The University of Zambia
School of Law

The Zambian Land Tenure System and the Process of Land Alienation: The Need for Land Reform in Zambia

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Table of Contents

Dedication.................................................................................................................... i
Declaration................................................................................................................... ii
Acknowledgment.......................................................................................................... iii
Abstract......................................................................................................................... iv

Chapter One - Introduction
1.1 General meaning of Land....................................................................................... 1
1.2 Land tenure system............................................................................................... 1
1.3 Land alienation system......................................................................................... 2
1.4 Basis of Land Tenure and Alienation in Zambia..................................................... 2

Chapter Two - Historical Background
2.1 Development of Land Tenure System in Zambia................................................ 3
2.2 The Northern Rhodesia (Crown lands and Native Reserves) Order in Council 1928 4
2.3 Reserves and Trust Lands.................................................................................... 7
2.4 Crown Land.......................................................................................................... 8
2.5 After Independence............................................................................................... 8
2.6 Land in Barotseland............................................................................................. 9
2.7 The 1975 Land Reforms...................................................................................... 10
2.8 The Lands Act 1995 - Present status quo......................................................... 10
2.9 The Draft Land Policy (October 2002)... ............................................................ 11
2.10 Interim Report of the Constitution Review Commission (June 29, 2005)........... 12

Chapter Three - Legal Framework
3.1 Genesis of the 1995 Land Act............................................................................. 14
3.2 Principal Features of the Lands Act 1995............................................................ 18
3.3 Vestment of Land............................................................................................... 20
3.4 One Country Different Tenures........................................................................... 25
3.5 Customary Tenure............................................................................................. 32
3.6 Foreign Investors in Land.................................................................................. 35
3.7 Sale of Customary Land...................................................................................... 37
3.8 Security of Tenure............................................................................................. 39
3.9 Land Development Fund................................................................................... 42
3.10 Lands Tribunal.................................................................................................. 43
3.11 The Constitution................................................................................................ 44

Chapter Four - Institutional Framework
4.1 Institutional Framework Overview................................................................. 47
4.2 The Presidency.................................................................................................... 47
4.3 The Ministry of Lands....................................................................................... 48
4.3.1 Lands Tribunal.............................................................................................. 49
4.4 Office of the Vice-President................................................................................ 49
4.5 The Ministry of Justice..................................................................................... 50
4.6 The Ministry of Local Government and Housing............................................. 50
4.7 The Ministry of Agriculture and Co-operatives................................................. 50
4.8 The Ministry of Works and Supply................................................................... 50
4.9 The Ministry of Commerce, Trade and Industry............................................... 51
Chapter Five - Conclusion and Recommendations

5.1 Conclusions

5.1.1 Importance of the Land Tenure System and the Process of Land Alienation

5.1.2 The Basis of Land Tenure and land Alienation

5.1.3 The Legal Framework

5.1.4 Institutional Framework

5.2 Recommendations

5.2.1 The Basis of Land Tenure and land Alienation

5.2.2 The Legal Framework

5.2.2.1 Need for Amendment of Statutes

5.2.2.2 Revisiting the 1995 Land Act

5.2.2.3 Guaranteeing Right to Access Land in the Constitution

5.2.2.4 Protecting squatters

5.2.2.5 Vesting of Land in the President

5.2.2.6 Empowering Chiefs

5.2.2.7 Status of Customary Land

5.2.2.8 Gender Sensitivity

5.2.3 Institutional Framework

5.2.3.1 Need for an Integrated Approach

5.2.3.2 Inadequate Resources and Insufficient Technical Capacity

5.2.3.3 The Process of Securing Title Deeds

5.2.3.4 Jurisdiction of the Land Tribunal

5.2.3.5 Democratising Commissioner of Lands' Powers
Dedication

The fruits of the efforts and intelligence of each human being should reach all others; those who know should teach and those who don’t know should learn.

I dedicate every part of this work to all those who have arrived at these stimulating convictions – the teachers and their students.

And to my daughters – Akende, Beene and Nyemba – for sharing my convictions that there’s nothing impossible, all that is required is had work and for remembering that there are still many years of struggle ahead; even when they will be women, they will have to do their part in the struggle to create a more just, fair and humane society. Meanwhile they have to prepare themselves, be very revolutionary - which at their age means to learn a lot, as much as possible, and always be ready to support just causes; and also to obey their teachers and not to think they know it all too soon. That will come with time. I hope they will continue to fight to be among the best in school; the best in every sense, and they already know what that means: good conduct, seriousness, helpfulness to others, etc.
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This work is not the fruit of my personal effort alone. It stems from concerns, thoughts and ideas I have expressed over the last few years at various gatherings and the research I have carried out over the last nine months. However, this work has been developed and elaborated in greater depth with the necessary and decisive guidance of my supervisor, Mr. Patrick Matibini. And I thank him for that.

My greatest and deepest gratitude, however, must be reserved for those who did the most to make this work possible. They are, once again, the staff of Post Newspapers Limited, my lecturers, tutors and classmates at the University of Zambia, School of Law, who have committed themselves with great conviction to their duties.
Abstract

Zambia has abundant land resources. Most of this land is very fertile and suitable for agriculture. But millions of people in Zambia have no access to land. Access to land is still one of Zambia's major nightmares. However, unlike other countries, this is not due to the shortage of land. There is plenty of land in Zambia to satisfy the needs of everyone. The shortage is due to the inefficient methods of land ownership, its management and utilisation - it is difficult for the majority of people to secure land.

Consequently, there are hundreds of thousands of people with no access to that land. Their rights to land are more often insecure. And legal and economic insecurity creates a credibility gap in relation to the rights of the holder. Many people just 'sit' on their land without using it or using it efficiently and productively because they lack everything that is necessary for this. Due to the unfavourable economic environment in the country, even people with access to land are having to go hungry. This is the case in most rural areas. Although they may have access to land, most people lack the means for developing it. It is very difficult for people to access the technical know-how and the resources necessary to ensure rounded development of their land without the support of government.

Zambia, with 752,000 square kilometres, has abundant land for her population of roughly eleven million people. However, many Zambians do not have land of their own. The majority of the people in Zambia are merely squatters on the land they hold which hinders them from developing that land fully. One of the main reasons behind this is the country's land tenure system and the system of administration. Land is obtained through a certain framework called land law and policy. Sometimes, a country's land and policy can facilitate the acquisition of land by individuals. At other times, this is one of the obstacles which hinders access to land and therefore to development.

This research attempts to find out why Zambia has not completely modernised its land law and policy and how it is partly governed by customary law and partly by modern law. And also find out how this mixture has not always been smooth and why there have been tensions between the two systems, sometimes developing into full-blown controversies. This study reviews and examines the literature on land, the lands Act of 1995 and related legislation to identify the extent to which they protect or abrogate the rights of the poor and marginalised. It also reviews and examines the extent to which, the "duality" of the system negates or promotes the rights to security of tenure of poor people and recommends the necessary reforms that would promote an efficient, effective and desirable land alienation system. This is necessary because "land administration systems are not static; they are responsive to changes in society. They are modified, redefined or restructured in response to many factors such as population growth and density, conflict of interest or changes in the political and economic organisation of society". This may also help 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. In this way Zambia can begin to address the problems associated with the land delivery system in the country in order to ensure equitable access to resources and promote national development. Land law reform in Zambia is an urgent necessity.
Chapter One - Introduction

1.1 General meaning of Land
In law the word land extends to a great deal more than in ordinary parlance or meaning. The general rule or maxim of common law is *quidquid plantatur solo, solo cedit* (whatever is fixed to the soil belongs to soil). And at common law the maxim *cuius est solum eius est usque ad caelum ad inferiors*: he who owns the surface owns everything up to the heavens and down to the depth of the earth.

There have, however, come to be many exceptions to this rule:

i) Land means any interest in land whether the land is virgin, bare or has improvements, but does not include any mining right as defined in the Mines and Minerals Act in any respect of land

ii) the ownership of airspace above the surface extends no further than the height of the atmosphere

Land therefore *prima facie* includes the soil, the buildings and objects attached to it. And the word *fixture* is a term used to refer to anything, which has become so attached to land so as to form part of it.

Land includes any interest in or right over land, but shall not include a pledge or other charge. Therefore, land tenure and land alienation, is for the purposes of this essay, about what may be termed *ownership*. And ownership has various sides to it. Important among these is *title*, a term which may be regarded as indicating a legal right to land.

Another aspect of ownership is concerned with the periods of time for which land may be granted by one person to another - *estate* in the land, i.e the duration of the tenancy.

It is also concerned with the restrictions placed, on grounds of public policy, on certain forms of disposition of land. The last aspect may be regarded as being concerned with the machinery of the law, i.e the technicalities of the law, or the way things are done.

1.2 Land tenure system
A country's land tenure system is the general conditions upon which land is held in that country.

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1. Patrick Matibini, Land Law lecture notes, p.1
4. Section 2 of the Lands Act, Chapter 184 of the Laws of Zambia
5. R v Trent River Authority, exp National Coal Board [1969] 2 WLR 653 at 658, per Lord Denning
6. Patrick Matibini, Land Law lecture notes 7. Section 2, Lands Acquisition Act, Chapter 189 of the Laws of Zambia
Tenure, a word derived from the Latin tenere, means to hold.\(^8\)

Tenure thus connotes not merely the holding of land, but also the holding of land from a superior 'lord', and further that the land is held in return for certain services by the tenant to his 'lord'.\(^9\)

Land tenure systems are not static, they respond to changes taking place in society.\(^{10}\) The word tenure refers to the system of rules and practices under which persons exercise and enjoy rights in land or objects fixed immovably to land such as houses.\(^{11}\) It implies a relationship between persons and land and this relationship is expressed through rights.\(^{12}\) It has nothing to do with land use and agriculture practices.\(^{13}\)

### 1.3 Land alienation system

The process of land alienation deals with how one's interest in land can be disposed of.\(^{14}\) To alienate property means, broadly, to transfer it to some else.\(^{15}\) In the case of property which is capable of being inherited, to alienate the interest carries the further meaning of diverting the property from the course of the devolution, i.e. the path it would normally follow if it had not been alienated.\(^{16}\)

### 1.4 Basis of Land Tenure and Alienation in Zambia

In order to understand the nature of today's Zambia's land tenure and land alienation system the need to know how the present system evolved is thus unavoidable. This does not mean there is any necessity to delve into history for its own sake.

