

CONTEMPORARY CHALLENGES OF
CUSTOMARY LAND ADMINISTRATION IN ZAMBIA

by

Tamara K. Tucker

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DEDICATION

To the people of Zambia who depend on land for livelihood, as well as those who advocate for the realisation of land rights and work to improve land tenure security.

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ABSTRACT

Land is an integral part of Zambian identity, heritage, and rural livelihoods. Its importance is summed up by the expression ‘land is life’. Zambia’s dual land system, that of statutory and customary land, is at a critical juncture: greater tenure security is increasingly sought through leasehold tenure on state land, suggesting a departure from customary tenure where chiefs are to administer and hold land in trust for subjects. This customary land administration is characterised by widespread tenure insecurity due to *ad hoc* land administration and undocumented, or informal, land assignments. This administration occurs in a social, political and economic context that is increasingly in want of formal land registration and/or title to support investment.

This thesis describes the roles of and relationships among the state, customary authorities, and rural landholders in the administration of customary land. It details who is involved and who is excluded in such processes and some of its strengths and weaknesses. Specifically, data were collected through 36 semi-structured interviews and 1 focus group. Respondents were selected through a combination of purposive and snowball sampling, from three different provinces in Zambia, however, primary focus is given to the Southern province. Interviewees included professionals working on land issues in the government, non-government and legal sectors, customary authorities, and rural landholders. By utilising data from a qualitative case study approach, this research analyses the changing role of the chief regarding land administration. It further queries what it means for chiefs to hold land in trust for subjects, and examines challenges associated with customary land administration in the contemporary era. This thesis argues that there is urgent need to formalise customary land administration to improve tenure security, decrease land disputes, and increase the transparency of land transactions.

LIST OF ABBREVIATIONS USED

ACU	African Union
AfDB	African Development Bank
BCA	British Colonial Administration
BICC	Brethren in Christ Church
BSA Co.	British South Africa Company
BLA	Barotseland Agreement
FAO	Food and Agriculture Organization
GDP	Gross Domestic Product
GHI	Global Hunger Index
HA	Hectare
HDI	Human Development Index
IAPRI	Indaba Agricultural Policy Research Institute
IMF	International Monetary Fund
ILC	International Land Coalition
ILUA	Integrated Land Use Assessment
JWOP	Justice for Widows and Orphans Project
MDLA	Monze District Land Alliance
MMD	Movement for Multiparty Democracy
NER	Northeastern Rhodesia
NGO	Non-government organization
NWR	Northwestern Rhodesia
UN	United Nations
UNDP	United Nations Development Programme
UNIP	United National Independence Party
WB	World Bank
ZDA	Zambia Development Agency
ZLA	Zambia Land Alliance
ZLDC	Zambia Law Development Commission

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CHAPTER 1: INTRODUCTION

Land is like the air we breathe. It really helps us in our lives. The way we need air it is the way we need land. (Focus Group Participant)

Life revolves around land, especially for rural people. And that's why we use the slogan or motto "land is life"...when you take away land from the family, it is like you have taken away their life.
(Luyando, NGO Professional)

1.1 INTRODUCTION

Zambians feel a significant connection to land. It is considered the essential life-giving resource upon which all-else hinges. The phrase 'land is life' is often used in the non-government sector as a slogan to promote land rights for the poor. It represents the conviction that customary land rights and tenure security must be improved to ensure that customary land is preserved as an essential social security for smallholders who depend on subsistence farming. Further, customary land and its administration are seen as pivotal to Zambian culture; land is intrinsically bound up with notions of identity, heritage, and livelihood. Thus, as chiefs are the custodians of land, they are also the custodians and protectors of local culture and custom.

This research broadly responds to the phenomenon of increasing global demand for land in Africa; however, it is specifically centred on understanding and exploring the impact of this pressure on customary land administration in Zambia. The central objective is to consider the roles of and relationships among the state, customary authorities, and rural landholders¹ in the administration of customary land. The research probes who is involved and who is excluded in customary land administration, and examines the role of customary leaders in such processes. This study argues that significant changes are needed in Zambia's land systems to improve customary tenure security. However, the specific changes needed are a topic of much debate amongst stakeholders. The perspectives of professionals working in land in the government, non-government, and legal sectors, as well as those of customary leaders, and rural

¹ The terms rural landholder, smallholder and subject are used interchangeably throughout to refer to people who farm on customary land and are therefore subjects of a chief's authority.

landholders are presented to highlight the nuanced and complex nature of customary land administration.

