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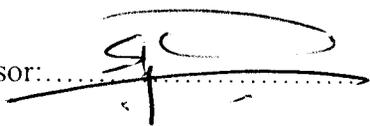
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Entitled

**AN OVERVIEW ON THE IMPACT OF THE DUAL SYSTEM OF LAND
TENURE ON DEVELOPMENT IN ZAMBIA**

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DEDICATION

To my dearest wife **DINGASE ZULU**

“Behind every successful man, there is a successful woman

My lovely children.

Your perseverance and support have been tremendous. May the Almighty God continue caring for us.

PREFACE

This essay has its principal aim to assess the evolving importance, present competence and future role played by secured land tenure in shaping and enhancing economic diversification in a contemporary democratic and independent state like ours. It is interesting that as the research work progressed, its timing became especially appropriate. As if by coincidence, the Government at the “77th Agricultural and Commercial Show” of 2003, declared and adopted as its theme “**Diversification is the key**” Not only was this project conceived and carried out on a parallel footing with government’s declared year of economic diversification, but also attempts to redefine the concepts **self-determination** in an independent Zambia. This work further proceeds to condemn the current dual system of land tenure as an impediment to development.

It is plausible that since the ‘New Deal Government’ took office, political rhythms have vibrated calling for economic diversification through rural investment. But so long as the land law remains unreformed, this will pass with the political era without achieving anything. The result is sad. The majority of Zambia’s poor people live in rural areas. It is therefore vital to maintain a strong focus on rural areas if hunger and poverty are to be meaningfully tackled. These areas are of critical importance in the struggle to achieve sustainable development but unfortunately they are not on the agenda of development strategies of both government and the donors. This trend has for years treated urban and rural areas as separate issues, and are subjects of different intellectual traditions, strategies and specializations. What is notable is the fact that rural and urban areas, are

not supernatural phenomena that cannot have their imaginary lines erased. As it is now, the urban areas have emerged and claim supremacy over the rural areas, despite its smaller geographical size 6%. Laws are made in Lusaka for the whole 94% of the rural areas and its population. This then is no different from the imperialist laws which were imposed on the territory from England. Worse the planners of development are not acquainted with the needs of the rural areas countrywide. No wonder their programmes are resisted and fail, for want of indigenous contents. Thus, has the effect that the rural community is denied the right to **self-determination**, which concept should be expanded and shifted from its conservative meaning adopted by “United Nations Resolution No. 1514 (XV) Declaration on Independence.” This entails devolution in the lands commissioners’ office, so that all developmental planning are done and implemented at provincial levels while he retains the national supervisory role. All title deeds to land should be effected at provincial levels though he will be entitled to know through second copies. I note further than secure rights to land play a key role in enabling productive livelihood opportunities and access to basic services for the poor. Both in rural and urban areas, secure land tenure provides the basis for economic investment, shelter and sustainable environmental management. Equitable land distribution also enables economic diversification.

I must confess that this subject is vast and poses a formidable task. More difficult is to try and squeeze it into fifty pages, which in fact ought to be one tenth of the essay. I encountered another obstacle in explaining concepts of “possession” and “ownership” which to me and indeed in many African languages the two are used interchangeably.

Finally the essay urges all stakeholders, to have a more open and democratic dialogue that will resolve the impasse on how the dual system of land tenure can best be resolved. Despite the several obstacles, I have nonetheless enjoyed doing this work. It has broadened my understanding of the genesis of land law in this territory but above all, I have known that law is an instrument for social and economic development. I hope to continue with this project in future.

TABLE OF CONTENTS

	PAGES
Declaration.....	i
Dedication.....	ii
PREFACE.....	iii
Table of contents.....	vi
Acknowledgements.....	ix
Table of Cases	xi
Table of Statutes.....	xii
Abstract.....	xiii

CHAPTER ONE

1.0	Introduction.....	1
1.1	Land ownership in African perspectives.....	2
1.2	Arrival of white settlers in late 19 th century.....	3
1.3	The coming of white settlers in Barotseland.....	3
1.4	White Settlers and Land Ownership in North Eastern Rhodesia (1890).....	5
1.5	Effect of British victory or Land Policy.....	7

CHAPTER TWO

THE ENGLISH CONCEPT OF LAND ADMINISTRATION

AND OWNERSHIP.....	9
2.0 Relationship between Land and Men.....	9
2.1 The Doctrine of possession.....	10
2.2 The Doctrine ownership.....	13
2.3 The impact and attitudes of courts on land ownership in British Colonies.....	14
2.4 Who owns land in Zambia today.....	17

CHAPTER THREE

3.0 IMPACT ON DEVELOPMENT OF THE DUAL SYSTEM OF LAND TENURE.....	21
3.1 Land alienation in Customary area.....	21
3.2 Why Rural Development is neglected.....	30
3.3 Rural Development Cardinal.....	34

CHAPTER FOUR

4.0 THE CRITICAL ANALYSIS OF THE DUAL SYSTEM OF LAND TENURE.....	37
4.1 Law as an instrument for social change.....	37
4.2 An epitome of verbatim interviews.....	38
4.3 (a). From the general citizenry	38

(b). Views from the foreigners.....	41
(c). Views from the Chiefs.....	43
(d) Government views on land tenure.....	45

CHAPTER FIVE

5.0 CONCLUSION.....	48
5.1 Observation.....	48
5.2 Recommendations.....	49
5.3 Conclusion.....	50
 Bibliography	 51
Interviews Conducted.....	

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I owe special thanks to His Royal Highness Chief Bright Nalubamba in his capacity as Chairman of the Royal Foundation of Zambia. Not only did he simplify my work but

also clarified the misconceived attitudes towards land held and administered under customary tenure. He was very elaborate indeed. I thank him for his generosity and sympathy to me; he is a caring chief. The Embassies of Egypt, the High Commissions of the United Republic of Tanzania, Kenya, Botswana and the German Technical Cooperation particularly Mrs. Katrin Saage Fain, I thank them very much. The Indian High Commission has a special place in this work for accessing me to its wonderful library. It has well written literature on land law reforms.

To Government officials, special thanks are due to the Senior Administrative Officer (Chiefs Affairs) Mr. Patrick Chombela in the Ministry of Local Government and Housing; he had all the answers on his finger tips, and accommodated me without appointment.

To individuals I have to mention a few, Mr. Mugal Salim who blamed the government for failing to repeal the imperialist law up to date; General Malimba Masheke, Dr. Guy Scott, Mr. Dickson Chasaya , Rtd Judge Noah Kabamba and Mr. Nkole Bwalya an Architect who made an enormous intellectual contribution. Indeed my work could have lacked data from the Ministry of Lands had it not been for the Media in particular, the 'Post', Zambia Daily Mail and Times of Zambia. Their detailed reporting styles have added quality and substance to this paper. And indeed without them, this paper could have been blurred or no data from the Ministry of Lands, I should thank them all.

TABLE OF CASES

	Page
1. Amodu Tijani v. The Secretary of Southern Nigeria [1921] AC 399.....	16
2. Cox v. The African Lakes Corporation (1901).....	14
3. Mwiinda v. Gwaba [1974] ZR 188.....	16
4. Raylands v. Fletcher [1866] L.R. 1.....	13n
5. R.e. Southern Rhodesia [1919] AC 211.....	15
6. Still Water Farms Ltd v. Commissioner of Lands plus 3 others LAT/30/2000	24
7. Yengwe Farms Ltd v. Mastock (z) Ltd phs 2 Others SCZJ No. 11/99.....	19
8. Village Headman Albert Mupwaya Phiri plus Another v. Mathew Mbaimbai: SCZJ No. 4/99.....	25

TABLE OF STATUTES

1. **Constitution** (as amended by Act No. 18 of 1996) Cap 1.

	Page No.
a. Article 1(i).....	7
b. Article 1 (3).....	7
c. Article 16(1).....	13
d. Article..... 16(2)(j).....	14

2. **Lands Act (No. 20 of 1995) Cap 184**

a. Section3(1).....	5
b. Section3(4) (c.).....	6
c. Section7 (1).....	8

3. **Agricultural Lands Act of 1960 Cap 187**

a. Section.....4(1).....	5
--------------------------	---

ABSTRACT

« Men are like birds of the sky. They converge in a kachele tree (type of fig tree but with small fruits) and eat its fruits to their fill; so are men, they till and harvest from the land. There is no need to quarrel over land since nobody owns it but God for his people is the owner”.

Chief Sairi of the Ngoni People – Eastern Province, February 1984.

CHAPTER ONE

INTRODUCTION

Zambia like many African countries was a colony of Great Britain as from 1924-1964 when she attained self-rule. The effect of colonialism as it is well-known is that the territory so colonised loses its legislative status to the imperialist government. Thus we see that from that period, the territory depended solely on the imported laws from the United Kingdom.

Among the various laws so imported was the Land Law. Surprisingly this law did not apply uniformly to the indigenous people instead, the white settlers influenced the Crown to create a “Dual systems of Land Tenure” which had its main aim to segregate the two races i.e. the indigenous from the white settlers. This is the law that Zambia has clung on up to this time.

