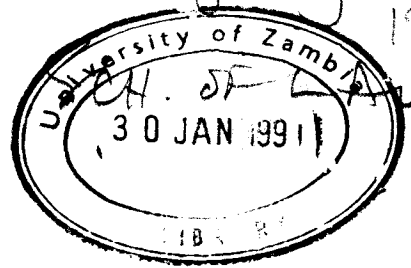


THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW



I recommend that the Obligatory Essay prepared under my supervision by Sarandos, Martin Joseph Zalounis entitled:

LEGAL AND PRACTICAL CONSTRAINTS
TO AGRICULTURAL DEVELOPMENT OF
CUSTOMARY LAND IN ZAMBIA.

be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements relating to format as laid down in the regulations governing obligatory essays.

DATE: 5/10/90.....

.....
DR. A.C. MULIMBWA

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

LEGAL AND PRACTICAL CONSTRAINTS TO AGRICULTURAL
DEVELOPMENT OF CUSTOMARY LAND IN ZAMBIA.

BY

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OBLIGATORY ESSAY
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DEDICATION

I dedicate this work
to my wife and children.

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CHAPTER ONE

LEGAL AND PRACTICAL CONSTRAINTS TO AGRICULTURAL DEVELOPMENT OF CUSTOMARY LAND IN ZAMBIA.

Introduction.

The Executive Diary for Zambia Airways has an apt introduction concerning Zambia:

"Zambia is a large country, as large as France, Switzerland, Austria and Hungary combined, covering some 750,000 square kilometres."¹

It is also a fact that Zambia finds herself in the twentieth century occupying a place between developed nations and some under developed nations by posing as a "developing" nation.

Land as a natural resource is a major factor in the development of any nation. Depending on how we handle the land issues in Zambia, this country can develop into a modern economy, with its citizens enjoying a high standard of living, or it can stagnate and eventually collapse. Zambians have to decide as to whether they remain rural villagers, labouring as subsistence farmers, with their treasured customary laws,

fixed permanently in place, or they courageously upset the apple cart and take revolutionary measures in order to jettison the rural population into the modern twentieth century and assist them participate fully in international markets by exporting crops and commodities of international standards in order to earn for themselves and for mother Zambia, the much needed foreign exchange.

The author strongly believes that the treasured customary laws of Zambia affecting land, have to be cautiously but courageously altered, for the sole benefit of the population and future generations.

With this background, this paper proceeds to examine the current procedures, formal and informal of acquiring land in the rural areas, and the legal and practical impediments encountered. An attempt is made to make some fairly modest suggestions to overcome the constraints.

Several relevant pieces of legislation affecting rural areas are evaluated and a modern approach, with new ideas is outlined with the ultimate objective of removing legal and practical obstacles in order to pave the way for a serious and modern agricultural development in the Reserves and Trust Lands to emerge.

Why the rural areas? It is important to outline the basic reasons for selecting the rural areas as an area for discussion. The Zambian economy is dominated by the copper industry. Copper is a diminishing asset, and other products, are always competing with copper. The country's dependence on copper is borne out by the following report:

"Out of a total of about K673.8 million, contribution by copper, zinc, lead, cobalt, amethyst, and silver, in 1964, for example, copper alone accounted for approximately K650.4 million, or 96.5%. In 1957 copper and cobalt accounted for 93% of the value of total export earnings."²

The copper metal, is bound to run out sooner or later, so we have to fall back onto the largest piece of land, that is the Reserves and Trust Lands. A report of the Lands Department says:

"Between them (but excluding Protected Forest Areas and Forest Reserves), Reserves and Trust Land occupy nearly, seventy-one per cent of the total surface area of the country, and support almost sixty per cent of the population."³

The second reason is that the majority of the Zambian people live in the rural areas. The 1969 population census recorded a total population of 4 million people but the 1975 projection for 1984 was above Five million people.⁴

The traditional sector accounts for roughly 70% of the population which is chiefly dependent on peasant or subsistence agriculture.

D.J. Siddle, a prominent geographer, takes the view that the total area used for subsistence agriculture is 5000 square miles or 14.5% of the country's total area.⁵

Mulimbwa has, on the basis of Siddle's assessment concluded that:

"in any given year, therefore, over 80% of the land is either lying fallow or being used for non-agricultural purposes such as mining, forestry, game reservation etc."⁶

The third reason for concentrating on the rural areas, is that there is a 'time-bomb' being created by the Zambian leadership themselves. The various components of the 'bomb' are as follows:

The Zambian population is increasing at a fast rate. Professor S.K. Gaisie of the University of Zambia states,

"Zambia's population is expected to grow...to 8,073,400 in 1990 and 11,834,100 by the year 2000."⁷

All these people need food, clothing, shelter and employment. The school drop-outs of Grade VII

per annum are as follows:- in 1975; 77,580; in 1980; 103,269, in 1985; 178,311.⁸ The unemployment figure is ever rising. These young people have basic human needs and aspirations. If these needs are not met, there are bound to be very serious problems.

Added to these problems, is the national debt. Zambia has a current external foreign debt of \$7.2 Billion.⁹

To diffuse this human 'bomb' a revolutionary approach is called for if this country is to attract young people to live in the rural areas, and those who are unemployed in the urban sector, to return to the rural areas. The fourth reason is that this large country that has lakes, rivers, and dams, is not self-sufficient in food.

The Zambian government is morally obligated not only to create job opportunities but to raise the living standards of the rural and urban population, if social justice is to be attained.

By careful planning, and dismantling of old fashioned customs and legislation, and the introduction of progressive investment policies, these rural areas

should have selected strategic productive areas to produce crops, create jobs and sell surplus produce to earn foreign exchange.

Turning the Reserves and Trust Lands into significant productive areas involves the total interplay of various political, financial, economic, geographical, sociological, psychological, legal and technological and managerial considerations.