Chiefs are the primary administrators of customary land, but this authority is largely delegated to village headpersons. Administrative processes are subject to local norms, which are interchangeably referred to as customary, traditional or tribal in nature. Therefore, these localized processes tend to be *ad hoc*, non-transparent and dependent upon benevolent customary leaders. Customary structures vary according to tribe, but generally a chief is the top authority over a territory known as chiefdom, and a headperson is the next subordinate level of authority. A headperson administers an area within a given chiefdom and oversees the immediate affairs of a village. For example, subjects are expected to take issues or concerns to their headperson first, and only to the chief if it cannot be resolved with the headperson. Some tribal authority structures may recognize a hierarchy that includes other levels, such as: paramount chief (oversees several chiefdoms in a region), chief/king (oversees one chiefdom or kingdom), senior headperson (oversees a zone within a chiefdom and is over several headpersons), headperson or sub-chief (oversees a single village).² Such higher levels of customary authority are only involved in resolving land disputes when the lower levels of authority cannot solve them.

In Zambia there are two types of land classifications. Statutory land is territory under the administration of the state. Customary land is territory under the administration of customary leaders, namely chiefs and headpersons. Customary land may either be held by an individual, or by several people with either concurrent or communal rights. Currently the only way to legally secure land, as private property,³ is to get title to a title deed for a piece of land held under leasehold tenure (typically for 99 years). Land titles and leasehold tenure are only issued on state land (not on customary land). This is the accepted equivalent to private property, entailing legally enforced individual property rights.

² Generally speaking headpersons are male, but the term 'headperson' allows for gender variance in this rank of customary authority, should they exist, and will be used herein. Throughout the country it is more common to hear of a female chief, referred to as a chieftainess. However, for simplicity sake, chieftainess will only be used when referring specifically to a female chief and the term chief will be used to refer to this rank of customary leadership more broadly.

³ Mention of private property forthwith is understood as being leasehold land and not freehold private ownership as is common practice in North America.

A specific caveat that results from increased demand for land at the national level is demand for more secure customary tenure to support individual investment in and on land. As demand for leasehold land increases, pressure mounts for customary land to be converted to state land to support this form of legally backed tenure. This is especially so near cities and towns. As such, land alienation via conversion threatens customary authority by shrinking customary territories: as a chief's land shrinks, so too does his/her authority. Opposition to decisions of conversion are not a given but do occur. Sometimes such objections can change a chief's mind without going to court, which is a challenging process for smallholders to navigate. It is important to highlight that once land is officially converted to state land there is no mechanism through which to convert it back to customary land. Thus, the impact of such decisions is lasting.

This particular form of land alienation spurred this research. Findings of a project conducted at the undergraduate level highlighted the need to analyse the role of the chief within customary land conversion. However, interviewees of this project revealed that although large-scale displacement does happen, what enables it is widespread small-scale tenure insecurity. This is largely due to *ad hoc* customary land administration. Tenure insecurity is characterised by undocumented or informal land allocations, in a social/political/economic context that is increasingly in want of formal land registration and/or title to support investment. As such, the findings of this project are primarily focused on this less visible form of tenure insecurity.

Indeed, it is precisely this tenure insecurity that contributes to large-scale displacements, because it permits a non-benevolent chief to convert land against the will of his or her subjects. If smallholders cannot formally claim land rights, then they are more easily displaced. In turn, this highlights the changing role of the chief in land administration from being historically understood as being the custodian of land, to having ultimate authority as "owner" of land. The difference between these is that as owner, a chief can give and take land on a whim. However, as custodian he/she is the caretaker and the administrator. Such a role indicates a position within an institution that includes a council, committee, or administrative body to provide structural accountability and checks on power.

1.2 RESEARCH QUESTION AND OBJECTIVES

The broad objective of this research is to analyse the roles of and relationships among the state, customary authorities, and rural landholders in the administration of customary land. Specifically, this thesis asks: what is the role of customary authority in Zambian land administration, and what are the implications of customary land administration for tenure security? To address this question, I do the following:

- a) Describe how customary land and authority are conceptualised and administered;
- b) Explore how changing conceptualisations of land in colonial and independence eras have influenced the contemporary role of customary authority in land administration;
- c) Analyse the strengths and vulnerabilities of customary land administration as it relates to tenure security in the contemporary context.

1.3 RATIONALE AND SIGNIFICANCE OF THE STUDY

Zambia's national land data is limited in terms of statistics on ownership, distribution, plot size and prices; a land audit is in progress, but the results are not yet available.⁴ It is sufficient for the purposes of this project to note trends in land distribution and the relationship between landholdings and household income.

