13. Traditional kingdoms and modern constitutions: parochialism, patriarchy, and despotism vs. indigenous safeguards against absolutism

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1 TRADITIONAL STRUCTURES OF GOVERNANCE AND AFRICA'S CONSTITUTIONS

This chapter pursues three closely related but distinct scholarly aims. The first one is to provide a comparative look at the different ways Africa's traditional structures of governance are brought into the fold of modern constitutions. There are two different ways of looking for this: the bird's-eye-view and the in-depth. These different angles representing different analytical perspectives illuminate different parts of what is under study, and thus reveal different observations. We propose a way to combine the explanatory strengths of cross-country perspectives relying on select comparative variables on the one hand, with country-based in-depth studies on the other, while incorporating the historically evolving global and regional geopolitical dynamics into the scholarly inquiry. Section 1 pursues the first scholarly aim of constructing and finetuning the most appropriate approach to analyse traditional structures of governance, the formal constitutional prerogatives they enjoy, and the real political power they hold.

The chapter's second scholarly goal, developed in Section 2, is to put this analytical combination to use by focusing on the fate of three traditional structures of governance from the continent: Ghana's Asante Kingdom, Uganda's Buganda Kingdom, and Zambia's Lozi Kingdom of Barotseland. Across the course of pre-colonial, colonial, and post-colonial *longue durée* history, we

[1] The author thanks Tom Ginsburg, Adem Kassie Abebe, Yonatan Fessha, and George M. Bob-Milliar.

trace the changes in their formal constitutional status as well the real political power the three kingdoms enjoyed.[2]

The third scholarly goal goes beyond analysing the constitutionalisation of traditional governance structures and finetuning the appropriate explanatory perspectives put to this end. Not everything under investigation will lend itself to a detached technocratic analysis. Constitutional philosophy has to come to our aid and helps us navigate some of the underlying foundational issues. What is under study is bigger than an *exposé* of the formalities, technicalities, and mechanics of constitutional clauses and legislation. At stake are also the foundations of a polity and competing notions of constitutional legitimacy.

On the one hand is the ideal-model of a one-citizen-one-vote unitary state where traditional structures are subsumed under an integrated conceptualisation of peoplehood.[3] It is this single *demos* which defines nationhood, and traditional structures acquire their (devolved) legitimacy top-down from the national constitution. The *demos* of the constitutional order is framed in nation-wide terms.[4] On the other hand stands a compound polity where homegrown traditional structures of governance are the bottom-up building blocks of nationhood composed of multiple *demoi*. Traditional kingdoms, paramount chieftaincies, emirates, sultanates, and tribal confederacies are each a sub-national *demos* internally themselves, akin to non-territorial (con) federalism or consociationalism, representing homegrown forms of communal and/or territorial self-rule with roots preceding the arrival of colonialism. In contrast to the ideal-model of nationhood based on a single *demos*, what we have here is the notion of a compound nation comprised of constituent peoples and polities indigenous to the land.

The polity resting on the notion of a nation-wide *demos* and the compound polity of multiple *demoi* do not occupy adjacent positions on a spectrum of different degrees of constitutional recognition granted to traditional authorities; they are opposing ideal-models representing different notions of constitutional legitimacy. It is principled reasoning and not technocratic analysis that is needed to help us navigate the competing notions of peoplehood, national

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[2] The notion of *longue durée* history is closely associated with the French *Annales* school in histography. Rather than focusing on specific personalities, incidents, and locations, the Annales school advocates attention to broader macro patterns which hold across different time-periods (Braudel 1958).

[3] The concept of 'ideal-models' was first articulated by the nineteenth century German Sociologist Max Weber. He had advocated the use of idealised conceptual benchmarks to steer scholarly inquiry (Weber 1949[1904]: 90).

[4] The etymological roots of the word 'democracy' in old Greek provide some help here. It is a compound noun composed of two parts: '*demos*', the people (in singular form), and '*kratein*', rule. *Demoi* is the plural.

unity, and constitutional legitimacy, and the balance between individual human rights and collective group rights. Section 3 is where we address these questions. That concluding section of the chapter is also where we propose a novel way of looking at Africa's traditional forms of governance in the field of comparative constitutional law.

Section 3 posits that, provided certain conditions are established, Africa's traditional structures can come to play a vital role as counterweights against the spectres of majoritarian populism and political absolutism. As indigenous constitutional safeguards holding the centre to account, they help ensure nation-wide political pluralism not only for themselves but also for other parts of the civil society. Plus, their roots deep in the native soil likely endow such indigenous structures with the autonomy and resilience to withstand the yet unknown challenges of the future. Instead of discussions on the form of constitutions, specific constitutional clauses, and legislation, it is this *constitutive* constitutional function of self-sustaining longevity which should be studied by the field of comparative constitutional law.

A Charting the Path to Scholarly Inquiry

For a continent with 54 countries (some new, others old, some breakaways from existing ones, others unions of formerly separate ones), dozens of religions (some of them Abrahamic, others indigenous, yet others mixed), hundreds of languages and ethnic groups, multiple systems of law and governance (some indigenous, others received, yet others mixed), different ways of communal life covering everything in between sedentary cultivation and pastoralist transhumance, a diverse geography which impacts on the local socio-economic activity, demographic variation ranging from overcrowded cities to peripheral provinces underpopulated by emigration, and a complex history which criss-crosses existing state borders, the very decision about where to start the scholarly inquiry itself requires scholarly reflection.

The path forward is marked by two distinct approaches on each side: The choice of looking at a single country in a multifaceted and comprehensive way might lead one to focus on a traditional structure of governance – be it a kingdom, a paramount chieftaincy, an emirate, a sultanate, a tribal confederacy, or a band of forager-hunters – and trace the formal status these polities held under the different constitutions of the country spanning the different phases of national history, as well as examine whether formal constitutional prerogatives are accompanied by real political power.

Instead of treating a country in its entirety and getting immersed in the national context, the alternative approach is to focus on a specific explanatory variable or set of variables deemed central, and then look at a pool of cases across the continent in order to see whether a causal relationship between

the select variables and certain outcomes can be observed. One could focus on, say, the advisory powers traditional structures of governance have over national legislation as enumerated in constitutions and explore the extent of real political influence this might amount to. The underlying assumption is that the purported relationship the variable(s) and the outcome is then generalisable.

Given the continent's complexity, it is tempting to try to bring a sense of explanatory order to what we are interested in by focusing on individual countries and examining things in-depth within their delimited unique legal, political, and social context. In addition to being a path to inquiry, this country-based approach is particularly relevant to the training of legal professionals who will practice in that very jurisdiction, and therefore, need to be fully immersed in national laws. The applied usefulness of this approach is offset by its scholarly limitations, however. While revealing the ebbs-and-flows in the form and function of national constitutions, the complexities of national politics, and the historical trajectory of various ideas on constitutionalism, country-based accounts risk leaving out some of the broader comparative dynamics which might apply across the continent. For every insight an in-depth examination of the chosen country reveals, other comparative lessons and international observations are inevitably sidestepped.

On the other end of the path stands the approach of variable-driven comparison. One looks at a number of countries, perhaps even at all 54 of the continent; yet this is limited to a small number of select variables plucked from each individual country. Datasets compiled by international organisations and aid agencies play a central role here as those who define, classify, collect, and provide these variables. This approach will not be much use to those who want to practice law in a particular jurisdiction, but there is still some applied utility, especially for those working for international organisations committed to economic aid and political development.

While the in-depth country-based path comes with the risk of seeing everything in the national experience as *sui generis*, the second cross-country option comes with the risk of inflating the importance of a few decontextualised variables selected and isolated from the rest of the national experience. The plusses and minuses of these different approaches to inquiry hold for all branches of comparative constitutional law, but the dichotomy is particularly pronounced when dealing with traditional forms of law and governance indigenous to Africa, which often tend to rest on unwritten, unofficial, and uncodified foundations. Without an immersion in national politics and the subsequent ability to decode local complexity, the decision on how to code variables into comparative cross-country datasets often come to rely on more formal indicators which quite often deviate from how things work in practice. There is a risk of completely missing, or misunderstanding and misrepresenting, the local dynamics which might not neatly fit into the existing categories in the

comparative dataset. This increases the chance that the real workings of constitutional politics remain obscured while what is formally on paper is reified into explanatory centrality.