All that is required is an understanding of the background of those principles which constitute the framework of the land tenure and alienation today. The next chapter is therefore concerned with such principles: tenure and alienation. The law described in the next chapter is therefore set in a historical framework. This treatment will incidentally enable certain historical matters to be explained and, thus avoiding the need to return to matters of history in later chapters. Tenure, the subject matter of this research, is the foundation on which Zambia's land law has been built.

And although certain forms of land tenure and alienation are discernible in the pre-colonial communities that constitute what is today known as Zambia, the starting point for its later evolution is generally regarded as the advent of colonialism.
Chapter Two - Historical Background

2.1 Development of Land Tenure System in Zambia

In Zambia, the present legal framework on land is the product of the country's colonial legacy. It is therefore imperative that an attempt be made to try and trace this legacy as a basis of examining the current problems. This is important not only in order to set out the history behind the current framework, but more importantly because the colonial influence is still apparent in the land administration system, leading to the confusion and doubts be-devilling Zambian system of land tenure and alienation.

Until the arrival of white settlers, all land in the territory or area today known as Zambia belonged to indigenous people. The system of law and practice that subsisted was based on indigenous law and usage. Each community had its own tenure system inherited from past generations. These communities differed according to different experiences and practices. Before the advent of the European settlers, the indigenous people, the natives, lived in accordance with their customs and traditions which differed - and still continue differ - from tribe to tribe. In some cases, land was the property of the extended family while the clan system prevailed in others. The tribe as a whole exercised overall ownership on behalf of its members. Individuals owned 'user rights' or what are known as userfract rights which in practice differ little from an English freehold. A holder of user rights held them in perpetuity. However, individuals had no right to freely transfer these rights to third parties not members of the grouping. However, this system was disturbed by colonial rule.

Northern Rhodesia, as Zambia was known, was from 1890 to 1924 under the direct rule of the British South African Company (BSA). In 1889, the BSA acquired a Royal Charter, that is a certificate of incorporation in England having a Royal seal, which empowered it to acquire land on behalf of the British sovereign. This land was to be acquired through concessions and treaties. Between 1900 and 1911, Zambia was administered by the BSA, on the basis of concessions signed between King Lewanika and the BSA, in 1900 and 1909. At that time, the country was divided into two parts, namely, North-Western Rhodesia and North Eastern Rhodesia.

17. Hansungule Michel, Women for Change Training Manual on Human Rights for Traditional Leaders, p.66
18. Ibid, p.66
19. Ibid, p.66
20. Ibid, p.66
The Concessions were later recognised by the British monarchy through a Charter of Incorporation coupled with a series of orders in council.

The 1911 Northern Rhodesia Order in Council revoked earlier Orders and led to the unity of the country which came to be known as Northern Rhodesia. However, it continued to be ruled by the BSA company as before. The 1911 Order made provision for land to be set aside for African use as tribes or portions of tribes. This provision comes from the 1900 Lewanika Concession in which King Lewanika insisted on a clause to ensure the settlers did not push the Africans in the areas covered by the concession out of their land.

An important development from the 1911 Order was that it divided land into two parts, Namely, Barotseland and other land. While the Litunga, the King of Barotseland, retained his powers to administer Barotseland, other lands became subject to company rule, save for the provision already mentioned above that Africans would not be removed from their land except only upon inquiry and by the order of the Administrator approved by the High Commissioner. Though the 1911 Order did not contain provision vesting land in the BSA, the latter claimed to be the owner of three freehold areas in North Eastern Rhodesia under the 1853 Concessions.

In 1924, an Order was introduced revoking the 1911 Order in Council. The 1924 Order took away the administration of Northern Rhodesia to the British sovereign. However, land continued to be divided between Barotseland and other land. The 1924 Order did not vest land in the Governor appointed to represent the British sovereign. However, the Governor was empowered to make grants through dispositions outside Barotseland. The 1924 Order was repealed by the 1962 Northern Rhodesia Order in Council 1962. Again, like in previous case, the Governor's powers to grant land to non-Africans were subject to the rights enjoyed by Africans who were in occupation of the land at the time of the grants, save for the three freehold areas claimed by the BSA.

2.2 The Northern Rhodesia (Crown lands and Native Reserves) Order in Council 1928

During all this time, discussions were going on among settler government officials on how to divide the land along racial lines. This led to the appointment of a Commission in 1903 with power "to consider the most suitable sites for Native Reserves in North Eastern Rhodesia".

27. An estate in perpetuity. The word estate refers to the duration of interest in land. (Patrick Matibini, Land Law lecture notes, p.3)
In 1924, shortly after the 1924 Order, a commission - "Native Reserves Commission East Luangwa" 1924-25 was appointed to inquire into what land should be set aside for the African occupation in Fort Jameson (now Chipata) and Petauke districts. Other commissions followed for the rest of the country. This led to the Northern Rhodesia (Crown lands and Native Reserves) Order in Council 1928 which divided land into Crown land and Native Reserves except for Barotseland, three pieces of freehold belonging to the BSA, as well as land the BSA alienated in perpetuity before 1924. Reserves were vested in the Secretary of State for colonies for the "sole and exclusive use and occupation of Africans".

In 1930, the colonial Government introduced a policy which was stated to be that "of providing for the natives sufficient land to enable them to develop a full native life in their own areas; sufficient land to meet the inevitable expansion of the indigenous population on these areas, and sufficient to enable government release the rest for European settlement". Crown Lands were to be for European settlement and Africans were not to have access to this land which comprised roughly 6 per cent being land along the line of rail from Livingstone to the Copperbelt and pockets in Eastern Province, Mbala, Mkushi, etc. Africans on land designated Crown Land were evicted and driven to Native Reserves.

In 1942, a new land policy was announced by government. Unalienated land or land that had not already been set aside for Africans would be declared "Native Trust Land". This land would be vested in the Secretary of State for Colonies "for the sole and exclusive use and occupation of the natives of Northern Rhodesia..." However, this was made subject to the provision for alienation for specific periods: (a) to individual natives; (b) for the purpose of establishing townships; and (c) to non-natives in special cases in respect of limited areas where such alienation can be shown to be for the benefit of the natives and where the land is not required for direct occupation provided that in such special cases, not more than a maximum of 6,000 acres is alienated to non-natives in respect of each of the existing provinces.

In 1959, the colonial government established the Northern Rhodesia (Gwembe District) Order in Council in 1959. This was in order to address the problems which arose as a result of the establishment of the Kariba Dam. The Governor was empowered to make grants as well as dispositions for fishing.

The separate status of Barotseland was retained through the Orders of 1924. However, given that the 1924 Orders were repealed by the 1962 Constitution, it was decided to insert a saving clause in this constitution.

By this clause, no law to be introduced by the Governor would contradict the concessions signed by Lewanika unless the Litunga in Council signified consent in writing to its having effect in the Protectorate. Second, it was provided that no alienation of land in any part of the Protectorate would stand without the consent of the Litunga.

At independence in 1964, the 1924 - 1963, 1947 - 1963, and the 1959 (Gwembe) Orders in Council were not revoked. Instead, the Orders were continued subject to adaptations, modifications and necessary changes. This continuation was provided for in the Zambia (State Lands and Native Reserves) Order, 1964 as well and the Zambia (Trust Lands) Order 1964. Both the two Orders transferred the land to the President in whom it was vested to hold as custodian.

It must be observed however that the separate categories of land meant nothing to the ordinary person other than that it was land, and certainly that while most people went without land, freehold land remained idle and unutilised.\(^{32}\) The owners of freehold land would hold it for the purposes of speculating it on the market or because they did not have adequate means to develop it. A number of them would be out of the country as absentee landlords.\(^{33}\)

In November 1964, government established a committee at the level of cabinet with a view to "review all aspects of land policy which was inherited on independence and to submit recommendations on a comprehensive Zambian land policy".\(^{34}\) The members of the committee were cabinet ministers with the minister of lands as chairman. Terms of reference included the power to examine all aspects of land policy and administration which were inherited at independence; examining the land problems submitted by the Provincial Working Committees; and to submit recommendations to the Cabinet on the future land policy and land laws in Zambia.\(^{35}\)

Seven months after the appointment of the Committee, a Commission of experts was appointed for the purposes of collecting information on various aspects of land law and land tenure for the use of the Committee and to make recommendations. This was in turn assisted by Provincial Land Working Policy Committees mandated to collect views at local level. Barotse Land was however excluded from this process.

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The provisions of the Orders effectively led to the two land categories we still have today, namely, statutory or state tenure and customary or African tenure. This distinction was thought necessary to distinguish the body of law applicable in each case. The manner in which interests may be acquired determines the system of land tenure applicable to it.

2.3 Reserves and Trust Lands
Reserves and Trust Lands are now called customary areas. As indicated, the law applicable in this category of land is customary land law or indigenous law. Government does not control occupation i.e. where one must build his house. Similarly, use of that land is a matter for local authorities to determine. For example, the community allocates fields and determines grazing areas, including the manner of that grazing. If a person wants to acquire a piece of this land say for a house, the first point of call is the village head. Once the village head agrees and a place allocated to him, he can start building even before the chief has been informed. This is because village heads are in actual fact the real custodians of the land. Everyone has a village to which he belongs. Even a chief has a village to which he belongs. The particular interests an individual enjoys are guaranteed by physical possession and recorded in the memories of the elders. Transactions concerning this land will therefore be 'recorded' not in a piece of paper but in the minds of seniors who might have witnessed it and this is passed on from generation to generation. Title to land in customary systems is a matter of fact to be proved by oral evidence. In occupying this land, a person is exercising a right which belongs to him as a member of the community, and not as an individual. He cannot transfer the right to occupy even if he has left the village to a person who is not a member of the same community. There is individualisation of usage of the land, but the title to occupy the land is not held by the individual. A right to occupy the land which depends upon being a member of a particular community, being accepted into such a community is not readily transferable to a person outside that community. In 1962, it was attempted to introduce legislation to enable customary land-holders to obtain statutory tenure for their land but this failed after the machinery of the ordinance was put on hold. The problem is that continued land-holding under this tenure for an individual depends on the goodwill of the group members. Acceptance into a community is not something that cannot be reviewed and an individual shown matching orders. This has happened to a number of people again and again, especially if one hails from another community or is a woman who has joined the community by virtue of marriage.

