 72) 178.

<sup>193</sup> Ibid.

<sup>194</sup> Chipungu (n 179) 51.

<sup>195</sup> Ibid.

<sup>196</sup> Ibid 57.

<sup>197</sup> Ibid.

the establishment, in 1931, of tribal elders, elected representatives of tribes who acted as agents of chiefs, where necessary.<sup>198</sup> The system was designed on a flawed assumption that Africans working on the mines were tribe members who could best be represented by their tribal representatives in industrial matters. It however failed to hold the stress during the two major riots in 1935 and 1940, respectively. Following the formation of the African Mine Workers Union in 1948 and subsequent events that followed, the workers, in 1952, voted to abolish the tribal representatives as part of the administrative management of the mines.<sup>199</sup> That notwithstanding, the politics within the Mine Workers unions were polarised on tribal lines.<sup>200</sup> The system was overhauled and reconstituted in a form that became incorporated into the Northern Rhodesia governmental structure, the Urban Advisory Councils.<sup>201</sup> The developments on the Copperbelt were instrumental to the emergence of nationalist political movements which upset the power position of chiefs. I return to this in chapter six of this thesis, which discusses the position of chiefs during the making of the independence Constitution of 1964.

Overall, the colonial administration left authoritarian political legacies in Africa that could not properly assimilate traditional governance systems. This is because the British government transplanted the European nation state without adapting it to the African political systems but maintained its power through military and police force.<sup>202</sup> By the end of the colonial period, some chiefs had joined active politics or were involved in politics as underground supporters of nationalist political parties notwithstanding threats of dethronement from the colonial administration which expected them to prosecute the nationalist agitators. For instance, Maurice Katowa as Chief Mapanza joined the African National Congress (ANC), a nationalist political party and became branch secretary at Mapanza between 1957 and 1959.<sup>203</sup> “Chief

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<sup>198</sup> JC Mitchell, *Tribalism and the Plural Society*, (Inaugural Lecture given in the University College of Rhodesia and Nyasaland on 2 October 1959) 21.

<sup>199</sup> *Ibid* 23.

<sup>200</sup> *Ibid*.

<sup>201</sup> FMN Heath, ‘The Growth of African Councils on the Copperbelt of Northern Rhodesia’ (1953) 5 *J Afr Admin* 123.

<sup>202</sup> Seidman (n 72).

<sup>203</sup> Chipungu (n 179).

Mapanza's decision to join the ANC raised state suspicion, leading to threats of dethronement and cancellation of his widely published state sponsored trip to Britain to study administration."<sup>204</sup> He however retained his title, continued his political career, attended his course in Britain in 1958, and was part of the team of Africans that attended the constitutional conference in London.<sup>205</sup> A detailed discussion of the role played by chiefs in the development of independence constitution is given in chapter six of this thesis.

### **3.3.3 Chieftaincy in the Post-Independence Period**

The events leading to the independence of Zambia altered the power position of chiefs in the local governance in the post-independence period. Modern day chiefs and traditional leadership institutions are comprised of the evolved pre-colonial leadership institutions and the administrative chiefs that were created by the colonial government for administrative convenience.<sup>206</sup> Zambia has approximately 288 chiefs, four of whom are paramount chiefs.<sup>207</sup> The paramount chiefs are the Litunga (king) of Western Province, Gawa Undi and Mpezeni of Eastern province, and Chiti Mukulu of the northern province of Zambia. The rest comprise of senior chiefs, ordinary, and deputy chiefs.<sup>208</sup> There are also several village headmen and women who fall under the various chiefs not included in this number. The position of chiefs in the development of the Constitution of Zambia and the local governance is discussed in further detail in chapters six and seven of this thesis. For the purposes of this chapter the next section discusses some characteristics of chieftaincy in the post-independence period which justify its study under public law.

## **3.4 Why Study Chieftaincy Under Public Law?**

The justification for choosing the institution of chieftaincy as the relevant study phenomenon for this thesis is threefold. The first is the recognition of chiefs by the Constitution of Zambia and legislation. The second is the exercise of public power by

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<sup>204</sup> Ibid 63.

<sup>205</sup> Ibid.

<sup>206</sup> Trutz von Trotha, 'From Administrative to Civil Chieftaincy – Some Problems and Prospects of African Chieftaincy' (1996) 37 J Legal Pluralism & Unofficial L 79, 80.

<sup>207</sup> Mung'omba CRC Report (n 31) 7.

<sup>208</sup> Chiefs Act, s 2.

chiefs in the local governance and the administration of land under customary tenure, which have implications for public law scholarship and policy. The third is the revival of interest, by both research and official policy, in chieftaincy and the role of chiefs in rural local governance, which is evidenced by growing literature on traditional and hybrid local governance. I discuss the first two justifications for studying chiefs under customary law below, beginning with the constitutional and statutory recognition of chiefs. The third justification which relates to the revival of research and policy interest in chieftaincy is discussed in the next chapter which analyses existing literature on chieftaincy.

### **3.4.1 The Constitutional and Statutory Recognition of Chieftaincy**

The Constitution of Zambia recognises the institution of chieftaincy and traditional institutions as follows:

The institution of chieftaincy and traditional institutions are guaranteed and shall exist in accordance with the culture, customs and traditions of the people to whom they apply.

Parliament shall not enact legislation which-

Confers on a person or authority the right to recognise or withdraw the recognition of a chief; or

Derogate from the honour and dignity of the institution of chieftaincy.<sup>209</sup>

The constitutional recognition of chiefs has taken various forms over the years. Initially, chiefs were recognised through the creation of a House of Chiefs with advisory powers to the president, when consulted, and could consider bills that impacted on customary law before they were presented before Parliament.<sup>210</sup> The House of Chiefs was abolished in 1991 but was reinstated in 1996.<sup>211</sup> The various

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<sup>209</sup> Constitution of Zambia, art 165.

<sup>210</sup> Constitution of Zambia 1964, s 85 provided for a House of Chiefs which was composed of 4 chiefs representing each of the following provinces – Northern, Western, Southern and Eastern; three chiefs representing each of the following provinces – North-Western, Luapula and Central and one chief representing the Copperbelt province.

<sup>211</sup> Constitution of Zambia (Amendment) Act 1996, art 127.

constitutional changes relating to chieftaincy are discussed in chapters six and seven of this thesis.

In addition to their recognition by the Constitution, the Chiefs Act provides for the regulation of chiefs.<sup>212</sup> Section 11 of the Chiefs Act lists some of the statutory functions of chiefs which essentially require a chief to maintain peace and order in their territory. The Act also states that:

A chief shall discharge the traditional functions of his office under African 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.<sup>213</sup>

Until the latest amendment to the Constitution in 2016 and a subsequent challenge in the Constitutional Court which saw the declaration of some of its provisions as unconstitutional, the Chiefs Act conferred power on the Republican President to recognise and withdraw the recognition of a chief.<sup>214</sup> The Act also provides for the remuneration of chiefs from public funds through allocations to the Ministry responsible for chiefs and traditional Affairs.<sup>215</sup> Following the declaration by the Constitutional Court of the provisions of the Chiefs Act on the recognition of chiefs as unconstitutional, the government decided to discontinue paying allowances to new chiefs, a decision that was successfully challenged by the four paramount chiefs in the Constitutional Court.<sup>216</sup> These developments are discussed further in chapter seven of this thesis.

The recognition of chiefs by the Constitution of Zambia, their regulation under the Chiefs Act, and the fact that chiefs draw emoluments from the public fund demonstrate that chieftaincy is a state institution.<sup>217</sup> These characteristics fall

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<sup>212</sup> Chiefs Act, s 2.

<sup>213</sup> Chiefs Act, s10.

<sup>214</sup> *Webby Mulubisha v The Attorney General* 2018/CCZ/0013 (unreported).

<sup>215</sup> Schedule to the Appropriation Act 2020.

<sup>216</sup> *His Royal Highness The Litunga and 3 Others v The Attorney General* 2020/CCZ/009 (unreported).

<sup>217</sup> The constitution of Zambia, art 266 defines a "state institution" as "includes a ministry or department of the Government, a public office, agency, institution, statutory body,

squarely under the constitutional definition of "State institution" which includes "a public office" defined as "an office whose emoluments and expenses are a charge on the Consolidated Fund or other prescribed public fund."<sup>218</sup> However, the inquiry does not end here for purposes of public law because public law is concerned with the public power of state institutions, over and above their source of power. It is therefore important to highlight some of the public powers of chiefs under customary law, including their power and functions in the local governance and administration of land under customary tenure.

### **3.4.2 Chiefs in the Local Governance**

Following Zambia's independence in 1964, the government abolished Native Authorities and replaced them with local councils headed by elected councillors.<sup>219</sup> With these changes, chiefs were limited to traditional governance functions and could only participate in the local governance affairs through village development committees that were introduced by the UNIP administration to facilitate grassroots participation in the local governance.<sup>220</sup> The village productivity committees were provided for under the Registration and Development of Villages Act which has remained largely unchanged although some of its provisions have been incorporated in the local government legislation.<sup>221</sup> The functions of chiefs under this Act include maintaining a master copy of all the registers in the villages in their area.<sup>222</sup> Chiefs are also responsible for spearheading the development of their areas.<sup>223</sup> In 1973, the independence constitution was repealed and replaced by a new one which introduced one-party rule in Zambia. Under the one-party political system, chiefs participated in the national government under the ruling party and were

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commission or company in which the Government or local authority has a controlling interest, other than a state organ.

<sup>218</sup> Constitution of Zambia, art 266.

<sup>219</sup> Local Government Act 1965 (repealed).

<sup>220</sup> Joachim Lühring, 'Political and Administrative Aspects of Rural Development in Zambia: A Critical Review of National Co-operation and Participation,' (1975) 10 (2) Africa Spectrum 141, 153.

<sup>221</sup> Chapter 289 of the Laws of Zambia.

<sup>222</sup> Ibid s 3.

<sup>223</sup> Ibid s 18.

incorporated in the local governance structures of UNIP. These developments are discussed further in chapter six of this thesis.

In 1991, a new constitution was enacted which abolished one-party rule and reintroduced multi-party politics. The transition to multi-party democracy demanded reforms to the local governance system which, in 1980 had been merged with the party and central government under one-party rule.<sup>224</sup> A new Local Government Act was enacted in 1991 which repealed the 1980 Local Administration Act, delinked the local government from the ruling party, and reintroduced democratically elected councils.<sup>225</sup> The Act provided for a local government system comprised of three types of councils, city councils for the big cities, municipal councils for smaller cities in urban areas, and district councils comprised of smaller rural-based local authorities.<sup>226</sup> The Act also provided for the demarcation of local councils into area wards from which councillors were elected for a five-year term.<sup>227</sup> Local councils were comprised of all elected councillors in the district, all members of parliament in the district and two representatives appointed by all chiefs in the district.<sup>228</sup> The inclusion of representatives of chiefs provided the means for involving traditional leaders in the local government. The council was headed by a mayor (for city and municipal councils) and a chairperson (for rural councils) who was elected annually by the councillors from the elected councillors.<sup>229</sup> This Act largely remained unchanged, save for minor amendments, until 2019 when a new Act was enacted following the amendment of the constitution in 2016.

The 2016 constitutional amendment provides for a constitutional local government comprised of elected councillors who include the mayor or district councillor and “not more than three chiefs representing chiefs in the district, elected by chiefs in the

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<sup>224</sup> Bornwell Chikulo, 'Local Governance Reforms in Zambia: A Review' (2009) 2 Commonwealth Journal of Local Governance 98.

<sup>225</sup> Bornwell C Chikulo, 'Decentralization Reforms in Zambia 1991-2010' (2014) 40 (1) J Soc Sci, 95-105.

<sup>226</sup> Local Government Act 1991, s 9.

<sup>227</sup> Chikulo (n 224) 102.

<sup>228</sup> Local Government Act 1991 s9.

<sup>229</sup> Ibid, s16.

district.”<sup>230</sup> The functions of the local authority are to “administer the district; oversee programmes and projects in the district; make by-laws; and perform other prescribed functions.”<sup>231</sup> Other functions are prescribed in the Local Government Act<sup>232</sup> and other laws such as the liquor licencing Act<sup>233</sup> which authorises the Local Authority to regulate liquor licences.

Apart from these attempts to include chiefs in the local government through constitutional changes and statutory provisions, chiefs have continued to exercise administrative authority under customary law outside the democratically elected local councils. This has created a dual governance arrangement at the local level especially in rural areas where chiefs have considerable influence on the administration of land. Bornwell Chikulo’s below description of the role of chiefs in local government is an insightful way to end this subsection.

The challenge posed by the tension between traditional authorities and local governments remain pervasive in most Southern African countries and may negate effective local governance. The challenge is how to draw on the strengths of traditional authorities while reinforcing and legitimating democratic local government.<sup>234</sup>

### **3.4.3 The Administrative Authority of Chiefs over Customary Land**

Another important power of chiefs is their power to administer customary land. This power is a product of history in many former settler colonies in Africa where land was administered under two separate tenure systems for the indigenous populations and the settlers. The British colonial policy on land was to place land that was reserved for Africans under the administrative governance of Native Authorities, headed by chiefs or headmen who would issue conditions for occupancy of land in

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<sup>230</sup> Constitution of Zambia, art 153.

<sup>231</sup> Ibid, art 152.

<sup>232</sup> Local Government Act No 2 of 2019.

<sup>233</sup> Liquor Licencing Act 2011.

<sup>234</sup> Bornwell Chikulo, ‘Democratic local governance in the Southern African development community region: Some emerging issues and challenges’ (2010) Commonwealth Journal of Local Governance (Special Issues) 145, 153.

their territories.<sup>235</sup> Traditionally, chiefs exercised political controls over land through ritual functions such as soil fertility, tree planting ceremonies, and blessing seeds and axes, among others.<sup>236</sup> These political functions were used by the colonial administrators to construct a proprietary power by traditional rulers to “allocate use rights” in the land.<sup>237</sup> The colonial policy was based on the assumption of communal tenure and that customary land could not be sold, contrary to evidence of mixed practices by Africans including in some instances, sale of land for cash since the advent of a cash economy.<sup>238</sup> These assumptions, rooted in European concepts of legal tenure involving proprietary ownership, presented themselves in the notion of community of rights under the administrative power of the Native Authorities.<sup>239</sup>

These colonial systems of tenure have largely remained unchanged in the many African states long after attaining their political independence.<sup>240</sup> In the context of Zambia, official documents estimate land under customary tenure at approximately 94 per cent, although these estimates could be much higher than the actual figure owing to conversion of land from customary to state land.<sup>241</sup> Chiefs are responsible for approving requests for land, resolving disputes, and are required to consent to the conversion of land from customary to statutory tenure.<sup>242</sup> The nature of these functions performed by chiefs in administering customary land is consistent with what scholars of public law have identified as public law functions, which include the

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<sup>235</sup> CMN White, ‘A Survey of African Land Tenure in Northern Rhodesia’ (1959) 11 J Afr Admin 171, 173.

<sup>236</sup> Ibid.

<sup>237</sup> Mamdani (n 138) 140.

<sup>238</sup> White (n 235).

<sup>239</sup> Mamdani (n 138) 139; Roberts and Mann (n 9) 25.

<sup>240</sup> Patrick McAuslan, *Bringing the Law Back In: Essays in Land, Law and Development* (Ashgate 2003) 78.

<sup>241</sup> Anthony Mushinge and others, ‘Threats of Statutory Tenure on Customary Land in Zambia Evidence from Chamuka Chiefdom in Chisamba District’ (2020) 3 (2) African Journal on Land Policy and Geospatial Sciences, 41, 44; Nicholas J Sitko Jordan Chamberlin, and Munguzwe Hichaambwa, ‘The Geography of Customary Land in Zambia: Is Development Strategy Engaging with The Facts?’ (2015) IAPRI Working paper 98, estimated customary land to be approximately 54 per cent.

<sup>242</sup> Austine Ng’ombe and Ramin Keivani, ‘Customary Land Reform to Facilitate Private Investment in Zambia: Achievements, Potential and Limitations’ (2013) 24 (1) Urban Forum 33.

control of and implementation of economic, development, and administrative activities.<sup>243</sup>

As Patrick McAuslan notes, a thorough understanding of the existing tenure situation including the legal and administrative justice mechanisms for dispute settlement should precede any successful land tenure reform which would blend the plural law and tenure systems.<sup>244</sup> Ann Valley, writing in the context of Mexico, criticized land reform efforts which unduly emphasise tenure legislation as having the effect of reinforcing the idea that the public and private are binary opposites.<sup>245</sup> Looking at chiefs as state officials offers a useful lens for understanding land tenure law and law reforms and could produce more meaningful reforms that are grounded in their social contexts.<sup>246</sup> I return to this subject in chapter nine which analyses customary land tenure law from a public law perspective.

### **3.5 Conclusion**

This chapter has introduced the institution of chieftaincy which is study phenomenon of the thesis. It has traced the evolution of chieftaincy as a state institution in Zambia and discussed the characteristics of chieftaincy to demonstrate why it is an important empirical phenomenon for the study of public law. Chieftaincy is an important state institution in Zambia as can be seen from its recognition under constitutional and statutory law, the functions of chiefs under customary law and statute which have public law consequences, and their role in the local governance. The study is also timely owing to the renewed scholarly and policy interest in chieftaincy. The next chapter explores this scholarly interest in chieftaincy by way of literature review to identify gaps in the literature to which this thesis contributes.

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<sup>243</sup> Zorina S Kravtsova, Olena V Sinkevych and Olena M Kudriavtseva, 'The Functions of State Institutions: Constitutional Legal Aspect' (2019) 10 J Advanced Res L & Econ 285, 287.

<sup>244</sup> McAuslan (n 240) 80.

<sup>245</sup> Ann Valley, 'Private or Public: Debating the Meaning of Tenure Legalization' (2002) 26 (3) International Journal of Urban and Regional Research 449, 458.

<sup>246</sup> Manji (n 37).

## Chapter Four: Review of Literature on Chieftaincy in Public Law

### 4.1 Introduction

The previous chapter introduced the study phenomenon by tracing the evolution of the institution of chieftaincy in Zambia. It also explained the justification for choosing chieftaincy as the relevant empirical phenomenon for the study of public law in Zambia. This chapter sketches the character of public law in Zambia and reviews existing literature on chieftaincy to identify the knowledge gap to which the thesis contributes. It argues that public law in Zambia, like many other former British colonies, is to a significant extent shaped by British public law. Unlike the British public law, however, the law that was imported in the colonies was overly dependent on judicial review of administrative action as the main mechanism for controlling public power. Further, the law regulating judicial review is heavily dependent on English public law and does not reflect the social reality of pluralism.

With regards to the state of literature on chieftaincy, the chapter shows that chiefs received considerable scholarly attention by anthropologists and other social scientists who studied pre-colonial African political institutions up until the colonial period.<sup>247</sup> This scholarly interest however declined in the post-independence period except for little literature mostly comprised of case studies on selected chieftaincies until the late 1990s.<sup>248</sup> Since the late 1990s, with the reintroduction of plural politics in Zambia and the regional efforts by chiefs to assert their influence in the local governance, there has been a revival of research interest in chieftaincy.

Notwithstanding this renewed interest in chieftaincy, public law research has not engaged with the institution and its role in the local governance. Additionally, legal studies in pluralism and customary law have tended to focus on matters of personal

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<sup>247</sup> Richards (n 126); Gluckman (n 144); and Mebeelo (n 163).

<sup>248</sup> For instance, Wim van Binsbergen, *Tears of Rain: Ethnicity and History in Central Western Zambia* (Kegan Paul International Limited 1992).

law such as family law.<sup>249</sup> There is also literature that has studied customary land administration which is useful for understanding chiefly power although it hardly links the developments in customary land administration to the larger field of public law.<sup>250</sup>

This chapter discusses this literature in the following three sections. The first section defines public law as adopted by this thesis by way of setting a background and justification for identifying the knowledge gap in the literature on chieftaincy under public law. It also outlines the character of public law in Zambia from its historical context. This discussion is important as it places the review of literature (in the second section) into context by outlining the character of public law. The second section conducts a critical review of existing literature on chieftaincy and public law. The section is divided into two thematic areas under which the literature review was conducted, namely, research by legal scholars followed by other social science research. The chapter ends with a section which identifies the gap in research to which this thesis contributes.

## **4.2 Public Law in Zambia**

There are many definitions of public law. This thesis does not attempt to define public law but rather adopts a broad description of public law as the law which regulates the state rather than that which regulates relations between citizens, which is the domain of private law.<sup>251</sup> The normal divisions of public law are

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<sup>249</sup> Kenneth K Mwenda, Florence NM Mumba and Judith Mvula-Mwenda, 'Property-Grabbing under African Customary Law: Repugnant to Natural Justice, Equity, and Good Conscience, Yet a Troubling Reality' (2005) 37 *Geo Wash Int'l L Rev* 949; Chuma N Himonga and Mushota L Munachonga, 'Rural Women's Access to Agricultural Land in Settlement Schemes in Zambia: Law, Practice, and Socio-Economic Constraints' (1991) 10 (4) *Third World Legal Studies* 59.

<sup>250</sup> For instance, Horman Chitonge and others, 'Silent privatisation of customary land in Zambia: opportunities for a few, Challenges For Many' (2017) 43 (1) *Social Dynamics*, 82; Anthony Mushinge and Sharon Mulenga, 'Legal Pluralism and Tenure Security: Exploring the Relationship between Statutory and Customary Land Tenure in Zambia' (2016) 4 (3) *International Journal of Social Science Studies* 7; and Anthony Mushinge, Alex Mumbaala Simposya, and Steven Chowa, 'Threats of Statutory Tenure on Customary Land in Zambia Evidence from Chamuka Chieftaindom in Chisamba District' (2020) 3 (2) *African Journal on Land Policy and Geospatial Sciences* 41.

<sup>251</sup> Barnett (n 1) 1.

constitutional and administrative law.<sup>252</sup> Constitutional law deals with the questions of allocation of power and functions of state organs.<sup>253</sup> Administrative law is “the law relating to the control of governmental power” ensuring that governmental power is exercised for its ends and does not unfairly impose burdens on others.<sup>254</sup> Another useful definition of administrative law is that it is the institution intended to “implement the laws reflecting the intervention of the state in economic and social affairs.”<sup>255</sup> It deals with principles, rules, and procedures which ensure that public administrators observe the requirements of the law, are accountable to the governed, and exercise their power in an effective manner.<sup>256</sup> “The idea of public law refers to relations of subordination that are not justified by direct consent – different from what is archetypically the case under private law.”<sup>257</sup> It is therefore the law that regulates the coercive power of the state.

Scholars who study law from a sociological perspective do not insist on the rigid separation between public and private law.<sup>258</sup> This is because the state has increasingly participated in enterprises that were previously in the domain of private law which include the provision of social goods such as education and health. Further, private persons have taken on functions that were traditionally performed by the state with the effect of changing the focus of public law from the source of power of the actor to the nature of the power and functions in question.<sup>259</sup> This sociological approach permits the study of public law broadly, beyond the traditional

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<sup>252</sup> Paton (n 2) 329.

<sup>253</sup> Ibid.

<sup>254</sup> Wade and Forsyth (n 82), Charles Sampford, ‘Law, Institutions and the Public/Private Divide’ (1991) 20 Fed L Rev 185, 186.

<sup>255</sup> Milton R Konvitz, ‘Administrative Law and Democratic Institutions’ (1938) 3 J Soc Phil 139, 140.

<sup>256</sup> Peter Leyland and Gordon Anthony, *Textbook on Administrative Law* (8<sup>th</sup> edn, OUP 2016).

<sup>257</sup> Lukas van den Berge, ‘Rethinking the Public-Private Law Divide in the Age of Governmentality and Network Governance: A Comparative Analysis of French, English and Dutch Law’ (2018) 5 (2) European Journal of Comparative Law and Governance 119.

<sup>258</sup> RWM Dias, *Jurisprudence* (5<sup>th</sup> edn, Butterworths 1985); Duncan Kennedy, ‘The Stages of the Decline of the Public/Private Distinction’ (1982) 130 (6) University of Pennsylvania Law Review 1349; G Teubner, ‘State Policies in Private Law? A Comment on Hanoch Dagan’ (2008) 56 (3) The American Journal of Comparative Law 835; G Teubner, ‘After Privatization? The Many Autonomies of Private Law’ (1998) 51 (1) Current Legal Problems 393.

<sup>259</sup> Mark Elliot and Robert Thomas, *Public Law* (3<sup>rd</sup> edn, OUP 2017) 564.

limitations which originated in political theories grounded in the unity of state and sovereignty, to include the study of other institutions in society with considerable public power and influence.<sup>260</sup> The thesis adopts this sociological approach to the study of public law by focusing on the nature of the power and functions of chiefs as I have endeavored to demonstrate in the previous chapter. This justifies study of chieftaincy under public law.

Public law is rooted in the social, political, economic, and historical context of a given state.<sup>261</sup> For the purposes of this thesis, the context is Zambia. Zambia's public law (like many other former British colonies) is based on the political theory of governance originating from Britain, the colonising state, as can be seen from the applicable law in judicial review actions and the design of its constitutional law.<sup>262</sup> English administrative law was received under the legal instruments providing for the reception of English statutes and the common law by colonial territories.<sup>263</sup>

Robert Seidman argues that the British administrative law system was developed within a context that met the five characteristics of a legal-rational government as follows: firstly the instrument of administrative law facilitated by the supremacy of parliament; secondly narrow definitions of administrative roles; thirdly the channels of communication provided formally through the electoral system and informally through the influence of the middle class; fourthly the rational procedures for rule making and application achieved through parliamentary inspection; and finally sanctioning institutions such as internal bureaucratic systems, parliamentary control through question and examination of ministerial rule making, and judicial review.<sup>264</sup> However, "of these institutions, only the formal, court enforced norms of administrative law made the long trip to Africa."<sup>265</sup> The imported administrative system largely depended on efficient administration by the official classes that

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<sup>260</sup> Norman Wilde, 'Plural Sovereignty' (1919) 16 (24) *The Journal of Philosophy, Psychology and Scientific Methods* 658.

<sup>261</sup> Loughlin (n 43) 2.

<sup>262</sup> Kalunga and Kaaba (n 53) 26.

<sup>263</sup> Seidman (n 72) 161-204.

<sup>264</sup> *Ibid* 166.

<sup>265</sup> *Ibid*.

constituted the state, performing both political and administrative functions.<sup>266</sup> The colonial administrators, known as Governors, were generally given broad powers and sweeping discretion by Orders in Council and they in turn delegated similar broad powers to their subordinates.<sup>267</sup> Administration by the colonial standards typically involved the maintenance of law and order and collection of revenue.<sup>268</sup> Issa Shivji describes the colonial state law as largely despotic as both constitutional and administrative law were undeveloped.<sup>269</sup>

Public law in the colonial state applied to two publics, the urban mostly comprised of Europeans to which administrative law principles and civil rights applied, and the rural public mostly comprised of Africans ruled under customary and traditional authority and law.<sup>270</sup> In terms of control of public power, the received law was useless in the African setting for two main reasons. The first is that the head of the colonial administration, the Governor, enjoyed broad discretion and exercised executive functions which were not amenable to judicial review by the courts. The broad construction of discretionary power had the effect of reducing grounds of judicial review to procedural impropriety since many cases could not succeed on the ground of *ultra vires*.<sup>271</sup> Similarly, "administrative decisions with respect to chieftaincy, land, and deportation and detention of Africans were all insulated from challenge."<sup>272</sup> Under English administrative law, purely administrative decisions (those that are neither of a judicial or quasi-judicial nature) were traditionally not amenable to judicial review as they fell under the political control of Parliament. Parliamentary control of administration was however absent in African colonies because the public administrators reported to the Governor who too was an administrator. "On independence, the new African governments inherited legal and

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<sup>266</sup> Ibid 174.

<sup>267</sup> Robert B Seidman, 'Law and Stagnation in Africa' (1973) 5 Zam LJ 39, 56.

<sup>268</sup> Seidman (n 72) 170.

<sup>269</sup> Issa G Shivji, 'Contradictory perspectives on rights and justice in the context of land tenure reform in Tanzania' (1998) 4 (1) Tanzania Zamani 57, 59.

<sup>270</sup> Mamdani (n 138) 18.

<sup>271</sup> Seidman (n 72) 182.

<sup>272</sup> Ibid 178.

government institutions for which the formal rules of administrative law had long failed to perform any significant function.”<sup>273</sup>

The result of the above history is that Zambia’s public law hardly reflects the country’s social context of plural legal and administrative orders regulated by legislation and traditional norms. For instance, the Constitution of Zambia divides governmental power between three state organs, namely, the executive, legislature, and the judiciary, and outlines their functions and ways by which they provide checks and balances on each other.<sup>274</sup> Although the constitution recognizes the institution of chieftaincy and traditional institutions, it is vague in terms of allocation and limitation of their powers, as chapters six and seven of this thesis will show.

The other feature of Zambia’s colonial history is the prominent role of courts which have developed as the main mechanism for controlling public power mostly through constitutional law challenges and judicial review.<sup>275</sup> There are also statutory controls in specific statutes such as through appeals to administrative bodies or the minister, arbitration, or redress by administrative tribunals such as the Lands Tribunal.<sup>276</sup> Zambian courts rely on English procedural law in judicial review matters and largely depend on the common law to develop grounds for judicial review.<sup>277</sup> Another administrative control which was introduced in 1973 is the office of the Investigator General or ombudsman which has since been replaced by the Public Protector under the 2016 constitutional amendment.<sup>278</sup> The above developments notwithstanding, the public law regulatory regime has tended to limit itself to a narrow construction of “public officer” and “public function” to statutory bodies and elected officials which is

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<sup>273</sup> Ibid 200.

<sup>274</sup> Constitution of Zambia.

<sup>275</sup> Mumba (n 73) 7.

<sup>276</sup> Kalunga and Kaaba (n 53).

<sup>277</sup> Ibid 24.

<sup>278</sup> Gregory S Phiri, ‘The Ombudsman in Zambia’ (1986) 12 Commw L Bull 235- 238 discusses the office of the Ombudsman as established under the 1973 amendment to the Constitution. Its mandate was limited to the regulation of public officials listed in the Act, which list did not include chiefs. See also Mumba (n 73) who discusses other non-judicial controls of administrative action including statutory appeals and administrative tribunals, and Kalunga and Kaaba (n 53).

rooted in Eurocentric values concerning the unity of state and sovereignty.<sup>279</sup> This is notwithstanding the fact that the Constitution of Zambia defines “public office” broadly, as “an office whose emoluments and expenses are a charge on the Consolidated Fund or other prescribed public fund.”<sup>280</sup>

As chapter three of the thesis has shown, the Constitution of Zambia recognises chieftaincy and the administrative authority of chiefs under customary law. The specific constitutional provisions on chieftaincy are discussed in further detail in chapters six and seven of this thesis. Apart from their regulation under customary law, the Chiefs Act provides for matters such as the functions of chiefs (in addition to their functions under customary law that is not contrary to the constitution or other law), and their remuneration.<sup>281</sup> Neither the Constitution nor the Chiefs Act, however, provides for mechanisms by which citizens could hold chiefs accountable for their exercise of public power under customary law.

Although the public power of chiefs has been subject of litigation in Zambian courts, most of the existing case law involves succession disputes between contending heirs to chieftaincy and challenges to the president’s power to recognize or withdraw the recognition of a chief.<sup>282</sup> In the only judicial review matter against a chief, *Amos Musuba (on his own behalf and on behalf of members of Mize Congregation of Jehovah’s Witnesses at Kazungula District Southern Province of Zambia) v Lackson Muntanga (Sued in his capacity as Chief Nyawa of the Tonga speaking people of Kazungula District Southern Province of Zambia) and The Attorney General*,<sup>283</sup> the Supreme Court of Zambia held that some decisions of chiefs are amenable to judicial review. The above position does not, however, appear to be firmly established as evidenced by the ruling of the High Court in a subsequent case decided on 20

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<sup>279</sup> Mumba (n 73) 2.

<sup>280</sup> Constitution of Zambia, art 266.

<sup>281</sup> The Chiefs Act.

<sup>282</sup> See for instance *Kilolo Ng’ambi v Opa Kapijimpanga* Appeal No. 210/2015 (unreported); *Chief Mwanatete v Innocent Munyikwa Lushato and Mweene Mutondo* 2014/HP/1043 (unreported); and *John Malokotela v Majaliwa Sitolo Muwaya and Thaya Odemy Chiwala* (2010) Z. R. 357.

<sup>283</sup> Appeal No. 97 of 2012 (SC).

December 2020. In that case, *Nabiwa Imikendu and 3 Others v Edwin Lubosi Imwiko (sued in his capacity as the Litunga of Western Province)*,<sup>284</sup> the High Court dismissed an application by the claimants, residents of Mongu, who sought an order that their chief should abdicate his throne on grounds of incompetence and abuse of office. The Court cited lack of jurisdiction to resolve such a matter of a customary nature as the reason for dismissing the claim.<sup>285</sup> I discuss these cases in chapter eight which analyses decided cases and ongoing litigation involving chiefs.

### **4.3 Literature on Chieftaincy in Constitutional and Administrative Law**

Existing literature on chieftaincy in constitutional and administrative law in Zambia can be grouped into two categories. The first category comprises of legal research which has hardly studied chieftaincy. In its study of Zambia's public law, this literature has tended to focus on constitutional documents and the administrative practice of the central government. In terms of time, this research has mainly focused on the administrative developments and constitutional law documents that were produced from 1890, the period when Zambia became a British Protectorate, to its independence in 1964 and the period afterwards. Notable among this research are works by Ngenda Sipalo,<sup>286</sup> Alfred Winstone Chanda,<sup>287</sup> John Sangwa,<sup>288</sup> Muna Ndulo,<sup>289</sup> and Muna Ndulo and Robert Kent.<sup>290</sup> The second category consists of research by social scientists such as historians, anthropologists and political scientists which has studied political and administrative governance institutions which exist in society, including traditional governance institutions, but not from a legal perspective. Notable among this research are the works of Richard Hall,<sup>291</sup> Henry Meebelo<sup>292</sup> and Samuel Chipungu<sup>293</sup> among others. I discuss this literature

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<sup>284</sup> 2017/HT/03 (Unreported).

<sup>285</sup> Ibid.

<sup>286</sup> Sipalo (n 17).

<sup>287</sup> Chanda (n 18).

<sup>288</sup> Sangwa (n 19).

<sup>289</sup> Ndulo (n 20).

<sup>290</sup> Ndulo and Kent (n 21).

<sup>291</sup> Hall (n 150).

<sup>292</sup> Meebelo (n 163).

<sup>293</sup> Chipungu (n 179).

below beginning with research by legal scholars followed by social science-based research.

#### **4.3.1 Research by Legal Scholars**

As stated above, legal research which has studied the history of Zambia's constitutional and administrative law has focused on the period starting with the BSAC rule in 1890 onwards. It has also tended to focus on the political and administrative institutions of the central government and the written legislative instruments that regulated these governance institutions. Where chiefs have been studied, the studies are often limited to their role within the Native Authorities, for studies that focus on the pre-independence period, and the House of Chiefs, after independence. A notable example of such research is the study by Ngenda Sipalo which analysed the constitutional history of Zambia "from 1890 the time when the British South Africa Company attempted to provide a system of administration to 1973 when Zambia adopted a one-party state constitution."<sup>294</sup> Sipalo used archival materials, legislative documents and stakeholder interviews to argue that Zambia's politicians adopted the British constitutional formula after independence because that was the system with which they were familiar.<sup>295</sup>

Another important work worth discussing is by Alfred Chanda who, like Sipalo, studied Zambia's constitutional history from the perspective of the written constitutional law and the central government institutions.<sup>296</sup> Chanda's account covers the period from 1890 to 1996. Chanda analyses legal documents, namely, concessions, legislation and case law related to Zambia's constitutional development. Chanda also discusses traditional leaders although his discussion is restricted to their power and functions within the Native Authorities and the House of Chiefs (in the post-independence period).<sup>297</sup> Chanda describes Britain's colonial policy of indirect rule as a policy by which "African chiefs were stripped of most of their powers and

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<sup>294</sup> Sipalo (n 17) vi.

<sup>295</sup> Ibid.

<sup>296</sup> Chanda (n 18).

<sup>297</sup> Ibid.

merely became agents of the Colonial Administration."<sup>298</sup> This position has been contested by Samuel Chipungu who contends that Native Authorities "attempted to balance their official duties as arms of the state with the expectations, concerns and exasperations of the rural dwellers."<sup>299</sup>

John Sangwa's work takes a slightly different approach from the other legal research by beginning its inquiry from an earlier period focussing on the history of migrations of the people of the country in what he calls "the making of Northern Rhodesia."<sup>300</sup> Sangwa discusses the pre-colonial societies with centralised political systems in the territory that became Zambia, namely, the Lozi under the Litunga, the Bemba under the Chiti Mukulu, the Ngoni under Mpezeni and the Lunda under Mwata Kazembe.<sup>301</sup> Sangwa discusses the origins of the different tribal groupings and their interaction with one another and European explorers and missionaries. Sangwa argues, with regards to the interactions of the various groups, that "Zambia is a product of greed and conquest by the powerful, and of the weak seeking a haven for peace and security."<sup>302</sup> He describes the contestations among the Africans as a product of mixed factors including a search for independence for smaller chieftainships, and a search a sanctuary among weaker tribes escaping tribal warfare.<sup>303</sup> He describes the power contests between Africans and European settlers as having been primarily driven by the greed of private entrepreneurs sanctioned by the imperial power of Britain.<sup>304</sup> Sangwa concludes that that the constitutional order that ensued from this history of contestation set out to "harmonise the competing interests."<sup>305</sup> He then proceeds to analyse the constitutional documents and enactments that emerged from this history of contestation. Sangwa's account lays an important foundation upon which to analyse the central government institutions and the public law that developed out of this history of "greed and conquest." However, Sangwa, like other

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<sup>298</sup> *ibid* 81.

<sup>299</sup> Chipungu (n 179) 51.

<sup>300</sup> Sangwa (n 19).

<sup>301</sup> *Ibid*.

<sup>302</sup> *Ibid* 101.

<sup>303</sup> *Ibid*.

<sup>304</sup> *Ibid*.

<sup>305</sup> *ibid*.

scholars of Zambia's constitutional law history, has disproportionately focused on British administrative institutions and neglected chieftaincy.

Another work is by Muna Ndulo and Robert Kent, who, like other legal scholars discuss Zambia's constitutional history from the perspective of the written constitutional documents. Ndulo and Kent mark the incorporation of the "Charter incorporating the British South Africa Company and (its) broad fiscal and administrative power in Central Africa" as a significant development in the study of Zambia's constitutional development.<sup>306</sup> In so doing, they exclude the study of constitutional and administrative norms and practice of Africans which existed in the pre-colonial period and how these evolved during and after colonial rule. Ndulo and Kent conclude, with regards to the outcome of these constitutional developments as follows:

What colonialism initiated independence consummated, a disruption of tribal organisation and tribal life and the unification of ethnic communities under the umbrella of one sovereign state with overriding power over the entire country. The national coat of arms symbolises this: "One Zambia, One Nation."<sup>307</sup>

The above quotation is indicative of what appears to have guided the scholarship on Zambia's public law as the study of the political and administrative governance systems under the written constitutional law and the central government unified under the sovereign state. This conception of a unified public law under a single sovereign state is consistent with legal centralist perspectives of public law which emphasise the unity of state and sovereignty.

Similar sentiments were expressed by Kwamena Bentsi-Enchill in his 1969 analysis of the colonial heritage of legal pluralism in Africa as follows:

At public law level, i.e. the area of constitutional and administrative law and of the bulk of criminal law, there is no significant plurality of legal systems. English law takes possession. For to pass under

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<sup>306</sup> Ndulo and Kent (n 21) 4.

<sup>307</sup> Ibid 3.

British rule is to become involved in and affected by the doctrines of the British constitutional and administrative law relating to dependant territories and it is within the context and limits of the common system of public law that the different systems of mainly private law have received formal recognition and scope of operation.<sup>308</sup>

The above conception of public law which assumes legal centralism has contributed to the neglect of non-state societal institutions with public power in public law research. This is notwithstanding the fact that plural legal and governance orders exist in many post-independence African states as evidenced by the endurance of chieftaincy. This centralist view of public law also reflects the theoretical foundations of public law which emphasise the unity of state and sovereignty. I develop this argument in the next chapter which discusses the historical and theoretical foundations of public law.

This assumption of legal centralism in public law scholarship has been challenged by recent research (mostly post 1990s) which emphasises the importance of accommodating traditional institutions in constitutional law. For instance, in his 2001 research on constitution making in Africa, Ndulo notes that post-colonial constitutions of many African states were not consistent with Africa's "cultural and historical peculiarities."<sup>309</sup> Ndulo stresses the need by a constitution that aspires to be legitimate and authoritative in an African state to address "the role of traditional institutions in modern African political systems."<sup>310</sup> Ndulo states:

It makes sense to find a place in the national political system for structures and institutions that cannot be wished away...every effort should be made to integrate traditional institutions into the modern political structures so that all institutions are made accountable and responsive to the people.<sup>311</sup>

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<sup>308</sup> Kwamena Bentsi-Enchill, 'The Colonial Heritage of Legal Pluralism (The British Scheme)' (1969) 1 Zam LJ 1, 2.

<sup>309</sup> Ndulo (n 20) 106.

<sup>310</sup> Ibid 107.

<sup>311</sup> Ibid 110.

Similar sentiments are expressed by Carlson Anyangwe, who addresses chieftaincy in the concluding paragraphs of his work which discusses Zambia's 1991 Constitution as amended in 1996 against the constitutional law principles of autochthony and supremacy.<sup>312</sup> Anyangwe argues that "since the wave of democratisation and constitution-making that began in the continent in 1990, chieftaincy is making its dramatic entry in the constitutions of most African states."<sup>313</sup> Anyangwe notes that "the African chief remains a powerful figure" in the post-colonial period despite previous attempts by the central government to extinguish the institution.<sup>314</sup> Anyangwe further notes the importance of chiefs as power brokers and the demands of rural communities for autonomy in the local governance as some of the key reasons behind the demands for the rehabilitation of the institution of chieftaincy.<sup>315</sup> He however wonders why African constitutional lawyers do not appear to have addressed their minds to this "interesting and intriguing phenomenon."<sup>316</sup>

This thesis hopes to respond to these calls for legal researchers to engage with chieftaincy under constitutional law by pulling together existing multidisciplinary literature on chieftaincy and constitutional law history through socio-legal research. The thesis also hopes to build on the existing literature by studying the social and political contexts within which the written constitutional documents were developed, including by assessing the extent to which chiefs were involved or excluded in the development of these constitutional documents. Understanding the historical context of constitutional law is key to implementing any efforts at integrating traditional governance institutions into the constitution and public law systems.

Apart from the historical works highlighted above, other literature on public law mostly comprises of doctrinal work which analyses constitutional statutes and cases which expound principles of constitutional and administrative law. Most of these works also focus on the application of these principles and laws in the regulation of

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<sup>312</sup> Anyangwe (n 67).

<sup>313</sup> Ibid 29.

<sup>314</sup> Ibid.

<sup>315</sup> Ibid 30.

<sup>316</sup> Ibid 29.

centralist state institutions. Examples of such works include studies which discuss constitutional law principles and doctrinal analyses of the legislation and case law on the regulation of central state institutions.<sup>317</sup> This literature is largely descriptive and is useful for people who want to learn about the nature of public law and statutory institutions in Zambia. It is however limited in terms of historical context and conceptual analysis of public law in its social context.

A notable example of such works is the article by Carlson Anyangwe, above, which analyses the Zambia's constitution against the principles of constitutional autochthony and supremacy of the constitution.<sup>318</sup> Anyangwe argues that the Constitution of Zambia 1991 as amended in 1996 was substantively but probably not procedurally autochthonous because it was adopted through Parliament instead of a broad based constituent assembly and a national referendum which would have given it popular legitimacy.<sup>319</sup> He also argues that the Constitution of Zambia being supreme towers above other norms, authorities, and persons, and as such, parliamentary sovereignty has no place in Zambia's constitutional law.<sup>320</sup>

Another notable example of doctrinal works that have analysed the constitutional review processes is by Muna Ndulo and Robert Kent who discuss the methods of adoption of the 1991 constitution and its amendment in 1996.<sup>321</sup> With regards to the 1991 constitution, Ndulo and Kent argue that although its adoption was a product of compromise between the two main competing political parties, it maintained the separation of powers, reduced executive dominance and strengthened the judiciary by its express assertion of constitutional supremacy.<sup>322</sup> Ndulo and Kent also condemn the provisions of the 1996 constitution which required chiefs to abdicate their positions upon seeking elective office or accepting a political appointment for

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<sup>317</sup> For instance, Ndulo and Kent (n 21), Anyangwe (n 67), Mumba (n 73).

<sup>318</sup> Anyangwe (n 67) 1.

<sup>319</sup> Ibid 13.

<sup>320</sup> Ibid 21.

<sup>321</sup> Ndulo and Kent (n 21) 3.

<sup>322</sup> Ibid 19.

being undemocratic although they do not go further to analyse the report of the Constitution Review Commission that made the recommendation.<sup>323</sup>

A third example of such doctrinal works is a book chapter on the state of administrative justice in Zambia by Felicity Kalunga and O'Brien Kaaba, which discusses the salient features of administrative justice in Zambia by analysing legislation and case law.<sup>324</sup> It argues that judicial review is the main mechanism by which people who are adversely affected by public power seek administrative justice in addition to statutory controls and the ombudsman, but the latter two are not fully developed.<sup>325</sup> The chapter also argues that Zambian courts rely on English law in judicial review proceedings for both the grounds of review and procedure in judicial review proceedings.<sup>326</sup> It further notes that although the constitution of Zambia recognises customary law and traditional governance institutions, this area of law has not been fully developed by case law.<sup>327</sup>

The dearth of literature on chieftaincy and the customary law aspects of public law is not limited to Zambia. A review of literature from other African countries with plural governance and normative orders also reveals a dearth of research on the subject. The notable exceptions are the research by Jennifer Corrin<sup>328</sup> and Aninka Claassens and Geoff Budlender.<sup>329</sup> Corrin analyses the approach that the courts in Papua New Guinea take in judicial review, and in decisions involving customary law. Corrin does this by analysing cases involving the review of "decisions involving custom and customary law by state courts and, second, the review of decisions of traditional leaders made outside of the state regime."<sup>330</sup> Corrin concludes that in Papua New Guinea, the English common law approach dominates administrative law compared to customary law notwithstanding the constitutional mandate which obliges courts to

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<sup>323</sup> Ibid 22 and 25.

<sup>324</sup> Kalunga and Kaaba (n 53).

<sup>325</sup> Ibid 24.

<sup>326</sup> Ibid 27.

<sup>327</sup> Ibid 28.

<sup>328</sup> Corrin (n 27).

<sup>329</sup> Claassens and Budlender (n 28).

<sup>330</sup> Corrin (n 27) 124.

develop indigenous jurisprudence. Corrin argues that administrative law in Papua New Guinea is part of the plural legal system, but it has not received the attention it deserves.<sup>331</sup>

Aninka Claassens and Geoff Budlender analyse cases in which the Constitutional Court of South Africa has engaged with customary law in fulfilling its constitutional mandate to develop customary law. They argue that the court has adopted an approach which emphasises the need for customary law to reflect the contemporary practice as opposed to overreliance on past practice (precedent) and statute.<sup>332</sup> The Constitutional Court of South Africa has also held that the determination of customary law is a question of law and not fact.<sup>333</sup> The thesis adopts a similar approach, using the Zambian example, by analysing case law and litigation involving constitutional and administrative law challenges against chiefs and those involving the exercise of power by chiefs over customary land, which the thesis argues is a public law power, to assess the extent to which developments in case law have influenced public law.

#### **4.3.2 Social Science-Based Research on Chieftaincy**

Although chieftaincy has not received adequate attention by public law research, scholars of African constitutional law and constitutionalism have in recent years acknowledged the value of traditional leadership institutions towards reconciling the plural legal and governance systems in these countries.<sup>334</sup> Fortunately, the period under review coincides with the revival of research interest by social scientists in chieftaincy. This research provides a useful resource for understanding the social and political context within which the constitution of Zambia has developed. It also offers useful insights for an interdisciplinary study of chieftaincy and traditional governance institutions in Zambia. This literature is useful in helping us to understand the social and political environment within which the constitutional

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<sup>331</sup> Ibid.

<sup>332</sup> Claassens and Budlender (n 28) 84.

<sup>333</sup> Ibid 97.

<sup>334</sup> Semahagn G Abebe, 'The Relevance of African Culture in Building Modern Institutions and the Quest for Legal Pluralism' (2013) 57 St Louis U LJ 429, 345.

developments occurred, the power relations between chiefs and central government officials, and the constitutionalising norms which regulate the public power of chiefs in society.

The literature reviewed under this section consists of social science-based research on chieftaincy. This literature is vital to the study of public law because a country's constitutional and administrative law reflect its social, political, and administrative history and its governance aspirations for the present and future generations.<sup>335</sup> Although this literature only incidentally addresses the legal context of traditional governance institutions, it is useful for understanding the social and historical context of Zambia's public law. The literature also helps us to understand the character of legal pluralism in public law.

Unlike the legal research which has neglected chieftaincy, social science-based research such as history, anthropology, and political studies, has engaged with traditional governance institutions in Africa and Zambia. However, most of the existing works focus on the study of traditional leadership institutions before colonialism and during the colonial period when chiefs were incorporated in the native local governance under the policy of indirect rule. Some of this literature has been discussed in the previous chapter which introduced chieftaincy as an important empirical phenomenon for the study of public law in Zambia. This chapter focuses on the literature relating to the post-independence period, which is the focus of the thesis.

The existing social science-based literature may be placed under three categories. The first comprises of mainly anthropological literature on the social and political systems of societies with centralised governance institutions in pre-colonial Zambia

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<sup>335</sup> John Hatchard, Muna Ndulo and Peter Slinn, *Comparative Constitutionalism and Good governance in the Commonwealth: An Eastern and Southern African Perspective* (Cambridge University Press 2004) 12.

before and at the advent of colonialism,<sup>336</sup> and the political and administrative roles of chiefs in the colonial administration.<sup>337</sup> The second category mostly comprises of literature on the reaction of traditional institutions to the developments in post-independence era and mostly covers the early years after independence, 1960s to the late 1970s.<sup>338</sup> The third category represents recent literature from the late 1990s onwards which studies the role of traditional leaders in the local governance and hybrid governance institutions.<sup>339</sup>

From about independence in the late 1950s and 1960 until the late 1980s and early 1990s, research and social policy largely neglected chieftaincy and its role in the governance of post-colonial African states.<sup>340</sup> As the institution of chieftaincy has endured the development efforts of the post-independence states, some of which included efforts at transforming or eliminating it, there is now revived scholarly and policy interest, from the late 1990s onwards, in the role of traditional governance institutions in the constitutional and democratic local governance.<sup>341</sup> A good example of such policy initiatives is the “symposium on traditional leadership and local government held between 23–26 September 1997 in Gaborone, Botswana,” which attracted over 50 traditional leaders and elected local and central government

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<sup>336</sup> Meebelo (n 163); Andrew D Roberts, *A History of the Bemba: Political Growth and Change in North-Eastern Zambia before 1900* (University of Wisconsin Press 1973); Hall (n 150); and Gluckman (n 144).

<sup>337</sup> Samuel N Chipungu (Ed), *Guardians in their Time: Experiences of Zambians under Colonial Rule, 1890-1964* (MacMillan Press Ltd 1992).

<sup>338</sup> Wim van Binsbergen, ‘Chiefs and the State in Independent Zambia – Exploring the Zambian National Press’ (1987) *Legal Pluralism and Unofficial L.* 139; Giacomo Macola, “‘It Means as If we Are Excluded from the Good Freedom’: Thwarted Expectations of Independence in the Luapula Province of Zambia, 1964-6’ (2006) *JAH* 47 (1) 43; and George Clement Bond, *New Coalitions and Traditional Chieftainship in Northern Zambia: Politics of Local Government in Uyombe* (1975) 45 (4) *Africa Journal of the International African Institute* 348.

<sup>339</sup> Baldwin (n 139); Kate Baldwin, ‘Elected MPs, Traditional Chiefs, and Local Public Goods: Evidence on the Role of leaders in Co-Production from Rural Zambia’ (2019) 52 (12) *Comparative Political Studies* 1925; Chikulo (n 234); Haang’andu and Daniel Beland, ‘Democratisation Without Westernisation? Embedding Local African Cultures’ (2019) 46 (2) *Politikon* 219.

<sup>340</sup> Ray (n 4242) 10.

<sup>341</sup> *Ibid* 11.

leaders from several commonwealth member countries including Zambia.<sup>342</sup> One of the most important recommendations made by the symposium was that “the role of traditional leaders should be recognised and, where appropriate, incorporated into the constitutional framework of each state.”<sup>343</sup> The output of these policy and research interventions included publication of considerable literature on the political and administrative power of chiefs and their role in development, local governance, and management of natural resources. The thesis relies on this body of multidisciplinary literature to conduct a socio-legal study of chieftaincy in Zambia’s post-independence constitutional and administrative law history.

The endurance of chieftaincy in the local governance of post-colonial African states, where the institution exists, has partly been attributed to the limited capacity of the state, the political economy of chiefs in the governance, and political systems of the state demonstrated through some of the political, social, and economic functions played by traditional leaders.<sup>344</sup> The limited capacity of the state is demonstrated by the failure of central state institutions to provide economic and social services in rural areas where they often depend on the political and social capital of the traditional leaders to implement development projects.<sup>345</sup> Early research on post-independence Zambia attributes this problem of limited state capacity to the urbanisation which took place after independence whereby many educated Africans migrated to urban areas leaving an administrative gap in the rural local governance which had to be filled by the continuation of chieftaincy.<sup>346</sup>

The public power of chiefs is also attributed to their legitimacy among the local people, which could be traced to the historical transformation of the state forms

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<sup>342</sup> Donald I Ray, Keshav Sharma and II May-Parker (eds), Report of the symposium on traditional leadership and local government (23 – 26 September 1997) 6.

<sup>343</sup> Ibid.

<sup>344</sup> Berihun Adugna Gebeye, ‘Decoding legal pluralism in Africa’ (2017) 49 (2) The Journal of Legal Pluralism and Unofficial Law, 228, 243.

<sup>345</sup> Baldwin (n 139).

