LAND LAW

HISTORICAL BACKGROUND

The first people to acquire land in Zambia were mineral prospectors and they acquired land through two sources firstly, through mineral concessions with chiefs, and secondly through the decentralisation of North Eastern Rhodesia as a protectorate. In North Western Rhodesia the landuse the land was acquired through mineral concessions with Traditional Authorities, and the first to come was made that he be entitled to mine in land authorized, and in exchange, he had to offer British protection and pay loyalties. The British South African Company bought the concessions from H. Ware but because they weren't happy with H. Ware so they sent Frank Lochivar to negotiate and many of the concessions were incorporated in Lochivar concession because the traditional authorizes had hoped that the British government would send soldiers to help in the protection against enemies from the south. The B.S.A Co. however alienated the land although they had no such rights.

In North Eastern Rhodesia on the other hand the company claimed titles to the land through the declaration of North East Rhodesia as a protectorate under the **1899 orders–in–council**. The question is whether the declaration of the protectorate conferred of the administrative authority in the ownership of land, and this was finally resolved in the Southern Rhodesia [in the application of 1919 act 211-law report].

And in this case the Privy Council held that the declaration of the protectorate did not vest land in the crown. So if the crown wanted land it would have passed legislation to that effect and hence it was only in **1928 when the order-in-council** created reserves was passed that the crown owned land (Crown Land).

COLONIAL LAND POLICIES

The land policies were passed on a belief that there would be lots of white settlers hence certain land was reserved for the anticipated settlers and the other land for Africans. However, the settler farmers relied on Africans for their labour, they were few and there was competition between African farmers and settler farmers. All this resulted in the BSA Co. handing over administration power to the British colonial office including the rights over land although rights over minerals remained with the

company. In 1928 an order-in-council was passed which created **native reserves**, and **crown land**. Although the land was meant exclusively for native use pressure from settlers especially missionaries forced the government to make allowances for non-natives to be granted leases in these reserves. The settlers favored this move because they did not want to have neighbors who had no knowledge of using the land.

PROBLEMS CREATED BY ESTABLISHMENT OF RESERVES

1. Insufficient access to the rail line – this meant that Africans could not produce excess for sell
2. Most areas were inhabitable due to the absence of water supply and the presence of tsetse flies as a result there was congestion and overcrowding. As for the land left for the natives was largely un-occupied, this becomes vacant for the settlers were fewer than anticipated hence land with rich soils was left uninhabited whilst natives occupied small reserves with generally poor soils.

The problems created by reserves led to the formulation of a new land policy in 1938, under which trust lands were created. The native trust land was vested in the colonial secretary of state and it comprised land set aside for the exclusive use of the natives. The native trust land is differentiated from a native reserve by the duration of an interest to a non-native. Non natives in reserves can be granted an interest up to 5 years only where as in trust land such an interest may be up to 99 years such an interest in the trust land is a right of occupancy whereas in reserve land it is called reserve lease. The land policy was finally implemented by the 1947 order-in-council.

CROWN LANDS

These were the lands available for non-native settlements and mining and covered all land with rich soils and all land along the line of rail as for the tenure (conditions under which land is held) the choice was between lease hold and freehold. The two systems of land tenure, freehold and lease.

FREEHOLD TENURE - The period for holding land is not prescribed and the rights continue forever under freehold to the owner.

LEASE HOLD – The period of tenure is fixed for a certain period of time and the rights ceases after that period of time.

Advantages of freehold tenure

1) It gives greater tenure security, in lease hold one cannot make long term investment.
2) Lending institutions give more loans to freeholds than leaseholds
3) Leaseholds describe terms which have to be followed whereas with freehold there is complete freehold ownership

Disadvantages

1) The government does not force any development initiatives and hence the land held under freehold may not develop their land waiting for it to increase in value so that they can sell it at a higher profit
2) The question of land fragmentation – a piece of land is divided into smaller unviable portions and as a result families on these portions cannot do any project or programme on very small pieces of land.

In 1924 the then Northern Rhodesia governor, he was for freehold arguing that settlers would be prevented from exploiting the soils fast before going back to their homes, however, the successor was for lease hold and his argument was that freehold was not conducive for agriculture development in that freehold. Freehold title give the holder the right to deal with the land in any way without restriction. The Northern Rhodesia legislative council supported Maxwell's policy and hence from 1931 the land along the line of rail could be alienated on leasehold tenure only. Other recommendations were that the term for

leases should be as long as freehold title and hence agriculture leases were to be of three types.

a) long term leases for 99 years
b) Short term leases to be for 30 years

Leases for small holdings to be for 99 years – As for long term leases the provision was to be made for minimum amount of development to be carried out within a specified time. So in 1947 the trust lands order–in-council was passed to set the trust land policy in motion.

