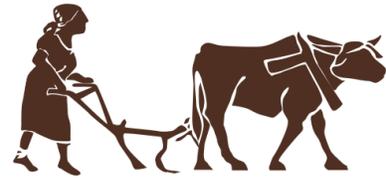


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A Legal Analysis of Disjunctions Between Statutory and Customary Land Tenure Regimes in Zambia

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Young African Researchers in Agriculture (YARA) Working Paper 3: A Legal Analysis of Disjunctions Between Statutory and Customary Land Tenure Regimes in Zambia

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A Legal Analysis of Disjunctions Between Statutory and Customary Land Tenure Regimes in Zambia

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Abstract

In the recent past, Zambia has experienced land governance-related issues such as voluntary and involuntary displacements, insecurity of tenure, food insecurity and land disputes. While laudable efforts have been made to uphold and realise land and resource rights of poor rural populations in Zambia, there are numerous longstanding challenges that remain unresolved. The majority of the rural population still do not enjoy sufficient legal protection of their land rights. This article shows the inadequate legal recognition of the strength of rights to land and natural resources derived from custom and how to recognise and secure land rights of holders in law and in practice. It also examines the degree to which vested property rights are protected from infringements, and analyses land rights in the context of ownership, possession and holder-ship. Furthermore, the relations between statutory and customary land tenure systems are assessed from the perspective of legal pluralism. Therefore, this article increases understanding on the diversity of land tenure regimes that exist, as well as what constitutes the legal status of land and ways in which they provide for vestment of property rights.

Keywords: land rights, tenure security, conflicts, legal pluralism, laws, policies

Introduction

Zambia officially recognises both customary and statutory systems of law. A large proportion of legislation in Zambia is derived from the British legal system, which comprises of common law and doctrines of equity which were in force in Britain on 17th August 1911. The Zambian Constitution is the supreme law of the land and all pieces of legislation, common law and doctrines of equity must be consistent with the provisions embedded in it. While statutory law is codified in acts of parliament, customary law is not defined or codified. Key elements of 'customary' law demonstrate both a strong colonial influence and continuity in this respect since independence in 1964. However, just like statutory law, it is also expected to be consistent with the provisions of the Constitution in its application. The Zambian legal framework thus consists of an array of customary and statutory laws administered through the legislative, judicial and executive spheres of government. The statutes are derived from the British legal system introduced during colonisation and are still in full force and effective within Zambia.

These statutes are strongly embedded with provisions that reflect the coloniser's culture. Colonisation and the resistance it generated in Zambia involved struggles over authority, natural resources and land. Traditional leaders' authority over their subjects was undermined, as force and coercion were used by the colonisers. Indigenous people, who were the rightful owners of their land of habitation, were disrespected, as the colonisers did not want to recognise the cultural rules and practices of indigenous people. Colonisers strongly enforced the superiority of their culture, legal system and economy because they believed these would civilise indigenous people. Chanock (1991) states that during the colonial era "legal changes

in material relations in the law of persons and property were as a result of the expression of the new economy”. Colson (1966) also discusses the transition that systems of land allocation experienced during the pre- and post-colonial periods, looking at three tribes in Zambia. She brought to light the lack of a close relationship between legal rules and actual rights in land.

On the other hand, Zambia has a ‘dual’ land tenure system, in which statutory and customary tenure are both recognised to some degree. A ‘land tenure system’ in this context refers to both the rights held by land users and the authority over land and other natural resources as exercised in systems of administration and land management. This recognition of the two land tenure systems is embedded in the Lands Act of 1995 as well as the country’s Constitution. Statutory tenure is regulated through various pieces of legislation, including the Lands Act of 1995, Lands Acquisitions Act of 1989, Mine and Minerals Act of 2015, Intestate Succession Act of 1989, and the Housing and Statutory Improvement Areas Act of 2010. The Lands Act provides for the regulation and management of statutory tenure. However, although customary tenure is recognised by the Lands Act, it does not go further in providing for its regulation and management. Since customary tenure is unwritten, its rules and regulations are not uniform and differ from locality to locality, based on variances in local customs and traditions. The Chiefs Act of 1995 section 10 (1) gives chiefs the powers to administer customary law in accordance with customary norms prevailing in chiefs’ jurisdictions. A discharge of such functions needs not be contrary to the Constitution or any written law nor repugnant to natural justice or morality.

Zambia is party to many international human rights and regional instruments, and has a dualist system of jurisprudence which considers international treaty law separate from domestic law. Domestication of international instruments by Acts of Parliament is necessary for these to be applicable in the country. The extent of domestication of instruments is therefore not easy to measure, leading to various mapping exercises and audits being undertaken. Domestication of international treaties into national laws is important to reinforce, promote and strengthen land rights. If not undertaken, this impedes the ability of citizens and others to use the law to compel the government to meet its international obligations, including those recommendations of international treaty bodies. Domestication also encourages reference to international standards and contributes to their inclusion in the legal system.

Over the past three decades Zambia has seen an increase in land disputes hinging on land rights violations. Resolution of these disputes is reached through the judicial system via litigation, which is initiated through a lawsuit by one party against another. Under customary law, dispute resolution is commonly achieved through informal channels such as traditional courts. The Constitution poses an obligation to promote the values enshrined in it when resolving disputes at all levels. The performance of land dispute resolution bodies and structures requires constant assessment to analyse the challenges, gaps and shortcomings of the system and the barriers that individuals face in obtaining justice.

Dispute resolution of land-related matters is a cornerstone for stimulating empowerment and promoting peace and harmony in society. Men and women face different challenges in ascertaining their land rights based on their circumstances, geographical location and status. However, evidence indicates that gender disparities exist with regards to access to justice. Women are considered an especially vulnerable group, as they face challenges with regard to the cultural barriers which hinder them from accessing justice when their rights are infringed upon. This underlines the importance of resolving problems that arise from the disjunctions between statutory and customary law within the overall legal system in Zambia.

Problem Statement

Secure access to land and natural resources is a major prerequisite for survival in rural Africa and forms the basis of many social and economic advancements by indigenous people. It is vital for livelihood sustainability, mainly through agricultural production by small-scale farmers (Netherlands Ministry of Foreign Affairs, 2010). Access to land, resources, ownership and control of land is vital for efforts by rural families to reduce poverty (Crabtree-Condor and Casey, 2012). However, for many people their relationship to land, in terms of the law, is characterised by limited access, constrained control of land and insecure land tenure especially because customary land rights are not fully recognised and protected in law (Machina, 2002). In the recent past, Zambia has experienced a wave of land governance-related challenges posing risks to food security and tenure security. Challenges in the operation of land administration and management systems have made it difficult for the majority of people to access, control and own land in a secure manner. Challenges in relation to land are mainly rooted in the institutional systems and legal and policy frameworks that govern land administration (Palmer et al., 2009). Zambia's Lands Act of 1995 is a key piece of legislation but has many loopholes, resulting in land tenure challenges.

Research reveals that the majority of the rural population do not enjoy sufficient legal protection of their land rights. In the context of the so-called 'land rush' in Africa, many people have suffered from voluntary and involuntary displacements, insecurity of tenure, food insecurity and land disputes (Batterbury and Ndi, 2018). Cotula et al. (2009) highlight that this is the case because over the past three decades there has been a rapid increase in global demand for food, biofuel, fibre, and water supplies (Cotula et al., 2009). In this regard, it is important to note that women in particular have been adversely affected. The property rights of women are insecure because many laws, policies, processes, procedures, and cultural practices severely disadvantage them. Translating the enforcement of laws into improvements with practical impacts has proven to be difficult. This research project thus focused on addressing the inadequate legal recognition of the strength of rights to land and natural resources derived from custom, as well as how to recognise and secure land rights of holders in law and in practice.

