

**THE 1995 LAND ACT: AN OBSTACLE OR INSTRUMENT OF
DEVELOPMENT?**

By

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TERMS OF REFERENCE

- Review and examine literature on land, the lands Act of 1995 and related legislation to identify the extent to which the Act protects or abrogates the rights of the poor and marginalised
- Examine whether or the extent to which the “duality” of the system negates or promotes the rights to security of tenure of poor people
- Given the findings of the various studies and the nature of the Land Alliance, present a concept note with specific recommendations of how the work of the Alliance can be enhanced
- Submit a draft report (both in print and electronic) of the study to the Secretariat of the National Land Alliance
- Present the draft report of findings of the study at a two-day key stakeholders’ dissemination workshop, which will include government policy makers, legislators, politicians and representatives from local and international institutions based in Zambia.

Introduction

Land is a very controversial subject. Whenever it has been discussed, land has always generated deep emotional feelings. In Africa, there are currently at least three social problems connected to land that have exploded to the surface. Apart from the well-known Zimbabwe land crisis, an explosion has just broken out on the outskirts of Tana River in Kenya between feuding pastoral and agricultural communities. The two communities, the Somalis and Pokoti's, are fighting for water, land and grazing rights. In West Africa, a similar conflict is raging in Calabar, north of Nigeria. There too, local communities are engaged in clashes over land rights. In both the two cases, hundreds of lives have been lost. Zimbabwe is a story everyone knows. The conflict between the white farmers and the so-called war veterans may have been hijacked for different reasons. Parties with different interests to pursue may have taken advantage of the situation to pursue their different objectives. However, beneath the conflict is unequal distribution of land between the landless blacks and the landed white minority farming community.

History is full of conflicts relating to land. In many parts of the world, these have blown into full-scale national and international wars. In fact the entire history of colonisation is in one sense a history of the struggle for land.¹ Colonialism entailed the usurpation of land of the local people by colonialists. Consequently, the struggle for independence in a colonial situation is a struggle for land. The two are synonymous. In modern day history, most of the world's conflicts have to do with land. The Palestinian-Israeli conflict that has been going on for centuries is basically a land conflict. To illustrate the point, a German Jew, Moses Hess, who was an advocate of the Jewish return to Palestine, in 1862, wrote in his book *Rome and Jerusalem* of how his Jewish 'nationality' was connected 'inseparably' with the Holy Land and the Eternal City: 'Without a soil a man sinks to the status of a parasite, feeding on others',² he wrote. Hence we see children and women Palestinians and Israelis dying for land. Many lives have been lost over this small piece of land. This is what land does. However small, people feel the need to fight and die for it. Land has this quality that it emotionally connects the living to their dead ancestors and even to God. Hence to die for it. Autochthonous people especially feel a special ritual intimacy with the territory they occupy.³ Recently, Ethiopia went to war with Eritrea over a very small, others would say "useless", piece of land, on their common border. Where it involves land, sentiment is very high. In developing countries like Zambia whose economies are largely land-based, without any technology, an added reason

¹ . Perhaps one of the best accounts of the struggle for land during colonialism is the story of Professor Mangaliso Sobukwe, President of the Pan Africanist Congress (PAC) in the 60s, during the time of the Sharpsville Massacre by the apartheid regime in South Africa. Professor Sobukwe was incarcerated at Robben Island in solitary confinement by the apartheid-state without charge. The only reason he was imprisoned for was that he demanded that the white settlers should give back the land of Africans. After four years in solitary confinement, the Minister of Justice visited him and asked him whether he had recanted from his demands to take away the land from the white invaders. His simple answer was: "until resurrection". See. S.E.M. Pheko. 1994. *The Land is Ours: The Political Legacy of Mangaliso Sobukwe*.

² . Martin Gilbert. 1998. *Israel*. A Black Swan Book, p. 8

³ . Hansungule, Michelo. 2000. *The Zimbabwe Land Crisis: Lessons for Africa*. *International Journal on Minority and Group Rights*. 7: 305-340, p. 307

exists for the intimacy with the soil. The soil is the technology. Land is the equivalent of a market share in western developed capitalist countries.

The land tenure system in Zambia is not in any way different from the tenures in those countries now at war. There is no reason to imagine that a land conflict is not possible in Zambia. Besides, the fact that the situation in Zambia has not degenerated into open warfare like in other countries does not mean this is not possible. The situation in Zimbabwe is more or less similar to Zambia only that in Zambia, the problem is localised. Instead of white people owning most of the arable land, the biggest threat in Zambia are companies such as the new owners of the copper mining companies who come under the cloak of investors, and who have all the protection of the State against its people. The State either directly or through its agents like local authorities treat the people without title-deeds, within their jurisdictions, as "illegal settlers" or "squatters" entitled to no rights. Similarly, private title-deed holders both local and foreign, in various parts of the country treat those without title deeds in the same way as the landless black people are being treated in Zimbabwe. They are not human beings but an irritable problem. The [new] desire for foreign investment especially by the so-called post-democracy regimes in Africa has led to displacements of local people in many parts of the continent. It is a true case of colonisation. The clamour for the title-deed is another threat. Zambians are being encouraged to get title-deeds for their land resulting in insecurity on the part of those who do not have. Local inhabitants who are usually ignorant of the leasehold title can easily be tricked into consenting to an individual getting their land registered on title after which they lose their customary rights in the parcel of land.

1. GENESIS OF THE 1995 LAND ACT

1.1 In 1995, Zambia introduced a new land law to replace, *inter alia*, the 1975 land law. The 1995 Land Act is a very controversial piece of legislation, which continues to arouse emotions more than five years of its coming into effect. When President Chiluba signed it into law, it stirred a big controversy in the country with the Lozi Royal Establishment⁴ and other traditional rulers out-rightly rejecting the piece of legislation. However, the Government was not bothered about the resentment the Act provoked and went ahead to effect and implement it.

1.2 The background to the Act lies in the MMD's liberal economic policy. In its maiden Manifesto unveiled in 1991,⁵ the MMD promised to liberalise the land tenure system once in power. It accused the UNIP government of destroying investor confidence in the land market through the introduction of the socialist-style Land (Conversion of Titles) Act in 1975. The MMD promised to institute a review of the customary system of tenure with a view to empowering traditional rulers over land within their jurisdiction while at the same time facilitating the emergence of the private land market. Consequently, the MMD campaigned on a platform of a major change in land relations in the country in line with its avowed commitment to market reforms.

⁴ . The Lozi Royal Establishment took the unusual step of convening an assembly of all the Lozi traditional rulers at the Royal Palace in 1996 at which they resolved unanimously to reject the 1996 Constitution and the Land Act. See the Minutes of the Lozi Royal Establishment, 1996.

⁵ . Manifesto for the Movement for the Multi-Party Democracy, 1990.

1.3 It will be recalled that the political change that swept the country in 1991 was not about really about issues. The electorate did not engage the MMD to explain its position and justify its stance to adopt a radical change of the tenure system. All the majority of the people wanted was to change the government by removing UNIP and replacing it with the MMD. Consequently, even though the MMD had preached a lot of things people would later find unacceptable, they still overwhelmingly voted for it. This way, the proposal to carry out a radical change of the tenure system which brought about much disbelief in the country as a whole, became a reality with the coming to power of the MMD.

1.4 Immediately after the 1991 elections, western countries and institutions began pressurising the government for the promised reforms in land tenure. The World Bank and the International Monetary Fund (IMF) even went to the extent of tying further economic assistance to Zambia to, among others, progress towards land reforms. In 1993, Government convened a “national” land conference at the Mulungushi Conference Centre. Due to poor planning, the conference was not attended by all stakeholders in the country, notably the Barotse Royal Establishment and other traditional rulers. Only a few hand-picked chiefs mainly from around Lusaka and the line of rail, attended. During this conference, several papers from government, the ruling MMD, opposition political parties, University of Zambia, professional bodies, churches, NGOs, the World Bank etc., were read.

1.5 The theme of the conference, which was chaired by the MMD Chairperson for lands, then Deputy Minister for Foreign Affairs, late Dr. Remmy Mushota, was "charting the way forward". Not unexpected, the government, through Dr. Mushota's paper, strongly argued for wide ranging changes to the land tenure system; to move from the state-based system to the market oriented system.⁶ It called for individualised titles to land in order to promote economic development. Reiterating its promise to reform the land tenure system, government called on the traditional rulers in the country to support the forthcoming land reforms by releasing more of their land to investors and people that would want to obtain state titles. The World Bank gave an outline of its involvement in land reforms in various countries and called for the return to the private land market. Similarly, professional bodies, notably the Surveyors Institute of Zambia,⁷ supported the government moves to introduce the land market. Surveyors even went to the extent of calling for the introduction of “land auctions”, to facilitate the land market.⁸ On the other hand, the University of Zambia⁹ called for caution in the reform efforts. While it supported greater access by women to land, it noted that reforms motivated by interests outside Zambia are likely to lead to reversals in the modest gains already scored. The few chiefs that attended strongly rejected any proposal for change in the *status quo*. In particular, they cautioned against calling for changes to the customary system of tenure, which they argued, was adequate. Similarly, the Church warned against change motivated by outside interests, saying any change to the country’s system of tenure must be based on the expressed wishes of the people. In particular, the Church opposed the return to the land market

⁶ . Remmy Mushota. 1993. Reforms to Zambia's Land Tenure (paper)

⁷ . See Sonny Mulenga. 1993. Land Reforms in Zambia (paper)

⁸ . Ironically, expected support for the auctioning of land came from the World Bank. During colonialism, land sales in Zambia, at one time used to be auctioned.

⁹ . Michelo Hansungule & Kalombo Mwansa. 1993. Zambia's Land Tenure System and Reform: The Way Forward. (paper)

saying it would lead to the exploitation of the poor, a position strongly supported by UNIP, in its paper.¹⁰

1.6 The results of this conference, no doubt after being sanitised, were made the basis of the tenure changes leading to the 1995 Act. The MMD Lands Committee together with the Commissioner of Lands and the Registrar of Lands and Deeds drew up the lay draft land bill. Among the background papers that circulated in the ranks of the committee members was a model framework from the World Bank. The framework made several proposals including a call for the auctioning of land in the new legislation. In the end, rather than embarking on fully-fledged reforms, it was decided to simply come up with makeshift changes to the country's land law especially changes to the Land (Conversion of Titles) Act, 1975, and the Lands and Deeds Registry Act, 1914. Both the Commissioner of Lands and the Registrar of Lands and deeds are the ones that actually penned the draft documents. This was subsequently reviewed by the MMD Lands Committee, in their various meetings held. In fact, already in 1993, a draft "bill" already existed in government and the Commissioner of Lands even circulated it to participants at the Mulungushi conference. This implied that the process of asking the stakeholders during the conference to reflect on the needs and priorities on land tenure, and to come up with proposals to change the system was a *fait accompli*. Government had already decided not only on change but on the content of that change, obviously with the IMF/World Bank positions in mind. The conference was just called to rubber-stamp the decision for the sake of legitimacy.

