

CUSTOMARY LAND TENURE

The word tenure in law relate to the legal rules regulating the *acquisition*, the *distribution* of rights and the *use of land* amongst a specific population. In Zambia the land tenure system varies from one area tenure to another due to difference in the customary authorities.

At present Zambia has two systems of land tenure altogether, land may either be held under **statutory law** or under **customary law** and hence the two categories of land namely, *state land* and *customary land*. For state land this may either be scheduled or non-scheduled land depending on whether the particular land appears in the schedule to the agriculture land Acts Cap 292. The customary land is what was basically trust and reserves, this is called customary land. Customary land because the interests in these lands are held under customary law.

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- Customary Land is Land held, occupied or used under Customary Law according to the Malawi Land Act 1965.
- However, the pocket law lexicon defines custom as “unwritten law established by long usage”.
- Customary tenure is sometimes referred to as communal tenure. The word Tenure comes from a Latin word ‘*tenere*’ which means ‘to hold’.
- The implication of this, in the case of land tenure is that land is held under certain given conditions. Variations in conditions of tenure do exist though. For example the occupier may not necessarily be the land owner, and vice versa that the land owner may or may not be the occupier. Therefore considering the nature and conditions of tenure, the expression ‘land tenure’ can be seen as a wide one.
- It may incorporate in its wide range of meanings the ownership of land, or the right to use land without owning it, or something in between the two extremes. Sir G. Clauson offers the meaning of communal tenure as implying;

“.... That the enjoyment of rights in question, whatever they be, is not exclusive to one individual but is shared collectively by a community, that is,

a tribe, village, or other group of persons, by reason of kinship or residence in a particular area.”

This may be perceived to mean that communal land is owned by the community or tribe. This however, may not truly reflect the picture of customary tenure on the ground as Elias observed and acknowledged;

“ Since the relation between the groups and the land is invariably complex in that the rights of individuals’ members often co-exist with those of the group in the same parcel of land. But individual members hold definitely ascertained and well recognised rights within the comprehensive holding of the group” (Elias 1951).

- Finally evidence from studies done by White on African Land Tenure in Zambia emphasizes the proprietary character of rights, and he criticised the use of expression of ‘communal tenure’ to imply that every community member has equal rights in every piece of tribal land. His investigation led him to the conclusion that rights over arable land are essentially individual (White: 1958).
- At this stage it is important to clarify the context in which the interchange of words between communal, and customary (or tribal). It is universal for land rights, whatever, they may be to be subject to some kind of external control.
- This external control may be exercised by the state, or like in primitive ancient days by an individual such as a King or a group of individuals, or as in other ancient communities by the custom or religious laws.
- Communal is therefore used in the context of community influences whereas customary is used in light of influence emanating from customs. Therefore customary is always communal although communal may not necessarily be customary.
- Customary tenure is one of the controversial concept.
- The nature of ownership, and title to land of customary tenure has raised considerable debate.

- Studies have failed to come up with conclusive agreement as to who owns the land in customary law, between the chief and the individual clan member. Issues are further pushed as to the exact nature of interest the chief enjoys as opposed to the clan member. However, the truth of the matter is that the diversity of customary tenure dictates that there can hardly be one answer to any one question on the nature of customary tenure.
- For instance, Zambia is country of 73 language groups (tribes), and within each of these language groups there are variations in customs, beliefs and cultural practices. Therefore, an attempt to try a generalisation on customary tenure would underpin the issue and likely result in confusion. That is why Sir Simpson (1976) wisely chose not to offer a definition of customary tenure. United Nations provided one as :

The rights to use or dispose of use-rights over land which rests neither on exercise of brute force, nor on evidence of rights guaranteed by government statute, but on the fact that they are recognised as legitimate by the community, the rules governing the acquisition and transmission of these rights being usually explicitly and generally known though not normally recorded in writing (Progress in land reforms; Fourth report: 1966)

The United Nations' definition raises a chain of questions. It leaves open the question of how the standard rules relating to land are arrived at, and introduces an element of controversy by declaring that the rules are explicit. It is suggested that most of the communal tenure rules are seen as being implicit rather than explicit for instance it is common practise for individuals to avoid taking up an already opened up field in customary land as this implies that land is already engaged and owners of such fields don't need to go around villages advertising that the field in such and such a place belong to them. Conversely virgin lands and derelict lands implies vacancy to would be occupiers.