Purpose of Research

While laudable efforts have been made to uphold and realise the land and resource rights of poor rural populations in Zambia, there are a number of longstanding challenges that remain unresolved. This research aimed to examine land tenure-related issues from a common law perspective, and assess the degree to which vested property rights derived from customs are realised in practice, and thus protected from infringements. The relations between statutory and customary land tenure systems were assessed from a political economy perspective, as well as from the perspective of 'legal pluralism'. The study further explored the underlying reasons for land conflict, and the possibility that these derive in part from disjunctions between the customary and statutory justice systems, against the backdrop of notions of 'the rule of law'. The outcomes of this study are relevant for the design of legal and policy interventions to address the root causes of such conflicts.

Research Questions

- What are the key differences between land systems in Zambia, with an emphasis on underlying social relations and the degree to which these are reflected in both legal status and institutional arrangements to support rights holders and ensure security of tenure?

- What are the land tenure systems in place for effective enforcement, realisation and protection in practice?
- How do judges in Zambia tend to view customary laws and practices in the context of land property-related disputes?
- What are the complexities that arise in Zambia, in relation to the realisation of land rights of the rural majority, from disjunctions between the legal status of statutory and customary land tenure systems?
- How can policy and law help resolve these challenges, in attempts to ensure the tenure security of the rural poor in Zambia?
- What are authorised customary and statutory practices in relation to land dispensation, land redistribution and monitoring?

Conceptual Framework

The history of law in Africa has always been a contentious topic. The fact that statutory law is written in prescriptive texts, provides a range of benefits to people, as opposed to customary law, which is unwritten. It also provides contextual guidance on social, economic and political issues. However, statutory laws embedded in pieces of legislation are not determinative or exhaustive of customary indigenous law. The legislature did not have the capability to determine rules and practices that rural customary communities followed in the way they governed themselves and their affairs during colonialism. Customary law recognition from a colonialist perspective reflects the state's objective in using indigenous people's systems as instruments to advance the interests of colonialists (Himonga and Nhlapo, 2015), instead of recognising indigenous people as stakeholders with abilities who are instrumental in governing themselves.

At the heart of the many issues surrounding law in a post-colonial setting is the question of the legal status of land as a form of property, which is a key resource for indigenous people. In order to understand the evolution of land tenure laws in the social, cultural, political and economic context of contemporary Zambia, this research refers to definitions of what constitutes property, and uses it to understand the diversity of land tenure regimes and the ways in which they provide for vestment of property rights. Property in law consists of an array of legal rules that determine the content, nature, establishment, protection, transfer and termination of various real relationships between an individual or groups of individuals and land (Scott, 2017). This study analyses distinctions that exist between physical and legal possession of property, enabling a discussion of what constitutes ownership, possession or 'holder-ship' of land in law. A number of relevant factors are examined, including recognition of the unity of property versus the separation of property rights, and both historical and recent developments in the definition of property. It is prudent that this is done, as ownership, possession and holder-ship of land are usually taken to mean one and the same thing, yet they are distinct in nature.

'Ownership' is a real and comprehensive relationship under customary or statutory land tenure. Property law, in the frame of land ownership, usually refers to surface rights to the surface of land in which one has a legal claim. Land ownership, for instance, does not automatically confer mineral rights which are below the surface. In light of this, land tenure in the context of

the law shows us connections between certain categories and not others. It also shows us that rights of ownership are conferred specifically and separately to the category of each particular ownership. It further refers to rules and principles used for enforcement in incidences of overlapping interests (Okoth-Ogendo, 1989).

‘Possession’ is the physical control of property, but outside of the law. It is not a ‘real right’, but a possessor has a real relationship with the possessed property. Security of ownership to land can be enjoyed if the claim is upheld by the law. This is evident under statutory tenure. Possession does not in itself provide security, as it denotes the guarantee of facts which are self-assertive. Since time immemorial, administration and management of customary tenure has never been regulated by legislation, as customary rules and practices are unwritten. In instances of competing interests, customary tenure has been classified as ‘insecure’ because it fails to meet the required legal standard of security (Tay, 1964).

‘Holder-ship’ on the other hand, is the physical control of land, either lawfully or unlawfully with an intention to derive a benefit from it. A lawful holder has a real right whilst an unlawful holder only has a real relationship. Given the fact that customary laws are unwritten, security of land tenure becomes a point of departure. Establishing whether the subjects of customary land tenure are considered owners, possessors or holders is of paramount importance in this study. Identifying whether or not customary land dwellers have real rights of ownership to land, or whether or not they merely have real relationships to land, requires an analysis. This is similar to the question of whether or not customary land dwellers are holders of land and can use it for agricultural purposes, and are thus able to sell the produce or alienate the piece of land for financial gain. Okoth-Ogendo (1989) highlights the importance of paying attention to what constitutes property amongst indigenous people under customary tenure, whether customary systems recognise ownership or not, and in instances where they do, it is prudent to establish whether such ownership is absolute or corporate in character, and who is in charge of awarding ownership and to which class of individuals or groups of individuals it is given (Okoth-Ogendo, 1989).

Guarantee of the right to property is entrenched in the Zambian Constitution under Articles 16 and 17. Article 16 states that,

... except as provided in this Article, no property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, unless by or under the authority of an Act of Parliament which provides for payment of adequate compensation for the property or interest or right to be taken possession of or acquired.

In the recent past, Zambia has experienced a wave of displacements from land, leading to resettlement and compensation. These have been induced by the actions of government, foreign and local investors in mining, agriculture and development projects. In this context, Article 16 has been used to invoke the right to property (and non-deprivation of such a right) by customary land settlers who have been adversely affected (Phiri and Chu, 2015). Despite the Constitution granting the right to property and non-deprivation, limitations of ownership imposed by law, as reflected in Article 16, exist. Another form of limitation other than that imposed by pieces of legislation is that imposed by the rights of other legal subjects, in that one’s real rights of ownership should be respected in the realisation of one’s own property rights. This study focuses on exploring how this plays out in practice.

Once ownership of land has been granted to an individual or groups of individuals, they have rights to use, control, destroy, alienate, vindicate and burden that land (Tay,1964). Property rights are legal entitlements that both customary and statutory land dwellers have to land. They are conferred upon by virtue of their ownership to property. However, these rights are not absolute, as they impose obligations. Customary land dwellers have utilised their land rights to empower themselves economically and improve their livelihoods through agriculture. Whether the full realisation of land rights is achieved in practice, is a political, and thus debatable, issue. However, this research sought to understand how land rights are viewed in relation to power, allocation, execution and protection. In Zambia, there have been a number of challenges arising from the existence in law of both rights and obligations, mainly because they conflict with one another. This is due to the dual character and lack of harmonisation of the legal system. In most cases the legal rules used in application are drawn from judicial precedents and pieces of legislation, and since customary laws are not written down, the courts apply customary practices prevailing within a specific locality against the Constitution and use other pieces of legislation such as the Lands Act of 1995, the Local Courts Act and the Chiefs Act to help reach a conclusive decision in dispute resolution.

The rule of law is another key concept that this research study used to assess what role it plays in both land tenure systems. The study explores if it addresses only the procedural and formal aspects of landed property and land property rights, or whether it also extends to the informal procedures of landed property under customary tenure. Landed property rights in Zambia, as in other jurisdictions, are drawn from the legislative framework.

This study also attempts to assess the deficiencies of land tenure regimes from a political economy perspective. Marxian political economy draws attention to the significance of a just society without inequality. This affirms the importance of integrating politics, the economy, and society, as they are interdependent (Dimmelmeier et al., 2016). Given this background, an analysis was conducted on how political power is balanced and controlled under the two tenure systems, as well as the extent of the impact of land insecurity and inequality. The political economy concept is relevant to this study because it highlights the centrality of power relations in land governance. It also analyses the legitimacy and validity of customary land tenure, bringing to light discussions on current and historical issues. This concept also guides the understanding of policy-making institutions, the impact of customary rules and practices in land property rights, protection and realisation of vested land property rights through dispute resolution, and the legislative and policy framework.