This essay is a thought-provoking one. It carries out a research aimed at finding out from the various people of all walks of life whether there is any justification in having a dual system of Land Tenure in a free state. The essay will have chapters arranged in the following manner:-

Chapter one is an introduction and discusses the notion of Land ownership as approached from the African perspectives before the coming of white settlers. Chapter two is dedicated to the arrival of white settlers and how they affected change in Land administration. Chapter three is a critic on the dual system of Land Tenure and its effect

on development in the country, while chapter four will analyse the various views so gathered and depending on these views consider the possibilities of modifying the dual system into a single system of Land Tenure. It is also in this chapter that the issue of vesting the administration of Land in a single authority shall be discussed. Chapter five will reflect a recommendation to relevant authorities for effecting a repeal of the current system.

0.1 Land Ownership in African Perspectives:

To whom does Land belong to?

*"I conceive that the land belongs to a vast family of which many are dead, few are living, and countless numbers are yet unborn."*¹

This was the reply by one Nigerian chief to the question posed by the West African Land Committee in 1917. The committee wanted to know whether land in an African perspective was owned individually. Clearly such a notion of individual land ownership, was inconceivable even in this territory now called Zambia. Chiefs were the key players in the art of administration of Land affairs. Sitting with his advisors, he could pass regulations pertaining to the use of land. For example the chief could choose a grazing land for their animals, choose where crop farming could be done and in case of the usage of river-water-usage, he could decree that a certain point will be used for bathing for male or females or children only while another for tapping drinking-water etc. The belief in communal ownership was so strong that for example in the Ngoni custom it was said:

*"if a stranger was hungry, ...let him go in someone's field ...pluck fruits or cut sweet stocks or dig some root-tubers....sit down and eat to his feel ...won't be treated as a thief but if he carries it away ..."*²

¹ Ghana Land Law at page 24.

² Interviews with village Headman Mpondombini on 3rd January 2003.

And Mvunga M.P observes; ...” *During dry season owners could take their cattle to graze in fields belonging to others.. The apparent owners of fields did not cease to be owners in this case but continued to be landholders subject to recognised interests or rights of others ...*³

Therefore what is meant when referring to an individual as a landholder or occupant as ‘owners’ is that such an individual has more rights and interests in the land than anybody else. In real sense Land is communally held by the entire community itself.

0:2 Arrival of White Settlers in the Late 19th Century

The territory was divided into two major kingdoms. The land laying west of the Kafue River up to the boundaries of Angola, and Congo in the west and then to the Zambezi River was called the Barotseland under King Lewanika. Land on the east of Luangwa bordering Mozambique, Nyasaland and Tanganyika was claimed to be the Angoni Land under their King Mpezeni. It is unknown whether these two chiefs ever met to demarcate their territories. The two territories were later renamed by white settlers as North Western and North Eastern Rhodesia.

0:3 The Coming of White Settlers in Barotseland

At the time King Lewanika was under constant fear of invasion mainly from King Lobengula of the Matebele across the Zambezi and the advance of the Portuguese from Angola in the West. He thus was ready to accept any offer of protection at whatever cost.

³ The Origins and Development of the Land Tenure system of Zambia 1924-1964: A legal Perspective; Page 23.

Lewanika was in close and friendly relationship with King Khama of Bechuanaland and asked him if he was happy under the British protection. Khama replied that it had been a blessing to him, relieving him of all anxiety from both the Boers and the Matebele. Lewanika opened the gates to his kingdom. In January Lewanika requested Shippard, the British Administrator of Bechuanaland for British Protection; and that the Matebele should be restrained from making further attacks. In June 1889, Lewanika put his mark on a document submitted to him by Henry Ware a Trader from Kimberley. This mark signified a concession granting Ware exclusive Mineral Rights in Lewanika's territory. John Cecil Rhodes the Proprietor of the British South African Company (B.S.A Co.) bought the concession from Ware. Rhodes sent his loyalist F.E Lochner to Lewanika to make a more elaborate and definite concession.

This concession which was signed on June 27, 1889 included a term assuring Lewanika that he was going to arrange for some British residents to settle at Lealui. Lochner did not perform as agreed i.e. that no British settled at Lealui till 1897 when R.T Coryndon arrived to represent the BSA Co. It was Coryndon who on 25 June 1898 obtained the Kings assent to a new agreement which defined more specifically the respective rights of the British and the Barotse. Thus the Agreement gave all mineral rights in the BSA company. "It on the other hand recognised and gave LAND and all that was attached to it e.g. game or forest to the King (Hanna)."⁴

⁴ Story of Rhodesia and Nyasaland at 133.

Here we see that land ownership, by virtue of this concession, vests with the king of Barotseland, the legacy that has not changed up to this day. Was it the same in North-Eastern Rhodesia? This is what the next article tackles.

0:4 White Settlers and Land Ownership in North-Eastern Rhodesia (1890)

East of Luangwa River was a vast hilly land extending to the borders of the modern Mozambique, Nyasaland and Tanganyika. This land was claimed by one King Mpezeni of the Ngoni People. This tribe settled here after defeating several indigenous tribes in the 1860's. It was another break-away group from the Zulu kingdom of the Kwa Zulu Natal in South Africa as it is now called. This tribe was too strong to accept any protection from any other power. It had the military tactics of King Shaka's Impi.

However, Mpezeni was not let to enjoy quiet possession of his hard earned territory. The British Prime Minister Lord Salisbury on, 22 August 1888 declared Britain's Policy in Africa as:

"Its purpose was to advocate a policy of attempting to secure for the British Empire a continuous stretch of territory from Egypt in the North to Cape Colony in the South." (Hanna)⁵

⁵ Quoted from the Times 22 August 1888 by Hanna in "The Story of Rhodesia & Nyasaland at P.14

Following this declaration, the Prime Minister directed his representative then in Southern Rhodesia Alfred Sharpe to make treaties with tribal Chiefs northwards.

In 1890 SHARPE declared the whole country North of the Zambezi River to be under the British Protection.

In making these treaties, however, he had only limited success. King Mpezeni saw no reason to avail himself of the Crown's Protection. He at the time had already repelled Matakenya (the Portuguese half-caste) who was a notorious slave trader from Mozambique. Britain could not tolerate any obstacle as usual. The two engaged into a fierce battle till to the victory of the British in 1898 February when Mpezeni's own son and great warrior surrendered and assassinated at a place now called Feni East of Chipata. King Mpezeni's rule ended as British rule started. The British denied to recognise King Mpezeni as owner of land for want of written evidence. This move by the British government should to a modern lawyer be regarded as ridiculous. For if Mpezeni did not own land why in the first place approach him to make their treaties? Or did they find any title deeds with Lewanika, when they made those concessions?

We also learn that William Duke of the Normandy invaded England in 1066 with a large army. Immediately after the Battle of Hastings, William began the process of rewarding the chief men among his followers with grants of land in England. Ridall says:

*"At the time William can have known little about his new Kingdom ... he had only been to England once before ..."*⁶

⁶ Introduction to Land Law at p.7

Although William did not have any title deeds, (and from whom could they have been acquired) the distribution of land could not await a detailed survey of the conquered territories. Hence then it is prima facie that land ownership vested with King William by conquest and not by any law as at the time there was none. Equally, Kings Lewanika who many scholars and even lawyers say “he gave what did not belong to him” is unjustified for if there was any owner other than himself could have risen to challenge the white settlers the way King Mpezeni did. So, therefore, it is submitted that the land belongs to the Kings in Africa held for their subjects in the similar manner with the United Kingdom, as title deeds was a concept unknown not only to African Kings but to William also. The British had their own agenda to achieve at all costs.

0:5 Effect of British Victory on Land Policy

The defeat of King Mpezeni brought with it the new land policy to North Eastern Rhodesia. The white settlers took control of the whole land. There was a relatively huge influx of whites, those coming from Nyasaland, Tanganyina, squeezed out by Portugues in Mozambique as well as from Southern Rhodesia and South Africa, all found their new sanctuary in the territory. Though the Ngoni people were defeated, they did not flee their territory so as to leave a vacuum to be occupied by these settlers. The new white Administration was faced with the problem of minimising any further conflicts with the natives. In the absence of any suitable settlement scheme, they had to import the provisions of the Land Apportionment Act of 1925 from Southern Rhodesia. By this Act land was divided into two; the Crown Land and the Native Reserves. Only Europeans

could buy land in the Crown Lands but all natives could only remain in the Native Reserves. Thus observes Hanna:

“The Land Apportionment Act established the Principle of Racial Segregation”

Discriminative as the Land Apportionment Act was, it nonetheless laid a foundation in Land Law development in the territory now called Zambia. At independence in 1964, the dual system of land tenure continued subsisting with only minor changes to its principle such as that the natives were now allowed to acquire land in the former Crown lands. Another minor and insignificant change being the nomenclature such that Crown Land became known as State Lands whereas the Native Reserve Lands remained ‘Reserve Lands after striking out the detested word “native.” Also worth-noting is the fact that the law practiced in these two lands varied. In the Native Reserves, indigenous people applied their customary laws while in Crown Lands only the English Law was administered. This is the system that Zambia has clung on to even after independence. Is there any justification in upholding the very discriminatory law in a free-state?