THE CONCEPTS OF TENURE AND ESTATES

Tenure comes from *'tenere'* which means to hold, and estate is a piece of land however in this context it means the length of someone's interests in a particular piece of land. In English law the concept of absolute ownership of land (*dominion*) does not exist. The crown owns all land and everybody else has a lesser interest.

Land Ownership has various sides to it. Important among the various facets is **Title** to land, a term indicating the legal right to land. Tenure refers to the conditions upon which land is held. The duration of a tenancy of land (i.e. the maximum time before which the tenancy must come to an end) is termed as **estate** for which the tenant holds the land. The conditions or services in return for which land is held tells the nature of tenure by which the tenant holds the land. Under freehold estate there exist 3 types-:

1) **Fee simple estate**
2) **Fee tail estate**
3) **Life estate**

Fee relates to interests that can be held and capable of being inherited.

Fee Simple: a fee without limitation to any class of heirs; they can sell it or give it away.

Fee Tail: a fee limited to a particular line of heirs, they are not free to sell it or give it away.

Estate Pur Autre Vie- this refers to **life estate** but here the measure doesn't count on the life of tenant but on a condition that it will be granted to a person as long as another one lives.

ESTATES

Estates can be held in three types of ways

1) **Estates in possession** - here there is entitlement to immediate possession although not ownership
2) **Estate in remainder** – here you get the remainder after another interest has expired
3) **Estate in reversion** – here the land reverts to the owner after another's interests have expired

ALIENATION: To alienate property means to transfer to someone else.

LAND OWNERSHIP: A simple and not uncommonly assumed use of the term ownership is to describe a relationship between a person (the owner) and a thing (the object of ownership) in which the owner has every possible right in the thing in the most absolute degree.

Various schools of thought define ownership differently. The Roman Law based systems consider ownership in a concept known as *dominium*. This is where the relationship between the owner and the object of ownership in which the owner has every possible right in the item in the most absolute sense.

The English Law based systems on the other hand are generally characterized by the consideration of ownership as consisting of a bundle of rights over land of which any selection may be detached and given to a person other than the owner.

However, despite the differences in conceptual approach certain tendencies in behavior as regards ownership remain constant in both the Roman and English Law systems. For instance an individual who owns a pen will have the right to write with it or lend it out but at no time has he the right to poke it into another person's eye. This illustration of ownership rights and restrictions are universal, and shared by most legal systems whether being Customary, Common Law based, Roman Law systems.

A.M. Honore' in Oxford essays in Jurisprudence suggest a liberal concept of ownership as a series of rights and incidents as follows;

1. **Right to possess**
2. **Right to use**
3. **Right to manage**
4. **Right to income of the thing**
5. **Right to capital**
6. **Right to security**
7. **Right to incident of transmissibility**
8. **Absence of term**
9. **Prohibition of harmful use**
10. **Liability to execution**
11. **Incident of residuarity**

(Right to possess: This is the privilege to hold or keep property by the owner. This is the right to exclusively control the land i.e. exclude other people from entry. This right may be exercised in a physical way to prevent other people from entry on property.)

Honore' further comments that the above listed may be regarded as necessary ingredients in the notion of ownership. But they are not individually necessary though they may together be sufficient conditions to designate ownership of an item in a given system.

Objectively speaking land is not capable of being owned in the most absolute sense. That is, you cannot own land and do as you wish with it without regard to other living beings. In this respect even the English system smartly avoids the direct connotation of owning land, but rather uses owning an estate in land.

'Ownership' is a word derived from a very simple term 'own', defined by the pocket oxford English dictionary as: **Not another's**

The Roman legal based systems correctly defines ownership in dominium as the unrestricted, and exclusive control which a person has over an item of ownership. However, whether this concept can be extended to be used over land is a matter of serious debate as land is a universal property which cannot be subject to absolute private ownership. It belongs to all living things, plants and animals. By virtue of their existence, all living things are entitled to some space, somehow, somewhere on earth. And it is not necessary that for any living being to exist it must first own some space to live on, on the face of earth. Nature has never acknowledged absolute private ownership of land, it is in actual fact is based on

interdependence of systems. The fact the living exists naturally gives them a right to live somewhere on land, and their existence does not depend on whether they own land or not. They cannot be excluded from land and get thrown into outer space for instance if the world gets completely owned by limited people. Land like fresh air and water, as necessity of life is *fungible* (not capable of being owned) and as such it falls into a category of thing that are common to all (*res communes*).

Land as a shared property will always create condition where other living beings will constantly impose restrictions onto the so called '*land owners*'.