The study's understanding of land tenure is also strongly influenced by the theory of legal positivism. According to this theory, the pedigree of rules, that is, their source, determines their status as law (Galligan, 2007) and the validity of rules in terms of the officially accepted rule of recognition, rather than social acceptance, is what makes them laws instead of mere rules, or norms, or mere convergence of behaviour. This theory is applied to statutory and customary land tenure to assess the extent of recognition and vesting of land property rights. Land laws enacted by the legislature according to the principle of legal positivism do not require the people to accept rules of recognition – they only need to obey them. This is so, regardless of whether the public accepts or endorses the rules themselves or the rule of recognition (Galligan, 2007). It was interesting to consider how this plays out in a democratic society like Zambia.

On the other hand, legal centralism concentrates more on the centralisation of power, while in contrast, legal pluralism focuses on the decentralisation of power. We see legal pluralism reflected in Zambia through the co-existence of customary and statutory legal systems. This

research used the theory of legal pluralism to bring to light issues derived from the decentralisation of power in customary and statutory tenure systems. According to Meinzen-Dick and Pradhan (2010), property rights approaches by policy-makers through statutory law are most often considered unitary and fixed, rather than diverse and changing. They further maintain that such approaches overlook the diversity of property rights and how they are claimed (Meinzen-Dick and Pradhan, 2010). Legal pluralism asserts that equality is not immediately guaranteed by mere co-existence of diverse systems. This is reflected in the fact that statutory law has always taken precedence over customary laws and practices.

Methodology

This research was guided by an analysis of the existing literature on customary and statutory land tenure systems in Zambia and further afield, which includes published and unpublished sources. Amongst these are pieces of legislation, international and regional instruments, cases, textbooks, journals, thesis/dissertation papers, research reports, and media sources. Gathering of relevant information using a literature analysis was important to this study, to understand the contextual issues relating to the inadequate legal recognition of the strength of rights to land.

This study was also guided by fieldwork comprising of interviews with key stakeholders in the public, not-for-profit organisations (NPOs) and community members. Interviews with the public sector were conducted with twelve people from ten institutions namely, the Ministry of Land, Natural Resources and Environmental Protection; Ministry of Chiefs and Traditional Affairs; Ministry of Local Government and Housing; Ministry of Justice; Solicitor General; Human Rights Commission; Zambia Law Development Commission; Land Tribunal; Office of the Vice President; Disaster Management and Mitigation Unit. Five meetings were held with NPOs: Zambia Land Alliance; We Effect; Tetra Tech USAID; Caritas Zambia; and Indaba Agriculture Policy Research Institute.

Community focus group discussions were conducted in Kafue, in the Mpande area. Mpande is a community of people who have experienced government-induced displacement and have since been resettled. However, they have continued to experience challenges in relation to land tenure at the resettled site, such as insecurity of tenure, inadequate access to clean, safe water and sanitation, constrained access to medical facilities, and poor fertility of land for agricultural purposes, which has led to food insecurity.

The research team comprised of the author as the lead researcher, Zambia Land Alliance, and Caritas Zambia. Focus group discussions and surveys were administered in a local language widely spoken and understood in the area, which is Nyanja. The field visit to Mpande to hold focus group discussions and administer surveys to the communities did not happen in time as authorisation from the Chieftainess to carry out the work proved challenging to obtain. This ended up delaying the progress of the study. Caritas Zambia played a key role in assisting with obtaining clearance from the Chieftainess.

Analysis of Limited Real Rights and Legal Relationships in Land Property

Property rights that deal with lawful relationships between legal subjects and the relationships between legal subjects and the objects exist (Scott, 2017). Limitations in this regard are those posed by public law and not those arising from a real right. Under statutory land tenure limited real rights are registered and regulated by the Lands Deeds and Registry Act. Both statutory

and customary limited rights to property are protected by the Constitution under Article 16. There are varying views of ownership where others regard it as the most absolute right whilst others state that ownership is not absolute. The view that ownership is not absolute was reached in the cases of *First National Bank of South Africa Ltd v Commissioner South African Revenue Service* and *Port Elizabeth Municipality v Various Occupiers*.

Subsequently, property rights in light of deprivation in the broader sense refer to limitations and regulations (Van der Walt and Pienaar, 2016). These limitations in landed property are an interference with one's rights to enjoy and use one's property. Under customary land tenure, it is prudent to establish whether the lapsing of a usufructuary registered right of way on a piece of land once deprived has a legitimate impact on the rights holders against the rights of the new owner (Van der Walt and Pienaar, 2016). If the rights of the holder are impacted negatively then it can be averred that the rights holder has been arbitrarily deprived of his or her property rights, as constitutionally protected. Arbitral deprivation reflects that real security rights and servitudes have substantial value and are limited real rights to property. It was held in *Erlax Properties (Pty) Ltd v Registrar of Deeds* that,

A real right consists basically of a legal relationship between a legal subject (holder) and a legal object or thing (res) which bestows on the holder of the right a direct power or absolute control over the thing. The content of the absolute control may vary depending on various real rights which may range from full ownership to *jura in re aliena* and other real rights.

The important point to note is that limited real rights are aimed to burden land property, and as a result the owner of the land ends up having limited entitlements.

In establishing whether customary land dwellers are holders, possessors or owners of land, it is imperative to understand that the aspect of individual ownership to land is foreign to customary land tenure. Originally, it was unusual for people to have individual rights to land, and this is evidenced presently in the way customary land is administered. The traditional authorities are custodians of customary land, and its nature was never to subject it to ownership. Customary land in Zambia originally could not be sold and therefore it did not have commercial value. Interestingly, due to the current demand on land Zambia has seen commercial value added to customary land over the years.

Consequently, the right to land ownership is inherently comprehensive and one can enforce such right against anyone in conflict with it. In the case of *Gien v Gien* 1979 (2) SA, the court looked at ownership and defined it in full consideration of its inherent nature. In that ownership's inherent nature is the most comprehensive real right a person can have to property. This freedom is however restricted by rights of others and the law. Ownership also poses entitlements on individuals to use, alienate, burden, control, consume as well as vindicate (Scott, 2017). Limitations on land ownership change for various reasons such as to protect, benefit, regulate as well as harmonise interests that are in conflict with each other.

The Lands Act of 1995 vests all land in the President and he holds it in perpetuity on behalf of the Zambian people. This provision can be interpreted to reflect that there is no individual absolute ownership of land. What are owned are real rights to land which are limited by the rights of others and the law. Limitations that are imposed by the law are usually influenced by various factors in the social, economic and political spheres (Scott, 2017). The Town and Country Planning Act has now been amended to extend to customary tenure. This highlights

the fact that the development or subdivisions of one's land require permission from the government. This Act restricts one's rights to act freely in developing one's property. The Water Act equally vests all water in Zambia in the ownership of the President and that the use, diversion and appointment of all water is made in terms of the Act. The above-mentioned pieces of legislation show that ownership of land is not an unlimited right in Zambia.

Ownership of land is also linked to the principle reflected in the Latin maxim, *plus iuris in album transferre potest quam ipse habet*, which means: "No one may transfer more rights to another person than he has himself". However, because of ineffective enforcement systems and mechanisms that regulate land administration and management in Zambia, we evidently have a society where people have been able to illegally transfer land ownership under customary and statutory land to the detriment of the sole owner. Hence the challenges of double allocation of land, encroachments, large-scale land allocations by chiefs to investors when clearly chiefs are not permitted by law to allocate more than 250 ha of land.

In instances where land has been unfairly grabbed, communities and individuals can invoke their rights to property by claiming ejectment against resettlement and compensation. Although, on the other hand, the Zambian Constitution and the Lands Acquisition Act give powers to the President to compulsorily acquire land. The Lands Acquisition Act states under Section (3):

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.