CHAPTER TWO

THE ENGLISH CONCEPT OF LAND ADMINISTRATION AND OWNERSHIP

The White Settlers invoked two concepts namely: "Possession" and "Ownership" to wrest land from the natives. The terms will be discussed in detail below:

2.0 Relationship between Land and Men

Of all creatures man can rightly be described as a 'land animal: He grows and develops to the exhaustion of all his talents on its surface. Yet still when he dies, he is respectfully returned to the land. This is peculiar to man and distinguishes him from other animals for when they perish, their carcasses provide a source of nourishment to other animals including to man himself. This explains why "our ancestors viewed land with such religious awe." (BUSIA).¹ Wrought up in this mystical religious belief, Africans never thought that land could individually be owned to the exclusion of all others. This conservative view is still rife in the general populacy up to this day. It is not because they are illiterate, but because their conscience is deep rooted in the belief that God made land and created man to live on it. One Ngoni Chief at land dispute settlement said:

*"Men are like birds of the sky. They converge in a Kachele (type of a fig with small fruits) tree and eat its fruits to their fill; so are men, they till and harvest from the land. There is no need to quarrel over land since nobody owns it but God for his people is the owner."*²

¹ The Position of the Chief in the Modern Political System of Ashante pp.40-2.

² Chief Sairi: Presiding over Customary Land dispute: February 1984 (not reported)

He nonetheless, commented that there was need for law to control the use and occupation of all land in this chiefdom, but without elaborating how this could be achieved. Was he to demarcate plots to each of his subjects as a means of providing security to such tenure: would he subsequent to such allocation give any symbol of ownership to land holders? What would such holding denote; mere “possession” or ownership”? The two terms are confusing and in most African vocabulary they only mean one thing i.e. that the possessor of a thing is the owner and the two can only be distinguished from the word ‘keep.’ That is if a thing is in custody of one man for someone else – he is merely keeping it and not possessing that thing because he is not owner. This is the interpretation found in most African communities. But for the White settlers the terms ‘Possession’ and ‘Ownership’ have meanings each distinct from the other. Employing these two concepts, the White Settlers were able wrestle all beautiful lands from the Africans. How they interpreted these terms, is the concern of the next articles giving them their legal efficacy.

2.1 Doctrine of Possession

This term ‘possession’ has not been defined even in the English legal parlance. The problem in defining it is acknowledged by Viscount Jowitt J. as he says:”

“In truth English law never worked out a completely logical and exhaustive definition of possession.” (Quoted by Keenan)³

³ English Law at p.377

However, in reliance on an old theory of possession, may be understood if derived from the Roman Law, that it:

1. Corpus (physical control)
2. Animus (intention to exclude others)

But these concepts are never conclusive in themselves. Kwamena attempts to define it in a more speculative fashion as he says:-

“...the word Possession ...is to denote the de facto physical relation between a person and something in his control ...”⁴

There are various inanimate things that can be possessed or that can be said to be in one's hand control e.g. a cow, plot of land or things locked in a room which one has a key to. This shows that the nature of the actual physical relationship varies with the nature of the items possessed. But it seems that what matters is the mental element of control and specification is an essential part of the concept of possession. Land is however, possessed in a way different from that of portables.

In the case of land it involves the engagement and intent of the mind to exclude other persons from it and also other persons must have reciprocal duty to be excluded from use of such land. For only when this element of exclusion is mentally recognised, there will be no possession of land “(Kwamene above) Pollock and Wright explained.”

⁴ Land Law in Ghana at page 7

*“...the reality of de facto dominion is measured in inverse ratio to the chances of effective opposition ...”*⁵

What this entails is that possession imports a reciprocal duty on others. Their mental attitudes must be convinced that such possession entitles the possessor to exclude them from interfering with it, just as the possessors' expectations are that others will acquiesce in it. This is however, distinguishable from possession a thief acquires in a thing. This is because his mental attitude and that of the legitimate owner of the thing in question, do not build a conscience to exclude interference in the thing once found or seen. Of course not because this type of possession is against the public policy and therefore, he can have no reasonable expectation of non-interference but because others are not expected to acquiesce to that possession.

Although, English law has failed to define the term 'possession' it has nonetheless shown that the term is paradoxical in nature. It imports both lawful and unlawful meanings; and the latter case will not normally be guaranteed and is the type of possession that courts assist to prevent. How have courts helped prevent unlawful possession? This will be shown below through courts attitudes and their subsequent decisions below; but how do chiefs in Zambia hold the land? Meantime, the concept of ownership is to be discussed.

⁵ English Law at p.375

2.2 The Doctrine of Ownership

“Ownership is used to express the relationship which exists between a person and certain rights which are vested in him” (Keenan)⁶

The notion of ownership is the most comprehensive relation that may exist in land. It connotes totality of rights and powers that are capable of being exercised over a thing. In a broader sense ownership connotes, rights, obligations, immunities and power which are juridically enforceable. To this effect, Nwabueze identifies some of the rights in brief as:

*“...the right to make physical use of a thing, the right of income from it in money; in kind or in services and the power of management including that of alienation...”*⁷

However, no right is absolute in a thing “as an owner of land can use it only subject to certain limitations.”⁸ Thus an owner of a thing will use it within the set out standards of limitations. Besides these limitations, an owner of land enjoys a variety of rights. For example, the right to income envisages user by other persons such as under tenancy relationship or by way of mortgage. However, the real essence of ownership, lies with the power of alienation. It denotes essentially the totality of the rights of disposal of the thing so owned. For short ‘ownership’ is the greatest right or collection of rights, or the

⁶ Ibid p.5

⁷ Land Law in Nigeria at p.7

⁸ Ryands V Fletcher (1866) L.R.1

ultimate right which a person can ever have over or in a thing, in this case “land.” It imports the fullest amplitude of rights of enjoyment, management and up to the disposal heights of the property. The absence of these right in a person simply deem such person a mere possessor.

2.3 “The Impact and attitudes of Courts on Land ownership in British Colonies.”

Land ownership, has been highly contested in Crown Colonies. The contestants usually were the chiefs, the early companies which through various concessions with traditional rulers or in some situations, subjects against their rulers. The contentious issue before these courts was to discover the owner of the land. The white settlers claimed that the native chiefs did not own the land, whereas the chiefs argued to the contrary. On the notion ownership the two parties demurred radically. Thus the solution, was only through legal process. In such circumstances, courts action remains the only option, for then the rule of natural justice⁹ will play its role, but above all, the principle of re-judicata¹⁰ – applies with immediate effect. We can now examine some of the contested cases and see decisions of the courts: In the unreported case of **COX V the African Lakes Corporation Ltd.** (1901) commonly known as the Kombe case. Facts are that (Chief Kombe) through a concession, purported to give fishing rights to the defendant company in the crown waters. The question that arose was for the court to decide whether the chief had any proprietary rights over the land such that he could be said to have validly granted these rights to the defendant company. (This was in Nyasaland of Central Africa in 1901) Nunan J said...

“...The chiefs jurisdiction, even in the theory, is a purely personal jurisdiction over the natives of his tribe. His proprietary rights in the absence of any special

⁹ There should be no Bias and both parties must be heard

¹⁰ Parties to the Dispute are Bound by Court's Decision

treaty stipulations, are rights in the name of his tribe to existing villages and plantations, and the user of occupied lands.”

And Mvunga¹¹ observes that his Lordship viewed the chief’s authority as pertaining more to his subjects than over the lands. Specifically denying that a chief can be conceived as a landlord, his Lordship concluded...”

“...The Chief is therefore in nonsense to be considered the land lord of the land in which he exercises jurisdiction over the natives of his tribe. Even under the native law of the tribal system he would not have been considered the sole proprietor...”

The implication of this judgement seems to be a recognition that a chief is only one such proprietor amongst many others of his people to whatever rights there may be in land. But it’s not known what these other “proprietary rights” are. Supposing that the chief jointly and acting together with his tribesmen, alienate such rights, would it matter? This is no sense because it cannot reasonably be expected that the whole tribe can be a signatory to a contract of this nature. The proprietary rights that can be imported into are those related to usufructuary ones, which still fall short of any legal recognition.

In **Re Southern Rhodesia (1919) AC 211**, the factual issue which fell in this case was, “Who owned the vacant or unoccupied lands of the Southern Rhodesia; was it the Crown, or the British South Africa Company or Indigenous peoples? The contestant company brought this action arguing inter-alia that since it was the first to occupy the territory, this also automatically connotes ownership of the entire land. The matter was heard by the Judicial Committee of the Privy council (Privy Council). For the Privy Council Lord Viscount Hardane rejecting the company’s contention held...

¹¹ Land Law and Policy in Zambia p.9

“...in itself and by itself ...occupation is not title ...”