What is more, such datasets almost always leave out relevant geopolitical factors, both internationally and regionally. One's new post-independence international protector/ally might have had a preference for a socialist people's constitution, or international donors preventing national bankruptcy might see liberal modernist constitutions as a condition to receive further aid. The late nineteenth century Scramble for Africa or the Cold War competition between the West and the Soviets for friends and allies amongst the newly independent African states are examples of global geopolitics impacting on national politics and the prevailing ideas on constitutionalism. Looking at the national level only will lead to an underestimation of the role of international and regional dynamics on pan-African constitutional politics. While it is self-evident that each country has a unique history, these broader dynamics apply across the continent, and thus need more systematic treatment.

Neither path marking the two distinct approaches to inquiry can deliver reliable explanatory lessons on its own. What we seek to do in this chapter is to chart a more middle course between the two and find ways to combine their explanatory strengths. To ensure both the international and the national find a voice in the analysis, and that cross-country patterns are incorporated into country studies while new country-based observations are fed back into continent-wide dynamics, we combine a comparative historical overview with a more in-depth examination of a few select cases. We have chosen one such traditional structure of governance from West Africa: the Asante Kingdom of Ghana; one from East Africa: the Buganda Kingdom of Uganda; and one from Southern Africa: The Lozi Kingdom of Zambia. Ghana, Uganda, and Zambia have other traditional structures of governance within their borders but we will cover the constitutional status of these select three kingdoms in-depth as instances of the broader comparative patterns at play.

The comparative dynamics are not only lateral between the three kingdoms but temporal as well. That is, for each of the three kingdoms, real and formal powers have fluctuated across the course of the historical *longue durée*. This means that there is a need to combine cross-country comparison with comparison across time. A broadly shared political history for the continent, especially in terms of the effects of colonialism and the evolving geopolitical dynamics affecting the domestic politics of almost all African counties, means that international explanations are inextricably linked to national ones. Tracking the fate of the three kingdoms through the ups-and-downs of recent history can capture and reveal some of the more comparative dynamics. This helps put light on how the form and function of constitutions interact and the best way to analyse their workings. But we should also inject a caveat here. Reconciling

the in-depth with the bird's-eye-view, and thus combining the different angles of different analytical perspectives, will not deliver all the answers.

No matter how seamless the union of cross-country comparative perspectives and the country case-studies is (and the attending explanatory strength of reconciling two analytical perspectives), there will still be things beyond reach. For a field of study covering big themes like nationhood, state authority, and legitimacy, it is inevitable that some of the questions in comparative constitutional law will be more philosophical than analytical, and thus call for something beyond reconciling the in-depth with the bird's-eye-view.

Two such questions are particularly pronounced for Africa's traditional structure of governance, their place in national constitutions, and the real political power that may or may not accompany formal constitutional prerogatives. One is foundational and juxtaposes a constitutional order based on a national *demos* against a constitutional order of a compound polity representing the union of multiple constituent *demoi*. The second one is the reflection of the same foundational dynamics within the polity in question itself; that is, the juxtaposition of nation-wide individual human rights against territorially bound collective group rights.[5]

Navigating the high seas of constitutional politics involves various moral challenges and choices. Different choices engender different political and social consequences. This means that, despite the explanatory usefulness of a middle course between different approaches to scholarly inquiry, some of the issues related to the constitutionalisation of traditional structures of governance will still be beyond easy reach. As we had outlined in the introduction to the chapter, even when different relevant angles of different analytical perspectives are combined, not all trade-offs involved can be conclusively settled by a technocratic examination of constitutional clauses granting recognition to traditional governance structures.

When what is at heart is essentially the very nature of the polity in question, moral challenges about the constitutionalisation of territorially delimited collective rights for indigenous communities and the effects this has on nation-wide individual rights, or the constitutional empowerment of hereditary traditional leadership and the effects this has on electoral politics are examples of bigger questions which should not be evaded. This, after all, is the

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[5] In their introductory chapter to a previous Edward Elgar collection on comparative constitutional law, the editors suggest that, despite the various ideas and analytical constructs populating the field, there is still a shortage of theorising (Jacobson and Schor 2018: 5). The two questions we highlight above, that is, (a) juxtaposing national *demos* polities with compound *demoi* ones, and (b) the relationship between nation-wide individual human rights and territorially bound collective group rights, can help establish two such theoretical benchmarks.

very essence of what constitutes a polity, i.e. its 'constitution' in the original etymological sense of the word. These are foundational issues, not technical ones. The constitutional recognition of traditional structures of governance indigenous to the land is not an apolitical matter where cutting-and-pasting a 'best practice' from abroad, a constitutional clause, a procedural design, a legal mechanism, or a reform blueprint will deliver the intended policy outcomes. What constitutes a polity is a bigger question than identifying, copying, and implementing the most up-to-date technocratic constitutional mechanism from elsewhere. The constitutional recognition of indigenous structures of governance (and the attending recognition of their traditional systems of law and the collective group identity of the community that underpins this) represents the foundational nature of the political order established by the national constitution. That is why we need to complement the analytical middle course with more philosophical reflections.

The purported philosophical justification for granting constitutional recognition to indigenous systems of law and governance and the potential risks that might accompany tradition require reflection. And this reflection should move beyond what we know from the comparative study of a handful of liberal constitutions from the West. The final part of the chapter calls for moves to make the study of comparative constitutional law truly global where other constitutional traditions, indigenous checks-and-balances, division-of-powers are also part of the scholarly repertoire. This allows us to contrast the risks of empowering the parochialism, patriarchy, and despotism accompanying the constitutional recognition of traditional forms of governance structures with the vital service they perform as non-governmental checks on political centralisation. The function they perform can only be explained, understood, and justified if our ideas on constitutionalism are expanded to include other potential checks and balances with homegrown roots.

Traditional structures of governance might fall far from some ideals of modern constitutionalism in the West, but regardless of the contents of their political agenda or the composition of their leadership, these provide a vital service as homegrown safeguards against absolutism – be it against despotic/charismatic authoritarianism, majoritarian populism, religious fundamentalism, or ideological totalitarianism. The way forward is to formally enshrine traditional governance structures as part of a country's make-up, but then make sure such recognition exists together with further guarantees for the group rights of smaller minorities which might live within the territories of larger collective groups, and, of course, for the nation-wide protection of individual rights. While all this could contribute to preventing absolutism and opening the national space to political pluralism, the type of pluralism might not always be

of the liberal-democratic variant.[6] What any constitutional design has to take into consideration is the need to inject some kind of (an indigenous) bridgehead to safeguard political diversity which is capable of functioning autonomously long after the support mechanisms favoured by the international community are switched off. At the end of the day, it is function not form that matters.

B A Continent Defined by Legal Pluralism

The starting point for any comparative overview of constitutions and constitutionalism in Africa has to be the acknowledgement of the complementary and contradictory coexistence of different legal systems. The legal pluralism defining the continent is not only about the dichotomous interaction between the select Western legal systems received during colonial rule and the traditional system of law and governance that was in place before that. Legal pluralism also defines the multitude of traditional laws. What is indigenous to Africa shows immense variation across the continent.

Some of Africa's traditional systems of law and governance are closely related to one another, usually separated by only minor variations in local customary law in different jurisdictions. Shared ethnic and linguistic roots, geographic proximity, and close historical relations explain the similarities in indigenous law. Yet neighbours living side by side can also have different systems of law and governance composed of diametrically opposed principles, priorities, and practices.[7] Such foundational differences can set indigenous legal systems so far apart from each other that they would have little common ground even to communicate. Compared to such foundational incompatibility, common law and civil law systems, with their West European Christian roots, have more in common with one another than the legal concepts of – say – two neighbouring communities in the Horn of Africa. The Somali traditional law, *Xeer*, which rests on the group rights and obligations of clans, the blood feuds and tributary relations among clans and sub-clans, and the retribution-based punitive justice, has little in common with the Oromo system of traditional

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[6] There is a need for two additional sets of constitutional protections to ensure all benefit from the function traditional structures perform as counterweights to political centralisation: one on media independence and the second one guaranteeing the collective autonomy of the legal profession. More on this later in Section 3.

[7] As the principal investigator of the pan-African 'Restatement of African Law Project' (RALP) Anthony Allott reflects on the late 1950s and early 1960s: 'There were enormous variations in the structure and the content of legal and judicial systems between societies with different political structures (e.g. between chiefly and acephalous societies) or economic backgrounds (e.g. between pastoralists and agriculturalists)' (Allott 1965: 220).

law, *Gadaa*, which is based on a social stratification system of age-groups, the collective feuds and compromises, and a reconciliation-based restorative justice.