An act of misbehaviour could lead one to lose his right to occupy the land of his hosts while the death of a woman's husband almost immediately renders her landless. In this context, customary land tenure is considered to be incompatible with security.

2.4 Crown Land
On the other hand, Crown Land (now known as state land) is administered under English law. This is supported by the English law (Extent of Application) Act by which English land law as it was on the 17th August 1911 applies to the land held under statutory tenure only subject to local legislation such as the Lands and Deeds Registry Act, Lands Act, Orders in Council, etc. This is the case in spite of the fact that the pre-1925 English law was found untenable in England and most of it repealed. This was after the law was found to be cumbrous, archaic and expensive notwithstanding the fact that it is still the law in Zambia. This land could only be alienated to European settlers. Customary law did not apply to this category of land.

The interest created were those known to English law. These are estates and tenures in freehold and leasehold. The settlers were either granted freehold or leasehold estates by the crown within this category of land.

2.5 After Independence
After independence, several developments on land took place. More are still taking place now. Among the visible ones include:

1. 1970 Western Province Land Act
2. 1972 Lands Acquisition Act
3. 1975 Land (Conversion of Titles) Act
4. 1985 Land (Conversion of Titles) Amendment Act
5. 1995 Lands Act

In addition, the Lands and Deeds Registry Act, an ancient piece of legislation going back to 1916, has undergone some revisions. The most important and most recent of these is the introduction of the Common Leaseholds Act. This in effect is an addendum to the aging Lands and Deeds Registry Act. Its primary objective is to enable the issuance of title-deeds to holders of flats. Previously, it was not possible to obtain a title-deed for a flat which is part of a block of flats.

This law enables this and thereby enhances individuality through individual titling of property.
2.6 Land in Barotseland

In 1964, the Barotse Agreement incorporated Barotseland into Zambia thereby losing its special administrative status it had enjoyed since the first concessions between King Lewanika and the British South Africa company.\(^{46}\)

The independence Constitution of 1964 described Zambia as an indivisible nation based on the principle of territorial integrity. In other words, Zambia went into independence as one country.

In 1969, government spearheaded a major constitutional reform through a referendum. Given that the independence Constitution was entrenched in the bill of rights, the new government would not interfere with property, especially land owned by absentee landlords while the majority of indigenous people went without land. The referendum was a resounding "yes" to calls to amend the Constitution. Following this, the Western Province Act was enacted into law. The purpose of this Act was to dismantle the exclusive control of the Litunga over land in that part of the country and to bring this land in line with land in other parts of the country. Western Province was declared a reserve like any other.

It was vested in the President to hold for and on behalf of the people of Zambia, just like the rest of Zambia. After independence, Crown land became state land while the terms Governor and Secretary of State for Colonies were replaced with President where applicable.

In 1972, government enacted the Land Acquisition Act. This is a piece of legislation which empowers the government to compulsorily acquire land in the public interest but subject to the principle of compensation. Where land is required, it must be demonstrated that it is required in the interests of the public which is the first limitation to the powers of the President over the property of the subject. The term public interests would include such things as the public interest to build a school or a hospital, rail line, electricity utilities, etc. In other words, property like land in fact belongs to the public generally who can recall it at any time. Courts are especially excluded from entertaining questions of compensation in connection with compulsorily acquired land.

\(^{46}\) Western Province (Land and Miscellaneous Provisions) Act, No. 47 of 1970 Section 2 provides: "All land in the Western Province is hereby vested in the President as a Reserve within the meaning of land under the Zambia (State Lands and Reserves) Order, 1928 to 1964."
2.7 The 1975 Land Reforms
In 1975, the government introduced far-reaching changes to the country's land tenure system. First, bare land lost commercial value which means absentee land could be acquired by the state without compensation.47
Second, the English system of freehold prevailing in Crown lands now state lands and until 1969 protected in the independence Constitution was extinguished.48 In its place, the maximum term a person could own in land was the 100 year lease renewable.49 The lease form of tenure gave the government the flexibility it looked for with which to impose controls and conditions on the rights of land-holders.50 After the 1975 Land (Conversion of Titles) Act, all transactions in land had to precede prior approval of the state through what became known famously in legal circles as "state consent".51 It was no longer possible for anyone to transact any dealings in land without disclosing such to the state including such things as the price of the land so that government could value the improvements on that land to see if the price was consistent with the government's socialist principles.52 The land itself was valueless in keeping with the country's Humanist principles decreed by the state.53 In 1985, the 1975 Land Act was amended to provide special provisions to facilitate foreign land ownership. The 1985 Land Amendment Act is an acknowledgement by the then regime that the tough 1975 Land Act scared away investors. This was therefore a bid to facilitate investment in land by foreign nationals.

2.8 The Lands Act 1995 - Present status quo
Following the 1991 elections and coming into power of the new government with its liberal western principles, the 1975 Land Act became one of the earliest victims of the reforms. The 1995 Land Act principally reversed the 1975 Land Act. Some of the key features of this Act include: abolition of Reserves and Trust Lands, and declaration of these categories of land merely as customary land; reintroduction of economic value to land whether or not it was virgin or bare; discontinuation of the extensive system of state consent as a means to restrict land transactions but leaving it only as means of recording land transactions; legalisation of the requirement for the chiefs approval to any applications for alienation (state title) of customarily held land; creation of a land development fund in which payments due from land developers would go and later shared between ministries part of which would be ploughed back to the community concerned in each case; establishment of the Lands Tribunal with jurisdiction to adjudicate all land-related claims with minimum procedures in order to ease congestion at present in the High Court.

However, land has remained vested in the President who holds it in trust for and on behalf of the Zambian people. In this sense, the President could be likened to the overall landlord who is holding a radical title to the land while Zambians merely own terms of years and the maximum being 100 years. The residue of the term (remaining number of years) if not renewed reverts back to the state upon the expiry of the lease. Even with the clause providing that an applicant for a leasehold title in customary land requires to first obtain the prior approval of the chief and local authority in the area, land alienation procedures continue to be abused to the detriment of local indigenous holders.54

2.9 The Draft Land Policy (October 2002)

Following growing opposition to the Lands Act 1995 from non-governmental organisations like Women for Change led by human rights activist Emily Sikazwe and Zambia Civic Education Association under the leadership of lawyer and human rights activist Lucy Sichone, among others, who had conducted a number of works in rural and urban areas to educate and mobilise people against this Act, the Zambian government came up with the Draft Land Policy in October 2002.

The formulation of this policy was a culmination of various consultative meetings, studies, workshops and seminars for stakeholders at the district and provincial levels and a national conference held at Lusaka’s Mulungushi International Conference Centre from July 19-23, 1993.

The Minister of Lands, Judith Kapijimpanga, stated that "the task of the government of the day is to ensure that the people of Zambia are given an equal opportunity to access and utilise this resource".55

This Land Policy was intended in part to address the question of equity and efficiency in the land delivery system.56 And Kapijimpanga stated that "this policy could not have come at a better time than this when there is an increased concern by the majority of Zambians on how land has been in the past alienated to developers".57

The land policy review process begun even before the cabinet approved the draft land policy in principle in the year 2000- Since then the draft policy document has been in circulation for comments and consensus by all stakeholders through both print and electronic media and through workshops-

The policy review followed the formulation of the 1995 Land Policy and Lands Act, which have been surrounded with controversy by many sectors of society especially civil society and traditional leaders in terms approach of it's formulation, content of the policy, policy and legal provisions, including policy principles.

Civil Society had problems with the land policy in the sense that it lacked a wider stakeholder consultation in its formulation process, especially the participation of poor and marginalized communities and social groups, respectively. This has been seen in the policy falling short of addressing the interests of the poor and marginalized social groups such as women in terms of access and control of land. However, on the other hand traditional rulers have not been too comfortable with the draft policy on grounds that it takes away their power and control over land. However, realizing the fact that current land policy falls short of addressing various concerns and interests of stakeholders; the need to reduce poverty levels that the country is experiencing; the liberalized market economy and need to promote investment for economic growth, the review of the land policy is imperative.

Therefore, the government through ministry of lands as a ministry mandated to formulate the land policy has embarked on the policy review process to try and address the issues and challenges faced with the current land policy and the land administration system of the country. As key stakeholders in the land policy review, civil society through the Zambia Land Alliance have been actively involved to complement government's effort in this process by soliciting public views from especially the poor rural communities on the land policy and advocating their participation in the policy review process. Civil Society has also gone further to put up it's position paper, which is a paper that outlines some of the shortfalls in the draft land policy and provides recommendations for the improvement of the policy.58

This Land Policy still remains in draft form to date. There has been no forward movement on this matter by the government. But discourse on the land question has continued in submissions to the Constitution Review Commission.

2.10 Interim Report of the Constitution Review Commission (June 29, 2005)

Some of the submissions received by the Commission on the subject of land were that land under traditional authority should vest in chiefs, on the one hand, and that all land should vest in the President on the other.59

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Other submissions were that the Constitution should guarantee the right of access to and ownership of land by Zambians; the amount of land that can be acquired by a person should be limited; and that non-Zambians should not be eligible to own land.60
There were also submissions that the Office of Commissioner of Lands should be a constitutional Office and that the holder should be appointed by the President subject to ratification by the National Assembly, on the one hand, and that the Office be abolished and replaced by a Lands Board, on the other.61 Some of the recommendations of the Commission were that the Constitution should:

• provide that all land in Zambia belongs to the citizens of Zambia and should be vested in the President on behalf of the citizens for the purpose of administration and regulation, for the use or common benefit, direct or indirect, of the citizens of Zambia;

• provide that in the regulation and administration of land, Local Authorities and Chiefs should have a part to play within the context of devolution of power;

• provide that citizens should have the right of access to and right to acquire land without any impediment, all conditions of acquisition having been met and at the expiry of a lease, the lease should be renewed as a matter of right;

• provide that eligibility of non-Zambians to acquire land should be restricted and regulated by law; and

• establish a Lands Commission.62

It is therefore necessary in the next two chapters of this research to critically examine and analyse the current legal framework, especially the salient provisions of the Land Act 1995 and the Institutional Framework and find out why it is believed to have failed"to ensure that the people of Zambia are given an equal opportunity to access and utilise this resource" and to address the question of equity and efficiency in the land delivery system, giving rise to "increased concern by the majority of Zambians on how land is being alienated to developers".