Section (10) of the same Act provides for land acquisition against the payment of compensation. It states:

Subject to the provision of this Act, where any property is acquired by the President under this Act, the Minister shall on behalf of the Government pay in respect thereof, out of moneys provided for the purpose by parliament, such compensation in moneys may be agreed or, in default of agreement, determined in accordance with the provisions of this Act. Provided that where the property acquired is land the President may, with the consent of the person entitled to compensation, make to such person, in lieu of or in addition to any compensation payable under this section, a grant of other land not exceeding in value the value of the land acquired, for an estate not exceeding the estate acquired and upon the same terms and conditions, as far as may be practicable, as those under which the land acquired was held.

In the case of *Trustee of the Brian Lackey Trust v Annadale* 2003 SA 528, the courts established key points to consider when awarding compensation. These are: value of land, costs of transfer, and compensation for personality infringement which has led to involuntary loss of land.

Additionally, possession entails a real relationship between the possessor and the land. The possessor of land has no real right but only has a real relationship. This real relationship of possession cannot be unlawfully disturbed as it is fully recognised by the law. The presumption of possession affirms that as long as one has control over property, that one retains the right to possess and that such control signifies that one is the owner. If one wants to claim possession of land that is in control by someone else, the claimant bears the onus to prove that he/she is the owner. In order for possession to be considered in particular circumstances of land, physical

control, intention of owner should be present and such possession must be unlawful. There are usually two types of possessors to land, namely, *bonafide* possessors (possessors in good faith) and *malafide* possessors (possessors in bad faith). Possessors in good faith are not recognised as owners of property due to the fact that they do not fulfil the requirements upon which ownership is established. Instead, they have the intention of an owner, but are not aware that they have incorrectly assumed ownership of the property.

Under customary land tenure, one of the prominent disputes hinges on land encroachments. The major challenge is that customary land is not mapped out well, neither are boundaries properly defined. This has led to property rights infringements as well as escalating disputes around encroachments. Due to corruption problems in systems of statutory land tenure, we see a lot of double land allocations and illegal non-consensual sales of other people's land. In light of this, persons who purchase land and conclude contracts of sale with non-owners and assume that they have become owners of such pieces of land, are considered as mere possessors in good faith and only have a real relationship to the piece of land and not real rights. Real rights are only present in ownership and not possession (Scott, 2017). Possessors in bad faith are always aware that they are not owners of the land and cannot be legally recognised as such. But they nevertheless have the intention of the owner. What they equally have is a real relationship to the land.

Furthermore, holders do not classify themselves as being owners of land and are aware that there is an owner who retains ownership, but instead control land, inferring that they will derive a benefit from it. Two kinds of holders exist namely, lawful and unlawful holders. Lawful holders are persons who have been given control of land by owners with the purpose of deriving a benefit from it. Since the chiefs retain custodianship of customary land, in instances where someone decides to leave the chiefdom in which land was allocated to him or her, such person is at a disadvantage of losing the land and it can be allocated to someone else by the chief. However, this kind of challenge is not present under statutory land tenure. Instead, statutory laws impose repossession of land that has not been developed for a consecutive period of 18 months.

Additionally, once a statutory title deed's tenure lease of either 99 years, 30 years or 14 years elapses, one can suffer the consequences of losing land if the lease is not renewed by government. Therefore, it can be concluded that customary land dwellers do not enjoy ownership or have ownership of land, as their rights to ownership are limited, can be taken away and are subject to conditions. This equally holds true for statutory land. Customary land dwellers have enjoyed deriving benefits from land such as farming activities to sustain their livelihoods and using pieces of land for homesteads. Holders in bad faith, usually do not have permission to control or access land from the owner but do so in order to derive a benefit from it.

The Zambian Constitution under Article (16) recognises the right to property and this right enjoys constitutional protection. To this end, possessors and holders of land in good faith are protected by the law. In instances where a Chief decides to take away a portion of one's land with the reason that it is allocated to another, or selling land to investors for mining or agricultural purposes, thereby displacing his or her subjects, the persons aggrieved can bring claims against the chief in the courts of law, stating that they enjoyed control of the land peacefully, without disturbance and that the chief disturbed such control in an unlawful manner.

Furthermore, customary law is recognised in the Constitution – the Lands Act of 1995, Subordinate Courts Act of 1965, and the Local Courts Act of 1966. In the case of *Kamiki v Jairus* (1967) ZR 71 it was held that customary law can only be recognised to an extent that it is not repugnant to natural justice, good conscience, equity or any written law. In the case of *Mumba v The people* (1984) ZR 38 the courts highlighted that laws that are inconsistent with the Constitution are null and void. This is rightly so in relation to statutory as well as customary laws.

Customary land tenure is usually divided into categories, and the purposes of use are different, namely, agriculture, grazing, and the establishment of homesteads. These categories of land are usually allotted to a specific tribe in a locality and the enjoyment of rights is to the exclusion of others. Profits derived from such pieces of land are also unhampered. There is no conclusive agreement on the nature of rights to land that could be acquired. This raises a number of questions: since customary laws are not codified, are the rights under customary tenure adequately, protected and realised? How does one claim rights when the basis of the claim is not adequate? Does one require a point of reference in order to fully claim rights under customary tenure?

The English law that was passed in 1677 referred to as the Statute of Frauds required that transactions of land sale are reduced to writing, in order to be enforceable. The aim was to prevent claims that are fraudulent. Customary land transactions are usually informal; a similar case at common law gave birth to the Statute of Frauds law. The intention of the Statute of Frauds law, as explained in the case of *Steadman v Steadman*, was to document important interest in land. However, this law did not work well in practice. The Law Reform Commission Enforcement of Contracts Act of 1954 amended the Statute of Frauds 1677 Section 4 which provided that:

No action shall be brought upon any contract for the sale or other disposition of land or an interest in land, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person there unto by him lawfully authorised.

In the case of *Zambia Building and Civil Engineering and Contractors Limited v Georgopoulos*, the court held that, in light of the Statute of Frauds, an agreement does not necessarily have to be in writing as long as all material terms of a contract are present. The provisions in the Statute of Frauds were interpreted differently in other cases and brought about confusion. However, discussions around it are that interests in land can either be oral or in writing. If they are oral, it is important that they satisfy the requirements stipulated in the Statute of Frauds or equity in order to be valid. (Re Hoyle, 1893) stated: “The question is not one of intention of the party who signs the document, but simply one of evidence against him”. In this light, it begs the question: do customary land-holding certificates suffice as valid if they satisfy the requirements of a valid contract? Land disputes have been taken to courts of law in Zambia where people under customary land have been able to use them as evidence to invoke land rights.

Legal Pluralism and Property Rights

Zambia’s legal system is dualist in nature, hence the co-existence of recognised statutory and customary systems which operate officially in society. Narrowly interpreted legal pluralism is based on the duality of judicial decisions which played a key role in developing customary

laws. These judicial decisions were used to incorporate customary laws into legislation. Therefore, legal pluralism can be inferred from the perception that law comprises of rules and regulations that are created by the legislature, interpreted by the judiciary and enforced by the executive. However, laws are not only confined to court decisions, rules and administrative orders (Meinzen-Dick and Pradhan, 2010) but rather that law extends to customary systems which comprise of customary norms and practices.

Legal pluralism refers to two or more legal systems co-existing within society. These systems are usually in conflict with each other. For instance, the Constitution under Article (23) (3) provides for protection from discrimination on the grounds of sex but customary laws and practices on the other hand discriminate against women in land allocations. Despite the co-existence of legal systems, it is never obviously assumed that they receive equal recognition and status. The statutory legal system and laws are usually superior as opposed to customary laws and practices. Substantially, it is important to note that legal systems should not exist in isolation but that they should mutually interact and influence each other (Guillet, 1998). Efforts to consolidating the understanding of property rights usually lean towards the statutory system and therefore end up being unitary. This is reflected in the land property rights being codified into pieces of legislation in order for them to provide tenure security. The dominance of this approach signifies that customary systems do not provide adequate land tenure security, since the Lands Act of 1995 only recognises customary tenure but does not provide for its administration (Mushinge and Mulenga, 2016). It can be inferred that the Act fails to provide customary tenure security and to protect entitlements. Uncertainties and ambiguities in customary land tenure are caused by irregularities posed by upholding statutory tenure superior to customary tenure. This has therefore, affected the recognition, protection and realisation of land property rights under customary land tenure in Zambia. The Lands Tribunal which has a mandate to hear and decide on land-related matters is centralised in its operation and mostly confined to urban and peri-urban localities. Therefore, poor rural communities residing under customary land tenure are unable to access justice due to geographical and technical barriers. Most customary property rights in light of legal pluralism recognises that there are various rights attached to property such as rights to use and rights to make decisions on the property.

