THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

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LAND TENURE SYSTEMS AND REFORM

IN ZAMBIA

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21 November 1994

Date

Supervisor
LAND TENURE SYSTEM AND REFORMS

IN ZAMBIA

by

MÁRIA M. K. MAPANI

AN OBLIGATORY ESSAY SUBMITTED TO THE UNIVERSITY
OF ZAMBIA IN THE PARTIAL FULFILMENT OF THE
REQUIREMENTS FOR THE DEGREE OF BACHELOR OF LAWS
(LL.B)

THE UNIVERSITY OF ZAMBIA
P.O. BOX 32379
LUSAKA

NOVEMBER, 1994
Dedicated to Mum and Dad

"The friendship and bond that goes without saying."
ACKNOWLEDGEMENTS

Grateful acknowledgement is made to Dr. M. Hansungule without whose constant supervision this dissertation would not have been a reality. His guidance was invaluable. Gratitude is also expressed to my family in particular Mrs. Maria Ndulo, Mr. P. H. Hamukoma and friends who patiently stood by me. Lastly I wish to thank Ms Mwangala Chocho who typed this script.

Maria M. K. Mapani

November, 1994
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## INTRODUCTION

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Let it be told in no uncertain terms that land is a gift from God. Land represents the natural and cultural heritage of Zambia. It can only be the greatest injustice for the nation to give up this gift....
INTRODUCTION

This is a dissertation designed to study the systems of land tenure in Zambia. The information presented is purely a theoretical investigation of the various tenures which have all at one time been or still are being practised in Zambia.

In the quest to determine which tenure is most suitable, a historical background as to what is tenure under English law and Customary tenure will be given.

Much of the work will be devoted to looking at the advantages and disadvantages as well as the nature of freehold tenure (specifically the fee simple), Leaseholds and Customary tenure.

The primary objective of this dissertation will bear in mind when concluding which type of tenure Zambia needs. Proposals will be made as to which tenure will be best suitable in consideration of our social, cultural, political and economic situation.
CHAPTER ONE

LAND LAW THEORY AND PRACTICE – LITERATURE REVIEW
Historical background

Before the conquest of William I, English feudalism was the product of the chaos into which Western Europe was plunged by the decline of the Roman Empire. Weaker members of the society consequently had to pay homage to stronger members (who became lords) implying mutual duties of support and protection.

Feudalism therefore, became synonymous with land ownership. For this purpose small landowners transferred ownership to more powerful neighbours receiving in exchange the right to remain in occupation and to reap the profits. Once satisfied, the new lord would grant these weaker members protection.

This practice laid down the foundation of feudal tenure. (It made it easy for stronger nations to conquer weaker nations). The lord became the owner of land and the weaker members the vassals. Vassals no longer owned the land but held the land of the lord therefore, becoming tenants and their interest in land so held became a "fee".

One Charles Martel acquired large tracts of land from the church and parcelled them out as fees but as personal alligience, he added the duty of providing Knights whenever called upon so to do. In turn these royal vassals would sublet to their own vassals. They created a process of
subinfeudation where a vassal could grant land to another and when required to provide Knights acquired by the sublet vassal. This organisation enabled the state to fulfil one of its public functions which is to provide for an army.

Feudalism had no concern with the village. Originally the village owned all land. However this Medieval ownership did not extend to pooling and sharing of the total produce. Cultivation, nonetheless, was done in commor. The connection link between the village and the feudal hierarchy was the lord of the manor. The lord of the manor was apparently the greatest landowner in the village which amounted to mastery. The villeins were answerable to this lord. They had to cultivate for him and no villein would leave or enter the village without his permission. Even a marriage required a licence from the lord.

The feudal manorial systems created two separate systems of land law which was represented by separate set of court; feudal ones being royal courts and manorial courts being customary courts.

In summary the basis of ownership of land henceforth is not absolute ownership but only relative titles. Land belongs to the over lord (the Queen).
"Land tenure refers to the personal rights, privileges, duties and obligations attached to land ownership." Personal rights for instance are those land owners enjoy over water. In the feudal system certain duties and obligations had to be rendered in order for the King to give you land.

Personal rights under customary land tenure on the other hand will be those rights to own land which descends from one family tree to a succeeding issue. Another instance will also be a right to own a pool in a river where no one else can catch fish without the owner's consent.

In general people have privileges of passing and repassing over people's land. A privilege can also exist where one can graze on another's land.

A duty a person has over his land is towards a chief. For instance, to do any work required of you for the well being of the area. It may be ploughing for the chief's field or making roads. Also a person must give respect and obedience to the chief.

In case of a mortgage, and if a person dies and leaves a mortgage, his personal representatives can pay off the mortgage and redeem the property or keep on paying the instalments.

In other words land tenure is the custom under which people hold land under customary law prevailing in the given area.
According to Megarry "this position of tenure can be traced from the Norman conquest. William I regarded the whole of England as his by conquest. To reward his followers and those of the English who submitted to him, he granted and confined certain lands to be held by him as over lord."\(^2\)

These lands were granted although they held them upon certain conditions. In this sense tenants owed duties and obligations towards the king. These tenants who held land directly of the king were known as "tenants in chief". Those who occupied the land were called tenants in demesne and tenants who stood between the king and the tenant in demesne were called mesne lords. It must be remembered that the system of land holding was based in return for services.

Riddall's definition of "tenure connotes not merely the holding of land from a superior lord but also the holding of land from a superior lord and furthermore that the land is held in return for certain services by the tenant to his lord, whatever the services may be."\(^3\)

Tenures were classified according to the kind of service which was rendered to the lord. The tenancies which existed at common law were divided into two, namely; free and unfree tenure.
There were basically three classes of free tenure;
(i) Tenures in chivalry;
(ii) Spiritual tenures;
(iii) Tenures in socage.

Tenures in chivalry consisted of Knight service and grand sergeanty. A tenant who held by tenure of Knight service was originally obliged to supply his lord with an agreed number of "armed horsemen". This obligation latter changed in the twelfth century to a fined money payment termed "saitage". A tenant who held by tenure of grand sergeanty did so because of the honourable character of his services he owed the king, such a person for instance would be a Chancellor in the King's court.

Spiritual tenures were divided into two: namely, divine and frankaloign. People who held land by tenure of divine service were given land in return for the promise of specified spiritual services, namely saying mass on every specified days. Usually if no specified spiritual services were required land granted to the Abbeys would be in return for praying for the king's soul. This kind of tenure was known as frankalmorgn.

Socage tenures consisted of two, namely Petty sergeanty and Common socage. Tenure of Petty sergeanty consisted of services of a non-personal nature such as a tenant providing straw for the king's bed. Under Common
socage services most rendered by tenants were of agricultural character. The nature and amount of service were fixed. A hypothetical situation would be ploughing the king's land. By the end of the fifteenth century services in Common socage were replaced by payment called "quit rents" by which the tenant became quit of his services.

On the other hand there was unfree tenure which was known as villeinage. In the beginning a villien tenant had no legal right to the land he occupied and had no access to the royal courts. He held his land at the will of his lord and could be ousted without redress. The main features of villien tenure were the uncertain varying nature of the services to be rendered to the lord in both quantity and quality.

The legal position of the villien later improved in that a record of his holding of title to land was written on a court roll and could have redress in court. Thus the new tenant came to be regarded as holding "... by copy of court roll" and for this reason the tenure came to be called copyhold.

From the aforesaid tenure answers the question of who holds the land. A further essential element is the length of time for which the land is held. In Megarry "a subject cannot own land but can merely own an estate in it, authourising him to hold it for a certain period of time." In other words, an estate will determine for how
long an individual can hold an interest in the land.

At common law there were basically two types of estates; estates of freehold and estates less than freehold.

"Freehold is a term originally designating the holding of an estate in land by free tenure... as contrasted with a villeins A person holding a freehold estate owed services which were free from service incidents".6

Estates of freehold consisted of three;

(i) fee simple,
(ii) fee tail,
(iii) life estate.

A fee simple estate originally endured for as long as the original tenant or any of his heirs survived. The line of heirs comprised of any blood relations. A fee simple could terminate if the original owner died without leaving any descendants. The fee simple was the largest estate one could hold in land. Even if an owner alienated land the fee simple would continue as long as there were heirs of the new tenant.

The fee tail was an estate which continued for as long as the original tenant or any of his descendants survived. Unlike a fee simple, the line of people capable of inheriting the estate was restricted to one's issues (children).
A life estate lasted for life only. The measuring line of this estate was that of the original tenant himself. An estate could be granted sometimes upon the life of another person. The form of these estates (life) upon life of another were known as estates "pur autre vie" (for the life of another).

The distinctive features of all estate of freehold were, duration of the estate was fixed but uncertain. For instance in life estates you cannot tell when someone is going to die, although the estate was bound to determine. The word "fee" denoted that an estate was one capable of inheritance (lasting in perpetuity). The words "simple" and "tail" respectively denote who is capable of inheriting in the estates, that is blood relations and issues. The life estate was not a fee and could not be inherited neither could it continue forever. On the death of the tenant the life estate determined.

Originally the three estates of freehold were the only estates recognised by law. The only other lawful possession to land recognised were tenancies at will.

Terms of years (leaseholds) grew outside the system of estates with lack of protection given to them by courts. At common law leaseholds were regarded as mere contractual rights to land. This placed leaseholds in an inferiority complex and thus acquired the status of estates less than freehold.
The holding of a tenure in leasehold resembled in practice the relationship of a lord and tenant. (In terms of a leasehold it is a lessor and lessee). Later it came to be accepted that leasehold constituted a form of tenure. A lease had characteristics of both an estate and tenure, tenure in the terms of holding the land from a superior lord in return for certain services for instance rent money. An estate as regards to duration of the holder's interest for instance a tenant could hold land for a period of seven years under leasehold.

Estates of freehold were held in perpetuity as evident in all estates. On the other hand leaseholds were held for a fixed term of years. A lot of controversy is drawn from the fact the fact that a 999 years lease has not determined. It will determine in the year 2065 as from the time William I granted such a lease in 1066. This in itself entails perpetuity as it has passed on from a number of heirs.

The difference between leaseholds and freeholds is that a freehold is capable of inheritance in perpetuity unlike a leasehold which can only be inherited for the years it exists.

The terminology of lord and tenant as regards tenure closely resembles that of landlord and tenant used alternatively in leaseholds.
Today it is possible to regard leasehold as a form of tenure. As generally understood leaseholds create interests in land for a fixed period of certain duration, usually in consideration of the payment of rent.

The English form of tenure is very different from the customary tenure which continues to be the practice in ninety percent of the land in Zambia. It must be noted that only about ten percent of land is actually governed by English incidents of tenure.

"Historically land tenure concepts were very important and are still fairly important in tribal areas. The first law that ever existed in Zambia was indigenous law of the tribes. It is generally referred to as customary law and the great majority of Zambians still conduct most of their activities in accordance with and subject to customary law. It should be appreciated that the use of the term customary law does not indicate that there is a single uniform set of customs prevailing but is rather used as a blanket description covering many different systems".

Zambia has a dual land system that is statutory and customary law. Customary law is not uniform. Customary law prevails in given areas. It varies from one chief's area to another because customary law is not universal. For instance the law which prevails in Mabanza is not the same as that in Musokotwane.
Customary law is not written and clans own land.

English land law on the contrary is written down and codified in Acts of Parliament. The law is uniform and prevails throughout consistently. In England the owner of the land is the Queen unlike customary tenure where land is owned by the Community.

In customary law there are no tenures like in English law. Land is held by the Community and clans give land according to clan rules. In England people are without land, all they do is pay rent. Unlike Zambia, in Reserves everyone has land.

All land under English law is registered under the Lands and Deeds Registry Act but in customary tenure there are no title deeds. Problems are arising with this system because some people are in need of land which apparently is in Reserves. In this case English law prevails and thus people are forced on to other lands. A lot of land disputes arise out of this, since there is apparently more land in Reserves.
FOOT NOTES


4 ibid page 17


7 Report of the Native land tenure Committee Government Printer, Lusaka, 1945 Paragraph 1
CHAPTER TWO

THE THEORY AND PRACTICE OF A FEE SIMPLE ESTATE: THE ZAMBIAN EXPERIENCE
This chapter is intended to discuss the theory and practise of Freehold in the Zambian experience by specifically studying the fee simple which was in force until 1975.

As discussed in the earlier chapter, it is important to remember that estates of freehold consist of three namely; fee simple, fee tail and life estates.

The original theoretical concept of a fee simple virtually entailed that this was an estate which endured as long as the original tenant or any of his heirs survived. It was virtually eternal. Heirs in this instance comprised anyone. There were no restrictions on who could inherit. Even after a tenant alienated land in fee simple it would continue as long as there were any heirs of the new tenant. A fee simple generally entailed an interest in land capable of inheritance.

As a general rule he who owns the soil is presumed to own everything "up to the sky and down to the centre of the earth", that is *Cujus est Solum ejus usque ad coelum et ad inferos*. This basically means that an owner in fee simple has a right to do anything in, on or over the land. In other words this is the highest form of absolute control of one's land.

It must be remembered that originally this is how William I understood the concept of a fee simple when
rewarding his followers after the Norman conquest. Unlike a leasehold which commands greater control of the land through a 99 year lease by the state, there is more freedom in a fee simple as it gives greater freedom in the sense that one becomes the "outright" owner of the land and one is not subject to control according to the theory.

In the Zambian theory of land tenure, the President has no power to control land in a fee simple. The President cannot revoke undeveloped land as compared to a leasehold where the land is heavily state controlled. This means that for instance, since you own the air space you are free to do anything in the air. One does not have to worry about pollution since under a fee simple the land is not under the jurisdiction of environmental laws.

In leaseholds, rights in land are heavily controlled by the state. If you had to dig holes over the land without cause and without interest to how you occupy the land one is likely to suffer pain of sanction, usually through a fine or eviction (without compensation). This bows down to the concept that the state must protect its interests which are echoed in the land (Conversion of titles) Act 1975. Since the Eccles land tenure Committee of 1943, the leasehold through a 99 year lease has always commanded greater control over the land.
In 1975 the former President Dr. K. D. Kaunda announced a new policy on land. In his famous speech known as the "Watershed Speech," he said that since land was a gift from God, it could not have any market value. All existing freehold titles were then cancelled and replaced with 99 year leasehold.

Land still has value although it is very minimal under Section 13 of the land (Conversion of titles) Act 1975. Nevertheless, to determine its value, one needs presidential consent. Under a freehold land has "market value." Where land has value this enables more transactions taking place at real estate markets. Estates brokers are there to fix prices and buy the best land one needs. Unlike in a lease, land is generally allocated without room for choice due to the increasing population. Where one buys land there is a guarantee that you get a good bargain for your money.

It does not really matter in a freehold if your land is underutilized but in a leasehold you risk your land being taken away without compensation. The President as custodian of land in Zambia can revoke a lease if the lessee was not using the land productively.

Leaseholds towards their end of term generally become insecure thereby diminishing value of investment. Under freehold, and since the land is held in perpetuity, such issues do not arise. Freeholds are equally good for investors in that there are no restrictions on how
the business on the land should be conducted. From an economic stand point where there is more investment as a matter of fact more jobs are created thereby creating low prices on commodities since the purchasing power is high.

A fee simple too offered security to those involved in commercial activities. In a fee simple, everyone who held land for future construction would not feel vulnerable. Mostly people in the fee simple usually acquired land for future interests. In most cases it was not necessary or expedient to develop on the land there and then. For instance, land could be bought for a five year old son as a way of a gift. This so bought land would only become operational (in terms of individual production) once the son attained majority. Before that time, that land would remain until in the future.

In a recent research study carried out by the Land Tenure Centre (American) on Zambia, it was stated that "the leasehold system is too centralized and the procedures for leasing ... involve far too many separate stages and decision makers".²

This in itself shows that the process of obtaining a lease is strenuous. Some of these procedures involve paying a consent fee of two thousand kwacha, obtaining Presidential consent, producing a National Registration Card of a potential buyer ... Some of these procedures have to be cut down as they are time and money consuming.
As for a freehold, once assigned it will always be in your exclusive ownership and control.

On the contrary, the original theory of a freehold entailed that it offered the highest form of security of tenure since it lasted in perpetuity. However, this security of tenure is questionable because a lease of 999 years granted by William I in 1066 will only determine in 2065. In examining such a lease, there has been a long line of inheritance just like in a fee simple.

It is also interesting to note in the Zambian experience that from the time a fee simple was granted up to 1975 when it was abolished, the fee simple was practically not older than the lease above 999 years.

The speculative life expectancy in Zambia is 55 years. A 99 year lease which was granted in 1975 will only determine in 2074. By this time, the original tenant would have died and the lease would have passed on through a succession of heirs thus entailing security of tenure (It becomes perpetual because of the various heirs).

It is also urged that freeholds as opposed to leaseholds generally dispose the poor through land transactions as people have to buy land. Most people in Zambia cannot afford to buy land at exorbitant prices since land at "market value" is relatively expensive.
Loans in freeholds are rarely given by the government since the land theoretically is not supposed to be state controlled. But where loans are granted, interest rates upon repayment are usually very high and people are unable to pay back. In the on-going case of chindindidi, the exact scenario is brought out where a loan was granted but because of high interest rates he is unable to repay the money.

Since owners have absolute control of land in a fee simple, there is sometimes underutilization. The state theoretically has no rights in the land thereby leaving the owner with the outright say.

In Zambia prior to Independence, fee simple estates were only granted to whites. Real estates were found along the line of rail where the roads were accessible and generally land was good. Large tracts of land were only granted to whites in fee simple, thus forcing the majority of Zambians into lands other than freehold land (Reserves and trustlands). Freeholds could not be given to blacks because this would defeat government policy of putting Africans in the above stated lands.

As a result, these apparent freehold areas were not heavily utilized since there were only a few whites living in there. The total output on the land at that time was less as compared to a situation where whites and blacks should have been producing alongside (that is both dwelling in freehold estates). Zambians were mostly servants and were not allowed to live in the fertile land.
As envisaged in the theory, the fee simple in practise does not give a right to totally uncontrolled land. For instance, in the conveyance of a fee simple between Ralph John Seal and the provisional council of the University of Zambia dated 30th March, 1966 concerning a farm, the following restrictions concerning absolute control of the estate were observed.

"That in pursuance of the said agreement and in consideration of the sum .... paid by the purchaser to the vendor .... the vendor as beneficial owner hereby conveys into the purchases ALL THOSE the hereditaments more particularly described in the schedule hereto to hold the same unto and to the use of the purchaser and its assigns in fee simple subject to the exceptions, reservations, restrictions, restrictive covenants and conditions contained ....".³

An assumption can be drawn that the fee simple is actually in practice more controlled than a leasehold. Looking at the indenture to the conveyance on fee simple stated above, the said "reservations, restrictions, restrictive covenants and conditions" were described. Minerals, oils and or precious stones were reserved and the crown could enter upon the land at any time - (right of entry) and apportion any of the aforesaid. In other words, despite the fact that a fee simple theoretically implied absolute ownership of land the crown had a right to enter one's land and acquire any mineral, oil and or precious stones thereby defeating the concept of absolute
control of land.

Restrictions, for instance, occurred where an owner could have no control over water passing through his land in a fee simple. The owner was expressly restricted not to disturb the flow of water. You could not barricade the water so as to stop it flowing out of your land because if you did this you would suffer pain of sanction usually by paying a fine.

An owner under the conveyance could not contract to do something outside the scope of the conveyance. For instance, one could not engage in mineral production other than authorised by the crown. Mining was left to the prerogative of the crown. This instance amounted to a restrictive covenant because the crown restricted the kind of activities that an owner could carry out on his land and mining was one such incidence.

With regard to the fee simple being controlled, the conditions go without saying to show how in practise the state heavily controlled the transactions in it.

These conditions on the fee simple conveyance have also been reflected in various pieces of legislation. Parliament has imposed restrictions on a fee simple depriving theoretical rights through;
1. Compulsory land acquisition.

2. Rights to use land are subject to planning law; and

3. The state has rights over air space above the land and of minerals over and in land.

Under the Lands Acquisition Act Chapter 296 of the Laws of Zambia Section 3 provides:

"subject to the provisions of this Act the President may whenever he is of the opinion that it is desirable or expedient in the interests of the republic so to do, compulsorily acquire any property of any description". ⁴

The key word in compulsory acquisition is the opinion of the President. The people in freehold estates are at risk because if the President feels that he should acquire your land you have no absolute control because he is the chief executive of Zambia. Although the Act goes further to compensate the people affected, the Land Acquisition Act is a clear example of disregard of rights in land. It illustrates disregard in rights because a fee simple which is supposed to be absolute ownership is actually controlled.
Rights to use land are subject to the Town and Country Planning Act. The primary task of the Act is to control and regulate the development of land. This Act among other things attempts to control rights of a landholder to use and develop his land. This is done so by requiring the landholder to obtain planning permission before one's land is to be developed. Anything that will amount to material change in the development of your land is subject to planning laws.

In the case of Guilford R.D.C. v Fortescue "Development is the carrying out of building, engineering, mining or other operations in, on, over or under land or ... the making of any material change in the use of any buildings on other land".

For example, someone in a fee simple cannot carry out any modifications in terms of engineering to a rail line or to a highway without planning authority. These sentiments were also reflected in the indenture between Ralph John Seal and the provisional council of the University of Zambia that any material changes to the estate are subject to planning law.

Since the state has rights over air space above the land and of minerals over land and in land, a fee simple owner cannot be said to have absolute control. It is important to note that the test of freehold entails absolute control over one's land. In practice planes
fly over any territory, there are no restricted fly zones thereby no limitations on an individual's airspace. Planes can fly freely to and fro over a few simple estates.

Despite the fact that freehold tenure is prone to abuses due to lack of control, Zambians were not given a chance to own land under freehold. Not many Africans were educated on the issue soon after independence and as a result leasehold was opted for. For a freehold to operate effectively the conditions and uses must be removed to allow ownership as originally envisaged in the theory.
FOOT NOTES

1 CORBETT V HILL (1870) L. R. 9Eq 673

2 M. ROTH AND J. BRUCE Land tenure markets and institutional transformation in Zambia
   Land tenure Centre Madison 1993 page 54

3 RALPH JOHN SEAL AND THE PROVISIONAL COUNCIL OF THE UNIVERSITY OF ZAMBIA Conveyance relating to subdivision D of subdivision No. 13 of Farm No. 488q situated near Lusaka in the Central Province of Zambia.

4 LANDS ACQUISITION ACT CHAPTER 296 OF THE LAWS OF ZAMBIA SECTION 3

5 Chapter 475 of the Laws of Zambia

6 (1959) 2QB 112
CHAPTER THREE

LEASEHOLD TENURE UNDER THE LAND (CONVERSION OF TITLES)

ACT NO. 20 OF 1975
Historically at common law only the three estates of freehold were recognised by law as well as a tenancy at will under which the tenant could be ejected at any time and which therefore could hardly be ranked as an estate. In addition also recognised was a tenancy at sufferance which arises where a tenant having entered upon land under a valid tenancy holds land without the landlord's assent. Also recognised were Periodical tenancies which continue until determined by proper notice. For instance a weekly tenancy can be determined by a weeks' notice.

Terms of years (leaseholds) grew up outside this system of estates which due to the lack of protection given to them by the courts, placed leaseholds in a position of inferiority from which they never recovered. Leaseholders were regarded as holding their land in the lords' name. Meaning that their possession was regarded as possession of the lord. Unlike a freehold where land was held in perpetuity, a leaseholder tenant only held the land for a term. In essence the lord remained as the overlord to which some form of payment had to be made.

From the onset the leaseholder's interest in the land was subject to "control as to his rights" which differed from a freehold which entailed absolute rights.

Nevertheless the various forms of leasehold estates are of extreme importance nowadays. Although it is not possible to evolve a precise definition of a leasehold, certain categories have been drawn, namely;
(i) Fixed term of certain duration;
(ii) Fixed term with duration capable of being rendered certain;
(iii) Uncertain period of uncertain duration.

In the first category a tenant may hold the land for a fixed term of certain duration, like a lease of 99 years. Whether a lease is extended or curtailed under some provision this does not affect the basic conception which is one of certainty of duration. This lease does not create an estate of freehold since it was for a fixed duration of time. No one can hence outlive the required 99 years estate. It is important to note that this category of a lease is the one which applies in Zambia after the introduction of the Land (Conversion of titles) Act 1975.

The second category comprises of leases with no provisions as to their duration. Such leases usually continue indefinitely unless either landlord or tenant take some steps to determine it for instance a tenancy at sufferance. However such a lease can be determined with six months notice on a fixed date. Coupled with the fact that originally the lease was for an uncertain term of uncertain duration, classifies the estate as one less than a freehold. This rule applies to other periodical tenancies as well, for instance, weekly and monthly tenancies.
Thirdly a tenancy of uncertain period of uncertain duration needless to say was, too, an estate less than a freehold. Such a tenancy at will may continue indefinately or may be determined by either party at any time.

The position of leaseholds today however, has changed. Leaseholds were at first regarded as mere contractual rights to occupy land. Despite their subsequent recognition as legal estates leaseholds remained outside the feudal structure of landholding. In present day, leaseholds constitute a form of tenure. Arising out of this is the relationship of land and tenant which is of practical importance.

In our Zambian experience the President is the lord of all land as custodian and the people are tenants to whom the land is leased for a period of 99 years. Section 4 of 1975 Act expressly vest all land in the President.

It must be remembered that out of all the leases granted by William I, that is 999 years, 99 years only the 99 year lease is applicable in Zambia.

It remains necessary to examine whether the leasehold is a suitable form of tenure for the Zambian experience. Before 1930 in Zambia, all alienations of land in urban areas were made in freehold. As from 1930 alienations of freehold land were limited to municipalities and townships namely Livingstone, Lusaka, Broken Hill, Port Jameson and the smaller railway townships between Livingstone and Broken Hill. In other townships plots were alienated in leasehold only.
By the recommendations of the Eccles Land tenure Committee in 1943, January 1 all land alienated was made in leasehold. The leases were for periods of 99 years. Furthermore in 1950, a select committee of the legislative council was appointed to inquire into the advisibility of reverting from the system of leasehold to one of freehold, in respect of agricultural land only. No recommendation was made with regard to urban land owing to the government policy at that time which was laissez-faire. The government could only acquire land through compulsory land acquisition.

On 24th November, 1964, a Cabinet land policy Committee was established to review all aspects of land policy which was inherited at independence and to submit recommendations on a comprehensive land policy. In the land reform of 1970 it was proposed that freehold title be abolished.

(i) That all freehold should be converted to leasehold.

(ii) All those who lost their land (freehold) should be compensated by the Minister of Lands.

(iii) Leases were to be for a number of years not exceeding 100 years.

(iv) The right to convert leasehold land to freehold should be discontinued.

(v) Developed land in Reserves should be given leasehold title status, if it
was so desired.

Most of these recommendations were incorporated into the Land Act of 1975. This was to enable the state to acquire the power of control over land held in freehold. It was thus necessary to convert freehold title into leasehold.

**LAND (CONVERSION OF TITLES) ACT NO. 20 OF 1975**

In 1975 the former President Dr. K. D. Kaunda announced a new policy on land. In his famous "Watershed Speech" he stressed the fact that since land was a gift from God it could not have any market value. It was argued by the government that land is the nations heritage and therefore could not be a commodity for sale or speculation. Land therefore is priceless. It was also argued that freehold tenure promoted shortage of land through lack of rational planning of the utilization of land. In view of this, all existing freehold titles were then cancelled and replaced with 99 year leaseholds.

The Act sought to enhance four main objectives:

1. It was passed to vest all land in the President as custodian on behalf of the state.

2. It was intended to convert all titles of freehold to a renewable leasehold of not more than 100 years but subject
to terms, convenants and conditions laid down by the Minister in a statutory instrument.

(3) To abolish the sale, transfer or other alienation of land for value. Land would have no value except for unexhausted improvements.

(4) The Act sought to put restrictions and conditions on Agricultural holding. Prior to the introduction of the Act, it was met with a lot of criticism during parliamentary debates.

It is section 4 of the Act that vests all land in the President. It states

"Notwithstanding anything to the contrary contained in any other law, deed, certificate, agreement or other instruction or document but subject to the provisions of this Act, 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."

Only the President is viewed as the custodian of land according to this provision. This argument, however, has been criticized because, it purports to vest all land in the President. On 6% of land, is actually state land which the Act affects. Other land in Zambia has been categorised as Trustlands and Reserves lands. It must be remembered that these Trustlands and Reserves lands through their respective orders in council were already placed in the President. Therefore it is repetition in the
Act to further re-instate the provision of land ownership.

The misgivings of Section 4 undermine the importance of the Chief who apparently no longer plays an important role because his status of a chief is based on the land he possess. It is his sole right to distribute the land to his own people. The role of the chief is more pronounced in Trustland and Reserve land. There is however, no express legislation to vest custody of land in the chief. It has evolved through custom to recognise the chief as *de facto* custodian of the land because of the important role which he plays in distributing land and settling disputes. Furthermore the land Act cannot entirely apply to Trustlands and Reserves because of the different systems of tenure obtaining, the latter being customary.

On the contrary land under the Act offers better security of tenure as evidenced in various instances. However, people with enterprising ideas normally prefer to bring about development in areas where it is possible to obtain titles to land.

The Act Converts all freeholds into leaseholds. All land that was held in freehold or as a leasehold for a term exceeding 100 years from the date of commencement of the Act were converted to statutory leaseholds. This placed the President as the lessor and the citizens as the lessees. These statutory leases however, were held under certain convenants.
In looking at what tenure is suitable for Zambia it is important to bear in mind the need for industrial development as well as Agricultural development.

CONVENANTS IN A LEASE

The Act empowers the Minister to make regulations... Pursuant to the powers thus entrusted to him, the Minister passed the Land (Conversion of Titles) Regulations 1975 which set out the conditions attached to land. The conditions apply to both land in Municipal areas and land in township areas. Section 3 of the Regulations states that;

"The covenants and conditions of a statutory lease relating to any land -

(a) other than agricultural land situated in any municipal area, shall be the covenants and conditions set out in Part I of the Schedule,

(b) other than agricultural land situated in any township area, shall be the covenants and conditions set out in Part II of the first Schedule ..."^3

With reference to Section 3(a) Part I of the Schedule, some of the conditions of a statutory leasehold are that the lessee shall pay a yearly rent to the lessor.
The lessee shall pay rates, taxes ... The lessor retains the right to enter upon land and acquire any minerals, oils and precious stones at any time. The lessee has a duty to maintain and repair any buildings and improvements. The lessor has a duty to observe that the lessee has peaceful enjoyment of the land and that he shall not disturb the lessee once he has paid his rent. A lessor can terminate the leasehold where there has been breach by the lessee within six months of the commencement of the breach. Where a lessor causes damage to the property of the lessee he is entitled to just and fair compensation determined by the Minister.

The conditions in Part II of the Schedule are similar to those in Part I except where under Clause 9

"that without prejudice to the right of renewal of the lease contained in Section 7 of the Act upon the expiration or former determination of the statutory term the lessee shall peaceably surrender and yield up possession to the lessor of the land with all buildings erected or being erected thereon together with all permanent fixtures in good tenantable repairs and in accordance with the covenants on the part of the lessee herein contained. Provided that just and fair compensation shall be paid by the lessor in respect of all unexhausted improvements thereon."
This clause is very important because the lessor can opt to take back the lease notwithstanding the right of renewal even if you had have developed it. A lessee has no right of action if just and fair compensation is paid to him as determined by the Minister.

This Part II of the Schedule differs from Part I because the lessor has to renew a lease in the latter. There is no such option in Part II of the Schedule. This provides no security of tenure to the people directly affected under Section 3(b) of the land (conversion of titles) regulations. The lack of security of tenure comes in because the lessor has a right not to renew the lease with no right of action once just and fair compensation has been paid. One loses out on all the improvements made or additions to the land.

In the watershed speech it was envisaged that land could not have any market value since it is priceless. However by the definitions offered in Section 3 of "land and unexhausted improvements," there is a fallacy, land can actually be sold through unexhausted improvements. And in every day usage bare land as a matter of fact is sold despite Section 13 of the Act which restricts alienation of land. Further more the definitions of land and unexhausted improvements are misleading because for instance a house or building in law is part of the land. This illustration goes to show that land can be sold.
Section 13 of the Act states

(1) "No person shall subdivide, sell, transfer, assign, sublet, mortgage, charge or part with possession of his land or any interest therein without prior consent in writing of the President.

(2) The President may in granting his consent impose terms and conditions binding on all persons and shall not be questioned in court or tribunal ..."\(^\text{12}\)

The above section restricts any subdivision and alienation of land except through prior Presidential consent. Under subsection (2) the need for Presidential consent in all dealings in land is not possible in as far as it extends to customary tenure since leasehold tenure is very different from the latter. Even under the Act consent in statelands is rarely obtained due to the complexities of procedures involved.

In the rather contraventional case of *Datson Siulapwa V Failless Namasiku* which involved the sale of a village hut was held to be void ab initio for lack of Presidential consent. "The decision in *Siulupwa* case has been criticised by some who have argued that not only is it impractical to require peasants to apply to the Commissioner of Lands for consent each time they have dealings in land but that conveyance is too
expensive for the villagers to afford and most land in reserves is unsurveyed." 13

Despite the fact that the Act is intended to cover all types of land the subsection should be amended to specifically apply only to lands which are registered under the Lands and Deeds Registry Act and not lands other than stateland. 14

It must be noted that "the leasehold system is too centralized and the procedures for leasing ... involve far too many separate stages and decision makers." 15 The procedure of land alienation in itself under stateland is too labourious thereby curtailing industrial development. Since there is need for investment, investors get off in the process of land alienation.

In conclusion government intended to create a better tenure from freehold to leasehold through the land (conversion of titles) Act 1975. Regard must be given to the four objectives to show how suitable leasehold has been as a form of tenure.

The vesting of all land in the President in the Act is a misgiving in as far as it sidelines chiefs. A practical approach must be given to this section because in as much as the Act purports to apply to customary tenure the two are diametrically opposed. Therefore the
application of Section 13(2) in dealings in land of any tenure (specifically customary tenure) should be amended. By this fact the D. Siulapwa case was wrongly decided. Bare Land notwithstanding the provisions of Section 13(1) is sold even where unexhausted improvement do not exist. It is therefore, inaccurate to assume that land has no economic value. The subsection on this point too must be amended.

What this Chapter attempted to examine is which tenure is best suitable for Zambia, in the light of agriculture and industrial development. To enhance better development the above subsection must be given accurate construction and must be applied practically to suit everyday situations.

The current law of leaseholds is quite inappropriate in most cases under the present conditions in Zambia. It is therefore incumbent to review some of the Sections of the Land Act 1975 to modify them and make them more appropriate for present day land dealings.
Section 4

Land Reform Proposals 1970

Republic of Zambia No. 31(i)


Ibid Section 4

Datson Siulapwa V. Namasiiku 1984 H.N./C.A./16 (unreported) per Musumali J; extended the Act to cover customary land tenure which is contrary to its application as will further be observed upon consideration of the facts of the case.

In Re Southern Rhodesia (1919) A.C. 201

Land was vested in the crown and the chiefs' role is merely administrative.

Section 5

Statutory Instrument No. 187 of 1975

For comparisons on the covenants between a lease and freehold refer to Chapter 2.

Ibid No. 187 of 1975

Opp sit

Section 13

1984/H.N./C.A./16 (unreported)
Chapter 287 of the Laws of Zambia.


Muleya Luke *The effect of the Zambian land tenure system in Agricultural Development* LIM University of Zambia page 138

CHAPTER FOUR

RIGHTS TO LAND UNDER CUSTOMARY LAND TENURE: THE TONGA EXPERIENCE
Zambia has a dual system of land tenure namely, customary land tenure and statutory land tenure. 90% of the inhabitants live in lands which are governed by customary land tenure. These lands are commonly referred to as Trustlands and Reserves. The relevant instruments creating these land are found under.

Section 6 (1) "The lands described in the schedule hereto and known as reserves and the appendant rights set forth in the said schedule are hereby vested in the President and subject to the provisions of this Article .... are hereby set apart for the sole and exclusive use of the natives of Zambia." ¹

Section 4 (1) "All trust land is hereby vested in the President and shall, subject to the provisions of this order be administered and controlled by the President for the use and common benefit direct or indirect of the natives of Zambia." ²

It is necessary to read these two provisions conjointly because foremost they vest all land in the President. Since most of the people in Zambia live in either trustlands or reserves, the type of tenure affecting these areas will be examined thereafter. It will appear that land is reserved for the Zambians notwithstanding the fact that from time to time grants of leases are periodically granted to non-Zambians.

41.
Customary land tenure differs from that of English tenure. Terminology which is used in both does not necessarily imply the same for the different tenures. For instance, in both tenures there exist different rights. Under customary land tenure you cannot sell land which under the land (Conversion of Titles) Act you can as a matter of fact alienate land provided you have prior Presidential consent. Thus, it is apparent that what can be a right under customary tenure will not necessarily be so under English tenure.

Zambian land tenure has often been categorised by loose descriptions such as the Chief or Headman owns the land or allocates the land. Neither the headman nor the chief can claim to have rights over land which they use or exercise control over. Land is already vested in the President.

The chief thus can in no way be regarded as holding the land on behalf of the community in his capacity. Gluckman on ownership in African land tenure observed that;

"In approaching the problem of what is better called tribal tenure ... we must bear in mind that what a person owns is a right in or a thing or piece of land rather than the thing or land itself ... In describing systems of African land tenure it is therefore necessary to describe the right which every social group or each social personality has in the land."
Construed in another way it would appear that customary land tenure tends to promote individual rights rather than communal rights. It tends to suggest that once a person has asserted himself over a parcel of land he assumes de facto rights by virtue of physically occupying the land. It must however be emphasised that not all social groups prefer individual rights to communal ones.

It is important to note that customary land tenure is not uniform and it differs from place to place. However, communal rights are favoured in instances where the whole community has a right to graze their cattle over someone's land after harvest. The same will apply to where fishing is concerned. Clan rights too override the individual rights. The clan will have more rights over a member's parcel than any other person, for instance in fishing.

To further our understanding of how individual rights defeat the chiefs authority, a case study will be taken among the Tonga who by no means have a systemized hierarchy of chiefs.

CASE STUDY: TONGA CUSTOMARY LAND TENURE

Commenting on the Tonga customary land tenure White C. observed "...the Tonga had no traditional authorities to allocate land in any case and the Tonga headman of a village does not allocate land to his villagers and only participation in the acquisition of land is to provide information as to whether or not existing rights
are already enjoyed by an individual in a piece of land which another wishes to acquire."

Among the Tonga therefore, the role of the chief is merely administrative. The Chief has no role of regulating the conduct of the villagers who already hold interests in land. By this fact alone Tonga tenure creates individual rights rather than communal. Man has a right to clear a land and occupy it since the headman has no authority.

"Tonga customary land tenure supports the view which confines the authority of the chief or headman to the regulatory role without any powers of granting land."\(^\text{6}\) The regulatory role pertains to granting or withholding of permission for strangers to settle in the area.

The ways by which one becomes a landholder under customary law seem to dispel the theory that traditional authorities are said to allocate land to individuals.

In the case of **MWIINDWA V. GWABA** "The plaintiff was claiming **inter alia**, an injunction restraining the defendant, a headman from continuing ploughing his land. In his defense the headman argued that since the plaintiff had left the village of his own accord the land automatically reverted to him and he was therefore entitled to allocate it to others or possess it himself."
The court finding abandonment not proved granted the injunction sought. On the fundamental issue of the reversionary interest which the court did not address itself. The defendants version was supported by one of the assessors of the court. He said "when a man moves from his village, the land he was ploughing or the land he was given to settle, that land remains the property of the headman. It is the headman who is going to be approached to allocate the land."  

One chief Ufwenukwa who has been called as a defendant witness but poised with special knowledge of the relevant customary law said, "when a headman allocates land it is not his land as much to give ...." 

By this statement it is a generally accepted fact that the headman has no control over the land because certain distinctions have to be made. The question which arises therefore is that one has to distinguish between a headman's control over land and on the other hand ownership.

Having established in the above case that Tonga customary tenure emphasizes on individual rights in land, it will be accurate to conclude that land in this instance does not belong to the chief.

The above discussion has shown that among the Tonga customary land rights are vested in the individual rather than the community. These rights enjoyed must be
perfectly well be understood as a defined and well regarded system of land tenure. Furthermore the role of the chief at all times remains at an administrative level rather than of owner of land. What in essence is owed to the chief is political allegiance.

It will now be necessary to examine the modes of acquiring interests in customary land. Rights in land can be acquired by the actual clearing of land for cultivation or signifying such intention by marking. There are several ways of acquiring land under customary tenure and these include inter alia, Acquisition, Transfer of land by way of gift, sale of land, Acquisition by marriage and Acquisition by inheritance.

ACQUISITION

Land can be acquired through original acquisition. This occurs when an individual takes up either undeveloped or virgin land or unoccupied and abandoned land. This mode of acquisition makes no reference to any traditional authority except where there is doubt as to whether land is actually abandoned. This is said to be a very original mode of acquiring land. Once land is so acquired it cannot be a subject of dispute because of the originality of the rights to it. Where one finds virgin land rights can be established by clearing the land in preparation for cultivation. The extent of the area will be to the amount one cleared so as to warn others of his intention.
Acquisition by occupation applies only to those who are members of a village community and not anybody else. Within the village a family can move from one area to another usually in search of grazing lands as long as that area is not already occupied.

However a stranger will first seek permission from the headman before he settles in the village. This is so because of his character, he must be a credible person. In practice many strangers have managed to settle in some places in return for personal favours to the chief.

Land can also be acquired through Derivative acquisition. This covers instances where land is transferred inter vivos or is inherited. In this instance members of the family pass on land to their issues who further do the same. Land is kept in the family in perpetuity. This establishes a long interest in the land capable of going on for a very long time.

TRANSFER OF LAND BY WAY OF GIFT

"Customary land rights are essentially individual. Once a person has established his rights by occupation he is free to transfer rights to any member of the community without reference to any traditional authority ... Rights of an individual are absolute. Among the Tonga gifts can be made freely and such gifts are not restricted to those who are relations of the grantor." 10
A grantor can even bequeath land to a stranger so long as such persons have secured permission to settle in the area. In such a case relatives and the headman will merely be informed so that they can bear witness to this fact. A grantor can equally bequeath land to a family member although there will be no hard and fast rule to call for witnesses.

SALE OF LAND

"Sale of land under customary tenure is not permitted. This idea of selling land is totally foreign especially among Tonga though and custom."  

Most chiefs and headmen are agreeable on the point that land cannot be the subject of sale. Sale of land cannot be tolerated in any form. Sale of land is subject to sanction in the sense that the purchase price is recovered and land is retrieved. However, there has been no case in which sale of land has even been adjudicated.

"According to one Euro-African farmer in the Reserves bitterly complained that he had been trying to purchase land from the Tonga for many years but no one would sell him land."

What can be sold in certain circumstances are improvements on the land, for instance a village hut. Bare land cannot be sold due to scarcity.
ACQUISITION BY MARRIAGE

Land can be acquired through marriage and this takes place in three forms namely; Virilocal, Uxorilocal and Bilateral.

VIRILOCAL

In a virilocal marriage the wife moves to the husband's village. Virilocal marriages are common among the Tonga, Mambwe and Luvale to mention a few. The couple cultivates the husbands' field who may have acquired land for preparation of marriage. The wife just has a mere right of cultivation, which she loses either on divorce or widowhood. A wife is only entitled to the crop which she tended. A wife is at the mercy of the husband and cannot be said to have any interest in the land. However, where a wife acquires land independently she has exclusive rights to such land.

UXORILocal

This is where a husband moves to his wife's village. He may live there for some years before he returns to his father's village. This is most common among the Bemba, Lunda, Lala, Lamba etc. A man will labour in his in-laws garden and will depend on them until a field can be cleared for him. Land given as a gift from the wife's relatives will always remain as her property. The husband will only be entitled to a share in the produce. This is the only right he acquires.
His successors have no claim to the land.

As compared to virilocal marriages a husband in a uxorilocal marriage is not given any interest in the land. The land simply belongs to the wife.

**BILATERAL**

A couple may live wherever they went. It is most common among the Lozi. Whereas a wife is entitled to half the produce, a husband has no right in the crops.

**ACQUISITION BY INHERITANCE**

Inheritance provides further evidence that rights in land are vested in the individual rather than in the community at large. Customary law of inheritance is either Matrilineal or Partilineal.

**MATRILINEAL**

Rights in property are derived through the female line. A man's children have no rights to his estate but his mother, brothers, sisters, maternal uncles, nephews and nieces have a right.

**PATRILINEAL**

Rights to property are traced through the male line with children taking pre-eminence over the man's parents, his brothers and sisters.
Under both systems there appears to be no provisions for widows. What usually happens during inheritance is a sole heir is chosen to take up the mammoth task of administrating the estate. These rights however can be passed on again to another heir.

The rights under customary land tenure have been subject to a lot of criticism. The rights confer too much individual title such that a chief cannot chase anyone for disobedience to him, unless the whole community sanctions it.

Once land has been granted to one it is held in perpetuity and not even abandonment can dispel this claim. This sidelines the role of the chief to an administrative one. The chief only deals with incoming settlers.

Land is not subject to sale unlike in Leaseholds where you can get Presidential consent and sale the unexhausted improvements. Mostly in villages people refuse to sell land because they hold it sacred in the sense that it passes from one clan generation to the next.

Customary rights in land despite creating a form of tenure are inadequate especially where lack of title deeds are concerned. In modern day trends it will be necessary to sale land since that is the only way to attract investors. Title deeds in customary land tenure may be acquired through the council or through the President as provided in the Orders in Council.¹⁴
FOOT NOTES

1 Zambia (Statelands and Reserves) Orders 1928 to 1964 Appendix 4 to the Laws of Zambia.

2 Zambia (Trustland) Orders 1947 to 1964

3 Section 13


6 Republic of Zambia A report of the Commission of inquiry into land matters in Southern Province. 25th June, 1982 at page 10

7 (1974) Z.R. 188

8 Ibid page 5

9 Oppcit page 8

10 Conroy D. W. The general principles of land tenure "landholding and usage among the plateau Tonga of Mazabuka District". A reconnaissance survey of 1945 at page 92.

11 Ibid page 177

12 Conroy Oppcit page 179

13 Procedure on land Alienation Circular No. 1 of 1985. This circular is purely administrative without legal support. It can totally be ignored when alienating land.

14 Ibid Orders 1928 to 1964, Orders 1947 to 1964

52.
CHAPTER FIVE

Reflect on whether Zambia needs a new system of land tenure to take account of the social, economic, cultural and political events taking place.
"MMD shall institutionalise a modern, coherent, simplified and relevant land code intended to ensure the fundamental right to private property and ownership of land as well as to be an integral part of a more efficient land delivery system".¹

It goes without saying that the present government policy towards land is to liberalise and commercialise it. These sentiments were made in the Movement for Multi-party Democracy (MMD) party (now government) manifesto and have now been crystalised under the Lands Bill of 1994.

The chief objectives of this Bill being inter alia;

(a) to revise the leasehold system of tenure;

(b) to introduce a land market;

(c) to recognise customary rights; and

(d) to introduce the land tribunal and the land development fund.²

Currently, land in Zambia is held under a dual system of tenure, namely, customary and leasehold tenures.

In order to conclude the debate about which tenure is most suitable for Zambia, it will be important to note that these remarks are still in favour of the dual system of land tenure. If at all any reforms have to be made, they will be reforms to build on the demerits of the existing tenures.
The law as it is, which is obtaining in Zambia allows for the creation of non customary interests in Reserves and Trustlands. Non-customary interests created in Trustlands are known as rights of occupancy granted for a period not exceeding 99 years by the President. ³

In a Reserve on the other hand, non-customary interests can be granted for; -

(i) 99 years for land set aside for public purposes;
(ii) 33 years for land set aside for missionaries and charitable organisations; and
(iii) 5 years in other cases. ⁴

However, under the land (Conversion of titles) amendment Act 1985, a restriction has been imposed in which no land whether in a Reserve or Stateland can be alienated to a non-Zambia unless the President approved an application made to that effect. ⁵

The Chief cannot make grants of non-customary interests in land. The chief's role is merely administrative and without legal force. ⁶ Nonetheless, the Government has provided the chief some administering role in granting land under Circular No. 1 of 1985. ⁷ This Circular it may be noted is merely an administrative procedure with no legal effect.
Land reforms must be the will of the people and must not just be for economic gain. Section 4 (i) of the new Land Bill gives land value but this provision does not seek to protect customary tenure.

The question which arises in this context relates to what sort of rights will be created under customary land tenure. Notwithstanding the fact that among most tribes, rights created in land are individual ones, regard must be given to clan and family rights.

A problem is created since most of these people who fall in the latter merely have defacto rights and hence no recourse to any title (by registration for instance). What the Land Bill seeks to achieve is to encourage land sales to rich people thereby displacing the villagers who have no financial base.

Seeing that there is no regard for the people, the demerits of customary land tenure must be taken into account in order to make the tenure more suitable.

One area in which customary interests to land are lacking are in respect to women. Women do not actively participate in land holding as is evident in the types of land acquisition where there is no specific mention for the rights to land for a widow. Similarly, it is quite impossible for a married woman to acquire land.
There is also need to give the chief greater power than the administering role he plays. Since land is vested in the President already, the chief must be consulted on behalf of the President in making any grants of land. A provision must be made to the effect that the chief and the President work in consultation. For it is the chief who knows which areas are unoccupied or abandoned, thus ensuring that no villagers' land is taken away when making grants of land.

Customary land tenure however as it presently stands offers the best security of tenure to land since it is not affected by the Lands Acquisition Act. Once people settle in a given area they hold land in perpetuity as land passes from one generation to the next. As regards financial lending institutions, and since there are no deeds to the land, loans must still be encouraged but security on the loans should be held over assets like cattle, harvests, farm inputs ...

As regards the creation of non-customary interests, however, the law should provide for a uniform 99 years right of occupancy in both Trustlands and Reserves. This will be for easier administration and for purposes of investment. The occupancy will still be renewable at the end of its term.

On the other hand, the leasehold as it is under the Land (Conversion of titles) Act must be upheld except with a few changes to be made.
The misgiving that 99 years is not enough for investment is a fallacy because the number of years almost create a century and cannot be said to create insecurity of tenure. Besides some investments wind up before achieving their objectives after a few years of incorporation.

The provision relating to need for Presidential consent under Section 13 (2) of the Act is not possible to extend to cover customary tenure since the land tenure system obtaining in the latter is different from that which the Act seeks to cover. Since land is already vested in the President under customary tenure in the Orders, it is wrong to vest all land in the President under the Act.

The restrictions in the lease should continue as they are, particularly one does not develop the land in a certain period. The state is then at liberty to revoke the lease provided just and fair compensation as decided by the Minister is paid.

The provision above is very important because what is at stake is the land of the people. Since the land is under supervision, investors will be able to improve the land readily.
By all means, land should continue to vest in the President holding on behalf of the people in perpetuity. Freehold must not be re-introduced because it creates absolute ownership. This is commonly illustrated in the famous maxim of *Cujus est colum ejus est usque ad coelum et ad inferor* which simply means that as a general rule, he owns the soil is presumed to own everything "up to the sky and down to the centre of the earth".

Finally, despite the fact that Zambia is going through a phase where there is need for economic investment, the land holding of tenure with the changes that have been highlighted in the leaseholds and customary tenure should continue in their present form. Regard must be given to the historical background as to why land was transformed to leaseholds and customary tenure which has been saved since 1928. Zambia itself does not have a strong economic base and where one contemplates selling land, it will obviously be highly priced.

It should also be noted that land is the most important resource in our country and affects everybody. This is why in deciding what tenure is best suitable, all the people at different economic strengths should be considered. Since the people are generally poor, I rest my case by holding that land should not be the subject of sale.
FOOT NOTES

1  Paragraph M, MMD Campaign Manifesto 1990

2  The Lands Bill 1994

3  Section 6, Zambia (Trustland) Orders 1947 to 1964.

4  Section 6 (a) (1) Zambia (State Lands and Reserves) Orders 1928 to 1964

5  Act No. 2 of 1985

6  Re Southern Rhodesia (1919) A.C. 201

7  Circular No. 1 of 1985

8  Lands Bill 1994

9  Section 2 Lands Acquisition Act.

10  Act No. 20 of 1975

11  Ibid 1975 Act

12  Section 4 (1) Zambia (Trustland) Orders 1947 to 1964.

13  Corbett V. Hill (1870) L.R. Eq 671 esp 673
ARTICLES
Chanda A. W. The effect of lack of Presidential consent under Section 13 of Land (Conversion of Titles) Act 1975; Bridget Mutwale V. Professional Services Limited, 1984
Conroy D. W. The General Principles of Land Tenure "land holding and usage among the plateau Tonga of Mazabuka District" A reconnaissance survey 1945
Gluckman African Land Tenure, Rhodes 1945
White C. M. "Terminological confusion in African land tenure" 1958

DOCUMENTS
Lands Bill 1994
MMD Campaign Manifesto 1990
Procedure on land alienation Circular No. 1 of 1985
Ralph John Seal and the provisional council of the University of Zambia Conveyance relating to subdivision No. 13 of Farm No. 488(a) situated near Lusaka in the Central Province of Zambia, March 1966
REPORTS

Eccles Land Tenure Committee 1943
Humanism in Zambia; Watershed Speech 1975
Land Reform Proposals 1970
Report of the Native Land Tenure Committee 1945
Republic of Zambia No. 39(i) Daily Parliamentary debates
August, 1975
BIBLIOGRAPHY

BOOKS

Mbao L. Law and Urbanisation in Zambia, 1987
Megarry R. E. A manual of the law of real property, 1975
Muleya L. The effect of the Zambian land tenure system on agricultural development, 1990
Mulimbwa A. C. Law and Agricultural development in Zambia 1987
Mvunga M. P. Land Law and Policy in Zambia, 1987
Ndulo M. Mining rights in Zambia, 1987
Riddall J. G. Introduction to Land Law, 1988
Roth M. and Bruce J. Land tenure, land markets and institutional transformation in Zambia, 1993
Walker D. The Oxford Companion to Law, 1980