1.7 Even though the Mulungushi conference resolved to call for another conference to look at the draft document before submission to government, this was never done. Instead government unilaterally decided to go ahead and finalise the bill, which it later presented to the general public through a series of carefully arranged meetings for senior ministers held across the country. It was at this stage that controversy broke out. The public rejected the bill wherever it was presented. There were reports of cabinet ministers being publicly harassed for trying to present and defend the bill. Concurrently, government decided to introduce the bill in the National Assembly, which it did. However, in spite of its overwhelming majority in the House, it was clear from the pronouncements of backbenchers that government would not get the support it needed to make the bill become law. Consequently, before the voting stage, the Minister of Lands at the time, late Dr. Luminzu Shimaponda, on instructions from the executive announced the withdrawal of the bill so that as he put it: "to allow for wider consultation especially with traditional rulers". President Chiluba later reiterated this assurance that the bill would not be reintroduced in the House until after exhaustive consultations with traditional rulers had taken place. However, no such consultations took place. And because the bill had not been rejected by the House, but merely withdrawn, the rules of procedure of the National Assembly allow the same bill of the same substance to be introduced in the same session. Consequently, before any consultation could take place, government, clearly acting under pressure from outside donors, decided to reintroduce the bill in the House after undertaking some minor amendments. For example, the word "consult", in relation to the powers of chiefs over their land, was replaced with "approve". This was to intended to buy the chiefs into supporting the bill and withdrawing their opposition to

¹⁰ . Land Reforms in Zambia. 1993. A Paper by the United National Independence Party (UNIP)

it. And in order that this time, government did not face still opposition from its own parliament, the President took the unusual step to convene a caucus of MMD Members of Parliament over the bill where he strictly ordered them to support and vote for it or quit. According to the Confidential Cabinet Memorandum prepared on the bill by the Attorney General, Cabinet Ministers unanimously approved the bill without any raising any comments on it, except for two ministers. Hon. Akashambatwa Mbikusita Lewanika and Hon. Humphrey Mulemba, both ministers at the time, added that caution be had in dealing with land. In the Cabinet meeting itself, ministers, according to reliable sources, did not even discuss the bill after it was introduced by the Attorney General. It was approved *enmasse*.

1.8 Meanwhile, the World Bank had even stationed its officials in Lusaka to see to it that the bill was enacted into law. These officials were literary holding on to money the Bank had assured Zambia in various loans until the bill was put into effect. Consequently, when the bill appeared on the House's Order paper, the executive had prepared to sail it through without the difficulties it had experienced before. Since it had already been published in the *Gazette*, not less than thirty days as required by law, before being introduced during the fateful incomplete first reading, it did not need to be published again. This point is very significant because most people do not understand why after being withdrawn, the bill was quickly enacted into law at a very short notice after it was reintroduced. Prevailing rules of procedure governing the treatment of bills in the House were followed, though in bad faith. The rules provide an elaborate system of first reading, second and third reading, which in normal circumstances, provide safeguards against arbitrary action. However, the procedure can be compressed so that all readings are done at once, provided the House approves to suspend the restriction not to take all stages of the bill at one sitting. If leave of the House is obtained, the first, second and even third reading may be taken at the same sitting. This is how the land bill became law. Conscience of the fact that the public resented the bill and in view of the mounting pressure from the donor community for the bill to be enacted into law, government decided this time to fast-track it. It did this by obtaining the leave of the House, which enabled it to take all stages of the bill in one sitting, i.e. in one day!

1.9 This lengthy background to the 1995 Land Act is necessary in order to fully-grasp the challenges and difficulties, which face the Act today. Instead going through the normal gestation process, the Act was approved through the back door and in the most undemocratic manner. There were a number of hiccups along the way, which ensured that it attracted the hostile reception it did during and after its enactment. It is an example of a legislation that has been imposed on an unwilling people by an undemocratic regime through undemocratic methods. In spite of the widespread resentment against it, government forced it into law. This background helps in trying to understand just why the Act continues to provoke such resentment whenever it is mentioned even so long after its enactment. In a democracy, government has a duty to act democratically by soliciting the views of the people before resorting to legislation. However much a law may sound perfect, its value is in the acceptance of the system and method of its generation by the people it is meant for. In apartheid South Africa, for example, there were some very good laws that could not be found in a democracy. For example, apartheid South Africa had some of the best environmental laws on the planet, intended to protect the environment. But due to the undemocratic nature of the regime and the arbitrary manner in which they were being introduced and enforced,

no reasonable person would respect them. In other words, the first problem with the 1995 Land Act was the obvious lack of legitimacy.

2. PRINCIPAL FEATURES OF THE ACT

2.1 Before looking at the principal features, it is important to say a word or two on the pieces of statutes that the Land Act came to repeal. Compared to other pieces of legislation, the 1995 Land Act is a fairly straight-forward statute containing a total of only 32 sections. Previously, the issues of land were regulated by a host of statutes including the Land (Conversion of Titles) Act, 1975 Cap. 289.; the Zambia (State Land and Reserves) Orders, 1928 to 1964; the Zambia (Trust Land) Orders, 1947 to 1964; the Zambia (Gwembe District) Orders, 1959 to 1964 and the Western Province (Land Miscellaneous Provisions) Act, 1970. In order to pave way for the new Land Act, all these pieces of legislation were expunged from the statute book, save for stipulated exceptions.

2.2 It will be recalled that most of these statutes hail from the colonial period. Colonialism had a lot to do in shaping Zambia's system of land law. Different Orders-in-Council, which governed the country's land tenure system up to 1995, had been introduced by the colonial legislature way before independence. As we shall see below, each of these statutes had a specific problem to deal with at the time of its inception. Consequently, with time, Zambian land law became a 'forest' in that different issues were found in different pieces of statutes rendering it difficult to use the system without having to acquire specialised legal knowledge. One of the objectives behind the 1995 land change was to bring about a simplified and efficient system of land tenure and land delivery. It was considered essential to economic development to harmonise the land tenure system so as to achieve maximum benefits. Consequently, the above statutes were repealed and their different functions harmonised and tucked under a single liberal statute, the 1995 Land Act.

2.3 Previously, as we shall explain below, land in Zambia was divided into a number of categories such as Reserves, Trust Land, Barotseland and Crown land categories. Reserves and Trust Land, at least, were abolished by the 1995 Act. However, this abolition did not terminate all the features of the monstrous institutions. For example, even though the Reserves and Trust Land Orders in Council are no more, the actual designations of the land falling under these categories have been perpetuated under the 1995 Land act. What this means is that same land, which previously was called Reserves and Trust Land, will now be called "customary area". In other words, there will be no new designations of customary areas in the Act. The colonial nomenclatures reflected in the words "Reserves" and "Trust Land" have been replaced with simply "customary area", to bring it in line with current terminology. Consequently, instead of saying, for example, " people live in a Reserve", we will now have to say "people live in a customary area". Although only a change of nomenclature, this is important if only to emphasise the country's independence. It is strange that such a minor change had to take so long to institute in Zambia's laws.

2.4 However, it should be observed that contrary to the different land categories in the law, people, in actual fact, do not make the same distinctions as does the law. The law had categorised certain lands "Reserves", while others "Trust Land" and the

remainder, State land to serve a certain social policy of the time. But a curious observer of the soil is bound to get mixed-up. The ground itself does not make these distinctions. Rather, land is simply land. It was the colonial policy which saw value in the classifications and which went about categorising the land as such. The 1995 Land Act puts to rest these artificial and unnecessary divisions. Instead of talking about "Reserves" and "Trust Lands", we now talk only of a "customary area". In other words, the divisions have remained, except that this time, they have been reduced to two: State land and Customary area. It was not possible again to have a single category of land. This was beyond the ambitious of even the politicians of the 1990s. Even this government finally failed to legislate into law a single system of land tenure. All they could do, however, was to make changes to the law that will facilitate the displacement of the customary tenure with statutory tenure, hoping that in the end, there will be a single system of tenure.

2.5 Turning now to substantive issues, it will be observed that the 1995 Land Act was no doubt an ambitious piece of legislation. Among its most important features, it introduces a radical definition of land, provides liberally for the land market including access to land by foreign investors, tries to open customary land to private land rights, introduces a Fund for opening up new lands and sets up a machinery for resolving land disputes cheaply and speedily, etc. To begin with, the Act offers a radical concept of land which is intended to live up to the market policies. Previously, since the 1975 Land Act, "virgin" or "bare" land had been excluded from the definition of land. This was to safeguard land from manipulative practices, such as exploitation, speculation, and generally making profit on bare soil. In line with socialism, government in the Second Republic had banned what it called the unscrupulous practice of making money on a piece of land which one has not developed. However, under the MMD policy, land even in its natural form, had value. It says: "land means any interest in land whether the land is *virgin, bare* or has *improvements*...." The 1995 Act has therefore extended the idea of land for purposes of commercial transactions to land, which has not been developed, land in its virgin form, etc. In other words, land under the 1995 Act has value by itself say due to demand, as a result of its location, etc., without having regard to human labour expended on it.

2.6 But it does not include rights acquired under the Mines and Minerals Act. For example, the right of exploration, which is obtainable from the Ministry of Mines and not the Commissioner of Lands, is not land, even though in practice, the difference makes no sense. The holder of an exploration licence in practice does everything the holder of land does. But in law, mining is administered differently from land in spite of intersections. For this reason, anything relating to mining and mineral exploration is dealt with under a different legal regime from the land regime *per se*.

2.7 Even though the Act is visibly silent on water, it is the case that there is a different regime for regulating water, just like mines. The Water Act regulates the administration and use of water resources and usually, under a different government ministry though this is not a strict legal requirement. Again, in practice, the division between water and land appears to be artificial. There is no practical distinction between water and land. But a legal distinction was found necessary though not strictly desirable to cater for the two interests differently. Water rights are obtained from another department other than the lands department. Subject to these

modifications, land encompasses *any interest in land*, which term is broad enough to cater for a variety of interests i.e. leasehold, tenancy, easement, *profit a prendre*, encumbrances, etc. Significantly, the definition is intended to extend to customary land but whether or not it successfully does this in the Act is arguable. At least this was the intention behind the MMD economic policies. However, the practical value of extending the definition to land in customary areas is negligible. There is no clear procedure yet for the sale of customarily held land¹¹ on the Zambian market unless it has been converted to state land, in which case it is no longer subject to the control of traditional authorities.

3. VESTIMENT OF LAND

3.1 One of the most controversial principles in the Land Act is the principle of vesting land in the President. Every inch of the Zambian soil is vested in the Republican. Section 3 of the Act decrees: “*all land in Zambia shall vest absolutely in the President and shall be held by him in perpetuity for and on behalf of the people of Zambia*”. This clause has created serious conceptual differences in the community particularly as to whether the President is the sole owner of all the land in the country? Whilst it is commonly said that the Litunga of the Western Province, for instance, or chiefs, are the owners of customary land in the country, the exact legal position is less clear. Chiefs and rural people in general usually disagree with the contention that all land, especially “chiefs land”, is vested in the President. Chief’s land, they often contend, can not vest in any authority other than the chiefs. How can ancestral lands, it is argued, be said to vest in the President when this can not be the wish of the ancestors? Fictitious legend holds that chiefs are the spiritual links between this earth and the departed ancestors. Among the Bemba, they say “mwine mpanga” (owner of the forest), to refer to the paramount chief, while in Lozi, the name “Litunga” means land. Among the Ngonis, they say “ntaka ni yamfumu”, i.e. the land belongs to the chief, just to give a few examples. With this in mind, it becomes very difficult for local people, at least, to entertain let alone, appreciate the view that all land in Zambia is vested in the President.

3.2 But was land in pre-colonial Africa really vested in chiefs? It is very difficult to make conclusive observations on an issue such as this. African customs are diverse and quite different. However, there is evidence to the effect that whenever a person needed land to settle or to farm, they would go to the chief for allocation. The chief became a chief because his or her ancestors were the first to settle in that piece of land and to lay claim to it through the various local methods for the acquisition of land. Later, other people joined them becoming a village and finally a cluster of villages under a chief. It is in this regard that a total stranger in an area can not just cut down trees or clear the forest without the permission of the “owner of the forest”. The colonialists recognised this fact and wherever they went, they tried to obtain land through chiefs and kings, as the case might be. In the African Memorandum No. 1146 of 1932, on Barotseland, for example, at page 12 is a section entitled “(a) The Paramount Chief”, which includes the following words, “In him (and his Kotla) all land is now vested”.¹² What this means is that the colonialists understood that according to Lozi customs, the land of the Barotse was vested in the Litunga and his Council as custodians of the Barotse people rather than a vesting in the Litunga as a

¹¹ . See, however, the lone case of *Siulapwa v. Namusika*, *below*. 1985. Z.R. 21

¹² Report of the Land Commission. August 1967. Republic of Zambia, p. 12

sole owner. It is also worth noting that the grants of land Lewanika made to the Litunga were made “with the advice and consent of the Council”. At any rate, the Litunga has been recognised as having the power to control land matters in the Barotse country and this was again restated in the Barotseland Agreement dated 18th May 1964.

3.3 However, to understand the origins of the vestment clause in modern Zambian tenure system, it is necessary to go back to colonial rule. Colonialism was the one that first introduced this clause in the modern sense in which it is. The desire to acquire colonies in order to secure cheap sources of minerals and other raw materials drove Europeans to overseas lands in Africa and other parts of the world. In Zambia, after the adventures of Dr. David Livingstone, the territory was opened up to European settlement. In 1900, agents of the British South Africa Company (BSA) visited Lewanika, the Lozi King, to secure concessions over land. Cecil Rhodes, the British magnet who had emigrated from Britain to South Africa, in poor health, had entertained imperialistic ideas about bringing the entire Africa, from Cape Town to Cairo in Egypt, under the British sovereign. Consequently, he sent a number of agents to the north from South Africa to extract concessions from African kings and chiefs. In 1900, BSA agents and King Lewanika concluded the maiden concession ever between foreigners and local authorities in Zambia. This concession constituted Zambia's formal act of colonisation. With this concession, Lewanika handed over Zambian land to the BSA Company. Part of the concession reads: “nothing written in this agreement shall...give the British South Africa Company the right to any other land for mining and trading purposes, but the British South Africa Company shall have the right to make grants of land for farming purposes in any portion of the Batoka or Mashuku-Lumbwe country to white men approved by the King”. In the same concession, the BSA Company was prohibited from prospecting minerals in the whole of Western Province.

3.4 This explains why Southern, Lusaka and Central provinces, for example, are inundated with several farms while until independence, there were practically no farms in Western Province. The Litunga had prohibited the company from granting land in Western Province to white men for farming and denied them the right to carry out explorations in the province. However, he allowed this on Batoka (Batonga country) and other parts of Zambia he claimed to exercise jurisdiction. Lewanika claimed that he controlled the Batonga country as well as countries of other ethnic groups even though it must have been evident even at the time that this was false. The mere fact that the concession referred to what it called: “Batoka or Mushuku-Lumbwe country implies independence by this country from Litunga control. Significantly, however, there was no mention of vestment of land in the first concession. Following this, a series of other concessions were signed between Lewanika and the BSA Company. The BSA agents went back to him for various requests or to make adjustments to previous concessions. For example, only in 1905, the two parties signed a concession in which Lewanika stated: “with the advice and consent of my Council, I grant to the British South Africa Company, as a free gift, to dispose of as they may think, all the land within my territory situated within a radius of fifteen miles of the North Bank of the Zambezi River at the Victoria Falls”. This was intended to add to the land already acquired in the first concession.

3.6 The same concession granted the Company such blocks of land not exceeding eight miles per block as might be required for the development of townships, again, except in the areas reserved from prospecting in the 1900 Concession. This is how townships and cities were established. Urban development became a necessity following heavy concentration of settler population in mining areas and trading centres. The Litunga granted the BSA Company with land enough for the development and human settlement. Finally, in this same concession, Lewanika undertook to refrain from making grants, leases or sales to any person or Company without the prior approval of the BSA Company. Clearly, this undertaking was forced onto Lewanika by the Company to safeguard their interests. To ensure he did not sign away the same land to someone else, as Lobengula did in neighbouring Matabeleland, the Company tied his hands. During this time, there were many agents of different companies and sovereigns who were roaming Africa in search of land to lease or buy from chiefs. Previous experience in Zimbabwe where King Lobengula concluded different concessions over the same piece of land with agents representing different Companies including the BSA Company taught them a lesson.

3.7 In 1906, Lewanika concluded another Concession with the Company in which he confirmed the right of the latter in the 1900 Concession, to make grants of land anywhere in the area controlled by the Litunga. However, this did not include the land already excepted from prospecting. With this assurance, settlers would be granted land rights in various parts of Zambia. Three years later, in 1909, Lewanika, yet again, signed another Concession in which he agreed to give to the Company all the land within his territory except what he had prohibited from prospecting “subject to native rights to the present holders, villages, gardens”, etc. The Concession provided for compensation in the event the native rights were violated by the Company. Forced removals, for example, or other forms of disturbances with native title were due for compensation under Company terms. In this Concession, Lewanika also negotiated to exclude the present North-Western Province from exploration. In other words, exploration for minerals was banned by the Litunga in his Barotse nation as well as the land west of the Zambesi up to the Angola Border. Consequently, no leases were granted in Barotseland and North-Western Province, right up to independence. Likewise, the establishment of townships in Barotseland did not entail the introduction of state taxes – rates – on those who might own property and neither would the land convert to State Land. The local authorities were prohibited from rating the property owners within their jurisdiction and no holder of land in these areas would get a title-deed because the land was exclusively under the jurisdiction of the Litunga who did not subscribe to this method of tenure. It is like in the Red Indian Reserves in the United States of America (USA). According to the United States law, Red Indians who hold land in Reserves (e.g. Menominee Indian Reserve) do not suffer tax liabilities for the land, as other Americans on none reserve land do, because Red Indian law has no provision for land tax.

3.8 The critical question in all this is: what is the effect of these concessions on local land rights? Where do the concessions leave indigenous land claims and can we say chiefs in different parts of the country then and now “own” the land within their jurisdictions? The short answer is no, they do not. This same question was raised in an old American case of *Johnson v. MacIntosh* (1823)¹³. The question in this case was

¹³ . *Johnson v. MacIntosh*. 18 21 U.S. 543 (1823)

whether a non-Indian who bought land from an Indian tribe obtained a valid title. The Supreme Court held that the buyer did not acquire a valid title if he bought the land after “European discovery” of the North American continent and the “conquest of its inhabitants.” The Court went on to hold that all the Indians occupying these lands owned were the “rights of occupancy” in their ancestral lands, a right which was superior to all claims other than those of the Federal Government. The Federal Government could extinguish the “Indian title” at will but until it did so, the Indians had the right to remain on their lands. This decision is persuasive in our circumstances, least of all because Zambia is a common law jurisdiction. The effect of the Concessions with King Lewanika was that the country passed hands to the BSA Company, and later, to the British Government, after the latter bought the concessions. After independence, Zambia succeeded the British state, and in international law, it inherited all the rights and liabilities of the previous state. In other words, following independence, the state of the newly independent country puts on the shoes of the departing State, in our case, the British colonial state in the same way as if it was the coloniser. The land that chiefs call “their land” was lost as far back as 1900 when His Majesty, King Lewanika signed the first Concession with the agents of the BSA Company. But how does vestment come in?

3.9 Before 1911, Northern Rhodesia, as Zambia was then known, was administered by the BSA Company on the basis of these concessions. The country was divided in two parts, namely, North Western Rhodesia and North Eastern Rhodesia. The Company provided government for the two parts of Rhodesia. Its right to rule the territories derived from two sources: the Charter of Incorporation of the BSA Company and the two Orders in Council enacted for the two territories. In 1911, these orders were revoked and the two territories became one country as a political unit under the name of Northern Rhodesia. One of the effects of the 1911 Order was to divide land in Northern Rhodesia into parts: land within Barotseland, which could not be alienated, and other land, for which alienation was possible. Significantly, the Order contained no provision vesting land in the BSA Company although the Company claimed to be the lawful owner of land in North Western Rhodesia, granted it in the various concessions. Similarly, it claimed ownership of the land in North Eastern Rhodesia on the basis of the concessions approved by Certificate of Claim issued by Sir H. E. Johnson in 1893. In other words, Johnson negotiated the concessions procured from chiefs in North Eastern Rhodesia, e.g. Eastern Province, and later bought by the Company.

3.10 In 1924, the 1911 Order in Council was revoked by the Northern Rhodesia Order in Council of that year. By this Order, the Company lost control of the territory. The British Government took over the administration of the territory from the BSA Company. A Governor was appointed by the British Government and trusted with the powers of administering the country. But the divisions between Barotseland on one hand and other land continued. The Governor was empowered to make grants and dispositions of land in Northern Rhodesia territory, but not in Barotseland. Again, the 1924 Order in Council did not contain any provision vesting land in the British sovereign or the Governor. However, the Governor made grants and dispositions of land to non-Africans under the express power conferred upon him by the 1924 Order, not as the result of a vestment clause. The 1924 Order in Council was repealed in 1962.

3.11 Consequently, from Company settlement in 1900 to 1928, there were only two land categories in the country, namely, Barotseland and other land. A European who got a grant of land from the Company and held land under title deed held it subject to customary rights. Customary rights prevailed over title deed rights, save only for three pieces of land the Company claimed to hold freehold title. This is very much similar to the principles contained International Labour Convention No. 169 of 1989, regarding indigenous rights. The Convention also agitates that landholding in land inhabited by indigenous people should be subject to local rights and circumstances. And the settler could get land anywhere other than Barotseland.

3.12 Predictably, the settlers complained against the subordination of their rights to customary land holders, claiming the policy retarded development. They called on authorities to come up with a mechanism by which to extinguish the African rights in areas where settlers would be granted land. Already in 1903, an idea was mooted to introduce reserves for Africans starting with Eastern Province where a general scheme to separate Africans from settlers was drawn in 1913. In 1924, immediately after the coming into effect of the 1924 Order in Council, a Commission, the Native Reserves Commission East Luangwa, was instituted with a mandate to find out what land should be set aside for African occupation in the Fort Jameson and Petauke Districts. Other Commissions dealing with other parts of the country were established later. By 1928, the Northern Rhodesia (Crown Lands and Native Reserves) Order in Council, 1928, gave effect to the results of these commissions, which basically agitated for the divisions of land into different categories based on race and colour. This category divided land in the country into two categories, namely, Crown lands and Native Reserves except:

- Barotseland
- Three freehold areas vested in the BSA Company
- Land alienated by the Company before 1st April, 1924; and
- Land in perpetuity by the Governor of Northern Rhodesia between 1st April 1924 and 22nd March, 1928.

3.13 It was at this time that the vestment clause appeared for the first time in the statute. The 1928 Order provided for the vesting of all rights of the British sovereign in or in relation to Crown Lands in the Governor, who was also empowered to exercise them, on behalf of the sovereign. The Governor was required to act in accordance with the law and on the basis of instructions from the Secretary of state for colonies. He could make grants and dispositions of land in Crown Lands subject to the above limitations. The 1928 Order was supplemented in 1929 when by the Northern Rhodesia (Native Reserves) Supplemental Order in council 1929 and the Northern Rhodesia Crown Lands and Native Reserves (Tanganyika District) Order in Council 1929, additional areas were set aside as Native Reserves. Also, through the latter Order in Council, the three pieces of land that the BSA Company claimed to hold in freehold were set aside as Native Reserves. In 1963, after several amendments, these Orders in Council were consolidated by the Northern Rhodesia (Crown Lands and Native Reserves) Order in Council 1963. To make room for Crown Lands, Africans were removed from their ancestral land to Reserves, against their will. Some of them had their lands reduced in size where such of their land was declared Crown Lands or coerced into moving to Reserves altogether.

3.14 However, not all land was declared Crown Lands or Native Reserves. Some of the lands remained unalienated and uninhabited. The people that had been there were removed and settled in Reserves. In 1942, Government announced a new policy on land. Land that had not yet been alienated was to be declared Trust Lands. Crown Lands would be available strictly for non-native settlement “on an economic basis and for mining development”. This was land that would be certified as a result of geographical survey to be suitable for European development, as well as land known to contain mineral resources.

3.15 On the other hand, Native Trust Land was going to be vested in the Secretary of State for Colonies (not Governor), and set apart in perpetuity for the sole and exclusive use and occupation of the local Africans. It would also be used, unlike Reserves, which were totally closed to non-natives, towards the establishment of townships. Finally, Trust Land would be allocated to non-natives in special cases provided it was shown that such alienation would be for the benefit of the native population. However, it had to be shown that such land was not required for immediate occupation by the local people and in any case, no more than a maximum of 6,000 acres in each province would be alienated to non-natives. Specifically, it was pointed out by government that where this land would be required for mineral development or the development of railways or other public purpose, it would be excluded from Trust Land.

3.16 In 1959, the Northern Rhodesia (Gwembe District) Order in Council was enacted. This was prompted by the construction of the Kariba Dam. The Order was required to address special issues that would arise such as forced removals of Africans from the area earmarked for the construction of the dam as well as empowering the Governor to grant land to non-natives within what was previously a Reserve. Also, the Governor was empowered to grant fishing rights. No specific vestment of land was made in this Order.

3.17 These Orders survived independence in 1964, save for such modifications, adaptations, qualifications and exceptions as would be required to conform to the needs of a new social order. In particular, the British sovereign was going to be divested of all the powers and responsibilities, including the rights in respect of Crown Lands and other categories of land, and to yield the same to the President. Consequently, the Zambia (State Lands and Native Reserves) Order, 1964 transferred to and *vested* in the President of the Republic of Zambia all rights in or in relation to Crown Lands as well as Native Reserves, which were vested in the Secretary for colonies. Similarly, the Zambia (Trust Land) Order, 1964 transferred to and *vested* all Native Trust Land which, like Reserves, was vested in the Secretary or British Minister in charge of overseas territories. This is the background behind the vestment clause in section 3 of the 1995 Land Act.

3.18 As to the advantages or disadvantages of the clause, it is difficult to say because it has been practised differently in the successive periods. In addition to the colonial practice, the notion of vesting land in an authority symbolising the state is more or less a universal practice. In England, which originated the present practice, land is vested in the Crown. Vestment of land, virtually the whole country in the President or sovereign, is intended to help unify a country. Instead of vesting land in different ethnic authorities, for example, which could lead to instability in the nation, it is

desirable that along with the notion of a unitary state, land is vested in one central authority. But it must be understood that the notion of vestment creates a trust relationship - similar to a fiduciary trust in law. Thus, the relationship created between the President and the Zambian people through the notion of vestment of land resembles that of a ward to his guardian. By accepting the presidency, which carries with it the notion that land is vested in this office, a duty is imposed on the President to protect the right of Zambians to their land. In other words, the trust relationship entails a duty of protection (U.S. v. Kagoma, 1886).¹⁴

3.19 The foundation of this relationship is that the people vest the land to the President, on behalf of the State, because they trust that the President will protect their land. Trust is the foundation behind the concept of vestment. Secondly, there is an implied duty, not just express duty to protect, but to use the land for the purposes of promoting and advancing the interests of the people. This obligates the President and through him the government to ensure that people can benefit from alienation of their land without them losing their right to live their lives. Similarly, under the same trust relationship, government when granting land rights to non-local people, must ensure that water, for instance, to the local communities is not interfered with, even if water itself is not specifically enshrined together with land in the Act. Finally, the trust doctrine through the concept of vestment is intended to ensure the survival and welfare of the local people. It is a solemn duty; a special duty that the government through the President must never betray. The government through the President is the “fiduciary” of the land resources on behalf of the people, which means that whenever it is dealing with land, it must act with utmost good faith and utter loyalty to the best interests of the local people. To ensure this, there is urgent need to have an explicit law on land that reflects specific tasks on the government as part of this duty. This is necessary so that various ethnic groups that feel short-changed by the President in the manner their resources have been used or granted to non-local people can sue government for the mismanagement and claim damages. At least this was the conclusion of the Supreme Court of America in *United States v. Mitchell* (1983).¹⁵ In this case, an Indian tribe sued the United States federal government arguing that it had mismanaged its land resources contrary to the Allotment Act of 1887. The tribe argued that the Act imposed a fiduciary duty on authorities to manage the resources in a manner that advanced the interests of the members. In its first ruling, the Court rejected the claim for damages on the ground that though the Allotment Act and similar statutes imposed a trust relationship between the federal government and the Indian tribes, the duty was not specific but general. Therefore, the government could not be liable for failure to implement general duties. The tribe went back to Court this time with a host of statutes and regulations imposing specific duties on authorities on how to manage the land of Indians. The Supreme Court held that where there are specific duties, and it is shown that authorities have failed to discharge those duties, the tribe, which stands in the position of a ward, can claim damages. Zambian needs to inject specific duties in the Land Act to force the President and government to ensure the discharge of its trust relationship. The present wording of Section 3 is too vague to be a sound basis for demanding the loyalty of the government to the people.

¹⁴ . U.S. v. Kagoma 118 U.S. 375, 384 (1886). See also along the same lines *Seminole Nation v. U.S.*, 286 (1942)

¹⁵ . *United States v. Mitchell* 463 U.S. 206 (1983)

3.20 In the Zambian experience, there is no doubt that the vestment clause has recently been grossly abused by the President. The nearest example of this abuse is over the seizure by the President of the University of Zambia land. At first, the President partook in the illegal sharing of the University of Zambia land situate in Lusaka's Kabulonga residential area, together with his Vice President and ministers. When the whistles were blown and the act exposed, he returned the land but only to grab an even bigger portion this time near show grounds, to build his institute. This is unbecoming of one who is trusted to look after the resources of the people, as his wards. Instead of doing so, he helps himself to the resources he is looking after! In other jurisdictions, the President's actions exposed him to prosecution in addition to immediate loss of office. The President has money and can buy land just like any other citizen instead of grabbing it using the trust reposed in him. Also, the relationship extends to the President's ministers because they are his appointees and therefore his extension. Under the same rule, ministers of government and other senior officials like council mayors are not supposed to abuse the trust relationship and get land for themselves. As public officials, they have a duty to discharge to the people they serve. The second example of breach of the trust is reflected in the illegal acquisition of land by the President to build his dream Presidential Housing Initiative (PHI) houses, initially in Chainama area in Lusaka and later, to other parts of the country. The Chainama project is constructed on land that does not belong to it but because it was the President involved, no one would question it. Chainama hospital lost its land to a housing project, which would not benefit it. Third, the whole issue of sell of government pool houses conflicted with the fiduciary duty. Cabinet ministers and other senior government officials who benefited from the sales breached the trust reposed in them as government. There are many such examples, which show that the vestment clause in Zambia is highly abused. It is time to review the clause so that it is vested in the State and the people jointly, like under the Ethiopian model. Under the Ethiopian Constitution, land does not vest in the President, which makes sense because the Presidency can actually be abolished and in Zambia's case, with ease since the Presidential clause is not entrenched. But the State is a permanent institution unless the whole country agrees to abolish it. Land should be vested in the state and the people to hold jointly so that any change to the tenure will require a referendum to determine the wishes of the people, another safeguard. In the meantime, the President should set an example of his unswerving adherence to the trust relationship by diligently returning back the UNZA land he has grabbed, as one of his final acts as head of state. This will restore the confidence he had eroded in the office of President through his land grabbing antics. Land grabbing should be restricted to desperate sections of the population like the war veterans in Zimbabwe, but not a head of state.

4. ONE COUNTRY; DIFFERENT TENURES

4.1 Like most ex-British colonies, Zambia has different tenure systems depending on the type of soil you are standing on. We have observed from above how colonial policy divided land into different categories in order to accommodate the interests of white settlers. Basically, the orders in Council under which Zambia was administered divided the country into two parts, namely, land available for economic development by non-Africans and land set aside for the sole use of Africans. The provisions of the orders relating to land administration have been repealed by Section 32 of the 1995 Land Act. Therefore, the Orders are no longer part of the law of Zambia. However, since Section 2 defines "customary area" by reference to the definition in the same

Orders that have been repealed, it follows that the Orders are still part of Zambian law, at least to the extent of the schedules describing the Reserves and Trust Land. In other words, the 1995 Act failed to come up with new customary areas preferring instead to use the old colonial schedules. An opportunity to redefine the land categories so as to take account of new circumstances and correct previous mistakes by colonialists was missed. Government would have used the occasion to return to customary land some of the parcels of land unfairly seized by colonialists from local people.

4.2 By reason of the 1995 Land Act read with the Orders, there are two types of land tenure in operation. These two systems may be designated “statutory tenure” and “customary tenure” to distinguish the different laws applicable in each case. Since as far as the land itself is concerned, there is no visible difference, how do you determine which land is statutory and not customary? The manner in which interests in the land may be acquired determines the system of land tenure applicable to it, otherwise it is difficult to tell the category of land just from a naked eye. In customary areas (formerly, Reserves, Trust Land and Barotse Land), land may be occupied and used in accordance with customary usage. It is obtained, through allocation, gift, inheritance, grabbing, clearing, etc. Since there is not one but several customs in the country, the exact method of acquiring a particular inch of the land ultimately depends on the culture and custom prevailing in the particular case. Government does not exercise any control over the occupation and use of land where customary tenure prevails. For instance, to build a house in a village, there is no need to go to the government to obtain permission. Consultation with the family or village head is in most instances all one needs. However, certain rules such as rules on environment under the Environment Act, may dictate different methods of use of land even in customary areas. For example, certain trees may not be cut because they are subject to a Tree Protection Order or some statutory protection. Any one who cuts such a tree commits an offence sometimes punishable by imprisonment. But beyond this, customary tenure is basically a *laissez-faire* system.

4.3 Customary land constitutes roughly 94% of Zambia's total land mass. On the other hand, statutory tenure prevails in at least 6% of Zambia's land. As we have noted above, the method used to categorise a piece of land into Crown Land was whether it was suspected to be harbouring minerals or soil samples showed that it would be good for agriculture or for European settlement. After the 1964 Order, Crown Land became known as State land. Land rights may be obtained and enjoyed by individuals in State Land by grants from the President or in cases where a monetary exchange economy has grown, through transfer *inter-vivos*, i.e. private sales. Government controls the occupation and use of this land and the system of tenure upon which the land is held is statutory. You can not, for example, start building on state land without permission from authorities and when permission is granted, occupation, use and management of the land should strictly conform to the prescribed rules. A person who occupies this land without prior government authority is called “squatter”, and is liable to prosecution and eviction while the improvements he has expended labour on are liable to be demolished. This is a common law position, which Zambia has inherited. It does not matter whether there is an ancestral claim to the land as long as it is under the category of state land, state law prevails over customary and usage. However, a rule of law existed in common law, which has not been enforced in Zambian courts. According to this rule, a squatter who has occupied land illegally and with the owner

aware of it for over twenty years is entitled to legal protection. He can not be evicted in the same way as a person who has squatted only recently. If the rule was applied, many people who are in precarious situations on mining land, state land, council land, private land, etc., would be protected and their situations regularised.

4.4 By virtue of the English law (Extent of Application) Act, Cap 5, the English land law as it was on the 17th August, 1911 applies to land held on statutory tenure subject to local law and circumstances. Most people who hold title in state land do not simply have a clue of what this means. The law relating to State land is based on statutory tenure under which the land is held by the occupier either directly or indirectly from the President in whom, as we have already seen, it is vested on behalf of the Republic. In Zambian tenure system, no land is allodial i.e. owned by a subject. Land that is owned allodially is land a person owns perpetually, infinitely, for-ever and ever. When land is owned on terms, such as leasehold tenure is not "ownership of land" but merely ownership of a term of years in land, whose duration is prescribed in the contract of conveyance. During colonialism and the independence era right up to 1975, land ownership in the original sense did exist in Zambia. The freehold with all its estates i.e. the fee simple, the fee tail and many others were all practised on Zambian land. The fee tail was the first one to go followed in 1975 with the fee simple. Today, the only estate in existence is the statutory leasehold. Consequently, when people say, as they often do, "I own a farm in Kapiri Mposhi" or "I bought a piece of land in Lusaka West", they are expressing their ignorance of the land law system in Zambia. Apart from the President who can be said to be the "owner of all land" in the country due to the vestment clause, no one in Zambia owns land in the strict sense of the word.

4.5 One of the things the 1995 Act was accused of was sneaking the freehold title behind peoples' backs. This is not entirely correct. Generally, the freehold estate remained buried under the 1995 Act. But there are some provisions which empower the President to grant a freehold within the prescribed limits spelt out in the Act. Under Section 3 (6) provides that the President may alienate land for a term exceeding ninety-nine years where:-

- a) he considers it necessary in the national interest
- b) in the fulfilment of any obligations of the Republic; and
- c) it is approved by a two-thirds majority of the members of the National Assembly

4.6 Since the Land (Conversion of Titles) Act, 1975, it had been understood that the freehold estate had been abolished in Zambia. Following this Act, the maximum estate a person can have in a statutory tenure has been 100 years, in practice ninety-nine (99) years. However, the above provisions imply the possibility of the President making grants of more than 100 years provided the conditions stipulated in the section are fulfilled. In other words, subject to the limitations specified thereunder, Section 3(6) reintroduces the entire English concept of land tenure, which is behind the statutory tenure. In English law, and Zambian law before the 1975 Land Act, grants of land can be available for different periods of time. It might be granted for an indefinite period either for life or in fee simple, (i.e. for as long as the tenant or any of his heirs, whether descendants or not, are alive) or for a definite maximum period, for example, the present hundred year leasehold in Zambia. Under Section 3 (6) (b), the President can grant freehold title to land to a foreign mission in reciprocity to what

Zambia has been granted in the country of origin of the grantee. For example, the USA diplomatic mission in Lusaka could be granted freehold title to the land on which is the American Embassy if the USA has done the same to the Zambian Embassy in America. Similarly, there could be special circumstances necessitating the grant of a larger estate besides the principle of reciprocity. While paragraphs (b) and (c) of Section 3 could be justified and are sufficiently able to protect the use of power from abuse, paragraph (a) is not. Too much discretion in the use of public power has frequently led to abuse. The issue of granting estates of longer duration than what the rest can get is too important to be left to one individual to decide, even if it happens to be the President. What could stop him from granting himself or his children freehold title given the difficulties of proving abuse of office in cases where subjective use of power is authorised? Besides, information about such grants is usually treated secretly by authorities so that we do not know, for example, just from searches at the Lands and Deeds Registry how or whether the provision has been used since the coming into effect of the Act. On the other hand, land held for an indefinite period is known as freehold and leasehold is holding rights in land held for a definite period of time. Before 1975, Zambia had both these two types of tenures. But after President Kaunda's "Watershed Speech" at Mulungushi in which he condemned the freehold as being exploitative and tantamount to locking up land that poor Zambians desperately need, the freehold was abolished under the Land (Conversion of Titles) Act, 1975. All freeholds were converted to leaseholds the maximum of which was the 100 year leasehold.

4.7 Each of these periods of tenancies (for-ever and ever; hundred years, etc) is called an "estate". Estate is the duration with which a person may hold rights in land. For all practical purposes, customary tenure is similar to freehold and probably even greater than freehold since the latter is today strongly regulated by statute. On the other hand, "leasehold estate" indicates that the land is held for a definite period. In English law, the freehold estate is the largest estate that can exist in land. It connotes the idea of absolute ownership although in practice, as we have observed, it too is increasingly held in tenure.

4.8 Earlier, we alluded to the complexity of English land law. The doctrine of estates coupled with the fact that land, unlike chattels, is permanent is what makes the law relating to land a very complex subject. For example, A may hold long-acres for a life estate, while B holds it for a life estate in remainder and C for a fee simple in remainder, and D may hold a lease for 99 years, subject to a sub-lease in favour of E, a rent charge in favour of G, an easement such as a right of way in favour of H, etc. All these estates or interests in land are capable of subsisting at the same time. In addition, there are "equitable interests" which can also subsist together with legal estates in the same piece of land at the same time. Is this what the Zambians really want? A full-blown system of land market will lead to situations where concurrent rights may exist for different people in one piece of land. A fully developed land-market can be cumbersome and as inefficient as tenures in undeveloped systems. However, there is growing desire for private title in Zambia, and Africa as a whole. Modern young people especially feel so strong about the need for a title deed especially freehold. The problem with educated Africans is that they love everything white people do. The title deed is one such example. Liberal Africans tend to think the land market is the answer to their economic problems. In Sesuthu, there is a saying

which best summarises this attitude: “Sehalare sa Mosotho ke lekgowa”, which means, “the medicine of black people to any problem is the white man”!

4.9 The English law, which applies to land held on statutory tenure, is cumbersome, archaic and expensive. Most of it no longer applies in England itself where, in 1925, it was completely revised. But in Zambia, under the English Law (Extent of Application) Act, the disused law in the mother country is still the most recent law. The 1995 Land Act somewhat modifies the English law but it by no means replaces the English law. For example, when determining the right of a holder of a statutory tenure, regard must be had to the pre-1911 English court decisions and statutes, which have not been repealed or modified in Zambia.

4.10 The Land (Conversion of Titles) Act, 1975, was primarily intended to convert freeholds to leaseholds. It came after Government detected serious shortcomings in the land law especially the issue of profiting from bare land. The immediate reason was the sale of a freehold piece of land at the present Development Bank of Zambia (DBZ) next to Lusaka City Council Library. An absentee landlord sold the present site of the DBZ at an exorbitant price to the government, which wanted the plot to construct the bank. When the government learnt of the sale, it halted it and used it to look at the whole tenure situation in the country. This led to the so-called “Watershed speech” by President Kaunda, which he made to UNIP party loyalists urging them to change the law in order to provide government with greater powers of control over land. The result was the 1975 Land Act.

4.11 Some of the main features of the 1975 Act include a clause declaring bare land “valueless”. Government prohibited sale of bare land alleging that it contradicted the African concept of land tenure and that it went against the UNIP policies of humanism. Bare land, it was argued, was a gift from God, and no one should profit from that which God has given to all. Unless a holder of land developed the land or carried out some improvements on it, he can not sell the land in its natural form, as this would be tantamount to profiting from nothing. To safeguard exploitative transactions in land, the 1975 Act provided a requirement for prior approval by the President (in practice the Commissioner of Lands) for all transactions in land. In other words, it became a requirement after 1975 that legal transactions in land must first obtain “Presidential consent”, to be valid. This created a huge bureaucracy with consequent corruption at the Department of Lands as dealers tried to jump the official lines to secure the consent. In cases where parties had transacted without securing the consent, courts have held that such transactions are *void ab initio* i.e. invalid from the very beginning. For example, in the case of *Bridget Mutwale v. Professional Services Limited* (1984),¹⁶ the respondent rented a residential flat to the appellant, Bridget Mutwale, without first obtaining Presidential consent. The appellant depended on her boyfriend, who in fact was the one who obtained the flat in the first place, to pay the rent. However, the boyfriend (a diplomat) failed to pay the rent due throughout the two-year period of tenancy. When Professional Services Limited tried to secure the payment through the courts, the Supreme Court held that since no prior Presidential consent had been obtained by the Landlord to rent the flat in terms of Section 13 of the 1975 Act, “the whole of the contract including the provision for the payment of rent was unenforceable”. In other words, what the Court was saying was that the

¹⁶ . *Bridget Mutwale v. Professional Services Limited*. 1984. Z.R. 72

landlord could not get relief from courts. The Court could not help them enforce a contract in order to recover the rent due, as to do so would be to entertain a claim founded on an illegal transaction. A year later, the Supreme Court reiterated its decision in *Jasuber R. Naik and Naik Motors Ltd v. Agnes Chama* (1985). In this case, the respondent (Agnes Chama) had been renting business premises from the applicant, without having secured Presidential consent. Later, the applicant decided not to renew the lease but the respondent, as tenant, sought the protection of the Business Premises Act in a magistrate court. A business tenant enjoys certain protections under the Landlord and Tenant (Business Premises) Act, Cape 440, such as to have the lease renewed where the landlord intends not to renew it, unless he can justify his refusal. In this case, the magistrate, on discovering that the landlord had rented the premises without securing Presidential consent, advised him first to secure the consent at his own expense. He refused to comply with decision and appealed. The Supreme Court upheld the magistrate court's decision and observed that it was the duty of the landlord to obtain Presidential consent before leasing the premises and to bear the costs which follow. Further, the Court observed that failure to obtain this consent does not deprive the tenant the right to seek protection of courts under the Landlord and Tenant (Business Premises) Act. As observed above, section 13 (1) of the 1975 Act specifically provided that no transaction in land would be valid without "prior Presidential consent". This section proved an obstacle to many transactions. Consequently, under the Land Act of 1995, the word "prior" was deleted and so although Presidential consent is still a requirement under Section 5, it has been reduced to a mere formality, mainly for statistical purposes. In other words, after the 1995 Act, a transaction conducted without prior Presidential consent is very unlikely to be declared illegal, as used to be the case. This is the result of liberalisation of the land market. The State has been withdrawn from land transactions leaving private parties with the freedom to conclude transactions without fearing that Uncle Tom will invalidate them.

4.12 Of course, the most important reforms introduced by the 1975 Land Act was to abolish the freehold, which was viewed negatively. We have noted how the freehold as well as other estates in statutory tenures were imported from England and applied in Zambia during colonialism. In the 1964 Constitution, property was one of the fundamental human rights guaranteed in the Bill of Rights, as it is today. As far as land is concerned, it meant that government would abstain from interfering with the right to property (land) including the right to own it as freehold without first taking the matter before a referendum, to change the Constitution together with the necessary Parliamentary approval. The Bill of Rights chapter in the 1964 Constitution was entrenched, i.e. it required a referendum to change and not only parliamentary approval. This restriction frustrated the new government, which had wanted to facilitate delivery of land to indigenous people after independence. Due to the rigidities of the Lancaster House Constitution, Government decided to call for referendum in 1969 in order to effect the necessary changes. People overwhelmingly voted to change the constitution, which was done. Consequently, the Lands Acquisition Act, was enacted in 1972, providing for compulsory acquisition of property including land in the public interest. Also, the Western Province Act was enacted in 1970, which converted Barotseland from a special status category to an ordinary Reserve on the same footing as other Reserves in the country.

5. CUSTOMARY TENURE

5.1 A lot of controversy surrounds the issue of customary tenure. This has led to gross misunderstanding, and even dismissal of the tenure as an inefficient means of owning land. Some of the issues that have arisen on this tenure is the status of the individual vis-à-vis the group members, whether land in customary areas can be exchanged or traded on the market like land in statutory areas, security of tenure of those individuals who hold customary land, etc. Since the 1995 Land Act perpetuates customary tenure, it is only fair that efforts are made to try and understand this concept.

5.2 Prior to European colonisation, customary tenure was the only tenure known to Africans. There was no title deed in the sense of the Western concept but just tenure in accordance with African customs and usage. However, the situation radically changed following colonial rule, resulting in land being divided into the divisions we have seen above. However, customary tenure is still the dominant means of occupying and using land in the country. The fact that 94% of the country is still under traditional tenure is due to colonial policy. Zambia was not a colony of Britain but a protectorate. Consequently, it was less settled by white people than colonies such as Kenya and Zimbabwe. A colony was regarded as an integral part of Britain and hence the heavy presence of the British in those territories. When 94% of land is under customary tenure, it means that this form of tenure is the most used in the country, and hence the need to focus on it.

5.3 As indicated above, there are many ways of obtaining customary land including:-

- ancestry
- allocation
- gift
- grabbing
- clearing
- inheritance/succession
- group membership, etc.

(See appendix on methods of acquiring land in customary area)

5.4 Many commentators have emphasised the fact that land rights in customary systems cannot be procured by individuals. According to this view, land in former Reserves, Trust Land and Barotseland, can only be occupied and used in accordance with customary law and usage, which, it is argued, is averse to individual tenure. Government does not exercise control over the occupation and use of land held under customary tenure. In other words, customary law has its own rules governing the occupation and use of land within that jurisdiction. A person who belongs to a particular ethnic group need only to identify the grouping to which he belongs in order to claim entitlement to land of that grouping. Similarly, there is no need for a person holding customary land to obtain government permission to build a house or to plough the land or put it to a different use than previously. Subject to the rules and customs of the community, customary tenure is basically a *laissez faire* system of land ownership, similar to freehold system.

5.5 The source of rules governing customary tenure is custom and usage of the community supplemented by statute in instances where the state has legislated on the issue. As we pointed out before, custom and usage differ from culture to culture. However, there are certain common features which cut across all cultures. One of the most important issues the rules deal with is the question of ownership of land in customary systems. Early European explorers and anthropologists attempted to deny the existence of the equivalent of an "owner of land" in customary tenure. It was argued that customary land tenure involved the use or usufruct of land in contrast to ownership. In other words, unlike in more developed European systems, early writers could not find the notion of allodial ownership of land, already referred to above. This is in spite of what we have said about the colonial authority's view of the place of the Litunga in relation to land within his kingdom. Early writers argued that in Africa, apart from usufruct rights, no other rights exist. These views were strengthened by statements from respected Africans such as the one made by a Nigerian chief to a Lands Committee in 1912. When asked to explain who owns land in Africa, the chief retorted: "I conceive that land belongs to a vast family of which many are dead, few are living, and countless members are unborn".¹⁷ It is from statements such as this that Europeans drew mistaken conclusions that Africans did not entertain the notion of individual ownership.

5.6 However, it is true that customary land is not *terra nullius*, i.e. owned by no one. Just like in Western systems, people hold rights in African customary tenure, which could be transmitted and succeeded upon from generation to generation. Transmission and succession remain the core attributes of the notion of ownership. English law stresses the fact that ownership implies a position where possession of land is not limited to some specific term of years, which excludes leaseholds. African customary tenure, as we have seen, is more or less similar to freehold tenure, which has no limitation.

5.7 Basically, African land tenure manifests in at least two forms of situations:

- a) rights between individuals
- b) rights between an individual and the state

5.8 In the first instance, an individual may have rights in land against another individual such as the right to quiet possession of the land. On the other hand, an individual may hold rights in land against society or the state. Rights to land in customary systems are expressed vertically and horizontally. Such rights may be individual, concurrent, successive, conditional or contrasting. This means that sometimes they are claimed by corporate groups, such as where a family like in West Africa claims to be the owner of a piece of land. In certain situations, the land may be enjoyed communally by members of the community, as in the case of grazing rights.

5.9 Individuality of rights is their exclusiveness. The right should leave no room for the exercise of any or similar right simultaneously over the same piece of land by anyone else. The use of the term "communal land tenure" has brought much confusion in the conceptualisation of African land tenure systems. Similarly, the term "allocate", in respect of acquisition of land, has led to serious confusion. It is not in every case

¹⁷ . T.O. Elias. 1956. The Nature of African Customary law. Manchester University Press, p. 162

that customary land is obtained by allocation. Only in a few instances does this happen. Allocation implies the existence of successive land authorities at each level of allocation, and consequently, a cascade of rights downwards and upwards. Among the Baswana people of Botswana and South Africa, this system of rights does take place. However, unless it is possible to identify the appropriate authority responsible for land allocation at every level, and unless it is possible to discern actual successive allocations and reversions taking place, it is inappropriate to speak of rights in land as obtained through allocation. Where individuals acquire specific areas of land by their own act, as by clearing vacant bush and building a house on it or cultivating it, without the participation of any land authority by any formal act, there is no allocation. If a headman merely points out a vacant land or supplies information to an individual that certain land is vacant and can therefore be occupied and used without infringing prior existing rights, this is not allocation. In most parts of the country, people do not get land by way of allocation from their chiefs or headmen. It is rare for a villager to turn to his authority for land within the ancestral area. Rather, they may discuss this with the village head or just move on and start clearing the land for their purpose. It is only when a person wishes to settle in an area other than under his ethnic group that allocation becomes relevant.

5.10 One point that needs stressing in respect of customary land rights is that contrary to misinformation, rights over a piece of land are in actual fact acquired by individuals and their use exercised by individuals. They are therefore best regarded as attributes of individuals except where local circumstances give the land to corporate groups, like in West Africa. In Zambia, land tenure practice dictates that individuals acquire the land themselves which they hold in their own rights. Thus, the right to acquire rights in land vests in individuals by reason of their being legitimate residents in a given area within which they exercise these rights of acquisition. Such rights to acquire land might arise from the fact of being born in a particular area; or from the fact of being accepted as a resident who had moved into the area from somewhere else. Likewise, legitimate residence in an area implies membership of a community, which entitles one to the land of the community. Once the requirements relating to legitimate residence are fulfilled, individuals may acquire land in any of the ways we have listed above.

6. FOREIGN INVESTORS IN LAND

6.1 As indicated above, the main motive behind the introduction of the 1995 Land Act was to allow for greater access to land by foreign investors. The whole concept of the land market in the MMD's political reforms is designed to ensure that the country opens up to greater foreign involvement in the economy, and land is one such important aspect. During the 1975 Land reforms, land was nationalised resulting in many foreign investors leaving the country. The decision to pronounce bare land as having no value irked many people especially the proponents of the market. The 1995 Land Act came to reverse this situation and to reintroduce capitalism in land.

6.2 Section 3 Part 11 of the Land Act contains elaborate provisions on the powers of the President to alienate land but one can not miss the impression that it speaks loudly on alienation to foreigners. The circumstances described in the section under which the President is empowered to alienate land to non-Zambians clearly shows an unchecked desire to sell Zambia as a whole to foreigners, for the sake of foreign

capital. At least eleven circumstances have been approved by authorities under Section 3 for the President to grant land to them. And when it is considered against the background of the Lewanika concessions above, it becomes abundantly clear that King Lewanika was more cautious than the present government in opening up land to foreigners. For example, Lewanika prohibited the BSA Company from giving grants of land or carrying out explorations in Barotseland and North Western Province. Furthermore, he insisted that grants of land to non-Zambians should be held subject to the rights of local people holding customary land. Section 3 opens the entire land to ownership by non-Zambians. An attempt was made in Section 3 (4) to ensure that the President, in making an alienation, did so whilst respecting customary rights but the final wording of the provision does not help matters. All that the subsection requires is that when alienating or granting land in a customary area, the President should "take into consideration the local customary law on land tenure, *which is not in conflict with this Act*" (sic). This last injunction limits the extent to which customary law can check the excesses of the President and foreign nationals. If it was intended to limit the powers of the President by subjecting them to customary law, then the intention has not been born out in the statute. The fact that the limitation on presidential powers to alienate land has itself been severely limited by "which is not in conflict with this Act", shows a clear desire by authorities not to be restricted or unreasonably fettered by customs. Between customary society and foreign investors, they have no doubt chosen the latter. This differs sharply with the protections set out for indigenous rights in colonial Reserves which were explicit and specific. In short, under the 1995 Act, customary land rights have given way to the needs of investors.

6.3 Furthermore, Section 3 read with Section 9 ensures that once granted land, investors would not be bothered by squatters or illegal occupiers of their land. Section 9 makes it a criminal offence to occupy any land without lawful authority. It does not acknowledge historical claims to the ownership of land, for example, as a reason for occupying it and neither does it provide an alternative to those who might as a matter of fact be occupying land illegally, not out of desire but desperation. Given that the Land Development Fund does not cater for compensation for those evicted from "their land" to give way to investors, for example, the poor have no protection under the Act. According to the present arrangements, compensation to illegal occupiers of land is discretionary, not a right. This means, for instance, that the thousands of families "squattling" on so-called mining land (on which mining companies hold mining or surface rights) is purely at the mercy of the new mine owners without protection in the Constitution or the Land Act. Compensation on their being evicted would depend on the good will of the mine owners and government but cannot be claimed as a right.

7. BOUNDARIES

7.1 After colonialism, there has been numerous boundary disputes especially between chiefdoms in various parts of Zambia. Customary law does not have a formal method of demarcating boundaries of land held under customary tenure. Nevertheless, individual landholders are usually well aware of the extent of each other's boundaries and normally respect them. Whenever they occur, disputes over boundaries are almost always settled on the spot and are not left to litigation. In recent years, holders of customary land have taken to fencing their pieces of arable land to prevent damage to crops, which also serves to demarcate boundaries. The Fencing Act does not prohibit

a holder of customary land from fencing his land and the practice is highly desirable. In the absence of survey and registration of this land at the Lands and Deeds Registry, fencing reduces boundary disputes.

8. SALE OF CUSTOMARY LAND

8.1 This is one of the most controversial subjects in customary tenure. Even though sales of customary land do take place in various parts of the country, they are still rare and limited to places with a somewhat developed economic base. Land sales are still viewed suspiciously and even negatively when they involve customary land. This is basically the result of subsistence economy coupled with abundance of land. Once there is land scarcity and the economy somewhat begins to develop, land sales begin to manifest. Development leads to scarcity of land and therefore to land acquiring an exchange value. This is what has happened in urban and peri-urban areas. In many parts of Africa, land markets have slowly been replacing traditional conceptions. As early as 1938, a court in Cameroon, then ruled under Nigeria, decided, in the case of *Wokoko v. Molyko*¹⁸ that custom was not static and that sales of land had superseded any earlier practice of not selling land. In this case, the question for the court was whether in Cameroon, sales of land had replaced the previous practice of not selling land. When the occasion arose to determine the same question in Zambia, the court did not pronounce a sale of customary land invalid only on the ground that it was customary. In *Siulapwa v. Namusika*,¹⁹ the issue involved the sale of a village house in Northern Province, but without securing presidential consent. When the seller reneged on the sale and could not complete the transaction, the buyer commenced litigation against the seller. Commissioner Cleaver Musumali did not even address the issue of whether the sale was or was not valid. Rather, the case was decided on the assumption that it was valid and the only question was whether Section 13 (1) of the 1975 Act on Presidential consent applied to sales of traditional land. The court held that it did apply.

8.2 In most customary areas, however, authorities still apply the false distinction between land and improvements. Headmen and chiefs can allow a sale of an improvement a person has added to the land through the expenditure of his labour. Improvements such as trees grown, houses built and other things can be sold while the land may not. This is what we found out in *Kasisi*²⁰, near Lusaka. A man, not hailing from that community, had built a bar and house on a piece of land he had been allocated by the headman. However, after a while, he moved to his home province leaving the improvements. The headman told us that he could sell his bar and house but not the land. He said the land belonged to the Soli ethnic group, which prohibited individual sales of land. This is the false distinction we have referred to. The house cannot be such without land. In English law, a house is a fixture, which means it cannot be separated from the land. It is a futile exercise to try and separate fixtures from land because this is practically impossible.

8.3 Customary land can also be loaned. This is when the person loaning the land does not relinquish or transfer the rights out right to the borrower of the land. He merely allows the land borrower the use of his piece of land. Often, no term is stipulated for

¹⁸ . *Wokoko v. Molyko* [1938] 14 N.L.R.41

¹⁹ . *Siulapwa v. Namusika* [1985] Z.R. 21

²⁰ . Own experience during research, date of research: August. 1994

the transaction but the borrower knows that the lender will resume occupation of the land at any time after giving reasonable notice to that effect. The notice is necessary to allow the borrower time to reap the crops, which he has planted. Usually, African land loans do not entail the payment of money in return but are usually based on good will and reciprocity between parties. In a Barotse case of the Prince and the Ungrateful Borrower (1942)²¹, the issue was whether a royal prince in the Litunga establishment could recover a piece of land lent by his father to an ungrateful councillor. Even though the case dealt with different issues, it shows however that land in customary tenure can be lent and borrowed. Similarly, it should be mentioned that in North Western Province, in particular, customary law has for a long time now recognised land pledges. This is when, a person who wishes to borrow money from another hands over to the money-lender a parcel of land as security for repayment of the loan. If the loan is not satisfied, the lender takes the land. Sometimes, the produce of the land and not the land itself may be pledged. The counterpart of pledging in customary tenure is mortgage or charge in English tenure.