In addition, it was held that the Crown could only establish dominion over land by an indication of the desire to acquire land expressed through an Order in Council. By virtue of this decision, the notion of ownership by “occupation” or by “conquest” is subverted. The land became Crown land. In West African case namely: **Amodu Tijani V the Secretary of Southern Nigeria (1921) AC 399** where facts were that, the land at Apapa on the highland and within the colony belonged to the Oluwu tribe under Idejo a white cap chief. On its acquisition by the government under the public Lands Ordinance No. 5 1903, the questions arose as to:

- (1) the person to whom compensation should be paid.
- (2) The basis on which it should be made and the title here by conveyed the payee to the crown.

Viscount Haldane pronounced the judgement of the Privy Council and held:

1. *While the radical title to land was in the Crown, the full usufructuary title vested in the chief on behalf of the community of which he was the head.*
2. *That therefore, the proper person to compensation should be made was the chief as the representative of his community of which the compensation money should be distributed ...in such proportion and manner as the District Native Council... should determine with the sanction of the governor.*
3. *That the compensation was payable on the basis that the chief on behalf of his community was transferring the land to the governor in full ownership ...”*

His Lordship emphasized that “the chief is only the agent through whom the transaction is to take place and he is to be dealt with as representing not only his own but the interests affected.” It is quite clear that his Lordship does not recognise the chief as an owner of the land but that he only exercises custodial power over it on behalf of the community. This view has been acknowledged in Zambian courts; and is illustrated in **Mwiinda V Gwaba (1974) ZR 188**. The plaintiff who was allocated a portion of agricultural land.

left the village in search for rich pastoral area where his cattle could have sufficient graze. He remained out there for three consecutive farming seasons. The defendant headman, occupied this portion claiming reversionary rights over any abandoned land. On return, the plaintiff demanded reoccupation but the defendant contended that he had a reversionary right over it by virtue of his position as headman. Plaintiff sought an injunction restraining defendant from continuity ploughing the land in question. Finding abandonment not proved, the court granted the remedy sought. On the more fundamental issue of the alleged reversionary interest, the court observed that the headman merely converted that land to his personal use when there were settlers interested in it. The court's observation suggests that the acquisition of this land was done in "bad faith" with preconceived interest in it. This invites in a question; "supposing that the land was given to someone else other than himself; what bearing could that have on the court's ruling? Relying on Chief Ufwenuka's testimony (under whose chieftaincy defendant is subject) who pointed out that "*when a headman allocates land to his subjects, it is not his land as such to give.*" The court's attitude could not have been altered at all. This judgement shows that our traditional rulers are mere custodians of land on behalf of the people in their respective areas.

Applying the two concepts; "possession" and "ownership", our chiefs are in *de facto* possession of land and once the rightful owner claims it, the law will assist that owner to acquire it, and protect him to have quiet possession and enjoyment of it all. That's the search for a true owner of this land continues.

2.4 Who Owns Land in Zambia Today?

Land ownership in Zambia today can be described as a '*pendulum in ceaseless oscillation*' pended to three fulcrums namely, the President, the chiefs and the Citizenry. This description finds sanctuary in the current Lands Act No. 29 of 1995 Chapter 184 of the Laws of Zambia. By virtue of section 3(I) all land in Zambia vests in the President of the Republic who holds it in perpetuity for and on behalf of the people of Zambia. But unfortunately, this section is derogable in section 3(4) which reads:

“...the President shall not alienate any land situated in a ... an area where land is held under customary tenure ...”

And subsection 3(4) (a) (b) (c) clearly set out conditions on how the President may exercise his authority over land. The doctrine of ownership is complex i.e. has several attributes. An owner for example shall have several rights in the thing so claimed. For the purpose of this essay, the right to manage and the right to dispose of the thing are such attributes to ownership which the president is lacking. He is therefore, far from being an owner. How about chiefs; these are mere custodians of land on behalf of their subjects (See Amodu Tijani case above). The third claimant of Land as an owner is a common subject of either state or chief. Section 3(4) (c) says ...

“...the President shall not alienate land ...without consulting any other person or body whose interest might be affected by the grant ...”

This section recognises a common man as being an owner of land. In real sense and facts of life, an owner of a thing does not need to consult any body on how to deal with the thing, which is his. On the other hand, this implies that the one giving authorization is the true owner of the thing.

These ambiguities put the whole legal fraternity into a great more embarrassing situation. A lawyer would not have any authoritative argument for his client, be it for plaintiff or defendant. A judge's task could have not been easy but save, the doctrine of stare decisis has to a greater degree assisted in avoiding absurd decisions.

The uncertainty in the Lands Act has created a lot of anxieties among the various stakeholders to land in the country. The chiefs do not trust the government nor does the government trust the chiefs. They accuse each other of infringing certain rights which they reasonably expect to be enjoyed by them. To this extent Chieftainess Nkomesya of the Soli people declining to accept an appointment to sit on Land Tribunal observed:

*“While appreciating this very important appointment, I regret to inform you that I I’m unable to serve on the committee because there are a lot of issues and clauses/sections in the current Lands Act which I personally do not agree with ...”*¹²

This is the true character of the current lands Act. One attribute for a good law is that the law must be predictable otherwise this law fails to meet this standard. The land law that has been in force in Zambia has never been predictable since Independence. It has failed to identify the real owner of land with the consequence that courts find it difficult to determine on whose authority to lean their decisions should be based. At times they fail as it happened in **Yengwe Farms Ltd v Masstock (Z) Ltd plus 2 others**¹³ who is the complainant.

In this case the appellant having satisfied all the dictates of the then lands (conversion of titles) Act had his application for land been approved and issued with Title deeds in respect of 2,000 hectares by the Commissioner of Lands. The President then approved the grant of 20 hectares of land to the first respondent. Contrary to Presidential orders, the Commissioner of Lands approved and located 2,500 hectares of each farm. One of the farms encroached on the appellant’s farm. He brought this to the attention of the commissioner. The commissioner ordered appellant to surrender his title deeds claiming it was erroneously issued. This was contested in the High Court which thought that the President had unfettered power to make valid disposition of land and that where he steps on other peoples toes, the only remedy was thorough constitutional provisions on compensation. It was also the court’s view that the commissioner did not have power to allocate the mass of land he allocated to the appellant. On appeal to the Supreme Court, the Court found that the provisions of Section 3(4) which forbid him to alienate land in *customary area without consulting other interest groups such as district councils, chiefs and or individuals whose interest may be affected by such grant.* This judgement demonstrates that :

¹² The Post Newspaper December 4, 2002 Issue No. 2240: P.1

- (1) The President is not in strict legal sense an owner of the land in Zambia.
- (2) Land in Zambia is *bona vacantia*¹⁴ but can be claimed by either of the three authorities (named above) upon whose area the pendulum has entered.

Owing to these ambiguities in the law in force, comments or concerns such as those raised by Chieftainness Nkomesya will continue. The law must be certain and predictable and above all, it must be authoritative enough so as to exert the principle of **res judicata** on the parties to the dispute which this law is lacking. Should this law continue? This is the concern that this essay addresses in the successive chapters.

¹³ SCZT No. 11 of 1999.

¹⁴ Ownerless

CHAPTER THREE

IMPACT ON DEVELOPMENT OF THE DUAL SYSTEM OF LAND TENURE

The preceding chapters demonstrated that land administration in Zambia vests in three entities namely; the President, the Chiefs and the common man. For neither of them may validly exercise absolute power to alienate any parcel of land without the consent of the other in this set up. This chapter will tackle the impact on development that the dual tenurial system has on the land in Zambia with a bias to customary land. More attention is paid to customary land because:

1. Land holding is communal
2. *Such holding is indefinite and the number of hectares is undemarcated*
3. There are more disputes than are recorded in state owned land
4. *It constitutes 94% of the total land in Zambia which is under utilised.*

Owing to above reasons, Land Law Reforms should be focussed on the land held and tied to traditional values. And that this should take a more democratic path than using underhand methods. It is only then that development shall be delivered to rural areas.

3.1 Land Alienation in Customary Area

In order to understand how land is held and alienated in rural customary areas, section 7 of the Lands Act of 1995 Cap 184 sheds light. Subsection 7(1) recognises customary holdings and asserts that such holding shall continue. In addition subsection 7(2) states:

“... the rights and privileges of any person to hold land under customary tenure shall be recognised and any such holding under the customary law applicable to the area in which a person has settled or intends to settle

shall not be construed as an infringement of any provision of this Act or any other Law except for a right or obligation which may arise under any other law.”

This section binds the holder of land in such areas to the will of the customs prevailing in that area. He can not protect his property from trespassers, nor has he any right to choose how to develop it. That is if such holder departs from the customs to introduce a system regarded incompatible with the practices of the area such person shall be ejected without remorse to what he has spent on that land. Village headman Kayula in Chief Mwamba’s area in Kasama was interviewed on who between the chief and himself has power to allocate land to new comers and the rights and privileges the holder of that land enjoys. He had this to say:

“Village headman has unfettered power over land. Any person in need of a piece of land, shall approach the village headman. The headman in consultation with his indunas (advisors) shall consider the request. If he succeeds, that person shall be given land on conditions that he abides to our customs. For example, he will not be allowed to hold that land to the exclusion of all others. But that he will only be entitled to till the land and harvest from it the crops e.g. cassava potatoes, finger Millet etc. without interference. If that land is endowed with other natural edibles e.g. wild fruits or mashrooms or medicinal herbs, every person is free to walk in and out at any time without committing any offence of trespass. He should pick such fruits for himself.”¹

¹ Interview with Headman Keyula on 30 July 2003.

He described a chief as a mere custodian of the tribal customs and not land. The chief could in rare cases, be consulted when and if a person applying for land is a total stranger and this is for security reasons. And it must be made clear that such consultation is meant only to notify him that there is a stranger living among his people and at the named village. The advantage of this type of land holding according to him is that once land has been carved out for you, no one can withdraw it except where the holder fails to comply with the customs of the area. That land remains tied to the holder's name even several years after his death. Where the holder dies, the land will not be reallocated to another person but should be inherited by his children or nephews. If there are no heirs, the land shall not be tempered with not even by the chief nor the President.

Mr. Kaniki Chimpampwe² a Coffee Farmer in Kasama observed that both village headmen and chiefs were not true owners of land although they are empowered to grant a holding right to land seekers. The true owners of land are subjects of such villagers. He was sure that if a chief or headman alienated land in his area without consulting his subjects with interests in such land, the grant is deemed null and void. But a subject can only give part of that land issued and not any other.

The two interviews prove the basis of sections 7 which is about land holding in customary area and section 3 (4) (c) which states that:

"...the President shall not alienate any land situated in a district or any area where land is held under customary tenure:

- (a)
- (b)
- (c) *Without consulting any other person or body whose interest might be affected by the grant.*

Chiefs have attempted to rebel against this consevertism by re-allocating land in their areas lying unoccupied. But sadly, once contested in courts of Law or the lands Tribunal, such grants are nullified. This happens without recourse to the sank-cost the investor might have expended on it. Thus in the matter of:

Still water farms ltd. –	Appellant
and	
Commissioner of lands	– 1 ST Respondent
Mpongwe district council	- 2 ND Respondent
Dawson Lupunga	- 3 RD Respondent
Bautis Kapulu	- 4 TH Respondent ³

The appeal was unsuccessful. Facts being that appellant was a farm owned and managed by a Mr. Van Rensberg an investor from South Africa. He came to Zambia in 1993 and in 1995 he was allocated 107 acres for farming purpose by chief Lessa in Ndola Rural. The land was surveyed and chief Lessa recommended him for title deeds to 1st Respondent. By then appellant with the assurance from the chief and his village

² Interviews on 27 July 2003 at Kaniki Farm
³ LAT/30/2000

headmen around, had constructed a farm house and was tilling the land in a Boer fashion. Before title deeds were processed, the 3rd and 4th respondents emerged and told him to stop business on the land. The matter was heard by the local authority which authority ruled in favour of the two respondents named above. The appellant appealed to the lands tribunal. The tribunal interpreted the statute provisions obtaining in section 3(4) (c) and upheld the Local Authority's ruling. The appellant wound up business and left. The tribunal cited **Village headman Albert Phiri Mupwaya and another v Matthew Mbaimbai**

In this case the appellant granted a deserted land to a Mr. Kaamal Jeet Sign an investor in Kabwe Rural. As construction work was half way through with borehole sank, the respondent emerged, claiming that the land so allocated as belonged to his late uncle who died many years ago. As such he could only be the right heir of the land. The Lands Tribunal gave judgement in his favour. The appellants made an appeal to the Supreme courts. The Supreme court without taking into account of the development that had since taken place and the fact that the land remained deserted for several decades, upheld the decision of the Tribunal. Likewise this investor lost his investment opportunity, thereby robbing the local community of the much needed development. As to what has happened to these two pieces of land is any one's guess, but to be precise the land reverted to ancestors through the legal process. This means that nobody shall be allowed to till this land but only expected to enjoy the usual seasonal endowments such as wild fruits and mushrooms.

Is this the type of investment that will deliver the rural community from abject poverty? This paper contends that the current land law has robbed the rural community of the instrument for development. There is terrifying head butting every time it emerges that a traditional ruler has allocated land to an investor. Each time, be it a chief or Government that allocates land for development such an entity shall be crowned with a rebuff from the other entity. Worse if the would be investor is a foreigner. The question is should every effort to create jobs in the rural areas be scuppered by this phobia about leasing land to a foreigner?" Certainly not. Ever since the Movement for Multiparty Democracy (MMD) formed a government in 1991, through the Zambia Investment Centre (ZIC), Zambia has been marketed abroad and over seas as, a peaceful safe place for investment. But now what is the position of the government in such situations. This essay argues that there is total failure by the current Lands Act to identify a single authority to be responsible for allocating land. There is total confusion at present. For example, a South African businessman Laban Naidoo had through the commissioner of Lands been allocated 400km² of land in chief Chiawa's area. Where he intended to set up a \$150,000,000 project. Chieftainess Chiawa could not allow this project to be accommodated in her area saying:

*"Dr. Naidoo's project was too ambitious to be accommodated in my area. My area has suffered political attacks: politicians have used me for their benefits while my subjects continue suffering."*⁴

⁴ Sunday Times of Zambia 17 August 2003

The tone of the language used by her Royal Highness is centred on “benefits” accrued by persons in authority through such alienation. She also felt that the project demanded huge tract of land.

Another good example is the recent case where the government successfully negotiated with the Litunga (King) of the Barotseland (Western Province) to open up for investment in Liuwa and Sioma Ngwezi National Park by foreign investors. When the government announced its successful negotiations, the Barotse Patriotic Front through its President, vehemently protested. Asked why protesting when the local people were the beneficiaries he said.”

“We are neither refusing development nor investment because we dearly need it. But that there should be an open debate and tender to ensure equal opportunity. Show proper benefits to the people of the land and not to an individual and let these benefits be public knowledge.”⁵

These sentiments point to the fact that those in power use underhand method in allocating land. Hence the protest by those who did not benefit. This paper argues that there is too much distrust among the stakeholders to land in Zambia. It goes further to show that the current law was not made in the open so as to allow the people debate.

The similar case (not reported) happened in Namwala in Southern Province. This district lies in the Kafue River flat. The people there are of Ila tribe code named Masai people of

⁵ Interview with Prince Mutangelwa Imasiku (By phone) 26 July 2003

Zambia because they are a cattle- raising-people. Their cattle from time immemorial have grazed in these flats. Due to lack of veterinary medicine in the MMD government the animals were attacked by the Foot and Mouth Disease called **DENKETE** in their language. It killed hundred of thousands. The Chief Nalubamba without consulting his councillors “connived” with the government to allocate the whole plain to foreign investors for rice growing. This proposal was frustrated. The community belligerently protested amid accusation that their chief had been corrupted. The paper simply says all this points to the fact that there is no law and no policy to guide the general citizenry.

Yet still in Mkushi a wrangle has erupted between a traditional ruler Chief Munkonchi and the Minister of Lands. The Chief with the Kapiri Mposhi Rural Council of Central Province approved an application for 26.000 hectares of land by Mulungushi Agricultural Development Corporation Limited (MADC) a company owned by South African investors, but to be jointly managed with Zambians. When submitted for title deeds to Ministry of Lands, the Minister rejected to approve and give title deeds. What were the reasons?

“The tract of land is too big, and would entail displacing settlers. We can’t guarantee the viability of the project at the moment although on paper the intention appears to be good. The maximum I have approved is 250 hectares and this too is subject to review.”⁶ Said the Minister of Lands.

⁶ Sunday Times of Zambia: August 17 2003

One wonders where the Minister has come from because the Act where land alienation is concerned has vest this power in the President through the Commissioner of Lands (Section 3) and not the Minister. And indeed on what legal basis did she elect to give 250 hectares as opposed to what was applied for? And when the honourable Minister views 26,000 hectares of land as "too big," is Zambia short of this commodity; land? It is regrettable that a project such as this one which was earmarked for maize and tobacco production with an estimated annual earning of US \$33 million with employment capacity of 6,500 locals should be frustrated.

A member sitting on the Lands Tribunal when approached to comment on the number of disputes received and solved by the Tribunal: he said:

*"There are too many disputes most of them from customary areas. But we have no option. We have to interpret the law as it is. What can the tribunal do if the law is defective. Nothing until when it is reformed to suit the rural development. That is all."*⁷

This paper views above cited incidences as worrying and causing great embarrassment to the Government. Why travel overseas wooing investment and fail to protect them once in the country. It must be noted that one investor turned away, he blocks tens of them. It is here argued that matters that concern land development would be viewed with less suspicious by all stake holders such that investors should not be scared away. The economy is liberalised and private sector driven.

⁷ Interviews with Samuel M. Mushingeh 23 July, 2003

The socialist approach ended with the demise of the Second Republic. There is need to develop agriculture through private sector participation. This needs no over emphasising at this stage of Zambia's economic doldrums. The trend portrayed in above incidences, have a negative impact on development in rural areas.

3.2 Rural Development Neglected

It is now four decades after independence, yet the vast tracts of land remain utilised or unoccupied in rural areas. There has been no meaningful investment put in our rural areas. The rural community country wide is in abject poverty. It is heart-rending that during dry season, they are unable to find water sufficient to drink. Why is the situation like this? Don't they have a government to care for them? Or does the government expect some other authority to do that work for the rural population? Or is the government impeded from access to land, or mere negligence?

The above concerns bring us to the protracted debate that has been going on for a long time. It is between the government and the traditional rulers. Unfortunately, this is a silent debate. It's not an open-ended debate. This is about the administration over the rural land situated in customary areas. The unresolved question is who should have the administrative power over it – the government or traditional rulers? This approach is wrong. The question should have been, 'how should this land be developed?' For if the debate hinges on 'who', instead of 'how', it provokes issues of supremacy. Chiefs have held

a belief that land belongs to them for reason that they settled and established their rule before white settlers arrived. At this the government withers out. It is disgraceful that despite writings by scholars and several judicial decisions showing that land does not belong to chiefs, for whatever reasons, government has not been bold to tell the truth.

The 1947 Orders in Council imported into this territory from South Africa the discriminative law. This law encouraged separate settlement between races. The white settled in Crown lands while black Africans settled in the Native Reserves land. (This was elaborated in chapter one of this essay). It appears that the whole freedom struggle focussed on fighting racism and not development. Thus, having attained self-rule, there was a scramble for the one time Englishmen's land offices plus enterprises. This attracted a huge influx of rural Zambians migrating into urban areas. That was all that self-rule meant: (i.e. to live, eat and work like a white man). This attitude neglected, the rural areas. All able bodied young men found jobs in offices and the mines. Today the mines have folded up business. The only solution is to diversity the economy. But Chiefs having realised that land is a source of wealth have resisted vehemently attempts by government to lease land to investors.

The question is who should administer land situated in customary area. To deal with this question adequately, we need to know the nature of State Zambia is in i.e. if it's a Unitary Sovereign, Federal or a Kingdom? To understand this, its better to rely on the supreme law of land the "Constitution" and also see the provisions relating to land administration.

Article 1: declares:

“Zambia is a unitary, indivisibleand democratic sovereign state.”

Here we are told that Zambia is a Unitary indivisible and democratic sovereign state. Of importance here are the two terms – Unitary and sovereign. By Unitary it is meant undivided while sovereignty means the choice of self-determination. It follows that a Unitary sovereign state such as Zambia has a centralised type of government with only one legislative institution, one executive body and one judicial system. Under this system of government, the law is expected to apply uniformly through out the Republic. And subsection 3 of Article 1 declares:

“This constitution is the supreme law of Zambia and if any other law is inconsistent that other law shall, to the extent of the inconsistency, be void.”

The rationale behind this assertion is to restrain the legislature from enacting laws in contradiction with constitutional provisions. Part III of the constitution protects the fundamental rights and freedoms guaranteed to individuals. Article 16(1) provides for the protection from deprivation of property except under the Act of Parliament. And the provision under 16(2) states that nothing contained or done under the authority of any law shall be held to be inconsistent with clause (1) provided it is shown that such law provides for taking possession of any property ... thereover....

(i) *“In terms of any law relating to abandoned, unoccupied, utilised or underdeveloped.*

(ii) For the purpose of the administration of disposition of such property or interest or right by the President in implementing of a comprehensive land policy... or affecting rights over land or any other rights enjoyed by chiefs and persons claiming through or under them, shall apply with substantial uniformity throughout Zambia.”

This Article empowers the President to administer for effecting a comprehensive implementation of any land policy in Zambia notwithstanding rights enjoyed by chiefs of the affected land. This is the will of the people as reflected by the Constitution. What is surprising is the provision of the Lands Act particularly sections 3(4) and 7. It empowers the chiefs to administer land under customary tenure. This provision therefore contravenes the will of the people and the whole law is null and void. This paper contends that the President is vest with the power to administer for any disposition of land as may appear to foster public interest. The chiefs should only be allowed to enjoy control over those lands they have occupied already and not unoccupied, abandoned or unutilised land. All citizens of Zambia owe their allegiance to the Constitution including chiefs. The problem that has existed is that there has been no policy and no paradigm discourse that all people could see and obey. Most politicians only concede to statements such as “Land issues are sensitive.” What is good for the people is to empower them and not keep the land unutilised year in and out.

What is more embarrassing is that when the President alienates Land to an investor of foreign origins the first to oppose are the Members of Parliament joined by the chiefs. This only goes to show that the people are not well represented.

If it's xenophobia that we are still suffering from, the better its cured or risk being left out from globaliation. These attitudes only go to show that Britain is still ruling us because we are implementing it's discriminatory laws. We don't seem to understand why Britain behaved the way it did. This essay argues that Britain at that time was the most advanced country of the world, surprisingly could ally itself here with the most backward and conservative class. They bolstered a dead feudal class by creating 'Land Lord' (chiefs) without title deeds. It is not difficult to understand why the British acted in this way. The whole object for their presence was to exploit the country's wealth and never develop it. Truly, the interests of the exploiters and of the exploited are not the same. Hence the British fell back on the relics of feudalism which Zambia has to date tolerated and still possesses it.

3.3 Rural Development Cardinal

"The majority of the world's poor live in rural areas and farming is the livelihood of most of the 900 million people. So far the means for them to escape poverty has to be through more efficient agricultural production and rural development"

said Lannart Bage⁸ at the Millenium World Food Summit in Johannesburg in 2002. Indeed the majority of the poor people in Zambia live in rural areas who are peasant farmers. He believes that although the challenges are enormous there are grounds for

optimism with growing interest in funding agriculture and rural development. Lannart adds that success will require a sharp and decisive increase in investments in rural and agriculture development. In support of these sentiments, it is the position of this paper that agriculture and the rural economy constitutes the engine of economic growth in this country, hence the basis for its integration into the world economy. Therefore, the productive rural sectors which can make a substantial proportion of the income, employment and exports earnings require sustained support in order to ensure broad based growth.

It is here further argued that since independence land policy in Zambia has tended to be biased against the rural needs. The government often concentrates public expenditure and services in urban areas. Worse still the government continues to harm rural development through in inappropriate policies (e.g. the liberalised crop marketing). There is too much paradox language here. Government leaders stress the importance of agriculture and Food safety, but at the same time the proportion of capital going into agriculture and the rural sector is too minimal and negligible. This research work exposed heart-rending conditions to which the rural community is subjected to. Its all lamentations everywhere:-

“Where is the government we spend all nights at a water pond only to fill a bucket. Our children are dying with malnutrition. Our livestock have perished. Our member of Parliament promised to bring development which I welcomed but he has never returned;”⁹

⁸ President of International Fund for Agricultural Development.

⁹ Chief Mazimawe of the Ngoni People – Chipata. Interview on 1 August 2003.

Asked if he believes that land belongs to him. He disagreed with this notion. “He said that he is merely there to represent the traditions of the tribe. Land belongs to the people and since people form the government they are themselves to choose how to use it.” It is therefore surprising that people and those in power think that chiefs are the owners of land. All the government required to do is to take more positive approach towards agrarian policies. Shri Jawaharlal Nehru said:

“But here it is more important to pay heavy salaries to officials and spend money on the army; No one thinks of the poor peasant who is the backbone of the country. And as the peasant is weak and poor, the country is weak and poor. We must put an end to this if we are to build a prosperous India full of healthy and educated men and women. The future of India lies with the peasantry.”¹⁰

This is the true version of Zambia. The other sector has failed and that the only solution is diversification. A fact well known is that law is an instrument of development. At this time the law is defective and the consequence is the denial of real investment in land. It is the concern of this essay that the poor peasants tend to rely on customary and informal rights to land which rights lack legal backing hence do not enable holders access to money lending institutions. Secure rights to land play a key role in enabling productivity for the poor as well as the basis for economic investment and sustainable management. It is here contended that equitable land distribution will also enable the poor to benefit from broad based economic growth and can improve agricultural production. The current law is inadequate, therefore urges its urgent repeal.

¹⁰ Land Reforms in India at page 18.

CHAPTER FOUR

4.0 THE CRITICAL ANALYSIS OF THE DUAL SYSTEM OF LAND TENURE

4.1 LAW AS AN INSTRUMENT OF SOCIAL CHANGE

The major role played by law from its inception in society has been shaping and reshaping the social order of society. However, the manner of legal intervention vary with time, place and circumstance for given societies. In its position as an instrument for change, it operates in three successive phases which Iredell Jenkins¹ arranges in their functional order as follows:

- (i) **“Conservative:.....** Primarily concerned to protect and reinforce an established order that is threatened by disputes among individuals and by the defiance of group rules and decisions.....the “trouble case.”
- (ii) **“Liberalizing.....** the emphasis shifts to law as an instrument of change. The social order becomes more complex and individuals assert themselves and new forces, seek new outlets. In this stage law is seen as providing rules and framework within which men are to be free to manage their own affairs and make their arrangements.
- (iii) **Constructive:...** law in this respect assumes a positive and creative role. When private interests are left too much to themselves, initiative issues in exploitation with injustice and disorder the result. So that the task of law becomes that of regulating the forces at play in society and organizing the social effort towards

¹ . Social Order and Limits of Law at P. 214

clearly defined goals. That is law becomes an instrument of achieving a new social order.”

It is the last phase that this research work is interested in. The preceding chapters have authoritatively demonstrated that the Zambian society has passed through the first two stages and the law has failed to deliver the expected aspirations. It is now time to engage the constructive phase with the result that the goals of economic diversification through rural investment can be realised. The predominant problem has been to in act a law that accommodates the socio dynamics in this country. Eugen Ehrlich (1862-1922) a German jurists observed....”*The*

impulses to create law which result from a distribution of power in society have their source in society.”²

Thus guided by this proposition the research work concentrated on conducting verbatim interviews in the cross-section of the Zambian community. In order to be systematic thereby providing a simpler understanding, the interviewed persons will be categorized according to their status in society. They are classified as the general citizenry, the foreigners (on various missions) the chiefs and government officials. For short of space, only very few shall be reflected in brief in this paper.

4.2 AN EPITOM OF VERBATIM INTERVIEWS

4.2 (a) From the General Citizenry

Mr. Mugal Salim³a Lusaka businessman expressed the following views on the current land law....”*It is very embarrassing that Britain is still ruling us. The*

dual system of land tenure was intended to deny Africans to have equal opportunity in developmental spheres. Immediately after independence this law should have perished. Both the chiefs and President should be relieved of the duty to administer land. Let the power to administer

² . L.lloyd Introduction to Jurisprudence at P. 601

³ . Interviewed on 18 July 2003

land vest in the lands commissioner who should decentralize his functions such that there shall be local lands Authorities set out at village levels - districts , provincial levels with members from the grassroots itself. Under such setting, the villagers will be partners in development. The commissioner's work will be simply to grant title deeds to any body so recommended by these local officials."

Mr. Dickson Chasaya⁴ was not impressed with the land law in force saying:-

The current land law is like an electric circuit in a coil without a central command. Law must have a command post to derive its authority. Right now three people claim to have authority over land and are the president, the chiefs and the ordinary citizen. This is bad and confuses the would be investors more especially of foreign origin. I would prefer a law that will vest power in a commissioner but that he should operate under the lands Board Authority that will over see his operations. At village level, people should form their own committees so that they recommend to commissioner of lands the nature of investment is suitable for their areas."

Mr. Lombe Bwalya⁵ took this view;

"considering the rampant corruption at the office of the Commissioner of Lands it would not be a good idea to vest all land and power in the Commissioner of lands. All we need is to style the current Lands Act in a way similar to the Agricultural Lands Act of 1960 Cap 187 which has a provision for the Lands Board, appointed by the Minister. It's functions is to receive and approve or otherwise all applications for agricultural land. Equally if the

⁴ . Interview on July 30, 2003 (retired Civil Servant)

⁵ . Of Nkole Bwalya & Associates; interviewed on 8th August 2003

Lands Boards were introduced at various local authorities, it will operate more efficiently such that the prevailing conflicts of interests may be minimized.”

General Malimba Masheke⁶in condemning the dual system of land tenure had this to say:-

“This disposition is bad and counter development under the current political scenerio. In the second Republic land belonged to the state regardless where it was situated. The President had all the discretion to use any land within Zambia; as and when it appeared in the public interest and for the benefit of the local community e.g. Nakambala Sugar Estates, Mununshi Banana Plantation etc. At the moment too much discretion has been given to chiefs and the President. Mind you too much discretion is good recipe for corruption. There is no option but to repeal the current Land Act for a better one which will address the common man’s interests.”

Dr. Guy Scott⁷observed as follows:

“The duality of land tenure entails that there are two governments in one unitary government, which is not possible. This law should have died at the end of the colonial government. But you know the 1995 Act was donor – pushed as such it left out the interests of the poor. Chiefs give huge tracts of land ignorantly for a small bribe. Also Chiefs have no book-keepers to account whatever investors pay for land they get in their areas. Its better to enact a law that will make all accountable to the people. President and Chiefs should stay away from land issues.”

Retired Judge Noah Kabamba⁸said.

“It is difficult for a tribunal to pass a decision in certain matters based on

⁶ . Former Army Commander and Prime Minister: 6 September 2003

⁷ . Prominent Farmer and Former Minister of Agriculture: 22 August 2003

⁸ . Interviewed on 22 August 2003

Section 3(4) (c.) of the current Land Act. An investor loses but most affected are the locals who were the sole beneficiaries of the project. Time has come to repeal this law and replace it with a more indigenous oriented one, which will accommodate the interests of the common people. The current system where chiefs are indifferent to people's interests is not law to rely on for development. The law should define development. The UNIP government tried and was able to come up with Lands (Acquisition) Act empowering the President to compulsorily take any idle land for development purposes. Land should not be kept for customary prestige, unless that land with tourist attractions. We need only one tenure system which will guarantee security to holders."

These are views of some of the many people interviewed in connection with the dual system of land tenure and also asked whether it was suitable for a free state.

4.2 (b) Views from the Foreigners

A good number of people from this category made valuable contributions to this research work and here below are what they think land law ought to be:

Joseph Blake Quinton I⁹ an Economist by Profession stated as follows:-

"I note that in this country you still have a problem in utilizing what we call in America " tribal or family land" New York is one areas surrounded by such land owned by various tribes. The chief of tribe owns say X acre as long as the national government exists. The chief many lease the land to an investor for 99 years. Only the chief has custody and control of the land. To this effect he has title deeds. The chief as a landlord, leases out the land to investor for 99 years. With a lease the investor is enabled to get a loan for land development. The chief then gets constant cash flows and at the end of 99 years, the chief and his tribe gets improved land (with

⁹ .Tourist from America Interviewed on 6 April 2003

wells, soil, conservation measures and trained labour.) If in Zambia a policy similar to this one, is introduced, the current problem could end and land can soon be developed.”

Ms. Katrin Saage Fain¹⁰ expressed her views as follows:-

“it is regrettable that up to date the British is still ruling. Immediately after independence this discriminatory law should have perished and replaced with an indigenous law suiting a self-governing nation. The German system is different. There are no tribal chiefs and most land is held by individuals. Government as a legal person also has its own land and property. The land Register is maintained by a magistrate at district levels. Whoever wants to buy real property will search and verify with this Register. Foreigners are eligible to acquire real property in German for whatever purpose. You see, this disposition attracts a lot of foreign investment unlike here where it is restricted only to nationals.”

Mr. Austin A. Kagose¹¹ when interviewed said, “The land law in force in Zambia is similar to the pre-independent Kenya. There was what they called **Ancestral** (for blacks) and Crown lands. This is no longer there. All land vests in the commissioner of lands. Tribal chiefs are entitled to what they can only use and not the way of Zambia. The commissioner of lands is has delegated his power to alienate land to provincial and district or local authorities with government Civil Servants. They work hand in hand with local people so that the land-planning unit surveys in advance for any project suitable for the local people. These projects are community based ones so that the community itself is the beneficiary although the government gets a certain percentage in annual rates.”

Mr. Abd El Latif A. Al Layeh¹² said “Land belongs to the government. The land

¹⁰ . Legal Advisor for German Technical Cooperation 8 August 2003

¹¹ . First Secretary Kenyan High Commission 13 August 2003

¹² . The Attache' of the Embassy of the Arab Republic of Egypt on 13th August 2003

Reclamation Act of 1962 vests all land in the Government and not president. The Government appoints commissioners at provincial levels who are responsible for the planning and effective land development in those provinces. They alienate land to investors themselves. There are no customs tied to land nor do chiefs claim ownership of land. I find the customary system an obstacle to development in Zambia where huge tracts of fertile land is not utilized. Chiefs have no access to foreign aid as they are not recognized but only the government has the capacity to develop land."

4.3 (c.) Views from the Chiefs

In this category three chiefs were interviewed. Two of them were more flexible and are ready to adapt to new positive development while the other one is too rigid. Here are their views:

Senior Chief Mburuma¹³ said:

"Young man be serious. Land issues is very sensitive. If you are not careful, you will become slaves soon. Look at what is happening across (Zimbabwe). I will protest to the Land Commissioner and even the President himself. Never expose our land to foreigners. I am better off poor with my land than having money but without land. Its our land we fought for it, and never give it away."

To this effect he even wrote to the Lands Commissioner in protest and the article has appeared in the Post Newspaper of August 25, 2003. He hopes that his subjects now staying in towns will return to develop the land.

Chief Mazimabi¹⁴ was of this opinion:-

"How can a chief own land. Land was created by God for his people."

¹³ . Of the Chikunda People Luangwa District: August 18, 2003

¹⁴ . of the Ngoni People of Chipata: Interviews 1 August 2003

Chiefs role is only to ensure tranquility prevails and also to ensure that culture inherent in every tribe is maintained. The aspect of development is for the government and since in a democracy, the people form the government, they are themselves responsible. All I can do is to coordinate between the government and the people. If the government brings in development it must be that which benefit our people here. In my view land is in the hands of the government and must develop it in any way without displacing people on large scale. All I want is development in my area," he concluded.