NATURE OF ESTATES OF FREEHOLD

In practice the fee simple owner is the actual owner of the land although his legal rights are less than those of the absolute owner. This is shown by-:

a) the right of alienation , i.e. the right to transfer to another the whole or any part of the interest in land
b) the right of ownership to everything in, on, or over the land

THE RIGHT OF ALIENATION

The fee simple owner has the same right as the actual owner and hence independent to dispose of his land to anybody he deems fit. He is under no obligation to any third party apart from those he contracts with there is however a regulatory limitation vested in the stall which tempers with freedom of the owner In the land e.g. a statute may prohibit him from building a home somewhere on his land.

THE RIGHT OF EVERYTHING IN, ON OR OVERLAND

The general rule is that he who owns the soil is presumed to own everything up to sky and down to the centre of the earth *cujus est solum ejus est usque ad colum et ad inferors*. He is entitled to possession of any chattel not the property of any known person which is found under or attached to his land. But this does not apply to temporary chattel merely resting on the surface.

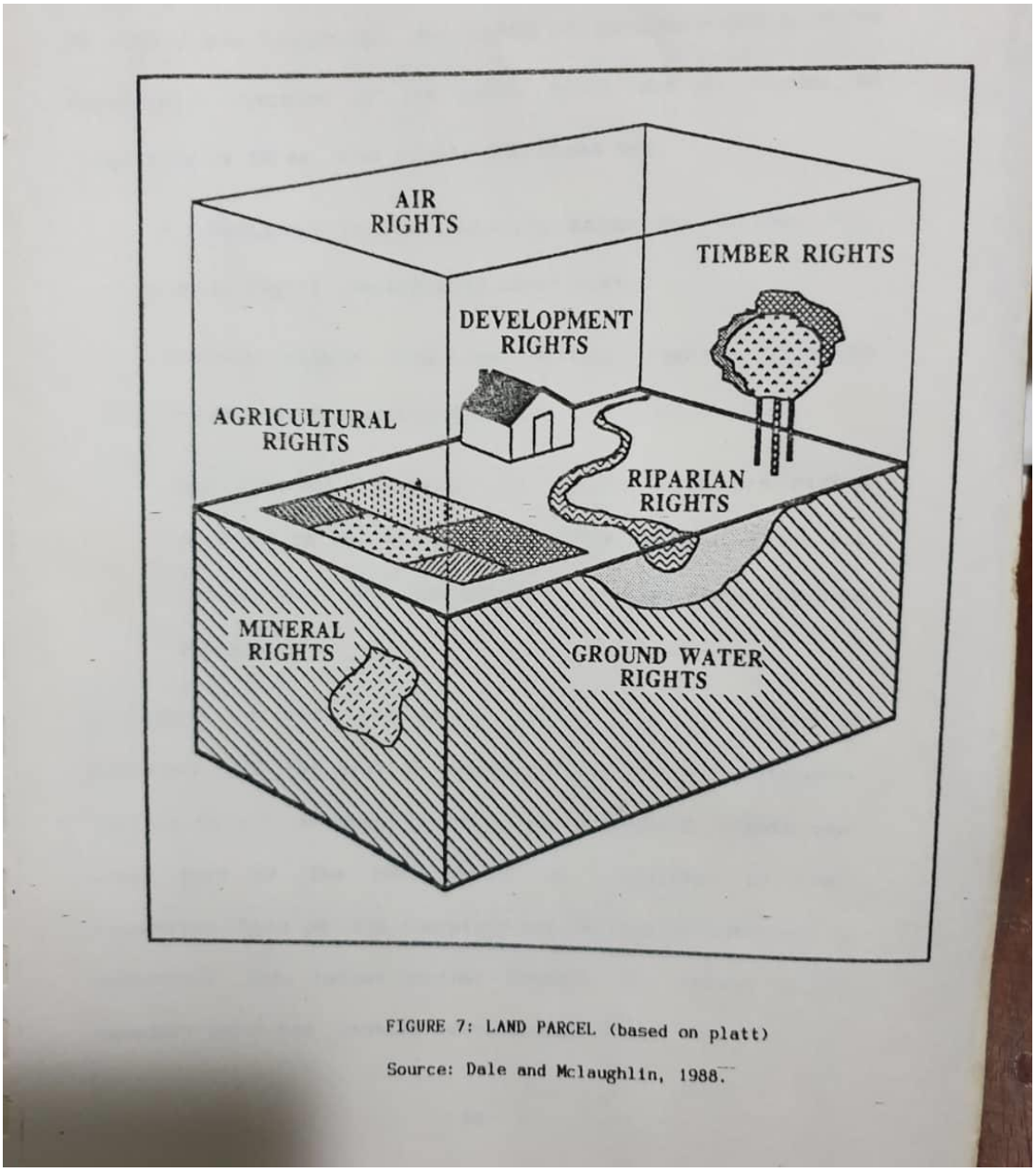

FIGURE 7: LAND PARCEL (based on platt)

Source: Dale and Mclaughlin, 1988.