According to the Integrated Land Use Assessment of 2005-2008, Zambia has 75,261,000 hectares of land in total (ILUA, 2005-2008, p. 33). It is commonly stated that 94% of Zambia's land is customary and 6% is statutory. However, this figure is contested, because it pre-dates independence and does not reflect the current situation due to a lack of data regarding the amount of land converted to leasehold tenure (Zambia Law Development Commission, 2013).⁵ ILUA 2005-2008 data indicate that national proportion of land held under state and individual ownership is currently 32.6%, and customary is 60.9%, suggesting a decreased proportion of customary land.

⁴ This data gap is noted in a report given to the National Assembly on September 27th, 2012, as well as in the policy brief by Jayne, *et al.*, 2009. I first came upon this challenge in 2010 when writing an undergraduate honours thesis and contacted Zambia Land Alliance (ZLA), Food Security Research Project, the FAO Zambia representative, and the Land Tenure institute to confirm that this data did not exist.

⁵ Even the Land Commissioner, the highest authority in the Ministry of Lands, called this particular statistic out-dated and stressed the need for a land audit. (Mulenga, B. October 29, 2012. ZLA Conference.)

Demand for conversion has increased since the 1995 Land Act ushered in land markets by permitting the sale of bare land (Brown, 2005; Adams, 2003).⁶ Further, the 2013 National Review of Customary Land Report from the Zambia Law Development Commission (ZLDC) indicates that rising land value and investment interests contribute to on-going land conversions of customary land to statutory.

More telling is the change in smallholder land distribution. Zambia's land to person ratio decreased by nearly half from 1.367 hectares in the 1960-69 period, to only 0.779 hectares in the 1990-99 period—a substantial long-term decline (Jayne *et al.* 2003, p. 256). There is significant stratification among smallholders: the Gini coefficient for land is 0.44 per household, and worsens to 0.50 when measured at the per capita level; mean landholding is 2.76 hectares per household and 0.56 hectares per capita; and the largest landholders have nearly 8 times more land than smallest holders (Jayne *et al.*, 2003). Approximately 82% of farming households cultivate less than 5 hectares (ZLDC, 2013).

There is a strong association between land and income among the smallest landholders: small increases in land are associated with significant income gains. To this end, the data presented in Appendix A reveal a strong association among land, income, and education; in sum, as education levels increase, landholding sizes increases, as do income levels. Female-headed households comprise a large proportion of households with low levels of education and small landholdings. Households with the smallest landholdings and lowest levels of education are most dependent on agriculture for income. This highlights the importance of land to smallholder livelihood.

In sum, landholdings among smallholders are decreasing. This is particularly so around cities and roadways where population densities increase.⁷ Land distribution has an integral role in mitigating rural poverty (Jayne, *et al.* 2009). State and customary leaders need to enable equitable and secure land tenure for rural smallholders.

⁶ Various sources indicate conversion of customary land has been ongoing and increasing for some time. See Adams 2003, Brown 2005, Moses Kaunda 1995, and Hansungule 2001.

⁷ See Appendix B for a map of Zambia's Land Pressures. This map indicates increased population densities along the line of rail.

1.4 LIMITATIONS AND DELIMITATIONS

This project contributes to Zambia's land discussion by examining the role of customary authority in land administration, and by analysing how it has been shaped historically, the challenges it faces, and what benefits and challenges it offers smallholders in Zambia's contemporary context. However, as with any research, this project is not without limitations. First, this was my initial experience with field research and collecting primary data. I found the learning curve to be steep, challenging and incredibly intriguing. Nevertheless, my perspective as a young academic influenced the types of questions I asked, as well as my ability to adjust lines of inquiry as data emerged; a skill that improved as the project progressed. Second, this work does not attempt or claim to be representative of every tribal customary land administration system in Zambia; such a feat falls beyond the scope and budget of this project. Rather, this project discusses customary land administration as represented by interviewees from 3 distinct categories (professionals working in land, customary authorities, and landholders) in 3 provinces, but focuses specifically on smallholder perspectives from the Monze district of Southern province. Third, the lack of accessible and current data at a national level poses an obvious challenge to getting a clear picture of what is happening overall, especially in terms of conversion of land from customary to statutory and national demand for leasehold tenure. Fourth, as noted, the initial inspiration for this research was to do with large-scale land alienation. Certainly this work needs to be done but it was not the chosen path here because (a) the scope was too large for this project, and (b) the sensitive nature of such alienations/acquisitions requires a longer field placement than was possible. Fifth, while this work uses legal pluralism as its theoretical approach, it is by no means a paper on legal theory nor is it written from a legal discipline. Rather, this work aims to utilise legal pluralism as a means of understanding the ways in which state and customary law affects and effects customary land administration in the contemporary era. This paper does not profess to be comprehensive in its presentation of laws that pertain to land. However, the lens of legal pluralism is useful analytically as a way in which to see the dynamic interaction between state and customary law in society, and the ways in which citizens navigate them in regards to land. Finally, this project unfortunately does not offer a strong analysis on gendered land