Political Economy and Property Rights

Before colonisation, all land in Zambia was regulated according to customary laws and practices where indigenous people could access, control and enjoy rights to land. Colonialism that was imposed in Zambia as in other countries in Africa, gave birth to significant changes in land tenure systems, which resulted into the coexistence of statutory and customary land tenure systems. Conflicts between Europeans and indigenous Africans arose, based on varying interests in land. Moreover, policies were used to dominantly reflect the interests of Europeans. Land policies also discriminated against indigenous people of Zambia by conforming them to lands that were less fertile and not serviced with communication (Mudenda, 2007). These land policies are the Land Conversion of Titles Act, The Creation of Trust Lands Reserves- The Northern Rhodesia (Native Trust Land) Order in Council 1947, Northern Rhodesia Order in Council 1911 and Northern Rhodesia Order in Council 1924. The British colonialist used these policies to over accumulate land in Zambia which is a characteristic feature of capitalist imperialism (Shivji, 2009).

Mvunga (1980) rightly highlighted that:

... the creation of the various categories of land was influenced by many factors all hinging on economic interests. There was need to assure European settlers with land for their settlement and exploitation. But this could not be achieved without designating reserves within which to confine the indigenous people. But the latter also needed good and adequate land for their utilization. The reconciliation between the two interest groups was not an easy one. Then of course the mineral deposits of Northern Rhodesia necessitated the exclusion of those areas known or believed to have minerals from land under African occupation.

Consequently, during colonisation, the British South African Company (BSAC) was given powers under the Royal Charter of 1889 to oversee the administration of North Western Rhodesia and North Eastern Rhodesia. The Royal Charter gave powers to the BSAC to create mining concessions, namely the Lewanika concessions of North Western Rhodesian and the North Eastern Rhodesian concessions, to conduct mining initiatives and make grants for land (Mudenda, 2007). However, the company claimed ownership of land and mineral rights using the two concessions, although they did not contain any provisions of such ownership. The BSAC further asserted that land ownership was given effect by the declaration of protectorate status. This reasoning was denied by the Privy Council. However, this declaration and the validity of the agreement of the monopoly of seeds, entered into with a Chief, was challenged in the cases of *Petit v African Lakes Corporation* and *Cox v African Lakes Corporation*. The court held that the agreement entered into with the Chief was for want of consideration, and therefore invalid to that extent. The Majesty's Commissioner was supposed to give consent for the land ownership transfer to the Sovereign of Great Britain. The Courts also had a task to establish who owned the land in dispute between the indigenous people, the crown and the BSAC company. It was held that there was no express indication that could constitute ownership of land by the crown.

Therefore, key drivers of the independence struggle in Zambia were about gaining back land that was taken away by the British colonialists, as well as gaining back political freedom. In the post-independence period, during the second Republic, interventions in land reform encouraged socialist economic policies, whereas the third Republic pursued interventions focusing on liberal economic policies. Liberalisation of the economy addressed issues surrounding bare land not having exchange value, maximum consideration in land dealings, and restrictions that affected non-Zambians engaged in land alienation (Mudenda, 2007).

It is pertinent that property rights are understood from the political economy perspective because this has influenced how landed property is perceived. Karl Marx explained the importance of considering property from a perspective of one's existence and one's relationship with the earth. In that respect, property refers to one's attitude with prerequisites present to one, by virtue of one's existence and one's relationship with natural conditions of production (Marx, 1857). Therefore, a person has existence in the natural inorganic conditions, which are land and natural resources in this context, which equally have a social character, namely, a person's existence in their communities and their role and relationship with the land. What is paramount is that one can only have such access to external natural inorganic conditions of production by virtue of belonging to a community or tribe. Policies and laws in Zambia equally play an important role in creating a legally conducive environment that upholds individual and community land property rights. Landed property rights therefore, remain a function of active real relationship to conditions of production.

Findings

Disjunctions between customary and statutory land tenure

Persons interviewed during this research highlighted that statutory land tenure is comprehensively protected by law as opposed to customary land tenure. Customary laws are dynamic, subjective and not objective. They are also evolving because the customary law that is not recognised is that which is not in conflict. The differences between customary and statutory land tenure are in the way they are administered. Under statutory land tenure there are rights to exclude others, whilst customary land tenure encourages communal use. Fundamentally, customary land laws are not written and thus subject to preference and personal interpretation. In the past, customary land tenure rights were secure, based on how subjects held land. Presently, verbal recognition of land access and control has proven to be inadequate. The conceptualisation of land in Zambia reflects differences amongst various localities, as customary land belongs to the clans and the clans hold land in perpetuity. The legality of customary laws is usually underplayed, as opposed to statutory laws.

Under statutory land tenure, the President delegates powers of land administration to the Commissioner of Lands and the Ministry of Lands gives urgency to the councils. The councils can thereby issue a state lease by recommendation. Additionally, customary land falls under the jurisdiction of chiefs who hold it as custodians on behalf of the people. Tenure for statutory land is 99 years which can be renewed after specific requirements have been met. The President is of the view that tenure status should not be renewed and that he will be within his right not to do so. Access to customary land on the other hand, runs in perpetuity and traditional institutions' mandates are quite strong, although weak when it comes to documenting traditional land holding. The mandate of institutions can be strengthened through an understanding of commonality. It is important to establish what people regard as security in terms of land rights. Although land is complex, commonality of purpose is very important.

Stakeholders interviewed also stated that, systems regulating statutory land are centralised and record-keeping is poor. The fact that persons are only entitled to surface rights is also a challenge, as this has given the government powers to displace individuals once mineral rights on a particular piece of land are of interest.

Concerns were also expressed on issues of inheritance of land, stating that there are grey areas around customary tenure. How a deceased estate is devolved, and whether or not the village registers are amended to reflect the heirs of the deceased, are questionable. It was also explained that customary tenure is simplistic and anyone can easily challenge it thereby affecting its security. One key feature of the law is that it should be certain and that rights should be claimed easily without any complication.

Vesting of land rights, protection and recognition

Interviewed individuals stated that customary land dwellers are disadvantaged in many aspects such as realisation of their rights to clean and safe water, rights to development and various other rights. Land rights are recognised but not fully respected and protected under both tenure systems. One has rights but no security. In the recognition and realisation of land rights, there is the need to make very functional village committees under customary tenure. There are still instances where people are born and no birth records are prepared. It is important that documenting of birth, death, land holding, land demarcations and titling are prioritised and

participatory. Improvements in natural resources regarding demarcations are evident and the participatory process has increased literacy levels amongst communities. These improvements have led to the reduction of issues around burning and cutting down of trees, soil erosion, and land degradation, which have since helped with water infiltration in the soil.

Subsequently, the fact that the Lands Act of 1995 provides for the recognition of customary tenure but fails to prescribe ways for its administration, is deliberate. This is mainly because customary land tenure administration cannot be confined to one specific way of doing things, as each tribe or ethnic group has its own system of administration. In order to uphold rights to practice customs or culture, this has to be considered. The land policy prescribes basic principles by all ethnic groups. These emanate from customary laws and gender equality pertaining to how customary land ought to be administered. Religious norms equally have a serious impact on land rights. Both customary and statutory tenure have legal strength in protection of land rights. However, in practice it is believed that customary land dwellers do not have sufficient land rights protection and recognition. What is prominent is that the majority of people who dwell on customary tenured land do not know their land rights and that they can reverse land injustices and take up land disputes in court. The village committees and local city councils are usually not vigilant when they have an instrumental role to play.