<sup>346</sup> George Clement Bond, New Coalitions and Traditional Chieftainship in Northern Zambia: Politics of Local Government in Uyombe (1975) 45 (4) Africa Journal of the International African Institute 348.

from the pre-colonial times through to the post-colonial state.<sup>347</sup> Donald Ray argues, using Ghana as a case study, that because chiefs draw their legitimacy from their people which said legitimacy is traced to pre-colonial roots, they form another power which co-exists with state power.<sup>348</sup> Based on a historical study of the constitutional and statutory regulation of chieftaincy in Ghana, Ray argues that where the state has felt threatened by the sovereignty of chiefs, it has moved to limit the powers of chiefs.<sup>349</sup> He concludes that notwithstanding the inconsistency in the regulation of chiefs under constitutional law, they have endured efforts to eliminate them or assimilate them within the central government, retaining both political and administrative power over social and developmental activities in their local areas.<sup>350</sup>

Christiane Owusu-Sarpong recounts the significant influence of chiefs in politics and development decisions in Ghana by demonstrating their presence in the images taken at official functions and their development initiatives which are acknowledged by the media, academics, government officials, and foreign governments, among others.<sup>351</sup> Another important role played by traditional leaders is that of managing conflicts and resolving disputes in accordance with customary law.<sup>352</sup> Traditional leaders also manage land and are regarded as guardians of their communities, in which role they play important cultural and ritual functions.<sup>353</sup>

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<sup>347</sup> Christiane Owusu-Sarpong, 'Setting the Ghanaian Context of Rural Local Government: Traditional Authority Values' in DI Ray and PS Reddy (ed), *Grassroots Chiefs in Africa and the Afro-Caribbean Governance?* (IASIA, 2003) 31-68; Peter Skalnik, 'Authority versus Power – Democracy in Africa Must Include Original African Institutions' (1996) 37 J Legal Pluralism & Unofficial L 109, 111; Donald I Ray, 'Ghana: Traditional Leadership and Rural Local Governance' in DI Ray and PS Reddy (ed), *Grassroots Chiefs in Africa and the Afro-Caribbean Governance?* (IASIA, 2003) 83-121.

<sup>348</sup> Donald I Ray, 'Divided Sovereignty in Ghana' (1996) 28 (37-38) Journal of Legal Pluralism 181, 181.

<sup>349</sup> Ibid.

<sup>350</sup> Ibid.

<sup>351</sup> Christiane Owusu-Sarpong, 'Setting the Ghanaian Context of Rural Local Government: Traditional Authority Values' in DI Ray and PS Reddy (eds) *Grassroots Chiefs in Africa and the Afro-Caribbean Governance?* (IASIA, 2003).

<sup>352</sup> von Trotha (n 206).

<sup>353</sup> Logan (n 22) 107.

Another work to highlight is by Carolyn Logan who used Afrobarometer surveys to study the attitudes of the local people towards traditional leaders in 15 African countries and established that the people did not view traditional power as antagonistic to the central state but rather saw the two as components of a single whole.<sup>354</sup> Logan set out to establish whether traditional institutions were compatible with modern democratic governance by assessing how the people who fall under traditional authority view traditional leaders compared to elected institutions. Logan used survey data from Afrobarometer in 1999 – 2001 and 2002 – 2003, respectively, to assess the popular perception of traditional leadership institutions and how they relate to “perceptions of elected leaders and to support for a democratic system of government.”<sup>355</sup> Based on the responses from the survey data and face to face interviews, Logan concluded that Africans who live under dual governance institutions did not draw a sharp distinction between traditional institutions and elected ones but rather regarded them as complementary parts of a hybrid whole.<sup>356</sup>

In the context of Zambia, Kate Baldwin discusses the role of chiefs as power brokers in democratic politics by emphasising their role in the local delivery of public goods in rural communities and how they in turn facilitate the implementation of development projects of the central government.<sup>357</sup> Baldwin argues that the empowerment of traditional leaders improves the accountability of elected politicians in modern democracies where elected institutions are weak.<sup>358</sup> Baldwin attributes this to the capacity of chiefs to mobilise resources in response to rural problems owing to the permanency of their positions which facilitates their investment in social institutions.<sup>359</sup> Baldwin’s findings appear to be consistent with earlier research by Wim van Binsbergen who, in 1987, conducted a study of chieftaincy in the post-independence government by analysing newspapers from 1972 to 1973 and

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<sup>354</sup> Ibid 121.

<sup>355</sup> Ibid 103.

<sup>356</sup> Ibid.

<sup>357</sup> Baldwin (n 139).

<sup>358</sup> Ibid.

<sup>359</sup> Ibid.

concluded that “state and chieftainship are closely interlocking aspects of the modern Zambian life.”<sup>360</sup>

Wolfgang Zeller provides us with a good example of the role of chiefs in the provision of local services through an analysis of the construction of Mwandi road in the Western Province of Zambia within the context of “the role of chiefs in local and national politics in Zambia and the interests of foreign aid donors and transnational investors in the country’s Western Province.”<sup>361</sup> Zeller argues that the construction of the Mwandi road cannot be seen solely as the result of coordinated efforts between the chief and the central government in furthering development, but rather as a temporal convergence of interests, such as the export of copper from the Copperbelt and access to consumer markets in Zambia and Namibia, between the state, chieftaincy, and transnational elites.<sup>362</sup> Zeller further argues that once the common goal, in this case the road construction, is met, “the great majority of people in Mwandi are left to their own devices: chiefs and local entrepreneurs.”<sup>363</sup> Zeller also discusses Senior Chief Yeta, at whose palace the Mwandi road ended, in the road construction project in particular, and in Zambia’s national politics in general.<sup>364</sup> The author describes Yeta’s role as one of striking a balance between the performance of his traditional duties at the palace and having something to show at home from his prominent role in the national politics where he served as member of the House of Chiefs and sat on the Mung’omba Constitutional Review Commission (CRC) at the time.<sup>365</sup>

In terms of policy interventions, several reforms aimed at improving public participation in the local government have been implemented. Zambia’s post-independence government in 1965 abolished the Native Authorities led by traditional

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<sup>360</sup> Wim van Binsbergen, ‘Chiefs and the State in Independent Zambia – Exploring the Zambian National Press’ (1987) *Legal Pluralism and Unofficial L.* 139, 192.

<sup>361</sup> Wolfgang Zeller, “‘Now we are a Town’: Chiefs, Investors, and the State in Zambia’s Western Province,” Lars Buur and Helene Maria Kyed (ed) *State Recognition and Democratization in Sub-Saharan Africa* (PALGRAVE MACMILLAN 2007) 209 – 231.

<sup>362</sup> Ibid 213.

<sup>363</sup> Ibid 226.

<sup>364</sup> Ibid.

<sup>365</sup> Ibid 219.

leaders and replaced them with a bureaucratic local government but it was not long before the state resolved to incorporate traditional leaders in the local governance by making them heads of village committees.<sup>366</sup> Several changes have since been made to the constitution and local government legislation with the current provisions allowing for the representation of chiefs in the local councils by not more than three chiefs in the district and elected from among themselves.<sup>367</sup> Notwithstanding the various law and policy reforms that have been implemented during the period under review, the lack of citizen participation, an integrated governance system, and the inadequate definition of the role of traditional institutions, remain to be challenges in the local governance.<sup>368</sup>

Overall, the existing literature on chieftaincy demonstrates a move towards embracing and accommodating the public power of traditional leaders in the local governance. This function of chiefs raises concerns about democracy and accountability, considering the fact that chiefs are typically unelected officials.<sup>369</sup> The concerns include the fact that chiefs tend to put the community ahead of individual rights and are largely patriarchal.<sup>370</sup> Some scholars have argued that existing systems within the African customary norms, such as council meetings, succession to thrones, ritual, and public meetings, which are rooted in their pre-colonial structures, could be adapted or incorporated into the modern systems of democracy to form hybrid governance institutions.<sup>371</sup> Other scholars have gone further to argue that democracy in Africa could improve if it were imbedded in African cultures and traditional leadership styles rather than the modern state apparatus which

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<sup>366</sup> Bornwell Chikulo, 'Local Governance Reforms in Zambia: A Review' (2009) 2 Commonwealth Journal of Local Governance 98, 99.

<sup>367</sup> Constitution of Zambia (Amendment) Act 2016, Article 153.

<sup>368</sup> Chikulo (n 224) 104, Chikulo (n 234) 145.

<sup>369</sup> Donald I Ray, 'Ghana: Traditional Leadership and Rural Local Governance' in Donald I Ray and PS Reddy (ed) Grassroots Chiefs in Africa and the Afro-Caribbean Governance? (IASIA, 2003) 83-121, 114.

<sup>370</sup> Mamdani (n 138); Jo Beall, 'Cultural weapons: traditions, inventions and the transition to democratic governance in metropolitan Durban' (2006) 43 (2) Urban studies 457-473.

<sup>371</sup> Logan (n 22) 105; Peter Skalník, 'Chieftdom: a universal political formation?' (2004) 43 Focaal – European Journal of Anthropology 76; Helene Maria Kyed, 'Hybridity and boundary-making: exploring the politics of hybridisation' (2017) Third World Thematics: A TWQ Journal, 1.

supplanted African institutions.<sup>372</sup> For instance, using a case study of the Bemba kingdom, Privilege Haang'andu and Daniel Béland argue that some of the democratic practices under traditional leadership could be adopted to build democracy in modern African states.<sup>373</sup>

The above questions on the resurgence of traditional leaders and democratic local governance necessitate research in chieftaincy under public law. Ghana and South Africa are among some of the African states with leading interdisciplinary research and policy developments on the integration of traditional institutions into the local governance, although the debate about their role in modern democracy is far from settled.<sup>374</sup> The report of the Mung'omba Constitutional Review Commission which generated content for the 2016 constitutional amendment made extensive reference to provisions in the constitutions of both the South Africa and Ghana for comparative purposes, as I have shown in chapter seven of this thesis.<sup>375</sup> With the subsequent challenges in the Constitutional Court and the most recent attempt to amend the Constitution to reinstate the power of the president to recognise chiefs,<sup>376</sup> it is important to understand the constitutional developments in their local context and consequently the value of this comparative venture.

#### **4.4 Absence of Chieftaincy in Public Law Literature**

As demonstrated above, the review of existing literature shows considerable neglect of chieftaincy in public law research in Zambia. The gaps in the public law literature may be filled by having resort to other social science-based literature, particularly in

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<sup>372</sup> Privilege Haang'andu and Daniel Béland, 'Democratization Without Westernisation? Embedding Democracy in Local African Cultures' (2019) 46 (2) *Politikon* 219.

<sup>373</sup> *Ibid.*

<sup>374</sup> See for instance, Petrus A Brynard and Mavhungu Elias Musitha, 'The role of traditional authorities in the implementation of Integrated Development Planning Policy (IDP) in Vhembe District Municipality, Limpopo Province' (2011) 4 (3) *African Journal of Public Affairs* 113 and J Michael Williams 'Leading from behind: Democratic Consolidation and the Chieftaincy in South Africa' (2004) 42 (1) *The Journal of Modern African Studies* 113 (on South Africa); Peter Skalník, 'Authority versus Power – Democracy in Africa Must Include Original African Institutions' (1996) 37 *J Legal Pluralism & Unofficial L* 109; and Maxwell Owusu, 'Tradition and Transformation: Democracy and the Politics of Popular Power in Ghana' (1996) 34 (2) *The Journal of Modern African Studies* 307-343 on Ghana.

<sup>375</sup> Mung'omba CRC Report (n 31) 540-41.

<sup>376</sup> Constitution of Zambia (amendment) Bill No 10 of 2019.

politics and development fields, which have made impressive strides in studying the institution and the role of chiefs in the local governance. This research is important for the study of public law because a country's constitutional and administrative law framework ordinarily reflects its social, political, and administrative history and the governance aspirations.<sup>377</sup>

The limitations of the social science-based literature are twofold. Firstly, the literature focuses on the social, political, and administrative aspects of the institutions and only incidentally addresses their legal context. Secondly and related to the limitation identified from public law literature, there is a research gap created by the lack of interest in chieftaincy in post-independence African States from the "1950s and 1960s, until the late 1980s and early 1990s."<sup>378</sup> In the context of Zambia, Wim van Binsbergen remarked, "from the available literature, one would get the impression that a totally consistent and monolithic, bureaucratic modern state has completely wiped out such fossil traces of traditional rulers."<sup>379</sup> There are however pockets of literature mostly comprising of case studies and ethnographic literature on specific chiefdoms which offers useful insights on the public power and regulation of chiefs.<sup>380</sup>

Notwithstanding the limitations noted above, this multidisciplinary literature provides useful insights for understanding the institution of chieftaincy from its social context. One of the explanations for the neglect of chieftaincy in public law scholarship has been attributed to the disciplinary demarcations of social science fields and law. Understanding public law from its social context requires researchers to employ socio-legal methods to understand how the social and cultural contexts give meaning to legal texts.<sup>381</sup>

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<sup>377</sup> Hatchard, Ndulo and Slinn (n 335) 12.

<sup>378</sup> Ray (n 42) 10.

<sup>379</sup> van Binsbergen (n 360) 140.

<sup>380</sup> For instance, van Binsbergen (n 248) and Zeller (n 361).

<sup>381</sup> Michal Jan Rozbicki, 'Constitutions, Culture, and History' (2012) 57 St Louis U LJ 447.

## **4.5 Conclusion**

This chapter has conducted a critical review of the existing literature on chieftaincy under public law. Based on the analysis of existing literature, the chapter has identified a gap in the existing public law literature, namely, the neglect of chieftaincy. There is however sufficient research that has engaged with the phenomenon in other social science-based research although this literature does not engage with the legal aspects of chieftaincy. There is therefore need for research which links the existing bodies of work to fill the knowledge gap in research on chieftaincy under public law. This thesis contributes to filling this research gap by conducting a socio-legal study of chieftaincy in Zambia's post-colonial constitutional and administrative law history. The next chapter discusses the analytical framework adopted by the thesis for the study of chieftaincy under public law.

## **Chapter Five: Socio-Legal Historical Study of Chieftaincy under Public Law**

### **5.1 Introduction**

The previous chapter reviewed existing literature on chieftaincy in public law in Zambia. It found that despite being an important state institution in Zambia, chieftaincy has been neglected by public law research which has tended to focus on centralist state institutions comprised of elected officials and bureaucratic offices regulated by statute. The chapter also found that notwithstanding the considerable neglect of chieftaincy by public law research, other fields of social science have, from the late 1990s onwards, paid considerable attention to the study of chieftaincy, and in particular, the role of chiefs in the local governance. The chapter also sketched the character of public law in Zambia and found that it largely depends on English public law partly because of the country's failure to transform the colonial law and institutions. One such institutions is law practice and scholarship.

This chapter develops the argument by interrogating the absence of chieftaincy in public law research from the perspective of law practice. It does this by tracing the development of legal scholarship and the administration of justice in Zambia and discussing the conceptual foundations of public law from its English context. In so doing, the chapter seeks to understand the process by which public law in Zambia has maintained its English law outlook, as established in the previous chapter, and neglected the study of chieftaincy. By discussing the conceptual foundations of public law and the development of legal scholarship and administration of justice, the chapter contextualises and justifies the research intervention and analytical framework adopted by this thesis for the study of chieftaincy under public law. The thesis conducts a socio-legal study of chieftaincy using legal pluralism as the underlying analytical concept. It draws on the analytical perspectives from post Luhmannian perspectives on sociological constitutionalism, constitutional sociology, and sociology of constitutions. The discussion

of the evolution of legal scholarship also lays a foundation for the analysis of court cases and research interviews with lawyers in chapter eight, which assesses the extent to which litigation has influenced the development of public law in Zambia.

The remainder of the chapter is divided into five sections. The first section briefly discusses the development of the administration of justice and legal scholarship in Zambia. It also discusses the conceptual foundations of public law with the view to discern how lawyers and scholars perceive public law and chieftaincy which would further explain the absence of chieftaincy from existing public law literature. The second section engages literature on sociological perspectives of public law to lay a foundation for the discussion of legal pluralism which the thesis has adopted as the analytical concept for the study of chieftaincy under public law in Zambia. The third section discusses legal pluralism and explains why this thesis has adopted it for the study of chieftaincy in public law. The fourth section highlights the contribution that this thesis makes to scholarship. The chapter ends with conclusion in the fifth section.

## **5.2 Explaining the Absence of Chieftaincy in Public Law Literature**

The absence of chieftaincy in existing literature on public law in Zambia should be understood from the context of the historical development of public law and legal scholarship. The first section of the previous chapter addressed some of the historical aspects of the reception of English public law and administrative practice to Zambia through the process of colonialism. This chapter develops this discussion by exploring the historical development of public law in Zambia from the perspective of law practice by discussing the development of the administration of justice and legal scholarship. This is important because law practice plays a key role in shaping the development of law. It is therefore important to understand how law practice has evolved to understand how it has played a role in the development of public law. This information is key for purposes of understating how lawyers perceive public law and chiefly power. It is also useful for purposes of discerning how these perceptions are reflected in legal research and law practice through litigation. As Alan Watson puts it, "Law...is above all and

primarily the culture of the lawyers and especially of the lawmakers - that is, of those lawyers who, whether as legislators, jurists, or judges, have control of the accepted mechanisms of legal change."<sup>382</sup> The discussion of the evolution of law scholarship and the administration of justice also demonstrates the significance of this research and contextualises the contribution of this thesis to scholarship.

### **5.2.1 Public Law and Administration of Justice in Zambia**

As the review of literature in chapter four of this thesis has endeavoured to demonstrate, there appears to be general consensus amongst leading scholars who have studied the foundations of modern public law that it traces its conceptual foundations to the historical developments of early modern Europe and the philosophical thoughts of scholars who tried to make sense of these developments.<sup>383</sup> These historical developments informed the worldview of scholars concerning how the political and governing power of the state is organised through the medium of law. This worldview has however failed to adapt to (or accommodate) the social reality of pluralism in the African context, as I explain in the next subsection. First, a brief discussion of the historical development of the justice system in Zambia.

The European worldview of public law was transported by Europeans to other territories of the world through the process of colonialism and has largely been maintained by the post-independence institutions that developed from the colonial processes.<sup>384</sup> "One of the last acts of the British before independence in the 1960s was to establish several institutions for legal training and research. Along with the Africanised judiciary, these institutions were to become the custodians of the common law."<sup>385</sup> In Zambia, the

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<sup>382</sup> Alan Watson, *Evolution of Law* (John Hopkins University Press 1985) 118 cited by Bruce W Frier, 'Why Law Changes: Review of The Evolution of Law by Alan Watson' (1986) 86 (4) Columbia Law Review 888, 891.

<sup>383</sup> Loughlin (n 44) 8; see also Berihun Adugna Gebeye, *A Theory of African Constitutionalism* (OUP 2021).

<sup>384</sup> Seidman (n 267) 51.

<sup>385</sup> Yash Ghai, 'Law, Development and African Scholarship' (1987) 50 (6) The Modern Law Review 750, 751.

process of transfer of English law began around the late 1800s. It manifested itself in the organisation of the state, briefly discussed in chapters three and four of this thesis, and administration of justice which is discussed below.

In terms of administration of justice, the Royal Charter establishing the BSAC authorised the company to administer justice to the people of the territory but enjoined it to give regard to the local laws and customs of Africans especially in matters of a personal nature such as marriage, land, and property rights, "but subject to any British laws which may be in force in any of the territories...and applicable to peoples or inhabitants thereof."<sup>386</sup> In practice, with the exception of a few serious criminal matters brought to the attention of the company administrators, the administration of justice among Africans was left to the Africans.<sup>387</sup> The first British courts were established pursuant to the North-Eastern Rhodesia Order in Council of 1900 which provided for the establishment of the High Court and magistrates courts with jurisdiction based on the law and practice obtaining in England.<sup>388</sup> The Order in Council, like the Royal Charter establishing the BSAC, enjoined the courts to give regard to the customary laws of Africans in civil matters involving Africans, provided that the customs in question were not repugnant to natural justice, morality, or the Order in Council and the regulations made under the Order.<sup>389</sup> For North Western Rhodesia, the first judges for the administration of justice were appointed in 1906 pursuant to the Barotseland-North-Western Rhodesia Order in Council of 1899.<sup>390</sup> These judges had similar jurisdiction as the courts in North-Eastern Rhodesia with regards to the application of customary law except that they could also apply customary law in criminal matters.<sup>391</sup>

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<sup>386</sup> Royal Charter of Incorporation of the British South Africa Company 1889, s14.

<sup>387</sup> Hoover, Piper and Spalding (n 181) 5.

<sup>388</sup> DO Aihe, 'The Administration of the Judiciary in Zambia, 1889-1969' (1972) 6 Nigerian LJ 117.

<sup>389</sup> Hoover, Piper and Spalding (n 181) 6.

<sup>390</sup> Ibid.

<sup>391</sup> Ibid 9.

When the two territories were merged in 1911 to form Northern Rhodesia, a single High Court was established. The high court was mandated to comply with the substance of the law and practice in England as far as the circumstances permitted.<sup>392</sup> Acts of the United Kingdom Parliament enacted after the commencement date of the Northern Rhodesia Order in Council, 17 August 1911, were excluded from applying in the territory.<sup>393</sup> In 1924, the British government took over the administration of the territory from the BSAC and a new Order in Council, the Northern Rhodesia Order 1924 was promulgated. The Northern Rhodesia Order in Council re-established the High Court for the territory with civil and criminal jurisdiction over all persons and matters, subject to the reservations on the application of customary law stated above.<sup>394</sup> The judges appointed to serve in the High Court and magistrates courts in Northern Rhodesia were British, and as such relied on English legal principles and standards of morality and natural justice to determine what customary law was applicable.<sup>395</sup> Customary law was received as evidence in these courts through the opinions of assessors, people familiar with the local custom, but their opinion did not bind the adjudicators.<sup>396</sup> Tribal courts continued to co-exist with the British courts but they were not formally recognised until 1929 when the Native Courts Ordinance was enacted.<sup>397</sup> Native Courts were presided over by traditional leaders who did not receive extensive training in law and procedure.<sup>398</sup> Notwithstanding the statutory recognition of Native Courts in 1929, they continued to operate separately from the British Courts and were presided over by untrained adjudicators. Lawyers were not allowed to appear before these courts.<sup>399</sup>

The two systems of administration of justice, namely, customary and British, remained parallel until after Zambia's independence in 1964 when the Native Courts were

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<sup>392</sup> Aihe (n 388) 118.

<sup>393</sup> Ibid.

<sup>394</sup> Ibid 119.

<sup>395</sup> Ibid 120.

<sup>396</sup> Hoover, Piper and Spalding (n 181) 7.

<sup>397</sup> Ibid 12.

<sup>398</sup> Ibid 17.

<sup>399</sup> Ndulo (n 6) 446.

reconstituted as Local Courts administered by Justices who were appointed by the Judicial Service Commission which fell under the Ministry of Justice.<sup>400</sup> With this development, chiefs no longer formally exercised judicial functions which they previously did under the Native Courts, save for their powers under customary law. The High Court and magistrates' courts continued to administer the laws and procedure imported from England.<sup>401</sup> As Earl Hoover, John Piper, and Francis Spalding argue, the entrenchment of English law and procedure is arguably the most important and enduring legacies of British colonial rule in Zambia.<sup>402</sup> Although the Local Courts were incorporated into the national judicial system, they are presided over by justices who are not trained lawyers, primarily administer customary law, and do not admit lawyers.<sup>403</sup>

The above exposition shows the institutions by which English law and procedure have been maintained in Zambia, especially in the field of public law which traditionally falls outside the jurisdiction of traditional courts. Let us now consider the conceptual foundations of the English public law which was imported and has been maintained in Zambia to understand why chiefs have been neglected from public law research.

### **5.2.2 Conceptual Foundations of Public Law**

Researchers who have studied the foundations of public law in Europe place it within the context of the developments by which political power emerged with the capacity to absorb competing societal power leading to the dissipation of religious power, its major competitor in earlier centuries, and the abatement of the societal power of individuals.<sup>404</sup> The development of juristic thought about the politics in Europe from the medieval period onwards culminated in constitutional orders of ascending and

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<sup>400</sup> Ibid 22.

<sup>401</sup> Ibid 20.

<sup>402</sup> Hoover Piper and Spalding (n 181) 118.

<sup>403</sup> Local Court Act, s 12.

<sup>404</sup> Loughlin (n 44); Jiří Přibáň, 'Power in Sovereignty and its Self-Legitimation: On the Autopoietic Semantics and Contingency of Popular Sovereignty' (2015) 11 (4) Int. J.L.C. 481.

descending governmental themes. Key to these developments is the doctrine of sovereignty, which was represented by the imperial parliament in the case of the United Kingdom, or the people as a collective through a written constitution in other versions of political organisation such as the United States of America.<sup>405</sup> In terms of public law, the sovereignty of the state represents itself as follows: public power is exercised through differentiation of governmental functions between the executive, legislative and judicial institutions and the formal designation of rights of the citizen.<sup>406</sup> These networks of institutions bring into effect dual aspects of enabling and constraining state action to enhance governmental power through a process known as constitutionalising.<sup>407</sup>

In modern society, the constitution as a written and prescribed formal document has become inseparable from the organisation of the state.<sup>408</sup> The phenomenon of enacting written constitutions has had the effect of rendering public law part of the positive law and thereby contributing to the growth of public law within a positivist culture of defining law as a command of the sovereign backed by sanction.<sup>409</sup> This positivist tradition was justified by organising concepts such as the rule of law which remains key to public law scholarship.<sup>410</sup> The rule of law became synonymous with the idea of governmental action being “bound by rules announced beforehand” which make it possible for people to foresee how public power would be exercised.<sup>411</sup> William Lucy even goes as far as insisting that a proper account of the rule of law “must include Lon Fuller’s eight desiderata” which include the requirement that rules must be “made and

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<sup>405</sup> Bentsi-Enchill (n 308) 2.

<sup>406</sup> Loughling (n 44)106.

<sup>407</sup> Ibid.

<sup>408</sup> Jiří Přibáň, ‘Constitutionalism as Fear of the Political? A Comparative Analysis of Teubner’s Constitutional Fragments and Thornhill’s A Sociology of Constitutions’ (2012) *Journal of Law and Society* 441, 459.

<sup>409</sup> Martin Loughlin, *Political Jurisprudence* (OUP 2017) 110.

<sup>410</sup> Mumba (n 73) 3; Margaret Jane Radin, ‘Reconsidering the Rule of Law’ (1989) 69 *BU L Rev* 781.

<sup>411</sup> Ibid.

promulgated.”<sup>412</sup> This concept of rule of law is of course contested with some scholars advocating for a change in our conceptualisation to emphasise its values as opposed to relying on some inflexible criteria or desiderata.<sup>413</sup> Csaba Varga, for instance, contends that the phrase “has no standardised meaning in law; consequently, it has no legally ascertainable or dependable criterial functionality.”<sup>414</sup>

Under this positivist tradition, the role of legal scholars is restricted to providing rational explanations of the logic of the law and its relation to the state and not to criticise it.<sup>415</sup> Martin Loughlin argues that “Kelsen’s pure theory of law, underpinned by the idea that ‘is’ and ‘ought’ constitute entirely different fields of knowledge, eliminated all reference to causal phenomena drawn from politics and history and presented itself as a logical science of the normative ordering of positive law.”<sup>416</sup> This desire for a pure science of law resulted in the separation of scholarship in law and politics due to the emergence of distinct disciplines of study where law was carved out of its social, political, and historical context.<sup>417</sup> In this way, law tended to ignore aspects of political and social constitutionalism not covered by positive law and written constitutions leading to the neglect, by legal scholarship, of societal institutions such as chieftaincy which were not regulated by the positive law.

Loughlin further argues that this positivist tradition led to the narrowing of the boundaries of public law as a discipline and ultimately altered its character, namely the study of “political right” described as a science by which people make arrangements, by the means of law, that seek to “reconcile individual claims of autonomy with the

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<sup>412</sup> William Lucy, ‘Access to Justice and the Rule of Law’ (2020) 40 (2) Oxford Journal of Legal Studies 311, 386.

<sup>413</sup> Radin (n 410) 804; Csaba Varga, ‘Rule of Law, Contesting and Contested’ (2021) 2 CEJCL 245.

<sup>414</sup> Csaba Varga, ‘Rule of Law, Contesting and Contested’ (2021) 2 CEJCL 245, 250.

<sup>415</sup> Ibid.

<sup>416</sup> Loughlin (n 44) 131.

<sup>417</sup> Ibid.

existence of a regime of public authority."<sup>418</sup> Loughlin, like other scholars who analyse public law from the sociological perspective, advocates for a study of public law which includes the study of the social conditions within which instituted power operates as well as its consequences.<sup>419</sup> Robert Seidman argues that the continuing dominance of positivism has contributed to the stagnation of institutions in Africa.<sup>420</sup> Let us now evaluate the impact of the above history and the Eurocentric character of the conceptual foundations of public law on the development of public law in Zambia by discussing the development of legal scholarship.

### **5.2.3 Legal Scholarship in Zambia**

The development of legal scholarship and law practice, like the administration of justice and public law theory, has equally been shaped by the history of colonialism and are modelled around English law. Before independence, lawyers from British colonies in Africa received their training in the United Kingdom mostly by joining an Inn of Court.<sup>421</sup> Admission to the English Bar was sufficient to practice law in British Africa although the training was inadequate for the skills that the lawyers in Africa needed as they performed functions of both solicitor and barrister.<sup>422</sup> Apart from lacking the skills of a solicitor, these graduates were ill-equipped to handle the problems of Africa, including problems of conflict of laws between general law (comprised of received English law and statutes) and customary law "for (they) had been encouraged to believe that the common law was the perfection of human reason!"<sup>423</sup> Many African countries only established local universities after independence.

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<sup>418</sup> Loughlin (n 44) 9.

<sup>419</sup> Martin Loughlin, *Political Jurisprudence* (OUP 2017) 20; Přibáň (n 408); Jiří Přibáň, 'Power in Sovereignty and its Self-Legitimation: On the Autopoietic Semantics and Contingency of Popular Sovereignty' (2015) 11 (4) Int. J.L.C. 481.

<sup>420</sup> Seidman (n 267) 65.

<sup>421</sup> Philip A Thomas, 'Legal Education in Africa: With Special Reference to Zambia' (1971) 22 N IR Legal Q 3, 6.

<sup>422</sup> Ndulo (n 6) 446.

<sup>423</sup> Thomas (n 421) 8.

By the time of independence in 1964, there were no Zambian lawyers.<sup>424</sup> The first university, the University of Zambia (UNZA), was established in 1965. The first intake to study the Bachelor of Laws degree at UNZA began in 1967 and graduated in 1969.<sup>425</sup> In 1966, the country established the Law Practice Institute (now Zambia Institute for Advanced Legal Education) to train lawyers for practice. UNZA maintained the country's only school of law until 2005 when three private universities opened law faculties following the liberalisation of university education in 1999.<sup>426</sup> The first graduates from private Universities were only admitted to the law practice course in 2009 after the Legal Practitioners Act<sup>427</sup> was amended to facilitate the admission of lawyers trained by private universities to practice.

Evaluating legal education in Zambia in 1971, Philip Thomas remarked as follows:

Although critical awareness of the benefits and dangers involved in wholesale transportation of structures, institutions, legislation and technologies from modern, developed nations to the emerging countries in Africa is imperative, it is also necessary that such countries as Zambia guard against an overreaction to the end of colonialism. These same attitudes should be adopted in regard to legal education. There is much that can be retained and received from the United Kingdom and the United States of America, for a controlled, eclectic approach has many benefits to bestow.<sup>428</sup>

Thomas observed that the English system and reception of Common Law set the ground rules for many social fields including the training of lawyers.<sup>429</sup> He however argued that lawyers in a plural society such as Zambia needed to possess more than the technical skills required of their English counterparts, but also such qualities as, for instance, the capacity to recognise problems requiring assistance from other

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<sup>424</sup> Muna Ndulo, 'Legal Education in Africa in the Era of Globalization and Structural Adjustment' (2002) 20 Penn St Int'l L Rev 487, 489.

<sup>425</sup> Thomas (n 421) 14.

<sup>426</sup> Nicholas A Kahn-Fogel, 'The Troubling Shortage of African Lawyers: Examination of a Continental Crisis Using Zambia as a Case Study' (2012) 33 U Pa J Int'l L 719, 723 and 757.

<sup>427</sup> Chapter 30 of the Laws of the Laws of Zambia.

<sup>428</sup> Ibid 5.

<sup>429</sup> Ibid 21.

disciplines.<sup>430</sup> Legal education in Africa therefore needed to equip graduates with the capacity to understand that legal norms cannot be understood outside their purpose, impact, and social context.<sup>431</sup> Thomas identified research, including on African customs, as one of the great opportunities for African scholars to contribute to the law and policy development efforts of the post-independence African states to transition from “pseudo to actual independence.”<sup>432</sup> He recommended that lawyers should engage in interdisciplinary research including the use of sociological and empirical research to augment the doctrinal method traditionally used by lawyers.<sup>433</sup>

Approximately 14 years later, in 1985, Muna Ndulo described the state legal education in Zambia as follows:

The structure of legal education in Zambia is English. The teaching methods are weighed heavily towards the English approach with, however, more emphasis on formalism than in England. Students are taught to memorise large numbers of rules organised into categorical system (requisites for contract and rules about breach, for example)...the students learn general broad holdings of cases. They do not learn policy arguments. Most of the rules learnt are straight from English textbooks; it is easier to learn British rules than local rules in the African context because the difficulties of working with local materials are formidable.<sup>434</sup>

Ndulo proceeded to identify some of the difficulties of working with local materials to learn about the law in Zambia at the time, which included the scarcity of locally produced materials.<sup>435</sup> Ndulo concluded that the system of legal education that existed at the time trained lawyers to become legal technicians with little or no interest in the policy issues shaping the law or to criticise it.<sup>436</sup> Ndulo repeats these observations in his 2009 evaluation of legal education in Zambia against the challenges of

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<sup>430</sup> Ibid 22.

<sup>431</sup> Ibid 24.

<sup>432</sup> Ibid 33.

<sup>433</sup> Ibid 36.

<sup>434</sup> Ndulo (n 6) 449.

<sup>435</sup> Ibid.

<sup>436</sup> Ibid 451.

internationalisation and development, and remarks that they have been maintained despite the changes implemented to the law curricula in former colonial powers.<sup>437</sup> Ndulo recommends that legal education in Zambia should, as far as possible, use local materials and focus on developing in the students skills for critical thinking rather than memorisation of rules.<sup>438</sup> Like Thomas, Ndulo also emphasises the need for interdisciplinary research and the inclusion of perspective courses such as sociology of law in the law curricula.<sup>439</sup> The problem of lack of locally produced materials has been partially mitigated by a book project that was launched by the University of Zambia around the year 2007 and resulted in the publication of local casebooks on various subjects, although most of them contain little analytical content.<sup>440</sup> Some of these materials have been discussed in the literature review of this thesis.<sup>441</sup>

The above recommendations for law scholarship to embrace sociological perspectives are based on the reality of pluralism in the legal orders of many African states, including Zambia. Further, despite the dominance of English law in the legal system and scholarship, many people in Africa are governed by customary and religious laws for their practical purposes.<sup>442</sup> The lawyer's role in post-independence African states came to be generally viewed as a "social engineer," who needed a broader outlook of law and more emphasis on policy than doctrine.<sup>443</sup> Although studies on pluralism have been conducted in law, they have not been extended to public law, as the literature review in chapter four of this thesis has shown. Interdisciplinary research, such as through socio-legal studies as this thesis does, is therefore important for developing a critical and broad outlook of public law in a plural society such as Zambia.

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<sup>437</sup> Muna Ndulo, 'Legal Education in Zambia and the Challenge of Internationalisation and Development' (2009) 40 Zam LJ 111, 128.

<sup>438</sup> Ibid 129.

<sup>439</sup> Ndulo (n 6) 452; David Morgan, 'Lawyers in a Developing Country' (1973) 5 Zam LJ 123, 126.

<sup>440</sup> Kahn-Fogel (n 426) 756.

<sup>441</sup> For instance Chanda (n 18); Mudenda (n 83 ).

<sup>442</sup> Ghai (n 385) 751.

<sup>443</sup> Ibid 754.

### 5.3 Socio-Legal Study of Public Law

Scholars who have studied public law from a sociological perspective generally agree that its study should comprise not only of the analysis of positive law and written constitutions, but also the political history and social contexts within which the law has developed and operates.<sup>444</sup> At the risk of overgeneralising their contribution to legal thought, sociological theories postulate that “law is a social institution with manifold consequences that must be apprehended holistically and empirically.”<sup>445</sup> The ongoing production of law involves a constant interplay between enacted laws which reflect “contesting social interests, doctrinal coherence rooted in the legal tradition, considerations of future social utility or welfare, and social norms of justice and fairness, all within broader social-cultural-economic-political surroundings.”<sup>446</sup> For this reason, research which studies law from a sociological perspective tends to focus on law’s empirical context, historical evolution, cultural differences, and social evolution.<sup>447</sup>

Several analytical perspectives have developed within the sociological school of thought in relation to public law (and in particular constitutional law), which could collectively be classified under the following broad categories: “the sociology of constitutions, sociological constitutionalism or constitutional sociology.”<sup>448</sup> Without overgeneralising their contribution to scholarship, these sociological approaches to the study of constitutional law are opposed to the idea of the nation state and political power as the centre of constitutional ordering, arguing that there exists deep pluralism in

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<sup>444</sup> Chris Thornhill, ‘The Sociology of Constitutions’ (2017) 13 Annu. Rev. Law Soc. Sci. 493, 495; Brian Z Tamanaha, ‘Necessary and Universal Truths about Law?’ (2017) 30 (1) Ratio Juris, 3; Joxerramon Bengoetxea, ‘Legal theory and sociology of law’ in J Přibáň (ed), *Research handbook on the sociology of law* (Edward Elgar Publishing Limited 2020) 7-18.

<sup>445</sup> Tamanaha (n 39) 29.

<sup>446</sup> Ibid 198.

<sup>447</sup> Jiří Přibáň, ‘Sociology of the rule of law: power, legality and legitimacy’ in J Přibáň (ed), *Research handbook on the sociology of law* (Edward Elgar Publishing 2020) 113.

<sup>448</sup> Thornhill (n 444) 494.

constitutional norms and societal reality both at the national and transnational levels.<sup>449</sup>

"A sociological approach questions the strict, formalistic understanding of constitutions and of constitutionalism, which emphasizes a distinctive form (not least, written) and substance (higher law) as frequently found in legal studies and understandings."<sup>450</sup>

Three of these analytical lenses are important for this thesis, namely, constitutional sociology, and in particular the systems theory (post Luhmannian perspectives), societal constitutionalism, and legal pluralism. The first two are briefly discussed below followed by a more detailed discussion of legal pluralism, which is the underlying analytical concept adopted by this thesis for the study of chieftaincy in Zambia, discussed separately under 5.4 below.

Beginning with the systems theory, Niklas Luhmann argues that political constitutions are part of the functionally differentiated social system and that it is fictitious to assume their role as the ultimate condition for societal unity.<sup>451</sup> Luhmann argues that society is functionally differentiated by autopoietic sub-systems such as law, politics, morality, and economy, which are cognitively open but normatively closed.<sup>452</sup> Through this systems lens, constitutions offer a communicative system for simplifying the coupling of law and politics thereby allowing political power to channel social exigencies into communications that can be performed by law.<sup>453</sup> At a practical level, constitutions establish administrative resources and social routines that filter social issues before they become fully taxing on political power.<sup>454</sup> Constitutions therefore, through internally generated communication, provide the means by which political power is legitimated using law, differentiated and stabilised through rights and norms.<sup>455</sup>

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<sup>449</sup> Chris Thornhill, 'Niklas Luhmann and The Sociology of The Constitution' (2010) 10 (4) JCS 315, 319.

<sup>450</sup> Paul Blokker, 'Sociology of constitutional law and politics' in J Přibáň (ed), *Research handbook on the sociology of law* (Edward Elgar Publishing Limited 2020) 230 – 242, 231.

<sup>451</sup> Niklas Luhmann, *Law as a Social System* (2004) 404-12.

<sup>452</sup> Niklas Luhmann, *Social Systems* (Stanford University Press, 1995) 102.

<sup>453</sup> Blokker (n 450) 328.

<sup>454</sup> Ibid 238.

<sup>455</sup> Ibid.

Sociological approaches inspired by Luhmann tend to understand questions relating to the relationship between law, politics, rights, and responsibilities by “emphasizing how societies consist of functionally different systems, which themselves contain a plethora of subsystems.”<sup>456</sup> The systems perspective has been employed to study constitutional law from its social context by de-centering the state and the political system, and recognising the overlap between several systems, including the non-political or private ones, performing societal functions.<sup>457</sup> “At its core, post Luhmannian sociological constitutionalism has a natural tendency to shift attention outside of the formal political sphere of the state...towards forms of non-public, non-political, societal constitutionalism.”<sup>458</sup> By so doing, it facilitates the study of societal institutions performing public functions but are not political or regulated by statute. Although this thesis argues that chieftaincy is a state institution, partly on account of its constitutional recognition and statutory functions, the literature review above demonstrates how mainstream public law perspectives which emphasise the unity of state and sovereignty have produced the neglect of chieftaincy from their studies. The systems perspective, therefore, provides a useful framework for studying chiefs by focusing on the functions of chiefs under customary law such as their role in administering customary land as a public power. The systems perspective of autopoietic systems is also useful for purposes of assessing how law practice through litigation and a legal culture conceived in the positivist worldview has influenced the development of public law in its social context.

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<sup>456</sup> Blokker (n 450) 232.

<sup>457</sup> Angelo Jr Golia, Gunther Teubner, ‘Societal Constitutionalism (Theory of) (March 14, 2021),’ Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2021-08, 3; See Also Luhmann (n 451) 211.

<sup>458</sup> Blokker (n 450) 237.

The second analytical concept that is important to this study is "societal constitutionalism."<sup>459</sup> "David Sciulli is credited for being the first scholar to develop a refined theory of societal constitutionalism."<sup>460</sup> Sciulli developed his theory by demonstrating that the specific exercise of collective power in civil society could produce possible alternatives for the analysis of societal organisation in terms of social integration or manifestations of social control, which he argued, provided possible alternatives for empirical analysis of societal politics without presupposing the social control function and making generalisations based on institutions found in western democracies.<sup>461</sup> Societal constitutionalism postulates that through the process of social evolution, there exist plural constitutions in several sectors of society such as the market, unions, and other "private" institutions outside the nation state.<sup>462</sup> Using this critical perspective, scholars are able to study restraints of collective power in civil or non-political societies such as clubs, professional bodies, and business communities. Societal constitutionalism has been used to study various constitutions of social sectors, such as professional bodies, as an expansion of the state constitution and use constitutional norms to elaborate these sub-systems and deduce further constitutional norms from them.<sup>463</sup> As an analytical concept, societal constitutionalism "assigns all constitutions the function of formalising, stabilising, and limiting the communicative media of social systems: power in politics, knowledge in science, money in the economy, information in the mass media."<sup>464</sup> By so doing, it provides alternatives for the empirical study of non-political societal constitutions in relation to state constitutions with the view to develop possibilities for imagining self-limiting societal institutions.

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<sup>459</sup> David Sciulli, *Theory of Societal Constitutionalism: Foundations of a Non-Marxist Critical Sociology* (Cambridge University Press 1992).

<sup>460</sup> Ibid 16.

<sup>461</sup> Ibid 13-17.

<sup>462</sup> Golia and Teubner(n 457) 9.

<sup>463</sup> Gunther Teubner, 'Societal Constitutionalism: Nine Variations on a Theme by David Sciulli' in P Blokker and C Thornhill, *Sociological Constitutionalism* (Cambridge University Press 2017) 313-340.

<sup>464</sup> Ibid 8-9.

Societal constitutionalism has also been used to study constitutionalism beyond the nation state, such as in the regulation of commerce and environmental rights, as well as to make sense of non-political self-constituting institutions in the global society.<sup>465</sup> Societal constitutionalism, therefore, provides a practical analytical lens for understanding customary law norms which perform the function of constitutionalism and are key to developing possible alternatives for regulating the public power of chiefs.

One of the ways though which socio-legal researchers have studied public law is by defining law broadly, which enables them to study public law by focusing on the empirical context, historical development, cultural differences, and the evolution of society.<sup>466</sup> In this way, one can study public law by focusing on the constitutional values such as the protection of rights, accountability for governmental action, and an independent judiciary.<sup>467</sup> Dawn Oliver uses the idea of “values” as the guiding principle for identifying underlying values that are common to both public and private law to study duties that may not fit under the public/private distinction, such as the duty to act fairly, which English courts have extended to private clubs in judicial review matters.<sup>468</sup> Another notable example of the use of a broader definition of public law concepts is Brian Tamanaha’s “pared down” definition of the rule of law, signifying the idea of government officials and citizens being bound by law.<sup>469</sup>

Applying this idea of a broader concept of public law enables us to study societal constitutions, and public law generally, whilst acknowledging the underlying rationale

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<sup>465</sup> Gunther Teubner, ‘The Project of Constitutional Sociology: Irritating Nation State Constitutionalism’ (2013) 4 (1) Transnational Legal Theory, 44-58; G Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalisation* (OUP 2012); Chris Thornhill, ‘The Sociology of Constitutions’ (2017) 13 Annu. Rev. Law Soc. Sci. 493; Chris Thornhill, *The Sociology of Law and the Global Transformation of Democracy* (Cambridge University Press 2018).

<sup>466</sup> Přibáň (n 447) 113.

<sup>467</sup> Ibid 119.

<sup>468</sup> Dawn Oliver, *Common Values and the Public-Private Divide* (Butterworths 1999) 92.

<sup>469</sup> Brian Z Tamanaha, ‘The Rule of Law and Legal Pluralism in Development’ (2011) 3 Hague Journal on the Rule of Law 1, 6-8.

for the public/private distinction, which is, to control “monopolistic” public power.<sup>470</sup> Public law achieves this by prescribing ascertainable norms for the exercise of discretion in an accountable manner and providing meaningful access to justice for people who are adversely affected by the exercise of public power.<sup>471</sup> The thesis draws on the above theoretical and analytical perspectives to answer the research questions by evaluating the research data against these two key features of public law restated as follows: constitutional and administrative norms that firstly, confer and limit public power to ensure accountable governmental action, and secondly, provide meaningful access to justice for people who are adversely affected by the exercise of public power. With regards to the constitutional and administrative law norms which confer and limit public power for accountable governance, this thesis adopts a broader concept of public law which admits customary and traditional norms using legal pluralism as the underlying analytical concept as I explain in the next section.<sup>472</sup> The thesis does not attempt to define the phrase “meaningful access to justice” but will rely on some of its key components that researchers who have attempted to define the concept have identified.<sup>473</sup> I elaborate on this in the next two paragraphs, before proceeding to discuss legal pluralism.

Access to justice may be described as the ability of people to seek and obtain a remedy for their legal problems through formal and informal institutions of justice.<sup>474</sup> Article 2(3) of the International Covenant for Civil and Political Rights (ICCPR) mandates state parties to the covenant to ensure that a person whose rights protected by the

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<sup>470</sup> Randy E Barnett, ‘Foreword: Four Senses of the Public Law-Private Law Distinction’ (1986) 9 Harv J L & Pub Pol’y 267, 272; William C Whitford, ‘Rule of Law’ (2000) Wis L Rev 723, 725-726.

<sup>471</sup> Barnett (n 470) 272.

<sup>472</sup> Gunther Teubner, ‘After Privatization? The Many Autonomies of Private Law’ (1998) 51 (1) Current Legal Problems 393, 396-7.

<sup>473</sup> For instance, Mauro Cappelletti and Bryant Garth, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ (1978) 27 Buff L Rev 181; Lucy (n 412).

<sup>474</sup> Colin Crawford and Daniel Bonilla Maldonado, ‘Access to Justice: Theory and Practice from a Comparative Perspective’ (2020) 27 Ind J Global Legal Stud 1, 4; Marc Galanter, ‘Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law’ (1981) 19 J Legal Pluralism 1, 3.

convention are violated has an effective remedy determined by a competent and impartial judicial, administrative, or legislative system provided by the legal systems of the state and ensure that such remedies are enforceable. Access to justice includes the right to a fair trial before a competent, independent and impartial tribunal, as provided under article 14 of the International Covenant on Civil and Political Rights (ICCPR) and article 7 of the African Charter on the Human and Peoples Rights (ACHPR). Zambia is a state party to both the ICCPR and the ACHPR.<sup>475</sup> Access to justice also forms part of global development agenda under goal 16 of the United Nations Sustainable Development Goals which seeks to promote access to justice for all.<sup>476</sup>

In terms of its key components, the traditional conception of access to justice under the civil and political rights rhetoric entailed a hands off approach to access to justice whereby the state's obligation ended at providing institutions of justice and ensuring that no one interfered with the enjoyment of the components of the right.<sup>477</sup> This conception of access to justice did not pay regard to such issues as the capacity of a party to understand and make full use of the law and legal institutions, or their ability to afford services of a lawyer or meet the costs of accessing justice institutions.<sup>478</sup> Perspectives with a socio-economic outlook emphasise the need for "effective" or substantial access to justice which goes beyond the capacity of the state to provide justice institutions and ensure that the enjoyment of rights is not interfered with, but demands that the state should take a more active role in providing equal access to justice for all.<sup>479</sup> Proponents of meaningful or substantial access to justice emphasise the need for approaches and reforms aimed at taking justice to the poor including by

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<sup>475</sup> Zambia ratified the ICCPR on 10 April 1984 and the ACHPR on 10 January 1984.

<sup>476</sup> United Nations, Sustainable Development (United Nations Department of Economic and Social Affairs) <<https://sdgs.un.org/goals/goal16>> accessed 20 March 2021.

<sup>477</sup> Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 Buff L Rev 181, 183.

<sup>478</sup> Ibid.

<sup>479</sup> Ibid 186.

removing such barriers to access to justice as, distance to courts, elitist justice institutions, and the financial costs of accessing formal justice institutions.<sup>480</sup>

One of the most comprehensive works on access to justice, the findings of which remain significant to date, is the 1978 article by Mauro Cappelletti and Bryant Garth which identified key barriers to effective access to justice and discussed some of the worldwide efforts at eliminating these barriers.<sup>481</sup> Barriers to effective or meaningful access to justice include distance to courts, complex laws and rules of court, and prohibitive costs.<sup>482</sup> Access to a lawyer or legal assistance is a key component of access to justice because of the complexity of modern justice institutions.<sup>483</sup> As such, shortage of lawyers and financial incapacity of litigants to obtain services of one present barriers to access to justice.<sup>484</sup> For instance, in *Dominic Liswaniso Lungowe and Others v Vedanta Resources Plc and Konkola Copper Mines Plc*,<sup>485</sup> a case involving Zambian claimants who sought legal redress in the High Court of England and Wales (Technology and Construction Court) for environmental violations by a Zambian subsidiary of an English mining firm, the court, among other grounds, admitted the claim in the English court on the ground that the plaintiffs could not obtain substantial access to justice in Zambian courts.<sup>486</sup> This was on account the financial incapacity of the claimants to afford legal representation in Zambia and the shortage of lawyers with the requisite expertise to litigate such a complex claim, among other factors.<sup>487</sup>

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<sup>480</sup> Benjamin van Rooij, 'Bringing Justice to the Poor: Bottom-up Legal Development Cooperation' (2012) 4 Hague Journal on the Rule of Law 286, 293-4.

<sup>481</sup> Cappelletti and Bryant Garth (n 477); Bruno Makowiecky Salles, and Paulo Márcio Cruz, 'The Florence Access-To-Justice Project: Descriptive Aspects' (2020) 22 Revista de Derecho 178.

<sup>482</sup> Andy Unger, 'The Rule of Law in Zambia: Enhancing Access to Justice' (2012) 104 (4) The Round Table 353, 354, DOI: 10.1080/00358533.2012.707513.

<sup>483</sup> Crawford and Maldonado (n 474) 5-6.

<sup>484</sup> Lucy (n 412) 383.

<sup>485</sup> [2016] EWHC 975 (TCC).

<sup>486</sup> Ibid para 178.

<sup>487</sup> Ibid.

Other barriers to access to justice worth highlighting are those that relate to the effectiveness and enforceability of remedies. The justice system should provide incentives for people to resolve their justice problems at the most appropriate level including through the provision of legal information and use of non-contentious and alternative dispute resolution mechanisms.<sup>488</sup> Further, an effective justice system should aspire to meet the needs of all users including by providing incentives for people who may not be motivated to pursue their legal rights against powerful defendants on account of unequal power relations to seek redress.<sup>489</sup> Efforts at eliminating barriers to access to justice range from provision of legal assistance and education to the poor to more structural reforms such as through legal reforms aimed at simplifying laws, alternative dispute resolution mechanisms, or introducing specialised courts or tribunals.<sup>490</sup>

## **5.4 Legal Pluralism: Analytical Concept for the Study of Chieftaincy under Public Law in Zambia**

The thesis has adopted legal pluralism as the underlying analytical concept for the study of chieftaincy under public law in Zambia. Legal pluralism describes the existence of more than one legal order within the same time and space context, or a situation in which behaviour pursuant to more than one legal order occurs.<sup>491</sup> The phenomenon is a product of different historical factors, involving movements of people and legal institutions. Brian Tamanaha argues that these processes and movements in history produced "legal pluralism along two axes: communities living side-by-side following different bodies of law and state law coexisting with contrasting regimes of indigenous law."<sup>492</sup> Pluralism is today accepted in the study of law although there are at least two conceptual debates within the field which are relevant to this study. The first, relates to

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<sup>488</sup> Marc Galanter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law' (1981) 19 J Legal Pluralism 1.

<sup>489</sup> Cappelletti and Garth (n 477) 193 and 274.

<sup>490</sup> Ibid; van Rooij (n 480) 294-5.

<sup>491</sup> Griffiths (n 3) 1-2.

<sup>492</sup> Brian Z Tamanaha, 'The Promise and Conundrums of Pluralist Jurisprudence' (2019) 82 (1) MLR 159, 163-4.

the characterisation of the concept as “legal.” Is legal pluralism the correct description for co-existing plural normative orders? Those who subscribe to the idea of legal centralism, namely those who relate law to the unity of state and sovereignty, find the use of the term “legal” problematic when referring to non-state normative orders.<sup>493</sup> The second conceptual debate relates to the ontology of non-state normative orders and consequently the epistemic tools for studying pluralism in law.

With regards to the characterisation of the phenomenon as legal, scholars with a positivist orientation argue against the characterisation of non-state normative orders as “legal” contending that the concept of law does not admit to descriptions of non-state normative orders.<sup>494</sup> These scholars mostly subscribe to the idea of law which is modelled around the unity of state and sovereignty.<sup>495</sup> Under this worldview, although power could be divided between different institutions, typically, the executive, legislature, and judiciary, sovereignty lies in the single state.<sup>496</sup> Sovereignty signifies the “ability to secure assent,” either by consent or compulsion.<sup>497</sup> The ability of the state to consolidate and unify the competing interests of its society was therefore considered to be a mark of civilisation.

Most traditional theories of law were framed around this idea of a single sovereign state.<sup>498</sup> This explains the dominant position occupied by state law in the jurisprudence of Western societies within which most theories of law were developed.<sup>499</sup> Scholarship under these dominant theories of law restricts itself to the study of positive law as distinct from other social phenomena which are said to fall outside the realm of legal

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<sup>493</sup> Griffiths (n 3) 3-4.