The continent's legal pluralism is yet compounded by the complexities and contradictions of the history of colonialism. Territories would exchange hands between colonial powers; sometimes coupled with the undoing of the legal systems imported earlier and replacing them by a new set (as Tanganyika's German laws were replaced by English ones after the end of World War I when it became a League of Nations Mandate territory and placed under British rule); and at other times leading to a unique mix (as the Dutch/Roman laws of the Cape of Good Hope's were integrated with English laws after the British took over the colony from the Dutch). The unique mix could sometimes have a number of progenitors. Former Ottoman territories along the Red Sea (in present-day Sudan, Eritrea, and Somalia) had laws of a mixed lineage, including the indigenous, the Islamic, the Abyssinian, the Turco-Egyptian, and the Ottoman. Once these territories were taken over by Italians and the British, common law and civil law were added to the mix.

The continent's post-colonial history came with its own complexities and contradictions. This time countries with common law, civil law, or Islamic law systems would adopt socialist or socialist-inspired constitutions, adding to the continent's legal pluralism. In this chapter our focus is on the constitutional status of the continent's traditional structures of governance, but it is imperative to first establish here that no indigenous system of law and governance has survived in pristine form since pre-colonial times. What is called 'traditional' is a modern historical product of interaction between different legal systems. Moreover, even where the impact of colonialism has been minimal, the traditional laws and governance structures of communities have also evolved with time and changing circumstances. All this means that one cannot incise and isolate the law from the broader legal, political, social, cultural, ethnic, linguistic, economic, geographic, and demographic context within which it is embedded.

C The Need for Cross-disciplinary Scholarship

After establishing legal pluralism as the starting point, the second acknowledgement which should mark a comparative overview of constitutional law in Africa is that the law is inseparable from the broader context. While this observation also holds for the workings of modern received statutory laws and constitutions, it is particularly pronounced when it comes to indigenous systems of law and governance.

Traditional law originates from the same history that gave a people their structures of governance. Whether one has a tribal confederacy with a weak

and temporary political centre or an elaborate hierarchical triangle of governance with a strong paramount chief at the top, structures of governance have historically impacted a variety of legal priorities and principles. These might vary from one system's premium on settlement versus retaliation to the preference of another system for punitive versus restorative justice.

The indigenous system of law can indeed be very complex and elaborate, as in the traditional kingdoms like Nigeria's Oyo and Uganda's Bunyoro, or relatively simple, as it is with the forager-hunter bands of the Kalahari and Namib deserts. The traditional systems of law and governance of nomadic/pastoralist peoples practising seasonal transhumance across different geographies will differ from sedentary ones who inhabit and cultivate the same lands as their ancestors. There are thus a variety of ways politics, history, religion, culture, demographics, and geography have come to influence legal principles and priorities.

Legal pluralism can thus have political components (the adoption of the secular legal system of the colonial power or a socialist system during post-colonial years), religious components (especially in terms of the local variant of Islamic customary law), ethno-cultural components reflecting the particular community in question and their respective history, and social-economic components containing differences between the sedentary and the pastoralist ways of living. Yet none exist in unadulterated form. Throughout the continent's history, legal systems with non-African roots, i.e. common law, civil/Roman/Napoleonic law, Islamic law, socialist law, have come into contact not only with each other but also with the bewildering variety of legal systems indigenous to Africa.

The continent's legal pluralism is not only lateral but temporal as well. That is, different legal systems and different constitutional priorities have impacted African countries during different periods of their political history. This means that a look at *longue durée* patterns is an indispensable part of any investigation. Attention to history ensures that two sets of important explanatory factors are not left out.

One is the fact that geopolitical factors, both at the international and regional levels, impact on the constitutions and constitutionalism of individual countries. We touched upon some of these earlier in Section 1.A, from the colonial Scramble for Africa to the Cold War. In addition to geopolitics, there is a second set of explanatory factors which are often underplayed in the study of comparative constitutional law in Africa: the changing international trends with regard to different legal mechanisms and ideas about constitutions and constitutionalism. Parallel to a varied and uneven interaction between distinct legal systems, international ideas on constitutions and constitutionalism have also changed with time, introducing different political currents to the different episodes defining the continent's geopolitical history.

Since international organisations committed to economic aid and political development often play a key role in political, economic, and legal reforms, the impact of such ideas on individual African countries has been more direct than is the case in the West. The changing popularity of different legal concepts are more likely to be adopted and embraced by international organisations which are not bound by the precedents of their past policies and agendas. In the late 1960s, the Law and Development movement favouring nation-wide legal uniformity and statist activism had become the dominant approach. By the 1990s, this was replaced by the new popular idea of Multilevel Governance, this time calling for separating legal and political power across local, regional, and national levels of government. Since international support for national reforms was conditional, whatever was in fashion was then prescribed to countries in the developing world in exchange for lending money.

The combination of geopolitical factors beyond national borders and changing international ideas about constitutions and constitutionalism means that to understand the workings of African law we need to look beyond the law itself. The challenge, of course, is to make this systematic and comprehensive rather than injecting international and ideational factors in a country-by-country ad hoc manner. Luckily, some of this seems to be within reach.

Despite the complexities of a continent marked by legal, political, social, cultural, ethnic, linguistic, economic, geographic, and demographic diversity, we can indeed spot a few general patterns which hold across time and place. There are distinct ways these two factors (that is, international and regional geopolitics and changing international trends with regard to different legal mechanisms and ideas about constitutions and constitutionalism) have come to influence constitutional recognition, inclusion, and empowerment of traditional structures of governance across the continent and across time. The next section looks at the fate of three traditional kingdoms while exposing some of these continent-wide comparative dynamics at the same time.

The combination of the different angles of different analytical perspectives, that is, the union of cross-country comparative perspectives and country case-studies with international and ideational factors, shows us the need to frame things beyond constitutional clauses, procedural design, and legal mechanisms. The formal prerogatives of traditional structures of governance and real political power that may or may not accompany constitutional recognition are not technocratic matters which can be addressed by copying-and-pasting 'best practices' from other parts of the world. What is at stake is much bigger than this. As outlined in the previous section, the question is whether indigenous political structures are the bottom-up building blocks of a compound polity of multiple *demoi*, or whether they acquire their (devolved) legitimacy top-down from the national constitutions embodying the unitary *demos*. Let

us now see how all this plays out in the *longue durée* history of three African kingdoms.

2 THREE KINGDOMS

Traditional forms of governance are invariably products of long-term historical processes and the interaction between the indigenous and the received. This holds even for those with a long and unbroken historical lineage of self-rule – be it indigenous kingdoms, paramount chieftaincies, emirates, sultanates, tribal confederacies, or bands of foragers-hunters. What is more, even the relatively insulated versions of indigenous law and governance still preserved and practised in remote regions beyond the reach of the modern state have also evolved with time and changing circumstances. This perhaps applies to all legal, political, and social phenomena qualified by the adjective 'traditional' and not only the traditional governance structures of sub-Saharan Africa. In order to avoid a naïve, romantic, and misleading reading of traditional forms of law and governance it is imperative to establish this point before we delve further into detail. While the roots are deep in indigenous soil, what is labelled traditional has never remained static over the *longue durée* history.

In fact, no form of governance, in Africa or elsewhere, is preserved in a historic time-capsule, insulated from outside influences and unreceptive to internal dynamics. Throughout the continent's history, tension between traditional forms of law and governance and changing circumstances have engendered slowly evolving patterns over the *longue durée*; but in other instances, change has been sudden and dramatic. Sometimes the interaction between different legal systems has been enumerated in formal terms in constitutions; in other cases, the relationship has been more uneven, unofficial, and uncodified. In some cases, traditional structures of governance have enjoyed widespread support and legitimacy in the eyes of locals despite lacking formal constitutional recognition at the national level; at other times, formalisation has been a façade for increased political manipulation by the colonial or post-colonial state. In addition to real legal pluralism on the ground, official policies towards legal pluralism have also changed throughout the different political episodes.

In Section 1.A we had mentioned how, seeking a balanced representation of the continent, we had chosen cases from the three corners of the continent. The fact that all three share similarities as politically, economically, and socially complex sedentary kingdoms during pre-colonial times helps us fine-tune the comparative focus. The fact that all three enjoyed similar jurisdictional status under British imperial constitutionalism as protectorates with (limited) internal autonomy ensured the continuation of the broadly similar historic path.

Protectorate status meant that, within the jurisdictional set-up of the British Empire, laws governing internal affairs (in particular, family matters)

remained insulated from colonial interference, elsewhere English common law was adopted in more commercial areas such as contract law. Formalisation of legal pluralism came with the coexistence of different court systems in all three. So-called 'Native Courts' applying customary law to the internal affairs of indigenous Africans coexisted with courts applying English, colonial, or imperial law to other matters. The precise nature of the legal formulation and the timing of such recognition differed across various British colonies, but what was shared was an arrangement giving native courts jurisdiction over 'native law and custom' and laws made by native authorities (Moffat 1952). The jurisdiction of the native courts was often limited to issues like marriage, divorce, inheritance, and local disputes. Their reach was never beyond territorially bound local issues (after all, each ethno-linguistic community indigenous to the land would have differences in their traditional customary laws); and there was usually an in-built qualification which potentially could be invoked to overturn decisions if necessary. This is the notorious 'Repugnancy Clause'.

What came to be known as the repugnancy clause (albeit, sometimes under a different formal label and different wording) was the legal mechanism which gave colonial authorities a blank check to overturn or disallow any native court decision. The validity of local laws was conditional on a broad and vaguely defined requirement that they were not 'repugnant to natural justice and morality'. This was a potential legal and political bridgehead which, had there been a political will to do so, would have rendered any notion of self-rule vacuous. What is common to all the three traditional kingdoms under focus is that their relations were directly with the representatives of the metropolitan government, appointed by London, following imperial policy priorities. There was no self-governing Dominion government within the complex jurisdictional hierarchy of the Empire with which to compete, nor were there European settler populations opposed to black African self-rule or chartered companies with purchased trade concessions in their regions.[8] All this means that the potential effects of the repugnancy clause were held in check.[9]

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[8] The Buganda Kingdom's first protectorate agreement was in fact with the Imperial British East Africa Company but shortly thereafter they signed a treaty with the Crown. The first treaty of the Lozi Kingdom of Barotseland was with the British South Africa Company. Only afterwards did the Kingdom become a British protectorate under a royal charter.

[9] Imperial jurisdiction failed to protect traditional law and governance as promised in other parts of the British Empire. In colonies with sizeable European settler communities, such as Southern Rhodesia (present-day Zimbabwe), North West Africa (present-day Namibia), South Africa, and Kenya, reforms towards any semblance of territorially delimited self-rule for Africans were either fended off or the limited autonomy of existing traditional authorities was further curtailed.

After a period of internal autonomy as British protectorates, the Asante, Buganda, and Lozi kingdoms made a seemingly seamless transition into post-colonialism. All three started their post-independence lives with constitutional recognition and real political prominence. But this did not last beyond a couple of years. First, the forces of electoral majoritarianism and political populism took over national politics. Then came the wave of despotic/charismatic authoritarianism. All traditional forms of governance structures witnessed their relative power and scope recede.

After a tumultuous couple of decades, the Asante have reclaimed their place as one of the foundational pillars of Ghana's constitutional and democratic order. One of the very first to declare its independence from Britain, Ghana, arguably, is now also the leading example of a successful African constitutional order where traditional governance structures and modern democracy go hand-in-hand. Ghana's political pluralism is safeguarded by the country's very own social structures with roots in homegrown soil. In semi-democratic Uganda, the Buganda bide their time for a politically more open future as the country's charismatic/authoritarian ruler ages. While their formal powers are reduced under the current president, the country's biggest traditional kingdom retains real political power, social influence, and, critically, it also wields economic might. This cannot be said of the Lozi. The once mighty kingdom spanning the rivers, lakes, marshes, and flood plains of south-central Africa has seen both its formal and real powers recede to near irrelevance in increasingly authoritarian Zambia. Let us now turn to the three kingdoms in more detail. This will be followed by some comparative observations on traditional governance and constitutionalism.

A The Asante Kingdom

The Gold Coast along the Bight of Benin in West Africa was the jewel within the Britain's African territories. It was seen as the most economically and political advanced part of the Empire in Africa. Coastal areas of the colony had long been under British tutelage, but in the interior, various Akan states held sway. By the late eighteenth/early nineteenth century the Asante Kingdom, populated by the eponymous Asante (alternatively spelled *Ashanti*) branch of the Akan people, had become the strongest state in the region establishing suzerainty over neighbouring states. The kingdom's constitutional structure was more akin to a royal confederacy, with the jurisdictionally dominant Asante Kingdom and its king, the *Asantehene*, in its capital Kumasi at the centre, encircled by Akan Principalities with their Princes, the *Amanhene*, forming the inner core of a federal union, then surrounded by a combination of provinces directly ruled by royal appointed aristocratic chiefs, and pro-

tectorates or tributary vassal states which had been voluntarily or forcefully incorporated into the Royal Confederacy of the Asante kingdom.

The sacred symbol of monarchy was the Golden Stool in Kumasi. Political, legal, and legislative functions in the kingdom's constitutional order were inseparable from the religious, cultural, and ceremonial. Theodor von Laue notes that the Asante did not consciously separate the political from other aspects of life (Von Laue 1976: 49). It is for this reason that Captain Robert Sutherland Rattray's final third volume of his *Ashanti Law and Constitution* highlights the need to broaden the meaning of 'constitution' (Rattray 1929: 398).

At the centre, the Asantehene traditionally governed in consultation with the aristocratic chiefs at the court in Kumasi and the Amanhene of the surrounding Akan Principalities. As William Tordoff remarks 'to be successful, an Asantehene had to balance the power of the Kumasi chiefs against that of the heads of the confederated states – the Amanhene' (Tordoff 1968: 153–154). The Akan clan system based on differences in social and cultural responsibilities across the constituent clans was an additional check on absolutism. The indigenous system of checks-and-balances and division-of-powers also included a general advisory council, the *Kotoko*; however, its powers as the ruling body of the nation had fluctuated over time (Arhin 1967: 69). In fact, the entire constitutional balance was not static since the powers of the centre vis-à-vis the constituent units had always changed in the course of the kingdom's history (Tordoff 1968: 166). Historically, Queen Mothers had played a big political role in this matrilineal society, but along with the principalities and the provinces, their influence in the monarchy's governance had been ebbing, despite the continuation of their ceremonial roles. At the time of contact with the British, the kingdom had already been centralising. Fed by economic and military might, the political powers of the Kumasi chiefs and the Asantehene were increasing at the expense of the Amanhene. What aided centralisation and the consolidation of the monarch's powers was the new political class of royal appointed bureaucrats whose very *raison d'être* was the monarch. The royal privy council had become the main decision-making body of the confederacy.

During the height of their power, the Asante army invaded the coast controlled by the British seven times; and the British, in turn, sent two military expeditions into Asante lands. But the 1884 Asante civil war had weakened the kingdom (Ward 1974: 143) The second British attack in 1896 ended up with the arrest and exile of Asantehene Prempeh I, the dismemberment of the Royal Confederacy, and the incorporation of the territory into the Empire under the status of a Protectorate. Until 1935, the kingdom was to remain without formal recognition and the Golden Stool sat vacant. In the absence of the Asantehene, the system of indigenous law and governance still remained in place for local

affairs, albeit under colonial supervision. The restored Royal Confederacy of 1935 was to become an example of the new British policy of indirect rule.

Before we proceed to discuss formal constitutional recognition and real political empowerment, we have to revisit a key enabling background factor already mentioned: the absence of a European settler population. A climate deemed inhospitable to Europeans and the prevalence of diseases like malaria and yellow fever had historically prevented a settler community taking root in West Africa. This observation underscores our earlier point on the need to look beyond the law itself in the study of comparative constitutional law. Focusing on constitutional clauses, procedural design, and legal mechanisms within individual countries runs the risk of under-appreciating some of the consequential non-legal factors impacting on the fate of indigenous law and governance. The combination of formal and real autonomy the Asante (and as we will see a little later, the Buganda and the Lozi) enjoyed was unavailable to other traditional kingdoms in colonies with sizeable settler populations. Of course, not everything can be attributed to this history, but we have to take into account how local geography and climate had created natural safeguards for the three kingdoms unavailable to the traditional communities inhabiting more hospitable geographies and mild climates of, say, the Kenyan highlands or Southern Rhodesia.

Ghana is important for any comparative study of law and governance in Africa, not solely because of the Asante, but as one of the first British colonies to gain independence. While the speed with which this happened probably took many by surprise at the time, the seeds were sown in the emerging geopolitics of the post-World War II years. There was a combination of factors.

During the course of the war, the fight against the Axis powers of Nazi Germany, Fascist Italy, and Imperial Japan was accompanied by the declaration that the Allies were committed to the liberation of all occupied lands. The 1941 Atlantic Charter signed by Britain and the United States had explicitly enumerated what the Allied policies would be at the end of the war. Political freedom, territorial self-rule, and national self-determination were to be the foundations of a new global order of free nations. Most of these Allied promises were made with continental Europe under Nazi occupation in mind, but once publicly adopted, the principles of national self-determination and territorial self-rule would be hard to reconcile with the type of colonialism practised by these liberated European nations and their liberators elsewhere in the world.

The 1956 Suez debacle had shown how little of the pre-war power and influence remained for France and Britain. The West was now led by the new global super-power, the United States, which was unwilling to support British and France adventurism at a time when the Cold War loyalties of the decolonised Third World countries was a geopolitical concern. The continent's two former overlords, i.e. France and Britain, no longer had the resources to

set and attain foreign policy objectives independent of the US-led Western alliance. Rebuked by the US and the newly formed United Nations, and without the economic might to go it alone, they were forced to give up on plans to re-establish control over the Suez Canal. With the benefit of historical hindsight, we can see that the moment marked the turning-point of European colonial retrenchment.

In addition to international commitments to national self-determination and the weakened ability for European colonial states to project political and military power, British domestic politics had also come to terms with the need to extend the degree of self-rule in the colonies. By 1947, the British Colonial Office had marked the Gold Coast as showcase for the new approach committed to modernisation and development. Direct economic investment would go hand-in-hand with increasing levels of political autonomy to first local, and then, regional tiers of government. No one knew how close independence was, however. Frederick Cooper tells us that the Colonial Office was convinced that 'internal self-government is unlikely to be achieved in much less than a generation' (Cooper 2002: 49). Things moved much faster than anyone anticipated.

After spending a decade reflecting on how to inject limited African political representation to the governance of the Gold Coast and slowly transfer power to the locals, the British suddenly packed their bags up and left. Protestations by the Asante and other traditional polities that the Protectorate treaties they had signed with the British were supposed to shield them from outside encroachment fell on deaf ears. The fear was that Kwame Nkrumah's Convention People's Party (CPP), with its power base in the densely populated coastal areas and urban centres, would dominate national politics through electoral majoritarianism. In the rest of the country traditional polities continued to look to Britain to ensure their historically gained collective rights were protected. Federalism, for them, was a way to temper populist majoritarianism and the risks of political centralisation.

Under the banner of the National Liberation Movement (NLM), the Asante tried to organise and mobilise as a political party to challenge the CPP and promote federalism. But the times were not in favour of political decentralisation, traditional governance, hereditary chiefs, and legal pluralism. By then the Law and Development movement was becoming the dominant international approach to constitutions and constitutionalism. Modernisation and development were seen to be dependent on an activist state resting on national unity and legal uniformity. Any deviation from such an idea was associated with tribalism, patriarchy, and reactionary politics. As Arnold Rivkin puts it: 'the mild element of federal structure proposed for the Gold Coast was equated with tribalism, and that in the end doomed it' (Rivkin 1969: 86–87). What is more, the Labour government which had come to power in Britain shared this ideological outlook of seeing development and centralisation as inseparable.

Plus, after Suez the British were looking for the quickest way out. Despite the promises in the protectorate treaties, the British abandoned their commitment to the traditional authorities, entrusted things to the hands of the CPP, and left. The Gold Coast, under its new name Ghana, became independent in 1957.

During Kwame Nkrumah's presidency (1957–1966) political power further gravitated towards the hands of the party of national liberation, the CPP. Formal measures on the constitutional recognition of chieftaincy standardised all forms of traditional leadership, depriving them of their independent economic power and real political autonomy, and turning them into domesticated regional branches of the national party state.[10] Neither the Asante nor any other traditional polity were able to put breaks on political centralisation. Weakened under CPP rule, traditional forms of governance were now also unable to challenge the centralised military rule that followed Nkrumah's toppling. The Chieftaincy Act of 1971 restored the powers of traditional leadership.[11]

The constitutional powers of the Asante Kingdom have fluctuated with the ups-and-downs defining post-independence years. Its real power in Kumasi and the Asante heartlands, on the other hand, has remained fairly consistent, however.[12] This pattern shows close parallels to Uganda's Buganda Kingdom, which during the course of the tumultuous few decades following independence, had also retained real power and the loyalty of its members, notwithstanding the changes in their constitutionally enumerated powers. The 1992 Constitution of Ghana, amended in 1996, recognises chieftaincies as political institutions and establishes a national House of Chiefs with advisory powers as well as regional Houses of Chiefs in all the ten administrative regions of Ghana representing traditional leaders and authorities.[13] Positions are also reserved for traditional leaders in various statutory boards and commissions. The most recent *de jure* addition to this system is the Chieftaincy Act of 2008 (Act 759). The national House of Chiefs is symbolically placed in Kumasi, the capital of the historic Asante Kingdom, and not in the national capital, Accra.

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[10] Nkrumah stripped much of the power from chiefs and even appointed CPP members to hereditary leadership positions. For more on this, see Cooper 2002: 68. We should also note that this pattern of political centralisation under charismatic authoritarian presidents and the cadres of the party of political liberation will be a pattern replicated throughout much of the continent.

[11] According to Isaac Owosu-Mensah, 'the Act remained as the most substantive legal instrument regarding chieftaincy until the 2008 Chieftaincy Act was passed' (Owowsu Mensah 2013: 39).

[12] This not only applies to the Asante but holds for the traditional leadership in general. Research on the history of chieftaincy in Ghana shows the endurance and resilience of traditional structures of governance across the different political episodes (Bob-Milliar 2009: 543).

[13] Articles 271 to 274, Constitution of the Fourth Republic, 1992.

B The Buganda Kingdom

The *longue durée* constitutional history of Uganda's Buganda Kingdom shows strong parallels with that of the Asante. The pre-colonial Buganda was a similar sedentary kingdom with a complex constitution. In territorial terms, tributary vassal states, allies, and dependencies coexisted with Crown lands under direct Buganda rule. In constitutional terms, territorial diversity was accompanied by an indigenous system of checks-and-balances and division-of-powers. In this complex constitutional order, the king, called the *Kabaka*, was the head of the state and the object of unswerving loyalty of the Ganda people, the *Baganda*, but he did not hold unlimited powers of royal absolutism. The society was composed of various clans with different roles in the indigenous system. As it is the case in many traditional systems of social stratification, historically the clans were not all of equal rank. Chiefs could come from any clan, but the origins of their positions were different. Some of the chiefs, the *Bataka*, were clan elders and the leaders of the constituent communities, others were Crown-appointed aristocrats called the *Bakungu*; but the office of chieftaincy was in principle non-hereditary. Also present was the institution of a general assembly/advisory council, the *Lukiko*, however its political relevance and role had waxed and waned over history. The office of the *Katikiro* played the role of the chief minister in the governance of the kingdom. He was aided by royal bureaucrats forming a third set of chiefs, the *Batangole*. Like the Asante and the Lozi, the kingdom's jurisdictionally complex royal hierarchy was accompanied by elaborate procedures and ceremonies.

After a period of sporadic interaction, in the late nineteenth century the kingdom came into closer contact with the British, who were in the process of expanding from their sphere of influence in neighbouring Kenya. At the time of British arrival, the Buganda were economically and politically the most advanced in the region, but they had been beset by internal rivalries between four different chiefly factions: those who had chosen different versions of Christianity brought in by Protestant and Catholic missionaries, converts to Islam, and followers of traditional Ganda religion. The British supported the Protestant faction, and with the aid of superior firepower, ensured their victory.

Following a series of agreements with British local representatives, the kingdom became a protectorate. At the time of British arrival, the Protestant Bakungu chiefly class had already been in ascendancy while the Bataka, who represented an older less hierarchical tradition, were in decline (Rothchild and Rogin 1966: 354). The new alliance further strengthened the internal position of the Bakungu (Twaddle 1969: 310). Under the leadership of Apollo Kagwa (later Sir), who headed the Protestant faction, the kingdom formalised the various prior arrangements into the Buganda Treaty with the Crown in 1900. Kagwa had been appointed Katikiro in 1899 and would hold this post for 37

years (Low 1956: 310). He managed to guarantee traditional governance structures and laws remaining in place and extracted real political autonomy from the British. We should, however, highlight the historic fact that there was no European settler community in the region, which ensured that imperial recognition of traditional forms of governance (for the Buganda as well as other the other kingdoms and paramount chieftaincies in the other regions of what was to become Uganda) went unchallenged and uncontested.

The kingdom's status as a British protectorate within the imperial jurisdictional architecture brought formal recognition to the traditional indigenous laws governing internal Ganda affairs, while English common law was adopted for other fields of law. There were thus two parallel systems of court. Courts running Kiganda law under Buganda supervision were mostly autonomous in terms of jurisdiction, save for a potentially powerful legal and political bridgehead in the form of the repugnancy clause, which could potentially be used to overturn or disallow any decision of the local courts. Despite the existence of such a clause, most Kiganda laws remained in effect together with the traditional forms of governance responsible for the application of the laws. Perhaps one reason for the dearth of instances of the repugnancy clause in action is because of the presence of a resident legal counsel on the Buganda royal court who advised chiefs and judges on judicial matters.[14]

During the decades preceding independence, the Buganda were one of the strongest traditional polities within the British Empire in Africa and came to directly benefit from the colonial policy of indirect rule.[15] As James S. Read put it in 1961: 'the Kingdom of Buganda, with its traditionally advanced organisation, has enjoyed a wider measure of independence than any other British dependency in Africa except Northern Nigeria' (Read 1961: 191). This led the smaller paramount chieftaincies and chieftaincies to also make use of the (internal) autonomy granted to traditional forms of governance under indirect rule.

Expectations in the post-World War II years were that the kingdom would retain its power and influence during the transition to self-government. And indeed, things started that way. The Buganda came to dominate the first few years of independence but then fell victim to successive waves of political centralisation: first populist electoral majoritarianism, then the military dicta-

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[14] One of the long-serving legal counsels of the Buganda Kingdom, E.S. Haydon compiled the first modern lawbook on Kiganda law (Haydon 1960).

[15] It is important to note that the pre-colonial Buganda constitutional order contained more indigenous checks-and-balances and division-of-powers (Smith 1965: 44). Similar to the Asante, British colonial policy of (external) indirect rule in time led to the (internal) centralisation of Buganda governance structures.

torship of Idi Amin, followed by the charismatic authoritarianism of Yoweri Museveni. Broad parallels with the fate Ghana's Asante are remarkable.

Just like their Asante counterpart, the Buganda Kingdom started post-independence with a high political profile. The unique asymmetrical constitutional arrangement of 1962 gave the Buganda Kingdom a federal-type relationship with the unitary state of Uganda; the smaller traditional polities of Toro, Ankole, and Bunyoro had a semi-federal relationship with the political centre; while the remaining districts were administered by the national government (Sharma 1964: 424). Yet tensions between the traditionally powerful Buganda and the new national populist party, Uganda People's Congress (UPC) were there from the very start. UPC's leader Milton Obote had assumed the prime minister's position but the ceremonial position of the head of state was initially still the British Governor General.

In what might be interpreted as misreading the tea leaves, the Buganda tried to extend their role in the new Uganda state by installing Kabaka Mutesa II as the country's first president. However, constitutional and political manoeuvring by Obote in 1963 ensured the position was only a ceremonial one (Lee 1965: 174–175). Disagreements over the extent of Buganda territory added to the political tensions with rest of the country the following year. Soon after, Obote suspended the constitution, appointed himself president, and sent the military to subdue the restless Baganda in 1966. The Kabaka fled abroad.

In 1967, the constitution was formally revised, removing the last vestiges of territorial autonomy for the traditional polities and turning the presidency into a powerful executive office following the same path as others like Kwame Nkrumah's Ghana, Julius Nyerere's Tanzania, Hasting Banda's Malawi, and as we will see in the next section, Kenneth Kaunda's Zambia. Taking a bird's-eye-view of the entire continent of the late 1960s, we can see that Obote played from the same rule book of his contemporaries and pursued populist political centralisation. The problem was that he was not as popular as the others and could not convincingly portray himself as the father of the nation. His quest to constitutionalise political monopoly was to lead to opposition and insurgency instead.

Uganda is not unique in terms of its post-independence constitutional centralisation of course. We saw an almost identical pattern in the previous section on the Asante; the following section on the Lozi will also reveal a fairly similar picture for Zambia's post-independence politics. Across sub-Saharan Africa, constitutionally enshrined forms of territorial autonomy (covering the spectrum from federal to decentralised), and asymmetrical forms of territorially bound political autonomy (such as the Buganda Kingdom), did not last much beyond the first few years of independence. Even though he was writing in the midst of these changes, Arnold Rivkin was still able to spot a similar cross-country pattern: 'Thus, the quasi federal or regional decentralisation

aspects of the Ugandan constitution joined those of Ghana and Kenya on the scrap heap of African independence constitutions' (Rivkin 1969: 89). Obote had also followed Tanzania's charismatic/authoritarian liberation hero Julius Nyerere's lead in trying to make Kiswahili the new national language – something that fell short of realisation, and in its stead, intensified the anti-UPC sentiment of the Baganda and other traditional polities.

By 1971, Obote was overthrown by the army and Idi Amin became the country's new president, opening an even more brutal decade for the country. After Idi Amin's defeat by Ugandan opposition militias and the Tanzanian army, Obote and the UPC came back to power in 1980. Hopes for political pluralism were raised with a new treaty extending formal recognition to the Buganda, but this did not last long. Very soon a new cycle of political oppression and civil war was unleashed. The Baganda of south-central Uganda were particularly vulnerable to Obote's scorched earth policies. In 1985 another military coup toppled Obote. The rebels, led by Yoweri Museveni's National Resistance Army (NRA), eventually assumed power; Museveni has been in office since. In 1993, with the Traditional Rulers statute he restored official recognition to the country's traditional polities.[16] The restoration did not amount to becoming bottom-up building blocks of democratic nationhood composed of multiple *demoi*, however, but turned traditional leaders into 'cultural leaders' (Nabukenya 2015: 309). Two years later a new constitution with provisions for election to advisory regional assemblies (in the traditional polities of Buganda, Bunyoro, Busoga, and Toro) was adopted.[17]

The details of Uganda's complex recent history might not be of direct interest to all students of comparative constitutional law, but there is a big scholarly observation from the country's tumultuous decades. The deep roots of traditional forms of governance in the native soil give them the long-term resilience even when removed from constitutions and lawbooks. While the formal powers of the Buganda were hollowed out, and even erased, during the post-independence decades, the kingdom managed to retain uncodified real power and continued to command the loyalty of the Baganda. As is the case with the Asante and the Lozi, this loyalty is not to the person of the king; it is an embodiment of collective identity.

The constitutional erosion of their formal powers under majoritarian electoral democracy as well as the subsequent periods of military rule and civil war could not uproot this traditional polity. The Buganda still enjoy widespread

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[16] For an overview of the first decade of Buganda's renewed constitutional status, see Englebert 2002.

[17] Article 246, Constitution of Uganda, 1995 (operationalised with the Institution of Traditional or Cultural Leaders Act, 2011).

social, political, cultural, and economic influence even if in constitutional terms they have been relegated to an office of the national government under central supervision. In a more democratic future they are likely to combine their uncodified powers with more formal ones and assume their function as a counterweight to popular majoritarianism and absolutism. It is a conclusion which puts function over form.

C The Lozi Kingdom of Barotseland

The Lozi Kingdom of Barotseland situated in the southwest of Zambia belongs to the same category of politically, economically, and socially complex sedentary kingdoms resting on a jurisdictional hierarchy. There were Crown lands under direct rule as well as tributary vassal states over which the kingdom held suzerainty as well as allies and dependencies. Yet in comparison to the Asante and Buganda kingdoms, the Lozi have failed to maintain an autonomous form of uncodified power and influence, and by extension, have failed to retain the unswerving loyalty of the kingdom's members. Unable to withstand the political ebbs-and-flows and serve as an indigenous counterweight to modern political centralisation, the Lozi are now too weak to provide the function of a safeguard of political pluralism in Zambia. And this comparative weakness has coexisted with formally enumerated constitutional powers for the various traditional polities of the country. But before we track these patterns over the *longue durée*, let us first turn to the confusion over the kingdom's name.

Our focus rests on the Lozi Kingdom of Barotseland, which historically covered the Bulozi region spanning the territories where the present-day borders of Zambia, Namibia, Angola, Botswana, the Democratic Republic of the Congo, and Zimbabwe converge. The Lozi people are variously called MaLozi, BaLotse, Barotse, Rotsi in different parts of this region of big rivers, seasonal lakes and floodplains, and surrounding elevated forested areas. Lozi is in fact the word for 'plain'. The geography, the language, and the people all share the same root word.[18] Lozi has since been more commonly used for the people, and Barotse for the kingdom and the territory.

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[18] Ma- and Ba- are the plural personal prefixes in the Bantu linguistic family, denoting the people of the plains. The region is called Bulozi, the local language Silozi. The word 'Lozi' itself is likely to be a relic of a transcription choice during German colonialism's incursion into the region. The consonant 'z' is pronounced 'ts' in German. It appears that during the first contact with Germans, who were expanding into Barotse lands from their new colony of South West Africa (present-day Namibia), the word '(Ba)Lotse/(Ba)Rotsi' the locals used for themselves was transcribed as 'Lozi' (pronounced 'Lotsi') without the plural prefix.

Territorially, the kingdom had a southern half and a northern half. The south was ruled by the Queen, the *Mukwae*, and the north by the king, the *Litunga*.[19] The north was jurisdictionally superior, but all the ceremonial symbols of royal rule were enjoyed by the south, which was consulted on all state matters, and had the right to levy its own taxes and collect tributes (Gluckman 1971: 14). The kingdom's territory was subdivided into regions (Mainga 1973). In addition, there were neighbouring vassal chieftaincies over which the Lozi held suzerainty. The Litunga governed with the assistance of royal ministers and bureaucrats (Coillard 1897[1971]). Traditionally to his right sat the *Makwambuyu*, the chiefs representing the constituent communities; and to his left sat the *Likombwa*, the royal bureaucrats. In the indigenous system of division-of-powers, the *Ngambela* was the chief minister. The Litunga was the titular head but day-to-day governance was carried out by the chief minister and a team of ministers, the *Induna* (Flint 2003: 395). Similar to the Asante and Buganda, governance at the Lozi royal court followed elaborate procedures and ceremonies. The most important such ceremony was the *Kuomboka*, the annual migration of the royal court from the Lealui on the floodplains to Limulunga on the surrounding higher ground.

For long, the indigenous system of law and governance in the far reaches of south-central Africa had remained largely insulated from the reach of colonialism. But by mid/late nineteenth century the kingdom was encircled by the expansion of Germans from their colony South West Africa, Portuguese from their colony Angola, Belgians from King Leopold II's Congo, and the two Boer Republics of Free State and Transvaal.

The Litunga, Lewanika, had initially played different colonial powers against each other, but as the competition increased in intensity Lewanika sought British suzerainty against the others. But the region was too remote for a direct British imperial presence and Barotseland thus failed in its first bid to become a British protectorate. The kingdom gradually fell under the sphere of influence of Cecil Rhodes' British South African Company (BSAC), expanding into what was to become Zambia from its base in neighbouring Southern Rhodesia (present-day Zimbabwe). The Kingdom of Barotseland established formal links with BSAC in 1888 and signed its first treaty with Rhodes' company in 1890. The region subsequently became a BSAC protectorate shielded from potential territorial encroachment by other colonial powers expanding into the interior of the continent, but the treaty did not in fact contain a clause for royal protection and was more of a concession to the

[19] For the monarch of the south, Max Gluckman prefers the title as 'Princess' on account that the Mukwae was a member of the royal family and not married into it (Gluckman 1971: 18).

commercial interests of the company. The protectorate status of the kingdom was thus initially different from that of the Asante and Buganda.

Like everywhere on the continent, these years, later to be labelled the Scramble for Africa, were marked by frenetic geopolitical activity. In regions hitherto removed from the reach of colonialism, this created internal divisions about the most appropriate strategies to deal with the arriving European explorers, missionaries, and traders. Not unlike the Buganda aristocracy, the Lozi establishment had competing factions, some more traditionalist, others recent converts to Christianity who had been exposed to Western ideas in the region's missionary schools. In 1889 King Lewanika appointed a Christian as his chief minister, thereby removing the competition between modernists and traditionalists; in the words of John Iliffe, this act 'bound the educated into alliance with the monarchy' (Iliffe 2007[1995]: 240).

In time, the Lozi were able to formally bring the Crown into their arrangement in 1899, and subsequently became the British Protectorate of Barotziland – North Western Rhodesia; BSAC continued to act on behalf of the Crown, however. The protectorate was later joined with that of North Eastern Rhodesia, creating the Protectorate of Northern Rhodesia in 1911. Northern Rhodesia joined the short-lived Federation of Rhodesia and Nyasaland in 1953 (bringing together present-day Zambia, Zimbabwe, and Malawi). Seeing the arrangement as a way to sustain territorial autonomy, the kingdom was in favour of the federal union; but this pitted them against the liberation movement in the rest of the country calling for majority rule.

Like the other two kingdoms under the same status within the imperial jurisdictional architecture, law and governance in the protectorate was defined by legal pluralism. Barotse law remained in place for local cases between locals, but BSAC regulations and British law was used for cases arising from relations between the Lozi kingdom and British authorities, or individual British subjects who might reside in Barotseland. The Bulozi floodplains and the marshes of Northern Rhodesia did not attract European settlers the same way Southern Rhodesia did (present-day Zimbabwe), which helped ensure indigenous law and governance remained in place uncontested.[20] As a result, the Lozi Kingdom of Barotseland, as well as the other traditional polities of Zambia, retained uncodified power and influence over people in their historic heartlands. Some of their powers were formally recognised, and they gained representation through the Northern Rhodesian Office of Traditional Leaders.

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[20] The founder of what later came to be own as Manchester School, Max Gluckman, had in fact honed his legal anthropology approach in his various studies of indigenous Barotse law before relocating to the UK. See for example Gluckman 1953.

Once independence suddenly appeared on the horizon, the Lozi Litunga travelled to Britain to lobby for the re-establishment of the protectorate status for the kingdom but could not put brakes on British determination for a quick exit. The tensions at the time raised the possibility for Barotseland's secession from Northern Rhodesia (Caplan 1968). In 1964, Northern Rhodesia became independent under its new name Zambia. Like most other newly decolonised countries, the country experienced the rise of a charismatic/authoritarian liberation hero, who swept into national predominance on a wave of populist electoral majoritarianism. Not surprisingly, President Kenneth Kaunda's United National Independence Party (UNIP) saw the country's traditional polities, especially the historic kingdom, as an impediment to political centralisation.

The 1965 Local Government Act abolished traditional institutions and imposed a uniform form of local government on all regions of the country. The name of the region was changed to 'Western Province'. In 1968 Zambia effectively became a one-party state; the new constitution of 1973 formalised this arrangement. Kaunda's UNIP sought to dismantle even the cultural symbols associated with the Barotseland kingdom, but combined this approach with more formal measures of recognition. The post-colonial constitutional architecture included an advisory national House of Chiefs, which was led by one of the more pliable paramount chiefs of Zambia until the early 1980s (van Binsbergen 1987). Legitimate paramount chiefs were excluded, while relatively minor traditional leaders incapable of challenging the post-colonial regime's political dominance were co-opted.

During the post-Cold War wave of constitutional reforms that swept across the continent, the country became a multi-party democracy again in 1991; however, this time it was the former opposition which sought to deny Kaunda's UNIP a future victory by adopting a constitution designed to consolidate their political dominance in 1996 (Ndulo and Kent 1996: 268–275). After 20 years of rule, in 2011 the governing Movement for Multiparty Democracy (MMD) was then replaced by the upstart Patriotic Front (PF) formed from within its own ranks. PF has monopolised politics since.

In formal terms, the 1996 constitution recognises the Lozi of Barotseland and the other paramount chieftaincies of the country. In addition to formal recognition at the provincial level, the traditional polities also have a representation in the capital in the form of the House of Chiefs composed of chiefs from the nine (now ten) provinces of Zambia.[21] Each province sends five chiefs to the House, selected provincially by their peers. In social, political, cultural, and economic terms however, the kingdom has seen the erosion of the regional

[21] Articles 130–132, Constitution of Zambia, 1996 (now, Article 169 following the Constitution Amendment Act, No. 2, 2016).

paramountcy it had enjoyed in pre-colonial times and the autonomous powers it had enjoyed during colonialism. What also works against them is the fact that other ethnic groups in the copper-rich north are economically stronger and welded to the political centre. What is more, a small faction within the Lozi traditional leadership has been co-opted into the political system run from the nation's capital, Lusaka.

Whether the Lozi are capable of any real power to influence politics at the centre, or whether they have the will and capacity to seek secession have been questioned.[22] In the current political environment, they are short on autonomy and their power lies dormant. The fact that the kingdom lies in a geographically remote and economically marginalised location with poor infrastructure make uncodified lifelines from the society, and thus self-sufficiency and autonomy, hard to maintain. Compared to the other two kingdoms, the Lozi of Barotseland are now a shadow of their former self.

D Comparative Patterns across the *Longue Durée*

The Asante Kingdom of Ghana, the Buganda Kingdom of Uganda, the Lozi Kingdom of Barotseland of Zambia, are situated on three corners of former British sub-Saharan Africa. Their *longue durée* history is without any geographical, cultural, or historical link with each another; nor were they ever part of the same imperial jurisdiction and were not subject to the decisions of the same colonial leadership. Yet, the first part of their constitutional journey from independent kingdoms to internally autonomous protectorates within the intra-imperial jurisdictional set-up show remarkable similarity. What is also noteworthy is how the three kingdoms followed the similar ups and down throughout the different phases of the continent's recent political history. Such shared patterns underscore the need to combine cross-country comparative perspectives and country case-studies.

One important observation revealed by this analytical middle ground is that a distance lies between formal and real constitutions. In different guises, all three case-studies contain instances where formal constitutional recognition granted to traditional structures of governance did not correspond to real political empowerment. Ghana, Uganda, and Zambia had started their post-colonial political lives with non-centralist constitutional orders giving traditional authorities, paramount chieftaincies, and the pre-colonial kingdoms formal recognition. These were not federal constitutions in the conventional sense, but nonetheless represented the formal recognition of homegrown local political

[22] For a discussion of Lozi separatism, see Englebert 2005.

structures (seen as legitimate in the eyes of the local population) which could potentially hold the centre to account.

An important question for comparative constitutional law is what we might call the direction of causality: Do traditional forms of governance play a role in ensuring political pluralism, or is it because of the existence of political pluralism that we see traditional polities granted formal recognition in constitutions? The *longue durée* history of the three kingdoms suggests that the direction of causality is the former; that is, traditional forms of governance, with their indigenous deep roots, autonomous socio-economic power, and the accompanying ability to command the loyalty of their members, are the safeguards of constitutional order and political pluralism. The ability to provide this function is more important than the particular official form designated to this end – that is, the details of constitutional clauses, procedural design, and legal mechanisms.

We have seen how the Lozi, notwithstanding various forms of official recognition at both provincial and national levels, fall short of a national role as a counterweight against absolutism. Without an autonomous social base and the economic resources to remain relevant, part of the leadership is co-opted into the political system at the centre. What is more, the historic heartland of their kingdom at the confluence of the great rivers is now divided between modern state borders.[23] Eclipsed by richer regions and other ethnic groups, the Lozi are not only geographically but also economically marginalised.

In a twist of history, during the times they were erased out of national politics and constitutions, the Asante and Buganda kingdoms became self-reliant and resilient. They have had not only the loyalty of their members but also of their historical allies and vassals. They have kept autonomous economic power through control over land and commerce; they play various roles in business; collect unofficial taxes; receive gifts and tributes. What works in their favour is that the Asante and Buganda kingdoms happen to be based in big urban centres where commerce and trade flourish. Put simply, they can afford to remain relevant. The Asante are already a part and guarantor of political pluralism and the constitutional order. The Buganda can also provide this function. Not the Lozi; at least not yet.

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[23] This is an instance of what we had argued earlier in Section 1.C.; that is, the need for cross-disciplinary perspectives in comparative constitutional law. Here we see how economic, geographic, and demographic factors enter the equation when reflecting on the explanatory factors differentiating the three case.

3 AFRICAN CONSTITUTIONALISM BETWEEN THE MODERN AND THE TRADITIONAL

Instead of focusing on the various forms of formal constitutional recognition, the *longue durée* history of constitutions and constitutionalism in Africa tells us that our main concern has to be self-sustaining longevity. Traditional polities can provide the function of (indigenous) counterweights against absolutism so long as formal constitutional clauses are accompanied by real political power as well as socio-economic lifelines ensuring the continuation of their autonomy and resilience. As the bottom-up building blocks of a compound polity of multiple *demoi*, traditional polities can function as guarantors of nation-wide political pluralism. In turn, the autonomous social power of indigenous structures has to be constitutionally protected; mostly through foundational constitutional clauses or preambles similar to the way federalism is enshrined in constitutions; that is, these should not be susceptible to the whims of 50 per cent-plus-one type of electoral majoritarianism.

We had seen how the Asante and Buganda had managed to maintain uncodified autonomous economic power through their control of land and commerce and as recipients of unofficial tax, tributes, and gifts. But what has worked for two rich kingdoms sitting on economically vibrant cities and regions cannot be replicated in each country of the continent. The insight that comes out from the examination of the three kingdoms is that economic self-sufficiency allows traditional polities to remain relevant. For those traditional structures of governance falling short of economic self-sufficiency, the lesson is then to ensure constitutionally protected direct state funding or own resources (collective ownership of land within the traditional homeland, local taxes/administrative levies), independent of who is politically in charge at the national level.

Examples of such constitutionally guaranteed funding can be found in the way consociationalism apportions educational spending across the constituent pillars or the way federal systems structure financial equalisation across provinces/states/cantons. There is thus a sizeable repertoire of different mechanisms from federal and consociational countries which accompany the more formal constitutional clauses on internal autonomy. Some are on finances, others on personnel, yet others on infrastructural capacity. But at the end of the day, the lesson is that such mechanisms have been developed and finetuned in the two other types of compound polities founded on federalism or consociationalism.

In sum, we are indeed promoting tradition as the self-sustaining safeguard of modern pluralism. There is thus an inevitable tension when modern democratic ideals come to rely on traditional structures more often associated with parochialism, patriarchy, and despotism. Our discussion in the chapter is concerned with maintaining national political pluralism, and how homegrown traditional

polities can come to function as self-sustaining counterweights against the risks of political centralism and absolutism. Yet we also have to acknowledge that all this discussion does not conclusively address internal pluralism within traditional polities.

The discussion of both formal and real powers for traditional polities, of constitutional recognition of collective group rights, and nation-wide political pluralism, has nothing to say about individual dissenters (and the group rights of smaller minorities which might live within the territories of larger collective groups, that is, minorities within the constituent *demoi* themselves). A way to ensure internal pluralism is through the adoption of nation-wide constitutional protections of individual rights. The Canadian Charter of Rights and Freedoms is a helpful example here. The Charter applies to individuals across the borders of constitutionally autonomous provinces, yet its applicability is tempered by the so-called 'notwithstanding' clause which gives provinces qualified and temporary exemptions under special circumstances for protecting their collective group rights.[24]

It is imperative to emphasise that we are not proposing strong traditional polities as the sole protector of political pluralism. To ensure both nation-wide individual human rights and territorially bound collective group rights remain permanent – both in law books and in effect – there is a need for a couple of additional safeguards, including the independence of the media, and the collective autonomy of the legal profession. These safeguards of course apply to all formally democratic systems around the world. The recent years have been a witness to how authoritarian-inclined leaders have turned their electoral majority at the ballot-box into monopolisation of political power at the centre despite the existence of formal constitutional clauses and national legislation on media independence and judicial autonomy.

In sum, while their form may fall short of the ideals of modern constitutionalism, traditional structures of governance provide an indigenous constitutional check on centralisation. They have survived invasion, occupation, domestication, co-optation, and political repression across the *longue durée*, and proven their resilience. These are structures with deep roots in the native soil. Their legitimacy is uncontested in the eyes of their members. There is a sense of public ownership and pride that constitutions copy-pasted from the West invariably fail in instilling.

At the same time, the political, legal, social, and cultural priorities traditional structures stand for might not always be liberal democratic and progressive. It is their function as counterweights to centralisation that matters.

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[24] The notwithstanding clause has mostly been invoked to protect the French-language laws of Québec.

Their very existence – constitutionally protected and properly resourced – fulfils a constitutional function: they put breaks on absolutism of all kinds. No despotic/charismatic authoritarianism, majoritarian populism, religious fundamentalism, or ideological totalitarianism can establish the absolutism they seek in a compound polity of multiple *demoi*. These are the challenges to political pluralism we currently know. The future surely has in stock other yet unknown challenges. Homegrown structures have proven to sustain themselves over various episodes of their political history. They are unlikely to be swept away in the face of the unknown constitutional challenges of the future. Constitutional investment in indigenous safeguards promises the steadiest returns for democratic stability in Africa.

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