In this paper the author confines himself to the legal and practical aspects to this multifaced approach, suggesting, what should be retained, what should be discarded and what new ideas should be adopted, in order to accelerate agricultural development in the Reserves and Trust Lands of Zambia.

And one of the major obstacles to agricultural development is the question of a sound land tenure system. As Mulimbwa has stated,

"nothing, however, has been done to involve a land tenure system that will encourage investment and prevent land accumulation in the Reserves and Trust Land."¹⁰

The challenge is, can be law create favourable conditions in the rural areas to enable the peasant farmer, and local and foreign entrepreneurs to invest in agricultural ventures in the rural areas.

CHAPTER TWO

A BRIEF HISTORICAL DEVELOPMENT OF THE DUAL LAND TENURE SYSTEM IN ZAMBIA.

At the advent of colonialism in the late 19th century, a new system of land tenure was super imposed on the existing indigenous customary land holding system. At that time, between 1899 and 1911, the British South Africa Company was the sole administering authority in the territory. This company continued to administer the land up to 1924 when the British Crown assumed direct control.

Although, strictly on the authority of, Re: SOUTHERN RHODESIA,¹¹ the British South Africa Company did not own the vacant land in North-Eastern Rhodesia; nevertheless the Company went ahead with alienation of land to white settlers. Title to these lands was therefore defective.

Reserve Land

Before 1924 the British South Africa Company had established provisional reserves for the indigenous Africans but such settlements lacked a legal basis. Africans could not be compelled to live in these reserves. In fact both the North-Eastern Rhodesia Order-in-Council of 1899 and the Northern Rhodesia Order-in-Council of

1911 guaranteed the existing interest in land of Africans. Thus Africans could only be legally deprived of their land if they willingly relinquished land to the British South Africa Company which in turn had to pay them compensation. The Crown however, had overriding powers to establish Reserves over any lands by virtue of the Order-in-Council of 1911.

By an Order-in-Council of 1928 there was established the first reserves for the indigenous Africans in the East Luangwa District of North-Eastern Rhodesia. Both the British South Africa Company and the North-Charterland Exploration Company were anxious to promote European settlement and investment but by this time African Reserves had not been created, an event which would release more arable land to European settlers.

To resolve this problem, the Government on 10th October, 1924 appointed a three member Native Reserves Commission chaired by Chief Justice MacDonald, C.J. As a result of this Commission, certain lands were for the first time specifically set aside as Reserves for the exclusive occupation of the indigenous Africans, by the Northern Rhodesia Crown Lands and Native Reserves Order of 1928. Europeans could acquire land in Reserves

only for exceptional reasons and then only for a five year term subject to renewal.

Trustland 1935-1947

Governor Young, who had been Governor for Nyasaland (now Malawi), was in 1934 appointed Governor for Northern Rhodesia (now Zambia) and he was anxious to introduce the Trust Land scheme into Northern Rhodesia. The trust land policy differed from reserve policy on the basis of duration of interests of a non-native. The interest granted to non-natives could not exceed five years in Reserves, whereas the interest enjoyed by non-natives in trust lands was 99 years. This could be granted to non-natives so long as it was in the Governor's pleasure and it was in the interest of the community as a whole.

However, like Reserves, Trustland was vested in the Secretary of State for Colonies.

Lord Moyne, the then Secretary of State, accepted the Trustland proposition in 1931 subject to certain conditions, which were:-

- (i) There should be no merger between Reserves and Trustland.
- (ii) Alienation in Trustland could be made to Europeans so long as such alienation was in the interest of the Africans.

"There can be little doubt that interests in these lands are held under Customary law. The relevant instruments of creation, however, make no specific mention of Customary law. s.7 of the Zambia (State Lands and Reserves) Order has merely this message on the intended interests: 'The President shall within each Reserve assign lands to natives, whether as tribes or portions of tribes..' The Trust Land Orders are virtually silent in this regard."¹²

With regard to State land, however, the received English law and Zambian statute law apply.

(iii) Native Authorities could be consulted whenever Trustland was alienated to Europeans.

(iv) Good agricultural land would also be made available in Trustland.

The Trustland issue was settled by October, 1947 by the Native Trustland Order-in-Council. Thus, by 1947 three categories of land had been created in Northern Rhodesia, namely:-

1. RESERVE LAND
2. TRUSTLAND
3. CROWN LAND (now State Land)

Crown land was to consist of the following:-

- (a) Land for European settlement
- (b) Land for mining development
- (c) Land, the allocation of which could not at the time be determined.

At present, under the Zambian law, we have a dual system of land tenure namely:- Reserves and Trustland where the law applicable is African Customary Law, and State land. With regard to the land tenure enjoyed by Africans in Reserves and Trustland, Professor, Mvunga aptly remarks,

CHAPTER THREE

CUSTOMARY LAW CONSTRAINTS

The unwritten nature of customary law poses as one of the most serious problems. There exist about seventy-two tribes in Zambia, and customs relating to land issues are not uniform. According to Professor Mitchell J. Clyde,

"In fact, there are about one hundred and seventy-five tribal groups in the Federation, amongst whom there are at least twenty different languages and many more different dialects; and amongst whom there are widely different customs and divergent beliefs."¹³

At the time of this remark, Northern Rhodesia (now Zambia) was a member of the Federation. There is constant litigation over land disputes but the court decisions are of limited relevance since they reflect the laws of a specific ethnic group.

Besides, as Mulimbwa in the Faculty of Law in the University of Zambia, pointed out,

"The difficulty with customary law is that the very existence of a given proposition of law needs proof."¹⁴

The primary pre-requisite for an effective law is that it must be certain, and certainty is enhanced when it is written down and can be identified in a document. Efforts were made to compile these customary laws, into a comprehensive document. He goes on to say,

"In the early sixties some attempts were made in East and Central Africa to compile customary laws into "Restatements" as guides to administrators. These efforts met with difficulty owing to variations among tribal communities in the same country, and were later abandoned."¹⁵

Uncertain Rights

Customary law is not very clear regarding individual rights on land matters. What are the rights in resting land? What are the rights in grazing land. Uncertainty is illustrated in the following case of MATIMBA v KULUMBWA.¹⁶ In this case there was a conflict of opinion among assessors as to whether it is the responsibility of a person who opens a field on land currently used as grazing land to fence off the land or the shepherds ought to ensure that their cattle do not trespass on to the field and destroy the crop .

When rights in land are not certain then there is bound to be confusion, and social injustice. The rights

of women in land has been another area of uncertainty. Professor Mvunga states,

"Among the Tonga however, more than among the Ngoni and Luvale it is said that even when the wife clears the bush on her own or through hired labour, if the husband took part, tacitly or overtly, in the location of the site, the field still belongs to him."¹⁷

But he doubts the validity of this proposition which he attributes to male chauvanism. A woman depending on whether she has contracted a virilocal or uxori-local marriage, her rights in land may or may not be disadvantaged. In the case of a virilocal marriage the wife has no right to land and is only entitled to a half share in the crops in the event of divorce, Mvunga adds that her right to cultivate the husband's field only subsists during the life of a marriage. Also that in uxori-local marriages, on the dissolution of the marriage the man forfeits his land rights. He can only retain rights in land, if he acquired it by his own initiative, quite independent of that of his wife.¹⁸

Ownership of Land

There exists the added confusion of the rights of the village headman and chief over land. Chiefs in Zambia in actual practice appear to "own" the land. Of course chiefs do not own land in the strict legal sense of the term. The chief exercises great influence and

control over land matters. If a chief refuses to allocate land, that is the end of the matter. On this point, Professor Mvunga states,

"Neither the headman nor the chief can claim to have rights over land which they could use or exercise to their individual benefit by virtue only of their control functions."¹⁹

In the name of customary law, why must chiefs wield so much power over land matters? Why make them appear as landlords when in fact they are not? There is no need for this situation to obtain.

From the chief's point of view, the more land he has jurisdiction over, the more power he wields. And the converse is true. The more land he gives away to different people, the less land he will have for his own tribesmen and the less power and social status he will enjoy. Chiefs often have bitter quarrels over land matters. There was a case reported in the Zambian press. The article was headed:

"2 CHIEFS SUMMONED." This article read, I quote, "Kalomo district governor, Comrade, ZEKIAS SIAMASIKU has summoned two senior chiefs in his district, MUSOKOTWANE and SEKUTE, to discuss a territorial dispute that threatens clashes among villagers."²⁰

Do chiefs in Zambia own any territory? The answer is No. Some researchers have provided data that negate the theory that chiefs allocate land as landowners. Since land is plentiful in Zambia, for the time being anyway, sometimes land is obtained without the consent of any headman or chief. Land rights are achieved simply by clearing a piece of unclaimed virgin land. Professor Mvunga, states that,

"in a total sample of 1,208 holdings taken in all three areas covered under this investigation, 305 consisted of unclaimed virgin land initially acquired by the present land holder without any specific grant or allocation from any person or authority."²¹

He further adds,

"....it can with confidence be asserted that a person who acquired land independently of a traditional authority obtains good title even if subsequently challenged by such authority."²²

Grazing Rights

Unlike in English land law, the question of trespassing on one's private property does not arise in customary law, particularly when it relates to cattle grazing after harvest. Mvunga discusses the

existence of a concurrent interest among the pastoral Ngoni and Tonga. He states that, after harvest, cattle can graze in any field, regardless of ownership.²³ Recognition of this right has recently been recorded in the case of:-

CAPTAIN MBEWE v. NJAKILWA and Another²⁴
Resident Magistrate Court unreported)
arising from Chipata. The facts of this case were that certain cattle came upon a field belonging to the plaintiff. These cattle destroyed and had eaten some heaps of maize.

The farm was situated in a tribal area. The plaintiff sued for damages. The defendants, who were the owners of the cattle, put up the defence that according to custom in the area cattle can graze in anyone's field after harvest. They further argued that the plaintiff was negligent in that he did not complete his harvest in time, and that he should have erected a fence to keep away the cattle from entering upon his land.

The court ruled in favour of the defendant, by applying the provisions of section 16 of the Subordinate Courts Act Cap.45; which gives recognition to existing customs and usage.

These customary rights of permitting any and all cattle to graze in any field after harvest time, can cause great losses to cattle owners, because disease infected cattle can transmit diseases to other healthy cattle. Zambia will never be able to export beef to the European Economic Community if this continues. This practice also encourages laziness amongst those who do not plant and harvest, because their cattle will graze in the field of the person who has worked hard to plough and plant and harvest. One would argue that if these customs and habits were encouraging productivity and good health, in the communities of the rural area, then one would have a good premise from which to support them. But since this is not the case, then such customs should be discontinued.

Conflict of Interest.

From a broad perspective, one cannot assume that the interest of the chiefs and headmen, and the interests of the Rural District Council all point in the same direction. There may exist a conflict of interest, over a piece of land. For instance, the

chief may want to retain a piece of land for his own children or villagers, whereas the Rural District Council may at the sametime want the same land for a rural project. At present, according to Dr. Mulimbwa other than in cases where an official Re-Settlement Programme in being implemented the District Rural Council has no powers at all, hence the absolute requirement of the chief's consent. The council only acts as a watchdog to ensure that dealings between private individuals and chiefs are above board. But the Commissioner of Lands (on behalf of the President) has extensive powers for compulsory acquisition of any property of any description. Hence a recalcitrant chief might find himself deprived of land.

To avoid such conflicts, District Councils should have legal powers to approve the allocation of land and the role of the chief should be limited to one who should merely be consulted but whose consent is not mandatory.

Subordinate Courts Chapter 45 Section 16
Application of African Customary Law.

This chapter of the laws of Zambia makes African customary law applicable. I quote, in part, the relevant section,

"....such African customary law shall, save where the circumstances, nature or justice of the case shall otherwise require, be deemed applicable in civil causes and matters where the parties thereto are Africans, and particularly, but without derogating from their application in other cases in civil causes and matters relating to marriage under African customary law, and to the tenure and transfer of real and personal property."²⁵

The author strongly feels that land must be free from customary laws. That land is not an expanding commodity, and therefore, it is far too precious to be left to the whims of chiefs and headmen to allocate anyhow. The author has personal experience of a village headman who allocated land to charcoal burners so that he could gain financially from the sale of charcoal; after cutting down trees and burning them for charcoal. Such practices will not stop, unless the land is free from customary laws with all chiefs and headmen stripped of their powers over land matters. This of course, is a dangerous proposition and has serious ramifications and therefore needs very careful consideration and the consequences discussed at length. But the author feels that it is better to have land lying idle as virgin land, than have it allocated, misused and finally destroyed.

Therefore, in the light of this proposition, a law should be passed to amend and delete section 16 chapter 45 of the laws of Zambia, only as far as it relates to land matters. Of course as soon as one takes

such an action, a vacuum is created. Another law should be passed to the effect that all land in the Reserves and Trust Land fall to be administered directly by the Commissioner of Lands acting on behalf of the President.

If the land in this country is to produce crops then such land should be allocated to persons, villagers, commercial farmers and companies that are committed in investing capital, equipment and labour. What is harmful to agricultural development is for vast tracts of land to be held by a chief or headman; all in the name of customary law and tradition.

At a meeting of the United Nation Independence Party at the National Council held in 1970.

The President of Zambia, Dr. Kaunda pointed out,

"but land accumulation may not only result from private ownership. It may also result from rights of usage over vast acres of land by individuals under customary law."²⁶

The leadership in the Government should not retain a system that is pleasing to the population but harmful to the long term interests of the country. But the authorities should be bold enough to drop the method of appeasement and do what must be done to the land so that agriculture

can flourish in Zambia.

Non Sale-Ability of Land

There are people who merely want to squat on land; and there are those serious-minded persons who want to work the land and grow crops. Therefore, there is need to interview people and find out exactly what they want to do before the land is allocated to them. For land to fall into the right hands, there must be a mechanism worked out which enables land holders to dispose of their unwanted land as quickly as possible. And one of the prerequisites is for land to attract a basic monetary value so that the poor peasant who wants cash for his land can sell out. He should be able to sell his piece of land to any Zambian willing to buy. In all land dealings, local Zambians should have the first option. What should be achieved is that there should be mobility of land, horizontally, and vertically. Let us not deceive ourselves that every unemployed Zambian is able and willing to go back to the land and grow food. With frequent transactions in land, this precious commodity begins to settle down into capable hands.

In Zambia bare land of itself cannot be sold for a money consideration. It is only the unexhausted improvements which attract a monetary value. This is a serious basic constraint in agricultural development in Zambia. Since land has no monetary value, peasants on customary land have a lax attitude towards the land they possess. The majority of villagers simply till the land, often with no crop rotation at all, for several years, and when the soil is depleted of its fertility, they simply move on to the next fertile patch of land or move on to another district.

This was the case in the Mumbwa District of Zambia. A large number of peasant farmers immigrated from Southern Rhodesia (now Zimbabwe) and settled in the Mumbwa District before and after 1964. They tilled the soil for some years, but when the soil lost fertility, they simply packed their bags and shifted to the Mkushi District of Zambia.

Further, there are those who simply cling onto the land they have acquired through their local chief. Such a person could be living in Zimbabwe or Malawi or elsewhere in Zambia but having a friend or relative to keep the place for him, with no developments going on. Such absentee landlords are still to be found in the rural areas. An example of this, is Kabwe rural where there is a piece of land of about 12 acres in size and it only has four mango trees; and has been

lying idle for about five years now. In 1984 the author approached the local headman who agreed to allocate the 12 acre land to the author. As soon as the author started clearing the land, the absentee landlord appeared from Kaoma, where he lives and claimed back his land by seeing the chief and giving the author a stern warning not to trespass on to his land. The chief confirmed that the land belonged to this man, and the author had to vacate the premises. It is interesting to note that up to this day, the land is still lying idle, and yet the 12 acre plot could easily be sold for K10,000.00 as it is located just 13 kilometres from the Lusaka City Centre.

The ramifications on this 12 acre plot that will lie idle for a long time to come are many. Firstly, customary law, permits one to be an absentee landlord. The land is simply lying idle. The land, because it is adjacent to Lusaka, is affected by market forces and so has appreciated in value to the tune of K10,000.00. There are Zambians, who are willing to pay the K10,000.00 to the absentee landlord, who lives on another farm in Kaoma District. The bare land, cannot be sold because of customary law rules, and finally the end result is that an investor has been denied an opportunity to invest

in his own country, and secondly, he is frustrated and cannot build himself a house and grow crops. It is a completely retrogressive situation. That part of Zambia remains undeveloped because of customary law. The Kabwe Rural Council could have raised some money as administrative charges, and if the owner sold it, he could have gained K10,000.00 to be used on his farm in Kaoma District. Under customary law, in Zambia, the most precious item—land has no value and cannot be sold.

As Professor Mvunga says,

"although there are indications that sales involving land do take place, what is meant by sale of land in Zambian customary law has not yet been satisfactorily resolved. In all the areas toured under this investigation it is insisted, and there is thorough unanimity in this, that land cannot be and is not sold."²⁷

He (Professor Mvunga) continued,

"what is sold, however, are improvements on land such as permanent fixtures, i.e., buildings; not the land but the thing itself (the house), to be reimbursed for expenses incurred and labour employed."²⁸

And yet, in State land, in Lusaka, a plot No. 10514 that measures only 40 metres x 20 metres costs K279,118.00²⁹. Of course to justify this amount, the citizen is told that this amount demanded by the City Council, is for service charges. This particular

plot is only situated twelve kilometres from the Rural Area that falls under customary law! If market forces (demand and supply) can be allowed to operate in state land the author does not see any good reason for these forces to be blocked out of customary land, because the pressure for land, by the Zambian people and external investors is increasing in intensity.

Another very important factor to bear in mind is that the villagers in the rural areas are poor. They need money to purchase farming implements and crop inputs, such as seeds and fertilizers. By changing the law, and enabling them to sell their piece of land, they could raise a sum of money to solve some of their problems. Some of the District Councils are also having serious financial problems. And yet, the whole year round they are approving allocation of farms and plots with no financial gain to the Rural District Councils. Land must become a primary source of revenue for the Rural Councils. These Councils willingly impose a levy on cattle, for example statutory instrument No.26 of 1986 Gazetted on 3rd March, 1989 of the Local Administration Act (Act. No.15 of 1980) the Mumbwa District Council (Cattle Levy) By-Laws of 1989. Section 3(a) of the said by-laws imposes a levy of five kwacha per beast for each beast purchased and transported out of the

district. In similar fashion more revenue could be raised by imposing a "land levy" or term it an "administrative charge" based on the actual size of the plot of land approved and allocated. District Rural Councils could raise funds to alleviate their current financial problems.

CHAPTER FOUR

STATUTORY CONSTRAINTS

At the time of independence it was decided that the legal framework would continue to apply. In this regard the previous Reserves and Trust land Order-in-Council were not revoked and their continued operation received the sanction of the Zambia Independence Order, 1964. The only change was that the vesting of land was now in the President instead of the Crown.

As indicated previously, Reserves and Trust Lands were lands specifically reserved for the indigenous inhabitants. But the Order-in-Council permitted settlement of non-natives for limited periods.

Reserve Lands

These lands are governed by customary law. Those persons dissatisfied with customary law, could obtain leases as contained in the Orders-in-Council. Having secured a lease, the landholder ceases to be governed by customary tenure as his rights and obligations are set out in the Orders-in-Council. Leases in Reserve Land were initially granted to non-natives

for a period of five years, on condition that such investment were in the interests of the indigenous Africans. Between 1967 and 1970, there were thirty leases granted in the Reserves.³⁰ Charitable organisations and missionaries, could be granted an interest of 33 years as per (s.6A (1)(a)-(d), Zambia (State Lands and Reserves) Orders, 1928-1964 App.4, Revised Laws).

Trust Lands

This land was also governed by customary law. But under the Native Trust Land Order-in-Council of October, 1947, white settlers, or non-natives could occupy this land but only for a limited period and on certain terms. Non-natives could be issued with an occupancy licence; for as long as ninety-nine years (s.5(6), Zambia (Trust Land) Orders, 1947-1964, App.4, Revised Laws). There were 28 rights of occupancy granted in Trust Land.³¹ The occupancy licence could be granted to a non-native so long as this was in the interest of the community as a whole.

Before independence, the Reserves and Trust Lands were vested in the Secretary of State for Colonies. At independence 1964, the President took the place of the Secretary of State for Colonies. Consequently,

irrespective of the tenant, no dealings in land comprised in a Reserve or Trust Land grant (including alienation) can take effect without the consent of the President.³²

Leases and Occupancy Licences.

Since most land, in Reserves and Trust Land is still in an unsurveyed state, the State has authorised the initial grant of rights of occupancy in Trust land for an initial period of fourteen years; as contained in the Land Survey Act. Cap. 293. There are examples of two institutions that were granted occupancy licences for a fourteen year period in Trust Land. Firstly, the Tobacco Board of Zambia in 1968 was granted rights of occupancy in Trust land for fourteen years, then in 1970 after, the land had been surveyed, the term was extended to 99 years (Farm No.3576). Secondly, the Scandinavian Independence Baptist Union, was also granted a 14 year lease in Reserve land in 1973. This lease was extended to the maximum term of 99 years after survey requirements had been completed, (Lot No.1454/M).³³

When the objective is commercial and application is made by a non-Zambian for land in the Reserves and Trust land, then certain restrictions are applied. Professor Mvunga states,

"but where a tenant is an expatriate using the land for a commercial purpose without any Zambian participation, the permissible interest is for even less than fourteen years."³⁴

Moreover, the recent amendment to the Lands (Conversion of Titles) Act 1975 restricts the lease that can be granted to a non-Zambian, who is not an investor to a period of five years.³⁵ This means that if a company requires land for business purposes then government insists that at least one Zambian should be a member of the Board of Directors.

The restriction of the initial period to 14 years and the requirement that Zambians should be board members of expatriate owned enterprises cannot attract serious foreign investors to Zambia. The approach should be that each foreign applicant should be examined individually and it should be left open for companies to decide whether they require a Zambian to be a member of their Board or not. When the initial capital outlay is large and costly and the company's business stretches over a long period of time, then such projects should be given top priority and survey facilities should be made available immediately by government to enable the company obtain at first instance, a 99 years lease on the property. However, the private land developer is also at liberty to

engage his own surveyors and prepare the maps which can then be submitted for approval to the Surveyor-General.

On the other hand, Zambians in both Reserves and Trust Land, who desire to opt out of customary law, can do so by initially being granted a lease of a 14 year term by the State. Only after the piece of land has been surveyed can the 14 year term be extended to a 99 year lease, with full title deeds to the property. The Zambian is also subjected to the same procedure as the foreign investor, in obtaining the consent of the chief and District Rural Council concerned. The Zambian, if a local resident of the area, can obtain land with no difficulty at all. But when he is of a different tribe and originates from a different locality, then problems may arise. Chiefs and headmen are normal human beings subject to prejudices and sometimes imagined fears and jealousies. They are primarily concerned with their immediate villagers and their needs, and cannot be expected to take into account national and international values.

The author has personal experience in this area. A resident of Lusaka, the author wanted some land along Mumbwa Road, in Central Province. The author was advised, first to make friends with a local

contact, who had a close relationship with the local headman. This was done, but it cost money and a lot of time travelling distances of fifty kilometres, on several occasions. The author requested for 100 acres of land but during the interview, the headman and his village advisers, only approved 5 acres and warned the author that he should not fence the land, as the headman's cattle had to pass that way every morning on their way for grazing. Being a very serious investor, the author left the village a disappointed man because the 5 acre allocation, was by far too inadequate. Therefore, obtaining the headman's or chief's consent can present a very serious problem, to both Zambians and foreign investors alike.

Since the land in Reserves and Trust Land is largely unsurveyed and consequently virtually unmarketable, the law should make provisions to facilitate its allocation by removing all the constraints outlined above.

The Land Reforms of 1975

Under the forces of supply and demand, the value of land, particularly in cities like Lusaka, was escalating at a very rapid pace. This development encouraged speculation in land. The President of the

Republic of Zambia, in his speech of 30 June, 1975, delivered at the sixth meeting of the United National Independence Party National Council in Mulungushi Hall, Lusaka, Zambia, stated, I quote,

"the cost of vacant plots in and around Lusaka and other cities is simply shocking, to say the least; what greed! What shameless broad-day light robbery! What exploitation! There are land lords comrades, who bought their one acre plot for K3,600 in 1970. Last year they were demanding K8,000.00 and this year for the same plot they want K10,000.00."36

The Party and Government decided to curb these exploitative tendencies by imposing controls through restrictions on dealings in land. This, it was thought, could best be achieved by vesting all the land in Zambia in the President and requiring consent of the President in all land transactions. This policy of the Party and Government of Zambia resulted in the enactment, of the Land (Conversion of Titles) Act. Cap. 289 No.20 of 1975 and this Act came into force on 1-7-1975. The preamble to this Act, states,

"An Act to provide for the vesting of all land in Zambia in the President for the conversion of titles to land, for the imposition of restrictions on the extent of agricultural land holdings, for the abolition of sale, transfer and other alienation of land for value and for matters connected with or incidental to the foregoing."37

The following land reform measures were to take effect on 1-7-1975. These were:-

(i) Farmland

all land held by farmers under Freehold were converted to Leasehold for a period of 100 years. All unutilized tracts of this land were to be taken over by the state.

(ii) Land in Residential Areas, in Cities and Towns

those who held Freehold Title to their properties lost it and received instead the leasehold title of 100 years. All sales of vacant lands, with the exception of developments on land, were prohibited and all vacant and undeveloped plots were to be taken over either by Local Authorities or the Central Government.

(iii) Real Estate Agencies were closed down.

(iv) Rent Control:-

Blocks of flats rented out to individuals, rented buildings owned by individuals whose value or cost had been realized, and all properties rented by Party officials and civil servants were to be taken over by local authorities.

The Land (Conversion of Titles) Act Cap.289 was the principle instrument for the realization of these policies. In this paper it is not intended to examine this Act, in detail, but the purpose is to highlight certain features and how these provisions affect customary land.

In the first instance does this Act, the Land (Conversion of Titles) Act. Cap. 289 apply to the Reserves and Trust Lands? Section 3 of this Act, defines land as including land of any tenure. On strict construction it would appear that the Act Cap. 289 of 1975 also applies to land held under customary law. The following case supports this view.

Siulapwa v. Namusika³⁸. In this case the court held that the Land (Conversion of Titles) Act, Cap. 289 of 1975 is applicable to the customary sector. This case illustrates that any transaction in traditional land, which does not have Presidential consent as required by section 13(1) is illegal and void ab initio. By section 13(1) of cap.289 no dealings in land can take place without the consent of the President. Such dealing may involve sub-letting, sub-dividing, selling, transferring, assigning, mortgaging and charging etc. Failure to secure consent renders a transaction illegal.

This section 13(1) of cap.289 gives force and meaning to the vesting of legal ownership of all land in the President; in accordance with section 4 which reads:-

"....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." ³⁹

In the Reserves and Trust Lands the provisions of section 13(1) of cap.289 are largely ignored. Chiefs and headmen in the villages are allocating land continuously without obtaining the President's consent. Amongst themselves, villagers are selling their huts, brick built homes for cash without Presidential consent. Those people who wish to acquire title deeds to their rural land, are the ones who make a formal application through their local chief and Rural District Council and finally, through the Ministry of Lands and obtain the President's consent. This procedure is outlined in a government circular issued by the Ministry of Lands and Natural Resources entitled, "Procedure on Land Alienation."

Land Circular No.1 of 1985

The current practice for securing land of non-customary tenure (i.e.) leases and occupancy licences, is that contained in the circular No.1 of 1985 first cited above. The procedure in this

circular appears very neat and straight forward on paper.

Prior to the introduction of the new procedure in 1985, a letter of consent from the chief on which the Executive District Secretary would sign to confirm the approval of the Council to such grant was all that was required to have a certificate of title issued by the Commissioner of Lands. This system was found to be a source of confusion and abuse as such signatures could be inserted by unauthorised persons. No physical inspection of the land to establish its size, nor research into existing rights were conducted.

The new procedure requires a committee of a Rural District Council to pass a resolution affirming its consent which resolution should be brought before and confirmed by a full council of the rural district; whereupon the applicant is required to submit the letter of Consent of the Chief, the minutes of both the Committee of Council and those of the full Council to the Commissioner of lands who would on being satisfied that a physical inspection took place issue the certificate of title.

But in practice it is tedious, cumbersome and slow. Just to illustrate this point, there is the case of an emergent farmer, who had his letter of approval for his

farm signed by a senior chief and dated 27/8/1983. This letter was finally given to the applicant after making numerous journeys by road between Lusaka and Ndola. The land is located in Ndola Rural District. The Ndola Rural District Council held meetings on 12/2/1986 and also on 27/3/1986 which finally agreed in principle to allocate the land to the applicant. The farmer eventually obtained his certificate of Title No.4869 on 6/10/1986. This process took two years and nine months!

There are very few investors, particularly foreign ones, who are prepared to wait, for a piece of rugged land and bush for so long. Therefore, the current procedure in obtaining land is also a great obstacle to the efficient allocation of land to the people. Since Zambia is in a hurry to develop, we should also be in a similar hurry to give up the land to the people.

The author suggests that people applying for rural land should not be treated the same. For example a committed investor, local or foreign, who intends to invest two to ten million kwacha into an agricultural project cannot be treated the same as a villager who simply wants about two to five hectares of land for subsistence farming.

To speed up the process of land allocation a new procedure is suggested in Schedule No.1 attached.

Applicants in Category A.

In this category we envisage simple villagers. Most villagers, have limited resources, so that they should only be given enough land they can efficiently manage. Any person requiring land of 0 to 10 hectares in the rural areas would follow the procedure in Category A.

In this instance the role of the chief is merely advisory. The government lands officer would have a significant role to play. The latter should have executive powers to overrule the chief in case of a dispute over land. Some of his functions would entail for example the reception and interview of the applicant, and the determination of the following:-

- (a) Is the applicant a Zambian?
- (b) Is the land applied for free?
- (c) Is the land suitable for settlement?
- (d) Does this allocation of land fit in with the overall National and Provincial plans for the particular area.
- (e) Finally, approve and allocate the land.
- (f) And carry out a simple demarcation and registration at village level.

- (g) Maintain simple records of these allocations and transmit the information to a Central Records system held at the District Council.

The role of the government lands officer and chief should be that of facilitating the allocation of land from 0 hectares to 10 hectares maximum.

Since the majority of the rural population is poor, it is envisaged that the moment land is allocated and registered into the Rural District Council register created for the purpose, the land would automatically assume a basic value of K1,000-00 (one thousand kwacha per hectare). Such monetary value placed on all bare land would achieve four objectives:-

- (a) It would create easy access to land;
- (b) It would attract some of the urban population to return to the rural areas;
- (c) It would enable the poor farmers to use their land as security for loans from financial institutions, and
- (d) It would enhance the development of agriculture from subsistence to semi-commercial as farmers would be encouraged to remain permanently in one particular place because of the added value to the piece of land.

Category B in Schedule No.1

In this category we include the big time commercial farmers, and small scale farmers and foreign investors. These applicants should be able to acquire land without reference to the chief. According to the new suggested procedure in category B, these applicants should approach the Provincial Authority directly and obtain information about availability of suitable land for the project proposed. The big time investor is in a hurry to obtain accurate, information, quickly. If we don't handle such people with care, they leave and go elsewhere. We must realize that Zambia is not the paradise of this earth! Such investors, should be able to obtain their certificate of title to land within a period of two months; since there are only two stages involved, that is, the provincial and ministerial authorities. If neighbouring countries are issuing title deeds within two months, then Zambia should issue title deeds within one month. This, however, will entail, the initial location of unoccupied but arable land in each and every district so that blocks of farm land of different sizes are surveyed and prepared and ready for handing over to investors.

CHAPTER FIVE

PRACTICAL CONSTRAINTS

1. The basics

For agriculture to succeed there are certain basic requirements which must be present, and these are:-

- (i) Identification of good arable land.
- (ii) Land survey and demarcation.
- (iii) The analysis of soil types to determine agricultural potential.
- (iv) Water supply.
- (v) Supply of power, electricity or solar energy.
- (vi) Access roads.
- (vii) Stumping and clearance of agricultural land.

The other requirements, such as competent management and finance can be supplied by the entrepreneur. The seven prerequisites outlined above should be met by the Government. The present approach of each individual going around the country side looking for land through chiefs

is totally onerous. It is also suggested that there should be a national scheme, where, the entire nation contributes money, e.g. in a tax levy for agriculture, and this effort should be supplemented by government, and more funds could be solicited from international donor agencies and injected into this national fund for agriculture.

2. Lack of Commitment by Government.

Slogans like, "back to the land," and the "agricultural revolution," will not produce results, unless there exists serious planning and such plans are backed up with large sums of money and serious commitment by the government of Zambia. The degree of commitment to agriculture of any government is reflected in the allocation of money in the annual budget.

The figures contained in schedule No.2 clearly indicate that the Zambian government is not serious with agriculture. There is only a lot of lip service paid to it. I consider this to be a major practical constraint in the approach to agricultural development in Zambia.

3. National Blue-print-plan

We are in the scientific age and therefore, nations have to tackle the agricultural problem from the scientific approach. Zambia needs a national committee of experts in land, law, and agriculture. The task of this committee would be to produce a national blue-print-plan on land and agriculture for the entire country for the next twenty five years.

4. Rural land unsurveyed.

After 25 years of independence, Zambia's rural land is still in an unsurveyed state. There is the usual cry that the Zambian government has no money. But when it affects politics, money is always available, as can be seen from the following press article. The Zambia Daily Mail, volume one No. 8,090 dated Friday, July 6, 1990. The article was headed,:

"K50m set aside for referendum."
I quote, "Government has set aside K50 million for the referendum on October, 17, according to supplementary estimates of expenditure being considered by parliament."

5. Long Procedure in Obtaining Title

The current procedure, in obtaining title to land, is too cumbersome and the process too slow.

6. Absence of Control

The present freedom of villagers to settle wherever space is available is also a constraint in agriculture. There is urgent need for the introduction or revival of village re-grouping, in order to create well organised villages with all the social services provided, such as schools, clinics, water and access roads; and where feasible, electric or solar power.

7. Water and Electricity Package.

At present each farmer has to tackle the water and electricity problems, with his own meagre financial resources. He is required to pay in cash the full cost of the borehole or electric installation. To drill a borehole for water, with casing, its cost approximates K130,000-00 and electric power, as per attached, schedule No.3 costs K11,800-00 per span, i.e. electricity between two poles. Few emerging farmers, are large sums of money. This is a serious constraint and there is an urgent need for a water-electricity package to be worked out. So that farmers can obtain these two essential services in the initial stages and pay the bill in instalments over a long period.

CHAPTER SIX

CONCLUSION

In conclusion, I would like to make the following recommendations, in order for agriculture in the rural areas to take off so that the peasant farmer can make a valuable contribution to the national economy; as well as serve the interests of the unemployed and retired urban dwellers who wish to return home to their villages and engage in agriculture:

1. The outdated Orders-in-Council governing Reserves and Trustland be re-cast in the context of the land (Conversion of Titles) Act.
2. In the context of the exercise of control, there is need to simplify land administration in such a manner that reference to the Commissioner of Lands and the branches of his office, in terms of discovery of available, surveyed and serviced agricultural plots and the terms of occupation and exploitation thereof, should be adequate to enable the President to alienate the same without the mandatory consent of traditional authorities.

3. This will also entail the establishment of a board of rural agricultural land which will embrace all land under customary law to monitor, and manage with the help of local district councils, traditional authorities, etc. and through the office of the commissioner of lands to inform and educate interested investors on where and or in what district such agriculturally potential land can be acquired.

With regard to the bottle-necks arising from the observance of customary law, it is encouraging that the government has taken the right step in making the land reforms contained in the Land (Conversion of Titles) Act applicable to Reserves and Trustland. It is also encouraging that the courts have through the Siulabwa case confirmed the application of the Act to customary land. But while these reforms have been introduced into the rural areas, their practical realisation through the gradual erosion or supplanting of customary law has yet to be achieved. It is, in any event, necessary to review the reforms themselves, particularly the concept of land without value enshrined in the Act in the context of motivation for land development generally and agricultural development in particular.

SCHEDULE NO.1

| Category A New Procedure | Category B New Procedure | Category C Current Procedure |
|--|---|---|
| <p>G.R.Z. Land Officer 1. and Chief (as the person to consult). ↑</p> <p><u>Applicants</u></p> <p><u>Villagers and Subsistence farmers.</u> land size 0 to 10 Hectares</p> | <p>2. MINISTRY OF LANDS ↑</p> <p>PROVINCIAL 1. Head Quarters ↑</p> <p><u>APPLICANTS</u></p> <p>Big and Small Commercial Farmers land size. 11 to 250 Hectares</p> | <p>4. MINISTRY OF LANDS ↑</p> <p>3. Rural District Council ↑</p> <p>2. Chief ↑</p> <p>1. Headman ↑</p> <p><u>Applicant</u></p> <p>All applicants Any Land size.</p> |

Schedule No.2

Ministry of Agriculture and Water Development
(Estimate of Expenditure) 1980, 1985, and
1990. January - December.

| Year | Ministry of Agriculture Kwacha alloca- tion. | Percentage % | Total amount allocated to all Government Mini- stries and Departments. |
|------|---|-----------------|--|
| 1980 | K25,150,000. | 13.15% | K191,308,000. (Page 247) |
| 1985 | K115,112,911 | 6.27% | K1,836,838,680 (Page xxi) |
| 1990 | K19,090,407 | 0.08% | K23,597,843,170(Page xxi) |

SCHEDULE NO. 3RA ELECTRICITY SUPPLY CORPORATION LTD.,PRICE SCHEDULE FROM 1ST JANUARY, 1990TT'S (COMPLETE)UNIT COST)

| | |
|----------------|-------------|
| KVA 11/0.23kV | K 75,000.00 |
| KVA 11/0.4kV | K111,000.00 |
| KVA 11/0.4kV | K127,100.00 |
| 0 KVA 11/0.4kV | K152,000.00 |
| 0 KVA 11/0.4kV | K174,100.00 |

TT'S (COMPLETE)UNIT COST

| | |
|--|-------------|
| 0 KVA 11/0.4 kV Rural type S/S xcluding cost of S/S Building) | K246,200.00 |
| 0 KVA 11/0.4 kV Open type S/S with fencing) | K486,000.00 |
| 0 KVA 11/0.4 kV Standard B/B S/S xcluding cost of S/S Building) | K432,700.00 |
| 0 KVA 11/0.4 kV Standard B/B S/S xcluding cost of S/S Building) | K463,900.00 |

O/H LINESCOST/SPAN

| | |
|--|------------------|
| 2 mm ² ACSR 1 - ϕ 2 - w | (1) * K 8,400.00 |
| 0 mm ² ACSR 1 - ϕ 2 - w | K11,400.00 |
| mm ² ACSR 3 - ϕ 4 - w | (2) * K11,800.00 |
| 0 mm ² ACSR 3 - ϕ 4 - w | K18,200.00 |

11 kV O/H LINESCOST/km

| | |
|--|-------------|
| mm ² ACSR 1 - ϕ 2 - w | K114,500.00 |
| mm ² ACSR 1 - ϕ 2 - w | K144,500.00 |
| mm ² ACSR 3 - ϕ 3 - w | K157,500.00 |
| mm ² ACSR 3 - ϕ 3 - w | K202,500.00 |
| 0 mm ² ACSR 3 - ϕ 3 - w (H-POLE) | K332,200.00 |

33 kV O/H LINESCOST/km

| | |
|--|-------------|
| mm ² ACSR 1 - ϕ 2 - w (1 - Earthwire) | K175,500.00 |
| mm ² ACSR 1 - ϕ 2 - w (1 - Earthwire) | K205,500.00 |
| mm ² ACSR 3 - ϕ 3 - w (1 - Earthwire) | K277,000.00 |
| mm ² ACSR 3 - ϕ 3 - w (2 - Earthwire H - Pole construction) | K537,000.00 |

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