<sup>494</sup> William Twining, ‘Legal Pluralism 101’ in Brian Z Tamanaha, C Sage and M Woolcock (eds), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press 2012) 112-28, 115; Russel Sandberg, ‘The Failure of Legal Pluralism’ (2016) 18 (2) Ecclesiastical Law Journal 137.

<sup>495</sup> Wilde (n 260) 658.

<sup>496</sup> Paton (n 2) 331.

<sup>497</sup> Wilde (n 260) 659.

<sup>498</sup> John Eekelaar, ‘Positivism and Plural Legal Systems’ (2012) 25 (4) Ratio Juris 513, 514.

<sup>499</sup> Tamanaha (n 492) 161.

scholarship.<sup>500</sup> Where non-state normative orders are studied, they are mostly referred to as comparators when studying plural societies. As the literature review in chapter four of this thesis and the discussion of the conceptual foundations of public law above have shown, this culture of focusing solely on state law and institutions is not only prevalent in Western scholarship and law practice, but also in non-western states where legal pluralism is accepted.<sup>501</sup>

Those who study legal pluralism advance the study of law from its social context. They criticise the obsession of traditional legal scholarship with state centralism which almost exclusively focuses on modern bureaucratic institutions and positive law. To address the question of the characterisation of legal pluralism as “legal”, William Twining proposes the use of the term “normative pluralism” as a way of shifting the jurisprudential questions relating to plural normative orders “away from the debilitating problems of conceptualising law.”<sup>502</sup> Twining argues that this conceptualisation helps us to domesticate the problems of broadly characterising law to include all manner of social phenomena by de-centering the state and focusing on the contextual value of the inquiry when analysing plural normative orders.<sup>503</sup> He argues that using this description, legal pluralism is then a species of normative pluralism representing the kinds of “normative orders that merit the appellation legal in a given context.”<sup>504</sup> John Griffiths opposes this characterisation as falling into “the taxonomic trap by using different terminology for certain social rules which differ from (some of) the rest only in their degree of differentiation.”<sup>505</sup> Brian Tamanaha resolves the question of normativity by defining law as “whatever people code as law.”<sup>506</sup> Overall, scholars of legal pluralism

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<sup>500</sup> Hans Kelsen, ‘Law, State and Justice in the Pure Theory of Law’ (1948) 57 (3) The Yale Law Journal 377, 382.

<sup>501</sup> Twining (n 494) 117.

<sup>502</sup> Ibid 115.

<sup>503</sup> Ibid.

<sup>504</sup> Ibid.

<sup>505</sup> John Griffiths, ‘What is Sociology of Law? (On Law, Rules, Social Control and Sociology)’ (2017) 49 (2) The Journal of Legal Pluralism and Unofficial Law 93, 109.

<sup>506</sup> Brian Z Tamanaha ‘A Non-Essentialist Version of Legal Pluralism’ (2000) 27 (2) Journal of Law and Society 296.

have expressed discomfort with the distinction between “legal” and other normative orders as being unnecessary and of little value in many contexts with the potential to distort the study of legal pluralism.<sup>507</sup> Griffiths goes as far as arguing that the phrase “legal pluralism” is, strictly speaking, redundant in the context of empirical theory since “‘law’ in the non-taxonomic sense is intrinsically pluralistic.”<sup>508</sup>

Within this conceptual debate, scholars also distinguish between “state legal pluralism also known as weak legal pluralism,” which relates to existence of other normative orders such as customary law that are recognised by the state, and legal pluralism relating to the coexistence of more than one autonomous or semiautonomous legal orders in the same space and time context.<sup>509</sup> Whether this classification is necessary largely depends on the context and nature of inquiry. Overall, legal pluralism focuses on the study of law in its social context. This enables scholars to extend the concept of law to admit other normative orders which are “too empirically important to be ignored.”<sup>510</sup> Therefore, in addition to studying non-state law, legal pluralism is also applied to the phenomena of “pluralism within state law” under which the study of recognised customary orders would ordinarily fall.<sup>511</sup> The consensus therefore seems to favour an approach that does not unduly focus on problems of normativity which tend to lead to sole focus on positive law. In this way, legal pluralism is used as an analytical rather than ideological concept, the value of which is dependent upon the purposes for which it is constructed.<sup>512</sup> This is the concept of legal pluralism that the thesis adopts for the study of chieftaincy under public law because it enables me to analyse both the positive law and customary norms regulating chieftaincies.

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<sup>507</sup> Ibid 114. See also Brian Z Tamanaha, ‘The Promise and Conundrums of Pluralist Jurisprudence’ (2019) 82(1) MLR 159, 166; and Tamanaha (n 506).

<sup>508</sup> Griffiths (n 505) 106.

<sup>509</sup> Twining (n 494) 120.

<sup>510</sup> Ibid 122.

<sup>511</sup> Gordon R Woodman, ‘Ideological Combat and Social Observation,’ (1998) 30 (42) The Journal of Legal Pluralism and Unofficial Law 21, 50.

<sup>512</sup> Franz von Benda-Beckmann, ‘Who’s Afraid of Legal Pluralism?’ (2002) 34 (47) The Journal of Legal Pluralism and Unofficial Law, 37, 46. See Also, Tamanaha (n 506) 300.

Having adopted legal pluralism as an analytical concept, the second question relating epistemological tools becomes fairly easy to resolve for the purposes of this research. If legal pluralism is employed as an analytical concept, it is to be used as a framework within which various empirical phenomena, whether normative such as what ought to be or “real” phenomena, what is, can be studied.<sup>513</sup> Empirical phenomena can be analysed within different analytical frames. Franz von Benda-Beckmann illustrates this using property rights which he argues could be legal, economical, and political at the same time, hence demonstrating not only the fact that empirical phenomena are not mutually exclusive but also “important for the discussions of the interrelations between different legal forms within a plural legal whole.”<sup>514</sup> Using legal pluralism as the underlying analytical framework and drawing on the analytical insights from constitutional sociology and societal constitutions, the thesis adopts a broad concept of public law which admits the study of public law empirically by focusing on chieftaincy using socio-legal research methods discussed in chapter two.

#### **5.4.1 Why Legal Pluralism for this Thesis?**

In Zambia, like many other African states, the plurality in the legal orders arises from the fact that the state is made up of pre-colonial societies with different languages, customs, traditions, and laws, and the introduction of the legal system of the colonising power.<sup>515</sup> In terms of public law, one of the most prominent ways through which this history presents itself is through the dual authority comprised of the political and bureaucratic institutions regulated by the written laws which co-exist with the traditional authority of chiefs which is recognised by the Constitution and is regulated under customary law. As I have stated in chapter three, the recognition and regulation of chiefs under the constitution has varied over time. These constitutional developments

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<sup>513</sup> Ibid.

<sup>514</sup> Ibid 47.

<sup>515</sup> Bentsi-Enchill (n 308).

should be studied to understand how chieftaincy has been included, excluded, and regulated in these constitutional law developments.

Legal pluralism provides the appropriate analytical lens through which to study chieftaincy as an empirical phenomenon under public law. Legal pluralism has established itself as a useful analytical concept for studying empirical phenomena that are neglected by research which unduly focuses on centralist institutions. Using legal pluralism, scholars of post-colonial legal orders have been able to study women's rights to property from a broader perspective;<sup>516</sup> laws regulating marriage and family relations;<sup>517</sup> and land law from a socio-legal context including the role played by development actors and lawyers in land development.<sup>518</sup> More recent research has also extended the concept of legal pluralism to the study of constitutional and administrative law through the study of traditional leadership institutions.<sup>519</sup> The concept has also been employed, in the context of the European Union (EU), to study the evolution of the protection of fundamental rights under EU law to understand the nature of pluralism in the constitutional frameworks and develop theory for understating constitutionalism in the "post-national dimension."<sup>520</sup> It has also been employed to

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<sup>516</sup> Akua Kuenyehia, 'Women, Marriage, and Intestate Succession in the Context of Legal Pluralism in Africa' (2006) 40 UC Davis L Rev 385; Kenneth K Mwenda and Florence NM Mumba and Judith Mvula-Mwenda, 'Property-Grabbing under African Customary Law: Repugnant to Natural Justice, Equity, and Good Conscience, Yet a Troubling Reality' (2005) 37 Geo Wash Int'l L Rev 949; Chuma N Himonga and Mushota L Munachonga, 'Rural Women's Access to Agricultural Land in Settlement Schemes in Zambia: Law, Practice, and Socio-Economic Constraints' (1991) 10 (4) Third World Legal Studies 59.

<sup>517</sup> Chuma Himonga, 'State and Individual Perspectives of a Mixed Legal System in Southern African Contexts with Special Reference to Personal Law' (2010) 25 Tul Eur & Civ LF 23.

<sup>518</sup> Manji (n 37); McAuslan (n 240).

<sup>519</sup> Donald I Ray, 'Divided Sovereignty in Ghana' (1996) 28 (37-38) Journal of Legal Pluralism 181, Corrin (n 27); Bhaso Ndzendze, 'Federalism with south African characteristics? Traditional Authorities and Customary Law in a Democratic, Constitutional State,' (2018) 76 The Thinker 26.

<sup>520</sup> See for instance, Francielle Vieira Oliveira and Alessandro Rosanò, 'The Interconstitutionality and The Interfundamentality of the Legal System of the European Union – In Search of a Theory on Protection of Fundamental Rights in the EU in in CS Botelho, LH Terrinha and P Coutinho (ed) *Constitutionalism in a Plural World* (Universidade Catolica Editora 2018) 184-203, 189.

explore regulatory options for limiting the power of supranational institutions and understand the effect of globalization on the individual in a national state.<sup>521</sup> Peter Smuk uses the concept to study the regulation of political parties in Hungary against democratic ideals.<sup>522</sup> Legal pluralism has also been used as an analytical concept to develop theory on law, power, sovereignty, and governance in jurisprudence.<sup>523</sup> There is therefore sufficient theoretical and analytical bases supporting the use of legal pluralism to study empirical phenomena in law.

For public law, the challenge of extending legal pluralism to traditional scholarship stems from the conceptual nature of constitutions as unifying institutions through a hierarchal normative system which is difficult to reconcile with the idea of different sets of norms.<sup>524</sup> As demonstrated by the above discussion of literature on the perspectives from socio-legal research, this view of the constitution has been challenged to admit the analysis of constitutional law from a social context. When viewed from its social context, the constitution shows not only roots in social and political factors, but also its interaction with social factors including the different normative orders in society.<sup>525</sup> Insights from the sociology of law and the contemporary scholarship on societal constitutions which focus on the structure and functions of constitutions, make it possible for us to study pluralism in constitutional law by studying constitutional norms in society.<sup>526</sup> Legal pluralism also provides “practical insights for the understanding of phenomena in African constitutionalism.”<sup>527</sup>

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<sup>521</sup> See for instance, Lilian Barros De Oliveira Emeilda, ‘Constitutionalism Beyond the State and the Question of Limitation of Power’ in Catarina Santos Botelho, Luis Heleno Terrinha and Pedro Coutinho (ed) *Constitutionalism in a Plural World* (Universidade Catolica Editora 2018) 52-55.

<sup>522</sup> Peter Smuk, ‘Pluralism? Party Law Studies from Hungary Confined’ in in CS Botelho, Lhe Terrinha and P Coutinho (ed) *Constitutionalism in a Plural World* (Universidade Catolica Editora 2018) 80-102.

<sup>523</sup> Kevin Walby, ‘Contributions to A Post-Sovereignist Understanding Of Law: Foucault, Law as Governance, and Legal Pluralism’ (2007) 16 (4) *Social & Legal Studies* 551–571.

<sup>524</sup> Alberto Febbrajo, ‘Constitutionalism and Legal Pluralism’ in Alberto Febbrajo and Giancarlo Corsi (eds) *Sociology of Constitutions: A paradoxical perspective* (Routledge 2016) 68-96.

<sup>525</sup> Ibid 69.

<sup>526</sup> Ibid.

<sup>527</sup> Berihun Adugna Gebeye, *A Theory of African Constitutionalism* (OUP 2021) 33.

## 5.5 Contribution of Thesis to Scholarship

The thesis makes two main contributions to existing scholarship on chieftaincy and public law. The first is that it helps us understand the character of pluralism in public law in Zambia. By so doing, the thesis contributes to the existing scholarship on legal pluralism, plural and hybrid governance institutions, and sociology of constitutions by studying chieftaincy in Zambia. The second is that it contributes to the literature on customary land administration by analysing the law on land tenure and law reform efforts from a public law perspective by focusing on the power of chiefs in customary land administration.

Beginning with first contribution, the thesis produces descriptive and analytical data for understanding the character of pluralism in public law by conducting a study of chieftaincy in Zambia's post-independence constitutional and administrative law history. Existing literature on legal pluralism has tended to focus on matters of personal law such as marriage and divorce,<sup>528</sup> inheritance and succession,<sup>529</sup> and customary practices as defences to criminal offences.<sup>530</sup> There are also studies that analyse the impact of customary law on the protection of women's rights to equality and property.<sup>531</sup> Legal pluralism has also been used to study land tenure systems but mainly as a comparative

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<sup>528</sup> See for instance Margaret Munalula, 'Family Law in Zambia' (1997) 1997 Int'l Surv Fam L 507- 523.

<sup>529</sup> AC Mulimbwa, 'Can an African Domiciled in Zambia Divest Himself of His Customary Law: A Comment on *Munalo v Vengesai*' (1981) 13 Zam LJ 62; Kenneth K Mwenda and Florence NM Mumba and Judith Mvula-Mwenda, 'Property-Grabbing under African Customary Law: Repugnant to Natural Justice, Equity, and Good Conscience, Yet a Troubling Reality' (2005) 37 Geo Wash Int'l L Rev 949 – 967; Akua Kuenyehia, 'Women, Marriage, and Intestate Succession in the Context of Legal Pluralism in Africa' (2006) 40 UC Davis L Rev 385-405.

<sup>530</sup> Kalombo T Mwansa, 'The Status of African Customary Criminal Law and Justice under the Received English Criminal Law in Zambia: A Case for Integration of the Two Systems' (1986) 4 Zimbabwe Law Review 23-42.

<sup>531</sup> Muna Ndulo, 'African Customary Law, Customs, and Women's Rights' (2011) 18 (1) Indiana Journal of Global Legal Studies, 87; Mulela M Munalula, 'Law as an Instrument of Social Change: The Constitution and Sexual Discrimination in Zambia' (1995) 1 Int'l J Discrimination & L 131- 152.

between statutory and customary tenure.<sup>532</sup> These studies have, however, hardly been extended to the study of public law and chieftaincy. Further, apart from the mostly anthropological scholarship during the colonial period which studied African governance institutions and their role in the colonial local governance, there is hardly any literature that links scholarship on traditional leadership institutions in the post-independence period to law.<sup>533</sup> As Filip Reyntjens notes, despite there being many overlaps in the existing scholarship on legal pluralism and plural or hybrid governance and institutionalised non state actors, the scholarship does not seem to speak to each other.<sup>534</sup> There is therefore need for this scholarship to mutually reinforce each other in producing complementary research.<sup>535</sup> This thesis contributes to filling this gap in the existing research by linking it through a socio-legal historical study of chieftaincy under public law.

With regards to the second contribution to scholarship, existing scholarship on customary land tenure regulation has tended to analyse land tenure and law reforms from a property rights perspective whereby customary tenure is viewed as a threat to property rights with the view to transform it to statutory tenure.<sup>536</sup> This approach appears to be consistent with the rule of law approach to tenure development which is anchored in ideologies of state centralism. The most prominent research under this lens

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<sup>532</sup> Anthony Mushinge and Sharon Mulenga, 'Legal Pluralism and Tenure Security: Exploring the Relationship between Statutory and Customary Land Tenure in Zambia' (2016) 4 (3) *International Journal of Social Science Studies* 7; Anthony Mushinge, Alex Mumbaala Simposya, and Steven Chowa, 'Threats of Statutory Tenure on Customary Land in Zambia Evidence from Chamuka Chieftaindom in Chisamba District' (2020) 3 (2) *African Journal on Land Policy and Geospatial Sciences* 41.

<sup>533</sup> See for instance Gluckman (n 144); Andrew D Roberts, *A History of the Bemba: Political Growth and Change in North-Eastern Zambia before 1900* (The University of Wisconsin Press, 1973); Audrey Isabel Richards, *The Political System of the Bemba Tribe –North-Eastern Rhodesia* in AR Radcliffe-Brown, M Fortes and EE Evans-Pritchard (eds) *African Political Systems* (Oxford University Press, 1940); and Chipungu (n 179).

<sup>534</sup> Filip Reyntjens, 'Legal Pluralism and Hybrid Governance: Bridging Two Research Lines' (2015) 47 (32) *Development and Change* 346–366. DOI: 10.1111/dech.12221.

<sup>535</sup> Ibid.

<sup>536</sup> Horman Chitonge and others, 'Silent Privatisation of Customary Land in Zambia: Opportunities for a Few, Challenges for Many' (2017) 43 (1) *Social Dynamics* 82.

is the work of Peruvian economist, Hernando de Soto, who argued in his most famous book, "The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else," that poor people are poor because they transact outside the law.<sup>537</sup> De Soto advocated for land titling as a way of improving tenure security for the poor so that they could use their land for economic development including to use it as collateral for loans. De Soto's thesis has been influential in the development of land law and policy in many African states.<sup>538</sup>

Scholars who have criticised land reform and development projects based on De Soto's rule of law development theories assert that "De Soto's theories seem to be based on mistaken assumptions."<sup>539</sup> For instance, Jan Michael Otto, after reviewing case studies of land titling projects conducted by researchers under the Leiden project, concluded that some of assumptions in De Soto's theories "related to a given country's legal system itself, while others have to do with the law's political, administrative, economic or social contexts."<sup>540</sup> On the law, De Soto's theories seem to have failed to recognise the plural context within which many of the development projects were implemented. Robert Home argues that "the African reality, in part a consequence of its colonial experience, is legal pluralism, and, for most of its people, the state is either irrelevant or an interference in their daily lives."<sup>541</sup> On the political context for instance, Otto accused De Soto of assuming that "local dwellers can make decisions about their land without being restricted by local power holders, their patrons and chiefs," which is not the true reality for many developing countries.<sup>542</sup>

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<sup>537</sup> Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books 2000).

<sup>538</sup> Celestine Nyamu Musembi, 'De Soto and Land Relations in Rural Africa: Breathing Life into Dead Theories about Property Rights' (2007) 28 (8) *Third World Quarterly* 1457; Manji (n 37) 2-9.

<sup>539</sup> Jan Michael Otto, 'Rule of Law Promotion, Land Tenure and Poverty Alleviation: Questioning the Assumptions of Hernando de Soto' (2009) 1 (1) *HJRL* 173-195, 187.

<sup>540</sup> *Ibid.*

<sup>541</sup> Robert Home, 'Land Dispute Resolution and the Right to Development in Africa' (2020) 45 (1) *Tydskrif vir Regswetenskap* 72, 79.

<sup>542</sup> *Ibid* 188.

The thesis contributes to research on customary tenure regulation by analysing Zambia's land tenure law from a public law perspective. It applies the findings of the research on the public law regulation of chiefs to the analysis of customary tenure regulation to identify perspectives for a public law approach to customary land tenure regulation by drawing on comparative research from African countries which have implemented public law approaches to land law reform.

## **5.6 Conclusion**

This chapter has justified the decision to conduct a socio-legal study of chieftaincy under public law by discussing the conceptual foundations of public law and historical development of the legal scholarship and administration of justice in Zambia. The discussion of the historical development of legal scholarship and administration of justice shows that law practice has not fully developed from its colonial foundations. As a result, the study of public law has continued to be influenced by Eurocentric values which define public law from the perspective of the unity of state and of sovereignty which emphasises the study of central state institutions and positive law. This is notwithstanding the reality of plural legal and governance orders represented, for instance, by the dual authority of central state institutions and chieftaincy. This reality of pluralism necessitates the study of public law from a sociological perspective. Drawing on the analytical perspectives from sociological constitutionalism, constitutional sociology, and sociology of constitutions, the thesis conducts a socio-legal study of chieftaincy under public law using legal pluralism as the underlying analytical concept. Through a historical study of chieftaincy in public law, the thesis contributes to existing literature on legal pluralism by understanding the character of legal pluralism in public law. It also contributes to research on customary land tenure regulation by analysing tenure law from a public law perspective. The next two chapters study the position of chiefs in the post-independence constitutional law history of Zambia.

## **Chapter Six: Unfulfilled Promises of Self-Governance and UNIP's Nation Building Project (1965 – 1973)**

### **6.1 Introduction**

Zambia gained independence from British colonial rule on 24 October 1964. The territory was known as Northern Rhodesia before independence. The independence constitution was negotiated in Britain between the British government, representatives of the government of Northern Rhodesia, and representatives of political parties at the time. The constitution was enacted as a schedule to a British Act, the Zambia Independence Order 1964. The constitution has since then undergone four major changes. The four major constitutional changes took place in 1973, 1991, 1996 and 2016, respectively.

This chapter and the next one study these constitutional developments with the view to understand the position of chiefs in the post-independence constitutional law history. This chapter focuses on the 1964 and 1973 constitutions as the key moments for the analysis of chieftaincy in the constitutional law history. It discusses the political developments leading up to the enactment of the independence constitution in 1964 and the post-independence constitutional and statutory reforms that affected chieftaincy. The next chapter will cover the constitutional changes from 1991 to 2016.

The key objective of the two chapters is to analyse the position of chiefs in the constitutional law history of Zambia. In so doing, the chapters contribute to the existing literature on chieftaincy under public law in two ways. The first is to contribute towards filling the identified research gap in the public law literature which has largely neglected chieftaincy. The chapters do this by producing descriptive and analytical data that focusses on chieftaincy in the constitutional law history of Zambia. This is done by synthesising the existing multidisciplinary literature on constitutional law history and chieftaincy to understand the social context within which the constitutional law was

developed as well as the process by which chiefs were included or excluded from the constitutional law processes. The second way by which the chapters contribute to existing literature on chieftaincy under public law is by analysing the various constitutional and statutory provisions regulating chiefs against the two key features of public law which I identified in chapter five of this thesis, namely, constitutional norms which confer and limit public power for accountable governance and provisions granting meaningful access to justice for people who are adversely affected by the exercise of public power by chiefs.

The rest of this chapter is arranged in five sections. The first section provides a recap of the review of existing literature. The aim of this recap is to contextualise the contribution that this thesis makes to existing literature. The section does this by interrogating the absence of chieftaincy in existing literature including by discussing literature that attempts to explain this absence of chiefs in existing literature. It then proceeds to demonstrate how this chapter advances the existing literature by synthesising the existing multidisciplinary data to understand the position of chiefs in Zambia's constitutional law history. The second section discusses chieftaincy in the Independence Constitution 1964 and the constitutional and legal reforms that were implemented by the UNIP administration shortly after independence. The third section discusses the constitutional changes in 1973 and the role of chiefs in the local governance during the period under review. The fourth section analyses the impact of the constitutional and legal reforms implemented during the period under review on chieftaincy. The chapter ends with a conclusion summarising the findings on the position of chiefs in the constitutional law history of Zambia for the period under review.

## **6.2 Absence of Chiefs in Existing Literature on the Constitutional Law History of Zambia**

As I have endeavoured to show in chapter four of this thesis, existing literature on the constitutional law history of Zambia has tended to focus on the analysis of the written constitution and role played by political officials in the central government in the

constitutional development process.<sup>543</sup> A few scholars have discussed chieftaincy although most of them have tended to limit the scope of their discussions to the institutional role of chiefs in the central government such as under the House of Chiefs.<sup>544</sup> A notable exception to this trend is work by Ngenda Sipalo which, in addition to discussing the constitutional provisions and the position of political party leaders, extensively discusses the role played by the king of Barotseland (the Litunga) during the negotiations for independence which culminated in the signing of the Barotseland Agreement 1964, which I discuss in further detail below.<sup>545</sup>

The literature review also shows that most of the social science-based research on the social and political history of post-independence African states tended to focus on the central government institutions and elected officials until the late 1990s when research interest in chieftaincy resumed following the return of plural politics in most states. In the context of Zambia, a book by Richard Hall on the history of Zambia is illustrative of this trend.<sup>546</sup> Hall's justification for focusing on politicians can be deduced from his opinion that African nationalism, which was instrumental in pushing for independence, was mostly initiated and sustained by educated and detribalised Africans who were not part of the Native Authority administration.<sup>547</sup> Hall's discussion of the creation of Zambia gives a comprehensive account of the development of nationalist political parties beginning with the formation of Native Welfare Associations which evolved to become political parties.<sup>548</sup> He also spends considerable effort on discussing the advances made by the United National Independence Party (UNIP) including a discussion of their negotiations and protests leading up to independence. Hall discusses chiefs in the constitution making process, albeit in passing, within the context of their

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<sup>543</sup> See for instance Ndulo and Kent (n 21); Chanda (n 18); and Sangwa (n 19).

<sup>544</sup> Ibid.

<sup>545</sup> Sipalo (17) 137-147.

<sup>546</sup> Hall (n 150).

<sup>547</sup> Ibid 113 - 121.

<sup>548</sup> Ibid chaps 5-7.

relationship with UNIP officials.<sup>549</sup> Hall argues that chiefs were anxious concerning the future of their office under an African government and UNIP strived to convince them that their significance would not be undermined by nationalism.<sup>550</sup> UNIP demonstrated its loyalty to chiefs by including in their constitutional proposals a House of Chiefs with wide powers.<sup>551</sup> Hall however does not delve into detailed discussion of the negotiations and power relations between chiefs and nationalist political leaders and how these power relations evolved towards the independence period or how they were reflected in the constitution that was finally adopted.

Although Hall does not focus on chiefs in the development of the independence constitution, his account helps us to understand the social and political contexts within which the independence constitution was developed. It also helps us to understand the process by which chiefs were excluded from the constitution making process and the literature which studies this process. The account also gives us a basis upon which to further interrogate the power relations between chiefs and nationalist political parties in the period leading up to the enactment of the independence constitution. This chapter hopes to build on this work by analysing communications between chiefs and nationalist political leaders to obtain an in-depth understanding the position of chiefs in the constitutional development processes.

Walima Kalusa describes this tendency by researchers to disproportionately focus on nationalist political parties as being consistent with postcolonial historiography which tended to limit its scope of analysis of African politics to politically conscious African nationalists who spearheaded the fight for independence.<sup>552</sup> In the context of Zambia, Kalusa argues that such scholarship tended to eulogise UNIP and its leaders with the result of glossing over important ethnic and socio-economic forces that influenced

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<sup>549</sup> Ibid.

<sup>550</sup> Ibid 197.

<sup>551</sup> Ibid.

<sup>552</sup> Walima T Kalusa, 'Introduction: Zambia's Postcolonial Historiography' (2014) 5 (1) Zambia Social Science Journal 1.

Zambian nationalism and the lived experiences of the ordinary people and other actors.<sup>553</sup> The same appears to be true of researchers who studied the political and constitutional developments of the country from the 1970s to 80s, who equally tended to focus on the development efforts of the UNIP government, its foreign policy, and political and social reforms in pursuit these goals from a centralist perspective.<sup>554</sup>

Research from the late 1990s onwards, has attempted to fill these knowledge gaps by studying individuals and other non-state actors with the view to understand the social context within which the political developments evolved. Giacomo Macola, for instance, studies the historical development of the Kazembe kingdom from precolonial and during the colonial period.<sup>555</sup> For the colonial period, he examines the interactions between the Lunda leaders, British officials, and Lunda subjects, and concludes that the royal family adapted better to the political and social conditions that emerged during the colonial period than the Lunda aristocracy. Macola's study ends with the reign of Mwata Kazembe XIV in 1950 and excludes the reign of Mwata Kazembe XV (1951- 7) which coincided with the rise of African nationalism leading up to independence. It therefore does not squarely apply to the period with which this thesis is concerned. It however provides useful insights into the political and administrative dynamics in the authority of chiefs and their interactions with educated bureaucrats. This chapter seeks to develop this literature by studying how chiefs adapted to the social and political conditions that evolved in the post-independence period.

Another interesting work is a study by Walima Kalusa of position of Kalonga Gawa Undi X, the Chewa Paramount Chief, in the African nationalist movement leading up to independence.<sup>556</sup> Kalusa argues that the involvement of chiefs in the nationalist

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<sup>553</sup> Ibid 3.

<sup>554</sup> Ibid.

<sup>555</sup> Macola (n 162).

<sup>556</sup> Walima T Kalusa, 'Traditional Rulers, Nationalists and The Quest For Freedom In Northern Rhodesia In The 1950s' in Jan-Bart Gewald and others (eds) *Living the End of Empire: Politics and Society in Late Colonial Zambia* (BRILL 2011) 67-90.

movements was motivated by varied factors. For Kalonga Gawa Undi X, his attitude changed from one of indifference and opposition to nationalist activities in the initial period of the movement to becoming a member of and an ardent supporter of the African National Congress (ANC) and later Zambian African national Congress (ZANC) a breakaway group from the ANC and UNIP (when ZANC reconstituted itself) in the late 1950s.<sup>557</sup> Kalonga Gawa Undi X executed his nationalism through state institutions, the Native Authorities, which the European officials used to abate African nationalism.<sup>558</sup> He also travelled to England “to take part in the constitutional talks at Lancaster House in 1959-60.”<sup>559</sup> Kalusa has not developed the discussion of the Chewa chief’s participation in the 1959-60 constitutional negotiations as his research limits its scope of analysis to the relationship between chiefs and nationalist leaders in their capacity as Native Authority leaders in which role chiefs were in some instances perceived as stooges of the colonial government. His account however gives us a unique perspective for understanding the role of chiefs in the development of the independence constitution and the subsequent changes. Kalusa’s account, which focusses on an individual actor, rather than a broad discussion of chiefs as Native Authorities, helps us gain a more nuanced understanding of the position of chiefs in the constitutional law history.

This chapter develops the existing literature by synthesising the existing literature on chieftaincy and constitutional law history. The data sources consulted include written laws, constitutions, and related documents such as the reports of constitutional conferences and review commissions together with historical and archival literature, journals, books, biographies, and letters, which give accounts of the actors in constitutional development that are not solely focused on politicians and centralist government institutions, to understand the position of chiefs in the constitutional law development. These sources collectively helped me to obtain an in-depth understanding of chieftaincy in the constitutional law history of Zambia.

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<sup>557</sup> Ibid.

<sup>558</sup> Ibid 77.

<sup>559</sup> Ibid 86.

### **6.3 The Independence Constitution 1964**

Chiefs played a key role in the local governance of Northern Rhodesia (which is what Zambia was called before independence). They oversaw the Native Authorities, the local government administration in rural areas or native reserves, and Native courts which were responsible for the administration of justice amongst Africans. In that capacity, chiefs played a key role in the transition from colonial rule to independence. Their roles, which were sometimes contradictory, ranged from organising and participating in the liberation struggles of the African nationalist movement to suppressing them in the performance of their duty to maintain law and order. Chiefs were also highly regarded by the colonial administration, which gave them a powerful position when it came to negotiating provisions to be included in the constitution and future of the country although their power position changed towards independence. This section discusses the position of chiefs in the negotiations leading up to the adoption of the independence constitution. It also analyses the provisions of the independence constitution on chieftaincy and the reaction of chiefs to the post-independence constitutional and statutory changes.

#### **6.3.1 Chiefs in the Constitutional Process**

In the years leading up to independence, chiefs were challenged by the phenomenon of detribalised Africans, those who had migrated from tribal areas and settled in urban (white) settlements and in particular the Copperbelt.<sup>560</sup> The interests of the detribalised Africans could not be adequately represented by the Native Authority administration as they were geographically away from their tribal areas, not answerable to tribal authority, and in some instances educated and under the influence of industrialisation. These developments, among others, prompted the formation of alternative fora for representation of African interests. The first step was the creation of native advisory councils (which evolved into a national body called the African Representative Council)

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<sup>560</sup> Robert I Rotberg, *The Rise of Nationalism in Central Africa: The making of Malawi and Zambia 1873-1964* (Harvard University Press 1965) ch 5.

that would recommend representatives to the Legislative Council.<sup>561</sup> The process culminated in the birth of African nationalist political parties which had evolved from the representative councils and welfare associations that had sprang along the line of rail.<sup>562</sup> These political parties took the lead in demanding for independence. Their relationship with traditional leaders, the native authorities, and the colonial administration is therefore key to understanding the social and political environment within which the independence constitution was negotiated. The development of the political parties and their relations with the colonial administration in the negotiations leading up to independence have been covered elsewhere.<sup>563</sup> This section restricts itself to the interactions of these political parties with traditional leaders in the constitution making process.

The position of chiefs in relation to the colonial administration and the African nationalist movement in the period leading up to independence can be explained in two ways. Firstly, through their statutory mandate to maintain law and order under the Native Authorities, chiefs worked with the colonial administration to suppress the efforts of the nationalist leaders including, in some instances, by ejecting them from their chiefdoms for causing trouble.<sup>564</sup> The second position was that some chiefs supported the activities of the African nationalist movement and helped to mobilise the villagers to register to vote in the 1963 elections.<sup>565</sup> Some chiefs even joined the political parties and held leadership positions. A good example is Maurice Katowa, chief Mapanza of the

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<sup>561</sup> Kalusa (n 556) 86.

<sup>562</sup> Sipalo (n 17) 82.

<sup>563</sup> Hall n 150) ch 5-7; Sipalo (n 17) ch 3; Chanda (n 18) chap 4; Owen JM Kalinga, 'Independence Negotiations in Nyasaland and Northern Rhodesia' (2005) 10 (2) International Negotiation 235.

<sup>564</sup> Letter by Kasama District Commissioner to Chief Mwamba urging him to rescind deportation orders against named members of UNIP, 11 May 1961, EAP121/2/4/1/10/1, United National Independence Party of Zambia (UNIP) [1949-1988] 'Chiefs, Correspondence [1960-1971]' (British Library) <<https://eap.bl.uk/archive-file/EAP121-2-4-1-10-1>>.

<sup>565</sup> See for instance the letter by Mainza Chona UNIP National Secretary to Senior Chief Musokotwane, 22 October 1963, EAP121/2/12/1/42, United National Independence Party of Zambia (UNIP) [1949-1988], 'Chiefs, Correspondence [1963]' (British Library) <<https://eap.bl.uk/archive-file/EAP121-2-12-1-42>>.

Tonga people of Southern province, who became a member of and held a position as branch secretary in the ANC in Choma notwithstanding threats of dethronement from the colonial administration.<sup>566</sup> The colonial authorities were aware of the political activity of some chiefs and watched them closely as evidenced by the following excerpt from the Northern Rhodesia African Affairs Report for 1958, which stated, with regards to the Chewa Native Authority, under the leadership of Paramount Chief Kalonga Gawa Undi X, that:

The danger with this native authority is that the interest of its members (under their Paramount Chief) in national politics will operate to the detriment of the services they render to the people of the area. This will have to be carefully watched.<sup>567</sup>

The leaders of the nationalist movement were well aware of the influence of chiefs in the colonial government and as such forged alliances with them including by keeping them abreast with the developments in the political parties.<sup>568</sup> For instance UNIP would invite chiefs to intervene whenever their members faced trouble with the authorities.<sup>569</sup> UNIP also gave assurances to chiefs that it would restore the dignity that traditional leaders previously had in the pre-colonial period when it formed government. The following quote from a letter by the president of UNIP to chiefs dated 21 August 1962 is illustrative of the assurances made by nationalist political leaders to traditional leaders:

UNIP's policy is that when we take over the reigns of government our chieftainship shall be more respected than it has been under a foreign

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<sup>566</sup> Kalusa (n 552) 79.

<sup>567</sup> Colonial Office, *Northern Rhodesia African Affairs Annual Report for the year 1958* (The Government Printer 1959) at 50.

<sup>568</sup> See, for instance, Letter by K.N Kafula UNIP Kasama Constituency chairman to regional chiefs, 10 November 1962, EAP121/2/4/1/10/1, United National Independence Party of Zambia (UNIP) [1949-1988], 'Chiefs, Correspondence [1960-1971]' (British Library) <<https://eap.bl.uk/archive-file/EAP121-2-4-1-10-1>>.

<sup>569</sup> Numerous letters, EAP121/2/4/1/10/1 United National Independence Party of Zambia (UNIP) [1949-1988], 'Chiefs, Correspondence [1960-1971]' (British Library), <<https://eap.bl.uk/archive-file/EAP121-2-4-1-10-1>>.

government. UNIP knows that our chieftainship was magnificent before the white man reduced it to the level where it is now.<sup>570</sup>

Where they felt undermined by the colonial administration or nationalist agitators, chiefs made their demands by invoking their precolonial legitimacy as natural rulers and would in certain instances threaten to use the strength of their supporters to make their areas ungovernable. For instance, Mwata Kazembe Kanyembo VI in a letter to UNIP warned, "please take action now on all matters that I now bring to you otherwise I will use my people to insurrection (sic) against the District Officer and the District Commissioner, Kawambwa."<sup>571</sup>

Although a number of chiefs saw the change of administration from a colonial to an African administered one as being inevitable and pledged their support to UNIP, some chiefs expressed concern that they might lose their power under an African government unless they were elected as members of parliament.<sup>572</sup> Others were, however, opposed to the participation of chiefs in active politics and expressed confidence in the African led administration to restore African values that were lost under colonial rule. The following quote from a letter by Mwata Kazembe Kanyembo VI, dated 12 November 1963, to the regional secretary of UNIP is illustrative of the latter position:

An African government is inevitable and is what we wanted in order to have our status, traditions, customs and cultural lines of our common

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<sup>570</sup> Letter by UNIP President to Chiefs, 21 August 1962, EAP121/2/4/4/1/61, United National Independence Party of Zambia (UNIP) [1949-1988], 'Chiefs, Correspondence [1962-1963]' (British Library) <<https://eap.bl.uk/archive-file/EAP121-2-4-4-1-61>>.

<sup>571</sup> Letter by Mwata Kazembe Kanyembo VI to UNIP regional leaders, 22 March 1963, EAP121/2/4/2/1/40, United National Independence Party of Zambia (UNIP) [1949-1988], 'Chiefs, Correspondence [1962-1963]' (British Library) <<https://eap.bl.uk/archive-file/EAP121-2-4-2-1-40>>.

<sup>572</sup> Ibid. Also letter by Chief Mukwikile, Shiwangandu 30 September 1963.

conventions respected because under a foreign rule, such things have died away by the influence of the policy of divide and rule.<sup>573</sup>

Mwata Kazembe Kanyembo VI was strongly opposed to chiefs aspiring for political office describing those who wished to contest as “non-loving timid feathery minds whose chiefdoms were only planted by the coming of the imperialist government.”<sup>574</sup> Similarly, many Bemba chiefs considered political office to be incompatible with their office and discouraged royals, including children of chiefs, from aspiring for political office.<sup>575</sup>

In terms of constitutional development, during the period between 1924 to 1964, after the British government took over the administration of Northern Rhodesia from the BSAC, there was no written constitution as such. However, the governance arrangements and rules were promulgated by the British Parliament in Orders in Council, which could be loosely termed as constitutions.<sup>576</sup> European settlers actively participated in these constitutional arrangements which were merely tolerated by the African majority, with the latter’s tolerance diminishing in the period leading up to independence when the African majority demanded full and equal participation in the governance of the territory.<sup>577</sup> The final Order in Council was promulgated in 1964 following negotiations for independence in London and the Independence of Zambia Constitution was attached to it as a schedule.

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<sup>573</sup> Letter by Mwata Kazembe Kanyembo VI to UNIP Regional Secretary Kawambwa, 12 November 1963, EAP121/2/12/1/42, United National Independence Party of Zambia (UNIP) [1949-1988], ‘Chiefs, Circulars [1963]’ (British Library) < <https://eap.bl.uk/archive-file/EAP121-2-12-1-42>>.

<sup>574</sup> Ibid.

<sup>575</sup> Letter by Chief Mukwikile to Kenneth Kaunda UNIP President, 11 October 1962, EAP121/2/4/1/10/2, United National Independence Party of Zambia (UNIP) [1949-1988], ‘Chiefs, Correspondence [1962-1964]’ (British Library) < <https://eap.bl.uk/archive-file/EAP121-2-4-1-10-2>>.

<sup>576</sup> Muna B Ndulo and Robert B Kent, ‘Constitutionalism in Zambia: Past, Present and Future’ (1996) 40 J Afr L 256, 259.

<sup>577</sup> Ibid.

Africans first participated in constitutional talks in the negotiations leading up to the enactment of the Northern Rhodesia Order in Council 1961. The African Affairs report for Northern Rhodesia for 1960 reported general awareness by chiefs of the implications of the constitutional talks which was expressed by their anxiety over the future of their power position.<sup>578</sup> African representatives who attended the constitutional talks in London, convened at Lancaster House, were drawn from both the African nationalist political movement and chieftaincy. There were eight African representatives in total, four from the African National Congress (ANC) and four chiefs. The ANC was represented by HM Nkumbula, L Katilungu, JEM Michelo, and CJA Banda.<sup>579</sup> The chiefs were represented by Paramount Chief Kalonga Gawa Undi X of the Chewa, Senior Chief Chikwanda of the Bemba, Chief Mapanza of the Tonga, and Chief Ikelenge of the Lunda.<sup>580</sup> The selection of representatives to attend the London conference was done at two stages. Firstly, meetings were held with the Governor to select representatives to attend the constitutional conference in Lusaka and secondly, the Lusaka conference appointed a four-member delegation to attend the Conference in London.<sup>581</sup>

The representatives of chiefs made similar demands as the nationalist political party representatives.<sup>582</sup> They demanded for inclusion of black majorities in the executive and legislative councils of Northern Rhodesia.<sup>583</sup> They also demanded that Northern Rhodesia should sever its ties with the Federation of Rhodesia and Nyasaland which was formed in 1953. They further demanded for the territory's constitutional conference

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<sup>578</sup> Colonial Office, *Northern Rhodesia African Affairs Annual Report for the year 1960* (The Government Printer 1961) 16.

<sup>579</sup> Colonial Office, *Northern Rhodesia Proposals for Constitutional Change* (Her Majesty's Stationery Office 1961) 10.

<sup>580</sup> Ibid.

<sup>581</sup> Colonial Office, *Governor's Address on the Opening of the Third Session of the Eleventh Legislative Council* (27 June 1961) 3.

<sup>582</sup> Colonial Office (n 578) 4-5.

<sup>583</sup> Ibid 4.

in light of the impending review of the federal constitution that was scheduled to take place at the end of 1960.<sup>584</sup> The chiefs also successfully lobbied for the creation of the House of Chiefs through which traditional leaders would present their opinions on matters of public interest to the government and scrutinise bills from the legislative council put before it by the Governor at the Governor's discretion.<sup>585</sup> After the publication of the White Paper on the proposed changes to the Constitution in February 1961, a conference of representative chiefs was called in Lusaka to discuss the constitutional proposals and it accepted the White Paper in principle and in particular the proposal to establish the House of Chiefs was accepted by the conference of chiefs.<sup>586</sup>

Another illustration of the considerable power and influence of traditional leaders during the period leading up to independence is the special position of the Litunga (king) of Barotseland in the constitutional development. As stated in chapter three of this thesis, Barotseland enjoyed separate governance arrangements by virtue of the various treaties between the Litunga and the British Government which gave Barotseland separate negotiation powers from the rest of Zambia in the independence and constitutional process.<sup>587</sup> For this reason, the Litunga did not attend the negotiations at Lancaster House in December 1960, but instead Barotseland conveyed its authoritative views on the proposed constitutional proposals in April of 1961, at a separate conference in London.<sup>588</sup> The Secretary of State for the Colonies in his opening remarks at the 1960 conference stated:

The Conference will also understand that in virtue of the special relationship with Barotseland, Her Majesty's Government cannot take

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<sup>584</sup> Colonial Office, *Northern Rhodesia African Affairs Annual Report for 1960* (Government Printer 1961) 52.

<sup>585</sup> Colonial Office (n 579) 8.

<sup>586</sup> Ibid 3.

<sup>587</sup> Ibid 1.

<sup>588</sup> Colonial Office, *Northern Rhodesia African Affairs Annual Report for 1961* (Government Printer 1962) 3.

any constitutional decisions affecting Barotseland until there have been separate consultations with the Paramount Chief.<sup>589</sup>

At a separate meeting, it was agreed that the constitutional changes effected in 1961 would not affect Barotseland. Further, assurances were made to guarantee the position of the Litunga and Barotseland after independence. For instance, the Secretary of State informed the Litunga that "he would be prepared to advise Her Majesty to make certain amendments to the provisions in the relevant Orders in Council in order to clarify and put beyond doubt the existing Barotse rights."<sup>590</sup> Another assurance that was obtained was that "in future, the Paramount Chief of the Barotse people would be described as the Litunga of the Barotseland Protectorate" and not a province.<sup>591</sup> The Litunga and his Council accepted the new constitution in its format subject to changes in the existing Orders in Council to guarantee the position of Barotseland. With this acceptance of the constitution, elections were held in Barotseland at the same time as the rest of the territory in the 30 October 1962 general election.<sup>592</sup>

The Northern Rhodesia Order in Council 1961 produced the first African government, UNIP/ANC coalition in 1962, having opened the franchise to Africans and created more seats both in the executive and legislative council.<sup>593</sup> The final constitutional document before independence was the Northern Rhodesia (Constitution) Order in Council 1963 which facilitated the self-governance of Northern Rhodesia. The House of Chiefs was retained in the 1963 Northern Rhodesia (Constitution) Order in Council with substantially the same powers and functions.<sup>594</sup> Notably, the House could make

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<sup>589</sup> Colonial Office (n 579) 1.

<sup>590</sup> Ibid 3.

<sup>591</sup> Ibid.

<sup>592</sup> The Colonial Office, *Northern Rhodesia African Affairs Report for the Year 1962* (Government Printer Lusaka 1963).

<sup>593</sup> Sipalo (n 17) 125.

<sup>594</sup> Northern Rhodesia (Constitution) Order in Council 1963, ch V.

recommendations on a bill referred to it by the Governor and submit recommendations on Bills which the Governor would lay before the Legislative Assembly.<sup>595</sup>

The 1963 Order in Council also recognised the special position of Barotseland by exempting it from the application of laws made by the National Assembly of Northern Rhodesia in relation to land, the Barotse Native Authority and court, forests, and other aspects of local governance listed in section 59 of the Constitution, without the consent of the Litunga and his council. The special position of Barotseland was protected under miscellaneous provisions of the Order in Council, as follows:

It shall not be lawful for any purpose whatever except with the consent of the Litunga of the Barotseland Protectorate and with the approval of a Secretary of State, to alienate from the Litunga and the people of the Protectorate any part of the Protectorate.

All rights of whatever kind reserved to or for the benefit of the natives by the concessions from Lewanika Paramount Chief of Barotseland to the British South Africa Company dated 17<sup>th</sup> October 1900, and 11<sup>th</sup> August 1909, respectively, as approved by the Secretary of State and as varied from time to time by any agreement to which Her Majesty or the Governor with the approval of a Secretary of State is a party, shall continue to have full force and effect.

No court other than a court recognised under the Barotse Native Courts Ordinance shall have any original or appellate jurisdiction in respect of land rights in the Barotseland Protectorate that are governed by Barotse law and custom:

Provided that nothing in this subsection shall be construed as limiting the jurisdiction and powers of High Court in relation to prerogative writs and prerogative orders.<sup>596</sup>

With the inclusion of the above provisions, Barotseland consented to the application of the 1963 Order in Council and the elections that were held in August 1963 to introduce

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<sup>595</sup> Ibid s 64.

<sup>596</sup> Northern Rhodesia (Constitution) Order in Council 1963, s 112.

an element of elected representation in the Barotse National Council produced 25 councillors all of whom were members of UNIP.<sup>597</sup>

The above discussion of the interactions between chiefs, the Northern Rhodesia government officials, and the leadership of the nationalist movement in the initial period of the constitutional negotiations reveal that chiefs had considerable influence on the constitutional process and arguably equal power relations with the nationalist political leaders. This can be deduced from the mutual relations between the two parties and the number of African representatives who attended the constitutional conference in 1960 with both chiefs and nationalist political parties having been represented by an equal number. The considerable influence of chiefs in the constitutional process can also be deduced from their negotiation of provisions including the creation of the House of Chiefs and the inclusion of provisions guaranteeing the special position of Barotseland and its traditional government.

These power relations however tilted in favour of the nationalist political party actors shortly before independence. UNIP emerged victorious in the 1963 election and formed government with its leader, Kenneth Kaunda, becoming the first Prime minister. Shortly thereafter, a conference was held in London to negotiate the terms for independence and a new constitution for the independent republic of Zambia.<sup>598</sup> Chiefs were not part of the delegation that met in London in 1964 to discuss the independence constitution of Zambia. The representatives from Northern Rhodesia comprised of then Governor, Sir Evelyn Hone, his Prime Minister Kenneth Kaunda, seven ministers and nine government officials, three representatives of the African National Congress, and three representatives of the National Progress Party.<sup>599</sup> The conference discussed provisions to be included in the independence constitution which did not substantially alter the

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<sup>597</sup> The Colonial Office, *Northern Rhodesia African Affairs Report for the Year 1963* (Government Printer 1964) 2.

<sup>598</sup> Sipalo (n 17) 131.

<sup>599</sup> Northern Rhodesia, Report of the Northern Rhodesia Independence Conference 1964 Cmnd 2365 (Her Majesty's Stationery Office May 1964) 4, Annex A.

provisions of the 1963 Order in Council.<sup>600</sup> The provisions relating to the House of Chiefs were retained in substantially the same format as the 1963 Order, save for the transfer of the powers of the Governor to the President.<sup>601</sup> The provisions guaranteeing the position of Barotseland were however removed from the constitution and placed in a separate document, the Barotseland Agreement, which was reached outside the London conference between the Northern Rhodesia Government and the Litunga of Barotseland.<sup>602</sup>

The Barotseland Agreement was signed on 18 May 1964 between Kenneth Kaunda, the Prime Minister of Northern Rhodesia (later Zambia) representing the government, Sir Mwanawina Lewanika III K.B.E, the Litunga (King) of Barotseland, and Duncan Sandys, Her Majesty's Principal Secretary of State for Commonwealth Relations and for Colonies, signifying the approval of the British government. The agreement facilitated the independence of Zambia as a single state notwithstanding the special status of Barotseland as a protectorate within the protectorate of Northern Rhodesia which gave the Litunga and his Council power over the local governance of Barotseland.<sup>603</sup> As above stated, representatives of the British Government had earlier made several assurances to the Litunga that "the treaties and agreements between Her Majesty's Government and the Paramount Chiefs of Barotse would stand until the Paramount Chief and the Barotseland Native Government themselves asked for them to be revoked or modified."<sup>604</sup>

Earlier in 1963, a series of meetings had been held between the Litunga and the First Secretary of State in Lusaka in January, and July of the same year in London, to discuss

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<sup>600</sup> Ibid 3.

<sup>601</sup> Ibid 12, Annex B.

<sup>602</sup> Ibid.

<sup>603</sup> Barotseland Concessions and agreements dated 17 October 1900, 11 August 1909, the Agreement of 1924, and 29 April 1954, respectively.

<sup>604</sup> Monckton Commission Report 1960 at 45.

the separation of Barotseland from Northern Rhodesia before independence.<sup>605</sup> The move to secede from Northern Rhodesia was strongly opposed by UNIP as well as some residents of Barotseland who expressed their dissent through a movement styled Barotse Anti-Secession Movement (BASMO), an organisation that was registered in 1960.<sup>606</sup> Following a series of negotiations between the Northern Rhodesia Government and the Barotse Native Government concerning their future relationship, two important outcomes were recorded. The first was that Barotseland agreed to participate in the October 1963 general election mentioned above, and the second was that Barotseland accepted to remain part of Northern Rhodesia after independence subject to the terms to be agreed upon.<sup>607</sup>

The terms were agreed upon in the 1964 Barotseland Agreement which repealed the previous treaties between Barotseland and the British government and created a fresh agreement between the Litunga and the government of the Republic of Zambia for the future arrangements concerning the governance of Barotseland after independence. The agreement stipulated that Northern Rhodesia would become an independent state as a single country whilst at the same time preserving certain powers of local governance and land administration to the Litunga and his council.

Clause 4(2) of the agreement provided that:

The Litunga of Barotseland, acting in consultation with his council as constituted for the time being under the customary law of Barotseland shall be the principal local government authority for the government and administration of Barotseland.

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<sup>605</sup> Colonial Office, *Northern Rhodesia African Affairs Annual Report for the Year 1963* (Government Printer 1964) 3.

<sup>606</sup> Assorted Correspondence, EAP121/2/12/1/27, United National Independence Party of Zambia (UNIP) [1949-1988], 'Barotse Anti-Secession Movement, Papers [1961](British Library) <<https://eap.bl.uk/archive-file/EAP121-2-12-1-27>>.

<sup>607</sup> Colonial Office, *Northern Rhodesia African Affairs Report for 1960* (government Printer 1961) 78.

Clause 4(3) of the Agreement gave the Litunga and his council power to make laws for Barotseland relating to land, forestry, fishing, game preservation, and local taxation, among others. The Agreement also gave the Barotse Native Courts (as they were then known) original and exclusive jurisdiction in relation to interests in land governed by customary law subject to the powers of the High Court in relation to prerogative writs.<sup>608</sup> The Agreement tasked the Government of the Republic of Zambia to ensure that laws for the time being in force in the Republic were not in conflict with the Barotseland Agreement.<sup>609</sup>

The agreement was however not included in the text of the Independence Constitution, Kenneth Kaunda, the then Prime Minister and first president of Zambia, having objected to its inclusion during the independence negotiations.<sup>610</sup> This is a good example of how the British government and the Zambian nationalist leaders used diplomacy to undermine the political power of Barotseland through the use of the Barotseland Agreement that had no legal force.<sup>611</sup> Without its inclusion in the text of the constitution, it became easy for the Zambian government to abrogate the agreement, which it did in 1969 through a constitutional amendment, without the consent of the Litunga and his council. I return to this in subsection 6.4.1 which discusses the constitutional and law reforms implemented by the UNIP administration.

### **6.3.2 Regulation of Chiefs under the Independence Constitution 1964**

The independence constitution organised governmental power by dividing it between three arms of government, namely, executive, legislature, and judiciary. The executive power was vested in the president who could exercise it directly or through other officers designated by the president or as conferred on such persons by Parliament.<sup>612</sup>

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<sup>608</sup> The Barotseland Agreement 1964, cl 5.

<sup>609</sup> Ibid cl 8.

<sup>610</sup> Antonios Maniatis, 'African Constitutionalism and Barotseland' (2019) 2 (2) Open Journal for Legal Studies, 41, 46.

<sup>611</sup> Ibid 49.

<sup>612</sup> Constitution of Zambia 1964, s 48.