His Royal Highness Chief Bright Nalubamba also Chairman of the Royal Foundation of Zambia¹⁵ spoke at length expressing his disappointment at government failure to engage into a dialogue with chiefs to resolve the unwarranted differences over land administration. He hoped that with the re-opening of the House of Chiefs he would in his capacity as Chairman of the Royal Foundation of Zambia (RFZ) propose to the government to have it all resolved.

"Government is aware that land is a valuable asset but instead does not tell the truth to the people. All we see is imposing uncoordinated projects in our areas. This explains why there is this apparent resistance from the RFZ. If there was an open dialogue with the government aimed at distributing burdens and benefits to all stakeholders, there can be no such resistance at all. No reasonable person even the most primitive one can be against investment. All of us dearly want development except that government uses under hand methods to get land from people. The 1995 Act was donor funded and therefore did not address nor does it reflect the people's wishes in this country. Together with the government we can develop Zambia and grabbing land from us is not a solution." He observed.

¹⁵ . Chief of the Ila (the Masai people of Zambia) of Namwala – Interviewed on 29th September 2003.

4.4 (d) Government views on Land tenure

The Ministry of Local Government and Housing is responsible for Chiefs affairs in this country. But one wonders why should government pay attention to these Chiefs considering that they are neither politicians nor do they form part of the government administrative syndicate. To clarify this was the Administrative Officer of Chiefs Affairs.

Patrick Chombela¹⁶ who explained as follows:-

“Chiefs are neither politicians nor Civil Servants and therefore do not draw a salary from the government. Government, is however responsible for the construction, rehabilitation, water reticulation, electrification, roads and other social services in chiefs areas. For purposes of these, government disburses funds in form of a ‘subsidy’ and this is given as and when it is necessary. But unfortunately, Chiefs convert it into personal use and have mistakenly thought it is a right to receive it on monthly basis as wages. This money is also meant for the running of the office of the chiefs and not the chief as a person at all. But you see, this money is not budgeted for and it has created antagonism with the donors as government has failed to give a satisfactory account for their money. The current land Act has contributed to this problem. Why should it vest power to administer land in the hands of the President and the Chiefs. These two bodies should not take part in land alienation. I have liked the initiative taken by chiefs Chiawa, Nabwalya Mponda, Chief Bright Nalubamba and Chieftainess Nkomenshya who have opened up their land to both local and foreign investors. There are clinics, schools, water and other social amenities in their areas built by donors. Locals have equally been employed. These chiefs get a certain percentage from ground rates paid to the government. I tell you these chiefs would not pester me for subsidy,

¹⁶ . Interviewed on 22 July 2003

as is the case with other chiefs. So let the dual system of land tenure come to an end as it impedes development in the whole Republic." There are over five hundred (500) chiefs in Zambia so they cannot exercise power to administer land as would be more confusion."

Efforts to have audience with the Ministers or their Permanent Secretaries at the sister ministry of Lands and Agriculture Food and Fisheries were made but failed. Appointment hours expired in waiting rooms as they were always said to be busy in meetings or are rushing for important meetings at Cabinet Office. But nonetheless, their public address through the media portray their stand on land policy. To avoid, the long beauracracy coupled with red-tapsim, the media provided an alternative to this research work. Government is currently reviewing the land policy to form a basis on which land related Act will be reviewed. To this effect the Draft Land policy has been published to enable members of the public to comment on it."

"The formulation of this policy is a culmination of various consultative meetings, studies, workshops and seminars for stakeholders at district, provincial and national levels...from 1993 to date..." Judith K. Kapijimpanga¹⁷

The draft comprises six chapters. A study of this document raises nothing of the very objectionable or controversial dual system of land tenure. Apart from a mention of Environmental issue (Chapter 3) the rest is purely a replica of the current Act with only some embellishment of language which sounds more technical as it relates to legal issues. One also doubts the credibility of the minister's claim that any consultations have been made with stakeholders at all considering that the Royal Foundation of Zambia which is the main stakeholder in land is not aware and up to now is calling for dialogue.

Surprisingly the Minister was quoted as having said "...*there were serious land tenure*

¹⁷ . Minister of Lands: Advertised in Zambia Daily Mail of 21 November 2002

*related issues that affected sustainable development in the Southern African Sub-Saharan – Region. These include manifestation of unequal distribution of land, sub-optimal utilization of land and insecure tenure.*¹⁸

Certainly, these are the basic issues requiring agent attention. Why has the ministry in its draft policy omitted this very important issue? This essay contends that the Chairman of the Royal Foundation of Zambia is right in denouncing the government for its failure to dialogue with the stakeholders. The so-called constitutive meetings and seminars accommodate only civil servants and usually held at Mulungushi International Conference Centre or at Siavonga a tourist centre. This is wrong because the affected people are over there in the rural areas. As long as such attitudes stay, no chief shall be persuaded to align himself with the government. Therefore land reform measures, in contemplation can not be truly effective and their full impact cannot be felt on the actual lives of the people till they are efficiently addressed to the people and must connote an indigenous picture and not too foreign. It is also the contention of this essay that law finds its source in the society itself and therefore government cannot make it in or for a vacuum but must be addressed to the people, who should be willing to uphold it.

¹⁸ . Ministers Speech at the United Nations Expert Group Meeting on Land Tenure Systems: Wednesday 1st October 2003.

CHAPTER FIVE

CONCLUSION

5.0 OBSERVATIONS

Both primary and secondary source of data collected to build up this essay reveal that the dual system of land tenure was not only discriminatory but also retards development. It was also found to be faulty lacking the necessary integrated outlook which is essential for comprehensive solution for the problems facing the Zambian community. It impedes investment particularly in rural customary areas.

5.1 RECOMMENDATIONS

It is here recommended that land reforms are imperative to repeal the dual system of land tenure. The reforms to be introduced by the government must take more radical character, but its apparent that the desired effects can be achieved fully only when people are associated with their creations and implementation. The recommended reforms are here under listed:

- 5.11 The machinery vesting land in President and Chiefs must be changed. The Presidency and chieftaincy are the two supreme institutions in their respective (Political and tradition hierarchy) such that the aggrieved party by their decision will have his right of appeal infringed and indeed the doctrine of '**natural justice**' is denied its primary role of ensuring that those with interest in an action, should not be judges. Instead land administration should vest with the neutral person namely the Commission of Lands who will himself be under the supervision of both the presidency and Chieftaincy. This will reduce corruption in the office.
- 5.12 The role the Commissioner of Lands in Land administration should be revisited with a view to deregulate current rules in order to allow for total devolution in the planning and implementation of developmental projects. This will entail that all planning powers and issuance of title deeds to land shall be delegated to his

subordinates at provincial levels. His role will only be that of a national supervisor and ensuring that project proposals are carried out in accordance with the original plans.

- 5.13 The desirability of achieving integrity, efficiency economy and public cooperation must be cultivated. This can only be attained if the spirits of people are inspired bearing in mind that the people are the source of energy and technology necessary for development. For this inspiration to be invoked, people must be convinced that the purported projects, are for their own benefit.
- 5.14 There is need to put in place a single integrated system of land administration with regional units composed of various interest groups. Such groups will include officials, experts and representatives of the people. The idea is to import a more functional character of land administration than the present day dead political and customary approach.
- 5.3 All land tied to ancestral mysteries should be reclaimed and allocated for cooperative cultivation or to any developer. Land should be held for use and as a source of employment and never to glorify invisible dead spirits such as the "Mulenga wa mupanga" of the Bemba people of Northern Province. This Mulenga wa mupanga (Mulenga of the forest) invisibly controls huge tracts of Land in Northern Province. To date Luapula and Northern provinces where Bemba speaking people live, most land is virgin for fear of offending Mulenga of the forest.

5.2 CONCLUSION

A progressive society as Sir Henry Maine¹ (1822 – 1888) an English Sociologist and Jurist pointed out, has to keep adapting the law to fresh social and economic conditions and legislation is an essential means of attaining this, however, imperfectly." So then

¹. Lloyd introduction to Jurisprudence at p. 868

those who exercise the legislative authority have frequently while paying heed if not lip-service to public opinion, to provide a lead in many directions where the public is unconscious or undecided. This includes situations where there may be wide spread hostility to a proposed reform. This includes the traditional leaders who should be the pioneers of reforms. If the legislator had obliged to wait upon the public mind to give clear guidance as to each future step, the history of law reform is deprived of many of its most significant achievements. And Friedman William² does not exclude the lawyers from this task. A contemporary lawyer in all states but most emphatically so in the developing nations must be active and responsible participants in the shaping and formulation of development plans. He must guide and counsel where necessary. The current feature in Zambia is the presence of huge tracts of land holding often under customary possession which holding is an impediment to development. Under such situation it is the duty of a Lawyer to advise the legislator and planners to differentiate between the various types of interests affected according to the social and economic equities. Finally, the dual system of land tenure has a negative impact on development and it must urgently be repealed. Much of scholars' ink has been spilled in an attempt to guide and counsel the legislator on land policy and its subsequent economic use but no heed has been paid. It is hoped that this ink is the last to be used on this subject.

² . Legal Theory at p. 430

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