Though the customary tenure is diverse, there are characteristic features which are standard. The operative feature of customary tenure is best summed up in the much quoted saying of a West African Chief by Meek:

“Land belongs to a vast family of which many are dead, few are living, and countless numbers are still unborn” (Meek: 1968)

Generally, customary tenure in Africa is based on tribal ownership of land. It may be wise at this juncture to first explore, and try to understand the concept of tribe. The concept of tribe is actually one with dual meaning. The black African understands tribe to mean an ethnic or language group. However, the implied meaning and use of the word by colonialist went further than that. The term tribe has been used to denote an early stage in social evolution moving from; the band, the tribe, the chiefdom and the state. The classification starts with the band as the most primitive and lowest of the social scale going up through the tribe, the chiefdom and finally the state. A tribal society is therefore seen basically as primitive and backwards. This is further illustrated in Sibanda's sentiments on colonial Zimbabwe:

“For once the Africans are characterised in the tribal category, their role in society is defined. Hence the Godlonton Commission of 1944 could make two broad categorisations of the total population of Rhodesia: ‘forward peoples’ who were to be the leaders or rulers – the Europeans generally; and the ‘backward peoples’, those to be led or ruled – the Africans generally. White domination is thus not only justified, they are in fact charged with the responsibility (or duty) to ‘help’ the Africans out of their archaic mode of existence, towards ‘civilization’ which the Europeans have come to epitomise” (Sibanda C. J. :1979)

Therefore Colonialist affiliated authorities writing about communal tenure tend to propagate the idea that communal tenure is primitive and out dated as supported by Liversage:

“In advanced communities land is regarded as form of property, the ultimate ownership of which must rest with some person or somebody. Amongst the most primitive communities it is not so; where sufficient space remains at the disposal of the population, land is considered a free good like fresh air” (Liversage V. : 1945)

The expressed sentiments portrays a sensible notion on the care and use of land in ‘advanced communities’. However, what Liversage seem not to have taken into consideration on the part of ‘primitive communities’ (customary tenure) as widely acknowledged is that customary tenure is dynamic, and very adapted to changing needs for instance where land starts to get scarce, the rules change to suit the needs (for

example the Tonga of Zambia as established by Colson E. 1966, and also as reported by FAO (1967):

Customary land law does seem to have inhibited the phenomenal increase in recent years in the production of cash crops in certain African countries. Meeting the challenge of cash economy, it has adapted and adjusted itself.

Communal land tenure has generally been associated with primitive societies, and people tend to think that as civilization develops such communities should of necessity abandon the institution of communal land tenure. Such notions are biased and narrow minded because there exist forms of very successful communal holdings in the world today in some of the very technologically advanced, and so called civilized communities like Switzerland, Israel, Eastern Europe and China.

It has always been contended that the difficult with the Customary system of land tenure lies;

- **in its impression as to title,**
- **lack of security of tenure,**
- **lack of freedom of alienability and**
- **its being prone to fragmentation and parcellation.**

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At present there about two different systems altogether, land may either be held under customary law or under statutory law and hence the two categories of land namely, state land and customary land. For state land this may either be scheduled or non-scheduled land depending on whether the particular land depending on whether the particular land appears in the schedule to the agriculture land Acts Cap 292. This customary land is what we basically trust and reserves we call them customary land and reserves. We call them customary land because the interests in these lands are held under customary law. It has always been contended that the difficult with the

Customary system of land tenure lies in its impression as to title, lack of security of tenure, lack of freedom of alienability and its being prone to fragmentation and parcellation.

Ownership of land in Customary tenure

Land rights are acquired by virtue of membership in a particular tribe and once an individual is a member he becomes entitled to a piece of land. However, these rights are mentioned only if certain obligations are fulfilled. These are allegiance to the political authority. Rights in land should be differentiated from the title to land. Acquisition of rights in land does not imply acquisition of title to such piece of land. In most tribal societies in Zambia title to land is vested in the community as a whole and the chief holds this land as a trustee for all the people hence the chief has interests of control whilst the individual members of the community have beneficial rights. In other tribes society's title is vested in family groups. Here the family owns the land although the interests in such land are held by a member of the family. Although title may be vested in the community as a whole or the chief as trustee for the community, the interests acquired by individuals are distinct and exclusive. These interests will endure for as long as their heirs succeed him unless he effectively abandons the land. Hence the interests are so well established that they only fall short of freehold title.

ALIENABILITY OF CUSTOMARY LAND

Another feature of customary land tenure i.e. say to inhibit both commercial and industrial development is the lack of freedom of alienability. An individual will be reluctant to invest in land where he may not realise his investment if he must move. In most tribal societies in Zambia however, there are no restrictions on the transfer or assignment of land by one individual to another. Land may be assigned by loan or gift without reference to any land authority. It is only in society where clans are the lands holding units that there is need to consult the other members of the clan. This form of alienation however is confined to the UN exhausted improvement on the land which can be sold as opposed to the land itself. In some tribal communities another form of alienation of land by individuals exists. Here an individual may allot a portion to his dependant who then proceeds to cultivate the plot. Here there is no actual transfer of the ownership of the land at all.

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whilst the individual members of the community have beneficial rights. In other trades society's title is vested in family groups. Here the family owns the land although the interests in such land are held by a member of the family. Although title may be vested in the community as a whole or the chief as trustee for the community, the interests acquired by individuals are distinct and exclusive. These interests will endure for as long as their heirs succeed him unless he effectively abandons the land. Hence the interests are so well established that they only fall short of freehold title.

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THE LANDS (CUSTOMARY TENURE) (CONVERSION) REGULATIONS 2006.