The president was the head of state and government.<sup>613</sup> The president also presided over cabinet which consisted of the president, vice president and ministers appointed by the president from the National Assembly.<sup>614</sup> Ministers were responsible, under the president, for the administration of government departments assigned to them by the president.<sup>615</sup>

The legislative authority was vested in Parliament composed of the President and the National Assembly.<sup>616</sup> The National Assembly was made up of 75 elected members and not more than five members nominated by the President.<sup>617</sup> The judicial authority vested in the Judiciary made up of the High Court and the Court of Appeal.<sup>618</sup> The Court of Appeal was the highest appellate Court whilst the High Court was mandated with original and unlimited jurisdiction to determine any civil and criminal matters under any law. It also had supervisory authority over "any subordinate court or any court-martial."<sup>619</sup> "The subordinate courts (magistrates courts) and local courts were creatures of statute."<sup>620</sup> The Local Courts primarily administered customary law and replaced the Native Courts which were created by the Native Courts Ordinance as stated in the previous chapter.<sup>621</sup> Local Courts were however presided over by Local Court Justices and not chiefs as was the case under the Native Courts Ordinance. Although the constitution or national laws did not recognise traditional dispute resolution mechanisms, following the repeal of the Native Courts Ordinance, traditional dispute resolution fora existed, and have continued to do so, alongside the statutory Local Courts.<sup>622</sup> One could also confidently assert that traditional dispute resolution mechanisms were recognised by virtue of the constitutional recognition of customary

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<sup>613</sup> The Constitution of Zambia 1964, s 31.

<sup>614</sup> Ibid s 45.

<sup>615</sup> Ibid s 51.

<sup>616</sup> Ibid s 57.

<sup>617</sup> Ibid s 58 and 60.

<sup>618</sup> Ibid s 97 and 98.

<sup>619</sup> Ibid s 98(5).

<sup>620</sup> Ndulo and Kent (n 21) 263.

<sup>621</sup> Ibid.

<sup>622</sup> Kahn-Fogel (n 426) 768.

law as an exception to the prohibition against the application of discriminatory laws.<sup>623</sup> I elaborate on this further below.

The constitution contained a justiciable bill of rights under chapter III which protected the political and civil rights of the individual. Access to justice was provided for in form of the right to a fair trial under section 20 of the Constitution which contained provisions on the secure protection of the law. Section 20(1) provided that a person charged with a criminal offence “shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.” In terms of civil proceedings, subsection (9) stated that “any court or adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial.” Such a tribunal was also mandated to give “a fair hearing within a reasonable time.”<sup>624</sup>

The above provisions notwithstanding, it is difficult to justify or extend the constitutional protections on fair application of law to administrative acts and decisions of chiefs beyond their judicial or quasi-judicial functions. This is partly because the independence constitution did not contain any provisions to ensure fair administrative action or administrative justice for people who were adversely affected by the exercise of public power and let alone chiefly authority. The application of the constitutional protections was therefore largely restricted to centralist state institutions, as the below discussion will show. Even within the context of centralist state institutions, meaningful access to justice was not guaranteed.

Although the constitution acknowledged the right to legal representation before courts, legal aid was not guaranteed as a matter of right as the freedom was only exercisable at own expense.<sup>625</sup> The Legal Aid Act was passed in 1967 to facilitate provision of legal

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<sup>623</sup> The Constitution of Zambia 1964 s 25(4).

<sup>624</sup> The Constitution of Zambia 1964, s20(9).

<sup>625</sup> Ibid, s20(2)(d).

aid in criminal and civil matters.<sup>626</sup> The Act empowered the High Court to issue a legal aid certificate to any person charged with a criminal matter.<sup>627</sup> This power was however limited in relation to matters before Subordinate Courts as magistrates could only issue a legal aid certificate in selected deserving cases.<sup>628</sup> For civil cases, legal aid was granted to applicants at the discretion of the director of legal aid services.<sup>629</sup> This, compounded by the lack of provisions on the application of customary law in the High Court, technically excluded the provision of legal aid services in customary law cases which were mostly determined in the lower courts.<sup>630</sup> Furthermore, the constitution recognised laws that excluded lawyers from proceedings under customary law.<sup>631</sup> The problem of access to lawyers was further compounded by the scarcity of lawyers at the time of independence caused by the colonial legacy of poor education for Africans discussed in the previous chapter, which discusses the development of legal scholarship in Zambia.<sup>632</sup> Let us now consider the specific provisions of the Independence Constitution on chieftaincy.

The 1964 Constitution defined a chief as “a person who is recognised by the President under the provisions of the Chiefs Act or any law amending or replacing that Act as the Litunga of Western province, a Paramount Chief, Senior Chief, Chief or Sub-Chief or a person who is appointed as Deputy Chief.”<sup>633</sup> It defined a public office as “an office of emolument in the public service.”<sup>634</sup> The Constitution defined the public service as “the civil service of government” including judges of the High Court and Court of Appeal and offices in the teaching service and members of the Zambia Police Force, but excluding the Attorney General, Secretary-General to the Government and members of

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<sup>626</sup> Legal Aid Act, Chapter 34 of the Laws of Zambia (repealed by Legal Aid Act No 1 of 2021).

<sup>627</sup> Ibid s 8.

<sup>628</sup> Ibid s9.

<sup>629</sup> Ibid s 11-12.

<sup>630</sup> Mphanza Patrick Mvunga, ‘Land Law and Policy in Zambia’ (PhD Thesis, University of London 1977) 420.

<sup>631</sup> The Constitution of Zambia 1964, s20(12)(b).

<sup>632</sup> Kahn-Fogel (n 426) 767.

<sup>633</sup> The Constitution of Zambia 1964, s 125.

<sup>634</sup> Ibid.

commissions appointed by the President under the Constitution.<sup>635</sup> Section 125 (4) stated 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 of Zambia or of the former protectorate of Northern Rhodesia.” With this definition of public office, it was unclear whether chiefs were included for purposes of public law, although by virtue of their recognition in the Constitution and the Chiefs Act, they could be deemed to be public officers as I have demonstrated in chapter three of this thesis.

The Constitution incorporated chiefs in the political governance of the country through the House of Chiefs which was comprised of representatives from all provinces of the country at the time.<sup>636</sup> This provision was retained in substantial conformity with the provisions of the Northern Rhodesia (Constitution) Order in Council 1963. Chiefs were not restricted in seeking election to the National Assembly, although those who were members of the National Assembly were disqualified from membership to the House of Chiefs.<sup>637</sup> The term of office for members of the House of Chiefs was three years from the date of election for each member.<sup>638</sup> Membership could also be terminated whenever a situation that would disqualify a member for election or appointment to the House arose.<sup>639</sup> All members of the House of Chiefs swore an oath of allegiance.<sup>640</sup>

The functions of the House of Chiefs were to consider bills, presented by the President at the President’s discretion, before the bills are presented to the National Assembly or any other matter that the President presented to the House.<sup>641</sup> Resolutions of the

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<sup>635</sup> Ibid.

<sup>636</sup> Ibid s 85. The House was composed of four chiefs representing each of the following provinces – Northern, Western, Southern and Eastern; three chiefs representing each of the following provinces – North-Western, Luapula and Central and one chief representing the Copperbelt province.

<sup>637</sup> Ibid s 85(3).

<sup>638</sup> Ibid s 85(5).

<sup>639</sup> Ibid s 85(5).

<sup>640</sup> Ibid s 90.

<sup>641</sup> Ibid s 86.

House of Chiefs were given to the President who would present them before the National Assembly.<sup>642</sup> The President of the House of Chiefs was elected by the members of the House from amongst themselves or outside the House while the deputy president was appointed by the President of the Republic after consulting with the President of the House of Chiefs.<sup>643</sup> The House of Chiefs met at such place and time as the President of the Republic would appoint.<sup>644</sup> Further, the republican President, Vice President, or a minister responsible for a matter under consideration could attend and participate in the proceedings of the House of Chiefs although they could not vote on the motions in the House.<sup>645</sup> Although membership to the House of Chiefs did not give any tangible power to the chiefs, it gave their subjects in the rural areas a sense of satisfaction that their ruler was involved in ruling Zambia.<sup>646</sup>

Apart from the provisions on the House of Chiefs, the 1964 Constitution did not contain any further provisions conferring power on chiefs or regulating their role in the local governance. The constitution, therefore, did not contain clear provisions conferring power on chiefs or prescribing limits on their power. This was left to the regulation of the Chiefs Act and customary law. Salient provisions of the Chiefs Act are discussed below. In terms of the position of customary law, the independence constitution did not list the sources of law in Zambia. It however recognised customary law when applied to people of the same race and with respect to "adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law" as a lawful exception to the prohibition against the application of discriminatory law.<sup>647</sup> This had the effect of

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<sup>642</sup> Ibid.

<sup>643</sup> Ibid s 88 and 89.

<sup>644</sup> Ibid s 93.

<sup>645</sup> Ibid s 94.

<sup>646</sup> Wim van Binsbergen, 'Aspects of Democracy and Democratisation in Zambia and Botswana: Exploring African Political Culture at the Grassroots' (1995) 13 (1) *Journal of Contemporary African Studies* 3, 17.

<sup>647</sup> Constitution of Zambia 1964, s 25(4).

allowing more opportunity for legal pluralism in the “private sphere” compared to public law.<sup>648</sup>

The application of customary law in the courts was provided for in the various statutes regulating individual courts. These provisions have largely maintained their colonial outlook and remained unchanged to date. In particular, the Local Courts Act provides for the application of African customary law which is not “repugnant to natural justice or morality or incompatible with the provisions of any written law.”<sup>649</sup> In the Subordinate Courts, customary law which passes the repugnancy test above is applicable as follows:

Such African customary law shall, save where the circumstances, nature or justice of the case shall otherwise require, be deemed applicable in civil causes and matters where the parties thereto are Africans, and particularly, but without derogating from their application in other cases, in civil causes and matters relating to marriage under African customary law, and to the tenure and transfer of real and personal property, and to inheritance and testamentary dispositions, and also in civil causes and matters between Africans and non-Africans, where it shall appear to a Subordinate Court that substantial injustice would be done to any party by a strict adherence to the rules of any law or laws other than African customary law.<sup>650</sup>

Parties are permitted to exclude the application of customary law to proceedings by express agreement or by implication based on the nature of the transaction from which a matter arose.<sup>651</sup>

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<sup>648</sup> Mulela M Munalula, ‘Law as an Instrument of Social Change: The Constitution and Sexual Discrimination in Zambia’ (1995) 1 International Journal of Discrimination and Law 131, 134.

<sup>649</sup> Local Court Act Chapter 29 of the Laws of Zambia, s 12.

<sup>650</sup> Subordinate Courts Act Chapter 28 of the Laws of Zambia, s 16.

<sup>651</sup> Ibid.

There are no similar provisions in the High Court Act, although it is empowered to receive evidence of customary law in a matter "in which questions of African customary law may be material to the issue."<sup>652</sup> This makes the position ambiguous concerning the jurisdiction of the High Court to apply customary law which appears incidental.<sup>653</sup> Coupled with the express mention of specific civil matters in the provisions on application of customary law and the phrase "matters of personal law" in the constitutional provision, it is fairly easy to observe how the law did not motivate the High Court to develop public law by applying customary law to limit the powers of chiefs. I return to this in chapter eight which analyses case law on chieftaincy.

With regards to their regulation under the Chiefs Act, the Act defined a chief as the person recognised as chief under that Act.<sup>654</sup> It maintained the powers of the Governor to recognise or withdraw the recognition of a chief which were now vested in the President.<sup>655</sup> The Act has substantially remained unchanged to date, save for the declaration by the Constitutional Court of the provisions on recognition of chiefs as unconstitutional, following the 2016 constitutional amendments which I discuss in the next chapter. The Chiefs Act provides that a chief shall, in addition to the functions given by the Chiefs Act or other written law, "discharge the traditional functions of his office under African 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."<sup>656</sup> Section 11 of the Act lists the statutory functions of chiefs which essentially require them to maintain peace and order in their local areas. In the case of *The Attorney General*,<sup>657</sup> the High Court affirmed the power of a chief to arrest and detain a person at the chief's palace as lawful exercise of the powers of a chief under section 11 of the Act.

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<sup>652</sup> High Court Act Chapter 27 of the Laws of Zambia, s 34.

<sup>653</sup> Mvunga (n 630) 420.

<sup>654</sup> Chiefs Act Chapter 287 of the Laws of Zambia, s 2.

<sup>655</sup> Ibid s 3 and 4.

<sup>656</sup> Ibid s 10.

<sup>657</sup> (1980) Z.R. 75 (HC).

The Chiefs Act does not prescribe limits on the powers of chiefs under the Act or on their powers pursuant to customary law although it contains a series of offences against any person who “attempts to undermine the lawful power or authority of a chief” or “obstructs or interferes” with the discharge of the lawful functions of the office of a chief.<sup>658</sup> With these broad powers, the main mechanism for controlling chiefs was through the power of the Republican President to withdraw the recognition of a chief if, after inquiry, the president was satisfied that it was necessary in the interests of peace, order and good government.<sup>659</sup> Using this power, people who were aggrieved by the conduct of a chief could report their grievances to a central government or ruling party official who would prevail on the erring chief with threats of withdrawal of recognition. A notable example of the use of this power as a control on chiefs is the 1972 instance in which Luvale people who were denied registration by two Lunda Chiefs on the grounds that their National Registration Cards bore the names of a Luvale chief from a neighbouring village. The District Governor EL Makusu, a UNIP official, intervened in this situation by negotiating with the concerned chiefs including by impressing upon them the importance of chiefs to comply with the government’s policy. Masuku’s report of how he resolved the dispute states, in part:

What has happened in the two chiefs’ areas is very unfortunate and contrary to Dr. Kaunda’s instruction to all chiefs in Zambia. I then read the President’s speech to the House of Chiefs... Any chief who opposes government policy, frustrates government’s efforts, flirt with or supports divisive elements or condones the activities of people who masquerade as leaders must not expect recognition or payment by this government.<sup>660</sup>

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<sup>658</sup> Chiefs Act, s 12.

<sup>659</sup> Ibid s 4.

<sup>660</sup> Report by District Governor for Zambezi, 11 August 1972, EAP121/2/12/4/12, United National Independence Party of Zambia (UNIP) [1949-1988], ‘President, Speeches [1972-1973]’ (British Library) <<https://eap.bl.uk/archive-file/EAP121-2-12-4-12>>.

Another administrative measure employed by the central government to supervise chiefs was through tours by cabinet ministers, Members of Parliament, and the president, to various provinces and districts to discuss developmental issues with the local leaders including chiefs and party officials.<sup>661</sup> Traditional leaders used these interactions to raise various developmental and social issues affecting their respective areas.

Many chiefs were disappointed with the turn of events as they were turned down when they attempted to collect on the pre-independence promises made by UNIP. For instance, some chiefs whose native authorities were merged with others by the colonial administration sought to regain their thrones under the independence government but were unsuccessful. A good example is chief Muyeleka of Isoka who sought to have his chieftainship recognised by requesting that a Native Authority and Court be established under his authority, but the central government dismissed his request stating that "the party or the government does not choose who should be a chief."<sup>662</sup> Another example of the discontentment by chiefs is that of Lunda chiefs, and in particular Paul Kanyembo, Mwata Kazembe XVII (1961-83), who clashed with UNIP following the independence government's failure to fulfil campaign promises of economic liberation and the changes it introduced to the local governance administration which had the effect of excluding the Lunda royals from the local governance.<sup>663</sup> I discuss the changes to the local governance administration that were introduced by UNIP in the next section.

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<sup>661</sup> EAP121/2/4/9/6, United National Independence Party of Zambia (UNIP) [1949-1988], 'General, tour Reports [1971]' (British Library) <<https://eap.bl.uk/archive-file/EAP121-2-4-9-6>>.

<sup>662</sup> Letter by UNIP National Secretary to Chief Muyeleka of Isoka, 27 January 1966, EAP121/2/4/1/10/2, United National Independence Party of Zambia (UNIP) [1949-1988], 'Chiefs, Correspondence [1962-1964]' (British Library) <<https://eap.bl.uk/archive-file/EAP121-2-4-1-10-2>>.

<sup>663</sup> Giacomo Macola, "'It Means As If We Are Excluded From The Good Freedom': Thwarted Expectations Of Independence In The Luapula Province Of Zambia, 1964-6' (2006) 47 *Journal of African History*, 43.

## **6.4 UNIP's Development Agenda and the 1973 Constitutional Changes**

Following its independence in 1964, Zambia, like many post-independence African states, embarked on a series of law reforms to complete the process of independence. These were aimed at developing the new state and consolidating nationalism. As H Kwasi Prempeh argues, "for Africa's founding elites, the urgency of these twin challenges of nation building and development assumed the character of a national emergency" which could best be addressed by an authoritarian state.<sup>664</sup> As a result of this, demands for decentralisation and proposals to include or integrate traditional governance institutions in the local government were dismissed as being "secessionist-inspired tribalism."<sup>665</sup> In Zambia, the UNIP government implemented a series of constitutional and legal reforms aimed at transforming the local governance and delivering its development projects to the rural communities. These changes culminated in the major constitutional amendment of 1973 which abolished plural politics and introduced one-party rule. This section looks at these constitutional and legal developments with a focus on reforms that impacted on chieftaincy including on the role of chiefs in the local governance of Zambia.

### **6.4.1 Constitutional and Legal Reforms Affecting Chiefs**

As chapter three of this thesis has shown, the local governance of rural areas in Northern Rhodesia fell under the administration of traditional leaders as Native Authorities. The transition to independence saw the transformation of the Native Authorities into bureaucratic local government units, a process which had started in the late colonial period with the inclusion of educated and elected officials into the Native Authority administration. The Monckton Commission which was appointed to review the constitution of the Federation of Rhodesia and Nyasaland reported, in 1960, concerning

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<sup>664</sup> H Kwasi Prempeh, 'Neither "timorous souls" nor "bold spirits": Courts and the politics of judicial review in post-colonial Africa' (2012) 42 (2) *Law and Politics in Africa, Asia and Latin America* 157, 166.

<sup>665</sup> *Ibid* 167.

tribal authorities, that it endorsed the views expressed in the Report of the Nyasaland Constitutional Conference which stated that:

Traditional political institutions in Nyasaland must be harmoniously reconciled with the development of parliamentary government at the centre, so that modern democratic government can be established in an orderly manner....In this process the chiefs would have an important and time honoured role to play.<sup>666</sup>

The commission noted that chiefs were "inevitably losing some of their former authority as a result of constitutional advances based on democratic practices."<sup>667</sup>

As stated in the above section which discusses the power relations between chiefs and nationalist political leaders, chiefs had anticipated this change in the governance structures after independence and wished to be included in the local government reforms. This could be illustrated by the letter written by Mwata Kazembe Kanyembo VI to the minister of Local Government dated 13 March 1963 in which the former expressed his support for the abolition of the ministry of Native Affairs in preference of inclusion of chiefs in the ministry of Local Government and Social Welfare "for sound government, respect to...kingly traditions and customary standards."<sup>668</sup> Notwithstanding these expectations, the Local Government Act which was enacted in 1965 to repeal the Native Authority and the Barotseland Native Authority Ordinances reconstituted native authorities as rural councils headed by elected councillors.<sup>669</sup> Chiefs were no longer in

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<sup>666</sup> Monckton Commission, Report of the Advisory Commission on the Review of the Constitution of Rhodesia and Nyasaland October 1960, 44.

<sup>667</sup> Ibid 45.

<sup>668</sup> Letter by Mwata Kazembe Kanyembo VI to the minister of Local Government, 13 March 1963, EAP121/2/4/2/1/40, United National Independence Party of Zambia (UNIP) [1949-1988], 'Chiefs, Correspondence, [1962-1963]' (British Library) <<https://eap.bl.uk/archive-file/EAP121-2-4-2-1-40>>.

<sup>669</sup> Government of the Republic of Zambia, *Annual Report of the Ministry of Local Government and Housing for the Year 1965* (Government Printer 1968) 2. See also the Local Government Act 1965 sections 7, 11, and 16.

charge of the local councils although they could be incorporated through appointment by the minister.<sup>670</sup>

The Local Government Act 1965 was to apply to the entire country including Barotseland, "notwithstanding anything to the contrary contained in any other written law or in the Barotseland Agreement, 1964" which reserved the local governance to the Litunga and his council.<sup>671</sup> The Act was supplemented by the 1969 constitutional amendment which abolished the rights, liabilities, and obligations of the Zambian government, "whether vested or otherwise," arising from the Barotseland Agreement.<sup>672</sup> With these legislative reforms, the Litunga lost power to appoint judges and councillors and became "just another chief."<sup>673</sup> The government also abolished the mineral rights of the Litunga.<sup>674</sup> It also enacted the Western Province (Land and Miscellaneous Provisions) Act 1970 which terminated the special privileges of the Barotse traditional government by declaring all land in western province to be a reserve within the meaning of the Zambia (State Lands and Reserves) Orders 1928 to 1964 and vested it in the President of Zambia.<sup>675</sup> Other legal reforms to the local government administration are discussed below under subsection 6.4.3 which discusses the local government reforms implemented during one-party rule. But first, a look at the 1973 constitutional change.

#### **6.4.2 The 1973 Constitutional Amendment**

The first major constitutional change in the post-independence period came in 1973. This was preceded by a referendum in 1969 which repealed section 72(3) of the 1964 Constitution which required amendments to the constitution to be approved by a

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<sup>670</sup> Ibid, s 16.

<sup>671</sup> Local Government Act 1965, s 113.

<sup>672</sup> Constitution (Amendment) Act (No.5) 1969.

<sup>673</sup> Gerald L Caplan, "The Secessionist Challenge to Zambia" (1968) 6 (3) The Journal of Modern African Studies 343-360, 358.

<sup>674</sup> Mines and Minerals Act 1969 (repealed).

<sup>675</sup> Western Province (Land and Miscellaneous Provisions) Act 1970, s 2 cited by Mphanza Patrick Mvunga, 'Land Law and Policy in Zambia' (PhD Thesis, University of London 1977) 370.

referendum of more than 50 per cent of the registered voters.<sup>676</sup> The justification given by the government representatives in Parliament for the repeal of the referendum provisions was to enable the Zambian people to create their own constitution through their elected representatives and facilitate the development agenda of the UNIP government.<sup>677</sup> Another justification that was given was that the changes that were needed to transform the society were so substantive that it would have been costly and inefficient to implement them through a referendum, the independence constitution having been essentially a British statute.<sup>678</sup> With the constitutional changes, the government was able to nationalise a number of private sector businesses to facilitate the participation of Africans in the economy as it had set out to do in its 1968 development policy.<sup>679</sup>

The major change brought by the 1973 Constitution was the introduction of a one-party state which was one of the resolutions of the UNIP conference held at Mulungushi Conference Centre in Lusaka in 1972. The new constitution was introduced through the appointment, by the President on 1 March 1972, of a Commission of Inquiry, headed by the then Vice President, Mainza Chona. The commission was popularly known as the Chona Constitutional Review Commission (Chona CRC), which is what the commission will be referred to in this thesis.

The Chona CRC was comprised of 19 members representing government officials (and headed by the Vice President), two representatives of the African National Congress (its president, Nkumbula, and deputy, Nalumino Mundia, having boycotted it), representatives from the labour movement, chiefs, business and industry, UNZA, defence forces, church, and civil society.<sup>680</sup> Chiefs were represented by Paramount

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<sup>676</sup> Ndulo and Kent (n 576) 264.

<sup>677</sup> Sangwa (n 19) 270.

<sup>678</sup> Ibid 271.

<sup>679</sup> Ibid.

<sup>680</sup> Sipalo (n 17) 170-171.

Chief Undi, then president of the House of Chiefs and his deputy, Chief Mukumbi.<sup>681</sup> As can be seen from the composition of the Commission, it was saturated by government officials compared to chiefs or other interest groups. The commission was tasked to consider constitutional changes “necessary to bring about and establish One Party Participatory Democracy in Zambia.”<sup>682</sup> The President justified the decision to establish one-party rule as a response to the demands by a wide selection of Zambians including chiefs.<sup>683</sup> The Commission toured all the provinces and districts to obtain submissions from Zambians and held 67 sittings in total.<sup>684</sup> To make its sittings accessible to many Zambians, the Commission translated its terms of reference in the seven main Zambian Languages and widely published its work throughout the country inviting people to make oral and written submissions.<sup>685</sup> The scope of work for the commission was limited to considering submissions relating to the form of the one party democracy excluding submissions on the pros and cons of the system.<sup>686</sup>

The Commission reported that many petitioners who appeared before it demanded that chiefs should be given more power and influence.<sup>687</sup> Petitioners to the CRC also submitted that chiefs should be included in Parliament or that the House of Chiefs should be expanded to include other interest groups and be given veto powers over bills passed by Parliament. To address these submissions, the Commission recommended that parliament should be expanded to include institutional representatives appointed by named institutions including chiefs, but the

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<sup>681</sup> Statutory Instrument No. 46 of 1972 appointing the Constitutional Review Commission, Sc A.

<sup>682</sup> Ibid.

<sup>683</sup> Report of the National Commission on the Establishment of a One-Party Participatory Democracy in Zambia (Lusaka October 1972)(The Chona Constitutional Review Commission Report), Annex 1.

<sup>684</sup> Constitution of Zambia Act 1973.

<sup>685</sup> The Chona Constitutional Review Commission Report 2-3.

<sup>686</sup> Ibid 3.

<sup>687</sup> Ibid.

recommendation was rejected by the government.<sup>688</sup> Based on this recommendation, the Chona CRC also recommended that the House of Chiefs should be abolished and in its place, a provincial council of chiefs be established in each province as well as a national council composed of chiefs who would be institutional members of Parliament and the chairpersons of the provincial councils.<sup>689</sup> This recommendation was equally rejected by the government as was the recommendation to remove all provisions on chieftaincy from the constitution so that it is regulated by statute.<sup>690</sup> Judging by what was rejected from the recommendations of the Commission, it is quite clear that the process was driven by the central government whose main goal was to establish one-party rule.

The 1973 Constitution came into operation on 25 August 1973 after it was assented to by the President.<sup>691</sup> It repealed the Independence Constitution and replaced it with a new one.<sup>692</sup> Its provisions maintained the structure of the independence constitution by allocating governmental power to three arms of government, namely, the executive, legislature, and judiciary. It also retained the bill of rights which was amended to, among other provisions, allow more flexibility for the government to limit property rights, which enabled the government to address the problem of absentee property owners after several Europeans left Zambia following its independence. The 1973 Constitution also maintained the provisions on the House of Chiefs. The biggest change introduced by this constitution was to recognise UNIP as the only political party.<sup>693</sup> This explains why most research on the constitutional and political history of Zambia during the UNIP administration has focused on this aspect. Although one of the justifications given by the government for introducing one-party rule was to facilitate citizen

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<sup>688</sup> Government Paper No. 1 of 1972, Report of the National Commission on the Establishment of a One-Party Participatory Democracy in Zambia: Summary of Recommendations accepted by the Government (Government Printer 1972) 7.

<sup>689</sup> Chona Constitution Review Commission Report (n 683) 25.

<sup>690</sup> Government Paper No.1 of 1972, 12.

<sup>691</sup> Ndulo and Kent (n 576) 265.

<sup>692</sup> Constitution of Zambia Act 27 of 1973, s 3.

<sup>693</sup> The Constitution of Zambia 1973, art 4.

participation in the governance of the country and its economic resources, it concentrated power in the president and the executive branch of the party.<sup>694</sup> There was therefore no decentralisation of power as the next subsection demonstrates.

Like the independence constitution, the 1973 constitution did not contain express provisions conferring and limiting the power of chiefs save for the provisions on the House of Chiefs. It retained the provisions on the right to secure protection of the law in the same format as the 1964 Constitution.<sup>695</sup> It therefore did not expand the rights to include the right to fair administrative justice and did not strengthen the provisions on legal assistance. With regards to provisions on accountability, one of the major changes introduced in 1973 was the Leadership Code which was intended to control public power by imposing strict financial standards on those holding leadership posts.<sup>696</sup> The Leadership Code applied to specific officers listed in the schedule of the Code including the President and cabinet ministers, judges and magistrates, civil servants, high ranking UNIP officials, and local government employees.<sup>697</sup> The code did not, however, apply to traditional leaders.

In terms of access to justice, the 1973 constitution introduced the Investigator General (also known as the ombudsman) who was the head of the Commission of Investigations.<sup>698</sup> The office was established in 1974 following the enactment of the now repealed Commission for Investigations Act. The Commission had power to investigate administrative processes of the central government ministries, departments, provincial and district administration, administrative agencies, and parastatals and make recommendations to the president.<sup>699</sup> The Act did not list chiefs as forming part of the

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<sup>694</sup> Ndulo and Kent (n 576) 267.

<sup>695</sup> Constitution of Zambia 1973, art 20.

<sup>696</sup> Ibid pt iv.

<sup>697</sup> Leadership Code [1972], EAP121/2/1/7/2, United National Independence Party of Zambia (UNIP) [1949-1988] (British Library) <https://eap.bl.uk/archive-file/EAP121-2-1-7-2>.

<sup>698</sup> Constitution of Zambia 1973, art 11.

<sup>699</sup> Commission for Investigations Act, s3(1).

institutions under the control of the Commission. During its life, the Commission had its offices in the capital Lusaka and rarely had sittings in other parts of the country. It was also largely inefficient on account of poor funding and delays in rendering its opinions on matters presented before it.<sup>700</sup> It was therefore useless in providing meaningful access to justice for people who were adversely affected by the administrative actions of chiefs.

The period also saw considerable use of courts by citizens who challenged the exercise of administrative authority by government officials in reaction to the violation of civil and political rights by state officials in implementation the single party agenda. For instance, courts were called upon to provide oversight in cases involving preventive detention of perceived political opponents or cancellation of trading licenses on grounds of political affiliation.<sup>701</sup> Evidently, this increase in public law challenges did not extend to the majority of the population due to “cultural, geographical, procedural and financial factors.”<sup>702</sup> I explore this further in chapter eight of this thesis which evaluates existing case law and ongoing litigation involving chiefs to assess the extent to which judicial control of administrative authority has been extended to chiefly authority.

#### **6.4.3 Local Government Reforms under One-Party Rule**

The above constitutional changes were complemented by changes to the local government administration which culminated in the enactment of the Local Administration Act of 1980 which merged party organs at the local and district levels to form an integrated local government structure called the district council.<sup>703</sup> Prior to the enactment of this Act, the UNIP administration sought to include chiefs in the local governance by incorporating them in Village Productivity and Ward Development

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<sup>700</sup> Kalunga and Kaaba (n 53) 40-41.

<sup>701</sup> Mumba (n 73) 8.

<sup>702</sup> Robert Martin, 'The Ombudsman in Zambia' (1977) 15 (2) *The Journey of Modern African Studies* 239, 242.

<sup>703</sup> William Tordoff and Ralph A Young, 'Decentralisation and Public Sector Reform in Zambia' (1994) *Journal of Southern African Studies* 285, 286.

Committees which were implemented under the country's First National Development Plan 1966-70. The idea of development committees was carried over from the pre-independence local government structures of UNIP towards the end of colonial rule. Under these structures, royals, entrepreneurs, party officials, and local heads of government departments performed the role of an advisory committee to the native administration to facilitate the implementation of development projects in rural areas.<sup>704</sup> Among the functions of the village development committees was to plan and implement development activities, promote unity among villagers, and generally to do things that were necessary to better the lives of people in rural areas.<sup>705</sup> Village Development Committees were headed by village headmen and women, but where the village headman or woman was considered to be too old to undertake the task, the people were encouraged to vote for an able bodied and conscientious chairperson to undertake the task whilst the village headman or woman maintained the post.<sup>706</sup>

Ward Development Committees had similar functions as Village Development Committees, but they were specifically responsible for providing an efficient and effective administrative machinery to facilitate the implementation of government projects at the ward level.<sup>707</sup> Membership to Ward Development Committees often included party officials and local businesspersons but chiefs could be invited to attend meetings of the committees.<sup>708</sup> In places where the Committees were functional, such as the Ward Development Committee in Chipata, the meetings of the committees provided a platform for the discussion of policy and exchange of information among villagers, traditional institutions, and the government committee.<sup>709</sup> The above notwithstanding, district and provincial development committees under the

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<sup>704</sup> Bond (n 346) 357.

<sup>705</sup> Lühring (n 220) 153.

<sup>706</sup> Presidential Tour to Northern Province, 17-24 July 1971, EAP121/2/4/9/9, United National Independence Party of Zambia (UNIP) [1949-1988], 'Presidential, tour Reports [1971]' (British Library) <<https://eap.bl.uk/archive-file/EAP121-2-4-9-9>>.

<sup>707</sup> Lühring (n 220) 154.

<sup>708</sup> Ibid.

<sup>709</sup> Ibid.

decentralisation policy were hardly implemented and, where they existed, they were staffed by civil servants.<sup>710</sup> This created a leadership vacuum as there were no effective links from the efforts in villages and wards to the district and provincial levels.

Overall, the structural changes proposed by the UNIP government towards decentralisation did not materialise in terms of improved participation and development in the rural communities.<sup>711</sup> One of the challenges noted in the implementation of these reforms was the lack of cooperation at the provincial levels.<sup>712</sup> Efforts were made to address the problems of rural underdevelopment in the Second National Development Plan 1972 – 76 including by appointing a “Working Party to Review the System of Decentralised Administration” in 1971 whose 1972 report concluded that the decentralised system was not working because, among other challenges, there was no real devolution of power from the centre and the quality of staff at the local levels was poor.<sup>713</sup>

## **6.5 Impact of Constitutional and Law Reforms on Chieftaincy**

The overall effect of the various legal and policy changes was to formally exclude chiefs from the local governance and statutory regulation, save for the president’s power to recognise and withdraw the recognition of chiefs under the Chiefs Act. For many rural communities, there was a disconnect between the national and local governance administration, which reinforced the neo-traditional local governance as the choice institution for democratic participation. This was compounded by the implementation of the policy of Zambianisation. This policy entailed the appointment of several educated Africans in the central government and civil service positions which left the rural

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<sup>710</sup> Ibid 155.

<sup>711</sup> Ibid 162.

<sup>712</sup> UNIP Party Conference Minutes [1967], EAP121/2/3/1/2, United National Independence Party of Zambia (UNIP) [1949-1988] 3 (British Library) <<https://eap.bl.uk/archive-file/EAP121-2-3-1-2>>.

<sup>713</sup> Lühring (n 220) 157.

populations with the less educated and more traditional elements who formed alliances with chiefs to fill the vacancies in local governance.<sup>714</sup>

In terms of the relations between the national government and the rural populations, chiefs who participated in the struggles of the nationalist movement such the Mwene Kahale of the Nkoya provided the closest link to the central government through their involvement in UNIP. Mwene Kahale, for instance, was nominated party trustee of UNIP as a reward for his subtle manoeuvring during the independence struggle and became a member of the House of Chiefs after independence.<sup>715</sup> President Kaunda also appeased selected traditional leaders by appointing them or members of their families to government positions.<sup>716</sup> Apart from the political links, traditional leadership institutions continued to act as intermediaries for participation by the local people in the governance of their communities through networks of patronage, nepotism, regionalism, and ethnicity, among others.<sup>717</sup> Wim van Binsbergen describes this perspective as the sociological view of democracy whereby the people “actively and responsibly participate, and have a sense of participation, in the major decisions that affect their present and future, in such a way that they see their major values and premises respected and reinforced, in a political process that links the local and the national.”<sup>718</sup> With the marginalisation of traditional institutions from formal systems of local governance, the rural people participated more in traditional leadership by reviving historical forms of protocol and symbolism expressed in music at the royal courts.<sup>719</sup>

With the deterioration of the economy in the late 1970s through to the late 1980s, middle class rural people began to broker the exchange of loyal support for state

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<sup>714</sup> Bond (n 346) 361.

<sup>715</sup> Wim van Binsbergen, 'Aspects of Democracy and Democratisation in Zambia and Botswana: Exploring African Political Culture at the Grassroots' (1995) 13 (1) *Journal of Contemporary African Studies* 3, 17.

<sup>716</sup> Zeller (n 361) 223.

<sup>717</sup> Van Binsbergen (n 715) 8.

<sup>718</sup> *Ibid* 9.

<sup>719</sup> *Ibid* 19.

recognition and participation in the local and national politics.<sup>720</sup> A good example of this is the one given by van Binsbergen of the founding of the Kazanga Cultural Association by middle class urbanites of Nkoya ethnicity of the Western Province as a way of brokering Nkoya citizen loyalty to the central government by linking urban and rural Nkoyas through the organisation and hosting, since 1988, of the Kazanga Cultural Festivals mostly attended by a representative of the central government.<sup>721</sup> The annual traditional ceremonies took the daily expression of protocols at the royal courts to more of a public performance before the national government at the annual traditional ceremonies which are widely covered by the mass media.<sup>722</sup>

## **6.6 Conclusion**

The chapter has discussed chieftaincy in the development of the Independence constitution of Zambia through to the enactment of the 1973 One-Party Constitution. The chapter found that chiefs commanded relative influence in the preliminary period leading up to independence. The scales of power however tilted in favour of the nationalist political parties shortly before independence. Through their position as Native Authority leaders, chiefs were influential in negotiating the terms to be included in the 1963 Northern Rhodesia Order in Council which was a precursor to the Independence Constitution. One such key provisions negotiated was the inclusion of the House of Chiefs with advisory powers to the government and the constitutional recognition of the Barotseland traditional government. As chiefs lost their influence shortly before independence, they were not represented in the delegation that negotiated the independence constitution in London in 1964. As a result, the protection of the special position of Barotseland was not included in the independence constitution but was placed in a separate document although the provisions on the House of Chiefs were maintained.

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<sup>720</sup> Ibid; Baldwin (n 139) Chapter 7.

<sup>721</sup> van Binsbergen (n 715) 19.

<sup>722</sup> Ibid 19.

After independence, the UNIP government implemented ambitious constitutional and law reforms which were aimed at developing the economy and unifying the state. These reforms culminated in the enactment of the 1973 One-Party Constitution. In relation to chieftaincy, the UNIP government abolished Native Authorities and replaced them with elected local governments. This had the effect of formally excluding chiefs from the leadership of the local governance although the government attempted to include them through ward and village development committees which largely failed. The government also abrogated the Barotseland Agreement through a constitutional amendment in 1969 without the consent of the Litunga and his council. Both the Independence and 1973 constitutions did not contain any express provisions conferring or limiting the power of chiefs although they recognised customary law as being applicable to people of the same race or tribe or in civil matters of a personal nature. The control of chiefs was therefore left to the Chiefs Act, through the power of the president to recognise or withdraw the recognition of a chief, and under customary law.

Further both the independence and 1973 constitutions did not contain adequate provisions granting meaningful access to justice for people who are adversely affected by the exercise of public power by chiefs save for the provisions on due process of the law under the bill of rights. Chiefs however continued to govern their local areas pursuant to their powers under customary law and functioned as development and power brokers between the central government and rural areas. This role was further necessitated by the failure of decentralisation and devolution of the bureaucratic governance institutions. The next chapter studies the constitutional changes from 1991 when multiparty politics were reintroduced to 2016 when the latest major constitutional change occurred.

## **Chapter Seven: Constitutional Guarantees Without Corresponding Limits on Chieftaincy (1991 – 2016)**

### **7.1 Introduction**

The previous chapter discussed chieftaincy in the post-independence constitutional law history of Zambia with a focus on the independence and the 1973 constitutions as the key events. This chapter develops the discussion on chieftaincy in the post-independence constitutional law history of Zambia by focusing on the 1991 constitution which re-introduced plural politics and its amendment in 1996 and 2016 respectively, as the key events. The chapter, like the previous one, studies the position of chiefs in the constitutional law development. It discusses the participation of chiefs in the various constitutional review processes and analyses constitutional provisions on chieftaincy against the identified key features of public law. The remainder of the chapter is divided into four sections. The first section puts the contribution of this thesis into context by interrogating the absence of chiefs in existing literature that has studied the constitutional law history of Zambia for the period under discussion. The second section discusses the 1991 constitution and its amendment in 1996. The 2016 constitutional amendment is discussed separately in the third section. This is because the 2016 constitutional amendment introduced substantial changes on chieftaincy, such as the repeal of provisions which empowered the republican president to recognise and withdraw recognition of chiefs, which merit separate attention. The section also discusses the developments that have occurred following this amendment, including the most recent attempt, in 2019, to repeal some of the provisions of the 2016 amendment. The chapter ends with a conclusion which summarises the key findings on chieftaincy in the constitutional law history of Zambia.

## **7.2 Absence of Chieftaincy in Existing Literature on Zambia's Constitutional Law History (1991-2016)**

Existing literature on the constitutional law history of Zambia for the period under discussion, 1991 to 2016, has tended to unduly focus on the political changes from one-party rule to multi-party democracy and the efforts by the central government to consolidate plural politics. This literature has therefore tended to emphasise the role played by various political parties and neglected other social actors such as chiefs.<sup>723</sup> This trend in the literature is expected considering the coincidence of Zambia's major constitutional changes with changes in electoral politics. For instance, the demands for multi-party politics towards the end of 1990 necessitated the constitutional reforms in 1991 that saw the repeal of the 1973 constitution. Further both the 1996 and 2016 constitutional amendments were enacted in an election year. Another interesting point worth noting about the existing literature is that apart from Marja Hinfelaar, O'Brien Kaaba and Michael Wahman<sup>724</sup> who have analysed provisions of the 2016 constitution to assess the extent to which it changed the level of executive power, the 2016 constitutional changes have yet to receive sufficient scholarly attention.

A notable example of literature that focuses on the political changes is the article by Jackton Ojwang which conducts a comparative analysis of the impact of the political changes on the constitutional law of Kenya and Zambia.<sup>725</sup> Ojwang discusses the similarities and differences in the constitutional and political developments of the two countries in their historical context to discern the consequences of these developments on constitutional theory in Africa.<sup>726</sup> Ojwang limits the scope of his analysis to the following six factors: (1) The juridical and extra juridical factors in the direction of

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<sup>723</sup> John P Sangwa, 'Constitution-Making and Experience with Constitutional Rule in Zambia Since 1990' (2000) 10 *Transnat'l L & Contemp Probs* 483; Ndulo and Kent (n 21).

<sup>724</sup> Marja Hinfelaar, O'Brien Kaaba and Michael Wahman, 'Electoral turnovers and the disappointment of enduring presidential power: constitution making in Zambia' (2021) 15 (1) *Journal of Eastern African Studies* 63, DOI: 10.1080/17531055.2020.1851515.

<sup>725</sup> Jackton B Ojwang, 'Constitutional Law and Political Change: Recent Developments in Zambia and Kenya' (1992) 4 *Afr. J. Int'l & Comp. L.* 325.

<sup>726</sup> *Ibid* 325.

change; (2) substance of constitutional change where elections produce a one-party system; (3) constitutional change and the freedoms of association and speech; (4) constitutional change and electoral law; (5) constitutional change and the party whip; and (6) constitutional change and parliamentary discipline.<sup>727</sup> These six factors limit the scope of his analysis to central government institutions and political players to the exclusion of other social institutions such as chieftaincy.

Ojwang provides us with useful information to enable us to understand the historical and political contexts within which the constitutional changes of the two countries occurred. For both Zambia and Kenya, the constitutional change to facilitate the shift from one-party rule to multi-party politics was adopted through Parliament. "In both cases the party is the principal instrument of change, and even the parliamentary act which sanctifies the political change emerges from the original decision of the party."<sup>728</sup> In the case of Zambia, the decision to introduce multi-party politics through constitutional reform was accompanied by the appointment of a Constitutional Review Commission which facilitated the collection of views from the people and presented recommendations to the President.<sup>729</sup> This article helps us to understand how and why traditional leaders were excluded from the constitutional processes and the literature that studies these processes which were driven by the executive and meant to facilitate the political transition which the exigencies of the time demanded. Building on this literature, this chapter analyses the reports of the various constitutional review commissions that were appointed to facilitate the constitutional amendments in Zambia. Reports of Constitutional Review Commissions are analysed to assess the extent to which traditional leaders participated in the processes, both as members of the relevant constitutional review commissions or through submissions to the deliberative bodies by analysing how their views were incorporated in the constitutions produced by these processes.

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<sup>727</sup> Ibid 332.

<sup>728</sup> Ibid 333.

<sup>729</sup> Ibid.

Another work worth highlighting is the article by John Sangwa which analyses the 1991 constitution of Zambia from the context of the economic and social hardships experienced under Kenneth Kaunda's one-party rule.<sup>730</sup> Sangwa argues that:

By 1989, it was clear that the one-party system as a vehicle for economic development, political stability and national unity had failed to meet its declared goals...The solution lay in carrying out economic and social reforms, which had to be pursued within a revitalised constitutional framework.<sup>731</sup>

Sangwa argues that the appointment of the Constitutional review commission by President Kaunda, on 24 September 1990 was in response to demands for democratisation, political pluralism, and diversification of the economy.<sup>732</sup> Sangwa then proceeds to discuss the ensuing constitutional amendment process including the composition of the Constitutional Review Commission (CRC) tasked to review the constitution. Sangwa however focuses his analysis of the 1990 CRC on the two main political party interests at the time, the ruling United National Independence Party (UNIP) and the opposition Movement for Multiparty Democracy (MMD).<sup>733</sup> The MMD boycotted the commission citing a disproportionate majority of UNIP officials or appointees.<sup>734</sup> The MMD also threatened to boycott the 1991 elections if their demands were not incorporated in the draft constitution.<sup>735</sup> Sangwa concludes that as a result of these contentions between the key political parties, the document that was finally adopted was "an unsatisfactory compromise" between the contending parties to facilitate multiparty elections and did not address the economic and social pressures of the time.<sup>736</sup> Sangwa notes similar political contentions with regards to the 1996

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<sup>730</sup> John P Sangwa, 'Constitution-Making and Experience with Constitutional Rule in Zambia Since 1990' (2000) 10 *Transnat'l L & Contemp Probs* 483.

<sup>731</sup> *Ibid* 487.

<sup>732</sup> *Ibid* 489.

<sup>733</sup> *Ibid* 489.

<sup>734</sup> *Ibid*.

<sup>735</sup> *Ibid*.

<sup>736</sup> *Ibid* 492.

constitutional amendment which was also enacted in an election year with the then President, Frederick JT Chiluba, firmly intent on securing his power position amidst grim economic conditions and following Kenneth Kaunda's announced return to active politics.<sup>737</sup> Sangwa's account of the social and political context within which the 1991 constitution and its amendment in 1996 were adopted, like Ojwang above, helps us understand the apparent absence of chieftaincy in the constitutional reforms and the literature that has studied these reforms.

A few scholars have discussed chieftaincy in the constitutional law history of Zambia during the period under review, albeit in passing. A notable example is the article by Carlson Anyangwe concerning the 1996 constitutional amendment which discusses chieftaincy in its concluding paragraphs. Anyangwe argues that the 1996 constitution sought to address demands for the rehabilitation and participation of chiefs in the local governance in a timid manner by restoring the House of Chiefs, which was repealed by the 1991 constitution, as an advisory body to the President and providing for a constitutionalised local government system based on democratic elected councils.<sup>738</sup> Anyangwe also notes the importance of chieftaincy which he argues "is making a dramatic entry into African constitutions" although African constitutional lawyers do not appear to address their minds to the phenomenon.<sup>739</sup> Muna Ndulo also stresses the need for African states to make every effort to "integrate traditional institutions into the modern political structures so that all institutions are made accountable and responsive to the people."<sup>740</sup> This thesis hopes to build on this literature by pulling together existing multidisciplinary literature on the chieftaincy and constitutional law history through socio-legal research.

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<sup>737</sup> Ibid 496-7.

<sup>738</sup> Ibid 30.

<sup>739</sup> Ibid 29.

<sup>740</sup> Muna Ndulo, 'The Democratic State in Africa: The Challenges for Institution Building' (1999) 31 Zam LJ 1, 20.

A notable example of the use of interdisciplinary research to study constitutional history is the work by Sishuwa Sishuwa which, although focussing on political leaders, takes an inter-disciplinary approach by analysing the coalition between civil society organisations and Michael Sata, then leader of the leading opposition political party, the Patriotic Front (PF) in the early processes that led to the 2016 constitutional amendment.<sup>741</sup> Sishuwa argues that Sata combined his ethno-populist strategy with civil society concerns built around constitutional reforms for his electoral bid in the 2011 general election.<sup>742</sup> Sishuwa focuses on a very specific unit of analysis, the coalition between Michael Sata and civil society organisations in the constitutional amendment process. This narrow focus provides a deeper understanding of the power relations and position of the specific actors in the constitutional review process. A similar approach is attempted here with a focus on chieftaincy as the relevant empirical phenomenon for the study of constitutional law history.

This chapter, like the previous one, contributes to the existing literature on public law in Zambia by producing descriptive and analytical literature on the position of chiefs in the constitutional law history during the period under review. It also analyses the various constitutional provisions against the two key features of public law identified in chapter five of this thesis, namely, norms that empower and limit public administration and provide meaningful access to justice for people who are adversely affected by the exercise of public power. The chapter also contributes to exiting literature on constitutional law history by analysing the 2016 constitutional amendment, from the perspective of the chieftaincy.

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<sup>741</sup> Sishuwa Sishuwa, 'Join Me to Get Rid of this President': The Opposition, Civil Society and Zambia's 2011 Election' in T Banda and others (ed), *Democracy and Electoral Politics in Zambia* (Brill 2020) 11.

<sup>742</sup> Ibid.

### 7.3 The 1991 Constitution and 1996 Amendment

This section discusses the development of the 1991 constitution and its amendment in 1996. It focuses on the role played by chiefs in the review processes and analyses the constitutional provisions on chieftaincy. The section is divided into two parts. The first part focuses on the 1991 constitution which repealed the provisions relating to the House of Chiefs. The second part discusses the 1996 constitutional amendment which re-introduced the House of Chiefs and banned chiefs from participating in active politics.

#### 7.3.1 The 1991 Constitution

As shown by the review of existing literature above, the process of constitutional change in 1990 was initiated by the ruling United National Independence Party (UNIP) in response to sustained pressure by citizens to democratise, which was seen as one of the solutions to socio-economic pressures of the time.<sup>743</sup> President Kenneth Kaunda initiated the process by appointing a commission of inquiry using his powers under the Inquiries Act.<sup>744</sup> The Commission was chaired by Professor Mphanza Patrick Mvunga, then solicitor general, by whose name the Commission came to be popularly known as the Mvunga Constitution Review Commission (Mvunga CRC).<sup>745</sup> The commission was comprised of 22 members including one chief, Bright Nalubamba, who was a member of the central committee of UNIP at the time.<sup>746</sup> Of the 22 members, only two came from the main opposition political party, the MMD.<sup>747</sup> The two commissioners representing the MMD did not take up their appointment citing disproportionate representation by appointees and sympathisers of UNIP on the Commission.<sup>748</sup> The commission was tasked to “examine and determine a system of political pluralism that

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<sup>743</sup> Sangwa (n 730) 488.

<sup>744</sup> Ojwang (n 725) 334.

<sup>745</sup> Ndulo and Kent (n 21) 17.

<sup>746</sup> Republic of Zambia, *Summary of Recommendations by the Mvunga Constitution Review Commission and Government's Reactions* (1991) 1.

<sup>747</sup> Ibid.

<sup>748</sup> Sangwa (n 730) 489.

would ensure a government, which would be strong enough to rule Zambia and guarantee the personal liberties and freedoms of the citizens.”<sup>749</sup>

The Commission collected oral submissions at public hearings and also received written submissions.<sup>750</sup> The public hearings were held at provincial centres between 18 October 1990 and 18 January 1991.<sup>751</sup> The commission justified its decision to limit the hearings to provincial centres on account of time constraints because it was mandated to complete its assignment within four to five months of its appointment.<sup>752</sup> The House of Chiefs submitted to the Commission in institutional capacity among other institutions that made submissions.<sup>753</sup> The Mvunga CRC also sent delegations to the United States of America, Britain, and Sweden for comparative experience.<sup>754</sup>

The Commission submitted its report and draft constitution to President Kaunda in April 1991. The MMD rejected the draft constitution and threatened to boycott the elections, to be held later that year, if their concerns were not addressed.<sup>755</sup> UNIP made concessions on some of the proposals by the MMD as a compromise to facilitate the 1991 elections, but the resulting constitution left many issues of constitutionalism unaddressed.<sup>756</sup>

The agreed upon draft was enacted by Parliament in August 1991 and multiparty elections were held two months after.<sup>757</sup> The constitution was enacted as a schedule to the Constitution of Zambia Act 1991. All existing laws that were consistent with the new constitution continued in force.<sup>758</sup> The 1991 constitution repealed the Constitution of

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<sup>749</sup> SI 135 of 1990 (as cited in Sangwa (n 730) 490).

<sup>750</sup> Mvunga Commission, Constitution Report (1991) 2.

<sup>751</sup> Ibid.

<sup>752</sup> Ibid.

<sup>753</sup> Ibid 3.

<sup>754</sup> Ibid.

<sup>755</sup> Sangwa (n 730) 489.

<sup>756</sup> Ibid 492.

<sup>757</sup> Ndulo and Kent (n 21) 17.

<sup>758</sup> Constitution of Zambia Act 1991, s 6.

Zambia 1973.<sup>759</sup> Its structure was like the independence constitution and in many respects reproduced its provisions.<sup>760</sup> It maintained the governance structure and functions between the executive, judiciary, and a unicameral legislature. The constitution also contained provisions for the protection of human rights and freedoms, subject to limitations listed in the Bill of Rights.<sup>761</sup>

Article 18 of the Constitution contains provisions on the secure protection of the law which are substantially the same as the independence constitution. It provides for the right to fair trial including the recognition of the right to legal representation at one's own expense. The bill of rights has remained unchanged on account of failure to hold a successful referendum to amend the bill of rights demanded by article 79 of the Constitution of Zambia, as the below discussion of the 1996 and 2016 amendments demonstrate. The law regulating the provision of legal aid remained unchanged until March 2021 when a new Legal Aid Act was enacted to, among other things, provide for the regulation of private legal assistants and paralegals.<sup>762</sup>

The 1991 constitution abolished the House of Chiefs. In its place, article 74 empowered Parliament to create a House of Representatives, by a two thirds majority vote, which would perform such functions as may be prescribed. This was based on the recommendation by the Mvunga CRC to dissolve the House of Chiefs and instead incorporate chiefs into a house of representatives which would be introduced as a second chamber of Parliament.<sup>763</sup> The Commission's recommendation was based on the submissions of petitioners who called for the retention and enhancement of the House of Chiefs by giving it legislative authority.<sup>764</sup> Although the constitution empowered

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<sup>759</sup> Ibid s 3.

<sup>760</sup> Richard C Nzerem, 'A Fresh Start: Zambia's Third Republican Constitution' (1992) 18 (3) *Commw L Bull* 1188, 1190.

<sup>761</sup> Constitution of Zambia 1991, Pt III.

<sup>762</sup> Legal Aid Act No 1 of 2021.

<sup>763</sup> Mvunga Commission, *Constitution Report* (1991) 66.

<sup>764</sup> Ibid.

Parliament to create a House of Representatives, it did not contain any provisions relating to the composition, powers, and functions of that House. In the end, Parliament did not pass the requisite resolution to give life the provision until it was repealed in the 1996.<sup>765</sup>

The Mvunga CRC reported that most petitioners including the House of Chiefs were opposed to the participation of chiefs in active politics.<sup>766</sup> They also opposed the appointment of chiefs to political posts.<sup>767</sup> The Commission however recommended that individual chiefs who aspired for political office should not be restrained.<sup>768</sup> Based on this recommendation, the 1991 constitution did not limit the active participation of chiefs in politics. Chiefs were therefore free to contest the 1991 general election although none of them was elected as a member of parliament.<sup>769</sup>

The 1991 Constitution did not contain any provisions on the local government. A few petitioners who submitted to the Commission had suggested that provincial assemblies or councils comprised of elected leaders and chiefs in the provinces should be created as a step towards decentralising governmental power.<sup>770</sup> Instead, the constitution provided for the position of ministers responsible for administering the province.<sup>771</sup> A new Local Government Act was enacted in 1991. This Act repealed the Local Government Administration Act 1980 enacted by the UNIP administration under the single party rule. The main impact of the 1991 Local Government Act was that it

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<sup>765</sup> Anyangwe (n 67) 7.

<sup>766</sup> Mvunga Commission, 66.

<sup>767</sup> Ibid.

<sup>768</sup> Ibid.

<sup>769</sup> National Assembly of Zambia, Members Of The Northern Rhodesia Legislative Council And National Assembly Of Zambia, 1924-2021 (National Assembly of Zambia)  
<[https://www.parliament.gov.zm/sites/default/files/images/publication\\_docs/Members%20of%20Parliament%20of%20Zambia%201924-2021%20First%20Edition%20March%202021..pdf](https://www.parliament.gov.zm/sites/default/files/images/publication_docs/Members%20of%20Parliament%20of%20Zambia%201924-2021%20First%20Edition%20March%202021..pdf)>  
accessed 11 November 2021.

<sup>770</sup> Mung'omba CRC Report (n 31) 502.

<sup>771</sup> Constitution of Zambia 1991, art 46.

removed references to party officials at the local level and replaced them with democratically elected councillors.<sup>772</sup>

### **7.3.2 The 1996 Constitutional Amendment**

As noted above, the 1991 constitution was a compromise to facilitate the transition from one-party rule to multi-party politics. As a result, the MMD during its campaigns for the 1991 elections, pledged to change the constitution once elected and replace it with one that would stand above partisan considerations, strengthen democracy, and promote human rights.<sup>773</sup> Further, the MMD in its manifesto for the 1991 elections promised to give chiefs their respectable role drawing support from the central government.<sup>774</sup> As has been noted from the literature review in chapter four of this thesis, this period coincides with the time when chiefs began to receive considerable policy attention following the fall of one-party and military rule in many post-independence African states. Wolfgang Zeller argues that following the fall of UNIP and re-introduction of multi-party democracy, an institutional vacuum was created in the rural local governance and chiefs were slowly emerging as key players in the rural local governance claiming many of their institutional roles during the colonial period.<sup>775</sup> For instance, "chiefs in Zambia [were] increasingly joining forces to realize common goals, trying to carve out official roles in national and local government, and engaging in debates on key issues, such as rural development, decentralization, constitutional reform, AIDS prevention, and security."<sup>776</sup> Chiefs therefore played a more active role in the constitutional changes that occurred after the reintroduction of plural politics as can be seen from their participation in the constitution review processes and the content of the constitutional provisions on chieftaincy discussed below.

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<sup>772</sup> Chikulo (n 225) 97.

<sup>773</sup> Ndulo and Kent (n 21) 20.

<sup>774</sup> Ibid.

<sup>775</sup> Zeller (n 361) 223.

<sup>776</sup> Ibid.

On 22 November 1993, President Frederick JT Chiluba, using his powers under the Inquiries Act, appointed a Commission of Inquiry to facilitate the adoption of a constitution that would ensure that Zambia is governed in manner that would promote democratic principles, transparent and fair elections, accountability, and protection of human rights, among other values.<sup>777</sup> The commission was comprised of 24 members and chaired by John Mwanakatwe, by whose name it was popularly referred to as the Mwanakatwe CRC. Of the 24 members, "five were appointed by the president, seven by non-governmental organisations, five by opposition parties, two by the church, four by academic and professional institutions, and one by the ruling party MMD."<sup>778</sup> Traditional leaders were represented on the Commission by Chieftainess Chiyaba and Chief Makasa.<sup>779</sup> One of the terms of reference for the commission required it to recommend a constitution that would ensure "effective grassroots participation in the political process of the country, including the type of provincial and district administration to be instituted."<sup>780</sup>

The commission toured the country to collect views from different people between March and September 1994 and conducted 46 public sittings in all the provinces of Zambia.<sup>781</sup> Unlike its predecessor, the Mwanakatwe CRC conducted public sittings at provincial centres and selected districts to broaden the scope of obtainable submissions.<sup>782</sup> It reported overwhelming response from members of the public including chiefs.<sup>783</sup> The Commission also sent delegations to Sweden, Norway, Denmark, and Finland for comparative experience.<sup>784</sup> It submitted its report and draft constitution to President Chiluba on 16 June 1995.<sup>785</sup> The Commission also published its

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<sup>777</sup> Ibid.

<sup>778</sup> Sangwa (n 730) 494.

<sup>779</sup> Report of the Mwanakatwe Constitution Review Commission (1995) 3.

<sup>780</sup> Ibid 5.

<sup>781</sup> Ibid 7.

<sup>782</sup> Ibid.

<sup>783</sup> Ibid 9.

<sup>784</sup> Ibid 8.

<sup>785</sup> Ndulo and Kent (n 21) 9.

report in the media to facilitate extensive debate.<sup>786</sup> "The draft constitution was based on the oral submissions of 996 petitioners and 519 written submissions from individuals and institutions."<sup>787</sup>

One of the recommendations of the Commission, which was rejected by the government, was that the constitution should be adopted by a constituent assembly attended by representatives of all political parties and people drawn from many segments of the Zambian society including "two elected representatives of chiefs from each province elected by the Chiefs Council."<sup>788</sup> The refusal by the government to adopt the constitution through a constituent assembly and national referendum made many interest groups to reject the 1996 draft constitution.<sup>789</sup> Chiefs expressed their protest against the government's decision to adopt the constitution through parliament through a public petition against the constitution in which they attacked the draft constitution for being "centralist and highly tyrannical in relation to traditional tribal kingdoms."<sup>790</sup> Despite the widespread criticism, government proceeded to amend the constitution through Parliament by enacting the Constitution of Zambia (Amendment) Act 1996 which essentially repealed and replaced every part of the constitution apart from the bill of rights and the amendment clause which required a referendum to be amended.<sup>791</sup>

The Mwanakatwe CRC recommended that chieftaincy should be strengthened by recognising traditional leaders in the constitution. The Commission also recommended that chiefs should be fully involved in and superintend on development projects at local levels as a way of bridging the gap between the central government and the grassroots

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<sup>786</sup> Ibid 8.

<sup>787</sup> Sangwa (n 730) 496.

<sup>788</sup> Mwanakatwe Constitutional Review Commission, Report of the Constitutional Review Commission (1995) 205 (as cited in Matibini (n 46) 11).

<sup>789</sup> Ndulo and Kent (n 21) 24.

<sup>790</sup> Nyambe Sumbwa, 'Traditionalism, democracy and Political Participation: The Case of Western Province, Zambia' (2000) 21(3) African Study Monographs 105, 118.

<https://doi.org/10.14989/68196>

<sup>791</sup> Ndulo and Kent (n 21) 24.

level.<sup>792</sup> It also recommended that the House of House Chiefs, which had been abolished by the 1991 constitution, should be restored and that chiefs should remain politically neutral.<sup>793</sup>

One of the key provisions in the 1996 constitutional amendment was to formally establish chieftaincy in the constitution as follows:

Subject to the provisions of this Constitution, the Institution of Chief shall exist in any area of Zambia in accordance with the culture, customs and traditions or wishes and aspirations of the people to whom it applies. In any community, where the issue of a Chief has not been resolved, the issue shall be resolved by the community concerned using a method prescribed by an Act of Parliament.<sup>794</sup>

The amendment also constituted chieftaincy as a body corporate with power to hold assets in trust for the institution and the people under its authority.<sup>795</sup> With this provision, chieftaincy was given legal personality apart from the holders of chiefly office. It also gave the “traditional or cultural leader” privileges and benefits “conferred by the Government and the local government or as that leader may be entitled to under culture, custom and tradition.”<sup>796</sup> These provisions enhanced the position of chiefs under constitutional law. However, no new legislation or amendment to the Chiefs Act was introduced to reflect these constitutional provisions or to prescribe the process by which issues to do with chiefs would be resolved by the concerned community.

Further, despite expressly establishing the institution of chieftaincy as a corporate body in accordance with the culture and traditions of the people and recognising the powers and privileges of chiefs in the local government, the 1996 constitutional amendment fell short in prescribing the limits on chiefly authority. Its regulation was therefore left to

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<sup>792</sup> Mung’omba CRC (n 31) 548.

<sup>793</sup> Ibid.

<sup>794</sup> Constitution of Zambia (Amendment) 1996, art 127.

<sup>795</sup> Ibid, art 128.

<sup>796</sup> Ibid.

customary law and statute. Notwithstanding these provisions, the Constitution did not amend the provisions on the application of customary law. It remained as prescribed under the bill of rights as an exception to the prohibition of application of discriminatory laws when applied to people of the same race or tribe or respect to matters of personal law.<sup>797</sup> Further, no amendments were made to the law regulating individual courts to clarify the application of customary law. Furthermore, no amendments were made to the Chiefs Act or the Local Government Act to confer and limit the powers of chiefs following the constitutional amendment. As above stated, the constitution did not improve the provisions on access to justice for people who were adversely affected by the exercise of chiefly power owing to the failure to amend the bill of rights to include the rights to administrative practice. The Mwanakatwe CRC had recommended that the right to administrative justice should be enshrined in the Constitution.<sup>798</sup>

The other change introduced by the 1996 amendment was the repeal of the provisions on the House of Representatives, which was supposed to replace the House of Chiefs but was never created. Whilst in opposition, the MMD had opposed the introduction of a second chamber of Parliament which it had considered to be unnecessary and a waste of public resources.<sup>799</sup> It is therefore not surprising that the provision empowering Parliament to create a House of Representatives was repealed in 1996. Instead, the 1996 amendment reinstated the House of Chiefs with advisory powers, in similar terms as the 1973 Constitution, contrary to the demands and expectations of chiefs that the House of Chiefs should form part of Parliament.<sup>800</sup> Despite its reinstatement by the

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<sup>797</sup> Ibid art 23(4).

<sup>798</sup> Mung'omba CRC Report (n 31) 157.

<sup>799</sup> Neo Simutanyi, 'The politics of constitutional reform in Zambia: From executive dominance to public participation?' in DM Chirwa and L Nijzink (ed) *Accountable Government in Africa Perspectives from public law and political studies* (UCT Press 2012) 26, 31.

<sup>800</sup> Anyangwe (n 67) 30.

1996 amendment, the House of Chiefs only became functional in December 2003 when it was officially opened.<sup>801</sup>

The 1996 constitutional amendment also implemented the recommendation of the Mwanakatwe CRC to ban chiefs from participating in partisan politics.<sup>802</sup> A chief who wished to take up a political appointment was required to give up their position and membership to the House of Chiefs.<sup>803</sup> This provision was strongly opposed by chiefs.<sup>804</sup> This was an interesting shift in the position of chiefs on their participation in active politics which they were opposed to in their submissions in the 1991 constitution which could be explained, in part, by the failure to implement provisions on the establishment of a second chamber of parliament and failure to decentralise. Some commentators have argued that the provision was targeted at barring the then vice president of UNIP, Senior Chief Inyambo Yeta of the Lozi, from participating in the elections which were scheduled to take place in October that year.<sup>805</sup> The 1996 elections were held under this constitution and UNIP boycotted the election in protest of the above and other controversial provisions including a citizenship clause that disqualified former president Kaunda from contesting the polls.

One of the innovations of the 1996 constitutional amendment was the introduction of a constitutional local government. However, the relevant provision merely provided that the local government “shall be based on democratically elected councils on the basis of universal adult suffrage” but left its regulation to statutory law.<sup>806</sup> This notwithstanding, no substantial changes were made to the Local Government Act 1991 except with regards to elections.<sup>807</sup>

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<sup>801</sup> Mung’omba CRC Report (n 31) 548.

<sup>802</sup> Constitution of Zambia 1996 article 129.

<sup>803</sup> Ibid article 133.

<sup>804</sup> Alfred W Chanda, ‘Zambia’s Fledgling Democracy: Prospects for the Future’ (1993-1996) 25 Zam LJ 125, 146.

<sup>805</sup> Sangwa (n 730) 504. See also Zeller (n 775) 216.

<sup>806</sup> Constitution of Zambia (amendment) 1996 art 109.

<sup>807</sup> Chikulo (n 225).

## **7.4 The 2016 Constitutional Amendment**

This section focuses on the 2016 constitutional amendment. It is broken into two subsections with the first one focusing on the amendment process. The detailed account of the amendment process helps us to understand the process by which chiefs were involved in the processes and gained considerable recognition of their power in the latest version of the constitution. The second subsection analyses the provisions of the constitution on chieftaincy. It also discusses events that have occurred following the amendment.

### **7.4.1 The Amendment Process**

The developments that led to the 2016 constitutional amendment began in 2003, approximately a year after president Levy Mwanawasa took office on 2 January 2002 on the MMD ticket taking over from Chiluba. Constitutional reforms formed part of the key issues in 2001 election campaigns and in light of the contested manner in which the 1996 amendment was adopted.<sup>808</sup> On 17 April 2003, President Mwanawasa, using his powers under the Inquiries Act, appointed a Commission of Inquiry chaired by Wila Mung'omba to obtain submissions from the people and come up with proposed changes to the constitution. The 41-member commission included four chiefs namely, Senior Chief Nalubamba, Senior Chief Inyambo Yeta, Chieftainess Nkomeshya Mukamambo II, and Chief Mwansakombe. Senior Chief Inyambo Yeta, quoted by Wolfgang Zeller in an interview conducted in 2005, attributed his appointment more to his personal relationship with President Mwanawasa than his institutional office as follows:

I enjoy a very, very personal relationship with President Mwanawasa, because he is a personal friend of mine. We both are lawyers...That does not necessarily mean that there is recognition of the institution that I represent...The minute you get a chief who is not in good books with President Mwanawasa, the President will be justified in just ignoring the Royal Establishment and say: "Oh no, those people there, we don't have any time for them."<sup>809</sup>

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<sup>808</sup> Mung'omba CRC Report (n 31) 67.

<sup>809</sup> Zeller (n 775) 217.

The above sentiments seem justified considering the proportionate number of only four chiefs appointed to the commission compared to, for instance, members of Parliament who were 10. Several changes were made to the composition of the Commission during its tenure including the appointment of Senior Chief Inyambo Yeta, in May 2004, as Vice chairperson of the Commission.<sup>810</sup>

The terms of reference of the Mung'omba CRC required it to, among other things, recommend a system of government that would ensure that Zambia is governed in a manner that promotes democratic principles, regular and fair elections, transparency and accountability in governance.<sup>811</sup> The commission interpreted this term of reference narrowly as relating to the separation of powers between the executive, legislature and judiciary, and elections.<sup>812</sup> This narrow perspective guided its evaluation of submissions and recommendations on the subject to the exclusion of other leadership institutions in society such as chieftaincy. Another important term of reference was to "examine and recommend effective methods to ensure grassroots participation in the political process of the country, including what type of provincial and district administration should be instituted."<sup>813</sup> The Commission was also required to recommend whether the constitution should be adopted by the National Assembly, a constituent assembly, national referendum or any other method, and the ways of implementing such a recommendation.<sup>814</sup>

The Mung'omba CRC toured all the 150 constituencies of the country at the time and obtained a total 12,569 petitions comprised of 5,203 oral and 7,366 written submissions.<sup>815</sup> The petitions were received from individuals and groups including the

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<sup>810</sup> Mung'omba CRC (n 31) 4.

<sup>811</sup> Ibid.

<sup>812</sup> Ibid 244.

<sup>813</sup> Ibid 5, para 11 of the terms of reference.

<sup>814</sup> Ibid paras 21 and 22.

<sup>815</sup> Ibid 8.

House of Chiefs and traditional rulers.<sup>816</sup> For the first time in the constitutional history of Zambia, the CRC toured African countries, namely, Kenya, South Africa, Uganda, Nigeria, Ethiopia, in addition to India, Sweden, Norway, and Denmark, for comparative experience.<sup>817</sup> The Mung'omba CRC submitted its draft report and constitution to President Mwanawasa on 29 June 2005.<sup>818</sup> It also simultaneously published these documents to the public and received submissions from the public on the draft up to 31 October 2005.<sup>819</sup> Its final report was based on the received petitions, its own research including the comparative studies, and the feedback received from the public after the initial report and draft constitution were published.

The commission received submissions calling for the recognition of the institution of chieftaincy with increased powers including authority to levy tax.<sup>820</sup> Petitioners also called for the removal of the power of the President to recognise or withdraw the recognition of a chief as the same was seen to be undermining the traditional authority and decisions of the local people.<sup>821</sup> Other petitioners called for the abolition of the institution of chieftaincy arguing that it was incompatible with modern democracy, a proposition which the Commission dismissed on account of the fact that "the institution has existed in the country since pre-colonial days and continues to play a key role in the governance of the country."<sup>822</sup> The Commission therefore recommended that the institution of chieftaincy should be retained in the constitution. It also recommended that the issues relating to the relationship between chiefs and the central government, including matters relating to recognition should be addressed through an amendment to the Chiefs Act.<sup>823</sup>

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<sup>816</sup> Ibid.

<sup>817</sup> Ibid.

<sup>818</sup> Ibid 10.

<sup>819</sup> Ibid 10

<sup>820</sup> Ibid 562.

<sup>821</sup> Ibid 556.

<sup>822</sup> Ibid 558.

<sup>823</sup> Ibid 556.

The Commission also received submissions on the possible inclusion of chiefs in the central government by creating a bicameral parliament where chiefs and representatives of other interest groups would sit in an upper chamber.<sup>824</sup> The Commission however dismissed these submissions in favour of retaining a unicameral parliament on the grounds that the socio-cultural diversity of the country would be best served by a unicameral parliament through a suitable electoral system.<sup>825</sup> It also recommended that devolution of power would offer the best option for the participation of traditional leaders in the governance of the country and recommended that parliament may, on two thirds majority, resolve that another chamber be created subject to approval by a national referendum.<sup>826</sup> The Commission also recommended that chiefs should be permitted to participate in active politics since they are viewed as ordinary citizens and do not enjoy any privileges such as immunity against prosecution, a position that was also advanced by the House of Chiefs.<sup>827</sup>

Some petitioners called for an increase in the powers of the House of Chiefs which would include making laws and resolving disputes relating to succession of chiefs.<sup>828</sup> The Commission recommended that the House of Chiefs should be maintained and proposed an increase in the number of representatives from three to five chiefs for each province.<sup>829</sup> The Commission also recommended that the functions of the House of Chiefs should include discussing and making recommendations on matters relating to national development and resolving disputes involving succession to chieftaincy.<sup>830</sup> The Mung'omba CRC also received submissions proposing that chiefs should be entitled to levy taxes from their subjects and receive a percentage of the taxes paid by investors exploiting resources in their local areas. Although the Commission agreed with the

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<sup>824</sup> Ibid 362.

<sup>825</sup> Ibid.

<sup>826</sup> Ibid.

<sup>827</sup> Ibid 551

<sup>828</sup> Ibid 554.

<sup>829</sup> Ibid.

<sup>830</sup> Ibid.

submissions in principle, it recommended that resource sharing within the concept of devolution and cooperative governance should consider chiefs and local communities.<sup>831</sup>

On the nature of the state, the Commission reported that most petitioners who submitted on the subject wanted Zambia to become a federal state. Some of the reasons advanced to support this call were the concentration of power and resources in the central government; marginalisation and neglect of provinces and districts; exclusion of communities and grassroots from meaningful participation in planning and management of development activities; and tribal imbalances in appointments to public office.<sup>832</sup> Federalism was also advocated for because of its perceived capacity to promote self-determination and effective control of the socio-economic development by the local communities.<sup>833</sup> The Commission however dismissed these submissions citing inappropriate geographical and population size and high economic and political costs of implementing federal reforms. The Commission instead recommended a constitutionally based local government system that would decentralise power to the provincial and district levels as the solution.<sup>834</sup>

With regards to the local government, some petitioners submitted that it should revert to the pre-independence system where Native Authorities led by chiefs were empowered to preside over developmental programmes in their areas because they were better placed to steer development than the central government.<sup>835</sup> The Commission concluded that these submissions reflected people's frustrations over the local government system and the exclusion of traditional rulers from politics.<sup>836</sup> The Commission gave a similar interpretation to calls for restoration of the Barotseland Agreement 1964 and recommended that the matter should instead be addressed

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<sup>831</sup> Ibid.

<sup>832</sup> Ibid 74.

<sup>833</sup> Ibid.

<sup>834</sup> Ibid.

<sup>835</sup> Ibid 404.

<sup>836</sup> Ibid 405.

through decentralisation of local government and proposed that the central government and the Barotse Royal Establishment should negotiate an agreement with regards to the future of the Barotseland Agreement.<sup>837</sup>

The Commission recommended that the constitution should provide for the system of local government. It also recommended that the constitutional provision must state the goals, objectives, structures, functions, and financing for the local government.<sup>838</sup> It also recommended that the local councils should be comprised of elected councillors, members of parliament holding constituencies in the district, three chiefs representing all the chiefs in the district, and representatives of the chamber of commerce, defence and security wings.<sup>839</sup> The Commission also recommended that a provincial council, comprised of mayors/council chairpersons and three representatives elected by all chiefs in the province from among the chiefs in the councils at the district level should be created, which would form part of the central government.<sup>840</sup> Whilst recommending more autonomy for viable local authorities, the Commission was sceptical about total devolution of power to the local levels on account of differences in institutional structures and human and financial resources between various provinces and districts.<sup>841</sup>

With regards to the mode of adoption of the constitution, an overwhelming majority of the petitioners demanded that the constitution should be adopted by a constituent assembly.<sup>842</sup> Other petitioners called for adoption of the constitution through a national referendum.<sup>843</sup> In light of these overwhelming submissions in favour an inclusive forum for the adoption of the constitution, the Commission recommended that the

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<sup>837</sup> Ibid 511.

<sup>838</sup> Ibid 406-7.

<sup>839</sup> Ibid 504.

<sup>840</sup> Ibid 507.

<sup>841</sup> Ibid 501.

<sup>842</sup> Ibid 801.

<sup>843</sup> Ibid.

Constitution should be adopted through a constituent assembly and national referendum.<sup>844</sup> The Commission also recommended that the constituent assembly should be created by an Act of Parliament that would prescribe its composition, procedures and functions. The Commission however went further to propose a list of would-be members of the constituent assembly which included 18 representatives of chiefs comprised of two representatives elected from each province by the Chiefs' Council.<sup>845</sup>

The government initially rejected the proposal to adopt the next constitution by a constituent assembly. However in July 2007, following a meeting of political parties represented in Parliament, it was resolved that instead of a constituent assembly, a national constitutional conference should be convened to deliberate on and adopt the draft constitution prepared by the Mung'omba CRC.<sup>846</sup> This decision was unpopular among civil society organisations led by the OASIS Forum, a consortium of civil society organisations, which argued that such a conference could easily be manipulated by the government.<sup>847</sup> Despite these objections from civil society, Parliament enacted the National Constitutional Conference Act which provided for the creation of the National Constitutional Conference (NCC).<sup>848</sup>

The NCC was comprised of 542 members representing a wide section of society including government, civil society, religious organisations, academia, and traditional leaders. Civil society organisations criticised the composition of the conference as being dominated by politicians and government appointees (who accounted for approximately 70 percent of the total number) and boycotted the process as a result.<sup>849</sup> The main opposition political party at the time, the Patriotic Front (PF), also boycotted the process

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<sup>844</sup> Ibid 804.

<sup>845</sup> Ibid 806.

<sup>846</sup> Simutanyi (n 799) 37.

<sup>847</sup> Ibid.

<sup>848</sup> National Constitution Conference Act 2007.

<sup>849</sup> Simutanyi (n 799) 38.

on this account and dismissed its members of parliament who attended the conference in disregard of the party directive.<sup>850</sup> Traditional leaders were represented by 18 chiefs from the House of Chiefs.<sup>851</sup> There was also a mandatory requirement for each nominating institution to send a gender balanced team or ensure that at least 30 per cent of its nominees were women.<sup>852</sup> The National Constitutional Conference submitted its report in August 2010 to then president, Rupiah Banda, who succeeded Mwanawasa following the death of the latter in office in 2008. A Constitution of Zambia bill which was presented to Parliament on 29 March 2011 failed to meet the needed parliamentary threshold because the opposition PF voted against it whilst members of the United Party for National Development (UPND), the second largest political party in parliament, walked out.<sup>853</sup> The then aspiring president, Michael Sata of the PF, promised to deliver a popular constitution within 90 days of being elected and included this promise in his manifesto which was released a few weeks after the defeat of the bill.<sup>854</sup>

Following his electoral victory, Sata, in November 2011, appointed a 20-member Technical Committee and assigned it to examine the reports of the previous constitutional review commissions and in particular the Mung'omba CRC Draft Constitution 2005 and come up with a draft that would represent the views of the Zambian People.<sup>855</sup> This was in keeping with the PF manifesto's pledge to minimise the cost of constitution making, having criticised the NCC for being wasteful.<sup>856</sup> The majority of the members of the Technical Committee were lawyers (13), followed by representatives of churches (4), representatives of civil society organisations (2), and

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<sup>850</sup> Sishuwa (n 741) 23-24.

<sup>851</sup> National Constitutional Conference Act 2007, s 4(f).

<sup>852</sup> National Constitutional Conference, Initial Report of Resolutions of The National Constitutional Conference (2010) 26.

<sup>853</sup> Simutanyi (n 799) 39, Sishuwa (n 741) 25.

<sup>854</sup> Ibid.

<sup>855</sup> Lusaka Times, 'President Sata names Committee of Experts to Review Zambia 's Constitution,' Lusaka Times, 16 November 2011.  
<https://www.lusakatimes.com/2011/11/16/president-sata-names-committee-experts-review-zambia-s-constitution/>. Accessed 17 March 2022.

<sup>856</sup> Hinfelaar, Kaaba and Wahman (n 724) 68.

one chief.<sup>857</sup> The Technical Committee was not created by statute, making it directly answerable to the president. It was also criticised for lacking constitutional expertise and for ethnic imbalance.<sup>858</sup> The Technical Committee commenced its deliberations in December 2011 and submitted its first draft constitution in April 2012.<sup>859</sup>

It gave the public 40 days within which to comment on the draft. This was followed by district and provincial consultative meetings, which culminated into the National Convention in April 2013. The National Convention was a meeting called by the (Technical Committee) where the final draft constitution was to be debated and finally agreed before submitting it to the government.<sup>860</sup>

However, the government delayed in releasing the final draft constitution and accused the Technical Committee of having been hijacked by people intent on “humiliating and embarrassing the government,” a remark that the Committee strongly condemned in its press statement dated January 2014.<sup>861</sup> In the end, the final report of the Technical Committee was never published. President Sata died in office in October 2014 which necessitated the holding of a presidential by-election within 90 days of his death per the 1996 constitution.<sup>862</sup> Constitutional reforms became topical in the electoral debates. During the campaigns, the PF government published the draft constitution and the guidelines for public debate.<sup>863</sup>

The presidential by-election took place on 20 January 2015 and Edgar Lungu of the PF was elected president. The government decided to proceed with the enactment of the constitution in two phases. The first phase was to amend the non-entrenched provisions through Parliament by enacting the Constitution of Zambia Amendment Act

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<sup>857</sup> Lusaka Times (n 855)

<sup>858</sup> Hinfelaar, Kaaba and Wahman (n 724) 69.

<sup>859</sup> Ibid.

<sup>860</sup> Ibid.

<sup>861</sup> Ibid 69.

<sup>862</sup> Constitution of Zambia 1991 as amended in 1996, art 38.

<sup>863</sup> Steven Mvula, ‘New Constitution on Cards’ (Zambia Daily Mail, 26 January 2015) <<http://www.daily-mail.co.zm/new-constitution-cards>> Accessed 17 July 2020.

No 2 of 2016 and President Lungu signed it on 5 January 2016 at a public event.<sup>864</sup> The second phase was to amend the entrenched provisions through a national referendum which took place at the same time as the regular elections in August 2016. The referendum failed to meet the requisite majority threshold.<sup>865</sup> As a result, progressive provisions which expanded the bill of rights to include economic, social, and cultural rights and enshrined the rights to access to justice and to “administrative action that is expeditious, lawful, reasonable and procedurally fair” were not passed into law.<sup>866</sup>

#### **7.4.2 Chieftaincy in the 2016 Constitutional Amendment**

The 2016 constitutional amendment has retained the provisions establishing the institution of chieftaincy as a body corporate in accordance with the culture, customs, and traditions of the people to whom it applies.<sup>867</sup> It goes further to guarantee the institution by abolishing the power of the president to recognise or withdraw the recognition of a chief as follows:

Parliament shall not enact legislation which—

(a) confers on a person or authority the right to recognise or withdraw the recognition of a chief; or

(b) derogates from the honour and dignity of the institution of chieftaincy.<sup>868</sup>

This provision was in response to the demands for increased autonomy of chieftaincy in their submissions to the Mung’omba CRC. The provisions also bear striking resemblance to the provisions of the Constitution of Ghana which was one of the resources consulted

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<sup>864</sup> National Assembly of Zambia, ‘President Lungu Assents to a People-Driven Constitution’ (National Assembly of Zambia) <<https://www.parliament.gov.zm/node/4825>> Accessed 20 March 2022.

<sup>865</sup> Y Syampeyo, ‘Referendum: Missed opportunity for Zambians’ (Zambia Daily Mail, 21 August 2016) <<http://www.daily-mail.co.zm/referendum-missed-opportunity-for-zambians/>> accessed 17 March 2022.

<sup>866</sup> Constitution of Zambia (Amendment) Bill N.A.B 37, 2016, art 31.

<sup>867</sup> Constitution of Zambia (Amendment) Act 2016, art 165(1).

<sup>868</sup> Ibid, art 165 (2).

by the Mung'omba CRC.<sup>869</sup> The Constitution of Ghana however provides for an exception when it comes to determination "of the validity of the nomination, election, selection, installation or deposition of a person as a chief" by a Traditional Council, a Regional House of Chiefs or the National House of Chiefs or a Chieftaincy Committee of any of them in accordance with customary law.<sup>870</sup> The Zambian provision does not, however, contain any provisions relating to resolution of disputes relating to installation or removal of a chief. This appears to have created a vacuum in the regulation of chiefs as the below discussion of the events that followed the declaration of the provisions on recognition of chiefs by the Constitutional Court as unconstitutional show.

The 2016 amendment also modified the ban on chiefs wishing to participate in active politics by permitting chiefs to hold positions in the local councils without the need to abdicate their thrones.<sup>871</sup> This provision is complemented by article 153 which provides for the composition of the local council which includes "not more than three chiefs representing chiefs in the district." Another new provision is article 168(3) which recognises the role of chiefs in "the management, control and sharing of natural and other resources in the Chieftdom" to be regulated by statute. However, the legislative provisions to give effect to the provision have yet to be enacted, as I illustrate in chapter nine of this thesis using the power of chiefs to administer customary land.

The 2016 constitutional amendment has retained the provisions on the House of Chiefs as an advisory body but has increased its composition from three to five chiefs from each province elected by chiefs in the province.<sup>872</sup> It has also lengthened the tenure of office for members of House from three to five years.<sup>873</sup> The chairperson and vice chairperson of the House are elected annually on a rotational basis from each

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<sup>869</sup> Constitution of the Republic of Ghana, art 270.

<sup>870</sup> Ibid, art 270 (3).

<sup>871</sup> Ibid, art 168(2).

<sup>872</sup> Constitution of Zambia (Amendment) 2016, art 169(2).

<sup>873</sup> Ibid, art 170.

province.<sup>874</sup> This rotation enables chiefs from all provinces to have a turn at leading the house notwithstanding regional alliances that may disadvantage some chiefs from minority or unpopular provinces.

The 2016 amendment also provides for devolution of government to provinces, districts, and wards and lists functions of each governance level in a schedule.<sup>875</sup> This schedule however gives exclusive mandate over “land, mines, minerals and natural resources” to the central government despite the recognition of chiefs’ authority over the management and control of natural resources under article 168 above.<sup>876</sup> The amendment also provides for the composition of the local council which consists of elected councillors, an elected mayor or chairperson, and not more than three chiefs representing chiefs in the district and elected by chiefs.<sup>877</sup> The term of office for councillors is five years and coincides with that of the National Assembly.<sup>878</sup> A new Local Government Act was enacted by Parliament in April 2019 but is yet to be fully implemented.

After the 2016 constitutional amendment, the Constitutional Court (introduced by the 2016 amendment), on 27 November 2019, declared sections 3 to 7 of the Chiefs Act, which provided for the recognition and withdrawal of recognition of a chief as unconstitutional. This was in the case of *Webby Mulubisha v The Attorney General*.<sup>879</sup> In that case, Chief Mulubisha of the Nkoya of Western Province asked the court to declare the provisions void for being unconstitutional. Following this judgment, the Government through the Ministry of Chiefs and Traditional Affairs, on 26 February 2020, directed provincial ministries to stop paying subsidies to new chiefs and subchiefs arguing that the payment of subsidies was conditioned upon a chief being recognised in

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<sup>874</sup> Ibid, art 169

<sup>875</sup> Ibid, art 147.

<sup>876</sup> Ibid annex.

<sup>877</sup> Constitution of Zambia (Amendment) 2016, art 153.

<sup>878</sup> Ibid, article 154.

<sup>879</sup> 2018/CCZ/0013 (unreported).

accordance with the provisions of the Chiefs Act, which had been declared unconstitutional.<sup>880</sup>

The four paramount chiefs, namely, the Litunga, Kalonga Gawa Undi, Chitimukulu, and Mpezeni reacted to the above decision of the central government by petitioning the Constitutional Court to, among other reliefs, declare that the institution of chieftaincy continues as defined under the Constitution notwithstanding the declaration of sections 3 to 7 of the Chiefs Act as unconstitutional. The four paramount chiefs also sought to fill the vacuum created by the repeal of the provisions on recognition of chiefs by praying that:

It may be determined and declared that the traditional authority of the Paramount Chiefs to recognise, install, and discipline including dethronement, of any of their subordinate chiefs in accordance with customary law shall continue to be exercised by them.<sup>881</sup>

The above claim was established using the uncontested testimony of the four paramount chiefs in which they argued that customary law empowers them to recognise, install, and discipline senior and junior chiefs in their chiefdoms.<sup>882</sup> This was notwithstanding the long standing contentions, for instance, by various non-Lozi tribes in Western Province who have been opposed to the Litunga's power to approve their chiefs before they could be recognised by the President. This power by the Litunga was subject to litigation in the case of *Edward Mbombola Moyo (suing as Chief Mutondo) v Prince Makweti Isiteketo (sued as Senior Chief Amukena) and the Attorney General*, a case that was commenced in March 2000, way before the 2016 amendment to the Constitution.<sup>883</sup> In that case, the claimant, a Nkoya chief, sought a declaration that section 3(2)(b) of the Chiefs Act, which empowered the Litunga to approve chiefs in

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<sup>880</sup> Letter by the Permanent Secretary, Ministry of Chiefs and Traditional Affairs, 26 February 2020 exhibited in courts documents in *His Royal Highness The Litunga and 3 Others v The Attorney General* 2020/CCZ009 (unreported).

<sup>881</sup> Petition filed in *His Royal Highness The Litunga and 3 Others v The Attorney General* 2020/CCZ009 (unreported).

<sup>882</sup> *Ibid.*

<sup>883</sup> Appeal No. 168 /2017.

Western Province, was unconstitutional owing to the differences in customs and traditions between the Nkoyas and Lozis.

Further, shortly after the Constitutional Court delivered its judgment in favour of the four paramount chiefs, the Mbunda Royal Establishment of Western Province protested against the decision as follows:

The Mbunda Royal Establishment wishes to congratulate the four paramount chiefs of Zambia, Lubosi Imwiko of the Lozi, Kalonga Gawa Undi of the Chewa, Mpezeni of the Ngoni and Chitimukulu of the Bemba on the Constitutional Court ruling, delivered in their favour in respect of powers to recognise, install, discipline and dethrone their subordinates in accordance with customary law. It is therefore in view of this Constitutional Court ruling that we wish to caution particularly the Litunga of the Lozi speaking people not to abuse this authority to venture outside his Lozi traditional jurisdiction. We further wish to remind the Litunga and his Kuta that Mbundas are not Lozi in every way.<sup>884</sup>

The Mbunda chief, Mwene Kandala, is one of the chiefs that the Litunga listed as forming part of the 131 chieftainships under his jurisdiction. The Mbunda Royal Establishment's argument is that the Litunga no longer enjoys the power to recognise Mbunda chiefs because the definition of a chief under the constitution makes no reference to recognition by any authority. Article 266 of the Constitution defines a chief a "person bestowed as chief and derives allegiance from the fact of birth or descent, in accordance with the customs, traditions, usage or consent of the people in a chiefdom." Could the judgment of the Constitutional Court in the case of the Paramount Chiefs have modified the position of customary law by giving a power of recognition to paramount chiefs? This is an interesting subject for future research on chieftaincy to study how courts will develop jurisprudence in cases involving the installation of

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<sup>884</sup> Mbunda Royal Establishment, 'Press Statement dated 18 July 2021' (Barotseland Watchdog Facebook Page, 23 July 2021) <[https://www.facebook.com/barotselandwatchdog2/photos/a.877849439060553/2063935163785302/?\\_rdr](https://www.facebook.com/barotselandwatchdog2/photos/a.877849439060553/2063935163785302/?_rdr)> Accessed 23 July 2021.

subchiefs, particularly in Western province where the Chiefs Act gave the Litunga the power of recognition, following the repeal of the provisions on recognition.

In addition to attempting to discontinue paying chiefs their subsidies, the government attempted to repeal article 165 of the Constitution through a failed constitution amendment bill in 2019.<sup>885</sup> The 2019 amendment bill also sought to completely ban chiefs from seeking political office, including that of councillor.<sup>886</sup> The bill also sought to amend provisions on the House of Chiefs by repealing the provision that requires the election of the Chairperson and vice chairperson to be on a rotational basis.<sup>887</sup> The 2019 constitution amendment bill failed to gather the relevant majority threshold of two-thirds of all members of Parliament after opposition UPND MPs walked out of Parliament.<sup>888</sup> The UPND attributed its decision to boycott the constitutional amendment to the failure by government to generate consensus.<sup>889</sup> The amendment bill was drafted by a forum of delegates mostly appointed by the government that sat for 16 days and proposed sweeping and controversial amendments to the constitution ahead of the heavily contested August 2021 general election.<sup>890</sup>

To sum up, the 2016 constitutional amendment has arguably strengthened the position of chiefs. This can be deduced from the repeal of the provisions which empowered the President, using his powers under the Chiefs Act, to recognise or withdraw the recognition of a chief. The other evidence of the increased recognition of chieftaincy is the acknowledgment of the powers and role of chiefs in the governance of the local

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<sup>885</sup> Constitution of Zambia (Amendment) Bill No 10 of 2019.

<sup>886</sup> Ibid section 58.

<sup>887</sup> Ibid section 59.

<sup>888</sup> Michael Kaumba, 'Bill 10 Fails Second Reading Stage' (ZNBC, 29 October 2020) <<https://www.znbc.co.zm/news/bill-10-fails-second-reading-stage/>> accessed 18 March 2022.

<sup>889</sup> Mirriam Chabala, 'Tutwa, his Dialogue Forum can go to hell, we'll meet in Parliament – Mwiimbu' (News Diggers, 30 April 2019) <<https://diggers.news/local/2019/04/30/tutwa-his-dialogue-forum-can-go-to-hell-well-meet-in-parliament-mwiimbu/>> accessed 17 March 2022.

<sup>890</sup> Lusaka Times, 'Given Lubinda grants National Dialogue Forum extension till Saturday – (Lusakatimes.com, 8 May 2019) <<https://www.lusakatimes.com/2019/05/08/given-lubinda-grants-national-dialogue-forum-extension-till-saturday/>> accessed 17 March 2022.

resources. There are however no corresponding provisions to limit the public power of chiefs. Like the previous versions of the Constitution, this function has been left to the regulation of statute or customary law. The repeal of the presidential power to recognise chiefs, which functioned as a control on the public power of chiefs, leaves the regulatory function to customary law norms.

Unlike the previous versions of the constitution, the 2016 amendment contains a list of the laws of Zambia which includes “Zambian customary law which is consistent with (the) Constitution.”<sup>891</sup> Chuma Himonga and Tinenenji Banda have criticised this constitutional provision for its failure to guide courts on the conceptualisation of customary law as living customary law.<sup>892</sup> They argue that conceptualising customary law as living customary law makes it adaptable to constitutional and human rights standards, which is more progressive than striking it down on grounds of unconstitutionality.<sup>893</sup> Although this provision has yet to be interpreted by courts, one could argue that it extends the application of customary law beyond matters of a personal nature to which it was traditionally applied.<sup>894</sup> It would therefore be important for future research to study the public law norms which regulate chiefs under customary law and how the courts develop this area of law.

The failure of the constitution to prescribe corresponding limits on chiefly power could be attributed to the composition of CRCs, and people who have been submitting to the successive CRCs. Firstly, apart from the Mung’omba CRC, none of the previous CRCs conducted public hearings in the villages which meant that the Commissions were deprived of the opinions of the villagers with regards to their relationship to chiefly power and its regulation. Further, although the CRC reports have not disaggregated the

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<sup>891</sup> Ibid, art 7.

<sup>892</sup> Chuma Himonga and Tinenenji Banda, ‘Customary Law in Zambia’s New Constitutional Dispensation: A Tale of Lost Opportunities’ in Caesar Cheelo, Marja Hinfelaar and Manenga Ndulo (eds), *Inequality in Zambia* (Routledge 2022) 239.

<sup>893</sup> Ibid 240.

<sup>894</sup> Munalula (n 648).

data on the population dynamics of its petitioners, one could glean, based on the Mung'omba CRC report which found that "very few women (only 10.7% of the total number of petitioners) made submissions," that it is probable that the review commissions did not obtain the views of those who are most in contact with and likely to be adversely affected by the public power of chiefs.

With regards to provisions on access to justice for persons who are adversely affected by the exercise of public power of chiefs, the failure of the referendum on the bill of rights prevented the passing of the proposed amendment which sought to include the right to fair administrative action in the bill of rights.<sup>895</sup> The 2016 constitutional amendment however provides for the office of the Public Protector, a successor of the Investigator General, who has power to "investigate an action or decision taken or omitted to be taken by a State institution in the performance of an administrative function."<sup>896</sup> Unlike its predecessor which could only make recommendations to the president, the Public Protector has power to bring an action before court, hear a complaint, and make a binding decision.<sup>897</sup> It is however unclear whether the Public Protector has jurisdiction over chiefs owing to the ambiguous definition of a "state institution" under the constitution. The constitution defines a "state institution" as "includes a ministry or department of the Government, a public office, agency, institution, statutory body, commission or company in which the Government or local authority has a controlling interest, other than a state organ."<sup>898</sup> A "state organ means the Executive, Legislature or Judiciary." This is another interesting phenomenon that should be added on the agenda of future research to assess how the Public Protector exercises its powers over time with regards to chieftaincy.

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<sup>895</sup> Kalunga and Kaaba (n 53) 23-24.

<sup>896</sup> Constitution of Zambia (Amendment) Act 2016, art 224.

<sup>897</sup> Ibid.

<sup>898</sup> Ibid, art 266.

Another important provision on access to justice that is worth noting is article 118 which contains principles of judicial authority which, among others, provides that traditional dispute resolution mechanisms which do not contravene the bill of rights, are consistent with the constitution and other written laws, and are not repugnant to justice and morality shall be promoted. The constitution does not however define traditional dispute resolution mechanisms, nor does it contain any substantive provision on the same.

## **7.5 Conclusion**

This chapter has discussed the constitutional law history of Zambia from 1991, when the one-party constitution was repealed to re-introduce plural politics, to 2016, when the constitution was last amended. The study reveals increased participation of chiefs in the constitution making process both as members of the relevant CRCs mandated to collect views of the people and as petitioners who submitted to the relevant deliberative bodies. The study of the various reports of the successive constitutional review commissions shows that Zambians regard chieftaincy as an important governance institution that has historical and social significance in the lives of people, especially the rural populations. This can be seen from the sustained calls for recognition of chiefs and for chiefs to be assigned more administrative powers including powers of taxation and superintending on development projects in their areas.

Although not all the demands for increased power of chiefs have been implemented, such as the demand for legislative power through creation of an upper chamber of parliament, chiefs have made significant gains in their constitutional position. These gains can be deduced from the provisions of the 2016 constitutional amendment which has abolished the presidential power to recognise chiefs, recognised the power of chiefs over natural resources in their local areas, and incorporated them the local government. Other provisions which have strengthened the position of chiefs include the constitutional recognition of customary law as a source of law and the recognition of traditional dispute resolution mechanisms. The challenge however appears to be that

the constitution having set broad guidelines leaves the regulation of chiefs to customary law and statutes. No new legislation or amendments to the existing legislation has so far been implemented to supplement the constitutional provisions. In this way, the constitution has failed in its role of setting norms that confer and limit public power for accountable leadership.

The constitution has also failed to develop provisions on access to justice for people who are adversely affected by the public power of chiefs mostly on account of the failure to amend the bill of rights to include a justiciable right to fair administrative practice. The regulation of chiefs and traditional governance institutions under the current constitutional law is therefore largely a function of customary law and statute. Without any corresponding changes to the legislation on chiefs following the repeal of the administrative power of the president to recognise and withdraw the recognition of a chief, the limitation of chiefly power therefore largely depends on customary law norms and the courts in the exercise of their function protect the constitution and human rights as well as through their common law jurisdiction in judicial review matters. The next chapter analyses cases involving chiefs to assess how courts have performed this function.

## **Chapter Eight: Judicial Control of Chieftaincy in Zambia**

### **8.1 Introduction**

The previous chapter argued, based on the analysis of the historical developments in the constitutional law after 1991, that chiefs in Zambia have gained considerable recognition and power without corresponding controls on their powers. It also argued that the repeal by the 2016 constitutional amendment of the provisions which empowered the president to limit chiefly power through the power to recognise or withdraw the recognition of a chief has effectively left the control function to customary law mechanisms and the courts. This chapter seeks to understand how courts have exercised this power by analysing cases involving chiefs or challenges to their public power. In so doing, the chapter responds to the second research question posed by this thesis which seeks to assess the extent to which case law involving chiefs has influenced the development of public law in Zambia in its social context. The analysis of cases assists in filling the identified research gap, namely, the absence of chieftaincy in public law literature. The case analysis was supplemented by interviews with selected lawyers who represented the claimants in the analysed cases to understand the context of the cases as well as obtain the views of the lawyers on how they perceive chiefly authority and public law.

The remainder of this chapter is divided into three sections. The first section briefly explains the process by which the case analysis and interviews were conducted to give a conceptual background to the discussion that follows. A detailed discussion of the research methods is given in chapter two of this thesis. The second section analyses cases involving chiefs. The section is divided into two parts. The first part focuses on constitutional and administrative law cases involving chiefs while the second part discusses selected cases and ongoing litigation involving the exercise of chiefly power over customary land. In the third section, I discuss the findings on the case analysis

and qualitative interviews conducted with lawyers who represented the claimants in the analysed cases.

## **8.2 Understanding the Regulation of Chiefs under Public Law from Litigation**

As chapter four of this thesis endeavoured to demonstrate, chieftaincy appears to have been neglected from public law literature. This dearth of literature on chieftaincy and customary law aspects of public law is also noticeable in other African countries where the institution exists with the notable exception of the research by Jennifer Corrin<sup>899</sup> and Aninka Claassens and Geoff Budlender<sup>900</sup> which used the doctrinal method to study how courts have decided cases involving chieftaincy and customary law in Papua New Guinea and South Africa, respectively. This chapter applies the doctrinal method to analyse not only decided cases but will go further and also analyse ongoing litigation involving the exercise of power by chiefs. The aim of the case analysis is to understand the regulation of chieftaincy under public law from law practice. In discussing case law and ongoing litigation, the chapter also sheds some light on the state of access to justice, in terms of access to courts, for people who are adversely affected by the exercise of chiefly power. It also adds to existing literature by discussing ongoing cases which would otherwise not be published.

The chapter analyses cases from the High Court and other superior courts of Zambia. The justification for limiting the scope of analysis to the High Court and appellate courts is because the High Court of Zambia is the court that is clothed with original and unlimited jurisdiction to hear civil and criminal matters, and to review decisions as prescribed.<sup>901</sup> It is also the court with the jurisdiction to hear cases alleging violation of human rights pursuant to article 28 of the Constitution of Zambia. The initial aim of the thesis was to concentrate on constitutional and administrative law claims against chiefs. However, because of the paucity of cases involving constitutional and administrative

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<sup>899</sup> Corrin (n 27).

<sup>900</sup> Claassens and Budlender (n 28).

<sup>901</sup> Constitution of Zambia (Amendment) Act 2016, art 134.

law claims against chiefs, I extended the analysis to cases involving the exercise of chiefly authority over customary land, including cases in which chiefs were not sued. I have used land litigation because of the results of the review of cases involving chiefs, explained in the next section, which revealed customary land cases as the most developed field of judicial regulation of chiefly authority with regards to the relationship between chiefs and their subjects. I develop this argument further in the next chapter which analyses customary tenure regulation from a public law perspective.

Although a particularly useful method for understanding law from the perspective of law practice, the doctrinal method alone does not give us a complete picture of the factual and social context of the cases save for the facts that the judge deems important for purposes of establishing a legal principle.<sup>902</sup> For this reason, the case-based method was supplemented by qualitative interviews with lawyers who represented the claimants in the reviewed cases. The justification for conducting qualitative interviews is twofold. Firstly, the interviews helped me to understand the factual and social context of the cases. For instance, the interviews with lawyers brought out facts that I could not discern from the written records or court documents, such as how the lawyers met their clients. This information is important for purposes of evaluating access to justice for people adversely affected by chiefly power. Secondly, the qualitative interviews were used to obtain the views of the lawyers concerning how they perceive chiefly authority and how this influences their litigation choices by asking them how they determined the appropriate court and process by which to seek redress on behalf of their clients. As chapters two and five of this thesis have argued, studying the views and perceptions of lawyers is important because lawyers are instrumental in shaping the development of law.<sup>903</sup>

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<sup>902</sup> Kennedy (n 51); LaRue (n 45).

<sup>903</sup> Tamanaha (n 36); Watson (n 382).

### **8.3 Cases Involving Chiefs**

The process that guided the case analysis is stated in detail in chapter two of this thesis. I reviewed a total of 39 cases for this study. Out of the 39 cases, 33 are decided cases while six were active cases either pending trial or awaiting judgment. In terms of subject matter and parties involved, the majority, representing 19 cases, were land disputes involving a decision of a chief, although in most of these cases, the chief was not a party to the proceedings. These were followed by disputes between contending heirs to chieftaincy, including challenges to the recognition or withdrawal of recognition of a chief by the President (for cases decided before the 2016 constitutional amendment), which stood at 16 cases. Cases in which claimants have sued their chiefs were the least, standing at three. There was also one tort case in which the claimant had sued the Attorney General, on behalf of government, seeking compensation for his detention by a chief using the statutory powers of a chief under section 11 of the Chiefs Act.<sup>904</sup> For purposes of answering the second research question posed by this thesis, this chapter discusses the cases involving constitutional and administrative law challenges against chiefs and land litigation involving the exercise of public power by a chief. A detailed explanation of the selection of cases and exclusion criteria is given in chapter two of this thesis.

#### **8.3.1 Constitutional and Administrative Law Claims against Chiefs**

As chapter four of the thesis endeavored to show, Zambia's administrative law practice is almost entirely driven by the common law power of courts to review decisions of public authorities.<sup>905</sup> A review of existing case law reveals that most judicial review cases typically comprise of challenges to the decisions of central government

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<sup>904</sup> *The Attorney-General* (1982) Z.R. 75 (H.C.)

<sup>905</sup> *Kalunga and Kaaba* (n 53); *Mumba* (n 73).

institutions such as cabinet ministers,<sup>906</sup> the National Assembly,<sup>907</sup> and decisions of statutory bodies.<sup>908</sup> These cases are adequately discussed elsewhere and fall outside the scope of this thesis.<sup>909</sup> In relation to chieftaincy, as above stated, the majority of existing case law has involved challenges by contending heirs to chieftaincy<sup>910</sup> and challenges to the recognition or withdrawal of recognition of a chief by the president.<sup>911</sup> The systematic review of cases found only three cases in which litigants have challenged the exercise of public power by a chief under customary law through constitutional or administrative law processes. These cases are discussed below, beginning with the latest case, which was dismissed on a preliminary point. The other two cases are discussed together because they arise from the same facts and the claimants in both cases were represented by the same lawyer.

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<sup>906</sup> For example, the *Attorney General v Roy Clarke* (2008) 1 ZR 38 which involved a challenge to decision by the Minister of Home Affairs to deport the Roy Clarke after the latter published a satirical article that the minister deemed offensive to the President and cabinet ministers. See also *The People v Minister of Information and Broadcasting Services ex parte Francis Kasoma* 1995/HP/2959 (unreported).

<sup>907</sup> *Frederick Jacob Titus Chiluba v Attorney General* (2003) ZR 153. In this case, the applicant, a former president of Zambia, sought judicial review of the decision of the National Assembly to remove his immunity from prosecution for crimes allegedly committed while in office as president alleging that his right to be heard was violated.

<sup>908</sup> *C and S Investments Limited, Ace Car Hire Limited and Sunday Maluba v The Attorney General* SCZ Judgment No. 24 Of 2003 (unreported). In that case, the appellants challenged the seizure of their various property by the Drug Enforcement Commission, a statutory body mandated with regulating narcotics and psychotropic substances and well as investigating allegations of money laundering.

<sup>909</sup> See, for instance, Kalunga and Kaaba (n 53) 26; Chaloka Beyani, 'Judicial Review of Legislative Action in Zambia: A Comment on in Re Thomas Mumba in the Matter of the Corrupt Practices Act and the Constitution' (1986) 18 Zam LJ 76.

<sup>910</sup> For example, *Chief Chipepo (also known as Chilufya Mwamba) v Senior Chief Mwamba (also known as Paison Chilejwa Yamba Yamba)* SCZ Judgment No. 25 of 2008; *Ted Chisavya Muwowo alias Chief Dangolipya Muyombe v Abraham Muwowo Temwani and Winston Muwowo (suing in his capacity as chairman of the Uyombe Royal Establishment Committee)* SCZ/8/50/2014; and *Matthew Namhalika Musokotwane v George Simundu Simukali and 7 Others* Appeal No. 97/2015 (unreported).

<sup>911</sup> For example, *Everson Mumba (suing in his capacity as Senior Chef Kalindawalo) v The Attorney General* Appeal No. 207/2013 (unreported).

The first case is *Nabiwa Imikendu and 3 Others v Edwin Lubosi Imwiko (sued in his capacity as the Litunga of Western Province)*.<sup>912</sup> In this case, the claimants who described themselves as Barotse royalists, sued the Lozi King (the Litunga) in the High Court seeking, among other reliefs, an order that:

The said Edwin Lubosi Imwiko voluntarily abdicates failing which the Applicants together with the people of Barotseland be at liberty to invoke options of customary nature open to Lozi tradition to remove the said Edwin Lubosi Imwiko on grounds of gross incompetence and abuse of authority of office.<sup>913</sup>

The claimants, who were not represented by counsel, had first commenced the matter in the High Court in Mongu by way of originating summons pursuant to articles 165 and 166 of the Constitution. The High Court referred the matter to the Constitutional Court arguing that the Constitutional Court is the one with the exclusive jurisdiction to hear constitutional matters, except for matters pursuant to the bill of rights.<sup>914</sup> However, the Constitutional Court returned the matter to the High Court stating that the High Court did not frame a constitutional issue for the former's determination.<sup>915</sup>

After the matter was sent back to the High Court, it was heard by a three-member panel constituted by the Chief Justice. The Litunga, who was represented by three law firms, raised a preliminary motion to dismiss the matter for irregularity. He claimed, among other irregularities touching on the form of the writ, that the statement of claim filed with the writ "did not disclose a reasonable cause of action, and that the action was scandalous, frivolous or vexatious."<sup>916</sup> The claimants who appeared in person argued that the claim disclosed a reasonable cause of action, namely, that the court

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<sup>912</sup> 2017/HT/03 (unreported).

<sup>913</sup> Ibid, ruling 3.

<sup>914</sup> Perpetual Sichikwenkwe, 'Litunga Case Referred to ConCourt,' Times of Zambia (16 March 2017) < <https://www.times.co.zm/?p=94353> > accessed on 7 April 2022.

<sup>915</sup> Zondiwe Mbewe, 'ConCourt send back to High Court case in which 4 want Litunga out', News Diggers (22 August 2019) < <https://diggers.news/courts/2019/08/22/concourt-send-back-to-high-court-case-in-which-4-want-litunga-out/> > accessed 7 April 2022.

<sup>916</sup> Ibid 4.

should “determine that the Defendant was incompetent, abusing his authority, and that he was not following Lozi traditions, and as such, the Defendant should abdicate his throne by order of the court.”<sup>917</sup>

In its ruling dated 30 December 2020, the High dismissed the matter holding that the case had “no reasonable or real prospect of success.”<sup>918</sup> The court stated:

It is not the duty of the court to order that a chief or any person holding the office of chieftaincy should be removed from his/her office based on an action taken out by his subjects on allegations of incompetence, disregard of traditions and customs, or abuse of the chiefly office.<sup>919</sup>

The court further stated that chieftaincy is established by customary law and as such, those affected by the exercise of chiefly power should have recourse to processes under their respective authorities.<sup>920</sup> The court deemed such a matter as falling outside its jurisdiction. In making this order, the court did not address itself to matters such as whether those institutions are available or accessible to the applicants against their chief. This approach seems to be oblivious to the historical factors, such as the emergence of an authoritarian chief following the destruction of most of the precolonial political and administrative controls of chieftaincy, discussed in chapter three of this thesis, and the dominance of judicial control as the key mechanism for control of public power in Zambia.

While it could be argued that the court’s decision sought to encourage non-state mechanisms for resolving customary disputes, it also demonstrates an attempt by the court to avoid controlling the public power of chiefs under customary law. Judicial control of chieftaincy arguably provides those adversely affected by the exercise of

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<sup>917</sup> *Nabiwa Imikendu and 3 Others v Edwin Lubosi Imwiko (sued in his capacity as the Litunga of Western Province)* 2017/HK/03 (unreported) Ruling (30 December 2020) 9.

<sup>918</sup> Ibid

<sup>919</sup> Ibid 11-12.

<sup>920</sup> Ibid 12.

public power by chiefs with the most effective remedy considering the fact that traditional dispute resolution fora may be only suited to the traditional elite, leaving those in the lower hierarchy with no relief.<sup>921</sup> In any event, national courts arguably remain best suited for the resolution of disputes of constitutional significance.<sup>922</sup>

The decision of the court is also problematic because it purports to oust the jurisdiction of the court to inquire into the exercise of public power by a chief under customary law, which would be contrary to article 267 of the Constitution which empowers the courts to exercise "jurisdiction in relation to a question as to whether [a] person, authority or institution has performed the functions in accordance with the constitution or other laws." Since article 7 of the Constitution of Zambia provides that customary law which is consistent with the constitution forms part of the laws of Zambia, courts have the duty, when moved by an aggrieved party, to question whether an entity exercising public power under customary law has done so in accordance with the relevant customary law and whether such customary law is consistent with the constitution. By so doing, the court would ensure that no sections of the population are subjected a separate justice system. A notable example of an approach which encourages judicial control of chiefly authority under customary law is the South African case of *Pilane and Another v Pilane and Another*,<sup>923</sup> where the Constitutional Court emphasised that members of a traditional community are entitled to exercise their rights protected under the constitution including the rights to freedom of expression and association, which in that case presented as the right to meet and discuss secession from the traditional area.

The remaining two cases are discussed together because they arose from the same facts and the claimants were represented by the same lawyer. The facts of the case are stated on pages 2 -3 of the judgment of the Supreme Court of Zambia in *Amos Musuba (on his own behalf and on behalf of members of Mize Congregation of Jehovah's*

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<sup>921</sup> Corrin (n 27) 138.

<sup>922</sup> Cappelletti and Garth (n 477) 239.

<sup>923</sup> 2013 (4) BCLR 431 (CC).

*Witnesses at Kazungula District Southern Province of Zambia) v Lackson Muntanga (Sued in his capacity as Chief Nyawa of the Tonga speaking people of Kazungula District Southern Province of Zambia) and The Attorney General.*<sup>924</sup> On 21 September 2011, Chief Nyawa of the Tonga speaking people dissolved Musuba village under which the Mize Congregation of the Jehovah's Witnesses fell and deregistered its members. The ground for disbanding the village and deregistering its members was the refusal by members of the Jehovah's Witnesses to support and participate in the Lwiindi traditional ceremony of the Tonga speaking people on religious grounds.<sup>925</sup> After dissolving their village, the chief created a new village called Mantanyani and set preconditions for inclusion in the village register, which included an obligation to obey the orders of the chief and a pledge, in writing, to support the Lwiindi traditional ceremony.<sup>926</sup>

Dissatisfied with the decision of the chief, the claimants commenced judicial review proceedings in the Livingstone High Court seeking, among other reliefs, an order of certiorari to quash the decisions of the chief and a declaration that the decisions of the chief were "illegal, unconstitutional, unreasonable, and an abuse of authority."<sup>927</sup> The rules of procedure regulating judicial review proceedings in Zambia require a complainant to first obtain the permission of court.<sup>928</sup> The High Court dismissed the claimants' application for leave to commence judicial review on the ground that a chief is not a public officer.<sup>929</sup> The High Court held that:

The office of chief is not a creature of statute. Chiefs are chosen and installed by their respective communities in keeping with culture, customs and traditions or wishes and aspirations of the people to whom the same applies. The government merely recognises a chief once installed. A chief does not perform public but cultural and/or traditional

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<sup>924</sup> *Musuba* (n 283).

<sup>925</sup> *Ibid*, judgment (9 December 2015) 3.

<sup>926</sup> *Ibid*.

<sup>927</sup> *Ibid* 4.

<sup>928</sup> Rules of the Supreme Court of England 1999, Order 53 r 3.

<sup>929</sup> *Amos Musuba and Others v Lackson Muntanga and Another* Appeal No. 97 of 2012 (SC) 4 (unreported).

functions; a chief therefore is not a public servant but a traditional or cultural leader.<sup>930</sup>

The above position appears consistent with that taken by the High Court in the case of *Nabiwa Imikendu* above, that is, to avoid questioning the exercise of public power of chiefs. The parties appealed against this decision to the Supreme Court. The substance of their appeal was that the High Court was wrong to find that the office of a chief is not a creature of statute and that people adversely affected by an illegal act of a chief cannot challenge such an act by way of judicial review.<sup>931</sup> Counsel for the appellants asked the court to “shed some light on the status of chiefs; that is, whether they are public officers and amenable to judicial review.”<sup>932</sup>

The Supreme Court held that the High Court took a narrow view of judicial review by focusing only on the source of power.<sup>933</sup> It stated that:

Much as a chief is chosen by the community in accordance with its culture and customs, the office of a chief is clothed with a special status by the constitution and legislation through the Chiefs Act...The uniqueness of the office of chief is further illustrated by the functions bestowed on the office by the Chiefs Act. Apart from performing the traditional functions of a chief under African customary law, a chief also has an obligation “to preserve public peace in his area and take reasonable measures to quell any riot, affray or similar disorder which may occur in the area.” (Section 11 of the Act). These are ordinarily government responsibilities.<sup>934</sup>

Based on this analysis of the uniqueness of the office of chief, the Supreme Court held that some actions of chiefs are analogous to those performed by government officials and have public law consequences, and are therefore amenable to judicial review.<sup>935</sup>

The court however dismissed the appeal on the ground that the appellants’ claim

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<sup>930</sup> Ibid, quotation from the High Court judgment.

<sup>931</sup> Ibid 5.

<sup>932</sup> Ibid 16.

<sup>933</sup> Ibid 21.

<sup>934</sup> Ibid 19.

<sup>935</sup> Ibid 19.

substantially alleged a violation of their right to freedom of thought, conscience, and religion which is protected by the bill of rights and should have been brought under provisions of article 28 of the Constitution of Zambia.<sup>936</sup> Article 28 of the Constitution provides, in part, that:

If any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court.

The mode of commencement for matters under article 28 of the Constitution is prescribed by the Protection of Fundamental Rights Rules 1969 which require such matters to be commenced by a petition to the High Court. Zambian courts seem keen on enforcing procedural requirements that prescribe the mode of commencement for suits. For instance, in the case of *Miyanda v The High Court*,<sup>937</sup> the Supreme Court of Zambia, referring to the requirement to comply with procedural requirements for commencing suits, stated that "the term 'jurisdiction'...in another sense is the authority which a court has to take cognisance of matters presented in a formal way for its decision."<sup>938</sup> As such, failure to comply with the relevant procedure for commencing actions effectively deprives a court of jurisdiction. Further, in the celebrated case of *New Plast Industries v Commissioner of Lands and Another*,<sup>939</sup> the Supreme Court directed that "the mode of commencement of any action is generally provided by the relevant statute." On this basis, courts are reluctant to entertain matters that are presented to them using the wrong procedure, although in some instances courts have used their inherent jurisdiction to deem a matter to have been commenced using the correct procedure.<sup>940</sup>

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<sup>936</sup> Ibid 22.

<sup>937</sup> (1984) Z.R 62.

<sup>938</sup> Ibid 64.

<sup>939</sup> (2001) Z.R. 51.

<sup>940</sup> For instance, in the case of *Mike M Phiri and Anor v Registered Trustees of the Catholic Diocese of Mpika* 2017/HP/587 (H.C) (unreported), the court deemed a matter commenced

Following the dismissal of their application for leave to commence judicial review, the claimants commenced a fresh action on 28 November 2013 in the Lusaka High Court through a petition pursuant to article 28 of the Constitution. The lawyer who represented the claimants, justified his decision to appeal against the dismissal of the application for leave to commence judicial review proceedings, notwithstanding having earlier commenced another matter under the bill of rights, on his desire to obtain judicial pronouncement on the public power of a chief. He stated, during our interview that:

The matter came before the late Chief Justice Mambilima and they asked me a question, "Mr Kalokoni, do you challenge a contravention of the bill of rights by way of judicial review?" And I said my lady, I know that any alleged infringement of the bill of rights must be challenged by way of a petition. But the little research that I did around the subject showed that we do not have a single case in Zambia which has dealt with the issue of amenability of chiefs to judicial review for violation of human rights, and the bench agreed that on that basis, then we can proceed.<sup>941</sup>

The human rights petition was brought under *Kelvin Fungwe and 7 Others v Lackson Muntanga (Sued as His Royal Highness Chief Nyawa IV of the Tonga-speaking people of Kazungula District Southern Province)*.<sup>942</sup> The petitioners in that case asked the High Court to, among other reliefs, declare that the decision of Chief Nyawa to dissolve Musuba village and expel them from both the village and chiefdom for refusing to participate in, and contribute towards the Lwiindi traditional ceremony on religious grounds, violated their constitutional right to freedom of conscience, thought, and religion. They alleged that some of the activities undertaken at the Lwiindi traditional ceremony, such as worshiping or appeasing the dead, offended their religious beliefs.<sup>943</sup> The chief did not oppose the petition and refused to receive any court documents

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pursuant to originating summons to have commenced by writ of summons and directed the parties to correct the process to facilitate the hearing of the matters in dispute.

<sup>941</sup> Interview with James Kalokoni, lawyer for the claimants, 2 April 2022.

<sup>942</sup> 2013/HP/1778 (unreported).

<sup>943</sup> Ibid, judgment 31 October 2014, J5.

served on him. This prompted the court to proceed to determine the matter in his absence after satisfying itself that service had failed.<sup>944</sup> The Court delivered its judgment in favour of the petitioners on 31 October 2017. The Court held that “the chief has no authority to compel the petitioners to take part in the Lwiindi ceremony nor to make this a condition for them to continue living in his chiefdom.”<sup>945</sup> The court further held that the actions by the chief violated the petitioners’ right to freedom of conscience, thought and religion, guaranteed by article 19 of the Constitution of Zambia and was therefore null and void.<sup>946</sup>

The court did not specifically address the question of the public law nature of chieftaincy for purposes of a suit under the constitutional bill of rights. This could be partly because the chief did not defend the action and as such the issue was not in contention, although counsel for the petitioners submitted authorities to support their argument that the provisions on enforcement of the bill of rights “exceptionally...apply to a private individual or entity.”<sup>947</sup> In any event, Zambian courts seem to have long recognised both the horizontal and vertical application of the bill of rights.<sup>948</sup> One can therefore successfully enforce a violation of their rights under the bill of rights against both state and non-state actors.

The above two cases so far seem to be the only instances where courts have pronounced themselves on the public power of a chief in a judicial review matter and a case alleging violation of rights protected under the constitutional bill of rights. The above analysis shows that case law involving constitutional and administrative law challenges against the exercise of public power by a chief under customary law is in its infancy stage. Further although the Supreme Court in *Amos Musuba*<sup>949</sup> has pronounced

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<sup>944</sup> Ibid.

<sup>945</sup> Ibid J29.

<sup>946</sup> Ibid J37 – J38.

<sup>947</sup> *Kelvin Han’gandu v Law Association of Zambia* (2012) 3 ZR 181.

<sup>948</sup> Ibid; *Sara Longwe v Intercontinental Hotel* 1992/HP/65 (unreported); *Amos Musuba* (n 929).

<sup>949</sup> *Amos Musuba* (n 929).

itself on the public law character of the office of chief and its amenability to judicial review, the position does not appear settled. This may be discerned from the later decision of the High Court in *Nabiwa Imikendu*,<sup>950</sup> which dismissed the plaintiffs' claim citing lack of jurisdiction to determine such a matter of a traditional nature. Other cases in which courts have presided over chieftaincy relate to their involvement in administering customary land, which I discuss below.

### **8.3.2 Customary Land Litigation Involving Decisions Of Chiefs**

As above stated, the review of cases found that the majority of case law involving the exercise of chiefly authority is in customary land. Chiefs in Zambia are, by virtue of the historical developments which I discuss further in the next chapter, vested with the authority to administer land under customary tenure. This power, as I argue in this thesis, is a public one. Land in Zambia is organised under two tenure systems comprised of customary and statutory tenure. Customary tenure is governed by traditional and customary practices while statutory tenure is governed by rules of land law that are similar to English land law.<sup>951</sup> The Lands Act recognises customary tenure and mandates the president, in whom all land in Zambia is vested, to obtain the consent of the area chief and any other person who may be affected by a grant of land in a customary area.<sup>952</sup> Further, section 8 of the Lands Act permits a holder of interests in customary land to convert such interests to statutory tenure provided that the person obtains the consent of the chief and the local authority of the area. Although section 8 of the Lands Act empowers chiefs to consent or withhold their consent to an application to convert tenure, it does not provide for a remedy where a chief unreasonably withholds their consent.<sup>953</sup>

The provisions on the alienation of land in a customary area and its conversion from customary to statutory tenure have been the cause of contention in many of the cases

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<sup>950</sup> *Nabiwa Imikendu* (n 917).

<sup>951</sup> Mudenda (n 83) 366.

<sup>952</sup> Lands Act 1995, s 3.

<sup>953</sup> Mudenda (n 83) 471.

reviewed. With the exception of one case which I discuss in the next paragraph, the claimants in most of these cases involving the exercise of power by a chief to consent to the allocation or conversion of title from customary to statutory tenure have tended to sue the title holder and in some instances the Attorney General and the Commissioner of Lands and not the erring chief.<sup>954</sup> Other cases involve claims by title holders seeking to evict customary rights holders from disputed land.<sup>955</sup> These cases have been adequately discussed elsewhere and fall outside the scope of this thesis as they mostly discuss principles of property law and interpretation of statutes, which are remotely related to my research objectives.<sup>956</sup> It suffices to mention that although litigants have traditionally litigated their customary land claims in the manner described above, the power that chiefs exercise in managing and administering land under customary tenure is essentially of a public power as I endeavour to demonstrate in the next chapter. This chapter restricts itself to the discussion of recent cases in which claimants have either sued a chief or have challenged the decision of a chief or exercise of chiefly power through a constitutional petition under the bill of rights following their displacement from customary land.

The first case is *Mandalena Mungalaba and 94 Others v Elizabeth Mwachikoka Molenje (sued in her capacity as her Royal Highness Senior Chieftainess Nkomeshya Mukamambo II)*.<sup>957</sup> This case was pending hearing in the High Court at the time of writing. The plaintiffs in this case took out a Writ of Summons and Statement of Claim seeking, among other reliefs, an order of injunction to restrain the chief from interfering with their respective pieces of land. They also wanted the court to declare that “they

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<sup>954</sup> See for instance, *Henry Mpanjilwa Siwale and Others v Ntapalila Siwale* (1999) ZR 84; *Village Headman Mupwaya and Another v Mbaimbi* SCZ Appeal No 4 of 1999; *Still waters Limited v Mpongwe District Council and Others* SCZ Appeal No 90 of 2001; *Silas Ngowami and 6 Others v Flamingo Farms Limited* SCZ Judgment No. 5 of 2019; and *Julius Chilipamwawo Sinkala v Bornface Simbule and Two Others* Appeal No. 153 of 2016.

<sup>955</sup> See for instance *Duncan Silembo (S/A Next of kin of the late Silembo being his son) v Roman Shaloomov (S/A Sekelelea Farm)* CAZ Appeal No. 44 of 2018.

<sup>956</sup> Mudenda (n 83).

<sup>957</sup> 2019/HP/0383 (ongoing).

are legally entitled to occupy the land which they are in possession of and are entitled to continue to carry out their agricultural and other developmental activities.”<sup>958</sup> The plaintiffs challenged the decision of the chief to remove them from the land on which they had been trading and her decision to bar them from constructing permanent structures on residential plots. They alleged that the defendant chief wanted to give the land to “international investors... interested in building a shopping mall for the sole benefit of the Defendant.”<sup>959</sup> The chief denied the allegations that she wanted the land for her own benefit. She contended that the Plaintiffs were not the legal owners of the land and had only been allowed to cultivate the piece of land but not to erect permanent structures on it, pending commencement of development projects for which the land was reserved by the traditional authority.<sup>960</sup> The Plaintiffs applied for an interlocutory injunction to restrain the chief from interfering with their rights of possession pending the determination of the matter which the court dismissed on 6 May 2019. Shortly thereafter, the court on 23 October 2019 granted the chief’s application for an interlocutory injunction to restrain the Plaintiffs from continuing to erect permanent structures on the disputed land and to stop them from disposing of the land pending the determination of the matter.

This case raises critical issues concerning the judicial control of the power of chiefs over customary land. The chief’s argument with regards to the ownership rights of the plaintiffs appears consistent the provisions of section 8(3) of the Lands Act which states that:

Except for a right which may arise under any other law in Zambia, no title, other than a right to the use and occupation of any land under customary tenure claimed by a person, shall be valid unless it has been confirmed by the chief, and a lease granted by, the President.

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<sup>958</sup> Ibid, Statement of Claim dated 13 March 2019, 1.

<sup>959</sup> Ibid 2.

<sup>960</sup> Ibid, Defence dated 27 March 2019.

The lawyer representing the plaintiffs, in our interview, conceded that section 8(3) poses a challenge to her clients' case as it purports to give them only use rights which would potentially interfere with their rights to develop the property or build modern structures on the land. The lawyer stated that:

Section 8(3) of the Lands Act is the issue for trial because we are saying that traditional land passes on through generations unless where it is abandoned or for some reason the (I don't want to call them the lessee) person is banished from the village. If that does not happen, the land will pass on from generation to generation. Our argument is that since these people have been on this land for generations, life in the villages now has changed, villages are not what they used to be. People are making more money so you know in this part of the world that is what they call development. People would rather now not live in grass thatched roof house but, where they can afford, they can build themselves decent houses. But it looks like the chief doesn't want them to do that.<sup>961</sup>

These concerns appear consistent with the views of scholars who condemn the assumption that landholders under customary tenure only enjoy usufructuary interests as being inconsistent with African customary law.<sup>962</sup> The case therefore presents the court with an opportunity to engage with the assumptions which have informed the statutory provisions concerning customary land ownership and use or develop customary law norms on land ownership. I return to this in the next chapter which analyses customary land tenure law from a public law perspective.

The case also raises important issues with regards to judicial control of the power of chiefs in administering customary land. Mudenda's criticism of the provisions of the Lands Act, which empower chiefs to consent to the allocation or conversion of land from customary to statutory tenure without providing any limits on the power or remedy in an event where a chief unreasonably withholds consent, applies to this

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<sup>961</sup> Interview with Peggy Hlazo, lawyer for the Plaintiffs in the *Mandalena Mungalaba* case (16 March 2022).

<sup>962</sup> Mudenda (n 83) 769.

case.<sup>963</sup> Mudenda proposes that to control the exercise of this power, refusal to give consent should be tested for reasonableness by the Lands Tribunal.<sup>964</sup> Although this case does not deal with the withholding of consent to convert land to statutory tenure, it presents a great opportunity for the court to pronounce itself on the reasonableness of the chief's decision, and generally on the exercise of power by chiefs over customary land.

The remainder of this subsection focuses on cases involving the people in Senior Chief Muchinda's area in Serenje District who have been displaced from customary land and have challenged their displacement in the High Court alleging violation of their various rights protected under the constitutional bill of rights. The cases arose from the decision of the government to create farming blocks in the area, among them Nansanga and Luombwa, which increased the demand for land in the area. Although the government had committed to not disturb the local people when it created the farm blocks, many villages have been subjected to forced evictions after their land was alienated to commercial farmers.<sup>965</sup> For instance, in April 2013, 78 families representing 200 people were evicted from their homes and had their houses and fields demolished by Billy Vickers, leaving the occupants destitute when they were forced to squat in the nearby Musangashi forest reserve and without access to social services and amenities.<sup>966</sup> The displaced people sought the help of the government to claim back their land but their efforts proved futile leading them to explore litigation.

It is important to state at the outset that although none of the claimants in these cases have sued the chief, their claims arise from the failure of the chief to consult them

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<sup>963</sup> Ibid 471.

<sup>964</sup> Ibid.

<sup>965</sup> Human Rights Watch, "Forced to Leave" Commercial Farming and Displacement in Zambia' (2017) <[https://www.hrw.org/sites/default/files/report\\_pdf/zambia1017\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/zambia1017_web.pdf)> accessed 6 April 2022.

<sup>966</sup> Chambo Ng'uni, 'Displaced Serenje Families in Anguish' *Zambia Daily Mail* (Lusaka, 17 September 2013) 9.

when consenting to the allocation or conversion of land from customary to statutory tenure. Other cases allege irregularity in the way the consent of the chief was obtained. I have used these cases in this study because they demonstrate how lawyers have used constitutional litigation to hold the central government accountable for human rights violations resulting from the acts and omissions of chiefs.

The first case is *Molosoni Chipabwamba and 12 Others v Yssel Enterprises Limited and 7 Others*.<sup>967</sup> The petitioners in that case brought an action in the High court on 17 December 2017, alleging violation of their various rights as a result of forcible displacement from their land in 2013. The Respondents were the various companies and individuals who obtained and passed on title to the land in dispute including the first owner (Yssel Enterprises Limited) who passed the title to the present owner Billis Farm Limited (the 4<sup>th</sup> Respondent) at whose instance the petitioners were forcefully ejected from the land in June 2013. The petitioners also sued Serenje District Council, the Attorney General on behalf of the Government, and the Commissioner of Lands.

The petitioners did not sue the chief although their affidavit in support of the petition alleged that when they confronted the late Senior Chief Muchinda in 2001, he confirmed that he gave a parcel of land to Mr Yssel in exchange for a Land Rover Engine, but that the said land was small, unoccupied, and far from the disputed land.<sup>968</sup> They also stated that they subsequently discovered, during their searches in preparation for the suit, that Senior Chief Muchinda “authorised Mr P.L Yssel to settle as a commercial farmer in the river called Luombo near the Mulembo river” and was given 2000 hectares of land per the letter dated 10 February 1997.”<sup>969</sup> The decision not to sue the chief was not only because the petitioners alleged that his consent was invalid, but also that “there (was) no chief to probably answer to these issues,” the substantive chief having died sometime back and (at the time of writing) there was a pending

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<sup>967</sup> 2017/HP/2201 (unreported).

<sup>968</sup> Ibid, Affidavit in Support of Petition 17 December 2017, para 14.

<sup>969</sup> Ibid para 66.

matter in the Kabwe High Court to determine the rightful successor.<sup>970</sup> This is a curious case concerning the effect of the corporate personality of the institution of chieftaincy under the constitution, a topic that should interest future research on chieftaincy.

The petitioners alleged that the respondents and certain provisions of the Lands Act and the Lands and Deeds Registry Act violated their various rights protected under the bill of rights and other provisions of the Constitution of Zambia.<sup>971</sup> Amongst the alleged violations were their self-worth and dignity under article 8 of the constitution which articulates national values and principles but does not form part of the bill of rights. They also alleged violation of their right to protection against unlawful deprivation of property without compensation under article 16 of the Constitution.<sup>972</sup> Other rights claimed are freedom of movement, liberty, association, privacy of their homes and property, protection from discrimination, and protection from torture, inhuman and degrading treatment.<sup>973</sup> They contended that the respondents did not comply with the procedure for converting land from customary to statutory tenure because they did not obtain the consent of Senior Chief Muchinda and the people affected by the conversion, contrary to sections 3 and 7 of the Lands Act.<sup>974</sup> They argued that the letter written by the chief authorising Mr Yssel to settle on the land as a commercial farmer was invalid because it was written to an individual and not a corporate entity and was written after the local council had already approved the first respondent's application for allocation of land. The petitioners, among other reliefs, asked the court to invalidate the conversion of tenure, reinstate the petitioners on their land, and compensate them for the loss suffered as a result of the forced evictions.<sup>975</sup>

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<sup>970</sup> Interview with one of the lawyers for the Petitioners, 6 March 2022.

<sup>971</sup> *Chipabwamba (n 967)*, para 11 of the petition (17 December 2017).

<sup>972</sup> *Ibid* para 12.

<sup>973</sup> *Ibid* 4.

<sup>974</sup> *Ibid* 5.

<sup>975</sup> *Ibid* 7.

The 4<sup>th</sup> Respondent's argument was that the petitioners failed to prove their entitlement to the land under customary law as they failed to produce documentary evidence such as national registration cards or village registers to prove that they occupied the land for a long period.<sup>976</sup> Billis Farms Limited also argued that it acquired good title as a fourth generation owner from the first respondent who had complied with the necessary procedure for obtaining a certificate of title to the disputed land.<sup>977</sup> The land had passed through three registered owners before Billis Farms Limited acquired it. The company relied on section 33 of the Lands and Deeds Registry Act which provides that:

A Certificate of Title shall be conclusive as from the date of its issue and upon and after the issue thereof, notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the President or otherwise, which but for Parts III to VII might be held to be paramount or to have priority; the Registered Proprietor of the land comprised in such Certificate shall, except in case of fraud, hold the same subject only to such encumbrances, liens, estates or interests as may be shown by such Certificate of Title and any encumbrances, liens, estates or interests created after the issue of such Certificate as may be notified on the folium of the Register relating to such land but absolutely free from all other encumbrances, liens, estates or interests whatsoever.<sup>978</sup>

They argued that their title could not be impeached except upon proof of fraud, which the petitioners failed to establish to the required standard.<sup>979</sup> To counter this argument, the petitioners relied on case law in which courts have previously ordered cancellation of a certificate of title on grounds of failure to comply with the procedure for converting customary land to statutory tenure.<sup>980</sup>

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<sup>976</sup> Ibid 4 and 5<sup>th</sup> Respondents' Submission 23 January 2020.

<sup>977</sup> Ibid.

<sup>978</sup> Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia.

<sup>979</sup> Ibid.

<sup>980</sup> *Henry Mpanjilwa Siwale and Others v Ntapalila Siwale* (1999) ZR 84; *Still waters Limited v Mpongwe District Council and Others* SCZ Appeal No 90 of 2001; *Village Headman Mupwaya and Another v Mbaimbi* SCZ Appeal No 4 of 1999; and *Silas Ngowami and 6 Others v Flamingo Farms Limited* SCZ Judgment No. 5 of 2019.

The High Court delivered its judgement on 30 April 2020 in which it found that the certificate of title obtained by the first respondent was irregular because the consent of the chief was not obtained before making the application and the people who were affected by the allocation were not consulted.<sup>981</sup> “The chief was just used as a rubber stamp to legitimate the process, and he did not care to check if his subjects had been affected by his recommendation, and authentication of the sketch plan.”<sup>982</sup> The irregularity in the procedure adopted to convert the land from customary to statutory tenure affected the present owners who evicted the petitioners because they had notice of the petitioners’ interests in the disputed land.<sup>983</sup> The court also found that the petitioners’ rights were violated as the eviction turned them into internally displaced persons.<sup>984</sup> The court however refused to declare sections 33, 34, and 35 of the Lands and Deeds Registry Act, which make the issuance of certificate of title conclusive proof of ownership, unconstitutional.<sup>985</sup> The court also found the Commissioner of Lands to be ultimately responsible for the petitioners’ plight as it alienated the land in question without satisfying itself that all procedural requirements had been satisfied.<sup>986</sup> The court however refused to give the remedy sought by the Petitioners, holding instead that:

Having found that the (Attorney General and the Commissioner of Lands) alienated the land to the 1st Respondent without strictly following procedure, the conversion was null and void. However, looking at the fact the evidence on record shows that 4<sup>th</sup> respondent (Billis Farm Limited) has settled as a commercial farmer on the land in dispute, most likely in furtherance of government policy to create farm blocks, which are beneficial for national development, it would not be in the public interest to cancel the certificate of title that the 4<sup>th</sup> respondent holds.<sup>987</sup>

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<sup>981</sup> *Chipabwambwa* (n 967) J102.

<sup>982</sup> *Ibid.*

<sup>983</sup> *Ibid* J109.

<sup>984</sup> *Ibid* J125.

<sup>985</sup> *Ibid* J140.

<sup>986</sup> *Ibid* J145.

<sup>987</sup> *Ibid* J148.

On this basis, the Court deemed the conversion of title as compulsory acquisition and ordered the government, through the Commissioner of Lands, to grant land of equal value as the disputed land to the petitioners.<sup>988</sup> The court also ordered that the land to be given to the petitioners should be in an area where they would continue to enjoy their cultural and traditional rights as Lala people by tribe, have ready access to water and other social facilities such as schools and health centres.<sup>989</sup> The court also ordered the farmer who evicted the petitioners to compensate them for the property that was destroyed in the course of the eviction including for the value of their ancestral graves.<sup>990</sup> It also ordered the government to compensate the petitioners for the violation of their rights.<sup>991</sup>

The petitioners appealed against the judgment of the High Court to the Court of Appeal challenging, among other things, the decision not to cancel the certificate of title after finding that the allocation of land was irregular.<sup>992</sup> The appellants argued that the High Court's decision departed from existing precedent which establishes that the remedy, once the court has declared a conversion of title as null and void, is to cancel the title obtained from such a flawed process.<sup>993</sup> The Court of Appeal in its judgment dated 21 April 2022 upheld the appeal and ordered that the certificate of title be cancelled thereby reverting the land to customary tenure.<sup>994</sup>

Two other related cases were filed in the High Court by claimants in similar circumstances. They were pending before the courts at the time of writing. The petitioners in these cases were all represented by the same law firms that represented the petitioners in *Molosoni Chipabwamba* above. In *Asa Lato and 30 Other Village*

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<sup>988</sup> Ibid.

<sup>989</sup> Ibid.

<sup>990</sup> Ibid.

<sup>991</sup> Ibid J149.

<sup>992</sup> *Molosoni Chipabwamba and 12 Others v Yssel Enterprises Limited and 7 Others* CAZ/08/64/2020, Appeal No 104/2020 (CA) (unreported).

<sup>993</sup> Ibid, Appellants' Heads of Argument.

<sup>994</sup> Ibid judgment.

*Owners v Davison Chibale and 4 Others*,<sup>995</sup> the petitioners alleged violation or likely violation of their rights because of their actual and eminent forced eviction from traditional land after the land was converted from customary to statutory tenure. They also sued the local council, the Attorney General, and the Commissioner of Lands. Their grievances arose from the lack of consultation before the land was converted. Unlike the *Chipabwamba* case, the petitioners in this case were still occupying the disputed land at the time of the suit although the title holder had moved some of them from their homes and created a large boundary between them using bulldozers which destroyed some forest trees within the vicinity of their homes and curtailed their freedom of association, movement and residence.<sup>996</sup> They also challenged the consent of the chief to the allocation of land and wondered how the chief could have sold the land which included "land occupied by the chief's son and is a burial site for the chiefs, including the burial site of the same chief who allegedly sold the disputed land before his death."<sup>997</sup> The matter was awaiting judgment in the High Court by the time of writing.<sup>998</sup>

The third case is *John Chisenga Kapabila and 3 Others v Nicole-Nkalonga Investment Company Limited and 5 Others*.<sup>999</sup> The petitioners in this case sued a commercial farmer who forcibly evicted them from their land and, upon their refusal to move, planted crops around them. They challenged the process of the conversion of title without their consent. They also sued the Zambia Environmental Management Authority, in addition to the commercial farmer, the local authorities and the government, for the authority's failure to protect them from the violation of their right to a clean, safe and healthy environment contrary to article 256 of the Constitution of

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<sup>995</sup> 2017/HP/2087 (ongoing).

<sup>996</sup> Ibid Petition dated 29 November 2022.

<sup>997</sup> Ibid, Affidavit in Support of Petition 29 November 2022.

<sup>998</sup> Interview with one of the lawyers representing the Petitioners conducted on 6 March 2022.

<sup>999</sup> 2017/HP/2088 (ongoing).

Zambia and section 4 of the Environmental Management Act 2011.<sup>1000</sup> They alleged that the significant use of pesticides and herbicides by the commercial farmer together with “the flow of water during the rainy season from the centre-pivot into their water source and mixing of those chemicals by the river they depend on for water domestic and other uses (violated) their rights to a healthy environment.”<sup>1001</sup> The petitioners made similar allegations of violations of their rights protected under the constitution as the other two cases in addition to the violation of the environmental rights. By the time of writing, the matter was awaiting trial before a fresh judge of the High Court after the judge who heard the case died in 2021.<sup>1002</sup>

These three cases present an innovative approach to litigating customary land claims as constitutional rights which departs from what appears to have been the established practice where people have sought declaratory judgements against developers of land. Although the claimants in all these cases have not sued the chief whose decisions were the subject of contention, the cases greatly contribute the development of public law jurisprudence on the judicial control of the public power of chiefs over customary land by litigating customary law interests in land as human rights claims. By litigating customary land interests under the constitutional bill of rights, the petitioners in these cases have helped to put beyond doubt the construction of the right to property under the bill of rights as being applicable not only to the individual but also to communal interests in land under customary tenure. Article 16 of the Constitution of Zambia provides for the protection of property or interest in property from compulsory acquisition except as provided by law and subject to compensation. The Zambian bill of rights does not however guarantee the right to own land. When it comes to enforcing interests in customary land, the problem is compounded by section 8(3) the Lands Act, above, which only recognises use rights in customary land. Further, by litigating their

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<sup>1000</sup> *John Chisenga Kapabila and 3 Others v Nicole-Nkalonga Investment Company Limited and 5 Others* 2017/HP/2088, Petition dated 29 November 2017.

<sup>1001</sup> *Ibid* 6.

<sup>1002</sup> Interview with one of the lawyers representing the Petitioners conducted on 6 March 2022.

customary law rights to land under public law, the petitioners in these cases have managed to present before the court the broader human rights violations that they suffered as a result of their forced eviction in a manner that could potentially not squarely fit under a property law action.

The nature of the interests in customary land makes it difficult to enforce using court processes that are based on common law or statute because they do not squarely fit within the regulatory framework for land in Zambia, which heavily relies on English land law principles and procedural rules.<sup>1003</sup> As the next chapter shows, the inheritance of English land law in Zambia is one of the lasting legacies of the country's history of colonialism. Zambia still applies several English statutes on land law that were enacted before 17 August 1911, the cut-off date of the reception clause.<sup>1004</sup> With regards to substantive law, English land law conceives land as property and as such consigns it to the realm of private law.<sup>1005</sup> This has proved problematic for customary tenure regulation which falls under the coercive power of the state or traditional leaders by virtue of its historical foundations as I demonstrate in the next chapter.

With regards to procedural law, those claiming customary interests in land face challenges in seeking to establish their rights using common law actions of a private law nature which are governed by English property law and procedure. One of the obstacles faced by holders of customary law interests is the requirement by section 4 of the Statute of Frauds 1677, an English Act which applies to Zambia by virtue of the reception clause, for documentary evidence for dispositions of interests in land to be enforceable. The problem is further compounded by the provisions of sections 33, 34, and 35 of the Lands and Deeds Registry Act which, by making the issuance of a certificate of title conclusive evidence of ownership of land, place the burden of proof

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<sup>1003</sup> Mudenda (n 83) 366.

<sup>1004</sup> English Law Extent of Application Act Chapter 11 of the Laws of Zambia.

<sup>1005</sup> Ambreena Manji, *The Struggle for Land and Justice in Kenya* (Eastern Africa Series Book 49) (Boydell & Brewer, Kindle Edition 2020) 17; McAuslan (n 240) ch 11.

on the party claiming undocumented interests in land. This is problematic because many people in customary areas have limited access to legal information and lawyers, which hinders their capacity to effectively defend their interests in land. This problem of limited access to justice by rural people is discussed further in the next section which discusses the results of the qualitative interviews conducted for this thesis.

Furthermore, the judgments of the High Court and the Court of Appeal in *Molosoni Chipabwamba*<sup>1006</sup> provide us with important precedent for holding the central government ultimately responsible and accountable for the violation of rights resulting from the administrative acts and omissions of chiefs. Looking at customary land administration from a public law perspective would help us develop law and policy interventions that reflect the social context. I develop this point further in the next chapter.

## **8.4 Assessing Litigation and Lawyers' Conception of Chiefly Authority**

I now turn to the qualitative interviews conducted with selected lawyers who represented the claimants in the cases discussed above. One of the key findings of the interviews and the case analysis was that litigants do not appear to be enthusiastic about challenging their chiefs before courts. This can be deduced from the small number of cases in which people have sued their chiefs. Carolyn Logan's article based on Afrobarometer Surveys for 2014 to 2015 reports overall low contact rates with the courts in the preceding five years, at an average of 13 percent of the sample size, in Zambia.<sup>1007</sup> Among the reasons why people fail to approach courts are costs, lack of competence to recognise and pursue legal claims, and unequal power relations

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<sup>1006</sup> *Chipabwamba (H.C) (n 967) and Chipabwamba (C.A) (n 992)*.

<sup>1007</sup> Carolyn Logan, Ambitious SDG goal confronts challenging realities: Access to justice is still elusive for many Africans' (Afrobarometer 2017) 15 < [https://www.afrobarometer.org/wp-content/uploads/2022/02/ab\\_r6\\_policypaperno39\\_access\\_to\\_justice\\_in\\_africa\\_eng.pdf](https://www.afrobarometer.org/wp-content/uploads/2022/02/ab_r6_policypaperno39_access_to_justice_in_africa_eng.pdf)> accessed 21 September 2022.

between litigants.<sup>1008</sup> The problem of unequal relations stands out from the findings of the interview as may be illustrated by the statement of James Kalokoni, the lawyer who represented the people of Musuba village in the judicial review and human rights challenge alleging violation of their right to religion, as follows:

The public perception in Zambia is that chiefs, as the High Court in Livingstone pointed out, are traditional leaders, they are our leaders we are supposed to respect them and whatever they say is law. Even if what they have done is against the law, we have to forget, we have to respect them. Even the District Commissioner (DC) had to get involved in the chief's affairs "no we cannot be harassing our traditional leaders." It's like they are above the law. The DC's involvement was to protect the chief and not to resolve the issue.<sup>1009</sup>

This perception could also be deduced from the controversy that surrounded the case of *Nabiwa Imikendu* which prompted the Judiciary to transfer the case from Mongu, the seat of the traditional authority, to Lusaka.<sup>1010</sup> Further the matter was assigned to a three-member panel, a discretion that is rarely exercised by the Chief Justice.<sup>1011</sup> These findings resonate with one of the key barriers to effective access to administrative justice identified by Cappelletti and Garth, namely, unequal parties, that is "on the one side individuals, and on the other side bearers of public power."<sup>1012</sup>

Related to the problem of unequal power relations, chiefs appear to view themselves as being above the regulation of courts as can be seen from the attitude exhibited by the chief in the *Kelvin Fungwe* case, who refused to participate in the proceedings.<sup>1013</sup> Despite the court passing judgment in favour of the Petitioners in 2017, the chief has not complied with the judgment, compelling the petitioners to commence contempt proceedings against him.<sup>1014</sup> Another example of the defiance of traditional rulers is the

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<sup>1008</sup> Ibid 27 -29; Cappelletti and Garth (n 477) 190-191.

<sup>1009</sup> Interview with Mr James Kalokoni held on 2 April 2022.

<sup>1010</sup> *Imikendu* (n 917).

<sup>1011</sup> Ibid.

<sup>1012</sup> Cappelletti and Garth (n 477) 274.

<sup>1013</sup> *Fungwe* (n 942).

<sup>1014</sup> Interview with Mr James Kalokoni held on 2 April 2022.

resolution by the Council (Kuta) of the Barotse Royal Establishment on 8 February 2017 which, in reacting to the suit by *Nabiwa Imikendu and Others*, is reported to have been “unanimous in supporting Litunga’s immunity from persecution and they vowed not allow the summons be served on the Ngambela or Litunga.”<sup>1015</sup>

The small number of cases challenging the exercise of public power by chiefs could also be attributed to the challenges of access to courts and lawyers by rural populations over whom chiefs preside. Challenges of access to justice in rural communities in Zambia have been attributed to elevated levels of poverty and the limited number of lawyers, most of whom are based in the capital Lusaka.<sup>1016</sup> With minimal legal aid funding, lawyers in Zambia almost exclusively depend on commercial and private client work which is largely based in the capital and Copperbelt provinces, thereby leaving most poor populations outside the reach of voluntary free legal services offered by individual lawyers.<sup>1017</sup> This problem is compounded by the fact that the common law adversarial system, which is practiced in Zambia and depends on the private initiative of the complainant, has the effect of barring many litigants who cannot afford the services of lawyers. The case of *Nabiwa Imikendu* above which was dismissed at a preliminary stage, demonstrates the difficulty of prosecuting cases by self-representing litigants.<sup>1018</sup>

The problem of limited access to lawyers by rural communities could also be deduced from the interviews which found that all the lawyers who participated in the interviews met their clients through referrals from civil society organisations, their involvement in

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<sup>1015</sup> Lusaka Times, ‘Barotse Royal Establishment reject summon from Zambian Courts’ (Lusaka Times) < <https://www.lusakatimes.com/2017/02/09/barotse-royal-establishment-reject-summon-zambian-courts/>> accessed 6 March 2022.

<sup>1016</sup> Kahn-Fogel (n 426) 734-4; Samvel Varvastian and Felicity Kalunga, ‘Transnational Corporate Liability for Environmental Damage and Climate Change: Reassessing Access to Justice after Vedanta v Lungowe’ (2020) 9 (2) Transnational Environmental Law 323, 328-329.

<sup>1017</sup> Unger (n 482) 356.

<sup>1018</sup> Felicity Kayumba Kalunga, ‘High Court Civil Procedure and the Right to Equal Access to Justice for Self-Representing Litigants in Zambia’ (2017) International Journal of Multi-Disciplinary Research) 3471-2 .

the work of civil society organisations, or through their personal networks. The following excerpts from the interviews are illustrative of this:

The cases were referrals by a civil society organisation. There were some investigations by certain civil society organisations particularly in Serenje District of Central Province in an area where the substantive chief had died. But before he died, there are certain land allocations that he had made to foreign investors in the agricultural sector.<sup>1019</sup>

One of my former classmates in law school is amongst the Plaintiffs. So, he is also affected. When matters came to a head, he decided to come to me with his colleagues.<sup>1020</sup>

I am one of the Jehovah's witnesses myself. I received a report from our branch office here in Zambia in Makeni Lusaka that there was a case which had come up in Kalomo in Chief Nyawa's area, where our brothers were expelled from the village for refusing to contribute something to the organising committee of the Lwiindi traditional ceremony. That is how I became interested in the matter, and we took it to court.<sup>1021</sup>

The above sentiments could also explain why the same lawyers have represented the claimants in more than one case. For instance, the claimants in all the cases involving the displaced Serenje communities were represented by the same lawyers. Equally, the cases involving the residents of Musuba village who were ejected from their village on religious grounds were both litigated by the same lawyer. These findings are consistent with the findings of the 2007 report by the Paralegal Alliance Network, the Danish Institute of Human Rights which found that the void left by the lack of lawyers in the rural areas is often filled by the uncoordinated efforts of civil society organisations involved in providing legal aid services.<sup>1022</sup> This could further be illustrated by the finding from the case analysis and interviews that the cases brought by the displaced

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<sup>1019</sup> Interview with a Lusaka Lawyer conducted on 6 March 2022.

<sup>1020</sup> Interview with Peggy Hlazo conducted on 16 March 2022.

<sup>1021</sup> Interview with James Kalokoni held on 2 April 2022.

<sup>1022</sup> Paralegal Alliance Network, University of Zambia, and Institut for menneskerettigheder (Denmark), 'Mapping of legal aid service providers in Zambia' (Paralegal Alliance Network 2007) (as cited in Unger (n 482) 356-357).

Serenje communities had the institutional backing and support of civil society organisations such as the Southern Africa Litigation Centre.<sup>1023</sup>

Another impediment with regards to access to justice for people who are adversely affected by chiefly authority flows from the fact that lawyers in Zambia do not ordinarily appear before traditional dispute resolution fora nor are they expected to know customary law since it primarily applies in the Local Courts where lawyers have no audience.<sup>1024</sup> Lawyers would therefore only get involved in a customary matter once it is in the Subordinate Courts or the High Court. The following remarks by a Lusaka based lawyer speak to this state of affairs:

We once took a matter involving ownership of customary land by contending claimants before the High Court, but the court refused hear it and told us to go the Lands Tribunal... The traditional authorities are the ones who determine ownership. After the matter was discontinued, we pulled out as lawyers and left it to the parties to go to the traditional leader.<sup>1025</sup>

The High Court is empowered to transfer cases to a Local Court having jurisdiction over such matter.<sup>1026</sup> This power is further justified by the absence of provisions on the application of customary law in the High Court Act, although the court may receive evidence of it in matters where questions of customary law may be material to the issue before it.<sup>1027</sup> The denial of jurisdiction by the High Court to determine customary law disputes also contributes to limiting the capacity of courts and lawyers to develop public law jurisprudence in cases involving the exercise of chiefly authority under customary law.

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<sup>1023</sup> Southern Africa Litigation Centre, 'Zambia: Preventing The Displacement of Rural Women From Their Customary Land' (Southern Africa Litigation Centre, 6 February 2018) <<https://www.southernafricalitigationcentre.org/2018/02/06/preventing-the-displacement-of-rural-women-from-their-customary-land/>> accessed 4 March 2022.

<sup>1024</sup> Ndulo (n 6) 446.

<sup>1025</sup> Interview with a Lusaka based lawyer conducted on 11 November 2021.

<sup>1026</sup> High Court Act Chapter 27 of the Laws of Zambia, s 24.

<sup>1027</sup> Ibid, s 34.

Lawyers also tend to be constrained by rules of practice when litigating claims against chiefs. The High Court Act prescribes different procedures for commencing matters in the High Court.<sup>1028</sup> In *New Plast Industries v The Commissioner of Lands and The Attorney-General*,<sup>1029</sup> the Supreme Court of Zambia held that:

It is not entirely correct that the mode of commencement of any action largely depends on the reliefs sought. The correct position is that the mode of commencement of any action is generally provided by the relevant statute.<sup>1030</sup>

Applying this principle and based on their legal training, lawyers would classify their clients' claim based on their evaluation of the cause of action and reliefs sought to determine the appropriate procedure to adopt. Although a cause of action is difficult to define, it is determined by several factors which include the action or conduct of the defendant being challenged, reliefs sought, or the nature of the relationship of the parties.<sup>1031</sup> Most of the lawyers I spoke to during the interviews attributed their procedural choice to the reliefs sought by their clients, the conduct of the defendant, and the procedural rules. This was in response to the question, "why did you choose the particular mode of commencement?" The following quotations are illustrative of this point:

We opted to go by way of petition because of the numerous violations of human rights really, which issues can only be determined through a petition and not any other way of commencement. It is because of the statutory prescription as to how human rights violations or cases ought to be presented to the High Court. We couldn't go by way of writ of summons of course because we didn't want obvious preliminary issues to be raised in the matters and having the cases dismissed on technicality.<sup>1032</sup>

We commenced the action by Writ of Summons and Statement of Claim because of the reliefs that the plaintiffs were seeking. Between the

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<sup>1028</sup> High Court Act 1960, s10.

<sup>1029</sup> (2001) ZR 51.

<sup>1030</sup> Ibid.

<sup>1031</sup> Silas A Harris, 'What is a Cause of Action' (1928) 16 (6) Calif L Rev 459, 461.

<sup>1032</sup> Interview with a Lusaka lawyer conducted on 6 March 2022.

Lands Tribunal and the High Court, with hindsight we would have gone to the Lands Tribunal. But again, when they came, they set out these claims.<sup>1033</sup>

A notable exception was James Kalokoni who justified his choice of process based on his conception of a chief as a public officer as follows:

What made me commence legal action by way of judicial review was the fact that as far as I was concerned, chiefs exercise public power and you challenge abuse of public power by way of judicial review under Order 53 of our Rules of the Supreme Court 1999 edition. That is the only Order which talks about challenging abuse of public power. That is what made me go by way of judicial review.<sup>1034</sup>

Being able to determine the appropriate cause of action and consequently the process for moving the court is one of the effects of legal formalism produced by law training and the adherence to the writ system under the Common Law tradition.<sup>1035</sup> Although many lawyers and judges rarely interrogate the assumptions underpinning procedural law, these assumptions are deeply rooted in the conceptual understanding and classification of law and institutions as public and private respectively.<sup>1036</sup> These assumptions tend to dictate the set of rules applicable to particular facts and what those rules should do. Strict adherence to the public-private law divide is one of the factors that make it difficult for law practice to develop the law from facts which cannot be neatly construed within the formal rules.<sup>1037</sup> The above responses from the research participants seem to confirm this proposition and could potentially explain why there are very few cases challenging the customary law power of chiefs using public law processes. I develop this argument on the public-private law divide in the next chapter which analyses customary tenure regulation from a public law perspective.

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<sup>1033</sup> Interview with Peggy Hlazo conducted on 16 March 2022.

<sup>1034</sup> Interview with James Kalokoni conducted on 2 April 2022.

<sup>1035</sup> Tamanaha (n 39) 112.

<sup>1036</sup> Charles Sampford, 'Law, Institutions and the Public/Private Divide' (1991) 20 (2) Fed L Rev 185, 201.

<sup>1037</sup> Ibid. see also Alfred Cockrell, 'Can You Paradigm – Another Perspective on the Public Law/Private Law Divide' (1993) Acta Juridica 227, 245.

On the part of courts, the two matters in which litigants sued their chiefs and were dismissed by the High Court suggest some unwillingness to control the public power of chiefs, which courts deem to be a traditional power and therefore falls outside their jurisdiction. This record notwithstanding, the judgment of the Supreme Court in *Amos Musuba*, which held that chiefs do exercise public power and are amenable to judicial review, establishes ground-breaking precedent on legal pluralism in public law.<sup>1038</sup> Further, the cases involving internally displaced persons who have challenged their forced evictions under the bill of rights provide useful precedent for public law on the accountability of the central government for the abuse of power by chiefs or their failure to act.<sup>1039</sup>

## 8.5 Conclusion

This chapter has discussed the findings of the doctrinal analysis of court judgments and ongoing litigation involving the exercise of power by chiefs. The chapter found that although case law on judicial review and constitutional challenges against chiefs is in its infancy, the few cases discussed above demonstrate a move towards courts embracing their role to control the public power of chiefs. This can be deduced from the decision of the Supreme Court in the *Amos Musuba* case which held that chiefs occupy a unique position and that some of their actions are of a public law nature and therefore amenable to judicial review. Based on the findings from the case analysis and qualitative interviews with lawyers, the small number of cases involving challenges to the exercise of public power by chiefs may be attributed to the reluctance by litigants to sue their chiefs, limited access to courts and lawyers by rural communities and the reluctance by courts to determine customary matters against chiefs, which they conceive as traditional and as such falling outside their jurisdiction.