9. STRANGERS

9.1 As indicated before, Zambians have for a long time taken residence in a part of the country other than their birth-place. Sometimes, strangers from different countries would settle in an area subject to customary law. As a rule, strangers have no difficulty in settling in a chosen area and have been able to obtain land in the same way as members of the local community. With time, a stranger becomes a legitimate resident entitled to enjoy the same rights to land as those of the members. However, as a stranger, he needs the assistance of local people from time to time to point out to him which areas of land are free of rights. However, the position of strangers would usually remain inferior to that of locals from the point of view of customary tenure. The local community usually develops a hostile attitude towards the stranger at some time. This happens, for example, if the stranger is too productive or there are too many strangers in the area that local people fear being deprived of their land. Hostility among the locals arises towards the stranger if due to his enterprising and successful life, he begins to live a higher standard of life than the locals. This attitude has been known to drive strangers out of the area even if under the constitution, the right of freedom of residence is one of the fundamental human rights. Currently, in Chibombo, there is a family that originated from Monze and settled there some ten years ago. After being received by the headman and the local community and given land to settle, they have now been told by the same headman to go back to where they came from or at least to vacate the area as the land they had been given is said to be needed by local people. This is a violation of the constitutional right of residence guaranteed for every Zambian. But this explains the insecurity that bedevils strangers in customary areas where authorities do not forcefully enforce the constitution.

10. RIGHTS OF WOMEN IN CUSTOMARY LAND

10.1 From the point of view of law, women enjoy the same rights in land as men under customary tenure. In fact, there are a few women who hold land in customary tenure and have managed to succeed as farmers. But in general, far few women than

²¹ Mike Gluckman. 1942. Barotse Jurisprudence, p.123.

men hold land in their own right. This is due to patriarch and the fact that most women spend a substantial part of their lives as married women.

10.2 In those matrimonial societies where marriages are generally uxorilocal, i.e. the husband moves to live at his wife's village, a woman may have had a small garden cleared for her by her relatives before marriage. After the marriage, the family of the wife would give the newly married couple more land to cater for her and her husband's needs. The husband then acquires only contingent rights for the duration of the uxorilocal marriage. In the event of divorce or death, of the husband, the widow will retain the land or such part of it as she wishes.

10.3 On the other hand, in virilocal marriages, i.e. where the wife moves to her husband's village, she will only have the use of her husband's land at the latter's pleasure and in the event of a divorce or husband's death, she will usually return to her own relatives. She acquires no rights of her own in her husband's land. In such a case, few women have fields cleared for them to hold in their own right. Widows however are regarded sympathetically. Often, they have land cleared for them by other men and over such land they can claim undisputed rights even though it is in the land of a deceased husband. This is particularly the case where the widow had children with the deceased spouse. Where a woman has been living in a virilocal marriage and is widowed but elects to continue living at the village of her late husband, she will normally be allowed to continue using the land which belonged to her late husband for as long as she wishes. But she acquires no independent rights in the land. In one case, on the lake-shore near Mpulungu, a man died leaving a widow and three daughters. The widow continued to live at her husband's village and use his land. Some years later, a nephew of the late man returned to the village and tried to claim the land on the ground that as no patrilineal descendants of the deceased wanted the land, he should be allowed to take it and dispossess the widow. His claim was rejected by the family. He was told that the widow was entitled to use the land during her life time if she so wished, and that after her death, her daughters as direct patrilineal descendants of the deceased husband would have prior rights to succeed to the land rights if they wished.²² Nevertheless, the fact that women are women is an obstacle to holding land in many cases.

11. GRAZING LAND

11.1 While rights in arable land are acquired and exercised by individuals, grazing rights are exercised in common by all members of a community. Grazing rights may be described as communal, in the proper sense of the word. Anyone can simultaneously graze his cattle or goats on the same piece of land as the other. The reason why grazing rights are not exercised individually is twofold:

11.2 In the first place, the long dry season in Zambia means that the overall carrying capacity for cattle is low and twelve or more acres per beast is usual. Therefore, extensive grazing is inevitable. This is not possible unless on a large piece of land and cattle is allowed to wonder. Second, the cattle of a number of individuals are headed and grazed together. This is the tradition. Heading arrangements are practised

²² . Report of the Land Commission. Republic of Zambia. 1967. P. 56.

whereby an owner of cattle combines his beasts with those of another or other. It is not practice for one individual in a village to head his animals alone.

12. SECURITY OF TENURE

12.1 Security of tenure is one the main problems cited against customary land. It is argued that holders of customary land risk losing their rights to it at the discretion of chiefs and other traditional authorities. There can never be a better falsehood against customary society than this. Rights in customary land are basically of two types:-

- a) of permanent and total nature; and
- b) of a temporary and partial nature.

12.2 Where the rights are of the first type (such as ancestral rights), a person enjoys complete security of tenure to occupy and enjoy the land to the maximum extent possible. There is no customary rule of law, which deprives him of his land. Similarly, even corporate land, i.e. clan land, is for the clan as long as the clan persists. Even if an individual decides to leave his place of dwelling, his land rights do not lapse. Practice in various parts of Zambia can bear testimony to this conclusion.

12.3 But if an individual is holding borrowed land, the position is the reverse. A borrower has no security since no specific agreement is concluded. The lender can at any time give notice of his intention to reclaim his land. Due to increased population especially in areas near urban centres, a good number of people are resorting to borrowing land. Also, due to poor rainfall in places such as in Southern Province, many people are moving away from there to other places in Central, Lusaka and even as far as Northern Province. Even within the provinces, there is a lot of movements among people partly due to modernisation. The issue of insecurity arising from borrowed land is becoming a crucial challenge.

12.4 Rather, insecurity in customary areas is caused by the State itself. Grants of land to investors in customary areas otherwise known, in the 1995 Land Act, as "conversion" of customary to statutory tenure have been the leading cause of insecurity in these areas. During colonial rule, residents of reservations, were protected from non-natives. Reserves were out of bounds to non-natives. On the other hand, if a title deed was going to be issued, say a villager in a Trust Land wants to sell his land to a non-native, the Orders provided that the sell should be witnessed by a magistrate in the area who must also attest to the contract. Also, the magistrate should aver that the consideration proposed was adequate and that he was satisfied that the seller knew what he was doing. Finally, the District Officer must approve the sale as well as the District Commissioner. The District Commissioner was also a judicial officer in his own right. All this was preceded by a public inquiry convened to enable people with interests in the land to ventilate their views on the proposed sale. This safeguarded the rights of not only the seller but also the people in the community. At present, a conversion of customary land to statutory land is virtually a secret process so that people that are likely to be affected by the alienation have no opportunity to question the transaction. All they see in the end are bulldozers and hordes of people ordering them to leave as the land that belonged to them before has since changed hands. This is the most threatening form of insecurity customary land-holders face.

12.5 The issue of converting customary tenure to statutory tenure is most controversial, least of all because through it, customary land is becoming less and less. The 94% that is said to be customary land is based on old estimates when the extent of each category of land was estimated. It could be much different if new measurements were taken today. More and more people have today been obtaining title deeds to customary land in addition to what is being granted to non-Zambians. The State has also been getting large chunks of land from customary areas for such purposes as state farms, rural reconstruction centres, resettlements, and other public purposes. The first observation we can make about the idea of converting this tenure to statutory tenure is that there is no provision in the law for converting statutory tenure to customary tenure. If land has been converted from customary tenure to statutory tenure, it can not be taken back to its original tenure again. Even in other jurisdictions, this has been a problem. For example, in Menominee Indian Reserve in the State of Wisconsin, in the United States of America, there are pieces of land within the reservation area which were granted to individuals as freehold properties before the reservation was declared and which the local Indian officials have been battling since then to retrieve, without much success. Due to constitutional requirements, it is not easy to cancel a title deed once issued. In Zambia's case, even if the title deed is cancelled, the land does not revert back to customary tenure. Its status remains converted: state land. This shows that the whole idea of conversion from customary to statutory or leasehold tenure in Section 8 of the Act is merely aimed at getting rid of the former while promoting the latter. It is a device to "kill" the customary society. In early 60's, government in Kenya decided to issue country-wide title-deeds to everyone holding customary land. This is probably the only case in Africa of nation-wide statutory conversion of customary tenure. Only few pieces were left for common use, e.g. grazing. Also, the pastoralists Maasai communities totally rejected the policy. Otherwise, the entire country was held on statutory tenure. The result is that forty years later, millions of people have no land. Most of the individuals who got the title deeds as family heads later sold them leaving their kin on the streets. The title deed has led to massive dispossession of land rights instead of securing those rights. Perhaps, the best way to deal with this question would be not to deal with it now. Since land in Africa is also owned by the unborn, it would be prudent to leave the issue tenure to the future generation to decide because after all, it is not yours to do as you like.

12.6 The method of converting land from customary to leasehold tenure are suggested in the Act although it does not define them explicitly. First, a person must of course, be a holder of this land through either one of the above methods. Second, s/he must approach the chief for approval to convert the land. Some chiefs have obtained title deeds to their land which, as we have pointed out, is an abuse of public trust because there is an element of interest involved in this. However, the Act does not make exceptions which means even chiefs must follow the same procedure when discarding what is in actual fact their title to leasehold title. Chief's approval is a problem, which brings insecurity. Unlike ancient chiefs, modern chiefs generally do not exercise caution. People have obtained large parcels of land over which there are prior existing rights of others resulting in insecurity. Besides, Section 8 does not make provision for the participation of the poor to air their views on the intended conversion. We have seen that during colonial rule, an intention to convert tenure from customary to statutory was a serious process which first required the holding of a public inquiry. This secured transparency and accountability unlike under the current procedures

which only refer to a chief, without public involvement. In Tanzania, the law provides that when a person wants to get a title deed to customary land, all the adult members of the community must have a meeting at which the matter is discussed and a recommendation made. Of course, one reason for this is that Tanzania has no chiefs. But the practice of involving all the adult members rather than just one person is to safeguard against possible abuse of powers by that one person. It is recommended here too that the involvement of the adult members of the community in which land is situate is essential to safeguard their interests and at the very least, the Act should require approval of both the chief and the community.

12.7 Chief's involvement ends at "approving" the conversion and it must be observed that often, chiefs discharge this function without capacity. There are no surveyors or other technical experts to help chiefs discharge their duties. Consequently, the decision is usually made arbitrarily without any clarity of such issues as the extent of the parcel of land approved. In 1985, the Ministry of Lands issued Land Circular No. 1 in which it set out this procedure, namely, to get approval of the chief and then that of the local authority before the Commissioner of Lands can consider the conversion from customary to leasehold tenure. Under the 1995 Act, these procedures have been codified in statutory form. One of the provisions of the Circular recommends that no more than 250 hectares of land may be converted at any one time. This, however, is not in the Act. A number of chiefs and the government have previously approved far more than the 250 hectares. In the end, after the chief's approval, the matter ends there for the latter. The chief has no power to sign the conveyance as one of the parties to the contract. In Ghana, on the other hand, Kings and chiefs actually sign the conveyance regarding the conversion they approve of their land (see copies of conveyance signed by Ghanian traditional authority). In Zambia, the contract will be between the Commissioner of Lands (on behalf of the President) on one hand, and the lessee on the other. The chief is not a party. From the chief, the council or local authority in the area must approve the conversion, which it does through a resolution so that the decision is taken collectively. In many cases, councils have not gone along with chiefs approvals or have downgraded them. This shows that the involvement of councils can be important as a mechanism to check the use of power by chiefs while the Commissioner of Lands checks both the chief and the council. In the end, it must be observed that this procedure is merely intended to help the President through the Commissioner of Lands decide on the issuance of the title deed (see appendix on steps for obtaining a title deed).

13. ABANDONMENT OF CUSTOMARY LAND RIGHTS

13.1 Once an individual has established full rights over a parcel of land in a customary area, these rights continue to prevail until they are extinguished. If the holder of the rights expires and the rights are not inherited to another, they will automatically lapse. However, during the lifetime of the holder, he can only extinguish the rights by abandoning them. There are no rules governing the act of abandonment. It is a question of fact in each case whether the holder has abandoned his rights. Determining this fact is not easy because as pointed out already, a holder of customary land can leave it unused for a long time without having to lose it. It is common to see land lying fallow while the holder concentrates on other parcels. In order to determine whether the land has indeed been abandoned, regard should be had to all the surrounding facts. Village head persons are important in this respect as they

are most likely aware of the land within their areas, which has been abandoned, using a criteria responsive to local circumstances. They can tell if there are any existing rights in a piece of land even if it may appear disused. Generally, there is no presumption of abandonment where land has been rest to fallow.

13.2 In areas practising the chitemene system of agriculture (shifting agriculture), it is very difficult to determine abandonment. Since it is cultural for people to move from one area to another sometimes every season, land that has been worked on the previous year or season is likely to appear abandoned. Also, recent movements especially from Southern Province to other provinces or from Eastern Province to Lusaka or other provinces create similar problems. Some people after moving from their original home maintain remote ties hoping to return at some future time if things do not work out in the new "home". Others would not even attempt to cut their ties to their original home even though they may stop using the fields. Facts that could be taken into account would include things like how often he returns "home" to visit, attend funerals, etc.

14. INHERITANCE

14.1 Succession in English law is primarily governed by statute. Statute prescribes the making of wills, including the conditions governing testamentary dispositions. Similarly, statute determines the course of action to take in the absence of an intestate. A statute governing intestates is like a will by statute in the absence of a will. English law presupposes an identifiable estate as well as the possibility of identifying an individual who shall succeed to property.

14.2 On the other hand, succession to property in customary law is not limited to succession to an identifiable estate or assets. It is concerned with succession to a cluster of rules formerly held by the deceased if these rules continue to exist after his death. Such rules are far wider than the possession of assets. Rules involve matters of rights and obligations in respect of others, as well as expectations of duty fulfilment of others towards oneself, and rules can involve rights and obligations concerned with property. Consequently, inheritance to land could be one of the many clusters but by no means the only one. In African law, a successor to the deceased takes responsibility of all duties due to the deceased as if he had arisen from the grave. On the other hand, English law simply requires the executor to distribute the estate and after this, his assignment is finished. In Africa, the death of a person constitutes transfer of all his roles and responsibilities to the one chosen to inherit his estate. Sometimes, the heir to the deceased does not necessarily inherit the land rights. Another person may inherit the land rights and in the event no one wants to inherit the land, the rights may lapse. Due to the fear of being bewitched in cases where it is rumoured that the deceased died due to jealous people had over his fields, no one would volunteer to inherit them. Also, it depends on whether land was valuable for others to express interest to inherit it, otherwise it can just be given to a kin. It is important to note that under the Intestate Succession Act, 1989, customary land is specifically excluded from the rules governing inheritance. In other words, though there is now a statutory framework for the distribution of an estate of an estate of a person who dies intestate, it does not apply to customary land. Customary law and usage is still the *modus operand* of determining succession to land rights in customary land.

15. LAND DEVELOPMENT FUND

15.1 Section 16 of the Lands Act establishes a Land Development Fund. This is supposed to be funded by government through appropriations by Parliament. In addition, it should receive seventy-five percent of the fees paid under section 4. This is payment for lease charges, survey fees, etc. Seventy-five percent of these fees should go towards the Fund and the rest to the treasury. Finally, the Fund should receive fifty percent of ground rent collected from all land. Although the Fund is vested in the Minister of Finance, its management and administration has been entrusted to the Minister of Lands. The Minister of Lands is supposed to use the Fund to open up new areas for development of land. Similarly, a Council that wishes to develop an area can seek this funding.

15.2 Section 16 does not adequately provide for the use of the funds. The idea of a Fund in the jurisdictions that have it is not just "to open up new areas for the development of land", as section 18 provides. It is more than that. This is the money which can be used to meet the cost of land reparations. Government can use this money to invest in social services so that the owners of the land which is now being converted to leasehold estate benefit from the occupation and use by the converter. In the United States, a procedure exists whereby money raised from the use of Indian land as well as government's own grants are channelled through public assistance programmes to Indians. Communities can set up local funds from this money to uplift the poorest in their midst while some of it can be applied towards support HIV/AIDS programmes. In other words, the fund could be a useful instrument for dealing with poverty alleviation, the effects of HIV/AIDS and many other ills that dog the community in which land is situate.

15.2 The idea of vesting the Fund in the Minister of Finance makes it subject to the whims of the political decisions regarding the allocation of funds at the Ministry of Finance. Nowhere in the provisions of the Act is the fund invested with autonomy. It is subject to the decisions of political authority through the Minister of Finance, which makes it a weak instrument to steer development. As a result, the Fund has been a still-born. It never took off from the time of its establishment. The Minister of Finance has simply never funded the Fund. There are many areas agricultural settlements that have been waiting to be opened up for years. If it had been seriously drafted, even the Minister of Lands would not have been necessary to be entrusted with the twin tasks of management and administration. A separate machinery to manage and administer the Fund free of political biases should have been established. Lastly, it should be observed that already during colonial rule, there did exist a similar Fund. The difference was that the colonial Fund really operated. One of the functions of the colonial Fund was to compensate those landholders in customary areas who would be dispossessed of their land. The present provisions do not cater for this. There is no provision in the Act to compensate those who had been or would be forcibly removed from their land even though there are numerous evictions country-wide. The Fund should have catered for this.

16. LANDS TRIBUNAL

16.1 The 1995 Land Act establishes a Lands Tribunal. This was proposed by the Commissioner of Lands and the Registrar of Lands and Deeds Registry during the drafting of the lands bill. The idea was to find a cheaper and efficient means of settling disputes that arise in land. It will be recalled that during colonialism, the idea of convening an inquiry before people are evicted or land is converted from customary to statutory tenure is built around the same concept. A non-judicial mechanism for the settlement of land disputes has always been part of Zambian land law. Courts are congested with workloads and it is very expensive to pursue cases in courts. Most people that generally face evictions are desperately poor to mobilise funds to hire lawyers to argue their cases for them. This is why Section 20 provided for the Tribunal.

16.2 But the Act is discriminatory of the poor, in a number of respects. It provides, for instance, in Section 25, that a person may appear before the Tribunal either in person or "through a legal practitioner at his own expense". The right to legal representation in the constitution is a basic human right. Given that most disputes are between individuals and the State, it is very unfair for the Act to deny the individual the right to be represented before the Tribunal at the expense of the State. The principle of "equality of arms" will not have been satisfied if legal aid is denied to those who genuinely deserve it. But even more, the idea of a Tribunal as a middle-course justice system has been destroyed by the Act itself. As pointed out, the idea was to have a cheap, simple and efficient mechanism for the resolution of disputes. But in practice, the Tribunal has become even too technical to allow easy participation by lay persons, which was the original intention. Consequently, many people that have disputes feel intimidated to appear before the tribunal because it has become another court. At a time when the judiciary itself is undergoing change to rid itself of some undesirable actions like commercial cases by forming commercial arbitration forums, it is not necessary to turn the Tribunal into another court. Section 23 (5) provides that, "the Tribunal shall not be bound by the rules of evidence applied in civil matters". But the practice shows that the Tribunal Secretariat insists on properly drawn forms and affidavits before the matter can be entertained. This is a violation of the letter and spirit of the Act and constitutes discrimination against the poor. Similarly, most Tribunal sittings have taken place in Lusaka and the Copperbelt. This discriminates against rural people and makes the Tribunal an alien institution in the eyes of the poor.

6.3 Appeals from the Tribunal lie straight to the Supreme Court. This is provided for in section 29 of the Act. The fact that appeals do not lie to the High Court is intended to facilitate the dispensation of justice which could become blocked in the red-tape of channelling cases through an overworked High Court. The problem however is that the Supreme Court is not a court of first instance but an appellate court proper. In other words, it will have no opportunity to hear the witnesses first hand as would a High Court. In other words, when all is taken into account, the advantages secured by providing a fast track appeal process from the tribunal appears outweighed by the disadvantages.

7. THE CONSTITUTION

7.1 There is no better way of ending a discussion such as this with a brief look at the Constitution, to determine exactly what it says in relation to land. First of all, there

isn't an explicit provision in the Constitution on land. Many African constitutions do have provisions specifically on land to stress its importance in the life of the nation and its inhabitants. Under the Ethiopia Constitution, not only is land addressed in the Constitution but also some of the key issues on land ownership such as pastoral rights. In Ghana, the Constitution addresses the issue of customary land including the status of traditional rulers in relation to it. In Zambia, as pointed out, the Constitution refrains from providing specifically for land.

7.2 However, article 16 of the Constitution guarantees the right to property. The clause prohibits compulsory acquisition of property, in this sense including land, by the state. This is a vertical pledge by the state to abstain from interfering with the enjoyment by individuals of their property. However, the provision is not absolutely guaranteed. It is limited in a number of respects outlined in the clause. Paragraph (j) empowers the state to compulsorily land in terms of the Lands Acquisition Act where such land is proved to be abandoned, unoccupied, unutilised or undeveloped. Similarly, paragraph (k) provides for compulsory acquisition, again in terms of the Acquisition Act, of land whose owner is determined to be absent or non-resident. Both the two clauses, it must be understood, do not refer to customary tenure. As we have seen, customary land is beyond the reach of the statutory acquisition arm because no such equivalent concept exists in customary land law notions.

7.3 Also, it is not a contravention of the right to property under article 16 where the property that has been compulsorily acquired is a mineral or mineral oil or natural gas or any right accruing from a licence issued prospecting or mining minerals. The failure by the holder of a title to land or licence to comply with the terms in that title or licence justifies the acquisition. Finally, paragraph (g) empowers the state to derogate from the property clause as guaranteed in which case it can justifiably violate individual right to property if it can show that it is "implementing a comprehensive land policy". In other words, the property clause does not prevent the President from instituting a comprehensive land policy which could violate individual rights but in that case, the violations are not regarded as infringements of the guaranteed right. However, the use of the word "comprehensive" suggests a limitation on the use of these powers. It is not just any change of tenure that is protected from the allegation that rights have been infringed. Government should prove that it is engaged in a comprehensive land policy in order to enjoy the protection of the clause. Once this is proved to be the case, individuals must stand aside to let government go ahead with its policy to benefit the majority. Any compensation made in respect of infringements that take place under this policy should be based on principles which appreciate the right of the general public to benefit from the land as a whole. What would obviously not be protected under this clause would include situations like land grabbing by war veterans in Zimbabwe. Such actions are not based on a "comprehensive land policy". Finally, article 16 protection is limited to the extent necessary to allow for the conversion of freehold to leasehold, as provided for under a law. This is what made it possible in 1975 for the Land Act then to declare all freeholds as automatically converted to leaseholds, without the owners seeking compensation. Similarly, the restrictions on the freedom to alienate land that were introduced in Section 13 of the 1975 Act did not entitle the property owners who lost that freedom to recover from the state. Restrictions were imposed on the freedom of individuals to sell their land, subdivide it, sub-let and do a host of other things, without a cost to the state. It is important that the Constitution explicitly provides for

land. The vestment of land should be one of the cornerstones of the Constitution, preferably in the entrenched section to secure land from easy temptations.

CONCLUSION

It is not possible in this short study to enumerate all the problems haunting the 1995 Land Act or the opportunities created by it. This was merely an attempt to highlight the most visible and main problems and opportunities. What Zambia urgently needs is a broadly based land law which takes into account not only the short-term economic benefits but the rights of the people especially the poor vulnerable sections of society. As the country grapples with enormous problems including HIV/AIDS, retrenchments and the results of structural adjustment of the economy, it is important that a land tenure system able to respond to these problems is in place. The purpose of this study is to incite debate for a major land reform to look at every aspect of our land tenure system, and with everyone on board, so that a law that can steer the country forward begins to germinate. Land law reform in Zambia is an urgent necessity.