Title

1. These Regulations may be cited as the Lands (Customary Tenure) (Conversion) Regulations.

Procedure on conversion of **customary tenure into leasehold** tenure

2. (1) A person-

(a) who has a right to the use and occupation of land under customary tenure; or
(b) using and occupying land in a customary area with the intention of settling there for a period of not less than five years;
may apply, to the Chief of the area where the land is situated in *Form I* as set out in the Schedule, for the conversion of such holding into a leasehold tenure.

(2) The Chief shall consider the application and shall give or refuse consent.

(3) Where the Chief refuses consent, he shall communicate such refusal to the applicant and the Commissioner of Lands stating the reasons for such refusal in *Form II* as set out in the Schedule.

(4) Where the Chief consents to the application, he shall confirm, in *Form II* as set out in the Schedule-

- (a) that the applicant has a right to the use and occupation of that land;
 - (b) the period of time that the applicant has been holding that land under customary tenure; and
 - (c) that the applicant is not infringing on any other person's rights;
- and shall refer the Form to the Council in whose area the land that is to be converted is situated.

Consideration of the application by the Council

3. (1) The council shall, after receiving the Form referred to in sub-regulation (4) of regulation 2, and before making a recommendation to the Commissioner of Lands, consider whether or not there is a conflict between customary law of that area and the Act.
- (2) If the council is satisfied that there is no conflict between the customary law of that area and the Act, the council shall make a recommendation to the Commissioner of Lands in *Form III* as set out in the Schedule.
- (3) The Commissioner of Lands shall accept or refuse to accept the recommendation, and shall inform the applicant accordingly.

Conversion by council of customary tenure into leasehold tenure

4. Where a council considers that it will be in the interests of the community to convert a particular parcel of land, held under customary tenure into a leasehold tenure, the council shall, in consultation with the Chief in whose area the land to be converted is situated, apply to the Commissioner of Lands for conversion.
- (2) The Council shall, before making the application referred to in sub-regulation (1)-
- (a) ascertain any family or communal interests or rights relating to the parcel of land to be converted; and
 - (b) specify any interests or rights subject to which a grant of leasehold tenure will be made.

Requirement to pay ground rent

5. A person holding land on leasehold after the conversion of such land from customary tenure shall be liable to pay such annual ground rent in respect of that land as the Commissioner of Lands may prescribe.

Appeals

6. A person aggrieved by a decision of the Commissioner of Lands may appeal to the Lands Tribunal.

(Regulations 2 and 3)

FORM I

(Regulation 2)

APPLICATION FORM FOR CONVERSION OF CUSTOMARY TENURE INTO LEASEHOLD TENURE

Particulars of Applicant

1. Name
2. Postal and Physical Address:
3. Location of land:
4. Size of the land and plan No.
5. Declaration of Rights:

(a) I or my family have had the right to the use and occupation of the land shown on the plan for a continuous period of years;

(b) I am entitled to or my family's is entitled to (delete as appropriate), the benefit to the land and I am not aware of any other person's right to the use or, occupation of the land or part of the land except:

And granting leasehold to me will not affect these rights.

Signed:

Date:

Note:

- (i) If in occupation for less than five years, describe how the use and occupation of the land began, by stating the name of the Chief or the Headman who gave you permission to occupy and use the land;
- (ii) Prove that the use and occupation of the land is exclusive, by describing the use that the land has been put to;
- (iii) Please attach six layout plans of the land in issue to this Form.

FORM II

(Regulation 2)

**APPROVAL OF THE CHIEF OF AN APPLICATION FOR CONVERSION OF
CUSTOMARY TENURE INTO LEASEHOLD TENURE**

I Chief of (village) confirm and certify that-

1. I have caused the right to the use and occupation of(property number) by.....
(the applicant)..... to be investigated and the investigation has revealed that the
applicant or his family has for the last years been in occupation of the land described in the
plan to which plan I have appended my signature.

2. I am not aware of any other right(s), personal or communal, to the use and occupation
of the land or any other part of the land, except that these rights have always been enjoyed by
the community and shall not affect the right of the applicant to the use and occupation of the
land.

3. I have caused the consultation to be made with members of the community.

4. As a result of the consultation and the information made available to me I hereby
give/refuse my approval for the said land to be converted into leasehold tenure.

Signed:

Date:

FORM III

(Regulation 3)

**APPROVAL OF THE LOCAL AUTHORITY FOR THE CONVERSION OF
CUSTOMARY TENURE INTO LEASEHOLD TENURE**

I, , in my capacity as Council Secretary of District Council confirm and state that(property number) the land to be converted from customary tenure to leasehold tenure by the applicant(name of applicant) falls within the boundaries ofDistrict Council.

AND THAT the said.....(property number) falls within the Jurisdiction of Chief The **approval/refusal** of the.....Chief for the land to be converted from customary tenure to leasehold tenure is herewith attached.

2. The applicant.....(name) has occupied and has had the right to the use and occupation of the said land for a continuous period ofyears.

3. I am not aware of any other rights personal or communal to the use and occupation of the land or any part of the land.

4. As a result of the information available to me, I hereby **give/refuse** my approval for the said land to be converted into leasehold tenure.

Signed:

Date: