

# **Analysis of the New Draft Land Policy of 2006**

**ZAMBIA LAND ALLIANCE (ZLA)**

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## **Introduction**

After prolonged delays, Government has finally unveiled the Revised Draft Land Policy (Draft Policy).<sup>1</sup> This in itself is a very welcome development. If it is finally adopted, it will be the very first time in the Zambia's independent history that the country has a national land policy.

Zambia has had no comprehensive land policy since independence. This may sound an exaggeration but it is true that besides sporadic and isolated policies, there has been no single policy by which to guide the country in its various options. Given that Zambia operates a dual land tenure system, it is not difficult to imagine the myriads of challenges that confront individual land seekers trying to obtain a piece of the national cake.

In itself, the dual system of land tenure implies having at least two or multiple systems of land tenure. Technically, it will be very difficult to have one land policy particularly if as is the case with leasehold and customary tenures the two tenures represent different ideas. Land in leasehold is acquired differently according to different ideas from land in customary areas. Similarly, different burdens attend to each of the two types of tenure in relation to holders. This probably explains why developing a single policy to capture all the nuances of tenures that have nothing in common may be a very challenging task.

A serious source of concern in duality jurisdictions is that some of the holders will hold superior rights relative to holders of the other type of tenure. This is problematic particularly because the country's Constitution predicts a perfect situation in which all enjoy rights and freedoms in equality. Similarly, international law applicable to Zambia does not countenance discrimination or unequal protections such as prevails in two different land tenure systems.

How did the country find itself in this situation? The dichotomous nature of the Zambian land tenure and administration systems is in the first instant not Zambia's own making. Up until colonialism, individuals only held land under one form of tenure. What is now known as customary land tenure system was the universal system of landholding. Under this system, custom and indigenous law provided the only regulatory legal and institutional environment in which land could be accessed, held, exploited and transferred. Even though substantially modified since then, customary land tenure nevertheless continues to subsist. Section 2 of the Lands Act, the statute which terminated the Reserves and Trust Lands colonial land categories preserved the customary land categories and hence the duo system of land tenure.

Europeans, not wishing to submit to the indigenous land tenure systems, introduced their system of land applicable in their home countries. Some of the key institutions of

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<sup>1</sup> . GRZ, Revised Draft Land Policy, Ministry of Lands, Lusaka, October, 2006

European land policy and law include the freehold<sup>2</sup> and the leasehold<sup>3</sup> systems of tenure underpinned by common law. At first, they held their land mostly under freehold. This is land that was obtained or seized from Africans either on the basis of concessions between the local King or Chief on one hand and agents of the colonial system on the other or by use of naked force. The main player on behalf of the colonial system in Zambia was the British South Africa Company (BSA). John Cecil Rhodes the British magnet who had relocated from Britain to South Africa on medical grounds subsequently became the greatest mine owner who helped expand the British Empire conquering tribes from the Cape in South Africa right through to Zimbabwe and Zambia. In instances where control was not obtained by conquest, it was because a concession was said to have been executed between Rhodes' agents and the traditional leader (s) concerned. It is notorious that most local Chiefs and Kings were illiterate and lacked the necessary capacity to execute the said instruments.

One of the most popular forms of freehold is the fee simple estate. The fee simple is an estate in land said to be the most common way real estate is owned in common law jurisdictions. According to theory, fee simple estate is the most complete interest a person can own in land. It represents absolute ownership of real property limited only by government's overarching power to tax the holder of this estate; subject to police power to enter the premises based on lawful instructions; subject to the power of the eminent domain and that of the escheat – all of them imposed by government. Escheat means that the estate in freehold returns to the State upon the death of the holder who leaves no will and is not survived by any legal heirs. On the other hand, eminent domain also refers to the power of government to take over and convert privately owned property especially land for public use. This, however, is subject to reasonable compensation to pay for the taking. Another but lesser form of freehold is a life estate which takes effect upon the death of the holder.

Zambia, with the legacy of common law inherited from colonialism, operated the freehold. However, this has since been discontinued. The freehold existed from since colonial rule up to the middle of 1975 when it was terminated by then government of President Kenneth Kaunda based on the socialist policies of the United National Independence Party (UNIP). Kaunda discontinued the freehold in a series of sweeping changes he introduced as part of the larger economic reforms initiated following a major referendum and subsequent amendment to the Constitution in 1968. With the discontinuation of the freehold, only the leasehold remained on the formal side of the dual land tenure system. Like freehold, leasehold was a legacy of colonialism. The main distinction between the freehold and the leasehold is that the latter is basically defined by duration. A leasehold is a form of tenure which allows the holder to occupy a piece of land or a building for a given period of time. In Zambia, the leasehold exists in different terms of years. Among them is a 14-year provisional lease granted to holders of unsurveyed land or land not yet subject of a survey diagram which follows demarcation by surveyors after planning. The 14-year lease is convertible by law to 99-year lease

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<sup>2</sup> . See: Wikipedia, the free encyclopedia (Redirected from Freehold (real property)), [www.wikipedia.org/wiki/Freehold](http://www.wikipedia.org/wiki/Freehold)

<sup>3</sup> . Ibid

upon demarcation and a survey.<sup>4</sup> A holder of a planned, surveyed and demarcated agricultural settlement is usually entitled to an 30-year lease. The ninety-nine year lease is the maximum period a holder can hold under the 1995 Lands Act.

On the administrative side, dual land tenure implies having two systems of tenure. In line with this, the President through the Commissioner of Lands administers the former Crown now State land. On the other hand, Chiefs, village heads and other local authorities administer customary land.

The Commissioner of Lands is the principal government agency or more specifically President's agent responsible for the administration of leasehold land which concept entails alienation of land or giving grants of land to land seekers. In theory, any person can apply for a piece of land anywhere in the country. In practice, the right to apply though recognised for all Zambians and non-Zambians alike, is not available to the poor. Just completing the application to submit to the Council let alone to the Commissioner of Lands is a major hurdle to a poor person. It is a requirement that applications be made in English which most people cannot speak. An application in local language is bound to be thrown away as there is no mechanism for the local tongue under the rules. Also, grant of a leasehold entails being able to meet the relevant costs. There are fees payable upon receipt of the offer; charges for the preparation and execution of the lease beside an annual payment for ground rent. Poor people by definition are people who are in no position to afford these costs and unless Government intervenes and affirms them, they will continue to be marginalised.

In both the two tenures, gender is not adequately protected. Due to their status, women are most often discriminated against both by custom and by formal law and their institutions. Gender is uniquely important factor in land due to the exceptionality of women's status. It is a notorious fact that while most land is worked on by women, women nevertheless do not own it. In customary tenure, traditional views about women being nomadic and not sedentary like men, or so it is assumed, are behind the tight-fisted customs to deny women land. Married women are just tenants on their men's land while unmarried women depend on their male relatives. It would appear the same argument holds for the discrimination women often suffer from at the hands of policy, law and officials in so-called formal systems of tenure even though other reasons obtain in this tenure category.

## **1. Methodology**

*--- Methodology is a very important part of policy making*

*--- Methodology has direct impact on legitimacy and on the outcome of policy process and content*

*--- Methodology raises political as well as policy issues*

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<sup>4</sup> . On the other hand, the Land Policy Conference held under the auspices of the ruling Movement for Multiparty Democracy (MMD) in 1994 recommended for the amendment of the Lands and Deeds Registry Act to provide for automatic renewal to 99 years of a 14-year provisional Certificate of Title merely upon the expiry of this term.

- The draft policy discloses serious flaws in the choice (s) made which have effect on the key question of ownership of the product*
- Authorities should have aimed for a much more broad-based method in which all stakeholders including opposition parties participated in developing the policy.*
- Policy-making on land is a political process which cannot be left to junior civil servants as they are not accountable to the people*

Part of the method that was used in putting the document together is elaborated by the draft policy itself more especially the previous draft. However, a much more adequate version of what really transpired is contained in the Zambia Land Alliance (ZLA) booklet<sup>5</sup> the organisation put together as a 'report back' to communities.

The initiative by the ZLA to publicise some aspects of the preparation of the draft process is highly commendable. We found the booklet in several parts of the country during field work. Generally, governments are very poor in communicating to their citizens. Few have the habit to report back their their programmes and activities. In this context, ZLA was filling up a huge gap in information flow which is the duty of Government to do.

However, there are several areas of serious grievances about the methodology used. In the first instance, the consultation that preceded the compilation of the draft was definitely not enough. ZLA has established that visits were undertaken to provincial centres and some districts but this was not enough. Due to lack of time, only limited visits were undertaken. Only a few people were reached by the Technical Committee. This particular aspect of the method clearly did not meet the minimum threshold. Given that the Constitution in the preamble enshrines the principle of good governance, Government has a duty to do everything to allow for greater participation in policy making by people, more especially where land is involved.

The second methodological problem has to do with the way in which the consultation process was conducted. According to the ZLA booklet, the Technical Committee's visits involved interacting with local people at which views would be exchanged between and among the people and the Committee. It is very important that at least an effort was made to meet the people even though in a very artificial sense. However, one of the most serious methodological flaws that this exposes is that the people were not sensitized first before eliciting information from them. This is wrong. Land tenure being what it is - a very technical matter - it is grossly unfair for the Committee with the advantage of working in the Ministry of Lands some of them for years to expect villagers to be competent in responding to very complex issues. There should have been a deliberate effort on the part of Government to first expose the public to the key issues before asking them to express themselves. Sensitization campaigns should have preceded fact-finding visits by the Committee.

In fact, the whole exercise should have been preceded research. Country-wide research to build up the issues to articulate in the policy is unavoidable if the exercise is to be taken

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<sup>5</sup> . ZLA: Booklet on communities' views on the land policy. Draft Land Policy Review Consultation Process in Zambia, February, 2005

seriously. Research is a very important prerequisite for the grounding of issues.. It is very difficult to see how Government through the Committee was able to come up with the issues it did without prior research. Similarly, consultation without first endowing the constituency with basic information on the subject so as to empower them to effectively participate in the process is likely to be no more than symbolic. This explains why most of the views encapsulated in the ZLA booklet tended to be contradictory.

Third, the appointment of the Technical Committee under the jurisdiction of the Ministry of Lands and mandating it to draw up the policy is fatal to the extreme. As we have said already, land is a political issue. It is not possible for such a volatile political hot potato as land to be made responsibility of civil servants. Policy making on land is a natural responsibility of those that are politically accountable to the people so that if the people are not happy with the product they can remove the authors from office. This is a sovereign power that people enjoy in their role as appointers and removers of governments. Civil servants are not required to account to the people directly at elections as are politicians. It was a serious methodological flaw for the Government to have abrogated its responsibility in its capacity as political authorities to develop the policy together with stakeholders.

Government should have made an effort to reach out to their opponents in opposition to ask them to participate. As it is going to be a national land policy whith emphasis on 'national', there should have been involvement of broader civil society, faith-based organisations, traditional rulers, farmers both subsistence and commercial and many others. This should be done at the level of development of policy. A national policy should be developed by all the citizens through their representatives. This is how to have a policy that will last well after the incumbent government is out of office. Zambia has enough experience with failed attempts at policy making in land that it should avoid falling into the same trap. The 1995 debacle when ministers literary fled from missiles thrown at them by incensed members of the general public should be enough lesson on how not to do it the wrong way.

It is, however, not yet too late to rescue the process. Government could still approach opposition and social forces and invite them to join the process. The Committee's draft policy document could be considered as one of the several sources of data for the proposed 'multilateral Committee' comprising these other social and political groups. This way, it will be possible to sell the document to the people. It must be understood that it is not possible to change however mildly the Litunga's title without getting the Litunga involved as is often the case through his representatives. When the Kaunda Government unilaterally repealed the Barotse Agreement, it is common knowledge what happened. Up to this day, there are calls for the restoration of the Agreement, more than thirty years later. The matter has simply refused to die down much to the embarrassment of the Kaunda and successive administrations and this is what could happen to any changes perceived to be unilateral.

Tthere are several other issues that come to mind on methodology. For example, most of the Committee members that wrote the draft have no legal competence. This is a very

important failing because though policy is not necessarily a legal matter, most of the issues around land policy deal with law. Involvement of legal experts could have led to a different textual flavour of the document while retaining the social and political content. Second, while the Committee was chaired by a woman, other members were men. Given that one of the key issues the policy deals with relates to gender, it is ironic that it was itself genderless in its composition and consequently in most of its final conclusions. Third, even in government, the Committee lacked broadness of representation. In the text of the draft, the Committee boasts about having taken a 'holistic approach' in the drafting of the document but there is nothing much to support that claim. Government departments that usually deal with land such as the Ministry of Local Government and councils were not represented on the Committee. Though it should have been written by politicians, Government when it decided on civil servants should at least have broadened it to include other ministries and departments.

## **2. Dual<sup>6</sup> nature of the country's land tenure system**

- Since colonialism, Zambia has operated the dual system of land tenure*
- What this concept means is simply that some Zambians hold land under one of the two tenure systems*
- How does customary land tenure differ from leasehold?*
- What are some of the different challenges the two tenure systems present?*
- Should Zambia maintain the two tenure systems or are there different possible approaches to consider?*
- How does the dual land tenure system impact on development using land as a factor?*

One of the most notable features of the draft is its slipperiness. It skillfully avoided most of the controversial issues. Of particular importance in this connection is the dual land tenure system. Clearly, this would have been too much for the civil servants to handle. Which land tenure system to adopt clearly lies beyond the competence of the Committee even if the matter would subsequently be submitted to political power-holders. All the Committee did in this case was to confirm that the prevailing tenure systems would continue as before.

However, this does not mean that the country will never consider the possibility of adopting a specific policy on tenure contrary to the two tenure systems in place at the moment. For example, the fact that Zambia at one time had a freehold which it discontinued is proof that change is not altogether out of question. Besides, there are many people that support the restoration of freehold. Some of them have spoken to this consultant. Among those that have include some who liken the freehold to aspects of customary land. In certain customary communities such as the land tenure of the Tonga and its emphasis on the family, a holder is a holder absolutely and in perpetuity. This is

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<sup>6</sup> . The word 'dual' is in this report used at two different levels. In the first instance, it is used to describe the two types of land tenure, namely, customary and leasehold land tenures. In the second instance, it is used in its international law context to mean the distinction between international law on one hand and domestic, local or municipal law on the other. The two meanings represent totally different situations and it is important this is born in mind.

the same concept in the Buganda Kingdom in Uganda under the Baganda people. The Buganda and other centralised kingdoms in Uganda adopted the freehold with modifications and called it 'the Mailo' to refer to trigonometric demarcations of the extent of 'one mile' per plot. Consequently, land in Uganda, is held under Mailo (freehold), leasehold, ordinary freehold and customary law.<sup>7</sup> Those who support reintroduction of the freehold in Zambia point to the fact that in practice, customary land ownership such as practised by the Tonga who are more liberal and individualistic is in fact a form of freehold. Title to customary land among the Tonga resides in the individual who holds it in perpetuity. In terms of Tonga land tenure, a person's absence from his land even for decades does not affect his title. There are differences, of course, more particularly the power to alienate and to exclude others which is a principal feature of freehold save for the exceptions above which a customary holder does not enjoy in the same way.

The draft should have presented the issue of tenure to the public in any case it was merely a draft. People and not government should decide this issue and it is important government does not seek to take a position on it. The issue is of fundamental importance that it should not be skirted around. What the Committee should have done is to promote discussion around it in the hope ideas will develop to result in suggestions on the way forward. It is under this that issues like restitution of land previously customary but which has since been converted to leasehold could have been raised. This is a matter which needs policy intervention. As at now, land converts only in one direction. Leasehold land does not convert which is unfair to customary land holders. There must be equality of tenures. In specific situations, it should be possible to convert leasehold land back to customary tenure. This would be in keeping with the Constitution which anticipates equality.

Finally, while customary land is defined by customs and traditions, there is need to discuss it in more detail than was possible in the draft. The whole issue of registration and recognition of this category of land needed sustained focus. Fortunately, Zambia does already have in place a fairly sophisticated framework which provides for registration of villages and inhabitants therein under the Village Development and Registration Act. This legislation though of a different era nevertheless constitutes an important basis on which to expand and include recognition of some of the land held under customary law. Not all of it of course but one would recommend all of that subject to personal domain of respective individual holders. Recognition of rights and interests in portions of land subject to customary jurisdiction could help secure the poor people's connection to their land. The draft should not only be concerned with affording investors opportunity to access and acquire customary land. Government has a duty to protect its citizens and more especially those not in a position to protect themselves. Protection of customary land holders would be the first sign that government is truly committed to promote the dignity of the poor who constitute the majority.

### **3. Implication of vesting land in the President**

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<sup>7</sup> . Government of Uganda: Constitution of Uganda, Article 237; The Land Act, CAP 227, Section 2

- *What does vestment of land mean?*
- *What is the meaning of vestment in the contexts of 'customary land' and 'leasehold'?*
- *What are some of the problems that have arisen around the issue?*
- *If not vested in the President, what other models of vesting land are there?*

Just like the dual land tenure, the draft makes insufficient references to the issue of vestment of land in the President. Ever since the colonial orders-in-council, the concept was introduced that vested land in State officials. Crown land was vested in the Secretary of State for Colonies on behalf of the British Crown. This is an official who had never may have seen the said pieces of land he was trusted with in the first place. Customary land on the other hand was vested in the Governor, an official resident in the protectorate. Principally, this enabled the coloniser to dispossess the African of his land and based on that to exercise control over it. At independence, this legacy was continued till this day. All land in Zambia is vested in the President on behalf of Zambian people.

Discussions around this issue include questions around the wisdom of allowing one man even if a Head of State to have such enormous powers over land. Power and control over land is equivalent to exercising unqualified control over people. On the other hand, it is argued on behalf of the State that this was for purposes of custodianship only and that there is no other public office besides the President in which to securely vest an important resource as land. In their discussions, Committee members observed that most of those that are against the current arrangement in which land was vested in the President expressed personal dispositions against the incumbent President. This is far from the truth. This discussion has been going on long before the current President came to office. On the inverse side of this argument is the view that land should be vested in Chiefs which means each traditional leader acting as custodian of the land of his or her jurisdiction. This would easily conflict with Justice T.O. Elias who contended that African theory did not support the view that radical title to land was vested in the Chief.<sup>8</sup>

The vestment of land in the President requires extensive discussion by the general public. Recent events in which the President has had to dismiss from office the Minister of Lands for suspected corruption in the allocation of land of which she has just been formally charged and has appeared in court, more than confirm the case for wider engagement of the issue with the public. Previously, the country's former Heads of State and senior government officials were accused of breaching the trust that went with vestment. Giving the President too much power over land is what has resulted in the current embarrassing situation resulting in the Minister's dismissal and the removal from office of the deputy Minister, Commissioner of Lands and the Ministry's Permanent Secretary. The main problem is that the President has no one to account to for his actions. Similarly, the Minister and his officials as presidential appointees become big headed as their only route for accountability is to the President. There must be a way to ensure accountable use of these powers. Institutions like Parliament ought to come in to ensure a

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<sup>8</sup> . T.O. Elias, *The Nature of African Customary Law*, 1956, 162-168

balance in the use of State powers. The draft document did not obviously address this important question. It is content with leaving intact the status quo. As a Committee of largely junior civil servants, it cannot be expected that they can fix such a complicated problem involving the Head of State.

The draft should have delved into deeper issues of best practices from other jurisdictions on land vestment. There are several examples. Though it has not controlled abuse of power, Uganda and Ethiopian constitutions vest land in the State. The draft suggested that the word 'State' is vague and may mean President. It may also not mean President depending on interpretation attached to it. Obviously, the current arrangement in which the Commissioner and Minister have only the President to report to or not at all on the key issue of alienations or giving out of land is a recipe for abuse including corruption. If corruption is to be fought in the Commission of Lands, it is necessary to institute a Commission of persons drawn from professions, society and political groups to be the ones to exercise the powers of alienation, now exercised by one person. The current arrangement is completely undemocratic and even more worrying unconstitutional too. The Constitution speaks about the need for good governance. What is good about leaving all land matters in the hands of one person? It can't be that the country should leave this function in the hands of one person the Commissioner of Lands. This in the elementary sense is contrary to the principle of accountability. The President has not been able to provide the necessary leadership in the task of administering and controlling land which is why his own officials have defied him and started allocating land to themselves, their family and friends. .

#### **4. Corruption in land administration**

*--- Corruption in land administration in Zambia is rampant*

*--- The President has on several occasions stated that the Ministry of Lands is the most corrupt in his government*

*--- However, the draft does not make adequate references to corruption in line with this high profile acknowledgement of the scourge*

*--- One of the possibilities why the draft is weak on corruption is due to the fact that the authors of the document are civil servants in the Ministry who cannot be completely free of the perception*

We have just made reference to this subject in so far as vestment of land is concerned. But it is such a major challenge to proper and effective administration of land that it calls for separate treatment. ZLA can do well to lobby government to institute measures at the Ministry of Lands to fight the scourge and once again reinstate the lost public confidence in the State in as far as governance in land administration is concerned. Merely moving officials around without instituting measures will lead to nothing. Besides changing ministers and senior officials, no measures have been introduced which means it is business as usual.

The first area of concern which has not really been dealt with by the draft is corruption in land administration at local levels. The draft has mostly raised issues on the role of chiefs

in administering land within their localities particularly their refusal to give out their land for development but that's all. Corruption in the administration of chieftaincy land however was a subject of people picked up during consultations with the Committee and this is adequately reflected in the ZLA booklet. It is clear from the booklet that this particular problem is widely acknowledged. It is common knowledge that chiefs in general have performed their roles corruptly.<sup>9</sup>

This is an area Government should promote wider public discussions on. It can do this, for instance, by focusing attention in those areas perceived to be most corrupt and where chiefs are said to have no tradition of involving their people in decision-making. Government could foster an environment meant to understand whether this is not due to lack of good traditional governance in the areas concerned that it is because people there do not really have capacity to challenge the Chief in question why he administers land alone? A study of the structure of the customary system of the area and the content of power could help in promoting an understanding about how the system operates and the role and participation of people in the administration of the chieftaincy.

The draft must promote greater public discussions on whether indeed chiefs should have the same powers over land as suggested in the present Lands Act. People should discuss in great detail the roles and powers of chiefs to administer land understood to mean to approve applications to convert land within their jurisdictions from customary to leasehold tenure. Custom and tradition is definitely not the same in all jurisdictions as the Act tends to suggest when defining chiefs' powers on land administration. It quite is possible that in some areas the role of chiefs in land has simply been exaggerated from what it really is in practice. Government may just about be wrong in treating all chiefs the same in as far as land administration is concerned. When is the Lands Act and therefore policy going to acknowledge that you cannot take the same approach on land administration in Lozi land tenure as in Ngoni or even for that matter Tonga land tenure? These are different concepts and if research had been resorted to, specifics would easily have come out to guide proper policy formulation unlike is the case in the current draft.

Besides the Chief, however, the other serious area of concern on local level land administration and which is a source of corruption is the local government sphere. Unlike in Uganda, the lowest tier of local government recognised by law in Zambia seems to start from the local council after the Chief in areas subject to customary jurisdiction. In Uganda, on the other hand, there are committees starting from the lowest level committee known as Committee 1 leading to Committee 3 which is also known as the Parish Committee, and up to Committee 5. Committee 5 is the district Committee whose representatives come from all areas of the district. Committee 1 comprises the area inhabitants selected based on the principle of popularity, gender, and similar determinants. If it is in a village, Committee 1 comprises the villagers of the area the land in question is situated. This is the structure to which a land seeker or one seeking to convert land from pure customary to a customary certificate of ownership must go to first

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<sup>9</sup> . A good case showing how corruption in the Commission of Lands takes place is the Lands Tribunal case of Ernest Chitumwa Mwansa and Charles Kajimanga v. Commissioner of Lands, Estery Nkausu Banda and Benson Handila – LAT/34/2002

to get an initial endorsement or approval. The Committee is not only given statutory recognition but its roles and responsibilities are also detailed in the statute including for every application for certificate of customary ownership to determine, verify, mark boundaries, demarcate rights of way and other easements as well as having the jurisdiction to adjudicate upon arising disputes.<sup>10</sup> Final approval is for Committee 5 or the district Committee done after careful scrutiny of the application and the status of the land including rights and interests the land in question. Already, the difference is starkly clear that under the Zambian system, the Chief of the area, is empowered to make this very difficult decision solo. There is no statutory or other requirement forcing him to share even with his councillors the making of his decision. This is a weakness by law which must be rectified.

In most urban areas, people have come up with committees that are nevertheless not recognised to consider to be the first tier to entertain the application first before the area Council could be seized of the matter. Though illegal and therefore lacking legal standing, the 'Compound Committee' or 'Section Committee' known by various designations is in practice the only organ most urban dwellers in so-called informal settlements know as the initial structure of government to approach to get land. In rural areas, people do not generally approach the Chief for land unless they are foreigners or strangers who are not conversant with applicable rules and customs on land. Instead, land seekers approach villages or even families and individuals for allocations and only later if it is necessary are these transactions reported to the Chief by the headman in form of an introduction for formal political endorsement. Again, the village has conspicuously been omitted from the recognised structures at the lower levels of land administration. Policy should be made to speak about these critical issues.

## **5. Colonial land tenure**

*--- The draft document deals with the colonial land tenure system*

*--- However, the draft does not seek to draw lessons or inspiration from the colonial land policy*

*--- The backdrop of colonial policy referred to in the draft aims simply at recapturing this episode*

*--- The policy should aim at guiding government on how to redress some of the injustices perpetrated against the indigenous people due to colonisation such as through restitution*

*--- Another lesson inevitably arising therefrom is that government should avoid engaging in land dispossession under the guise of promoting development*

*--- Government should use the policy to implement the 1982 Southern Province Land Commission of Inquiry recommendations to reconstitute land taken away from the people and which still remains fenced and out of reach of people in this province*

The draft policy has highlighted the colonial land tenure system and made reference to the painful legacy of dispossession of land that took place at the time of colonial rule. However, it is not clear from the document the main reason for this reference. What the drafters should have done on this particular subject is to use the opportunity to demand

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<sup>10</sup> . Note 7, Section 5

for restitution of some of the lost land. This is the approach in South Africa among others. After freedom or independence, the in-coming government redresses the historical injustices by providing for restitution. There are still large areas in Southern Province and also along main urban areas like Chiefs Nkana and Nkomesha areas on the Copperbelt and Lusaka respectively where indigenous people the term the draft uses were 'chased' away from their land and heralded into Reserves and Trust Land areas now called 'customary areas'. Some of these areas could be restituted to the rightful owners as part of the 'freedom dividend' or some form of recognition granted to the local communities. In fact, this is already provided for in the case of the Southern Province in the 1982 report of Southern Province Commission of Inquiry on Land (the Justice Sakala Commission), which, however, has never been implemented. On the other hand, restitution in case of the two Chiefs Mushili and Nkomesha could involve them having permanent seat (s) in urban councils as part of self-determination to recognise them as first nations over their land. The policy should be made more robust in trying to be proactive in anticipating various implications both from past and present scenarios.

In fact, some of the colonial nuances even though dreadful nevertheless could provide best practices today. It is true that by definition the colonial land policy had no space for Africans and in fact it was the source of the current problems Zambia and other African countries are going through today. However, the racial classifications of land into multiple categories of Crown land, Reserves and Trust land though racist nevertheless have a protection model worth reciprocating. For example, the Reserve was so protected from outside influences that it guaranteed the individual effective protection of his portion of land. It was stated in the relevant orders that the reserves were 'exclusively set aside for native occupation' which, apart from the racist overtones ensured a measure of African protection of their land. An equivalent provision today would go a long way to protect the poor land holders in customary areas from loss of their lands to investors.

## **6. Challenges in accessing land in an unfriendly bureaucracy**

*--- The main reason government decided on the policy is to facilitate access to land by investors and by the government itself*

*--- The draft document makes it abundantly clear that the main objective of the policy outline is to promote access to land*

*--- Among the most important instruments governing access include Circular No. 1 of 1985 and Statutory Instrument No. 18 of 1996*

*--- Some of the institutions dealing with access include Chiefs, Councils, Commissioner and Registrar of Lands, Lands Tribunal, etc*

*--- Currently, land access is regulated by a number of mechanisms and instruments the overall effect of which is to delay or even block the process altogether*

*--- The draft policy also addresses the issue of collecting revenues stating that the purpose of the policy is among other things to promote revenue collection on land transactions*

One thing the draft document makes clear is that its original objective was to promote access to land. The whole idea behind having a national land policy would seem to have

been motivated by the desire by authorities to get customary land out of control of customary authorities and to place it directly under the jurisdiction of the State in practice in the hands of the Commissioner of Lands an agent of the President. Over the years, State land which is land under leasehold tenure has significantly dwindled from the original six percent which constituted this category at the dawn of independence. However, even though a lot of customary land has over the years been converted to leasehold and therefore added to the six percent, government would still want some more. This is largely because government wants the land for its own needs and also more people both local and foreign are trying to access leasehold land. It is ironical that categories such as leasehold that were initially introduced to oppress the local people have turned out to be the most sought after by those same people and not their own indigenous concepts.

One of the reasons for the growing desire for leasehold land of course includes the perception that this land unlike customary is secure. Security of tenure in leasehold tenure is assumed to derive from the title deed a holder is granted upon an alienation which is supported by the Lands and Deeds Registry Act and through it by the Constitution in its notion of property. Holders of customary land are not viewed to be in the same standing as those of leaseholds. Though customary land is a recognised mode of tenure as provided in Section 2 of the Lands Act, this is only in the general sense. In contrast, the Lands Act of Rwanda<sup>11</sup> explicitly states in Section 8 of that statute that customary land has the same status as other land tenure. This should compel courts to grant customary land holders the same standing as leaseholders or holders of formal tenure systems.

Accessing land particularly leasehold but also customary land presents a major challenge to land seekers. Some of the leasehold land is under the jurisdiction of local authorities especially urban councils delegated to them by the Commissioner of Lands. Therefore, accessing this land requires the land seeker to approach the relevant council. Most councils, however, lack basic capacity to efficiently administer this function. The majority of councils do not have at their disposal basic mechanisms to facilitate access. For example, Chongwe Council<sup>12</sup> was sued by an estranged land seeker aggrieved at loosing an offer extended to him by the Council but which he was not informed about till it lapsed. In the Lands Tribunal, the Council explained that it could not write successful applicants to inform them of the outcome of their applications due to lack of money to buy postage stamps. Generally, councils lack capacity to plan, demarcate, survey and service the land proposed at its disposal for alienation.

The Commissioner of Lands retains the power to control and to administer land not ceded to local authorities which he does through grants of direct leases. There are portions of land subject to the jurisdictions of other public authorities such as the Forestry Department, Wildlife authorities, mining companies, etc. The same lack of capacity as in councils characterise administration of these other categories.

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<sup>11</sup> . Rwanda: Organic Law No. 08/2005 of 14/07/2005 Determining the use and management of land in Rwanda

<sup>12</sup> . Dominic Sichinga, Raphael Sichinga versus Chongwe District Council Lat/15/2003

There is a wide variety of mechanisms and instruments providing a legal basis for the administration of land in both customary and leasehold areas. Generally, customary land it has already been pointed out is regulated by customary law, tradition and usage. This is a set of unwritten principles and value-systems enacted by constant usages and practices. Though there are similarities cutting across communities, it nevertheless differs from community to community. For centuries, customary law has promoted access to land for the majority of Zambians who are mainly dependant on this tenure for their land needs.

One of the main challenges posed by customary law which was alluded to in the draft policy is the unwritten nature of this tenure. Generally, customary law is by its nature unwritten. Its existence and legality do not depend on the written text and it has been like this for centuries. However, new challenges dictate adoption of different approaches. In Western Province, new approaches are already in force. Barotse Royal Council authorities are already issuing 'title deeds' to people whom they give land to. These are not really title deeds properly speaking. They are just pieces of paper. Nevertheless, some 'evidence' of a land transfer.

The growing clamour for land has overburdened customary areas which are the areas still open to new settlements presenting a major challenge to the holders of that land. Widespread cases of land dispossessions have been reported<sup>13</sup> particularly with the Government's adoption of the liberal economic policies from early 1990s onwards. Several people have been rendered landless by the power of the leasehold title. There is a real case for seeking to introduce changes to the present concept of customary land holding both in order to protect that land and its holders. The situation is already bad for people in parts of some of the rural areas. But it is bound to get worse now with these giant mining and tourism developments government is approving. The Fifth National Development Plan approved just recently has emphasised the private sector as the key to its successful implementation. In as far as land is concerned, this means preferring the title deed over customary tenure which implicitly means more displacements of poor people.

ZLA would need to lobby firstly communities to nurture them into accepting the concept of codification of aspects of customary tenure with the view to bringing it at par with leasehold tenure in as far as law is concerned. Codification of certain aspects of land tenure is a natural first priority for the full, effective and efficient protection of the poor and powerless in the face of powerful forces whose activities often subvert the interests of marginalised groups. In terms of strategy, ZLA needs to emphasis that the need for record of customary rights is not new. Customary records do in fact exist already except in memory and therefore unwritten form and all that is required is to reduce this into writing. Given that culture is a dynamic concept, codification could be promoted as part of this dynamism to ensure greater protection. While retaining the concept of customary land ownership as before, communities could be urged to embrace its recognition in modern instruments of which the written record is but one. Second, ZLA should ensnare government to adopt the Rwanda model by expressly enacting the equality of customary

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<sup>13</sup> . Email from Chris Singelengele, Women for Change Animator based in Mukonchi, Kabanga. Date of email 29th August 2006

land to leasehold. This will go a long way in helping courts to discharge their protection function.

Besides customary tenure, other instruments include Circular Number 1 of 1985 and Statutory Instrument Number 18 of 1996. These two instruments present the main regulatory framework providing basic administrative support to the 1995 Land Act and through it the Constitution. Among other things, the Circular outlines procedures for the administration of land at chiefdom level, local authorities level as well as the level of the Commissioner of Lands. It details particularly how local authorities should implement their tasks to administer land both within their jurisdiction and on behalf of the Commissioner of Lands in respect of land under the jurisdiction of this office. On the other hand, Statutory Instrument Number 18 specifically regulates the exercise by Chiefs of the powers inscribed in the Lands Act to approve applications for conversions of customary land to leasehold and to exercise their consultative roles again as provided for by the law.

Circular Number 1 has no legal effect. Though it has now been in force for over twenty years, the Circular has operated without legal backing. While legal backing is not always necessary, it is absolutely essential in land administration. Without legal backing, enforcement is not possible. In these circumstances, corruption easily grows as there are no mechanisms to control it. Similarly, efficient administration cannot be assured in an environment not backed by law. Inefficient land administration and the high rate of corruption in land administration prove the irrelevance of Circular Number 1. ZLA should lobby government to repeal the Circular and replace it with statutory framework. The Minister of Lands is the one responsible for introducing the Circular and should be called upon to denounce it and replace it with a set of statutory regulations.

On the other hand, Chiefs should be prepared to play their roles as provided for in the regulatory framework. Statutory Instrument Number 18 should be reformed if it is to remain relevant as a means to good government of the land resources. The reform suggested to the instrument should aim to make the Chiefs discharge their powers more openly and more democratically. For example, reference to 'Chief' in relation to the power to approve applications for land conversion could be defined to mean reference to all adult men and women in the community, invoking the Uganda model which is also the Tanzanian model. Community involvement is crucial to the authenticity and legitimacy of land deals and therefore to the consequent security of land due to land holders. The draft policy has bemoaned the fact that Chiefs have tended not to recognise land deals executed by their predecessors. This can be addressed by ensuring greater people involvement in the performance by the Chief of his functions. In fact, most Chiefs already practice this form of decision making process. Chiefs who govern according to the tenets of good government decide issues on the basis of their communities' views and recommendations. It is necessary however that this is made uniform and multilateral in that it should apply to all instances and in all chiefdoms as part of implementation of the principle of good governance. Therefore, an amendment to the Statutory Instrument is merely intended to make *de jure* that which is already *de facto*.

## 7. Gender in Land

- The draft document addresses the issue of gender and discrimination in land*
- It is established that women do not enjoy equal rights in both formal and informal land tenure systems*
- Generally, women are the largest users of land which they do not own*
- Government has recognised the marginalisation of women in land and has suggested the introduction of a quota (30%) for women in all land alienations*
- While the Constitution bans discrimination based on sex and gender, an exception pasted to the prohibitive clause effectively allows discrimination based on tribal customs, traditions and personal law*

The draft policy has attempted to address the vexing issue of women and gender equity in land. This is a positive development. It is a positive development that though generally male in its make up, the Technical Committee was nevertheless able to encapsulate this important subject in its conclusions. Gender equity in land is the only missing puzzle in Zambia's development paradigm. Generally, women because of being women do not own land. Government has since recognised this and it is taking appropriate steps to amend the prejudices in culture, policy and law that effectively locked women out of the landholding circle. To this end, a Division for Gender has been established at Cabinet Office. This was followed by the introduction of a policy on gender the first of its kind in the country's history. More recently, Government established the Ministry of Women and Gender with the objective to implement the Gender Policy. However, this is not enough. A lot more remains to be done to ensure that equity prevailed between men and women.

The draft policy has recommended for thirty percent (30%) minimum quota in favour of women to apply in all land allocations. What this means is that for every alienation of leasehold land, the Commissioner of Lands will reserve at least thirty percent for women. This is supposed to apply to councils as well. However, while the Commissioner of Lands has started to implement the policy, most councils do not similarly feel obliged and some of them are not even aware of it or how it should be implemented. There is need for dissemination of this information to councils and to train them to see and understand why affirmative action in favour of women in land is important.

Even more, the policy seems limited only to leasehold land. Most customary authorities are unaware of this policy. The few that are aware nevertheless do not encourage women in their areas to acquire land. As one Chief Said 'you do not expect me to go out looking for women to give land to'<sup>14</sup> In Chibombo, women told Women for Change that a Village Headperson who dares give land to a married woman risked being accused of having an affair with that woman.<sup>15</sup> Though women enjoy enormous respect in traditional African society, most customs exclude them from owning land in equality with men. Unless positive action is taken to force change, women will remain alien on the land they

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<sup>14</sup> . See: Matongo Mundia, Land Policy Research, Status Report, Monze, 2004. Chief Mwanachingwala is quoted in this report as having uttered these words.

<sup>15</sup> . Women for Change, Lusaka. Related to the author by Douglas Chipoya in an email dated 28th September 2006

use. Government should affirm the importance of giving land to women to facilitate development. The thirty percent or even fifty percent if adopted would not be enough affirmation due to the historical imbalances women underwent over the centuries. Affirmative action would entail adopting a deliberate formula by which women are automatically favoured in relation to men in getting land at least in the short term. To be effective, there is need for the policy once adopted to have legal backing.

## **8. Settlement of land-related disputes**

*--- Justice in land is much wider than merely the Lands Tribunal. It includes the whole spectrum of judicial institutions with jurisdiction on land disputes*

*--- The Supreme Court has on several occasions ruled that only the High Court has jurisdiction to order cancellation of a Certificate of Title and further that the Lands Tribunal does not have such power*

*--- Local courts have jurisdiction to entertain complaints relating to land based on customs and traditions*

The draft has sought to address the Lands Tribunal. It however does not address the whole question of justice in land. For example, several land cases are dealt with at Local, Magistrates, the High Court and the Supreme Court. However, none of these institutions are dealt with in the draft. In fact, the High Court remains the court of first instance for any type of complaint including land disputes. Under the Lands and Deeds Registry Act, only the High Court can order cancellation of a Certificate of Title. As the Lands Tribunal found out, cancellation of a title deed isn't one of its jurisdictions. The Tribunal tried and in fact cancelled many title deeds but this has been declared illegal by the Supreme Court. The powers of the Tribunal extend only to resolving disputes between the Commissioner of Lands in particular but also other public officers and citizens but does not include taking over responsibilities of the High Court under the Lands and Deeds Registry.

Civil society including ZLA have suggested<sup>16</sup> an expansion in the jurisdiction of the Lands Tribunal. In particular, civil society called for the decentralisation of the Tribunal so that it could be mandated to preside over customary related land disputes. While this recommendation is important, it ignores the fact that local courts already discharge this responsibility and in most cases fairly well. What is required is that local courts are adequately supported for them to play an effective role otherwise they stand a far better chance to play this role than would the Lands Tribunal. For example, local courts comprise justices not necessarily trained in Western law and therefore able to dispense justice according to customary law and common sense. On the other hand, Western trained judges are more likely to judge cases based on Western law.

While the ZLA should advocate for an effective and efficient Tribunal, this should not involve supporting calls for it to take on other functions such as reserved for the High Court. Similarly, the Tribunal should not be expanded to customary disputes as it has

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<sup>16</sup> . World Bank: Presentation of Plan of Action in Zambia, Summary of Consultative meeting with civil society, OXFAM Offices, Lusaka 12/04/2006

neither capacity nor capability to resolve such disputes. ZLA should fight for an adequately funded Tribunal for effective and efficient dispensation of justice. However, the Tribunal should reform as well. For example, the Attorney General under who has docket for composing the Tribunal should be lobbied to off-load some of the excess members who are really irrelevant. Only the Chairperson and his vice should comprise the Tribunal.

## **9. Decentralisation**

- The draft document addresses the issue of decentralisation*
- Zambia's land administration system is highly centralised*
- Besides the regional office in Ndola, the Commissioner of Lands in Lusaka is the only office that is mandated to administer land falling under leasehold tenure in Zambia*
- Though the Commissioner delegated much of his powers to councils, he reserves the right to alienate leasehold land as his prerogative while councils merely have powers to make non-binding recommendations*
- Decentralisation stretching down to the village level like the Uganda model is an urgent necessity for Zambia*

The draft alludes to the need to decentralise land administration. This in itself is a very good sign. As observed, one of the main reasons behind the failure of the present system of administration at Lands to deliver is that it is too bureaucratic. The other is centralisation. This is particularly the case for leasehold land. Unlike the leasehold system, the present system of customary land tenure is already decentralised but government is trying to centralise it. A person wishing to hold land in what the Lands Act calls 'customary areas' need not go beyond the village often the family to ask for land and once the request is granted, that's it. Similarly, if there is a problem or dispute, the same arrangement obtains. Structures prevailing at the same level where s/he got the land will act as the first local remedies givers for the aggrieved to resort to.

Centralisation is a product of the State. For example, the Chief's powers in the Lands Act as well as those of the local authorities in the same legislation effectively centralise land administration by requiring that any land seeker who wishes to obtain a title deed on a portion of customary land must go to the Chief and to the local authority concerned. Similarly, vesting land in the President and therefore empowering one person the Commissioner of Lands acting as President's agent to be the only one to alienate land is centralised administration per excellence. As indicated, both the Commissioner and the Registrar of Lands, the key officials for those who want title deeds for their pieces of land, are based in Lusaka. The Ndola Office is not yet fully developed

Along with the Commissioner of Lands of course institutions of planning and survey are also based in Lusaka and are similarly centralised. There are planning and survey officers at district and provincial levels but these are not the ultimate authorities. Lusaka must approve their decisions and activities. While the Minister of Lands under the Lands Act is empowered to order the decentralisation of the land administrative system, he has not yet done so and there is no plausible explanation for this. It is a big problem especially for

Zambians without the power and resources to obtain title deeds from Mulungushi House where the Commissioner and Registrar of Lands are based. There is no user-friendly system or environment at the Commission of Lands. For several days, months and often years, people have to loiter around the narrow corridors of the Office of Commissioner of Lands whilst trying to pursue their applications. Applicants often are never told when to expect responses for their applications. A very simple thing like telling a person to come on such and such a day for a decision is simply never done. Instead, it is come this afternoon, come tomorrow, come next week, etc. This type of situation is robust environment for corruption. Successive Commissioners of Lands have explained that they are the only signatory for land alienations and do so in their discretion. Again, an excellent example of centralisation per excellency.

The immediate past Commissioner of Lands who is currently facing corruption charges, is accused of using his discretion to his personal benefit. In another study we prepared for the ZLA at the instance of MS-Zambia, we showed how this weak administrative system directly vomits corruption. Officers in the Commissioner of Lands Office have taken advantage of the situation to connive with some corrupt members of the general public to sign and cause offers and title deeds without the knowledge or authority of the Commissioner for their personal gain. This cannot happen in a decentralised environment where instead of dealing with only one man, an application is dealt with by a committee of local people in the case of rural land residing on the land he is seeking to acquire and in full view of all adult members of the area before the matter is referred to higher authorities for necessary registration formalities. At the Commission, the application should be submitted to a Commission or group of several people to decide and not to one person. Councils or local authorities in this case would appear an exception in that there would be a group of officials charged with the responsibility to consider the application. However, councils too are very weak, in fact very weak. They are corrupt. Most council officials have been known to easily succumb to corruption particularly from party members but also from the general public in the area. There is need for sustained intervention in this regard to strengthen the capacity of councillors and communities to ensure that land administration was undertaken free of corruption.

## **10. Zambia's international boundaries**

*--- Unclear demarcations along Zambia's borders attracted the attention of the Technical Committee*

*--- The draft document has called for investment by government in surveying and demarcation of the country's borders*

*--- Ownership by individuals of land on both sides of the border is raising concern of likelihood to compromise the country's security*

This subject is addressed in the draft which indicates it as a serious problem. The concern around this issue is that Zambia's boundaries with neighbouring countries are not clearly demarcated and it is possible the country may be losing some of its land. Therefore, the call is for authorities especially joint permanent commission to invest in the regular demarcations of the country's boundaries. The best way it is suggested this can be done is

to involve chiefs and civil society in these commissions the resumption being these have knowledge of the boundaries and not just politicians and experts. This is probably correct but only as far as chiefs may be concerned. It is difficult to say the same for civil society.

Another problem related to this which, however, is not addressed in the draft is that the Commissioner of Lands without first ensuring proper scrutiny of applications has granted land titles to foreign applicants in some border areas which enabled these individuals to own land on either side of the border. There are cases on the Namibia/Zambia border, for instance, where one applicant holds titles in land on the Namibian side of the border and on the Zambian side granted by officials in the two countries. This gives the holder an undue advantage of owning adjacent pieces of land which tempts him not to respect the boundary and therefore the sovereignty of the two countries.

As earlier recommended in both the ZLA booklet and draft, there is need to sensitize Joint Permanent Commissions government maintains with neighbouring countries on the importance of maintaining the international boundaries as not doing so has often led to war. The war between Eritrea and Ethiopia is a case in point. The international community is only now trying to demarcate the boundary between the two countries but only after so many people were killed.

## **11. Integrated land administration**

*--- The present system of land administration is fragmented*

*--- Various departments and government ministries that deal with land do so in isolation from each other*

*--- The draft document claims to have adopted a holistic approach to the issue of land administration in the policy*

*--- There is need to ensure an integrated system of land administration*

The draft has also alluded to the fragmented nature of the system of land administration obtaining in the country. This too is particularly important. The draft refers to land as being important for agriculture, forestry, mining, etc. All these portfolios deal with land in different but related ways. Often, however, the various authorities responsible do not do so in coordination which leads to inefficient land administration. Agricultural development is often not linked to land administration at the Commissioner of Lands and also mining development. The best example we found of lack of coordination is the administration of the Agricultural Resettlement Scheme under the Office of the Vice President which had no relation with the Ministry of Lands yet both are trying to achieve the same objective. The Office of the Vice President not being traditional office for lands, the scheme was not getting a good share of attention from government. Another area of lack of coordination is between the Commissioner of Lands and the Ministry of Environment. While the Commissioner of Lands inserts a covenant in lease agreements binding land holders to 'develop' their holdings within a stipulated time-frame or risk losing their lands on the grounds of failure to develop them, the Ministry of Environment and the Forestry Department emphasis the importance of preserving nature – the very opposite of what the Lands Commissioner would be demanding for from the holder.

Fearing the prospect of losing their land, land holders have flattened the forests cutting and burning everything in sight.

For effective and efficient land management, there is urgent need for all stakeholders in land to coordinate their mandates, functions and activities. The task of drawing the land policy should have been the first opportunity to demonstrate practically coordinated administration. It is a pity an opportunity has been missed to implement what the draft policy is boasting about. Instead, each of the Ministries and departments dealing with land is busy drawing its own departmental policies. Failure to adopt integrated administration leads to fragmentation and inefficiency.

## **12. Affirmative action in land for the poor**

- There is no provision for affirmative action for the poor in the draft policy*
- Given the anti-poor land tenure policies especially under leasehold tenure, Government should develop a deliberate affirmative action plan and quota specifically to cater for the poor and marginalised individuals and groups*
- Pro-poor policies should aim at giving an advantage for the poor over advantaged and privileged members*

Just like the quota system being proposed for women in all land transactions, there is an obvious need to establish a quota for the poor and vulnerable members of the public to apply in all land transactions. The cost of land transactions is prohibitive. Poor and vulnerable members of the public cannot afford the cost of an offer of land, lease charges, survey, ground, etc. Even though affordable to rich people, the costs are far beyond the capacity of most poor people who constitute the majority.

Similarly, poor people are often not familiar with procedures pertaining to land transactions. Most procedures exist in a language poor people do not understand and therefore cannot relate to. The whole concept of land law together with the institutions of leasehold and alienation or grant are beyond alien to them. Consequently, poor people and other vulnerable members of the public including persons with disability are discriminated against in land administration systems. At the same time, the Constitution in Article 23 forbids discrimination based on status. There is urgent need for Government to come up with an affirmative action policy for poor people identified on the basis of the universally agreed poverty datum line are assisted to access land. A similar policy is necessary for persons with disability, orphans, etc. This would be to recognise that unless positively assisted, such people risk being discriminated against. Since the poor are by a larger margin more than the non-poor in Zambia,<sup>17</sup> it is only natural that government should direct its attention more towards them.

## **13. Squatters' title**

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<sup>17</sup> . GRZ: Report on the Implementation of the Programme of Action for Least Developed Countries (2001-2010) in Zambia

- *Squatting is a major problem in Zambia*
- *Current law forbids squatting without giving an alternative*
- *Currently, Government is in the middle of a campaign targeting squatters including demolishing their property without the requisite support of necessary court orders*
- *Like in the Ugandan case, Government should provide for the protection of squatters*
- *The draft is silent on the rights of squatters*

Squatting is a major problem in Zambia, very big problem indeed. As long ago as 1967,<sup>18</sup> Government through the Land Commission of Inquiry of that year recognised several hundreds of thousands of people that had started squatting around Lusaka. Over the years, the problem has worsened. It is a well-known case that Zambia is one of the most highly urbanised countries in Sub-Saharan Africa. The reverse side of this is that many people illegally occupy the land they are in possession of.

Generally, it is contended that squatting does not exist in customary areas. What this probably means is that the conventional notion of a squatter or someone who is landless is unknown in this tenure. Stretched to its extremes, it means that customary tenure provided land to all within its jurisdiction which if proved would be the best practice we may have been looking for. Indeed, practice shows that most squatters live in urban areas than in rural areas which raises a very fundamental question, namely, why should customary tenure not enjoy equal recognition by the State given its superiority to provide for human needs? Again, ZLA should advocate for full and equal recognition by government of customary tenure so that it can promote it and not just leasehold as a full means for ownership of land. We saw during field work in various Agricultural Resettlement Schemes how settlers only partially moved to their schemes while retaining the link with their former ‘homelands’ in customary areas one of the reasons being a settlement was too small to accommodate the cattle and the African way of life. There are many examples to show how customary provides more than modern tenure.

However, customary tenure though flexible and therefore adequate for its population, the fact is only a few people have secured access to land. We have already referred to the marginalised status of women in land and it comes out more clearly under customary tenure. Due to their status, women are generally not catered for under customary tenure which by its nature tends to favour men. Also, the youth are often marginalised in customary land ownership patterns. Their being youth has often been used to exclude them from the hierarchy of land owners normally restricted to adults. In the current context of huge numbers of orphans resulting from HIV/AIDS and other problems, this adds to a real dilemma on the part of armies of parentless youths.<sup>19</sup> Similarly, persons with disability do not have the same status in land as others. Finally, strangers or people not hailing from the respective community often do not enjoy similar rights to land as their local counterparts.

Nevertheless, the formal land tenure or in the context of Zambia the leasehold system is most definitely guilty of causing squatting in the modern sense of the word. The current

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<sup>18</sup> . GRZ: Report of Land Commission, August 1967, Lusaka

<sup>19</sup> . Note 13

dynamics of squatting especially on leasehold land suggest a development wrought by colonialism. Squatting in leaseholds is caused by the State particularly through the alienation of land or land grants the President, Commissioner of Lands or councils exercise. Second, squatting is caused by government and private parties who seize others' land either with or without court orders at the instance of one of the parties. The net effect of all this is that squatting in modern tenure systems is caused by inadequate and inefficient policies and legal frameworks.

Uganda<sup>20</sup> has responded with a model aimed at affording protection to squatters. So has South Africa.<sup>21</sup> The Lands Act of Uganda provides that a squatter has a right to demand for the formal recognition of his or her title to the land in possession after the expiry of twelve years of peaceful and undisturbed occupation. On the other hand, South Africa moved to protect tenants that may be squatting on others' land or former employers without the latter's permission following after expiry of the contract of tenancy. Many would be squatters have been protected from being thrown out by the owner to the streets. The law states that a property owner has no right to simply throw away a former tenant without first finding him an alternative.

Similarly, South Africa has introduced the restitution law whose effect is to return the dignity of previously dispossessed majority black people by enabling them to claim back their land which they and their ancestors may have been evicted from. This entitles previously dispossessed black African people to claim back their land which if granted resolves the squatter status forced on them by the system of apartheid. Common law as applied in Zambia does have the notion of title by prescription as well as title by adverse possession. Judicial authorities right up to the level of the Supreme Court<sup>22</sup> exist which have stated that a squatter or person in uninterrupted possession of a piece of land for a minimum period of twenty years is entitled to protection against the owner and third parties. Proof of twelve years uninterrupted possession constitutes a voidable title which means the squatter has valid claim to the land against third parties but not against the true owner. However, common law is neither adequate nor effective. It depends on the presiding judge's disposition and his or her understanding of the law as advanced. What Zambia badly needs is to expel the current provision in the Lands Act<sup>23</sup> which tends to exclude from application the principles of title by prescription and adverse possession. The Lands Act should be more pro-poor and not seek to ignore the reality of squatting. To address acute problems squatters face, ZLA should lobby government to enact specific legislation to protect squatters.

Unfortunately, the plight of squatters in the country was only recently made worse by no other than Government itself. Without first providing alternatives or obtaining orders from courts, government unleashed the full force of law on poor people seeking to eke out a living from 'street economies' and similar activities. Vendors have been driven out

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<sup>20</sup> . Note 7

<sup>21</sup> . South Africa: Extension of Security Tenure Act, 1997; Also Interim Protection of Informal Land, 1996

<sup>22</sup> . David Nzooza Lumanyando & Godwin Kafuko Muzumbwa v. Chief Chamuka & Kabwe Rural Council & ZCCM S.C.J. No. 21, 1989

<sup>23</sup> . Lands Act, Section 16

of their informal business activities and their business premises and residential dwellings demolished. All this has been done without the authority of courts, a route anticipated in the Constitution which among others guarantees the right to property. The Supreme Court has previously ruled<sup>24</sup> that the right to compensation applies irrespective of the status of the land holder but of course no one abides by this.

## 14. International law

*--- There is no reference in the draft for the ratification, accession and domestication of international law on land in Zambian law*

*--- ILO Convention No. 169 of 1989 as well as OAU Convention on Natural Resources afford important means of multilateralising and regionalising land tenure standards and systems of administration*

*--- Adding international law to the country's domestic law will enrich the Zambian land tenure system*

To domesticate international law is one of Zambia's main challenges. Like most common law jurisdictions, Zambia maintains a dual system by which undomesticated international law does not form an integrated whole together with the corpus of local law. However, there is at least one High Court decision that of Sarah Longwe versus Intercontinental Hotel<sup>25</sup> in which a High Court judge easily took judicial notice of United Nations and African Union Conventions on human rights and allowed counsel to rely on them in support of her arguments. This, however, has not made law save to parties in that case. And as it is a High Court case it is not binding on other High Court and inferior courts.

Even before domestication, Zambia has not yet acceded to ILO Convention Number 169 of 1989. This is a very important Convention in as far as land security to land in customary areas is concerned. In a nutshell, the Convention provides for co-existence between formal and informal title holders. It allows the Government of a State party to protect the holder of a title deed to land simultaneously as it protects those individuals and groups holding prior rights and interests in the same piece of land. A pastoralist, for example, will enjoy protection in grazing his animals on a piece of land at the same time as affording equal protection to sedentary people or agriculturalists. It is crucially important that Zambia accedes to the ILO Convention.

Similarly, the 1968 OAU Convention on the Conservation of Nature and Natural Resources has the same principle. According to the relevant parts of this Convention, a State party has a duty to take account of the rights of the local community in its programmes on the conservation of nature. In other words, the Convention provides not for segmented but for a holistic approach already a concept adopted by the draft policy in both the preservation of the environment and customary land. Though ratified, this part of the Convention has not yet pilfered through into the Lands Act or similar statute.

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<sup>24</sup>. See one of the cases: G.F. Construction (1976) Limited v. Rudnap (Zambia) Limited and Unitechna Limited SCZ Judgment No. 18 1999

<sup>25</sup>. Sarah Longwe v. Intercontinental Hotel, 1992/HP/765

ZLA should identify relevant instruments in the arena of international law including regional law to lobby government for adoption, accession and domestication to enrich the corpus of domestic legal regime relating to land tenure.

## **16. Revenue sharing from land**

*--- The draft does not address the issue of distribution and sharing of revenue derived from land between government and local communities*

*--- Chiefs have been calling on authorities to come up with a mechanism to ensure an equitable distribution of resources through revenue-sharing*

*--- Given that government is failing to develop local areas, a mechanism to provide for revenue sharing between the centre and peripheries is worth reflecting upon.*

Quite understandably, the draft policy does not address the controversial issue of sharing the revenue derived from land with local people. Government would not like to share revenue even with the people that reside on the land and therefore claim prior rights in it. Chiefs have, however, been calling on government to introduce an equitable revenue sharing mechanism to allow them benefit from their resources. The modus operandi is that revenue derived from all land transactions belongs to the State. Thus, fees raised from land offers, costs of preparing a lease, revenue from costs of planning the land, survey charges, and others, are State property. If not deposited with the treasury at the Ministry of Finance, it is retained by local authorities or councils within the area.

However, at least one Chief – Chief Mukuni of the Toka-Leya people on the outskirts of Livingstone – has started benefiting through various schemes he has established together with foreign investors. The Chief sits on a number of boards of mostly tourism companies he and his friends have established on Chiefdom land. However, the problem is that due to the money aspect involved, the Chief is reported to be giving out most of his community's land to developers for more such projects. In one such instance, in Batoka area, we learnt of a case where a Zimbabwean man who has lived in the country for more than twenty years from since the days of colonialism in his country and who has been doing a lot of farming benefiting the Zambian market in different ways was recently threatened with eviction by the Chief. According to reports, the Chief wanted the customary land the man was occupying repossessed from him to give the Chief's favoured investors. Similarly, Chief Mukuni sided with Legacy Holdings when the company tried to acquire land in a gazetted national park in the tourist town. Legacy had planned to build a hotel and golf course in Livingstone in land which is ecologically suited and in fact harbours wild life. There are several chiefs in this category.

In Western province, Lukulu Council Secretary Kabombo Mutakela has told the Minister of Local Government Silvia Masebo that the Barotse Royal Establishment in Lukulu is collecting fish levy, the major source of revenue for the rural council. Mutakela revealed that the Royal Establishment is running the markets and bus station in the district. In Eastern province, Chiefs asked ZLA to find out from the consultant what legal implications would arise if they decided to charge investors directly for the land allocated

to them. Another Chief in Northern province has vowed to start collecting revenue from land deals in his area.

This is a serious problem policy should have addressed. Given that Government has not really been developing rural areas, Chiefs may have a case. Government's inability to develop rural areas is the source of the anxiety and demands by rural communities to seek to benefit directly from activities in their areas. While they see investors paying Government money from their land, their areas are never attended to. In the circumstances, there would be nothing wrong in Chiefs calling on Government to adopt a policy which allows for some form of equitable sharing between Government on behalf of the country as a whole and indigenous communities.

However, whatever mechanism is introduced should not just aim at benefiting the Chief. The Chief should not benefit personally but the benefits should go to the local community. For example, a trust fund could be established benefiting orphans, persons with disabilities, students lacking parental support, etc. It could also be used for infrastructural developments in the area.

Finally on this particular aspect, the draft refers to the need to make land holders regularly pay their land levies and rates to the Ministry of Lands. It bemoans the fact that most leaseholders do not pay their dues. Though this is not really a policy issue, it is important to recognise that the problem in fact is caused by the Ministry of Lands itself. The Ministry including the officials in the Committee have simply failed to run an efficient system of administration. We spoke to several people who hold leases and confirmed that most of them have never received bills of ground rates and other charges from the Ministry. The few that paid did so irregularly and only after personally checking with the Ministry their debts. Computerisation of the Ministry and Commissioner of Lands has not helped the situation.

In the Times of Zambia of 13 July 2007, The Ministry of Lands under the hand of the Commissioner of Lands ran an advertisement in which are listed several properties located in various parts of the country. In the advert, the Commissioner is notifying his intention to re-possess the notified properties on the grounds of failure to pay ground rent. We spoke to ten leaseholders from different parts of the country who have never paid ground rent since they obtained their properties two of them more than ten years ago and confirmed that their names were not among those advertised for repossession. This is a small indication that there is chaos at the Ministry. Even more, the Supreme Court has ruled that while the Commissioner can cause a re-entry and repossess the property, the holder is entitled to compensation. The effect of this is that Government will end up paying repossessed holders millions of Kwacha if they took their matters to court let alone the fact that they may not have been informed of payments that were due. In the advert, the Commissioner reminds the public that according to the Lands Act, every property owner is expected to observe Terms and Conditions of the lease agreement with the President contained in every Certificate of Title. What he does not say of course is that the President is equally expected to observe the same Terms and Conditions and it is

a question for the court what happens if the property owner is not informed of his liabilities.

## **17 Land audit**

On several occasions, Government has admitted the unreliability of statistics on the status of land in the country. This is a major problem. The Commissioner of Lands has no information to rely on in either of the two tenure systems. He does not know how much land had been converted from customary to leasehold? At the same time, he is asking for more land from Chiefs.

There is no record of land government has acquired to build schools, health centres, roads, etc. Present Commissioner Fortune Kachamba admitted<sup>26</sup> lack of proper records on land situated but explained that an audit was underway. The Technical Committee recommended that land held by government should be recorded. It is difficult to plan and implement any programme in the absence of updated information on the standing of the two land tenures. The whole policy and the Fifth National Development Plan depend on availability of reliable information on how much land is available for grants to the public or for alienation. ZLA should pressurise the Minister to complete the audit and publicly announce the findings.

## **Recommendations for ZLA**

Arising from above, we can draw several recommendations for the ZLA and partners in their advocacy work for pro-poor policies. The following are some of the recommendations:

### **1. Strategy to lobby for the adoption of the national land policy**

There is an urgent need to lobby and pressure government to introduce the national land policy. It is now apparent that after signs of initial enthusiasm, government seems to have lost steam and put the draft policy on ice. ZLA and partners should mount campaigns to force government to return to the drawing table and complete the process. With the numerous problems facing poor people in trying to access land on secured terms, it is important a policy was concluded to help guide the country on most of these pressing issues. ZLA should seek meetings with the Minister of Lands to get a status report from him on the process and based on that chart a way forward.

### **2. Methodology**

ZLA should lobby government to adopt the broadest possible method with which to develop the policy. The present Committee comprising of civil servants is too narrow to

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<sup>26</sup> . Interview with Mr. Fortune Kachamba, date of interview 30th September 2006, Ministry of Lands, Lusaka

originate genuine proposals to develop into a policy. ZLA should advocate for the adoption of a method that involves all stakeholders especially opposition political parties and traditional leaders right from the gestation of the basic ideas to form the policy. The draft policy should form part of the sources from which to develop the final framework. In the meantime, ZLA should develop a **Background Paper** and **Issues Paper** the latter to identify the issues to present to the national land conference which ZLA must insist government should hold as an important part of the methodology. Government should not be allowed to adopt the policy without first referring to the national conference. This will require consultations on the road map so that there is broad agreement on both this and issues. Also, the ZLA should look into the feasibility of convening a Land Summit of civil society organisations at which to come up with a Civil Society policy. This is necessary given that the primary objective of the government policy paper seems merely to be to enable investors to access customary land.

### **3. Dual land tenure system**

The issue of dual land tenure system should form a central part of the national policy. ZLA and partners should embark on sensitization of the public on this issue and seek to obtain from them definite ideas if possible region by region on what type of tenure system communities prefer and defining mechanisms on the application of other tenures in the same areas. The issue of the dual land tenure is a matter that requires community's direct input.

### **4. Vestment of land**

ZLA should lobby government to promote discussion around this issue. The current corruption atmosphere at the Ministry of Lands should promote public discussion on how best to secure land given the abuse that has taken place. Instead of just removing and appointing new officials, ZLA should advocate for the introduction of definite mechanisms at the Lands Ministry and related departments to safeguard against abuse of power and naked corruption. This should be short-term.

### **5. Corruption in councils**

The issue of corruption does not begin and end at the Ministry of Lands. In fact, recent developments at the Ministry is just a tip of the iceberg. One area of serious concern for which ZLA should focus its attention on is councils. There is widespread perception that councils are corrupt. In their land deals, councils and councilors are notorious together with their party officials are known to be very corrupt. There is need for ZLA and partners in conjunction with the Anti-Corruption Commission (ACC) and the Local Government Association of Zambia (LGAOZ) to conduct joint sensitization programmes on basic land allocation procedures, anti-corruption procedures as well as council procedures and regulations. Since this is a big problem, the programme could be medium to long-term in this context from one to three years.

### **6. Decentralisation**

ZLA should lobby the Minister of Lands to mobilise funding and invoke the necessary procedures to decentralise the Commissioner and Registrar of Lands. This should be short to medium term. The Minister should introduce supporting legislation and/or get government enact appropriate legislation to give recognition to village and other parallel structures to make them part of the formal system of land administration. Councils should be empowered with the necessary knowledge and skills on land alienation and then their powers to alienate land restored back to them.

## **7. Gender in land**

ZLA should press government to adopt a 50% minimum quota for women unlike the proposed 30%. This policy should be given legal backing. In addition, Government should implement it not only in leasehold but also in customary areas.

## **8. Minimum quota for the poor**

ZLA should lobby government to adopt a pro-poor policy in land alienation. Just like women, poor people should enjoy preferential status in a determinate period of time to allow them get land outside applicable procedures as part of affirmative action. This could be on long-term basis. Similarly, orphans and others in vulnerable situation should enjoy protection over and above the rest.

## **9. Equitable sharing of resources**

ZLA should follow up the issue of resources and how these could be shared between communities and government. ZLA may wish to cause a paper on the subject which encapsulates best practices and sheds light to the issues around it.

## **10. Incorporation of international law**

Government should be pressured to ratify ILO Convention 169 and implement the OAU Natural Resources Convention. Aspects of international law cited in this report could be quite useful to the policy. ZLA could lobby government to access and domesticate international instruments or their provisions into domestic and regulatory framework.

## **11. Justice in land**

Justice in land is a very important aspect of good governance. ZLA should prepare a Background Paper together with Issues Paper identifying the issues on justice in land preceded by a studied background. Partners and ZLA should assist in developing the capacities of local courts to efficiently discharge their functions. ZLA should lobby the Minister of Justice to revise the composition of the Tribunal while advocating for more funding for it to discharge its responsibilities effectively and efficiently. Also, ZLA should lobby the Minister so that he does not empower the Tribunal with more powers than it already has.

**12. Land audit**

ZLA should lobby the Minister of Lands to quickly release results of the land audit. This is important and should form part of the drafting of the land policy. It should be stressed that action on the policy would be impossible without clear knowledge of the standing of the two tenures.