EXCEPTIONS TO THE GENERAL RULE

1) **AIR SPACE** – Intrusion into the air space above land is a trespass and often also a nuisance. Aircrafts enjoy a wide dispensation under the civil aviation act Cap 704 Section 7 of the act provides that no action shall lie in respect of trespass or nuisance by reason only of the flight of aircraft over property at a height which is reasonable under the circumstances, otherwise there must be previous notice to the owner or occupier of the land.

2) **MINERALS** – These are vested in the president by mines and minerals act Cap 329.

3) **WILD ANIMALS** – At common law wild animals are not subjects of ownership, the owner has a qualified right in them in that he has the exclusion right to hunt and put then to his own use but as soon as they fall dead they belong to the land owner even if killed by a trespasser. Under the national parks and wild life act cap 316, they belong to the president

4) **WATER**- Act common law a fee simple owner has no property in water whether it percolates under the surface of his land of percolating water the land owner may draw off, any or all of it without regard to claims of neigbors. In case of water flowing through a defined channel, the riparian owner can always take all the water but he has certain variable right first of all he has the sole right to fish in the water he is entitled to the ordinary and reasonable use of the water flowing over the land. Under the water Act Cap 312, Section 5 vests ownership of all water in the president provided the land owner has the right to take free of charge the water he may need for his own primary, secondary or territory use. Primary use refers to domestic purposes and annual life. Secondary use is for irrigation of land. Tertiary use is for mechanical and industrial purposes or for generation of power.

THE EXTENT TO WHICH THE DOCTRINE OF TENURE & ESTATE APPLY

Under section 4 of land conversion of Titles Act 1975 all land in Zambia is vested in the President. However, 99% of land had already been vested in the head of state under the orders-in-council.
Section 31-2 of the Lands and Deeds Registry Act Cap 287, abolishes the existence of fee tail in Zambia.

Section 5 of the Lands Conversion of Titles Act converts all freehold estates of a term beyond 100 years to statutory leases of about 100 years. Under customary land tenure chiefs have interests in the control, whilst individuals have interests of use.

FIXTURES

The maxim '*Quic Quid Plantatur Soloso Credit*' which means what is fixed or attached to the land becomes part of the land. There are two elements which have to be considered, firstly is the degree of annexation, there must be substantial connection with the land or building on it. Secondly, is the purpose of annexation? This infact is the main factor in that the degree of annexation is regarded as being of an importance as same as evidence of purpose. The rule is that articles not other wise attached to the land than by their own weight are not to be considered as part of the land unless the circumstances show that they were to be so. On the contrary articles are fixation. To the land even slightly are to be considered as part of land unless there is evidence to the contrary. if the purpose of fixation is to improve the land then they are fixtures but if the purpose is for decoration or enjoyment then it's a mere chattel. if the removal of the thing may cause damage either to the thing itself or to the land then one can safely say it has been attached as part of the land even if the person who fixed the thing is the land has no titles to the land itself it will still be considered as a fixture and cannot be removed. The general rule is that all fixtures attached by the tenant, become the landlord's fixtures however there are certain exceptions to the rule.

i) If it's a chattel the tenant can remove it anytime but if it is a fixture you cannot have the right to remove it.

ii) Trade fixtures -: These attached for the purpose of trade or business may be removed at anytime during the term but not long afterwards

iii) Ornamental fixtures -: if they are for the purpose of improving the land, then they are irremovable but if they are there for ornamental purposes, they may be removed e.g. flower vessels and certain paintains etc., these are also removable.

iv) Agriculture fixtures -: These are treated like trade fixtures

These exceptions were intended to encourage industrialisation.

LAW AND EQUITY

CONCURRENT INTERESTS

This can take various forms namely joint tenancy, tenancy in common, corpacennary and tenancy by entities.

JOINT TENANCY

The distinguishing factors of a joint tenancy are as follows-:

1) The right of survivorship i.e. *Jus accrescendi*- it means that on death of one joint tenant his interests in the land passes to the other joint tenant and does not pass to the deceased descendants. The joint tenant who survives becomes the sole tenant and the right of survivorship operates notwithstanding the existence of the will. The only way a joint tenant can alienate his interests to another is by reversing the tenancy by inter vivos (= transfer of an interest in land whilst you are alive) [converting the interest of a joint tenant to interests of tenants in common to allow your interest to pass to somebody upon death]
2) There must be the four units in existence namely (*vis a vis*) unity of inter unit of possession, unit of time and unit of title.