Chapter Three - Legal Framework

3.1 Genesis of the 1995 Land Act

The 1995 Land Act is a very controversial piece of legislation, which continues to arouse emotions more than ten years since its coming into effect. When President Frederick Chiluba signed it into law, it stirred a big controversy in the country with the Barotse Royal Establishment and with other traditional rulers outrightly rejecting this piece of legislation. However, the Government was not bothered about the resentment the Act provoked and went ahead to effect and implement it.

The background to the Act lies in the ruling Movement for Multiparty Democracy's (MMD) liberal economic policy. In its maiden manifesto unveiled in 1991, the MMD promised to liberalise the land tenure system once in power. It accused the United National Independence Party (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.

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 Lusaka's Mulungushi International 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, non-governmental organisations, the World Bank etc., were read.

The theme of the conference, which was chaired by the MMD chairman for lands, then Deputy Minister for Foreign Affairs, Dr. Remmy Mushota, was "charting the way forward".

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63. The Barotse 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 (Minutes of the Barotse Royal Establishment, 1996) 64. Manifesto for the Movement for the Multi-Party Democracy, 1990
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.\textsuperscript{65} 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,\textsuperscript{66} 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.\textsuperscript{67} On the other hand, the University of Zambia\textsuperscript{68} 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, arguing that 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 stating it would lead to the exploitation of the poor, a position strongly supported by UNIP, in its paper.\textsuperscript{69}

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 develop 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.

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, 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 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.69a

69a. Interview with Akashambatwa Mbikusita-Lewanika and confirmed by two other former Cabinet ministers who don't want to be on record.
According to the Confidential Cabinet Memorandum prepared on the bill by the Attorney General, Cabinet Ministers unanimously approved the bill without anyone raising any comments on it, except for two ministers.\textsuperscript{69b} Hon. Akashambatwa Mbikusita-Lewanika and Hon. Humphrey Mulemba, both ministers at the time, added that caution be had in dealing with land.\textsuperscript{69c} In the Cabinet meeting itself, ministers did not even discuss the bill after it was introduced by the Attorney General.\textsuperscript{69d} It was approved en masse.

Meanwhile, the World Bank had even stationed its officials in Lusaka to see to it that the bill was enacted into law.\textsuperscript{69e} These officials were literary holding on to money the Bank had assured Zambia in various loans until the bill was put into effect.\textsuperscript{69f} 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.\textsuperscript{69g} 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.\textsuperscript{69h} 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. Conscious 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.\textsuperscript{69i}

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.\textsuperscript{69j} 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.

\textsuperscript{69b} Ib\textsuperscript{id} 69c. Ib\textsuperscript{id} 69d. Ib\textsuperscript{id} 69e. Ib\textsuperscript{id} 69f. Ib\textsuperscript{id} 69g. Ib\textsuperscript{id} 69h. Ib\textsuperscript{id} 69i. Ib\textsuperscript{id} 69j} Ib\textsuperscript{id}
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 other words, the first problem with the 1995 Land Act was the obvious lack of legitimacy.

3.2 Principal Features of the Lands Act 1995

Before examining at the principal features, it is important to say a word or two on the pieces of legislation that the Land Act repealed. 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.

It will be recalled that most of these statutes hail from the colonial period. Colonialism had a lot to do in shaping Zambia's land tenure system. 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. And each of these statutes had a specific problem to deal with at the time of its inception. One of the objectives behind the 1995 land Act 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 statutes mentioned above were repealed and their different functions harmonised and tucked under a single liberal statute - the 1995 Land Act.

Previously, land in Zambia was divided into a number of categories, namely Reserves, Trust Land, Barotseland and Crown land. Reserves and Trust Land, at least, were abolished by the 1995 Act. However, 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, is now be called "customary area". In other words, there are 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.

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 ambitions of even the politicians of the 1990s. Even the MMD government of President Chiluba 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.

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, attempts to open customary land to private land rights, introduces a Fund for opening up new lands69k and sets up a machinery for resolving land disputes cheaply and speedily, etc.69l 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.69m 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.69n 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..."69p

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.

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.

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 prender, 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 land 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.

3.3 Vestment of Land
One of the most controversial principles in the 1995 Land Act is the principle of vesting land in the President. 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, cannot vest in any authority other than the chiefs. How can ancestral lands, it is argued, be said to vest in the President when this cannot 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.

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 on 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 cannot 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 on Barotseland, for example, there is a section entitled "(a) The Paramount Chief", which includes the following words, "In him (and his Kotla) all land is now vested". 71 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 sole owner. It is also worth noting that the grants of land Lewani ka made as 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:

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71. The African Memorandum No. 1146 of 1932, on Barotseland, at page 12
the Litunga and the National Council of Barotseland will be charged with the responsibility for administering Barotse customary land law within Barotseland.\textsuperscript{71a}

However, to understand the origins of the vestment clause in modern Zambian tenure system, it is necessary to go back to colonial rule. And as discussed in Chapter Two of this research, colonialism was the one that first introduced this clause in the modern sense in which it is.

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 assist 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 order words, the trust relationship entails a duty of protection.\textsuperscript{72}

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.

\textsuperscript{71a} Barotseland Agreement of May 18, 1964, Annex to the Agreement 4 (b).\textsuperscript{72} U.S. v. Kagoma 118 U.S. 375, 384 (1886); Seminole Nation v. U.S, 286 (1942)
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. Michell (1983).73

In this case, an Indian tribe sued the United States federal government arguing that it has 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. Zambians need to inject specific duties in the Land Act to compel 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.

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. There are many 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.

And the Mung'omba Constitution Review Commission observed that the majority of petitioners who made submissions on vesting of title wanted land under traditional authority to be vested in chiefs. However, some petitioners felt that all land should be vested in the President on behalf of the people of Zambia. A few petitioners submitted that traditional rulers should not have authority over land.

The Commission feels that the call for land under customary law to be vested in chiefs is partly inspired by the misconception that the vesting of all land in Zambia in the President entails that the President owns the land in his own right and not for or on behalf of the people. This perception is contrary to the provisions of the 1995 Lands Act, which makes it clear that this vesting is on behalf of the people of Zambia and that all land shall be administered and controlled by the President for the use or common benefit of the people of Zambia.

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However, the Commission appreciates the concerns of the majority of petitioners on the subject in the light of the unrestricted powers and discretion that the Act vests in the President to alienate land to both Zambians and non-Zambians.\textsuperscript{73f}

In its consideration of the subject of vesting of land, the Commission examined constitutions of other countries and found that vesting of land varied in many countries.\textsuperscript{73g} For instance, Article 257 (1) of the Constitution of Ghana vests all public land in the President on behalf of and in trust for the people of Ghana, while the Ugandan Constitution vests land directly in the citizens.\textsuperscript{73h} However, land under traditional authority in Ghana is vested in the respective traditional authorities on behalf of and in trust for the subjects, in accordance with customary law and usage.\textsuperscript{73i}

It is the view of the Commission that the Constitution should address the subject of vesting of the land, considering its importance.\textsuperscript{73j} And recommends that all land in Zambia should continue to be vested in the President for purposes of administration and regulation.\textsuperscript{73k} This should be so because as Zambia has all along been a unitary state, the President is the sole representative of all the people.\textsuperscript{73l}

However, in the vesting of all land in the President, there should be added in the Constitution that this vesting is "for the use or common benefit, direct or indirect of the people of Zambia".\textsuperscript{73m} According to the Commission, this constitutes an assurance and guarantee that there will be no abuse in the management, use and disposition of land to the detriment of the people of Zambia.\textsuperscript{73n} Further, in the regulation and administration of land, local authorities and chiefs should have a part to play within the context of devolution of power.\textsuperscript{73p}

The Commission recommends that the Constitution should explicitly provide that: all land in Zambia belongs to the citizens of Zambia and shall be vested in the President on behalf of the citizens for purposes of administration and regulation, for the use or common benefit, direct or indirect, of the citizens of Zambia; and in the regulation and administration of land, local authorities and chiefs should have a part to play within the context of devolution of power.\textsuperscript{73q}

3.4 One Country Different Tenures
Like most ex-British colonies, Zambia has different tenure systems depending on the type of soil you are standing on.

\textsuperscript{73f} Ibid, p.770 \textsuperscript{73g} Ibid, p.770 \textsuperscript{73h} Ibid, p.770 \textsuperscript{73i} Ibid, p.770 \textsuperscript{73j} Ibid, p.770 \textsuperscript{73k} Ibid, p.770 \textsuperscript{73l} Ibid, p.770 \textsuperscript{73m} Ibid, p.770 \textsuperscript{73n} Ibid, p.770 \textsuperscript{73o} Ibid, p.770 \textsuperscript{73p} Ibid, p.770 \textsuperscript{73q} Ibid, p.771
It was observed in Chapter Two of this research 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 the 1995 Land Act.\textsuperscript{73r} Therefore, the Orders are no longer part of the law of Zambia. However, since the Act 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.\textsuperscript{73s} In other words, the 1995 Act failed to evolve 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 should have used the occasion to return to customary land some of the parcels of land unfairly seized by colonialists from local people.

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 environmental protection and pollution control Act, Chapter 204 of the Laws of Zambia, may dictate different methods of use of land even in customary areas.

\textsuperscript{73r} Section 32 of the 1995 Land Act \textsuperscript{73s} Section 2 of the 1995 Land Act
For example, certain trees may not be cut because they are subject to a Tree Protection Order or some statutory protection. Anyone who cuts such a tree commits an offence sometimes punishable by imprisonment. But beyond this, customary tenure is basically a laissez-faire system.

Customary land constitutes roughly 94 per cent of Zambia's total land mass. On the other hand, statutory tenure prevails in at least 6 per cent of Zambia's land. As 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. One cannot, 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 a "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 cannot 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.