However, the realisation of land rights under customary land poses a number of challenges. The rights to use, derive benefits and profits, to mortgage and sell land are usually not fully realised. The right to sell land for financial benefits is also a limited right, as customary land is not expected to be sold. Customary land dwellers are usually disadvantaged, as financial institutions avoid to give these groups of people credit in the form of loans, when they present their pieces of land as surety for financing. Financial institutions prefer to accept ownership of land evidenced with a legally-recognised document such as a title deed, issued under statutory tenure by the Ministry of Lands, Natural Resources and Environmental Protection. It is also desirable to see villagers' economic status improved by increasing their chances of taking part in the global market as well as economic development of the country. Systems also play a key role in the enjoyment of land rights, and frameworks are key as they empower the people. Laws are equally not harmonised and this creates confusion about which rights supersede the others, and why. Complexities exist in the protection and realisation of land rights as there are challenges in promoting access to justice as resources are limited, justice structures are geographical and not accessible, and human resource capacity is limited.

Tenure insecurity

Stakeholders interviewed highlighted that the lack of land tenure security is a challenge of not having adequate rights to land. Statutory land tenure secures rights to land within the confines of the law. Statutory land has high value and awards tenure security, as it is subject to the law, planning, conventional land systems and development. It is also subject to various other pieces of legislation that govern land such as, the Town and Country Planning Act, and the Mines and Minerals Act.

Customary land tenure, on the other hand, has low value and is less secure as compared to statutory land tenure. However, it awards freedom and minor restrictions to its subjects.

The courts of law enforce both customary and statutory law. Statutory law is clear and evidence of a title deed is good enough. Customary law is dependent on available evidence as one cannot bequeath customary land. One has to secede what has been left behind by his or her ancestors

or ascendants. The insecure status of customary tenure is reflected in incidences of land grabbing, where people are relocated to land that is less fertile and removed from their ancestral land. Chiefs are not willing to give up their powers of leadership to the government in the interests of various stakeholders to formalise customary land under a statute. Land accords chiefs respect from their subjects and authority to hold it as a custodian. The fact that there is no reverse mechanism for conversions of customary land to statutory land, creates a much more complex environment. Zambia does not have comprehensive laws that recognise the disadvantaged position of vulnerable groups. Equality is key, because if people are weak or poor, they will not have the same capacity to access land.

Customary land-holding certificates

Interviewed stakeholders mentioned that, the existence and issuance of customary land-holding certificates lack legal backing and are therefore not legally recognised. In order for these certificates to be recognised by the law they have to be codified. Otherwise, they are merely a practice under customary land tenure. However, they assist in settling land-related issues and are good for purposes of administration. On the other hand, certificates of title issued under statutory tenure by the Ministry of Lands, Natural Resources and Environmental Protection as well as the local councils have the force of law. They also prescribe rights and obligations to title holders.

The community people hope that the land policy will give direction on customary tenure-related issues such as customary land-holding certification. They believe that what is not written, is informal, but this is not true. Customary laws and practices are backed by action, behaviours and activities of community people. This tells a story that such practices are written in their hearts. The customary land-holding certificates are not meant to change the way land is administered. They aim to help in setting boundaries of land given to a family, provide some form of security, aid corruption, and serve as a sustainable measure.

Issuance of traditional land-holding certificates is a preference of some chiefs whilst others are doubtful of the process. On the other hand, customary land dwellers have not been prepared adequately on the meaning of these land-holding certificates. It was evident during the research fieldwork that there are no deliberate guidelines in existence explaining what these land-holding certificates mean and what rights can be invoked. The current practice in holding a customary land certificate is that once one decides to leave the chieftom, one needs to surrender the land certificate to the traditional authorities, which gives rise to other complexities.

Key questions arise: are the children of first holders of a customary land-holding certificate able to own any other land in the chieftom, or are they confined to that particular certificate? Since it is hard to contest the powers of the chiefs when they decide to re-allocate a portion of one's piece of land to another, do the certificates limit such powers exercised by chiefs? In light of equal distribution of land under customary tenure, there is always consideration of those who do not have land by adequately accommodating them; is there adequate consultation and participation of the entire village through this process? Does the village meet to come up with boundaries when the mapping and surveying is being conducted, or is it one person who represents the village and does the mapping and surveying as a representative? If one person is the sole representative of the village who conducts the mapping and surveying on behalf of the village, then such person has more powers than he or she should have and the process is not consultative. In instances where the entire village agrees that such person represents them,

when issues arise, it is paramount that the entire village meets again to provide recommendations. It is important that the process is consultative.

The customary land-holding bill will play a key role in assisting with this challenge of legal recognition – it brings the land-holding certificates into perspective and therefore gives them that legality under the law. Security of tenure that the customary land-holding certificate promotes, is an important aspect to consider. However, the challenge is that the certification process attracts costs of surveys, which many people residing under customary tenure cannot easily afford. Other stakeholders were of the view that demarcating customary land to issue certificates is another way of paving the way to land title. Land title in itself has advantages and disadvantages, as the owner has a right to sale, to exclude others, and to use the land, and this can promote inequality. Living under customary tenure may have disadvantages, which is an indication that times are changing. One can end up being insecure and disadvantaged because customary land tenure is usually without title and the issue of proving ownership may be a challenge. Challenging someone with land title may not be easy, therefore, certificates can help in strengthening one's position in a land claim, as systems are biased towards customary tenure and disadvantageous.

Dispute resolution

Conflicts emanate from differences within families and sometimes because of marriages. This creates a problem under customary tenure and the women are usually disadvantaged because of this system. However, the children may be allowed to inherit their father's estate under patrilineal systems. Under matrilineal systems of inheritance, the challenge will be that they will need to inherit their mother's land rights as assigned by the chief. If this person died intestate, their rights will not be considered.

Judges usually consider who has rights over the pieces of land in dispute, how the parties acquired the piece of land and how the rights of the rightful party can be upheld. One-on-one discussions with stakeholders revealed that there is little engagement between legal practitioners and poor communities. Judges, magistrates and local court justices tend to view customary land tenure as insecure, as ownership is difficult to prove. When customary tenure-related disputes are before the courts, judges and magistrates usually utilise assessors who understand the customary systems and laws applicable to the locality from which the dispute arose. The use of assessors is prescribed by legislation, as judges and magistrates are not fully conversant with traditional issues as it is not their area of speciality.

Importantly, the lands tribunal also has jurisdiction to hear land matters and its mandate was recently expanded to hear matters emanating from customary land tenure. Appeals from the Lands Tribunal go to the Court of Appeal. Local courts or traditional courts on the other hand, usually tend to refer more to customs and traditions in resolving land property disputes. However, there are still challenges in people accessing justice in a timely manner because of the backlog of work and cases in the judicial system. The legal procedure is long, costly and technical but there are other faster ways of resolving disputes through mediation, negotiation or arbitration outside the courts.

It has been difficult for the Ministry of Local Government and Housing to plan in areas where conversions of land have occurred because of overlapping issues. However, the issues can still be remedied because the current amended piece of legislation extends planning to customary areas.

Land enforcement and monitoring

In order to secure and protect land rights of persons, effective enforcement and monitoring is paramount. The Lands Act of 1995, the Lands Deeds and Registry Act, the Zambia Environmental Management Act of 2010, and the Urban and Regional Planning Act prescribe systems and mechanisms of enforcement. The Lands Tribunal is also key in monitoring and enforcing land-related matters. However, court judgements lack proper monitoring and enforcement to ascertain whether or not a party to a dispute is honouring the conditions of the judgement. The onus remains on the aggrieved party to notify the courts of law of such encumbrance. The Ministry of Lands, Natural Resources and Environmental Protection monitors its actions and the actions of the councils. The village land committees, chief's committees and civil society organisations equally play an important role in monitoring land-related matters. Customary land tenure is easy to monitor as it is informal and without any prescribed tools as opposed to statutory tenure which is subject to formal processes and strict rules of procedure. Under customary tenure, if the systems in place are unable to deal with the challenge posed, then the systems under statutory land tenure will take effect.

Policies and laws

Contradictions that currently exist in the two land tenure systems should always be benchmarked with the Constitution, as laws and regulations ought to be systematic. Policies can help in reducing the costs incurred in resolving disputes, such as decentralisation of institutions. Once costs are reduced, people can better access justice. Other alternative means of dispute resolution are mediation, arbitration, and negotiation which do not have strict rules of procedure, are timely, and cost effective. Zambia also has a serious challenge of ignorance of land rights, and raising awareness should be an ongoing venture.

The laws and policies can help with the realisation of land rights by way of affirmative action. The current land titling programme initiated by the Ministry of Lands, Natural Resources and Environmental Protection in conjunction with Medici Land Governance is a good opportunity for the enhancement of land rights under statutory tenure. From a human rights protection perspective, land rights realisation should not be limited by resources. There is a need to protect the vulnerable. The Human Rights Commission receives more land cases related to customary tenure than statutory tenure, mainly because statutory tenure is structured whilst customary tenure is not. Other stakeholders interviewed were of the view that a legal framework under customary land tenure will be good to give it that legality and backing in administration and management. Implementation is a huge challenge in Zambia; in certain instances, the law has proven to be adequate, but how it is implemented has brought about many challenges.

Community group discussions

In 2005, the Zambian government initiated a Multi-Facility Economic Zone project at Forest 26 in Lusaka South for purposes of development. This development aims to promote foreign and domestic investment.¹ In order to achieve this, the government de-gazetted Forest 26 consisting of 2,100 ha of former Forest Reserve land. Despite this project being good for the country's economic development, communities who settled in the forest reserve were faced with development-induced displacements which led to their human rights being infringed upon. Amongst the rights trampled upon, are their rights to food, as most settlers relied on farming

¹ See: <http://www.zda.org.zm/content/mfez>

to sustain their livelihoods. This has increased poverty levels amongst these community members and thus instilled fear and uncertainty. This former forest reserve was home to vulnerable settlers with unstable livelihoods for decades. In 2013 the government subsequently initiated the resettlement of these community members in different parts of the country. However, the concentration of this research is on the community members who were resettled in Mpande in 2016.

Surveys were administered to 15 people (10 females and 5 males) and they provided demographic insights of the Mpande resettled community. The majority of the people who took part in the survey, ranged from 18 to 75 years old. Their source of income was through agriculture. Most of them appeared not to have much knowledge about what their land rights are and they did not see themselves as being key in protecting their land rights, but rather left that to other institutions.

During the focus group discussions, which comprised of 40 participants for purposes of this research, community members highlighted that they do not see benefits in their resettlement by the government. The portions of land allocated to them are small with a radius size of 100 m²; the land is also not fertile or conducive for farming activities. These community members have a background of farming on larger portions of land as they are small-scale farmers. In this regard, land allocated to them does not help in improving their livelihoods.

At the time of resettlement, the government gave the community members an option to choose whether to receive monetary compensation or land compensation, and this particular community chose land compensation, whilst another group that was resettled in another province was compensated monetarily, and land was also allocated to each household. This inconsistency by the government has raised many concerns amongst community members.

The criteria that the government used not to compensate the Mpande resettled community members, remain unknown. Community members' efforts to engage the government on their concerns have remained futile. The community members reflected on how they were displaced by the government, stating that the process of displacement was not fairly done, as the government burned their houses. In 2014, the government initiated a National Land Titling Programme to contribute towards social and economic development with objectives to reduce displacements, enhance security of tenure, promote internal security, and increase revenue. The Mpande resettled community members were included in this initiative to secure their land on title. To this end, community members were given invitations to treaty documents – these reflect the government's interest in securing land for settlement under title. They were valid for nine days and stipulated that those interested in the land allocated to them needed to pay K4,381,87 (\$299) to government for purposes of processing a title deed for land ownership. However, the requested amount from the community members is exorbitant, as the majority of them are poor. They are small-scale farmers who have not been able to farm and earn income as they used to before, for over 4 years, due to the process of displacement and resettlement. It is therefore an oversight by government to expect them to afford paying this amount, individually. However, in the area, there are urban elites who were also allocated land and these were able to afford paying the proposed cost.

Recommendations and Conclusion

The vestment of land in the President, and chiefs retaining custodianship of customary land, reflect the underlying reality that there is no individual absolute ownership of land in Zambia.

What are owned, are real rights to land which are limited by rights of others and the law. It is also evident that individuals and groups of individuals have real relationships to land and not unlimited real rights. The important point to note is that limited real rights are aimed to burden land property. As a result, the owner of the land ends up having limited entitlements. Customary land dwellers do not enjoy ownership or have ownership of land, as their rights to ownership are limited, can be taken away and are subject to conditions. This equally holds true for statutory land. Customary land dwellers have enjoyed deriving benefits from land such as engaging in farming activities to sustain their livelihoods, and using pieces of land for homesteads.

This study argues that enforcement systems and mechanisms to regulate land administration and management in Zambia are ineffective. We evidently have a society where people have illegally transferred land ownership under customary and statutory land to the detriment of the sole owner. Hence, there are major challenges of double allocations of land, encroachments, and illegal large-scale land allocations by chiefs. To this end, there is a need to strengthen the enforcement and monitoring of land systems in order to secure and protect people's land rights. Despite the co-existence of legal systems, it is never obviously assumed that they receive equal recognition and status. The statutory legal system is usually superior as opposed to customary laws and practices. Efforts to consolidate the understanding of property rights usually lean towards the statutory system and therefore end up being unitary. Systems regulating statutory land are centralised and record-keeping is poor. Systems of administration also play an integral role in the enjoyment of land rights, and these frameworks are key, as they empower the people. Customary land-displaced community members are usually disadvantaged, as the process of resettlement and compensation does not take into account their full rights to land. Consequently, there is a need to address this irregularity in the Zambian society. Equality is key because if people are weak or poor, they will not have the same capacity to access land. Traditional systems that disadvantage women in accessing land, present another form of inequality. Customary land-holding certificates lack backing by the law and are therefore not legally recognised. In order for these certificates to be recognised by the law, they have to be codified, otherwise, they are merely a practice under customary land tenure. However, they assist in settling land-related issues and are good for purposes of administration. It is also important that guidelines of customary land-holding certificates are drafted, indicating what they mean to holders and what rights can be invoked with the certificates. The government needs to devise laws that enhance the tenure security of disadvantaged groups. Policies and laws in Zambia equally play an important role in creating a legally conducive environment that upholds individual and community land property rights.

It can also be inferred that the Lands Act of 1995 fails to provide customary tenure security and to protect entitlements. This has therefore, affected the recognition, protection and realisation of land property rights under customary tenure in Zambia. In light of this, customary land dwellers are usually disadvantaged, as financial institutions avoid giving these groups of people credit in the form of loans, when they present their pieces of land as surety for financing. It is desirable to see villagers' economic status improved by increasing their chances of taking part in the global market as well as the economic development of the country. In the recognition and realisation of land rights, there is a need to establish functional village committees under customary tenure.

Complexities exist in the protection and realisation of land rights, as there are challenges in promoting access to justice: resources are inadequate, justice structures are geographically inaccessible, and human resource capacity is limited. Importantly, it is prudent that the Lands

Tribunal is decentralised in order for people to access justice in different parts of the country. There is also a need for the Lands Tribunal to be autonomous in its operations. There must be deliberate efforts to educate the judicial system, the local court justices, magistrates and judges on land administration rules. Overall, there is a need to promote proper monitoring and enforcement of court judgements to ascertain whether or not a party to a dispute is honouring the conditions of the judgement. There is also a need for the judiciary to fast-track land-related matters.

Gender inequality issues should be addressed in access to, control and ownership of land. A holistic approach should be considered in the formulation and implementation of laws, policies, regulations, and other interventions. The harmonisation of customary land tenure interventions should correlate with statutory land tenure. If inequality, poor laws and policies, ineffective monitoring and enforcement mechanisms, as well as poor processes and procedures of land administration are not addressed, they will escalate poverty in the country.

REFERENCES

- Batterbury, S.P.J. and Ndi, F. (2018). Land grabbing in Africa. In Binns, T., Lynch, K. and Nel, E. (Eds.), *The Routledge handbook of African development*. London: Routledge, pp. 573-582.
- Chanock, M. (1991). A peculiar sharpness: An essay on property in the history of customary law in colonial Africa. *Journal of African History*, 32(1), 65-88. <https://doi.org/10.1017/S0021853700025342>
- Colson E. (1996). Land law and land holdings among Valley Tonga of Zambia. *Southwestern Journal of Anthropology*, 22(1), 1-8. <https://ehrafworldcultures.yale.edu/ehrafe/citation.do?method=citation&forward=browseAuthorsFullContext&id=fq12-010>
- Cotula, L., Vermeulen, S., Leonard, R. and Keeley, J. (2009). Land grab or development opportunity? Agricultural investment and international land deals in Africa. Food and Agriculture Organization, IIED, and IFAD, London and Rome.
- Crabtree-Condor, I. and Casey, L. (2012). Lay of the land: Improving land governance to stop land grabs. Johannesburg: ActionAid.
- Dimmelmeier, A., Pürckhauer, A. and Shah, V. (2016). Marxian political economy. Exploring Economics. <https://www.exploring-economics.org/en/orientation/marxist-political-economy/>
- Galligan, D.J. (2007). *Law in modern society*. Oxford: Oxford University Press.
- Guillet, D. (1998). Rethinking legal pluralism: Local law and state law in the evolution of water property rights in northwestern Spain. *Comparative Studies in Society and History*, 2, 97-117. <https://doi.org/10.1017/S0010417598980021>
- Himonga, C. and Nhlapo, T. (2015). *African customary law in South Africa: Post-apartheid and living law perspectives*. Cape Town: Oxford University Press Southern Africa. <http://doi.org/10.18352/ijc.746>
- Machina, H. (2002). Women's legal rights in Zambia: Policy provisions, legal framework and constraints. <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.439.9143&rep=rep1&type=pdf>
- Meinzen-Dick, R. and Pradhan, R. (2010). Legal pluralism and dynamic property rights (CGIAR): System-wide program on collective action and property rights. International Food Policy Research Institute (IFPRI).
- Mudenda, F. (2007). *Land law in Zambia*. UNZA Press for the School of Law University of Zambia.
- Mushinge, A. and Mulenga, S. (2016). Legal pluralism and tenure security: Exploring the relationship between statutory and customary land tenure in Zambia. *International Journal of Social Sciences Studies*, 4(3), 7-17. <https://ideas.repec.org/a/rfa/journal/v4y2016i3p7-17.html>
- Mvunga, M.P. (1980). Challenges to the British South African Company claims. pp 37-76.

Netherlands Ministry of Foreign Affairs. (2010). Strengthening land governance for poverty reduction: Sustainable growth and food security. IS academie. https://www.landgovernance.org/wp-content/uploads/2019/09/NL_MinistryofForeignAffairs_Final-Version-LandInventory_06-12-2011_0.pdf

Okoth-Ogendo, H.W.O. (1989). Some issues of theory in the study of tenure relations in African agriculture. *Africa*, 59(1), 6-17. <https://doi.org/10.2307/1160760>

Palmer, D. Frieska, S. and Wehrmann, B. (2009). Towards improving land governance. Land Tenure Working Paper 11, 12-15. <http://www.fao.org/documents/card/fr/c/fcbe4803-0641-54a3-afc4-55db45d1f449/>

Phiri, D. and Chu, J. (2015). Large-scale land acquisitions in Zambia: Evidence to inform policy. <https://www.africaportal.org/publications/large-scale-land-acquisitions-in-zambia-evidence-to-inform-policy/>

Scott, S. (2017). Property law. Pretoria: University of South Africa.

Tay, A.E.S. (1964). The concept of possession in the common law foundations for a new approach. *Melbourne University Law Review*, 4(4), 476-497. <https://www.austlii.edu.au/au/journals/MelbULawRw/1964/17.html>

Van der Walt, J.A. and Pienaar, G.J. (2016). Introduction to the Law of Property. Cape Town: Juta.

Legislation

The Lands Act of Zambia Chapter 184 of 1995.

The Constitution of Zambia Chapter 2 of 1996.

Subordinate Courts Act of Zambia Chapter 28 of 1970.

Local Courts Act of Zambia Chapter 29 of 1994

Chiefs Act of Zambia Chapter 287 of 1965.

Cases

Erlax Properties (Pty) Ltd v Registrar of Deeds.

First National Bank of South Africa Ltd v Commissioner South African Revenue Service.

Gien v Gien 1979 (2) SA.

Kamiki v Jairus (1967) 71.

Mumba v The people (1984) ZR 38.

Petit v African Lakes Corporation.

Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC).

Re Hoyle, CA (1893)

South African Human Rights Commission and Another v President of the Republic of South Africa 2005 (1) SA 580 (CC).

Steadman v Steadman 1974 2 ALL .ER 977.

Trustee of the Brian Lackey Trust v Annadale 2003 SA 528.

Van Niekerk v Van Niekerk and Another 2011 (2) SA 145 (KZP).

Zambia Building and Civil Engineering and Contractors Limited v Georgopoulos (1972) ZR 228.

APPENDIX

Interview Schedule

NGOs	Name	Contact Number	Date of meeting	Status
IAPRI	Henry Machina	977240823	Friday 13th Sept 2019 08h15	Completed
WE EFFECT	Mr Sekeleti	977678884	Friday 13th Sept 2019 14h00	Completed
ZLA	Bridget Land Rights / MandE Officer	977591579	Thursday 12th Sept 2019, 10h00	Completed
CARITAS Zambia	Mr Kabilika Executive Director	977712051	Friday 13th Sept 2019 10h00	Completed
USAID Tetra - Tech	Matthew Sommerville Chief of Party	968865288	24th Sept, Tuesday 9:30am	Completed
Government Institutions	Name	Contact Number	Date of Meeting	Status
Zambia Law Development Commission	Inutu Senior Researcher	211263702	26th Sept, Thursday 15:00hrs	Completed
Human Rights Commission	Kebby Malila Foster Hamuyumbe	0211251327 0967791510	20th Sept, Friday 11:00am	Completed
Ministry of Lands, Natural Resources and Environmental Protection	Ms Agatha Banda Chief Registrar	0211251927	Tuesday 24th Sept 08h00 – 11h00	Completed
Ministry of Local Government and Housing	Ms Membo Changula - Principal Planner in Charge of Forward Planning	0979103390	Thursday 12th Sept 14:30	Completed
Ministry of Justice	Mwase Kumwenda Parliamentary Counsel	0211254645 0976204234	Friday 20th Sept 14h00	Completed

NGOs	Name	Contact Number	Date of meeting	Status
Attorney-General's Office	Abraham Mwansa Solicitor General	0211250538	Thursday 19th Sept 11h00	Completed
Office of the Vice President, Disaster Management and Mitigation Unit			Friday 20th Sept 09h30	Completed
Lands Tribunal	Micheal Chisengele Registrar Lands Tribunal	0954873077	Thursday 19th Sept 14h30	Completed
Ministry of Chiefs and Traditional Affairs	Mr Robert Kasezya- Director Traditional Affairs Mr James Chileshe Director Chiefs Affairs	0976307516	Tuesday 17th Sept 10h00	Completed