The case analysis has also found that challenges relating to the administration of land in customary areas form the bulk of the cases litigated in the High Court, although in

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<sup>1038</sup> *Musuba* (n 283).

<sup>1039</sup> *Chipabwamba* (n 967).

most of these cases chiefs have not been sued despite their actions being at the centre of the litigation. The thesis argues that notwithstanding the current practice, the power that chiefs exercise when they administer land under customary tenure is a public law one. The next chapter develops this argument by discussing customary land regulation from a public law perspective.

## **Chapter Nine: A Public Law Perspective on Customary Land Tenure Regulation**

### **9.1 Introduction**

The previous chapter analysed cases involving chiefs to assess the extent to which case law on chiefs has influenced the development of public law in Zambia. It found that out of the 39 cases analysed, 19 were disputes involving a decision of a chief in the exercise of their power under the Lands Act to consent to the allocation or conversion of land in a customary area. This was the majority of the cases reviewed. This number is based on the small sample used by this thesis which was guided by the narrow scope of the research question. Further, the sample only covered cases from the high court and appellate courts. It excluded disputes settled by traditional dispute resolution fora, the Lands Tribunal, and cases decided by the Local Courts and Magistrates Courts where most customary law matters are heard.<sup>1040</sup> The exclusion criterion for the cases was guided by the second research question which seeks to assess the extent to which judicial control of chiefs has influenced the development of public law in Zambia. For this reason, disputes before traditional fora were excluded because they fall outside the scope of the research question which is concerned with judicial control of chiefs. Cases from the Lands Tribunal were excluded because they fall under statutory controls and are well analysed elsewhere.<sup>1041</sup> Cases from the lower courts were excluded because the thesis focuses on constitutional and administrative law matters over which the High Court exercises original jurisdiction.<sup>1042</sup> The volume of customary land disputes is indicative of the contentious nature of the regulation of customary tenure in Zambia.

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<sup>1040</sup> Local Courts Act, s 8 and 12; Subordinate Courts Act, s 16.

<sup>1041</sup> Mudenda (n 83).

<sup>1042</sup> Constitution of Zambia, art 134.

The previous chapter also established that although customary land litigation forms the bulk of the cases involving chiefs, most of these cases are litigated as property rights claims against land holders or “squatters” claiming customary rights on land once a certificate of title has been issued. The chapter also analysed recent cases in which displaced residents of Serenje district have challenged their forced eviction from customary land using constitutional litigation alleging violation of their various rights under the bill of rights. In one of these cases, both the High Court and Court of Appeal produced landmark decisions which have affirmed the rights of customary landowners from a public law perspective.<sup>1043</sup> These recent cases present an interesting opportunity and justification for applying public law perspectives to customary land regulation. They show that although the Constitution of Zambia does not guarantee the right to own land and notwithstanding the provisions of section 8 of the Lands Act which merely recognises use rights in customary land, the High Court can affirm individual and community rights in customary land through a constitutional challenge. They also show how through strategic public law litigation, the claimants in those cases have managed to present complex human rights claims related to land in a manner that could potentially be incompatible under property rights litigation.

This chapter analyses customary land regulation in Zambia from a public law perspective. The aim of the chapter is to demonstrate the wider implications of this research by demonstrating its practical application to one of the most contentious fields in which chiefs exercise substantial power. The chapter argues that chiefs exercise public power when they make decisions involving customary land. It establishes this by discussing the historical context of Zambia’s land tenure law and customary land regulation to demonstrate its public law character. It also criticises the existing land law reform efforts which are framed within a property law paradigm and advances a public

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<sup>1043</sup> *Molosoni Chipabwamba and 12 Others v Yssel Enterprises Limited and 7 Others* 2017/HP/2201 (HC), Appeal No 104/2020 (CA) (unreported).

law approach to customary land regulation. Such public law interventions should however be framed within the social context of legal pluralism in Zambia.

I develop this argument in four sections under which the remainder of this chapter is organised. The first section provides a summary discussion of the history of land tenure law in Zambia with the view to establish the public law nature of customary land tenure law. The second section critically analyses the land tenure law reforms that have been implemented in Zambia, drawing on the existing literature which has analysed customary land regulation and comparative perspectives from other African countries. In so doing, I provide a justification for a public law perspective on customary tenure regulation by demonstrating the inadequacy of the present laws which, as I argue, are framed within the property paradigm. The third section proceeds to analyse the provisions on land tenure in the Constitution of Zambia (Amendment) Act 2016 and the 2021 Lands Policy to evaluate the public law efforts at tenure regulation that have so far been implemented. The fourth section explores the potential contribution of legal pluralism in public law to the challenges in customary land regulation.

## **9.2 Evolution of Land Tenure Law in Zambia**

The problems in the law regulating customary land tenure in Zambia should be understated within the context of the country's colonial history and the subsequent law reform efforts by the post-independence governments. This long and complex history has been well explained elsewhere and cannot be fully covered within the limited scope of this study.<sup>1044</sup> A workable summary is however attempted to give context to the discussion of the customary land tenure from a public law perspective.

Land tenure law in Zambia, like other former settler colonies, came under the realm of administrative law by virtue of colonial law and policy which provided for reservation

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<sup>1044</sup> For a compressive discussion of the history of land law in Zambia, see Mudenda (n 83) ch 11 and Mphanza Patrick Mvunga, 'Land Law and Policy in Zambia' (PhD Thesis, University of London 1977) pt II.

and movement of Africans from land.<sup>1045</sup> Zambia has a dual land tenure system comprised of customary and statutory tenure. The dual tenure system was first created by the Northern Rhodesia (Crown Lands and Native Reserves) Order in Council 1928.<sup>1046</sup> This Order in Council created two categories of land, namely, Crown Lands and Native Reserves by declaring the remainder of land, after creating reserves and recognising private interest, as Crown Lands.<sup>1047</sup> The Order in Council did not apply to Barotseland which was governed by the Barotse traditional government based on treaty obligations referred to in chapters three and six of this thesis.<sup>1048</sup>

The policy that drove the reservation of land was largely based on preserving the economic interests of the European settlers and mining interests of the British South Africa Company (BSAc) and the North Charterland Exploration Co Ltd.<sup>1049</sup> The latter held a concession from the BSAc and had contested the decision of the Crown, by Order in Council, to create reserves for natives within its tract without compensation, but the challenge failed on the ground that the decision was an act of state.<sup>1050</sup> These economic interests notwithstanding, the stated policy of the Northern Rhodesia government for creating reserves was twofold, firstly to assure that there was sufficient and suitable land for permanent occupation for Africans and secondly to make provision for European settlement and mining development.<sup>1051</sup>

The 1928 Order in Council vested all the powers of the British Crown in Crown Lands in the Governor of Northern Rhodesia who was empowered to make grants and dispositions of land to non-natives.<sup>1052</sup> Native Reserves were vested in the Secretary of

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<sup>1045</sup> Seidman (n 72) 189.

<sup>1046</sup> Mudenda (n 83) 365.

<sup>1047</sup> Northern Rhodesia (Crown Lands and Native Reserves) Order in Council 1928, s 2.

<sup>1048</sup> Mudenda (n 83) 365.

<sup>1049</sup> Mphanza Patrick Mvunga, 'Land Law and Policy in Zambia' (PhD Thesis, University of London 1977) 214.

<sup>1050</sup> Ibid 221.

<sup>1051</sup> Ibid 228.

<sup>1052</sup> Mudenda (n 83) 787.

State and set apart in perpetuity for the sole and exclusive use by natives.<sup>1053</sup> The Governor was required to assign land in Native Reserves to Africans in “tribes or portions of tribes” and non-natives could only occupy this land with the special permission of the Governor and approval of the Secretary of State.<sup>1054</sup> The land in Native Reserves was governed by the customary law of the natives while the general law, comprised of received English law and local statutes, applied to Crown Land.<sup>1055</sup> Native Authorities exercised administrative powers over Native Reserves mostly through regulations to control land use but not tenure.<sup>1056</sup> Chiefs exercised tenure regulatory functions in their traditional capacity pursuant to customary law.<sup>1057</sup> Grants in Crown Lands were given on freehold basis for a 999 years’ lease or held by the Crown for allocation to Europeans.<sup>1058</sup> Africans were moved from areas designated as state land.<sup>1059</sup>

A third category of land was created in 1947, in response to the pressure for land in reserves, by the Northern Rhodesia (Native Trust Land) Order in Council.<sup>1060</sup> The order set apart as crown land “only such land as was shown by an ecological survey to be suited for non-native settlement or to contain workable minerals, the remainder being constituted as Native Trust Land.”<sup>1061</sup> Native Trust Land was administered and controlled by the Governor of Northern Rhodesia “for the use or common benefit, direct or indirect, of natives.”<sup>1062</sup> Trust land could be allocated to Africans or non-Africans, subject to certain conditions, for up to 99 years but the interests in the land could not

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<sup>1053</sup> Ibid.

<sup>1054</sup> Ibid 341.

<sup>1055</sup> Ibid 788; M Kaunda, ‘Land Tenure Reform In Zambia: Some Theoretical And Practical Considerations’ (1987) 12 (2) The Cambridge Journal of Anthropology 29, 31.

<sup>1056</sup> Mvunga (n 1049) 161.

<sup>1057</sup> Ibid.

<sup>1058</sup> Lord Hailey, *Native Administration in the British African Territories* (London 1950) 77.

<sup>1059</sup> Mvunga (n 1049) 231 and 245.

<sup>1060</sup> Ibid 77.

<sup>1061</sup> Ibid.

<sup>1062</sup> White (n 235) 171.

be transferred.<sup>1063</sup> Native Authorities were to be consulted when making such grants.<sup>1064</sup> In 1956, the Northern Rhodesia (Gwembe District) Order was enacted to facilitate the construction of the Kariba Dam for production of hydroelectricity and to grant land and fishing rights in the area following this development.<sup>1065</sup> Individual tenure for Africans in all the three categories of land was included by a policy adopted in 1947 to accommodate the needs of "advanced Africans" mainly necessitated by the return of soldiers at the end of the Second World War, but the tenure conditions were less favourable, with regards to and time and often size, compared to non-Africans.<sup>1066</sup>

These Orders in Council were retained at independence as the Zambia Independence Act 1964 provided for the continuation of existing laws.<sup>1067</sup> New Orders were however promulgated pursuant to section 9 of the Zambia Independence Act to substitute the Crown, Governor, and Secretary of State, with the President and change the designation of "crown" to "state" land. Apart from these textual changes, the Orders remained unchanged for the duration of the UNIP administration.<sup>1068</sup> The independence constitution guaranteed the property rights of the individual in the bill of rights which prohibited the deprivation of property without compensation.<sup>1069</sup> The president delegated his powers to make grants and dispositions of land to the Commissioner of Lands subject to the directions of the minister responsible for land matters.<sup>1070</sup>

Three key changes to land law were implemented under the UNIP administration. The first was the enactment of the Lands Acquisition Act 1970 which empowered the state to compulsorily acquire land that was abandoned by Europeans after independence.

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<sup>1063</sup> Ibid.

<sup>1064</sup> Mudenda (n 83) 270.

<sup>1065</sup> Ibid 368.

<sup>1066</sup> Mvunga (n 1049) 337; Lord Hailey (n 1058) 157.

<sup>1067</sup> Zambia Independence Act 1964, s 2.

<sup>1068</sup> Mvunga (n 1049) 363.

<sup>1069</sup> Constitution of Zambia 1964, s 18.

<sup>1070</sup> Statutory Instrument No 7 of 1964, repealed by Statutory Instrument No. 4 of 1989 containing similar provisions on assignment of presidential powers.

The second was the enactment of the Western Province (Land and Miscellaneous Provisions) Act 1970 which terminated the special privileges of the Barotse traditional government by declaring all land in western province to be a reserve within the meaning of the Zambia (State Lands and Reserves) Orders 1928 to 1964 and vested it in the President of Zambia.<sup>1071</sup> The third change was the enactment of the Land (Conversion of Titles) Act 1975 which converted all freehold titles to 100-year statutory leases from 1 July 1975 when the Act came to force.<sup>1072</sup> The Act also banned the sale or transfer of land for value.<sup>1073</sup> The Act also empowered the minister responsible for land to prescribe the maximum area of agricultural land that one person could hold at a time.<sup>1074</sup> The ceiling was placed at 250 hectares for grants made out of Reserves or Trust Land.<sup>1075</sup> The 1975 Act was amended in 1985 to introduce restrictions on the allocation of land to non-Zambians.<sup>1076</sup> These changes have been extensively discussed elsewhere and will not be repeated here as they did not make fundamental changes to customary land tenure regulation and chiefly power.<sup>1077</sup>

The reforms introduced by the UNIP administration were largely premised on ruling party's political ideology of humanism which was aimed at "eliminating exploitation of man by man."<sup>1078</sup> President Kenneth Kaunda explained his conception of African land tenure under this ideology as follows:

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<sup>1071</sup> Western Province (Land and Miscellaneous Provisions) Act 1970, s 2 cited by Mvunga (n 1049) 370.

<sup>1072</sup> Land (Conversion of Titles) Act 1975, s 5.

<sup>1073</sup> *Ibid* s 7.

<sup>1074</sup> *Ibid* s 17.

<sup>1075</sup> Moses Kaunda, 'Resilience of the Status Quo: The Sad Story of the Zambian Lands Bill, 1994' (1995) 39 J Afr L 87, 92.

<sup>1076</sup> Land (Conversion of Titles) (Amendment) Act 1985.

<sup>1077</sup> Mudenda (n 83) ch 11; Mvunga (n 1049) ch 6 and 8; Moses Kaunda, 'Ownership of Property Rights in Land in the First Two Republics of Zambia: An Evaluation of Restrictions on Free Alienation and Some Lessons for the Future' (1989) 21 Zam LJ 61; Alfred W Chanda, 'The Effect of Lack of Presidential Consent under Section 13 of the Land (Conversion of Titles) Act 1975' (1984) 16 Zam LJ 79.

<sup>1078</sup> Mvunga (n 1049) 377.

Land, obviously, must remain the property of the state. This in no way departs from our heritage. Land was never bought. It came to belong to individuals through usage and the passage of time. Even then the chief and elders had overall control although...this was done on behalf of all the people.<sup>1079</sup>

Mphanza Patrick Mvunga criticises this conception of traditional land holding as having been premised on a misconception of African tenure and the role of chiefs in administering land.<sup>1080</sup> He argues, based on a case study involving three ethnic groups, namely, the Ngoni, Tonga, and Luvale, that although land was not sold *per se*, improvements on land such as fixtures could be sold for money or exchanged for other goods in barter trade.<sup>1081</sup> With respect to the role of chiefs, Mvunga refutes the claim of the overriding authority of a chief in land, arguing that what chiefs had were “interests of control” in that they could, for instance, be consulted before cultivating land to manage the individual and group interest in the land.<sup>1082</sup>

Following the change of political administration in 1991, the MMD government made the first major changes to land tenure law. These reforms were informed by the MMD’s political agenda of liberalising the economy which required a minimalist approach to land regulation by removing some of the restrictions that were introduced under the UNIP administration which were inconsistent with free market economics.<sup>1083</sup> Land market reform was also “one of the key conditionalities that the Zambian government was required to meet in order to restructure its international debt.”<sup>1084</sup> Zambia, like other African countries, was therefore influenced by the global efforts mostly sponsored

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<sup>1079</sup> KD Kaunda, ‘Towards Complete Independence’ (Address by President Kaunda to the UNIP National Council Held at Matero Hall Lusaka, 1969) 39-40.

<sup>1080</sup> Mvunga (n 1049) 377.

<sup>1081</sup> Ibid 149 and 157.

<sup>1082</sup> Ibid 116.

<sup>1083</sup> Moses Kaunda, ‘Ownership of Property Rights in Land in the First Two Republics of Zambia: An Evaluation of Restrictions on Free Alienation and Some Lessons for the Future’ (1989) 21 Zam LJ 61, 73.

<sup>1084</sup> Taylor Brown, ‘Contestation, Confusion and Corruption: Market Based Land Reform in Zambia’ in S Evers, M Spiernburg and H Wels (eds) *Competing Jurisdictions* (Brill 2005) 79, 84.

by the World Bank and other bilateral donor agencies at the time to enact “market-friendly land law.”<sup>1085</sup>

The World Bank has been influential in the law and policy reforms regulating land in Africa through its high profile policy documents.<sup>1086</sup> The other way by which the World Bank has influenced law reform in Africa is through partnerships with governments and development agencies under which it has supported land law reforms.<sup>1087</sup> The World Bank’s position on land tenure regulation has been largely based on market economics with an emphasis on the potential of land to advance economic development. For instance, the 1975 World Bank Land Reform Policy Paper emphasised, among other principles, “the need for policy and regulatory environment that promotes transfers to more efficient land uses.”<sup>1088</sup> One of the recommendations under this policy document was the abandonment of communal tenure in favour of individual title.<sup>1089</sup> This recommendation therefore influenced most of the law reform efforts in the 1980s to 1990s.<sup>1090</sup> Customary tenure was deemed unfavourable because it could not be turned into ready capital, such as by making it collateral for a loan, because it encompasses complex group rights and is often undocumented.<sup>1091</sup> Zambia’s Lands Act of 1995 was largely influenced by this policy framework as the below discussion of the problems with the tenure law in Zambia shows. More recent policy documents and research by the World Bank have recognised the value of customary or communal tenure and embraced the value of participation by local communities and leadership institutions in land law

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<sup>1085</sup> Patrick McAuslan, *Land Reform in Eastern Africa: Traditional or Transformative?* (Routledge 2013) 65.

<sup>1086</sup> Andrea Collins and Matthew I Mitchell, ‘Revisiting the World Bank’s land law reform agenda in Africa: The promise and perils of customary practices’ (2018) 18 (1) *J Agrar Change* 112, 114-115.

<sup>1087</sup> McAuslan (n 1085) 65; W Paatii Ofosu-Amaah, ‘Legal and Judicial Reform in Developing Countries: Reflections on World Bank Experience’ (2002) 8 *Law & Bus Rev Am* 551, 559.

<sup>1088</sup> Klaus Deininger and Hans Binswanger, ‘The evolution of the World Bank’s land policy: principles, experience, and future challenges’ (1999) 14 (2) *The World Bank Research Observer* 247, 248.

<sup>1089</sup> *Ibid*; Collin and Mitchel (n 1086) 115.

<sup>1090</sup> Collin and Mitchell (n 1086) 115.

<sup>1091</sup> Deininger and Hans Binswanger (n 1088) 250.

reform and management.<sup>1092</sup> These recommendations have however been criticised for being uncritical about the involvement of local and traditional institutions, including by overlooking their limited capacity and the potential for discrimination and exclusion of vulnerable populations under these institutions.<sup>1093</sup> I discuss some of these challenges further in the section which discusses the potential of public law interventions in land tenure regulation.

The land law reforms in Zambia under the MMD were achieved by enacting the Lands Act 1995 which repealed the previous laws regulating land tenure.<sup>1094</sup> The Act merged the land in former Reserves and Trust Lands into one and called it “customary area.”<sup>1095</sup> No amendments relating to tenure and the functions of chiefs have been made to the Act to date. The Act was enacted amidst protests from traditional leaders who bemoaned the lack of consultation prior to its enactment with some branding it as being “against the people’s wishes.”<sup>1096</sup> The main argument from the traditional authorities who were opposed to the Lands Act was that it would undermine their powers although the government’s view was that the powers of traditional leaders were actually enhanced by the provisions requiring their consent in decisions involving allocation and conversion of land in customary areas.<sup>1097</sup> The salient provisions of the Act which relate to the power of chiefs and customary land are highlighted below.

Section 3 of the Lands Act provides that “all land in Zambia shall vest absolutely in the President and shall be held by him in perpetuity for and on behalf of the people of Zambia.” The Act recognises customary land rights held before and after its enactment.<sup>1098</sup> It empowers the President to allocate land to any Zambian or non-

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<sup>1092</sup> Collin and Mitchell (n 1086) 115; Frank FK Byamugisha, ‘Securing Africa's land for shared prosperity: A program to scale up reforms and investments’ (World Bank Publications 2013).

<sup>1093</sup> Collins and Mitchell 116.

<sup>1094</sup> Lands Act 1995, preamble.

<sup>1095</sup> Lands Act 1995, s 2.

<sup>1096</sup> Sumbwa (n 790) 117.

<sup>1097</sup> Kaunda (n 1075) 91 – 92.

<sup>1098</sup> Lands Act 1995, s 7.

Zambian who meets the requirements outlined in section 3 of the Act. The president is however mandated to consider the local customary law of the area and consult the local chief, local government authority, and any person who may be affected when granting land in a customary area.<sup>1099</sup>

The Act also allows people who hold land in customary areas to convert it to statutory tenure subject to the approval of the chief and the local authority.<sup>1100</sup> Section 8(3) of the Act only guarantees “a right of use and occupation” in customary land. The procedure for conversion of land from customary to statutory leasehold is provided for under the Lands (Customary Tenure) (Conversion) Regulations 1996 which empower the local chief to consent to the conversion of land. Where a chief refuses to give consent, they are mandated to communicate the refusal, in a prescribed form, to the applicant and the Commissioner of Lands and state the reasons for the refusal.<sup>1101</sup> The Act however does not provide for any remedy where a chief unreasonably withholds their consent.<sup>1102</sup> Once land has been converted, it is regulated under statutory tenure. Another important provision of the Lands Act worth highlighting is section 9 which prohibits occupation of vacant land without lawful authority. The Act does not however define lawful authority. This provision alters the position under customary tenure where a member of the community could acquire land by occupying vacant land without seeking the permission of any person.<sup>1103</sup>

Land under statutory tenure is leased from the president for 99 or 100 (for former freeholds) years secured by a grant of a certificate of title issued under the Lands and Deeds Registry Act.<sup>1104</sup> This Act protects land that is subject to a certificate of title from adverse claims of right except in cases of fraud, a superior claim under that Act, or with

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<sup>1099</sup> Lands Act 1995, s 3(4).

<sup>1100</sup> Ibid s 8.

<sup>1101</sup> Lands (Customary Tenure) (Conversion) Regulations, r 2.

<sup>1102</sup> Mudenda (n 83) 471.

<sup>1103</sup> Mvunga (n 1049) 142.

<sup>1104</sup> Lands and Deeds Registry Act, chapter 185 of the Laws of Zambia.

respect to land that has been erroneously included in the certificate.<sup>1105</sup> Following the enactment of the Lands Act, Courts have ruled that a certificate of title can be successfully challenged by people claiming rights to the land in dispute under customary law if the title holder did not comply with the procedure for obtaining title in a customary area, including through failure to consult or obtain the necessary consent of traditional and local leaders.<sup>1106</sup> The Act also established the Lands Tribunal, but the provisions were repealed in 2010 and replaced by a separate Act establishing the Tribunal.<sup>1107</sup>

This attempt at summarising the evolution of land tenure law in Zambia demonstrates the process by which customary tenure came under administrative law. It also provides the necessary context to the discussion of the problems in the law regulating customary land and the power of chiefs which I discuss in the next section.

### **9.3 Problems with Land Tenure Law**

The above summary shows that although the Lands Act 1995 repealed the colonial legislation which created three categories of land, it has maintained the classifications of tenure founded by it. One of the earliest critics of the land tenure laws in Zambia (then Northern Rhodesia) was CMN White, an African Land Tenure Officer at the time, who conducted a comprehensive study of land tenure practices in all reserves and trust lands in the regions of Zambia (then Northern Rhodesia) apart from Barotseland where these provisions did not apply.<sup>1108</sup> White criticised the regulation of land in reserves and trust land arguing that it failed to provide for individual land rights of Africans. White argued that the law and policy regulating reserves and trust land were based on a misleading and “former widespread belief that Africans practice communal land tenure,

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<sup>1105</sup> Ibid, s33, 34, and 35.

<sup>1106</sup> Henry Mpanjilwa Siwale and Other v Ntapalila Siwale (199) ZR 84; Still Water Farm Limited v Mpongwe District Council and Others SCZ Appeal No 90 of 2001; and Chipabwamba (n 992).

<sup>1107</sup> Lands Tribunal Act 2010.

<sup>1108</sup> White (n 235) 171.

and that individuals enjoy no more than a right of use.”<sup>1109</sup> Based on his analysis of the ingredients of tenure holding in the various African communities he studied, namely, acquisition, security, transfer, transmission and succession, and abandonment of right, White contended that “the sum total of the rights which make the systems of African land tenure in Northern Rhodesia can only of be regarded as equivalent to individual tenure.”<sup>1110</sup> He advocated for amendments to the existing Orders in Council to recognise the existing *de facto* individual African land rights.<sup>1111</sup>

Concurring with this position, Mphanza Patrick Mvunga added, with regards to the role of traditional leaders over customary land, that “neither the chief nor headman (was) a land owning authority from whom all estates are derived.”<sup>1112</sup> What the chiefs and headmen and women had were administrative and control functions which permitted them to have a say on whether, for instance, a person can cultivate land which the community uses as grazing area.<sup>1113</sup> Mvunga’s submission was based on a case study involving three ethnic groups, the Ngoni, Tonga, and Luvale. Mvunga, however, observed that:

The insistence by political or ethnic authorities such as chiefs and headmen that they own land has reportedly resulted in some actual allocations and dispossession of land in some parts of Southern province. This introduces a new feature in the customary land tenure which calls for recognition or disapproval of that purported land owning authority.<sup>1114</sup>

This evolving character of the power of traditional leaders over customary land has become problematic as can be deduced from the high volume of disputes involving

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<sup>1109</sup> Ibid.

<sup>1110</sup> Ibid 174.

<sup>1111</sup> Ibid 171.

<sup>1112</sup> Mvunga (n 1049) 122.

<sup>1113</sup> Ibid 123.

<sup>1114</sup> Mvunga (n 1049) 123.

customary land and from the literature discussed below.<sup>1115</sup> White, in his 1960 study, attributed the small number of court cases at the time to the lack of “control by a political agency” in the land holding in customary areas which essentially made issues relating to land holding a domestic matter.<sup>1116</sup> This was bound to change over time as the system of land holding evolved due to a number of factors including population growth and commercialisation, which would make the need for a control agency inevitable.<sup>1117</sup> This appears to be the case now with the enactment of the Lands Act which has given control powers to traditional leaders by giving them power to authorise the occupation of vacant land in customary areas and consenting to allocations of land in customary areas and change of ownership from customary to statutory tenure.

Although there are no official records to indicate the effect of the 1995 Lands Act on the size of land in customary areas or the number of people who have converted tenure, researchers who have studied landholding in Zambia from the 2000s onwards have documented increased commercialisation of customary land and a fast pace of conversion of land from customary to statutory tenure mostly by local elites and foreign investors.<sup>1118</sup> This research shows that conversion of land from customary to leasehold tenure has produced adverse results which include social and economic exclusion of rural communities, elite capture of land resources, displacement of holders of customary rights from land, and corruption.<sup>1119</sup> The law on conversion of tenure also potentially undermines traditional leaders by threatening loss of their legitimacy by the

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<sup>1115</sup> Brown (n 1084) 94.

<sup>1116</sup> CMN White, ‘A Survey of African Land Tenure in Northern Rhodesia’ (1960) 12 J Afr Admin 3, 5.

<sup>1117</sup> Ibid 6.

<sup>1118</sup> Brown (n 1084); Jordan Chamberlin, TS Jayne, and Derek Headey, ‘Scarcity amidst abundance? Reassessing the potential for cropland expansion in Africa,’ (2014) 48 Food Policy 51; Lauren Honig and Brian P Mulenga, ‘The Status of Customary Land and the Future of Smallholder Farmers Under the Current Land Administration System in Zambia’ (Working Paper 101) (IAPRI 2015); Home (n 541) 168.

<sup>1119</sup> Brown (n 1084), 81; Also, H Chitonge and Others, ‘Silent Privatisation Of Customary Land In Zambia: Opportunities For A Few, Challenges For Many’ (2017) 43 (1) Social Dynamics 82, <https://doi.org/10.1080/02533952.2017.1356049>.

people who suspect that traditional leaders are selling land even when they are not.<sup>1120</sup> Further some chiefs fear losing their power because conversion of land takes away their power to evict erring members from their villages.<sup>1121</sup> Although the law vests customary land in the president, in practice chiefs tend to exercise sovereign power over decisions to allocate land and have in many instances successfully blocked government projects in rural areas.<sup>1122</sup> The effect of this is to leave customary land users at the mercy of the administrative discretion of chiefs without any institutional safeguards.<sup>1123</sup>

These problems are not peculiar to Zambia and have been documented in other African countries with similar land tenure law and history, such as Ghana, Tanzania, and Kenya.<sup>1124</sup> Semahagn G Abebe succinctly captures the problem of retaining colonial law and policy in the regulation of land as follows:

Incompatibility between the visible and invisible institutions has led to the simultaneous existence of different rules in relation to property rights law and customs that lead to conflict, which usually results in different notions of rights and obligations. In addition to this, the incoherence of the two systems has created 'different socioeconomic

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<sup>1120</sup> Lauren Honig and Brian P Mulenga, 'The Status of Customary Land and the Future of Smallholder Farmers Under the Current Land Administration System in Zambia' (Working Paper 101) (IAPRI 2015) 5.

<sup>1121</sup> Horman Chitonge and Others, 'Silent Privatisation of Customary Land in Zambia: Opportunities For A Few, Challenges For Many' (2017) 43 (1) *Social Dynamics* 82, 93. <https://doi.org/10.1080/02533952.2017.1356049>

<sup>1122</sup> Honig and Mulenga (n 1120) 6.

<sup>1123</sup> Nicholas J Sitko, Jordan Chamberlin, and Munguzwe Hichaambwa, 'Does Smallholder Land Titling Facilitate Agricultural Growth?: An Analysis of the Determinants and Effects of Smallholder Land Titling in Zambia' (2014) 64 *World Development* 791, 794.

<sup>1124</sup> Jordan Chamberlin, TS Jayne, and Derek Headey, 'Scarcity amidst abundance? Reassessing the potential for cropland expansion in Africa,' (2014) 48 *Food Policy* 51; Patrick Bottazzi, Adam Goguen and Stephan Rist, 'Conflicts of customary land tenure in rural Africa: is large-scale land acquisition a driver of 'institutional innovation?'' (2016) 43 (5) *The Journal of Peasant Studies* 971, DOI: 10.1080/03066150.2015.1119119; Ambreena Manji, 'Land reform in the shadow of the state: The implementation of new land laws in Sub-Saharan Africa' (2001) 22 (3) *Third World Quarterly* 327, DOI: 10.1080/01436590120061633; McAuslan (n 1085); Adeoye O Akinola and Henry Wissink, *Trajectory of Land Reform in Post-Colonial African States* (Springer 2019).

spaces and citizenships, characterised by exclusion, corruption and patronage.<sup>1125</sup>

The problems in the current land law and reforms appear to stem from its conceptual design which is founded in the market based concept of land as property.<sup>1126</sup> Law which conceptualises land as property tends to consign it to the private sphere thereby focusing on the relationship between the individual property owner and the physical objects which are subject to the individual's property rights.<sup>1127</sup> According to Ann Davis, "the term 'property' is like a metaphor for a subsistence farm, a parcel of land allocated to an individual which allows autonomy and self-sufficiency outside of the state."<sup>1128</sup> Davies further contends that because the property paradigm associates self-ownership to property ownership, it "produces subjects, authorizing and privileging actors who own and protect property."<sup>1129</sup> Furthermore, because property ownership can include ownership of people, it becomes impossible, under this paradigm for people "who have been owned historically" to enjoy citizenship because they still lack "self-ownership."<sup>1130</sup> This analogy applies to the rural communities who could be considered subjects owing to the historical and institutional design within which customary tenure is regulated. Patrick McAuslan argues that countries which retain strong elements of the social outlook of land that does not differentiate between the economic and social relations in society, which is characteristic of customary tenure, are unlikely to develop coherent land policies unless they pay regard to both the social and economic approaches to land policy.<sup>1131</sup>

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<sup>1125</sup> Abebe (n 334) 434.

<sup>1126</sup> McAuslan (n 240) 5; Brown (n 1084).

<sup>1127</sup> Sampford (n 1036) 191; McAuslan (n 240) ch 11; Ambreena Manji, *The Struggle for Land and Justice in Kenya* (Eastern Africa Series Book 49) (Boydell & Brewer, Kindle Edition 2020) 17.

<sup>1128</sup> Ann E Davis, *The End of Individualism and the Economy: Emerging Paradigms of Connection and Community* (1st edn, Routledge 2020) 145.

<sup>1129</sup> *Ibid* 152.

<sup>1130</sup> *Ibid*.

<sup>1131</sup> McAuslan (n 240) 6.

The property paradigm in Zambia's property law has been implemented in two main ways. The first is through its focus on transforming customary tenure with the view to eliminate it through conversion to statutory tenure or land titling.<sup>1132</sup> The second is through its reliance on litigation or centralised arbitration for enforcing property rights and interests. Both these approaches have failed to address the structural challenges of land tenure regulation discussed above as I demonstrate below.

Beginning with the reforms aimed at tenure conversion or land titling, Nicholas Sitko and others argue that Zambian policy makers have stagnated on developing a comprehensive land policy that would address the problem of access to arable land by smallholders but have instead opted to pass procedural laws such as the Lands Act which provides guidelines for converting customary land to leasehold tenure but does not regulate land allocation and administrative systems.<sup>1133</sup> Those who support land reforms aimed at eliminating customary tenure base their arguments on the undesirability of customary tenure to flourish in a market based economy because it cannot be used to facilitate credit which is required for commercial agriculture.<sup>1134</sup> Some of the identified characteristics which make customary land undesirable for a market based economy include its capacity to accommodate concurrent rights and interests on the same property, absence of documentary evidence of ownership, and the lack of mechanisms to control land use which exist under statutory tenure, for example, through conditions inserted in a lease.<sup>1135</sup>

One of the most influential proponents of land titling is the Peruvian economist, Hernando de Soto, who argued that the majority of people in Asia and Africa are poor

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<sup>1132</sup> Lands Act, s 3 and 8.

<sup>1133</sup> Nicholas J Sitko and Jordan Chamberlin, 'The geography of Zambia's customary land: Assessing the prospects for smallholder development' (2016) 55 Land Use Policy 49; Nicholas J Sitko, Jordan Chamberlin and Munguzwe Hichaambwa, 'Does Smallholder Land Titling Facilitate Agricultural Growth?: An Analysis of the Determinants and Effects of Smallholder Land Titling in Zambia (2014) 64 World Development 791.

<sup>1134</sup> Kaunda (n 1055) 35.

<sup>1135</sup> Ibid 36.

because they transact outside the law.<sup>1136</sup> De Soto argued that compared to the West where property is documented, the poor people in these parts of the world hold property in “defective forms” which “cannot be readily turned into capital” that can be used as collateral to obtain a loan or be transacted outside their local communities.<sup>1137</sup> De Soto’s work has been influential in the development of African policies aimed at land tilting.<sup>1138</sup> Zambia’s Lands Act sought to achieve this by providing for conversion of title from customary, which is undocumented, to statutory tenure. Once converted to statutory tenure, the land ceases to be customary and becomes state land.<sup>1139</sup>

Land law reforms aimed at tenure conversion have been criticised for their failure to accommodate African land tenure norms. Jan Michael Otto, for instance, argues that some land titling law reform projects undertaken in African countries do not seem to reflect the “law’s political, administrative, economic or social contexts.”<sup>1140</sup> Research in African countries has shown that the perceived benefits of land titling are not automatic and in some instances produce opposite results such as increased tension and elite capture of land resources at the expense of the majority poor.<sup>1141</sup> Mahmood Mamdani’s caution is therefore vital when evaluating and undertaking land law reforms:

It is not possible to understand the nature of colonial power simply by focusing on the partial and exclusionary character of civil society. It requires, rather, coming to grips with the specific nature of power through which the population of subjects excluded from civil society was actually ruled...as another form of power.<sup>1142</sup>

Mamdani refers to this excluded power as “decentralised despotism.”<sup>1143</sup> Mamdani’s work, which describes the colonial state as a “bifurcated state” made up of citizens

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<sup>1136</sup> De Soto (n 537) 64-65.

<sup>1137</sup> Ibid 18.

<sup>1138</sup> Musembi (n 538); Manji (n 37) 2-9.

<sup>1139</sup> Mudenda (n 83) 413.

<sup>1140</sup> Otto (n 539).

<sup>1141</sup> Camilla Toulmin, ‘Securing land and property rights in sub-Saharan Africa: The role of local institutions’ (2009) 26 (1) Land Use Policy 10, 15.

<sup>1142</sup> Mamdani (n 138) 15.

<sup>1143</sup> Ibid 22.

comprised of the European settlers and other elites who were regulated by civil law and owned property on the one hand, and subjects comprised of African “tribal” communities who were regulated by customary law that regulated non-market relations including land on the other hand, squarely applies to Zambia.<sup>1144</sup> Therefore, land reform efforts which do not engage with this “decentralised despotism” are unlikely to succeed.

The Lands Act has attempted to accommodate traditional leaders by giving them power to consent in decisions to alienate land in a customary area or convert customary land to statutory tenure. As Admos Chimhowu argues, this incorporation of the power of chiefs into statutory law has extended state power into areas where it had limited influence thereby creating “new checks and balances” which in reality the state lacks the capacity to follow through.<sup>1145</sup> The statutory incorporation of traditional leaders in the administration of land without corresponding checks has therefore enhanced the despotic powers of chiefs with the adverse effects discussed above. For instance, Taylor Brown reports that most of the displacements in customary areas have resulted from the failure by the chief and local authority officials to consult the locals due to oversight and, in some cases, for financial motives.<sup>1146</sup> There is therefore a need to regulate this power of chiefs to minimise its abuse. White proposed that such a control function should be given to a committee rather than the chief acting alone to avoid abuse of power.<sup>1147</sup>

The second approach by which Zambia’s land law has implemented the property paradigm is demonstrated in its reliance on litigation as the choice mechanism for dispute resolution. The problem with overreliance on courts, considering the conceptual foundations of public law discussed in chapter five of this thesis and its expression in

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<sup>1144</sup> Ibid 17.

<sup>1145</sup> Admos Chimhowu, ‘The ‘New’ African Customary Land Tenure. Characteristic, Features and Policy Implications of A New Paradigm’ (2019) 81 Land Use Policy 897, 901.

<sup>1146</sup> Brown (n 1084) 91 and 96.

<sup>1147</sup> White (n 1116) 8.

practice as the previous chapter established, is that land matters have been consigned to the realm of private law rights enforceable through individual initiative. This approach largely depends on courts to develop the law, a function that the courts perform within the context of the limitations imposed on them by the written law, rules of practice, and their legal training. Because private law is developed as judge made law, it largely depends on the expertise of the lawyers and judges to develop it, a key ingredient that is missing when it comes to customary land litigation and law.<sup>1148</sup> The problem in the case of Zambia is compounded by the challenges of access to justice by rural communities discussed in chapter eight of this thesis. Dimuna Phiri notes that most people in rural communities lack knowledge about the law and institutions for dispute resolution, have limited access to lawyers, and cannot afford the expense of enforcing their rights in the established dispute resolution fora.<sup>1149</sup>

The other problem with overreliance on courts is that the land law reforms have not been accompanied with corresponding reforms in the law relating to the jurisdiction and application of customary law in the courts. Mvunga argues that only the Local Courts and Subordinate Courts Acts contain provisions empowering courts to apply customary law.<sup>1150</sup> The High Court has no such jurisdiction but can receive evidence of customary law in a matter "in which questions of African customary law may be material to the issue."<sup>1151</sup> This means that the High Court would primarily only apply customary law in appeal cases. Mvunga argues that this absence of provisions on the application of customary law in the High Court Act effectively deprives the court of an opportunity to develop customary law through judicial interpretation.<sup>1152</sup> This lack of express

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<sup>1148</sup> Dan Priel, 'The Political Origins of English Private Law' (2013) 40 (4) *Journal of Law and Society* 481, 482 and 496.

<sup>1149</sup> Dimuna Phiri, 'A Legal Analysis of Disjunctions Between Statutory and Customary Land Tenure Regimes in Zambia' (Institute for Poverty, Land and Agrarian Studies, 2015) 18-20, < [www.plaas.org.za](http://www.plaas.org.za) > accessed 16 September 2020.

<sup>1150</sup> Local Court Act Chapter 29 of the Laws of Zambia, s 12; Subordinate Court Act Chapter 28 of the Laws of Zambia, s16.

<sup>1151</sup> High Court Act Chapter 27 of the Laws of Zambia, s 34.

<sup>1152</sup> Mvunga (n 1049) 420.

jurisdiction could also explain the small number of cases involving customary law in public law cases, such as judicial review and human rights, over which the High Court exercises original jurisdiction. This is a legacy of the colonial justice system whereby relations between customary land owners were governed by customary law and adjudicated before traditional courts “as a matter of personal rather than private or public law.”<sup>1153</sup> The effect of maintaining the status quo in Zambia, which falls under the common law tradition, has been to deprive the higher courts of the opportunity to develop precedent on customary law in public law through land litigation.

One of the ways though which the Lands Act 1995 sought to address the problems of limited access to justice was by creating the Lands Tribunal. The Lands Tribunal has admittedly contributed to the development of important precedent on customary land.<sup>1154</sup> However, the Tribunal has over time become inefficient owing to, among other factors, its lack of decentralisation and formalism.<sup>1155</sup> Specialist courts and tribunals tend to be effective if they provide “rapid, economical and efficient service.”<sup>1156</sup> A notable example of good use of tribunals is in Uganda where the Land Act provides for the establishment of District Land Tribunals and a procedure for appeal to the High Court, although its implementation has been problematic.<sup>1157</sup>

The problem with dispute resolution mechanisms that heavily rely on the individual effort to enforce one’s rights is that although litigants in a number of cases may obtain their remedy, such as the cancellation of title deeds, these processes do not address the public interest.<sup>1158</sup> As this thesis has endeavoured to show in this chapter and in chapter three, chiefs in Zambia are public officers exercising state sanctioned powers.

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<sup>1153</sup> Shivji (n 269) 63.

<sup>1154</sup> Mudenda (n 83) 416-454.

<sup>1155</sup> Brown (n 1084) 89.

<sup>1156</sup> McAuslin (n 1126) 266.

<sup>1157</sup> Uganda Land Act 1998, pt V; McAuslan (n 240) 88-90.

<sup>1158</sup> Rebecca Williams, ‘The Public/Private Divide Getting Out of Order 53’ (1998) 19 *Holdsworth L Rev* 91, 96.

As such, law reform interventions developed within the property paradigm which assigns land law to private law rights are ill equipped in providing meaningful access to justice for people who are adversely affected by the exercise of public power by chiefs in the absence of “constitutional limits on such power” to protect against the dangers of abuse of power.<sup>1159</sup> What public law interventions have been attempted through the Constitution of Zambia and policy to regulate this public power of chiefs over land? I address this question in the next section.

## **9.4 Land Tenure Regulation under the Constitution of Zambia and National Lands Policy 2021**

Catherine Boone argues that in most African countries, successful negotiation about land tenure reform will require prior consensus building concerning the political choices about which property rights the state will enforce, the state of bureaucratisation or democratisation of state authority and the content of national citizenship, which issues are constitutional.<sup>1160</sup> Embedding land reforms in the constitution provides a “framework blueprint” for reforms against which policy and law would be tested.<sup>1161</sup> It however does not guarantee successful land reforms as the constitutional aspirations may be frustrated by legislative inaction or lapse or by political and administrative authorities within the land administration institutions.<sup>1162</sup> A number of African Countries, such as Kenya, Uganda, Ghana, and South Africa, have used their constitutions to implement land reforms.

For Zambia, the framing of land debates as constitutional issues intensified after the enactment of the Lands Act 1995. Before that, the first Constitutional Review Commission (Chona CRC), addressed the question of land but only focused on whether

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<sup>1159</sup> Barnett (n 471) 271.

<sup>1160</sup> Catherine Boone, ‘Property and Constitutional Order: Land Tenure Reform and the Future of the African State’ (2007) 106 (425) *African Affairs* 557, 586.

<sup>1161</sup> Juanita M Pienaar, ‘Land Reform Embedded in The Constitution: Legal Contextualisation’ (2015) 114 (1) *Scriptura: Journal for Contextual Hermeneutics in Southern Africa* 1, 14.

<sup>1162</sup> Catherine Boone and Others, ‘Land Law Reform in Kenya: Devolution, Veto Players, And The Limits Of An Institutional Fix’ (2019) 118 (471) *African Affairs* 215.

non-Zambians should continue to hold and sell land and whether there should be limits imposed on the maximum land one could hold.<sup>1163</sup> The Chona CRC recommended that non-Zambians should not be allowed to hold freehold titles.<sup>1164</sup> Its recommendation was however not included in the Constitution, but was implemented through the enactment of the Land (Conversion of Titles) Act 1975, discussed above. Both the Mvunga (1990) and Mwanakatwe (1995) CRCs did not address the subject of land.<sup>1165</sup> The Mung'omba CRC whose 2005 report and draft constitution greatly inputted into the 2016 amendment received substantial submissions on land tenure including on the role of traditional leaders in administering customary land which are discussed further below.

The remainder of section discusses the provisions on land in the Constitution of Zambia (Amendment) Act 2016 and the National Lands Policy 2021. It also discusses the potential of the constitutional amendment to improve the regulation of customary land in Zambia. It draws on comparative and analytical perspectives from other African countries such as Kenya, Uganda, and South Africa, which have used the constitution as a means towards implementing land reforms and whose provisions have been extensively studied.<sup>1166</sup> The other rationale for drawing analytical perspectives from other African countries is that the Mung'omba CRC, whose 2005 draft constitution and report originated the content of the 2016 constitutional amendment, consulted the constitutions of and visited some of these countries for comparative experience.<sup>1167</sup> Although Kenya's Constitution was adopted in 2010, after the Mung'omba CRC had completed its work, it contains comprehensive provisions on land including principles for land policy that are similar to those contained in the Constitution of Zambia and

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<sup>1163</sup> Mung'omba CRC Report (n 31) 764.

<sup>1164</sup> Ibid.

<sup>1165</sup> Ibid 764.

<sup>1166</sup> See for instance, Boone and Others (n 1162); Ambreena Manji, *The Struggle for Land and Justice in Kenya* (Eastern Africa Series Book 49) (Boydell & Brewer, Kindle Edition 2020) and Pienaar (n 1161).

<sup>1167</sup> Mung'omba CRC Report (n 31) 8-9.

have been analysed by researchers.<sup>1168</sup> It therefore provides useful insights for purposes of assessing the potential of Zambia's constitutional provisions.

The Mung'omba CRC received 522 submissions on the subject of land and made various recommendations.<sup>1169</sup> However, only a few of the Commission's recommendations were adopted in the 2016 constitutional amendment by including a part outlining the principles that would guide legislation and policy on land, environment, and natural resources.<sup>1170</sup> Some of the principles outlined include "equitable access to land and related resources; security of tenure to lawful holders (a modification of the Technical Committee's recommendation which did not contain the word lawful); and transparent, effective and efficient administration of land."<sup>1171</sup> It is difficult to scrutinise some of the provisions of the 2016 constitutional amendment because the final report of the Technical Committee that drafted it was never published although much may be deduced from the Mung'omba CRC report. Overall, the inclusion of a part outlining principles to guide land policy without any substantive provisions or changes to the provisions on the right to land, demonstrates a resolve to maintain the status quo, something akin to what Patrick McAuslan describes as "a new law...for public relations, not for public actions."<sup>1172</sup> This can be contrasted to South Africa, for instance, where land reform aspirations are part of the property clause under the bill of rights.<sup>1173</sup> The approach taken by the South African Constitution facilitates a delicate balance between preserving the status quo by protecting vested rights in property and promoting the "public interest, which includes the reform of the property regime."<sup>1174</sup>

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<sup>1168</sup> Constitution of Kenya 2010, ch 5. For analysis of the provisions see Manji (n 1005); McAuslan (n 1085); and, Ellen M Bassett, 'The challenge of reforming land governance in Kenya under the 2010 Constitution' (2017) 55 (4) *The Journal of Modern African Studies* 537.

<sup>1169</sup> *Ibid* 764.

<sup>1170</sup> Constitution of Zambia (Amendment) Act 2016, pt XIX. Draft Report of the Technical Committee Drafting the Constitution (2012) 267.

<sup>1171</sup> *Ibid* s 253.

<sup>1172</sup> McAuslan (n 240) 250.

<sup>1173</sup> Constitution of the Republic of South Africa 1996, s 25.

<sup>1174</sup> Pienaar (n 1161) 12.

With regards to the vesting of land, the majority of the petitioners who submitted to the Mung'omba CRC, including the House of Chiefs, wanted traditional land to vest in traditional leaders.<sup>1175</sup> The Commission however felt that the submissions were based on a misconception of the vesting provisions as giving the land to the president in his own right and not as a custodian.<sup>1176</sup> It therefore recommended that the vesting provision should expressly state that the president holds the land as custodian "for the use or common benefit, direct or indirect of the people of Zambia."<sup>1177</sup> This can be contrasted to the Constitution of Ghana which vests stool, skin, and family lands in the appropriate stool, skin, or family heads on behalf of, and in trust for the subjects of the stool, skin, or family "in accordance with customary law and usage."<sup>1178</sup>

The recommendation by the Mung'omba CRC demonstrates a clear misapprehension of the concerns of petitioners with regards to the vesting of land. This is because vesting provisions have implications on the control and alienation of land, and ultimately tenure security.<sup>1179</sup> The concerns of the petitioners were based on their experience with the institutional gaps between the central government and customary institutions that exercise control and administrative functions over land. Removing the vesting of land from the President would have helped towards deconcentrating control and administrative power from the president and reduce presidential access to land through the commissioner of lands.<sup>1180</sup> The Commission further recommended that chiefs and the local authorities should have a part to play in the regulation and administration of land within the context of devolution of power.<sup>1181</sup> The final provisions in the constitution however do not contain provisions on vesting of land. It merely provides that "land shall be delimited and classified as State land and customary land and such

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<sup>1175</sup> Mung'omba CRC Report (n 31) 765.

<sup>1176</sup> Ibid.

<sup>1177</sup> Ibid 766.

<sup>1178</sup> Constitution of The Republic of Ghana 1992, as amended in 1996, arts 267 and 36(8).

<sup>1179</sup> Manji (n 37) 45.

<sup>1180</sup> Ambreena Manji, *The Struggle for Land and Justice in Kenya* (Eastern Africa Series Book 49) (Boydell & Brewer, Kindle Edition 2020) 7; Shivji (n 269) 73.

<sup>1181</sup> Mung'omba CRC Report (n 31) 766.

other classification, as prescribed.”<sup>1182</sup> It then proceeds to state that “the President may, through the Lands Commission, alienate land to citizens and non-citizens, as prescribed.”<sup>1183</sup> Land has therefore continued to vest in the president pursuant to the provisions of the Lands Act.

With regards to the role of chiefs in administering land under customary tenure, article 168(3) of the Constitution states that “the role of a chief in the management and, control and sharing of natural and other resources in the chiefdom shall be prescribed.” There has, however, not been any amendment to both the Lands Act and the Chiefs Act to prescribe the functions of chiefs in relation to land. Further, although the constitution provides for devolution of functions and inclusion of chiefs on the local councils, it places “land, mines, minerals and natural resources” under the exclusive functions of the national government.<sup>1184</sup> There is therefore no decentralisation in the management and administration of land. This position is confirmed by the Urban and Regional Planning Act 2015 which states that “planning shall be hierarchical in nature, from the national level proceeding to the regional, provincial and district levels and in like manner planning authorities shall be so ranked.”<sup>1185</sup> As Ambreena Manji notes in relation to Kenya, “resisting decentralisation has also meant resisting the communal model of land.”<sup>1186</sup>

Another key recommendation made by the Mung’omba CRC based on the submissions received was to include a provision guaranteeing Zambians the right to access and own land and to cap the maximum land that can be given to an individual.<sup>1187</sup> These provisions were however not included in the 2016 constitutional amendment because

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<sup>1182</sup> Constitution of Zambia (Amendment) Act 2016, art 254.

<sup>1183</sup> Ibid.

<sup>1184</sup> Constitution of Zambia, art 142(2) Annex.

<sup>1185</sup> Urban and Regional Planning Act 2015, s 6.

<sup>1186</sup> Manji (n 1180) 7.

<sup>1187</sup> Mung’omba CRC Report (2005) 769.

the bill of rights was not amended following the failure of the referendum.<sup>1188</sup> Including a positive right to property under the bill of rights could have demonstrated Zambia's commitment to promoting land reform as is the case, for instance, in South Africa where the constitution clearly demonstrates the clear intention to adjust the land law paradigm.<sup>1189</sup>

Another important change introduced by the 2016 constitutional amendment was the creation of a Lands Commission with powers to administer, manage, and alienate land on behalf of the President as prescribed.<sup>1190</sup> The commission is supposed to have offices in all provinces and progressively in districts.<sup>1191</sup> The rationale for creating a Commission is to deconcentrate the administrative functions from a single person, the Commissioner of Lands, with the view to bring accountability to the role.<sup>1192</sup> The Mung'omba CRC borrowed heavily from the provisions in the Constitution of Ghana in producing these provisions that were targeted at improving the administrative framework.<sup>1193</sup> The provisions are, however, yet to be implemented in practice.

With regards to the dispute resolution mechanisms, the Mung'omba CRC recommended that the jurisdiction of the Lands Tribunal should be widened to cover all land matters and that the tribunal should be decentralised.<sup>1194</sup> These provisions were however not included in the Constitution and the Lands Tribunal Act 2010 has not been amended to reflect this intention. Decentralising the Lands Tribunal would have helped towards addressing the challenges of access to justice identified above. Another way of mitigating challenges of access to justice for rural communities is by recognising

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<sup>1188</sup> Yande Syampeyo, 'Referendum: Missed opportunity for Zambians' (Zambia Daily Mail, 21 August 2016) <<http://www.daily-mail.co.zm/referendum-missed-opportunity-for-zambians/>> accessed 17 March 2022.

<sup>1189</sup> McAuslan (n 1126) 123.

<sup>1190</sup> Constitution of Zambia, art 233.

<sup>1191</sup> Ibid.

<sup>1192</sup> Mung'omba CRC Report (n 31) 775.

<sup>1193</sup> Ibid.