The English land law as it was on August 17, 1911 applies to land held on statutory tenure subject to local law and circumstances.\textsuperscript{73t} 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 it is vested on behalf of the Republic. In Zambian tenure system, no land is allodial, i.e. owned by a subject.

\textsuperscript{73t} By virtue of the English Law (Extent of Application) Act, Chapter 5 of the Laws of Zambia
Land that is owned allodially is land a person owns perpetually, infinitely, forever 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 Mkushi" 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.

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. The Act 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) if it is approved by a two-thirds majority of the members of the National Assembly. 73u

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 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.

73u. Section 3 (6) of the Land Act 1995
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 Chinese 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.

Each of these periods of tenancies (forever 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.

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.

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 examine 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.

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 cannot 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 \(^74\) 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,

\(^74\) 1984, Z.R. 72
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 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's court.

A business tenant enjoys certain protections under the Landlord and Tenant (Business Premises) Act\textsuperscript{74a} 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's 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.

\textsuperscript{74a} Chapter 440 of the Laws of Zambia
Of course, the most important reforms introduced by the 1975 Land Act was to abolish the freehold, which was viewed negatively. 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.

3.5 Customary Tenure

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-a-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.

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 discussed above. However, customary tenure is still the dominant means of occupying and using land in the country. The fact that 94 per cent 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 per cent 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.

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.

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 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 alodial ownership of land, already referred to above. This is in spite of what has been stated above 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". It is from statements such as this that Europeans drew mistaken conclusions that Africans did not entertain the notion of individual ownership.

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 it has been shown, is more or less similar to freehold tenure, which has no limitation.

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

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

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.

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 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.

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.

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. 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 listed above.

3.6. Foreign Investors in Land
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 was 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.

Section 3 Part 11 of the Land Act contains elaborate provisions on the powers of the President to alienate land but one cannot 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, it becomes abundantly clear that King Lewanika was more cautious than the MMD 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". 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.

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 "squatting" 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.

3.7 Sale of Customary Land
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 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, 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.

76. [1938] 14 N.L.R.41 77. 1985, Z.R. 21
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.

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 was found out in Kasisi area, near Lusaka\textsuperscript{78}. 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 said 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 referred to above. 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.

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 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\textsuperscript{79} 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.

\textsuperscript{78} Own experience during research, date of research: September 2005  \textsuperscript{79} Mike Gluckman, Barotse Jurisprudence, 1942, p.123.
3.8 Security of Tenure

Security of tenure is one of 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.

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.

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 Luapula and Northern provinces. 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.

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. 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 per cent 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 cannot 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 1960s, the 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 Masai 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 of tenure to the future generation to decide because after all, it is not one's to do as one likes.

The methods of converting land from customary to leasehold tenure are suggested in the Act although it does not define them explicitly. And the Mung'omba Report notes that these provisions do not state the position when approval is unreasonably withheld and this negates a landholder's rights of property because there can be no conversion without approval of the two institutions.80 First, a person must of course, be a holder of this land through either one of the above methods. Second, she/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. Chiefs 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.81 Besides, Section 8 does not make provision for the participation of the poor to air their views on the intended conversion.82 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.83 This secured transparency and accountability unlike under the current procedures which only refer to a chief, without public involvement.84a

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.

Chiefs involvement ends at "approving" the conversion and it must be observed that often, chiefs discharge this function without capacity.84b 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.84c

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 anyone 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 chiefs 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. 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.

3.9 Land Development Fund
The 1995 Lands Act establishes a Land Development Fund\textsuperscript{84d} which is supposed to be funded by government through appropriations by Parliament. In addition, it should receive seventy-five per cent of the of lease charges, survey fees, etc.\textsuperscript{84e} And the Fund should receive fifty per cent 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.

The Act does not adequately provide for the use of the funds.\textsuperscript{84f} 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 the Act provides.\textsuperscript{84g} 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.

\textsuperscript{84d} Section 16 of the Lands Act 1995 \textsuperscript{84e} Section 4 of the Lands Act 1995
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.

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. And since 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.

Clearly, the problem with this Fund is more of abuse of the funds as is the case with the road levy.

3.10 Lands Tribunal
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 the Act provided for the Tribunal.84h

84g. Section 18 of the Lands Act 1995 84h Section 20 of the Lands Act 1995
But the Act is discriminatory of the poor, in a number of respects. It provides, for instance, 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. The Act 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.

Appeals from the Tribunal lie straight to the Supreme Court. 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.

3.11 The Constitution

There is no better way of ending a chapter such as this with a brief examination of 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.

84i Section 25 of the Lands Act 1995 84j Section 23 (5) of the Lands Act 1995 84k Section 29 of the Lands Act 1995
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.

However, the Constitution guarantees the right to property.841 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 acquire 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. Customary land is beyond the reach of the statutory acquisition arm because no such equivalent concept exists in customary land law notions.

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.

841. Article 16 of the Constitution of Zambia
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. 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.

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 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.
Chapter Four - Institutional Framework

4.1 Institutional Framework Overview
The greatest resource that Zambia has is her land. The task of the government of the day, therefore, is to ensure that it is administered and managed in an effective, efficient and orderly manner. And also to ensure that the people of Zambia are given an equal opportunity to access and utilise this resource through a land policy that addresses the question of equity, efficiency, effectiveness and orderly in the land delivery system. In this regard, there's need to come up with an institutional framework that will make it easier for the present and future generations of Zambians to enjoy the benefits of holding land either under statutory or customary tenure. The question of how to acquire land is at the heart at most Zambians. Many people are trying to acquire land especially now that the economy is getting worse by the day and people are being thrown out of their jobs. However, the institutions that deal with land administration remain distant to most people, making it difficult for poor and uneducated people to secure land.

As for which institution to approach, it all depends on what type of land a person is seeking. A person may seek land in customary area; state land area; council area; forestry area; game management area, etc.

4.2 The Presidency
All land in Zambia is vested in the President or the presidency as an institution. And this makes it the supreme institution in the administration of land.

The President has unlimited power to make grants of land to any Zambian outside areas governed by customary tenure. With regard to land governed by customary tenure, the President must: first, take into account the local customary law on land tenure in so far as the same is not in conflict with the provisions of the Act; second, he must consult both the chief and the local authority (rural council) within whose area the land to be alienated is situated, and in the case of land in game parks, the Director of National Parks and Wildlife Services should also be consulted; third, the President must consult any person whose interests (presumably an interest under customary tenure) is affected.

and finally, in the case of persons holding land under customary tenure who wish to convert their customary interest into lease under the Act, the President is enjoined from granting the lease unless the applicant has obtained the approval of the chief and also that of the local authority in which the land in situated. These provisions also apply to grants of land to non-Zambians.

4.3 The Ministry of Lands
The current institutional arrangement places responsibility on the Ministry of Lands to formulate and co-ordinate the implementation of statutes related to land administration and management in Zambia.

The Ministry of lands is divided into four departments namely: Human and Administration, Lands, Survey and Lands and Deeds Registry. These Departments complement each other in terms of land administration and management.

The Lands Department of the Ministry of Lands, in general, is the custodian of all land in Zambia on behalf of the President of the Republic of Zambia. The President has delegated his powers to the Commissioner of Lands to make and execute grants and dispositions of land subject to special or general directions of the Minister responsible for land. This Department is divided into three sections namely: (a) Lands Administration; (b) Legal; and (c) Estates and Valuation Section.

The Survey Department of the Ministry of Lands, in general, plays the role of a national centre for surveying and mapping services. It is solely responsible for the production and revision of national maps of Zambia, the planning of aerial photographs, cadastral surveys and provision of national control. The Department is divided into three branches, namely: (a) Cadastral Services; (b) Mapping Services; and (c) Survey Services.

The principle function of the Lands and Deeds Department is to register ownership and real rights in and over immovable property in order to: (a) provide security of title; (b) ensure a complete record; (c) provide easy access to information; (d) ensure speedy registration of all documents lodged; and (e) be cost effective. The specific functions of the Department include: (a) ensuring the registration of rights, interests and liabilities through assignments, mortgages, discharges, caveats, power or attorney, leases or deeds or arrangement;

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(b) maintaining of various registers i.e. the Land Register, Property Register, Miscellaneous Register, Water Register, Common Leasehold Register and Agricultural Charges; (c) issuing full title deeds and provisional certificates; (d) storing and maintaining records on the computer or on normal records that constitute the public register; (e) ensuring that revenue is collected from different categories of clients; and (f) providing direction for periodic verification of land disputes that arise out of inspection and re-entries.

4.3.1 Lands Tribunal
In addition to these Departments there's a Lands Tribunal in the Ministry of Lands. The Lands Tribunal's function is to arbitrate the disputes arising under the Lands Act. This has been discussed in detail in the previous chapter.

It is important to refer to the Lands Tribunal because disputes in land are commonplace. But if all disputes involving land were to be referred to the Tribunal it would not cope. Already with just a few disputes referred to it, it has failed to attend to them with the required diligence. The tribunal is a good idea which donors can promote in addition to what government can do. It does not have any finances now to attend to its duties which has severely limited its operations.

4.4 Office of the Vice-President
The Office of the Vice-President, through the Department of Resettlement, identifies land for Resettlement Schemes to resettle people particularly retirees and other urban residents in need of land to these designated areas so that they are given an opportunity to own land and secure their livelihood. The Office of the Vice-President will be required to work harmoniously with the Ministry of Lands so that suitable areas are designated, planned demarcated and developed appropriately. But the Office of the Vice-President does not expertise required to deal with land matters.

And as a result of this land allocated for re-settlement schemes has not benefited the intended people. It would therefore be better to return this function to the Ministry of Lands where there's relatively better institutional or administrative capacity.

4.5 The Ministry of Justice
Land holding entails legal procedures as enshrined in the various pieces of legislation and covenants. This Ministry, among other things, renders legal advice to the Ministry of Lands during the review of legislation for the drafting of the laws whether substantive or subsidiary. The Ministry of Justice also attends to the legal cases where the Ministry of Lands is a party and attends to all agreements entered into by the Ministry of Lands with other parties.107

4.6 The Ministry of Local Government and Housing
The Ministry of Local Government and Housing is charged with the responsibility of assessing land for human resettlement, industrial and commercial development activities. Through the Department of Physical Planning and Housing and the respective Local Authorities, the Ministry is responsible for the preparation of structural and regional plans to guide town and rural development. In addition, City, Municipal and District councils are responsible for recommending applications for land. Consultations on land matters are held among the chiefs, councils and the Ministry of Lands to ensure that land is available for allocation but also to ensure that the customary rights of the local people are not infringed.

In addition, the Ministry through the Valuation Department advises the Ministry of Lands on property valuation and on any other matters pertaining to real estate management. The Valuation Department also utilises property data from the Lands and Deeds Registry of the Ministry of Lands to prepare valuation records.108

4.7 The Ministry of Agriculture and Co-operatives
The Ministry of Agriculture and Co-operatives, through the Land Husbandry Section, is responsible for identifying, planning, demarcating and recommending land for agricultural purposes.

This Ministry also monitors land user charges. Given the crucial role the Ministry of Agriculture and Co-operatives plays in land use planning it will assist in identifying and opening up-suitable land for agricultural use to sustain agricultural industry.109

4.8 The Ministry of Works and Supply
The Ministry of Works and Supply is responsible for the administration and maintenance of all Government property throughout the country.110

4.9 The Ministry of Commerce, Trade and Industry
The Investment Centre under the Ministry of Commerce, Trade and Industry co-operates with the Ministry of Lands in identifying suitable land for various development projects. The Ministry will facilitate the speedy registration of companies to assist prospective investors to acquire land for various investments. Therefore, strengthened co-operation between the two ministries is required to ensure an efficient land delivery service.111

4.10 The Ministry of Tourism, Environment and Natural Resources
The Department of National Parks and Wild Life Services under the Ministry of Tourism, Environment and Natural Resources gives concessions on land in areas demarcated as Game Management Areas and National Parks. The Department, through the Protected Areas Planning Unit prepares development plans with the use of land information produced by the Ministry of Lands and also regulates the development of tourism enterprises in the country. The Ministry assists entrepreneurs in the identification of land suitable for tourism purposes, including land in Game Management Areas. The Ministry of Tourism, Environment and Natural Resources provides advice to the Ministry of Lands on the suitability of land for specific purposes such as natural resource conservation and for the protection of the environment.112

4.11 The Commissioner of Lands
The President is the one in whom all land is vested113 and therefore the one with the power to alienate it.114

However, since the President cannot directly perform the daily administrative functions ancillary to alienation, a statutory instrument was introduced in 1964 under which the Commissioner of Lands administers land, including seeing to alienations on behalf of the President.115

The Commissioner of Lands is a public servant, just like any other civil servant. However, due to the sensitivity of the subject of land and in order to give decorum to the office, he is personally appointed by the President.

The Commissioner of Lands, on behalf of the President, enjoys unlimited discretion to allocate land to anyone.116

The exercise of this discretion does not require the Commissioner to consult anyone or take instructions from any authority except of course the President. In practice it does not work out like that. The Ministry of Lands feels they must interfere with the Commissioner of Lands and have frequently done so. Bowing to this interference, the Commissioner decided to interfere with his discretion by forming a committee to help him decide how to allocate land and who to give it to as well as how much to give. This committee, the Lands Allocation Committee, is based at the Ministry of Lands comprising mainly ministry officials. However, the Commissioner is still free to distribute and grant land to whomsoever he wishes. What this means in practice is that you just go to the Commissioner of Lands and ask him for land and if you are lucky you get it. It is easier for the Commissioner to grant your request if you inform him of the existence of a vacant piece of state land which you know has not to have been occupied or developed for at least two years. If he agrees, he can use his powers of re-entry and repossession especially for land where title deeds have not yet been issued, to give the informer. He can re-enter the land already alienated on title deeds but the procedure takes very long, at least six months because he has to inform the title deed holder of his intention to re-enter and let him contest this decision and only after this can the re-entry be finalised. All land alienated to holders is required to be developed within eighteen months of the grant otherwise it is liable to repossession. But the Lands Department does not usually do this because they have no way of knowing which land is undeveloped or unoccupied.

Even though the development required is only of a minimum of five hundred thousand kwacha, many land holders have still not managed to develop their holdings in as long as ten years and still the Commissioner has not acted. This raises questions on the value of the rules the Commission itself designs if they are respected by them in breach rather than in compliance, who will comply?

There are times when state land has been advertised in the national press and applications invited from the general public. Again, the Commissioner decides which land should be advertised in the press and which he should allocate himself by discretion. Where land is advertised, local councils in the area would take part in the design of the questions to be asked to applicants and in their selection. In 1985 a circular was issued laying down general policy guidelines regarding the procedure all councils are expected to follow in the administration and allocation of land.

The circular lays out the procedure on the preparation of lay out plans, allocations of stands and matters relating to unscheduled agricultural land pursuant to policy of decentralisation and to the principle of participatory democracy it was decided in 1985 that councils should participate in the administration of land.125

Under the circular councils are required to submit not less than three applicants per piece of land to the Commissioner of Lands. The Commissioner either on the basis of his discretion or through the Lands Committee would choose one of the three applicants. However, there are administrative problems in implementing this. The main obstacle in both the two examples is the delay to demarcate, number and title the land. A piece of land must first be planned.

Planners are based in districts either under the planning office or in the office of the District Agricultural Co-ordinators. Before they plan the area, they are supposed to physically check it and translate the physical impressions and information they saw on to the plan just like surveying. However, they do not put permanent marks on the ground as their job only entails mapping. The problem is that in the majority of cases, people will have already moved to the site and put up structures before the planning has taken place. This makes planning difficult. Creation of roads, schools, hospitals and other services may not be easy where people have already moved on to the site.

People move to the site as squatters. They cannot wait for the government which moves too slowly. Agricultural planning officers will usually have no resources to enable them move on to the site and the decision will be postponed again and again. Sometimes there is no motor vehicle for the officers, other times, there is no money to pay for allowances of officers. The list is long. Meanwhile, people cannot wait for the government to be ready. In the majority of cases, these are people who have no other alternative land except that. The second problem is that it takes very long to get the land numbered in Lusaka. When the land is planned locally the map is sent to the Commissioner of Lands in Lusaka through the Provincial Agricultural Officer for numbering. Each plot is given a number by which it will be known on the title deed. The Commissioner checks on the legal title of the land to assure himself that it is free of legal encumbrances i.e. legal difficulties. He checks, for example, to confirm that no one has claims to that land. After this, he would pass the sketch plan, as it is at this stage, to the Surveyor General for numbering. The Surveyor General cannot number the pieces of land unless he is satisfied that it meets the conditions in the Survey Act. In particular, the planning of the housing and other settlements should be such as would leave enough room for social services. The extent of holdings should be consistent unless there are reasons for differences.

Many times, the Surveyor General has rejected the sketch plans on the grounds of inconsistencies or other reasons. The problem is that the people on the ground are not informed of the stage of the process or the difficulties encountered. They keep waiting for results sometimes for years.

The Commissioner of Lands is central to the whole process of land allocation. He allocates land and takes it away. Both the Commissioner of Lands and the Surveyor General are situated at Mulungushi House in Lusaka. It is at Lusaka where real business on land allocation and dispossession takes place. Recently, an office has been opened in Ndola on the Copperbelt where an officer invested with powers of the Commissioner and the Registrar of Lands would be based to attend to issues involving alienations and registration of all transactions in land in this region and in neighbouring provinces. The Registrar of Lands is the officer who registers the allocation or transaction in a register of titles and deeds. He is also based in Lusaka at Mulungushi House. All the three officers are located on the first floor of Mulungushi House. People from far away places, including the Copperbelt, must travel to Lusaka to deal with land issues. The Ndola office is not yet operational and may not be for sometime. This leaves only Lusaka as the allocator and registrar of land transactions across the country just as before.

It is very difficult to get land allocated at the Commission of Lands. At the Commission of Lands, there is no public office for people to wait from while chasing their titles. They just hang around the corridors and keep trying their luck. They don't know which office to knock on as there is no one to direct them. It is like a gamble. Although officers, especially senior officers, are polite to the general public, people go through hell standing by in the narrow corridors of the Commission and Registry for hours on end. Files have several times gone missing at Lands and sometimes officers have had to be bribed to find them or to push the process, which is paying them for doing their work. Many people have complained of the administrative inefficiencies in the Commission.

As for allocations to foreign nationals, the 1995 Land Act has retained the provisions of the 1975 law requiring the applications to have the personal attention of the President. This was designed to guard against abuse of power by the officers at the Commission of Lands when dealing with foreign nationals and to safeguard the resources from undue exploitation by foreigners. However, practice has shown that it is at State House itself where abuse of power on land has taken place. For example, land allocations in Chiawa have revealed terrifying accounts at State House. In practice, the Commissioner of Lands prepares the application from the foreign national who should have gone through the procedures outlined above depending
on the type of land he wishes to acquire. After that and without deciding on it, the Commissioner takes the file to the President to advise him on it and the latter decides.

4.12 The Registrar of Lands
The Registrar of Lands is also a civil servant. He is a legal practitioner appointed under the public service to register all land transactions that are required by law to be registered. The Registrar is also based at Mulungushi House in Lusaka, virtually under the same floor as the Commissioner of Lands. The two work very closely. Once the Commissioner has alienated land, the decision is reported to the Registrar who registers it and prepares a certificate of title in the name of the person who has been granted the land.

4.13 Traditional Authorities
Many people in Zambia still live under customary authorities in rural areas. They get land, use and manage it in accordance with customs of the community. Land in customary areas may be acquired through (a) allocation by the community; (b) gift by kin or relative; (c) marriage (d) grabbing, (e) inheritance, etc. These and other methods not listed above are ancient which have been practised for a long time.

Ideally, allocation under this mechanism must begin with the headman in the area a person wishes to settle. It is the headman and the community who must identify a piece of land and give to the seeker. Later, the headman will take the newcomer to the chief to introduce him in accordance with customs. The chief confirms the decision of the headman to host the visitor but does not give him land as such. Contrary to widespread opinion, chiefs do not have land except through their headmen. It is the headman who must first be approached before the chief if one is to enjoy the hospitality of the community. Many foreign investors just go to chiefs without going through the headman and this later breeds suspicions and conflicts. It is important to appreciate the culture in the for the appreciation of the local environment. However, local land seekers acquire land consistent with customs. They first go to headmen before approaching chiefs. A lot of such practices were found during this research in chiefs Chaamuka and Nkomesha in Central and Lusaka provinces respectively. There were many people from Southern Province who were settling in these two areas in accordance with local customs and traditions. Land allocation in customary areas is simpler, transparent and accountable. Headmen would very rarely allocate land behind the backs of the villagers for how can they do this and survive the wrath of the community?

It is at the level of chiefs where there are serious institutional problems. Chiefs are not easily accessible by the ordinary subjects as this is against most cultures. What it means therefore is that people do not know exactly what goes on in the chief's palace which gives a bad chief the opportunity to profit from the transaction. However, besides this, it is possible to get land from a customary area the same day it is requested. Further, since this land is not subject to land planning laws or survey statutes, a holder can start developing it according to their plans the same day they get it. Of course there are some controls too exercised by the community like one cannot fence this land from the rest of the community or burn all the grass because it is subject to community rules which are however not as rigorous as state controls.

The extent of the land is a discretion of the community and the estate is unlimited as long as one conforms to local norms. It is important to know the local cultures and traditions.

If a person wants to take a title deed on customary land, the process one must go through is far more complicated. To take a title deed is called alienation and this brings us to the jurisdiction of the Land Act of 1995 and Circular No.1 of 1985 issued by the Ministry of Lands. First, it is policy under Circular No.1 of 1985 that no one must be allocated land in excess of 250 hectares where they want to obtain title deeds on it. But most chiefs and headmen do not have this circular and neither has it been explained why they cannot recommend more land. Those who have the circular tend to ignore it with the result that many people have acquired large pieces of land beyond the hectarage prescribed in the policy document. It is important to note that strictly speaking, the circular has no statutory force and can be ignored without dire consequences.

However, a person who wants to convert their customary land to modern title or seek to acquire customary land under modern title if they are not already in the community are required first to go to the chief in the area to get approval and then take the approval to the local council in the area which must resolve to recommend it to the Commissioner of Lands. Although it is the requirement that the President must obtain the approval of the chief in the area before granting the alienation, in practice, neither the President himself nor the Commissioner actually go to the chief with cap in hand as the law implies. Rather, the applicant himself goes to the chief to get the approval. There is no procedure in the law for the President to communicate with the chief concerned with the result that chiefs don't actually hear from him. The improvement is that in the pre-1995 law, the chief was only required to be consulted and the measure was not based on statute but merely on policy. The 1995 Land Act
upgrades it to a statutory basis and the consultation becomes approval. In practice, it has not meant much of a difference.

Further, the President is under duty to make sure before he alienates land; that he consults with any body who is likely to be affected by the alienation. This may be squatters on the land or peasants who are going to lose their peasant rights by a grant. In practice, this has not actually happened. Although chiefs have been accused of dishing out land contrary to the rules this is not possible in practice. The council should act as a check on the exercise by chiefs of their powers and in any case nothing goes from chiefs direct to the Commissioner of Lands. Besides, all that comes to the Commissioner of Lands is merely a recommendation and since land is vested in the President and not in chiefs (not even in the Litunga for land in Western Province), it is the President who should bear the blame for any exaggerated allocation and not the chief who is a mere recommender. This makes cries by government against chiefs hypocritical and highly irresponsible.

When chiefs approve requests for title deeds they do so without an informed background. They normally have to guess most of the factual details on the ground because they do not have the expertise required to detail the extent of the land as is the case with the state. One gets what is not very clear in terms of extent since chief’s land is not demarcated. Therefore, a sketch plan is normally drawn by council technical officers in the survey offices and this rough diagram is enough for the Commissioner of Lands to issue a "provisional certificate of title" running for 14 years. It is called "provisional" because the land for which it is issued is not yet surveyed and will therefore be replaced by the final title after the survey had been done which should be within the 14 year period. However, if this does not happen during this period the holder of the certificate can get it renewed with the Commissioner of Lands at minimum cost. This loophole has been exploited by a number of unscrupulous persons. What happens is that after the chief has showed the land seeker a piece of land, the latter will return at a later date to survey the land with a surveyor and normally without the chief or local people. Even if the local people happen to be present, their limited knowledge of the survey subject means they cannot do much to interpret the results of the survey and dispute the instructions of the land seeker to his surveyor. Many chiefs have lost their land through such tricks.

Zambia has a serious shortage of registered surveyors who are the only ones entitled to practice the survey profession under Zambian law.

In all the 56 councils in the country, there is not a single qualified surveyor! In practice however, the actual survey is done by technicians while registered surveyors have to sign the survey diagrams. Most surveyors have gone into private practice where they cannot easily be hired by poor people. It is the Survey Department at the Ministry of Lands that must number the diagrams when they are sent to Lusaka from various parts of the country. Without numbering them, there can be no demarcations of the plots and that means no title deeds can be issued.
Chapter Five - Conclusion and Recommendations

5.1 Conclusions

5.1.1 Importance of the Land Tenure System and the Process of Land Alienation
The importance of the land tenure system and the process of land alienation to Zambia's development and its people's well-being has been examined and found that it is cardinal to the nation's progress and prosperity. It has been observed that land is essential to human society and therefore the manner in which land is acquired, used and managed is very important. The low rate of economic growth and the high poverty levels can be partly be attributed to the country's failure to address the inadequacies and deficiencies in the land tenure system and the process of land alienation. Recognising this importance, the research traced the genesis of Zambia's land tenure system and the process of land alienation up to the current system and process.

5.1.2 The Basis of Land Tenure and Land Alienation
The research found out that tenure is the foundation on which Zambia's land law has been built. And although certain forms of land tenure are discernible in the pre-colonial communities, the starting point for its later evolution is generally the advent of colonialism. It has been observed that compared with other countries in the Southern Africa region, Zambia had very little of its territory occupied by settler communities. This, to some extent, has had the effect of limiting the poignancy and the political nature of the land question in the present-day state. Nonetheless, the country still faces significant challenges with respect to democratizing its land tenure and administration. These include the creation of space for civil society to contribute to developments as well as the proper handling of the role of traditional authorities in these matters. At the same time, the country is experiencing growing cases of tenure insecurity, especially in the "slums" and in some parts of the Copperbelt. Hence, while there may be few instances of high profile conflicts, there are still land related issues requiring address.

5.1.3 The Legal Framework
It has been observed that land tenure systems, i.e the system of rules and practices under which persons exercise and enjoy rights in land or the general conditions upon which land is held in a country, are not static, they respond to changes taking place in society. It is noted, with disappointment, that the current legal framework is not totally in tune or in line with what is on the ground, that is the demands and needs of the people. Even the Ministry of Lands recognises the fact that various provisions in some of the statutes are no longer relevant.

And while the process of land alienation deals with how one's interest in land can be disposed of, there's a lot of problems in this area, especially where customary land is concerned. The research has found out that the 1995 Land Act has some harmful effects which, among other things, marginalises the already disempowered, the poor and peasant farmers. And the land issue should therefore be perceived as one of human rights and constitutional concerns. The picture that emerges from this research is that Zambia has not really sat down to draw its own land laws. It is applying various land laws hastily assembled or picked up from other jurisdictions without any relevance to the situation here.

The 1995 Land Act has repeated most of the 1985 principles designed to smoothen the way for the acquisition of land by foreigners. This is done at the expense of local people who lack the power and the means to assert their rights and interests. Many people have been evicted to
give way to foreigners and transnational corporations as well as local political officials. This has been compounded by the fact that the 1995 Land Act clearly prefers the title deed to customary land holding. The Act makes provision for "conversion of land" from customary to title-based ownership but there is no equivalent provision for converting leasehold land to customary land even for land that may originally have been customary land.

This research established that the concept of vestment of all land in the President conflicts sharply with the African concept of land tenure which admits no such idea as a president holding land as custodian for the people instead of the chief. It is worse in communities with strong traditions like in Western Province where the name Litunga (the paramount chief) culturally means land. People do not often understand why their land should be entrusted to the President and not entrusted with their own chief who in their minds is the "owner of the land" - "mwine mpanga" as the Bembas would say. When land or lands are arbitrarily taken away from the people by government with the connivance of corrupt or weak chiefs to give to foreigners to turn into game ranches or for foreigners to grow flowers, peoples' doubts over the sincerity of such concepts as vestment are confirmed.

Unfortunately, the President holds not only land as custodian but also minerals, forests, wild animals, water, etc. The net effect of all this is that the administration of these resources is a matter of government, and not traditional rulers. All the revenue from these resources goes to the central treasury without the indigenous people benefiting directly from it. This creates resentment.

As for the traditional authorities or chiefs, there's nothing in the chiefs Act that empowers them to handle land matters. There's no law that backs their involvement in land matters. So, where do chiefs fall in institutions involved in land administration?

Now that there is a law on converting customary land to state land, is there a similar law for converting state land back to customary land? No. The only law which exists is for converting customary land to state land. This is because it is believed by government that customary land is an inefficient way of owning land and that the most efficient way is by title deed or to own land in the Western way. But is this true? Certainly not. Customary land holding can be as efficient as titled land provided a necessary environment exists. However, the question is how can customary land be an efficient way of holding land when there is no security of tenure and people cannot use this land to raise loans in banks? It is true there is no security of tenure in customary areas but this is the modern security of tenure. A customary security of tenure exists to protect those who hold customary land and since the law recognises this, it is as secure as any other. As for the attitude of banks, it is because government has not convinced banks to find a way of using customary land as collateral. In other countries they do use this land in spite of lack of title deeds. Moreover, in volatile economies such as in Zambia, a title deed is not a sure way for accessing bank and other loans. Many people that have tried to raise money this way have ended up losing their land to banks and creditors due to the unfavourable economic situation. In other words, contrary to widespread belief, a title deed is not a magic word out of economic and social ills.

Section 9 of the 1995 Lands Act prohibits squatting or what is called "occupation" in law. It is an offence to occupy or continue to occupy vacant land and one is liable to be evicted. The law protects vacant idle land from being occupied unless there is lawful authority. However, in practice, it mainly refers to leasehold land. It is a device for people with power and means to harass those without such status but who may be trying to make a living from vacant land. Poor and illiterate people often do not know how to get land or how to protect their land and the rich and clever people will exploit their ignorance to get title deeds on their land and proceed to evict them. In other cases, people with abundant land they do not need or use have
their rights to that land protected by law under this clause even if it remains vacant for years. Under the law, the only way to occupy vacant land is to get permission from the owner or from the Commissioner of Lands otherwise it is illegal. It does not matter whether you have stayed on the land for years and have been productive. If it is a forestry area, you are liable to be evicted at any time and to lose your investment of years in minutes. The law is unkind.

The law allows that land be compulsorily acquired by the President. This is a very important point because it touches on rights. The President has power under the Lands (Acquisition) Act, Cap 296 of the Laws of Zambia to compulsorily acquire any land in the public interest. However, there is no provision in the law for the President to compulsorily acquire customary land. The powers of acquisition can only be invoked for leasehold land which is why it is very dangerous to convert customary land to leasehold land.

The right to access land is not guaranteed in the Bill of Rights. Since land is missing in the Constitution, it is not easy to protect it from abuse. For example, it was possible to introduce the Land Act without public involvement because it was not a constitutional matter.

And lastly, but not the least, the 1995 Land Act is not gender sensitive. This implies that lack of land impacts equally on women and men, yet that is not the case.

5.1.4 Institutional Framework
An examination of the institutional framework for land delivery and management has revealed that it is very weak. All sectors face constraints in implementing policies largely due to inadequate resources and insufficient technical capacity to sustain programmes. The process of securing title deeds has been prone to delays. Not only because all applications (nationally) are processed from one office, but also due to human resource constraints faced by the Deeds Registry in the Ministry of Lands.

And the research found out that there's nothing in the chiefs Act that empowers the traditional authorities or chiefs to handle land matters. There's no law that backs their involvement in land matters. So, where do chiefs fall in institutions involved in land administration?

And a lands tribunal has been created with the objective of easing the process of settling land disputes. The idea behind this was that a mechanism that was reachable by the majority of poor people who are the ones often affected with land problems be established. As always in the expansive powers of the President, tribunal members, including the chairperson, are presidential appointees. The members enjoy no tenure of employment of course because they are not judges. But the most important problem that has surfaced is that over time, the tribunal (based at Mulungushi House Annex in Lusaka) has itself become bureaucratic and technical, the very problem it was set up to ease. Lawyers have since flooded the tribunal although the original idea was to keep them out so that facts flew freely from parties. The reality has been different. An elaborate procedure similar to civil procedure in a formal court-room has closed out the less privileged litigants. Second, the tribunal's bureaucratic procedures has ensured a system that is already overcrowded. Cases take as long as three years or more simply to get a date allocated. The whole objective for which the tribunal was created has been lost.

It is dangerous that the Commissioner of Lands has exclusive discretion to approve or reject an application for land. But this is the law. But clearly, the law makes the Commissioner vulnerable to abuse; it is too weak since it has no controls. However, no one has seen the need to change the law to make the Commissioner's use of powers more democratic and transparent.

Furthermore, some chiefs have joined the bandwagon of land thieves and are making a killing on selling land to developers even as they refuse their people the right to own land under state leasehold system. Corruption, undemocratic tendencies in the administration of land and
other factors have in fact combined to make indigenous Zambians insecure in their own country. This is particularly the case on so-called state land and council held lands. Most holders of land on state land are squatters.

5.2 Recommendations

5.2.1 The Basis of Land Tenure and land Alienation
The picture that emerges from this research is that Zambia has not really sat down to draw its own land policy. It is applying various land laws hastily assembled or picked up from other jurisdictions without any relevance to the situation here. There is potential in the community for good ideas on the country's system of land tenure. There's to go round and collect them and translate them into a policy document and finally a legal tenure and alienation system.

5.2.2 The Legal Framework

5.2.2.1 Need for Amendment of Statutes
In order to improve the system of land tenure and the process of land alienation some of the statutes related to land management in Zambia require amendments as recommended at various public, in particular the National Conference on Land on Land Policy. There is need for a major land policy to capture all the various needs. This land policy must be quite different from previous ones. It must be based on the widest possible opinion. As Chairman Mao Tse Tung once put it, "let hundred schools of thought contend". Government must promote the widest possible consultation before penning down the policy. Even the Ministry of Lands recognises the fact that various provisions in some of the statutes are no longer relevant. If the land delivery system is to conform to the demand for land and be universally accepted there is an urgent need to review and revise all land-related statutes with a view to updating and harmonising them. Therefore it is crucial for Government to mobilise resources and commitment from the public, traditional leaders and the private sector dealing in the land related enterprises.

5.2.2.2 Revisiting the 1995 Land Act
There's urgent need to revisit the 1995 Land Act to redress its harmful effects, especially those that marginalise the already disempowered, the poor and peasant farmers. And the land issue should therefore be perceived as one of human rights and constitutional concerns.

5.2.2.3 Guaranteeing Right to Access Land in the Constitution
The right to access land is not guaranteed in the Bill of Rights. In order to ensure effective rights, this must be there. Since land is missing in the Constitution, it is not easy to protect it from abuse. For example, it was possible to introduce the Land Act without public involvement because it was not a constitutional matter. The Constitution should guarantee the right of access to and ownership of land by Zambians.

5.2.2.4 Protecting squatters
A squatter under Zambian law has no right unlike his South African counterpart who is protected by the constitution from arbitrary eviction. There's for the protection of squatters in the constitution. Section 9 of the 1995 Lands Act prohibits squatting or what is called "occupation" in law. It is an offence to occupy or continue to occupy vacant land and one is liable to be evicted. The law protects vacant idle land from being occupied unless there is lawful authority. However, in practice, it mainly refers to leasehold land. It is a device for people with power and means to
harass those without such status but who may be trying to make a living from vacant land. Poor and illiterate people often do not know how to get land or how to protect their land and the rich and clever people will exploit their ignorance to get title deeds on their land and proceed to evict them. The law is unkind.

5.2.2.5 Vesting of Land in the President
The idea behind vesting land in the President is in good faith. It is intended to safeguard it from misuse, it being the most important resource. In some countries, to safeguard against possible abuse of this power by the President, land has been vested in the state rather than the President or state official. The state being an institution while the President being an identifiable person is more trusted to look after the resource more carefully than the latter.

5.2.2.6 Empowering Chiefs
As for the traditional authorities or chiefs, there’s nothing in the chiefs Act that empowers them to handle land matters. There’s no law that backs their involvement in land matters. So, where do chiefs fall in institutions involved in land administration? It is either they are done away with or legislation is enacted to govern their activities.

5.2.2.7 Status of Customary Land
Now that there is a law on converting customary land to state land, there’s need for a reciprocal one for converting state land back to customary land. The status of customary land should be clarified in the Act. Many people are shunning customary land because of propaganda that it is not a right. The other implication is that one cannot use customary land to borrow from the banks.

5.2.2.8 Gender Sensitivity
The 1995 Land Act is not gender sensitive. This implies that lack of land impacts equally on women and men, yet that is not the case. There’s therefore an urgent need to make it gender sensitive.

5.2.3 Institutional Framework

5.2.3.1 Need for an Integrated Approach
Land is the basis of all human activity from which we derive all the basic necessities at life. Therefore effective institutional framework for land delivery, administration and management should therefore stress the need for an integrated approach that includes a wide range of stakeholders.

5.2.3.2 Inadequate Resources and Insufficient Technical Capacity
As all sectors dealing with land administration face constraints largely due to inadequate resources and insufficient technical capacity, there’s need for adequate budgetary provision from the Treasury to the Ministry of Lands and other stakeholders. Revenue collection needs to be stepped up through periodic review of statutory fees, ground rent and charges for various land and survey services. And the Land Development Fund needs to be effected to assist in land development projects.

5.2.3.3 The Process of Securing Title Deeds
The process of securing title deeds as described in Chapter Four has been prone to delays. The Ministry of Lands has expressed its commitment to minimizing delays in the issuance of titles. To this end, the Department of Lands has begun the process of decentralizing the registration
process. It is the intention of the Ministry that the office of the Commissioner be represented in all provinces of the country. This process needs to be speeded up. The Ministry of Lands may need to be expanded so that departments like that of Resettlement currently under the Office of the Vice-President are brought under it as used it to be before.

5.2.3.4 Jurisdiction of the Land Tribunal
The jurisdiction of the Land Tribunal must be clarified to avoid doubts. In particular, it must be clearly stated whether it has power to attend to customary land disputes because this is very important. Furthermore, the selection and appointment of the members of the tribunal should involve the wider public. Tribunal members should be those people with the sensitivity of rights and necessary competence.

5.2.3.5 Democratising Commissioner of Lands' Powers
It is dangerous that the Commissioner of Lands has exclusive discretion to approve or reject an application for land. This makes the Commissioner vulnerable to abuse. There's need for controls. There's need to change the law and make the Commissioner's use of powers more democratic and transparent.
Bibliography

1. S.E.M. Pheko, 1994, The Land is Ours: The Political Legacy of Mangaliso Sobukwe
5. Remmy Mushota, 1993, Reforms to Zambia's Land Tenure (paper)
11. Mike Gluckman, 1942, Barotse Jurisprudence
12. Lands Acquisition Act, Chapter 189 of the Laws
13. F. Sichone, Land Law tutorial notes, University of Zambia, School of Law
15. Sangwa John, Administrative Law Lecture notes, Land Law tutorial notes, University of Zambia, School of Law
16. The Northern Rhodesia (Crown lands and Native Reserves) Order in Council 1928
19. 1970 Western Province Land Act
20. 1972 Lands Acquisition Act
21. 1975 Land (Conversion of Titles) Act
22. Patrick Matibini, Land Law lecture notes, Land Law tutorial notes, University of Zambia, School of Law
23. 1985 Land (Conversion of Titles) Amendment Act
24. Hansungule Michelo, Women for Change Training Manual on Human Rights for Traditional Leaders
27. The Land (Conversion of Titles) Act, 1975
29. The African Memorandum No. 1146 of 1932, on Barotseland
30. Barotseland Agreement of May 18, 1964
34. The Land Act, 1995