<sup>1194</sup> Ibid 778.

traditional dispute resolution mechanisms which could prove to be more credible, accessible, and accountable to the people compared to national courts.<sup>1195</sup> Although the 2016 Constitutional amendment recognises traditional dispute resolution mechanisms which are consistent with the Constitution, these provisions have yet to be implemented or studied.<sup>1196</sup>

Notwithstanding the above constitutional guidelines, no changes have been made to the existing laws to implement or clarify the constitutional provisions. The Constitution of Zambia (Amendment) Act 2016 did not set any timeframe within which Parliament was required to amend the existing laws or enact new laws in accordance with the constitutional changes. As a result, there appears to be no urgency in enacting or amending the relevant laws compared to Kenya, for instance, where the constitution set a time limit within which land legislation was to be enacted from the date of the promulgation of the constitution.<sup>1197</sup> Although this time limit has been criticised for producing “confused, contradictory and rushed legislation,” timelines are a useful mechanism to mitigate against legislative lapse.<sup>1198</sup>

The first ever national land policy for Zambia was launched on 11 May 2021 after many years of negotiation.<sup>1199</sup> One of the stated aims of the policy is to “provide equitable access to land on both State and Customary land, irrespective of status” including by streamlining its management and administration services.<sup>1200</sup> In terms of allocation of functions, the policy, like the Constitution and the Lands Act, contains vague provisions on the role of chiefs which more or less repeat their broad discretion given by the Lands

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<sup>1195</sup> Shivji (n 269) 76.

<sup>1196</sup> Constitution of Zambia, art 118.

<sup>1197</sup> Constitution of Kenya 2010, Fifth Schedule, (art 261(1)).

<sup>1198</sup> Manji (n 1180)109; Ambreena Manji, ‘The Politics of Land Reform in Kenya 2012’ (2014) 57 (1) African Studies Review 115.

<sup>1199</sup> Land Portal, ‘Zambia Launches National Land Policy’ (Land Portal, 16 June 2021) <<https://www.landportal.org/blog-post/2021/06/zambia-launches-national-land-policy>> accessed on 3 February 2022.

<sup>1200</sup> National Lands Policy 2021, 12.

Act. For instance, it states that “chiefs shall document all land rights and maintain a land register for their own area; superintend the use and allocation of rights to communal land.”<sup>1201</sup> This is a marked contrast from the rejected 2017 draft policy which contained detailed measures such as:

Provide legal recognition of land certificates issued by traditional authorities and procedures for issuance customary land certificate...and establish procedures for protection of customary interest in communal land resources in the name of the community and/ or Chiefdom.<sup>1202</sup>

Civil society organisations working in the land sector have condemned the Lands Policy 2021 for “watering down many progressive measures which were contained in the draft land policy.”<sup>1203</sup> Commenting on land reforms in the context of Kenya, Ambreena Manji criticises the use of such vague terms as “administration and management” without elaboration as being one of ways that “modern land reform purports to provide legal answers to what remain political and social problems relating to land.”<sup>1204</sup> The Zambian land policy also provides that chiefs shall “carry out dispute resolution in their chiefdoms.”<sup>1205</sup> This is another vague provision with no further detail to ensure that people have substantive access to justice as it gives the adjudicative authority to the same body whose decisions would potentially be in contention. A public law approach designed within the context of legal pluralism could potentially provide an alternative response to the problems of customary land regulation. I explore this further in the next section.

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<sup>1201</sup> Ibid 30.

<sup>1202</sup> Ministry of Lands, Draft Land Policy 2017.

<sup>1203</sup> Zambia Land Alliance, ‘Civil Society Welcomes Adoption Of National Lands Policy: Press Statement dated 28 May 2021’ (Zambia Land Alliance, 31 May 2021) <<https://www.facebook.com/ZambiaLandAlliance/posts/4029806703762155>> accessed 3 February 2022.

<sup>1204</sup> Manji (n 1180) 15.

<sup>1205</sup> Zambia Lands Policy 2021, 30.

## 9.5 A Legal Pluralism Concept of Public Law for Regulating Customary Land?

As the above discussion shows, the property paradigm that has informed the land law reforms in Zambia does not address the historical injustices of colonial land law. Eric Frefogle argues that land law is one of the fields in which the distinction between public and private law is blurred especially when viewed from the perspective of the origins of private property which would unmask the power behind it, such as conquest.<sup>1206</sup>

Understanding land law through a historical analysis of the origins and development of land law and its reforms from the social and political context provides a comprehensive perspective that would be useful for law reform within the social context. A notable example of such an approach is a book by Ambreena Manji which studies the history of Kenya's land law reform from the context of the various social, political, and legal struggles over the nature and purpose of land law reform in Kenya.<sup>1207</sup>

Looking at land law and reforms from a socio-legal context of its history helps us interrogate the colonial foundations of land tenure problems and the political theory that has influenced or maintained the structural injustices in land administration. The statutory incorporation of chiefs in managing and administering land under customary tenure has formally extended state power into customary land tenure and altered the character of customary land from "personal" to public law.

The above notwithstanding, the Lands Act, as noted above, does not contain clear provisions for regulating the administrative power of chiefs over customary land. Chiefs perform this public law function using customary practices and structures which vary between different chiefdoms.<sup>1208</sup> The customary norms for regulating land have however evolved overtime due to cultural interactions, population pressure, socio-

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<sup>1206</sup> Eric Freyfogle, *Agrarianism and the good society: Land, culture, conflict, and hope* (University Press of Kentucky 2007) 89, 90.

<sup>1207</sup> Manji (n 1180).

<sup>1208</sup> Chitonge and Others (n 1121) 87.

economic change, political and legal manipulation, among other things.<sup>1209</sup> These customary land management systems raise issues of effectiveness and accountability including discriminatory land policies against women and young people under some customs and inadequacy of mechanisms for holding chiefs accountable where traditional institutions have collapsed.<sup>1210</sup> Involving traditional leaders in land administration should therefore be effected through a critical lens as it has potential to produce conflict.<sup>1211</sup>

A public law approach offers a useful perspective to customary land regulation because of the ontological meaning of land under customary law which connects it to the community, tradition, and history.<sup>1212</sup> These aspects of customary land holding could best be regulated from a framework which “relies on land being vested in communities or in trustees, governed by customary laws and focused on the prioritisation of use and occupation.”<sup>1213</sup> The value of a public law approach lies in its capacity to prescribe norms for empowering administration and setting standards against which the power of chiefs would be measured for purposes of accountability.

Patrick McAuslan advances an approach which requires drafting “more rather than less law” in form of detailed rules that bind the exercise of administrative discretion by administrators.<sup>1214</sup> This approach could potentially address the concerns relating to the undemocratic practices under customary law which flow from the fact that traditional leaders are not democratically elected. It could also help reform the discriminatory aspects of customary law such as norms which exclude women and young people from land ownership.<sup>1215</sup> The problem with this approach, however, is that it seems to fall

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<sup>1209</sup> Toulmin (n 1141) 14.

<sup>1210</sup> Ibid.

<sup>1211</sup> Collin and Mitchell (n 1086) 116.

<sup>1212</sup> Manji (n 1180) 19.

<sup>1213</sup> Ibid.

<sup>1214</sup> McAuslan (n 240) 256.

<sup>1215</sup> Boone (n 1160) 578 and 584.

within the framework of laws that seek to eliminate customary tenure rather than focus on improving the communal relations under customary tenure.<sup>1216</sup> The approach of regulating customary tenure using detailed legislation has also been criticised for its potential to produce a highly bureaucratised system of land administration based on written law which ultimately trumps on the communities' constituting norms for controlling administrative power.<sup>1217</sup>

These criticisms against a public law approach which relies of legislative reforms may be attributed to the failure of public law to adapt in a manner that embraces the social context of legal pluralism. Rather than implementing public law responses that focus on drafting more laws, this thesis proposes a public law approach which embraces legal pluralism. A notable example of the use of this approach is the one suggested by Issa Shivji who advocates for an approach which seeks to remove the administrative power from the statist top-down institutions to a more bottom-up approach which empowers customary institutions that are "fundamentally modified by broad democratic principles embodied in the constitution and The Basic Land Law."<sup>1218</sup>

One of the ways through which this could be achieved is by drafting laws which accommodate customary law and provide clear guidelines for its application in a manner that ensures compliance with public law values such as the protection of human rights, accountability, and provision of meaningful access to justice for people adversely affected by the exercise of public power. A good example of such a law is section 20 of Tanzania's Village Land Act 1999 which makes land holding under customary law void "to the extent to which it denies women, children or Persons with disability lawful access to ownership, occupation or use of any such land."

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<sup>1216</sup> Manji (n 37) 67.

<sup>1217</sup> Shivji (n 269) 73.

<sup>1218</sup> Ibid 85.

To address the challenges of certainty and predictability, which are important values under administrative law, in customary norms, Gordon Woodman suggests that the norms could be obtained by combining codification of customary law with obtaining customary law from *ad hoc* sources such as the evidence of people well versed in the custom by courts as they develop precedent in the context of the constitutional provisions even though this would potentially differ from the living law.<sup>1219</sup> This must be combined with the evidence of the living law in order to transform customary law from its colonial foundations and develop in accordance with constitutional principles. A good example of this practice is the approach adopted by the South African Constitutional Court in interpreting its constitutional mandate to develop customary law, namely, by giving regard to contemporary practice or the living law as opposed to overreliance on past practice.<sup>1220</sup> For instance, in a case where a traditional leader sought to block a meeting of disgruntled members of a traditional community to discuss their secession from the traditional area, the Constitutional Court of South Africa held that the community was exercising its constitutional rights.<sup>1221</sup> The court stated that political participation that is actuated by the lawful exercise of the rights to freedom of expression and association “can and should assist in ensuring accountability in all forms of leadership and in encouraging good governance.”<sup>1222</sup>

Applying legal pluralism in the public law regulation of customary land would require a change in thinking by legislators, lawyers, and judges in the way they perceive public law and customary law, respectively. The 2016 constitutional amendment which lists customary law as a source law provides a practical basis for applying customary law in fields beyond matters of personal law. The constitutional reforms are, however, insufficient on their own and should be complemented by scholarship. Studying public

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<sup>1219</sup> Gordon Woodman, 'Legal Pluralism in Africa: The Implications of State Recognition of Customary Laws Illustrated from the Field of Land Law' (2011) (1) *Acta Juridica* 35, 44-47.

<sup>1220</sup> Claassens and Budlender (n 28) 80. Comment on *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC).

<sup>1221</sup> *Pilane and Another v Pilane and Another* 2013 (4) BCLR 431 (CC).

<sup>1222</sup> *Ibid* para 69.

law empirically, such as through the study of chiefs as this thesis has done, could assist in exploring alternative perspectives for understanding phenomena including by broadening our conception of public law to apply it to areas, such as customary land regulation, which have traditionally been consigned to private or personal law.

## **9.6 Conclusion**

This chapter has analysed the regulation of customary land as one of the most visible and contentious areas in which chiefs exercise public power. The chapter has done this by discussing customary land tenure law from its historical context to demonstrate its public law character and justify its study from a public law perspective. It has also critically analysed Zambia's land law to highlight the challenges of the current regulatory and law reform efforts which are designed under the property law paradigm. The chapter has further analysed the public law efforts that have so far been implemented through the Constitution of Zambia (Amendment) Act 2016 and the National Land Policy 2021, both of which are insufficient in the absence of accompanying legislative reforms. The chapter concludes that chiefs exercise public power when they administer land under customary law. A public law approach is therefore useful in understanding and designing solutions to the problems in customary land regulation. Any public law approach that is adopted should however embrace the social context of legal pluralism to offer flexible regulatory frameworks within the customary administrative structures and norms. This will also require a change in thinking in our conception of public law, such as by defining law broadly to admit the study of public law empirically which this thesis has attempted by focusing on chieftaincy. The next chapter draws conclusions on the findings of the study and identifies areas for future research.

## Chapter Ten: Conclusion

### 10.1 Introduction

This thesis set out to understand public law in Zambia in its social context by studying chieftaincy in the post-independence constitutional and administrative law history. It describes public law as the law that relates to the regulation of the state rather than between citizens, which is the domain of private law.<sup>1223</sup> It limits its scope of analysis to constitutional and administrative law, which are the accepted divisions of public law.<sup>1224</sup> Public law sets the norms which empower public administration and prescribe its limits to ensure accountability in governmental action. The thesis uses chieftaincy as the relevant empirical phenomenon for the study of public law in context based on the review of literature which revealed the absence of chiefs from existing public law research. This is notwithstanding the fact that chieftaincy is a key state institution in Zambia. The justification for studying chieftaincy under public law is based on three characteristics of chiefs in Zambia which make them an important study phenomenon and makes this research timely. These are, the constitutional and statutory recognition of chiefs, the nature of their functions in the rural local governance, and the revival of research and policy interest in chiefs and their role in the local governance.

Having identified chieftaincy as an important empirical phenomenon for the study of public law, I asked two research questions which guided the research. The first question sought to understand how chieftaincy has evolved under the constitutional and administrative law history of Zambia in the post-independence period. The second question sought to understand the extent to which case law on chiefs has influenced the development of public law in Zambia in its social context. The thesis limited its scope of analysis to the post-independence period based on the research gap that was

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<sup>1223</sup> Barnett (n 1) 1.

<sup>1224</sup> Paton (n 2) 329.

identified in existing literature as I have explained in chapters three and four of this thesis.

To respond to the two research questions, the study was designed as socio-legal study of chieftaincy in constitutional and administrative law history. It relied on qualitative research methods which combined desk-based research with qualitative interviews. These methods provided a rigorous mechanism for finding the evidence needed to answer the two research questions. Desk-based research was used to give me a full understanding of the study phenomenon, develop the conceptual framework for the study, and to conduct a doctrinal analysis of constitutional and administrative law. The interview component supplemented the desk-based research to give context to the doctrinal analysis of cases involving chiefs and to obtain the views of the lawyers who represented the claimants in some of the analysed cases concerning their perception of chiefly authority and public law. From the views of the lawyers, I hoped to deduce how the lawyers' conception of public law and chiefly power influence their choices when litigating claims involving chiefs.

This chapter summarises the key findings of the study on the two research questions. It also presents my reflections on the research process and identifies interesting topics that future research on the subject should engage. The remainder of the chapter is arranged in six sections. The first section summarises the conceptual framework and analytical perspectives that guided the study. The second section discusses the key findings of the research in relation to the first research question, namely, the changing perspectives on the chieftaincy under Zambia's constitutional law history. The third section summarises the findings on the second research question which set out to assess the extent to which litigation involving the chieftaincy has influenced the development of public law in Zambia. The fourth section highlights the contribution that the thesis makes to existing scholarship. The fifth section discusses the limitations of the study. The chapter ends with a reflection on the study and identifies interesting topics for future research on the subject.

## 10.2 A Socio-Legal Study of Chieftaincy in Public Law

As above stated, this study sits within socio-legal research which seeks to understand law in its social context including through empirical legal research. It studies chieftaincy under public law using qualitative research methods. A critical review of literature conducted for this study revealed considerable neglect of chieftaincy by existing public law literature. Existing public law research has tended to focus on central governance institutions and elected public officials whose public power is regulated by statute. The public law literature can be grouped into two categories. The first category comprises of mostly doctrinal and descriptive works which analyse the written law and case law against constitutional and administrative law principles.<sup>1225</sup> The second category comprises of analytical works which study constitutional law from its historical context but also tends to unduly focus on central state institutions and elected officials.<sup>1226</sup> Where chiefs have been discussed, this literature has limited its scope to analysing their roles in the central state institutions such as the Native Authorities during colonial rule and the House of Chiefs in the post-independence period.<sup>1227</sup> None of these works have focused on the position of chiefs in the constitutional developments and the judicial control of their public power, which they exercise pursuant to customary law.

The literature review also established that although chiefs have been neglected by public law research, other social science research such as history, anthropology and political studies has engaged with the institution and the role of chiefs in the local governance, especially from the late 1990s following the re-introduction of plural politics in many African states.<sup>1228</sup> The major limitation of this social science-based literature is that it only incidentally addresses the legal context of chiefly power. This

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<sup>1225</sup> Besa (n 16); Kalunga and Kaaba (n 53); Anyangwe (n 67).

<sup>1226</sup> Sipalo (n 17); Chanda (n 18); Sangwa (n 19); and Matibini (n 46).

<sup>1227</sup> Chanda (n 18); Ndulo and Kent (n 21).

<sup>1228</sup> Baldwin (n 139); Kate Baldwin, 'Elected MPs, Traditional Chiefs, and Local Public Goods: Evidence on the Role of leaders in Co-Production from Rural Zambia' (2019) 52 (12) *Comparative Political Studies* 1925; Chikulo (n 234); and Haang'andu and Béland (n 372).

multi-disciplinary research is, however, important for the study of public law because a country's constitutional and administrative law framework ordinarily reflects its social, political, and administrative history and governance aspirations.<sup>1229</sup> The thesis therefore set out to link these bodies of knowledge through interdisciplinary research focusing on chieftaincy in public law.

The thesis contributes to existing scholarship by conducting a socio-legal study of chieftaincy under public law using legal pluralism as the underlying analytical concept. Legal pluralism provides a practical means for understanding public law empirically using chieftaincy. Drawing on analytical perspectives from sociology of constitutions, constitutional sociology and societal constitutions, the thesis identified two key features of public law against which the research data were analysed to assess how chieftaincy has been regulated under Zambia's constitutional and administrative law during the period under review. The two key features that I identified are firstly, the constitutional norms which confer and limit public power to ensure accountability in the exercise of public power, and secondly, provisions on meaningful access to justice for people who are adversely affected by the exercise of public power by a chief. A summary of the findings of the study on the two research questions is given below.

### **10.3 Chieftaincy in Zambia's Post-Independence Constitutional Law History**

Chapters six and seven of the thesis are dedicated to the study of chieftaincy in the post-independence constitutional law history of Zambia. The two chapters analyse the various constitutional documents, legislation, and other multidisciplinary data with the view to understand the position of chiefs in the constitutional law history. By so doing, the thesis seeks to contribute to the existing literature on public law by producing descriptive and analytical data on the constitutional law history of Zambia which focuses

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<sup>1229</sup> Hatchard, Ndulo and Slinn (n 335).

on chieftaincy. The key objectives of the chapters were twofold. Firstly, to understand the process by which chiefs have been included or excluded from the constitutional law developments and secondly to assess the constitutional law provisions on chieftaincy against the two key features of public law above.

The two chapters found that chiefs enjoyed considerable power and influence in the initial period leading up to the independence of Zambia in 1964. This considerable influence enabled chiefs to participate in the negotiations for the Northern Rhodesia Order in Council of 1963, which substantially informed the content of the Independence Constitution, on equal footing with the nationalist political leaders. Under this Order in Council, chiefs successfully negotiated for the creation of the House of Chiefs and the inclusion of provisions that protected the special position of the Barotseland traditional government. The scales of power however tilted in favour of the nationalist political parties towards independence as evidenced by the exclusion of chiefs from the delegation that represented the Northern Rhodesia government at the independence negotiations in London in 1964. The result of this was the removal of the provisions that protected the special position of the Barotseland traditional government from the independence constitution. These assurances were instead placed in a separate document, the Barotseland Agreement, which had no legal force and was later abrogated through a constitutional amendment in 1969 without recourse to the Litunga and the Barotse traditional government.

After independence, the UNIP government instituted constitutional and law reforms which were aimed at national building and development. These reforms culminated in the major constitutional change in 1973 which repealed the independence constitution and introduced one-party rule in Zambia. The 1973 constitutional review was driven by the central government. This can be deduced from the negligible representation of chiefs on the Chona CRC which was tasked with collecting views on the constitutional review compared to the number of government representatives, for instance. The Government also rejected recommendations of the Chona CRC, such as the proposals to

coopt chiefs into the legislature as institutional representatives and create a provincial council of chiefs in each province which would have replaced the national House of Chiefs, which would have strengthened the position of chiefs.

The UNIP government also implemented legislative reforms which impacted on the role of chiefs in the local governance. For instance, in 1965, the UNIP government abolished the Native Authorities, which were created during colonial rule and were headed by traditional leaders and replaced them with rural local councils which were led by elected councilors. Another example of the law reforms implemented during this period was the enactment of the Western Province (Land and Miscellaneous Provisions) Act 1970 which terminated the special privileges of the Barotse traditional government by declaring all land in western province to be a reserve within the meaning of the Zambia (State Lands and Reserves) Orders 1928 to 1964 and vested it in the President of Zambia.<sup>1230</sup> These statutory changes were preceded by the 1969 constitutional amendment which abrogated the Barotseland Agreement 1964.

Overall, the constitutional and legislative reforms implemented by the UNIP government had the effect of excluding chiefs from the national government although they continued to exercise governance powers in their local areas pursuant to customary law. The UNIP administration attempted to include chiefs in the local government through ward and village development committees which were largely unsuccessful due to failure of decentralisation. Chiefs continued to participate in the national politics through the ruling party structures under the one-party state. Apart from the political links, chiefs were formally excluded from the national government, but they continued to govern their local areas pursuant to their powers under customary law and functioned as development and power brokers between the central government and

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<sup>1230</sup> Western Province (Land and Miscellaneous Provisions) Act 1970, s2 cited by Mvunga (n 1049) 370.

rural areas. This role was further necessitated by the failure of decentralization and devolution of the bureaucratic governance institutions.

The 1973 constitution was repealed in 1991 by a new constitution which reintroduced multi-party politics in Zambia. This constitutional change was executive driven and was intended to facilitate the transition from one-party to multi-party politics. For this reason, the participation of chiefs in this process was negligible. The 1991 constitution abolished the House of Chiefs and in its place empowered Parliament to create a House of Representatives, but this house was never created. With the return of plural politics in 1991, chiefs played a more active role in the local governance and the subsequent constitutional changes that were implemented in 1996 and 2016, respectively. This can be deduced from the inclusion of chiefs on both the Mwanakatwe (1995) and Mung'omba (2005) Constitutional Review Commissions and the Technical Committee that drafted the 2016 constitutional amendment. Chiefs also submitted to the deliberative bodies both as individuals and in their institutional capacity under the House of Chiefs. The resulting provisions saw the establishment of the institution of chieftaincy as a corporate body and the reinstatement of the House of Chiefs, which had been abolished in 1991, in the 1996 constitutional amendment.<sup>1231</sup> Chiefs gained further recognition and protection in the 2016 amendment which abolished the presidential power to recognise chiefs, recognised the power and role of chiefs in the management of natural resources in their local areas, and the incorporated them in the local government.<sup>1232</sup> Other important provisions introduced by the 2016 constitutional amendment are article 7 which lists customary law as forming part of the laws of Zambia and article 118 which recognises traditional dispute resolution mechanisms.

The constitution however merely prescribes the broad powers of chiefs without corresponding limits on their power. The regulation of their powers has been left to

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<sup>1231</sup> Constitution of Zambia 1995 as amended in 1996, arts 127 and 132.

<sup>1232</sup> Constitution of Zambia (Amendment Act) 2016, arts 165, 168, and 153.

customary law and statute, although no new legislation or amendments to the existing law have so far been implemented. In this way, the constitution has failed in its role of setting norms that confer and limit the public power of chiefs to ensure accountable leadership. The constitution has also failed to develop the provisions on access to justice for people who are adversely affected by public power of chiefs partly due to the failure to amend the bill of rights to include a justiciable right to fair administrative action.

Before the 2016 constitutional amendment which repealed the provisions that empowered the President to recognise and withdraw the recognition of chiefs, this power under the Chiefs Act functioned as a limit on chiefly power through threats or actual withdrawal of recognition of a chief following an inquiry. Using this statutory power, people who were adversely affected by the exercise of chiefly power would present their grievances to the central government for the President's action. With the repeal of these provisions, the regulation of chiefs has now been left to traditional institutions under customary law and the courts through their power to protect the constitution and through judicial review of administrative actions. The second research question sought to evaluate how Zambian courts have performed this function of judicial control of chieftaincy by analysing cases involving chiefs to assess their influence on the development of public law. A summary of the findings on the second research question is given in the next section.

#### **10.4 Judicial Control of Chieftaincy in Zambia**

To respond to the second research question which sought to assess the extent to which litigation involving chiefs has influenced the development of public law in Zambia, the thesis analysed judgments and ongoing litigation involving chiefs. The study initially set out to analyse judicial review and constitutional litigation in which a chief has been sued. After a thorough search on databases containing judgments from Zambia, namely the Zambia Law Reports 1963-2013 compiled on a CD by the Council of Law Reporting Zambia and on Zambialii, an electronic database containing legal resources from

Zambia, there were only three cases in which a chief was sued using constitutional and administrative law process. The study was therefore extended to include other matters where a decision of a chief was in contention even though the chief was not sued. These were mostly matters involving the exercise of power by a chief over customary land. The case analysis was supplemented by qualitative interviews with the lawyers who represented the claimants in the analysed cases. The aim of the interviews was to understand the factual and social context of the cases and obtain the views of the lawyers on chieftaincy and how these views affect their litigation choices.

The case analysis and interviews made three key findings concerning how litigation has influenced the development of public law in Zambia. Firstly, there are very few cases in which claimants have challenged the public power of a chief through judicial review or a constitutional challenge. Case law is therefore in its infancy. In the only judicial review matter against a chief, the case of *Amos Musuba*, the Supreme Court of Zambia held that some of the powers and functions of chiefs have public law consequences and are therefore amenable to judicial review.<sup>1233</sup> The position is however not settled as can be deduced from the decision of the High Court in the case of *Nabiwa Imikendu*, which was decided after the Supreme Court judgment, in which the court declined to exercise jurisdiction in an application by subjects seeking an order to have their chief removed for abuse of authority.<sup>1234</sup> The High Court in that case held that it had no power to determine such a matter of a customary nature.<sup>1235</sup>

Secondly, there are recent cases where claimants who were evicted from customary land following the decision of a chief to consent to the allocation or conversion of land from customary to statutory tenure have challenged their eviction under the constitutional bill of rights. In one of these cases, the High Court and Court of Appeal upheld the claimants' constitutional rights on customary land and held the central

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<sup>1233</sup> *Musuba* (n 283).

<sup>1234</sup> *Imikendu* (n 917).

<sup>1235</sup> *Ibid.*

government responsible for the wrongful acts or failure to act by a chief.<sup>1236</sup> These cases demonstrate a move towards courts embracing their function of controlling the public power of chiefs. Based on the findings from the case analysis and the qualitative interviews with lawyers, the slow pace at which public law litigation of the chieftaincy has developed can be attributed to the low contact rates of Zambians with courts generally, reluctance by litigants to sue their chiefs, limited access to courts and lawyers by rural communities, and the reluctance by courts to determine customary matters against chiefs which they conceive as traditional and as such falling outside their jurisdiction.

Thirdly, the case analysis established that challenges relating to the administration of land under customary areas form the bulk of cases litigated in the High Court, although in the majority of these cases, chiefs have not been sued despite their actions being at the centre of the litigation. Administration of land under customary tenure is therefore one of the most contentious powers of chiefs as can be deduced from volume of cases involving customary decisions of a chief in customary land litigation and the review of literature that has studied the problems in regulation of customary land. Using the power of chiefs to administer land under customary tenure, the thesis applied its findings and analytical perspectives from the study to analyse customary land regulation from a public law perspective. The thesis argues that chiefs exercise public power when they make decisions involving customary land. It criticises the existing land law and reform efforts which are framed within a property law paradigm and advances a public law approach to customary land regulation which embraces the social context of legal pluralism. The thesis argues that defining public law broadly, as it has done using legal pluralism as an analytical concept, enables us to study public law empirically such as though the study of chiefs which would also enable us to extend public law to areas, such as land law, where it traditionally does not apply.

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<sup>1236</sup> *Chipabwamba (H.C) (n 967) and Chipabwamba (C.A) (n 992).*

## **10.5 Contribution of this Thesis to Scholarship**

The thesis makes two main contributions to scholarship on chieftaincy and public law.

The first is that it produces literature on chieftaincy in the post-independence constitutional and administrative law history of Zambia, an area that has received little scholarly attention by public law researchers. The thesis does this by conducting a socio-legal historical study of chieftaincy in Zambia's constitutional and administrative law to understand the social and political context within which the constitutional law was developed as well the position of chiefs under public law. The thesis also analyses cases involving chiefs to assess how these cases have influenced the development of public law in its social context. In analysing cases, the thesis contributes to scholarship on the state of access to justice by persons who are adversely affected by chiefly power by analysing ongoing litigation and unreported cases which would otherwise not be published.

The second contribution that the thesis makes to scholarship is that it provides a unique perspective for understanding customary land regulation, which is one of the most contentious aspects of the exercise of chiefly power in the local governance, by analysing it from a public law perspective. Using legal pluralism as the underlying analytical concept, the thesis defines public law broadly by focussing on the identified key characteristics of public law which enabled me to analyse customary land tenure regulation from a public law perspective by focusing on the powers and functions of chiefs. The findings of the thesis have wider implications for public law scholarship as legal pluralism enables us to study public law empirically, like this thesis has done by focusing on chiefs, which may be applied to the study of constitutionalising norms of various persons and institutions in society which exercise public power.

## **10.6 Reflections on the Study**

I came to this study with over 10 years' experience of practicing law in Zambia and approximately five years of teaching constitutional and administrative law at the University of Zambia. These experiences equipped me with subject knowledge of

constitutional and administrative law and informed my assumptions about public law and scholarship. The university courses on constitutional and administrative law in Zambia focus on the written law and central government institutions comprised of constitutional and statutory bodies. Further, the law applicable in judicial review matters in Zambia heavily relies on the English Common law and procedure. My experience from law practice gave me an opportunity to engage with law in society, especially when I was retained by a civil society organisation to form part of the team that conducted public interest litigation on disability rights. One of the cases I was involved with was *Gordon Mwewa and 2 Others v The Attorney General and Another*<sup>1237</sup> which produced a landmark decision that contributed to the repeal of Zambia's archaic mental health law. As part of the post litigation actions, I noted the mismatch between legislative and social reform, evidenced by the failure of a fairly progressive law to influence practice. This prompted me to research on the potential role of administrative law in implementing social and cultural rights which are not protected under the constitutional bill of rights but are provided for in ordinary legislation. My hypothesis was that a proper system of administrative law has the potential to provide effective accountability for human rights contained in legislation that domesticates international human rights instruments in dualist states. My assumption of an ideal system of administrative law was one that applies the rule of law within the context of Zambian or African administrative justice institutions created by statute.

After conducting a preliminary literature review, I decided to evaluate my hypothesis by exploring the potential of administrative law in enforcing legislation which domesticates international human rights instruments in selected dualist states in Africa including Zambia. I decided to use the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) as a case study because it had been domesticated by a number of countries that I considered in my preliminary review of literature which would have formed sufficient basis for the comparative study.

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<sup>1237</sup> *Gordon Mwewa and 2 Others v The Attorney General and Another* (2017/HP/204).

During my preliminary supervisory meetings, I was challenged to refine my research topic by relating it to an incident or experience that triggered my research interest. This led me to analyse the topic within the context of the Zambian case of *Gordon Mwewa and 2 Others v The Attorney General and Another*<sup>1238</sup> mentioned above in which the applicants, among other reliefs, sought to enforce their rights to dignity and non-discrimination in accessing mental health services using the Persons with Disabilities Act 2012 which has domesticated the Convention on the Rights of Persons with Disabilities (CRPD). Analysing the role of administrative law in enforcing human rights through the perspective of the CRPD and the Gordon Mwewa case challenged my assumptions about administrative law and justice institutions created by legislation as an ideal system for enforcing human rights. After approximately two months of reading on the topic and refining it, the data directed me to reading further on the history of Zambia's administrative law and practice to appreciate the nature and development of Zambia's administrative institutions and law practice. My reading of the history of administrative institutions and mental health administration in Zambia further challenged my assumption that administrative mechanisms created by statute provide the ideal system for enforcing economic, social, and cultural rights that are not guaranteed by the constitution. This is because the literature that I reviewed on the experiences of the people revealed that many persons with disabilities in Zambia tend to seek health services from social institutions such as traditional and religious healers who are typically not regulated by the mainstream administrative law mechanisms. With this data, it became apparent that what I had assumed to be problems of law enforcement in mental health administration were simply a reflection of the broader problem associated with the existence of plural legal and administrative orders.

The above realisation prompted me frame a broad research question as follows: what is the public law problem of Zambia's dual legal system which in turn affects the potential

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<sup>1238</sup> 2017/HP/204.

of administrative law to enforce economic, social, and cultural rights? Framed this way, it became quite clear that I would have trouble applying my research skills to connect the problem of mental health regulation to public law within the limited time and resources to complete doctoral studies. I therefore decided to change my perspective on the research subject to instead study the institution of chieftaincy as an empirical phenomenon under public law. The choice of chieftaincy was informed by my prior knowledge and experience of researching the position of customary law in the development of public law in Africa under which I identified chieftaincy as a key state institution that exists in society in many African states.<sup>1239</sup>

I initially designed the research as a doctrinal analysis of Zambia's constitutional and administrative law by analysing the provisions of the constitution on chieftaincy as well as cases on chiefs. I had hoped to combine the doctrinal analysis with the reading of various parliamentary debates that informed the constitutional provisions and reports of the various deliberative bodies that were tasked to develop or amend the constitution. This was influenced by my legal training and conception of public law from a state centralist perspective and the key position of positive law in public law scholarship. With the guidance of my supervisor, I was challenged to immerse myself in reading broadly on the social and political history of Zambia, after my review of literature on constitutional and administrative law in Zambia revealed that chieftaincy was conspicuously missing in the existing literature. I spent approximately one year reading historical and other social science literature from Zambia and other African countries on the political and administrative powers of chiefs including their role in the local government. This multidisciplinary data proved useful in framing the research questions of this thesis and designing the study.

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<sup>1239</sup> Hugh Corder and Justice Mavedzenge (eds) *Pursuing Good Governance Administrative Justice in Common-Law Africa* (Siber Ink 2019).

I have given the above lengthy explanation of my research journey to demonstrate the transformative effect that the PhD experience has had on me both as a researcher and a lawyer. My engagement with socio-legal research has challenged my conception of law and public law to engage with the social context of pluralism. This transformed my thinking about public law as being concerned with state institutions created and regulated by statute and enabled me to study public law empirically by focusing on chieftaincy. The interdisciplinary element equipped me with knowledge and conceptual perspectives from social science which are key for the study of law in context, which is missing in the existing literature on public law partly due to the conceptual nature of public law which emphasises state centralism and is linked to the idea of the unity of the state and sovereignty.

Conducting socio-legal research also enhanced my research skills through interdisciplinary research using different qualitative research methods to obtain data. Some of the key skills I have developed include the capacity to conduct rigorous research by framing appropriate research questions, the proper use of qualitative interviews, managing and synthesising large volumes and multidisciplinary data, data analysis, and research communication, among others. As a researcher, I have also developed my capacity to reflect plan and conduct research within limited time and resources. I have also improved on my capacity to reflect on and adapt my research plans to enable me conduct rigorous research. The next section discusses the limitations of the research and identifies key areas for future research.

### **10.7 Limitations of the Research and Areas for Future Research**

The major limitation of the research design and methodology adopted is that they could not sufficiently capture the constitutional norms and administrative practice regulating chieftaincy in Zambia, which would qualify as the living customary law. Such type of an inquiry would require extended periods of observation and interviews with the local people through a case study or in all the approximately 288 chiefdoms in Zambia. Such an extensive study was not feasible for this research considering the limited time and

resources required to complete doctoral research. For purposes the current study, the resource challenges were compounded by the travel restrictions that were imposed during the research period on account the global coronavirus pandemic. The noted limitation notwithstanding, the research design and methodology adopted for this thesis were sufficient to answer the research questions which sought to understand the position of chiefs in Zambia's post-independence constitutional law history and assess how case law has influenced the development of public law in its social context. In any event, such research as described above would be best suited to develop descriptive knowledge about the constitutional norms and administrative practices regulating chiefs which falls outside the scope of this thesis.

From the findings of the research, the following six topics were identified as deserving the attention of future socio-legal research on chieftaincy and public law. The first, which relates to the major limitation of the current study, is a study of the constitutional norms and administrative practices which regulate chieftaincy under customary law. Such a study could take the form of case studies or a national study. Studying public law empirically by analysing the customary law norms which govern the public power of chiefs would prove useful for purposes of understanding Zambia's public law in its social context. Such a study could also potentially inform law and policy reforms targeted at improving the content of public law and, for instance, provide broader legal and policy options for regulating chiefly power in the local governance or in administering customary land.

Related to the issue of legal and policy options, the second area of law which deserves scholarly attention is the power that chiefs exercise in managing land and other natural resources. This is another area that has not received sufficient scholarly attention. As chapter nine of this thesis has endeavoured to show, this subject is ripe for further research into the powers of chiefs and the regulation of those powers under customary law in administering customary land. Targeted research in the constitutionalising norms and administrative practices governing customary land administration will be useful for

purposes of critically evaluating the role of traditional leaders in managing natural resources based on societal constitutional norms and administrative practices. Such research would help us in formulating law and policy that critically engages with the coercive power of chiefs under customary law.

The third topic that deserves scholarly attention is the study of the norms and practices regulating traditional dispute resolution mechanisms. This study is justified by the constitutional recognition of traditional dispute mechanisms in the 2016 amendment coupled by the reluctance of courts to exercise oversight on the public power of traditional leaders in customary matters. Such research should assess the constitutionality of the existing dispute resolution mechanisms against the standard set by article 118 of the Constitution and their capacity to provide redress to people who are adversely affected by the exercise of public power by chiefs. Such research could prove useful in developing law and policy to implement the constitutional provision which recognises traditional dispute resolution mechanisms. It could also help towards mitigating the problems of access to justice for rural communities on account of limited access to courts and legal representation.

Related to the topic of access to justice for people who are adversely affected by the exercise of public power by chiefs, this thesis has identified the control of chiefs by the Public Protector as the fourth topic that should interest future empirical research on chieftaincy under public law. The office of Public Protector, introduced by the 2016 constitutional amendment, enjoys broader powers than its predecessor, the Investigator General, which could potentially cover chieftaincy. It would be useful to monitor how this office exercises its administrative control function over time and assess the impact it would have on improving access to justice for rural communities and controlling chiefly power, in particular.

The fifth topic that the thesis has identified as deserving of scholarly interest relates to the resolution of disputes relating to identification of rightful holders of chiefly office

following the repeal of the provisions on recognition of traditional leaders. One of the interesting consequences of the 2016 constitutional amendment has been the problem of determining which chiefs should be recognised under the constitution and legislation including for the purposes of determining the maximum number of chiefs who should be paid government allowances. In the wake of the constitutional amendment, the central government attempted to stop paying allowances to new chiefs following the declaration of the provisions of the Chiefs Act on recognition of chiefs as unconstitutional, a decision that was challenged by the four paramount chiefs. The judgment of the court in the case by the four paramount chiefs, which gave the paramount chiefs power to recognise chiefs would potentially generate further litigation and probably law reform to fill the regulatory void created by the constitutional amendment. This is therefore an interesting topic to study and observe how the constitutional and administrative regulation of chieftaincy will evolve.

The final topic that future research should engage with relates to the latest constitutional law amendment which lists customary law as a source of law in Zambia. I project that this amendment provides a constitutional basis for the application of customary law to matters other than those of a personal nature as has previously been the case. It would therefore be interesting to study how the courts, and the Constitutional Court in particular, interpret this provision considering the limitations in the conflict of laws provisions regulating the application of customary law in the High Court which I have discussed in chapters seven and nine above. It would also be interesting to study how courts develop public law precedent through the application of customary law as law as opposed to evidence as previously been the practice.



## **Appendix**

Participant information sheet

Consent form

Interview Schedule

Approval of the Chief Registrar of the Judiciary of Zambia to access court records

## PARTICIPANT INFORMATION SHEET

### THE CHANGING PERSPECTIVES ON CHIEFTAINCY IN ZAMBIA'S CONSTITUTIONAL AND ADMINISTRATIVE LAW HISTORY

You are being invited to take part in a research project. Before you decide whether or not to take part, it is important for you to understand why the research is being undertaken and what it will involve. Please take time to read the following information carefully and discuss it with others, if you wish.

Thank you for reading this.

#### 1. What is the purpose of this research project?

The purpose of the research is to prepare a thesis for the qualification of PhD in Law. The research is conducted by Felicity Kayumba Kalunga under the supervision of Professor Ambreena Manji. The project studies legal pluralism in constitutional and administrative law by studying the regulation of chiefs or autochthonous governance institutions in Zambia from a public law perspective. It has two main objectives, namely:

- a) Conduct a social legal analysis of the changing perspectives on chieftaincy in Zambia's post-independence constitutional law history; and
- b) Study the judicial control of the administrative authority of chiefs or autochthonous governance institutions over customary land.

The first objective of the research will be met by conducting a study of chieftaincy under the post-independence constitutional law developments that Zambia has undergone. In particular, it studies the participation of chiefs in the constitutional development processes and the regulation of the chieftaincy under constitutional law.

To meet the second objective of the research, I study decided cases and ongoing litigation involving the exercise of authority by chiefs and other autochthonous governance institutions in the administration of customary land. This will involve the analysis of the selected decided cases and ongoing litigation in which people claiming rights and interests in customary land have sued chiefs or other traditional leaders. My interest is to understand how the litigants' and their lawyers' conception of chiefly authority is reflected in their procedural choices. Consequently, this information will be used to analyse the extent to which customary land litigation has contributed to the development of jurisprudence on the judicial control of the administrative authority of chiefs over customary land in Zambia and to the development of public law in its social context. This analysis will be complemented by semi-structured interviews with selected lawyers, such as yourself, who have represented litigants in cases involving customary land. The interviews will help deepen our understanding of lawyers' conception of the chiefly authority and the motivations for their procedural choices when litigating cases involving the exercise of power by chiefs over customary land.

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[Date 01/06/2021]

**2. Why have I been invited to take part?**

You have been invited to take part in the research because of your knowledge in law and your experience in representing litigants who have sued a chief or another traditional leader to claim their rights or interests in customary land.

**3. Do I have to take part?**

No, your participation in this research project is entirely voluntary and it is up to you to decide whether or not to take part. If you decide to take part, I will discuss the research project with you [and ask you to sign a consent form]. If you decide not to take part, you do not have to explain your reasons and it will not affect your legal rights.

You are free to withdraw your consent to participate in the interview at any time, without giving a reason, even if you have signed the consent form. However, any data you have already provided may still be used by the researcher. If you wish to withdraw your data from the research afterwards you should contact the researcher by 30 June 2022, the date by which the transcription of the interview responses will be completed.

**4. What will taking part involve?**

Your participation will entail responding to an online or telephone interview between 11 October 2021 and 30 March 2022. The interview will take approximately one hour and can be completed in one session or broken up in more than one session depending on your availability. The interviews will be recorded to facilitate transcribing and record keeping. The audio recordings will be saved on a secure OneDrive cloud operated by Cardiff University and will be deleted as soon they have been transcribed by myself.

The online interviews will be conducted using the Zoom video conferencing facility on a secure internet line. I will initiate the call from my University Zoom account which is password protected. Each meeting will be set up with a unique meeting ID which will only be shared with you and will be password protected. I will also enable waiting room function to control access to the meeting. In addition to your consent given in the attached consent form, I will ask for your permission to record the interview and inform them of their rights to stop the recording at any time during the interview at the beginning of the interview. Please note that the calls may be monitored by the service or website providers and government agencies, in the unlikely event that the content of the call violates any law or terms of use.

**5. What are the possible benefits of taking part?**

There will be no direct benefits to you from taking part, but your contribution will help us understand lawyers' conception of the chiefly authority and how their procedural choices when litigating cases involving the exercise of power by chiefs over customary land contribute to the development of jurisprudence on the chieftaincy and public law.

**6. What are the possible risks of taking part?**

There are no foreseeable risks associated with your taking part in the research. You may however be uncomfortable or concerned about the confidentiality of your personal information collected in the course of the research. I have addressed these concerns by strictly complying with the University's rigorous research ethics approval process which

[SREC/030221/01]

[Date 01/06/2021]

includes extensive training on data management and safeguarding. The University also maintains strict data management protocols which will be complied with and monitored to mitigate the risks associated with confidentiality as explained below.

Although the interviews are based on your experience in litigating cases, there may be a risk of potential disclosure of client information that may not be publicly available on the court records. To minimise the risk of disclosing confidential client information by:

- a) Requesting that you do not mention client names or details that could identify client.
- b) Where you identify such information in interview, I will take all necessary steps to minimise the risk of jigsaw identification or redact the information as necessary.

#### **7. Will my taking part in this research project be kept confidential?**

All information collected about you during the research project will be kept confidential unless you have explicitly agreed for some data to be used non-anonymously.

Any personal information you provide will be managed in accordance with data protection legislation. Please see 'What will happen to my Personal Data?' (below) for further information.

#### **8. What will happen to my Personal Data?**

The personal data that will be obtained includes your name, email address or contact numbers, and other information that you will indicate on the consent form accompanying this statement. Your responses will be attributed to you. I will ask you how you would like to be described in the interview. I will also consider checking direct quotes with you before publication.

Your responses will be attributed to you. If you elect not to be directly identified with your responses, they will be pseudo-anonymised. I will use generic phrases to identify participants (e.g., a lawyer based in Lusaka). Your responses will however be attributed regardless of pseudonymisation. There may be a risk of jigsaw identification, for instance, you may be identified notwithstanding the pseudonymisation because of your position or because the fact that you acted as counsel in a particular case is in the public domain. I will take steps to mitigate the risk of jigsaw identification by not directly quoting or not making direct reference to the case that you litigated in connection with the responses attributed to you.

Cardiff University is the Data Controller and is committed to respecting and protecting your personal data in accordance with your expectations and Data Protection legislation. Further information about Data Protection, including:

- your rights
- the legal basis under which Cardiff University processes your personal data for research
- Cardiff University's Data Protection Policy

[SREC/030221/01]

[Date 01/06/2021]

- how to contact the Cardiff University Data Protection Officer
- how to contact the Information Commissioner's Office

may be found at <https://www.cardiff.ac.uk/public-information/policies-and-procedures/data-protection>

If you have opted to participate anonymously, we will remove your name and other obviously identifying information from the stored data. However, it may still be possible to identify you from the information retained. This data will be stored in accordance with GDPR requirements.

Your consent form [including details of any other personally identifiable information which must be retained] will be retained for the duration of the research project plus 5 years or at least 2 years after the publication of the research output in accordance with the University's current data retention schedule and may be accessed by members of the research team and, where necessary, by members of the University's governance and audit teams or by regulatory authorities. Pseudo-anonymised information will be kept for a minimum of 30 days after being processed and thereafter be retained in accordance with the University Records Retention Schedules but may be published in support of the research project and/or retained indefinitely, where it is likely to have continuing value for research purposes.

Please note that it will not be possible to withdraw any pseudonymised data that has already been published or in some cases, where identifiers are irreversibly removed during the course of a research project, from the point at which it has been anonymised.

#### **9. What happens to the data at the end of the research project?**

The data will be processed published in a doctoral thesis document. It is my intention to publish the results of the research in academic journals, books, book chapters, reports and present findings at conferences. At the end of the research, the information would be accessible to the public in line with the University policies on open access to research. Upon successful completion, the PhD theses will be deposited in the University's digital repository (ORCA), unless I am granted permission to lodge a hard copy in a University library. Both the online and hard copies are subject to the expiry of any approved Bar on Access. Personal data, which does not form part of the published research will be removed before any form of sharing within or outside the University is allowed.

#### **10. What will happen to the results of the research project?**

The results of the research project will be published in a PhD thesis which would be accessible to the public as explained in (9) above. It is also my intention to publish the results of the research in academic journals both locally and abroad in academic journals, books, book chapters, reports and present findings at conferences.

Participants will not be identified by name in any report, publication or presentation unless they have explicitly agreed to being identified. If responses are pseudonymous the researcher will take reasonable steps to reduce the risk of 'jigsaw identification' in any published research.

[SREC/030221/01]

[Date 01/06/2021]

**11. What if there is a problem?**

In the first instance, please contact me, Felicity Kayumba Kalunga, on [kalungafk@cardiff.ac.uk](mailto:kalungafk@cardiff.ac.uk), or my supervisor, Professor Ambreena Manji, on [manjia1@cardiff.ac.uk](mailto:manjia1@cardiff.ac.uk), should you wish to raise a complaint.

Should you wish to raise a complaint if you feel that your complaint has not been handled to your satisfaction, you may contact the School Ethics Officer, Dr Roxanna Fatemi-Dehaghani ([fatemi-dehaghani@cardiff.ac.uk](mailto:fatemi-dehaghani@cardiff.ac.uk)) who is independent from the research team.

If you wish to complain or have grounds for concerns about any aspect of the manner in which you have been approached or treated during the course of this research, please contact me or my supervisor in the first instance. If your complaint is not managed to your satisfaction, please contact the School's Research Governance Unit on [lawpl-ethics@cardiff.ac.uk](mailto:lawpl-ethics@cardiff.ac.uk).

If you are harmed by taking part in this research project, there are no special compensation arrangements. If you are harmed due to someone's negligence, you may have grounds for legal action, but you may have to pay for it.

**12. Who is organising and funding this research project?**

The research is organised by Felicity Kayumba Kalunga, student for PhD in Law under the supervision of Professor Ambreena Manji. The research is funded by the Commonwealth Scholarship Commission UK.

**13. Who has reviewed this research project?**

This research project has been reviewed and given a favourable opinion by the School of Law and Politics (LAWPL) Research Ethics Committee.

**14. Further information and contact details**

Should you have any questions relating to this research project, you may contact me during normal working hours:

Name: Felicity Kayumba Kalunga  
Email: [kalungafk@cardiff.ac.uk](mailto:kalungafk@cardiff.ac.uk)  
Mobile: +447375341190

**Thank you for considering to take part in this research project. If you decide to participate, you will be given a copy of the Participant Information Sheet and a signed consent form to keep for your records.**

Participant ID no:  
*Do not include box for  
anonymised samples*

### CONSENT FORM

Title of research project: THE CHANGING PERSPECTIVES ON CHIEFTAINCY IN ZAMBIA'S CONSTITUTIONAL AND ADMINISTRATIVE LAW HISTORY

SREC reference and committee: [Insert SREC reference and committee or other relevant reference numbers]

Name of Chief/Principal Investigator (*for students, this is your supervisor*): Professor Ambreena Manji, manjia1@cardiff.ac.uk

*Instructions to be deleted after the ethics application is approved:*

- Amend the text within [ ]
- where the phrase "if relevant" appears, amend or delete the text or row as appropriate

**Please  
initial box**

I confirm that I have read the information sheet provided to me for the above research project.	
I confirm that I have understood the information sheet provided to me for the above research project and that I have had the opportunity to ask questions and that these have been answered satisfactorily.	
I understand that my participation is voluntary and I am free to stop participating at any time, without giving a reason and without any adverse consequences I understand that if I withdraw, information about me that has already been obtained may be kept by Cardiff University.	
I understand that data collected during the research project may be looked at by individuals from Cardiff University or from regulatory authorities, where it is relevant to my taking part in the research project. I give permission for these individuals to have access to my data.	
I consent to the processing of my personal information, name and contact details, for the purposes explained to me. I understand that such information will be held in accordance with all applicable data protection legislation and in strict confidence, unless disclosure is required by law or professional obligation.	
I understand who will have access to the personal information provided, how the data will be stored and what will happen to the data at the end of the research project. I understand that the responses given will be attributed. I have a choice to be named in the report for responses that are attributed to me or to have my responses pseudonymised through the use of generic descriptions such as a lawyer based in Lusaka.	
I understand that after the research project, pseudonymised data may be made publicly available via a data repository and may be used for purposes not related to this research project. I understand that it will not be possible to identify me from this data	

[Type here]

Appendix 4

Participant ID no:  
*Do not include box for  
anonymised samples*

that is seen and used by other researchers, for ethically approved research projects, on the understanding that confidentiality will be maintained.	
In some cases, archived data can be identifiable based on your statements or position (through, for example, jigsaw identification). I understand that whilst every effort will be made to ensure my anonymity, I may be identified because of, for example, my statements or position.	
I consent to being audio recorded/ video recorded for the purposes of the research project and I understand how it will be used in the research.	
I understand that pseudonymised excerpts and/or verbatim quotes from my interview may be used as part of the research publication. I understand that the researcher will take reasonable steps to minimise the risk of my being identified from pseudonymised excerpts.	
I consent to being identified in research publications, so that my participation is not anonymous.	
I consent to having my responses pseudonymised through the use of generic descriptions such as a lawyer based in Lusaka.	
I understand how the findings and results of the research project will be written up and published.	
I agree to take part in this research project.	

_____	_____	_____
Name of participant (print)	Date	Signature
<u>Felicity Kayumba Kalunga</u>	_____	_____
Name of person taking consent	Date	Signature
<u>Researcher</u>		

**THANK YOU FOR PARTICIPATING IN OUR RESEARCH**  
**YOU WILL BE GIVEN A COPY OF THIS CONSENT FORM TO KEEP**

SREC/030221/01

[01/06/2021]

## Interview Guide

1. Tell me about your background.

*Prompts*

- Name:
- Gender:
- Firm:

2. Tell me about how you got involved in the case.

*Prompts*

- Walk-in clients.
- You reside or have land in the area.
- Referral

3. Tell me about what made you decide to choose litigation as the preferred mode of dispute resolution. (Compared to alternative dispute resolution including though the Lands Tribunal or arbitration by a traditional institution).

4. Tell me about your choice of process for litigating your client's claim. Why did you choose the particular mode of commencement?

5. What law did you rely on in the claim?

*Prompts*

- Common law
- Statute
- Customary law
- A combination of different laws

6. Tell about the case

*Prompts*

- Progress made in terms of trial
- Choice of parties

7. Tell me about your experience with litigating this case in the manner that you did.

**Thank you for taking part in this research project. You will be given a copy of the Participant Information Sheet and a signed consent form to keep for your records.**

Delete

Archive

Report

Reply

Reply all

Forward

Re: REQUEST TO CONDUCT GENERAL SEARCH ON THE HIGH COURT REGISTRY

From:

Sent:

Thursday, February 4, 2021 10:33 PM

To:

Felicity Kalunga

Cc:

Subject:

REQUEST TO CONDUCT GENERAL SEARCH ON THE HIGH COURT REGISTRY

External email to Cardiff University - Take care when replying/opening attachments or links.  
Nid ebost mewnol o Brifysgol Caerdydd yw hwn - Cymerwch ofal wrth ateb/agor atodiadau neu ddolenni.

Dear Ms. Felicity Kayumba Kalunga,

On behalf of the Chief Registrar of the Judiciary of Zambia, I wish to acknowledge receipt, on 4th January, 2021 of your letter dated 21st December, 2020 regarding the above subject matter.

The contents of your letter have been duly noted and your request has been approved by the Chief Registrar.

In this regard, kindly contact the Senior Assistant Registrar of the High Court of Zambia, for further assistance on the following alternative email addresses:

Kind Regards and wishing you all the best in your research work.

Registrar - Constitutional Court of Zambia.

Reply

Forward

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### **Interviews (Conducted via Zoom Teleconference)**

Interview with Lilian Mushota (PC5), 11 June 2021.

Interview with a Lusaka based lawyer (PC6), 11 November 2021.

Interview with a Lusaka based lawyer (PC1), 6 March 2022.

Interview with Peggy Hlazo (PC2), 16 March 2022.

Interview with a Lusaka based lawyer (PC4), 23 March 2022.

Interview with James Kalokoni (PC3), 2 April 2022.