issues because only 4 interviewees and 2 focus group participants were female. This was not intentional, and it resulted due to circumstance rather than preference. Fortunately, several professional interviewees offered a gender perspective on matters of tenure insecurity related to widows and inheritance issues. So, these can at least be touched on; though admittedly, a more extensive gender analysis would have been a welcome contribution to this project.

1.5 COUNTRY PROFILE

This section provides a brief contextualization of the country in which this research occurred. The Republic of Zambia is a land-locked country of sub-Saharan Africa, divided into 10 provinces.⁸ There are 73 tribes associated with specific geographical locations; however, inter-tribal marriages and migration are common and tribalism is relatively low (ZLDC, 2010). The official language is English, and various tribal languages and dialects are also commonly spoken.⁹ This territory was formerly known as Northern Rhodesia and was a British protectorate during the colonial era. On October 24, 1964, the Republic of Zambia became an independent state, and its economy was largely dependent upon its extractive copper industry. Although not a driver of robust economic growth, mining continues to be a significant industry in terms of quantity, if not tax revenue: in 2012 mineral exports were 20% of GDP, however, mineral revenue was less than 0.5% of GDP (IMF Country Report 2012, p.15). Agriculture is another key industry with output contributing 20% of GDP in 2009, and primary agriculture comprising 35% of Zambia's non-traditional exports¹⁰ (Zambia Development Agency, 2011). Zambian households primarily consume maize as the staple dish *nshima*.

Zambia's rural population, accounts for 63.59% of the national population (FAO Stat, 2013). Based on the 2008 supplemental survey, Jayne and Hichaambwa (2011) argue that: 2% of smallholders produce 50% of maize sales and have an average plot size of 7.2 hectares; 30% of smallholders produce the rest of the maize and have an average plot size of 1.9 hectares; and 67% of smallholders have an average plot size of 1.1

⁸ See Appendix C for a Map of Zambia.

⁹ See Appendix D for a Tribal Map of Zambia.

¹⁰ "Non-traditional exports" means everything other than copper and cobalt.

hectares and do not sell maize. This highlights significant stratification among smallholders and the importance of subsistence farming to rural livelihoods.

Zambia continues to fall short of its economic and development potential. The population in 2012 was 14.08 million, and 60.5% live below the national poverty line (World Bank Data, 2014). Classified as a lower middle-income country, its annual Gross Domestic Product growth rates increased from 5.4% in 2004 to a peak of 7.6% in 2010 (WB Data, 2014). Also generally increasing, Foreign Direct Investment peaked at 11% of GDP in 2007 and 2010, and hovered around 5-6% in 2008-09 and 2011-12 (WB Data, 2014). During this time, Zambia's Gini coefficient increased from 0.60 in 2010 to 0.65 in 2012, indicating growing inequality during a period of moderate growth rates (United Nations Country Team, 2013). Further, the Global Hunger Index (GHI) classifies Zambia as having 'Alarming' levels of hunger¹¹ (GHI, 2013), and Zambia's consumer food price index quadrupled between 2000 and 2011 (FAO Stat, 2013).¹² The 2012 Human Development Index (HDI)¹³ ranked Zambia 163 out of 187 countries, indicating its low level of human development (Human Development Report, 2013).

In sum, despite Zambia's higher levels of growth and investment in recent years, poverty remains a significant challenge and human development indicators are persistently low. Given the centrality of land to rural life and livelihood, its administration is imperative to increasing resilience to poverty and mitigating risks thereof. The following section provides an outline of Zambia's land administration system and terms of reference, and then addresses Zambia's land distribution and challenges facing customary smallholders.

¹¹ The GHI considers (a) proportion of population undernourished, (b) prevalence of underweight children under 5, and (c) under 5 mortality rate. In 2010-2012, 47.4% of Zambia's population was undernourished, 16.7% of children under 5 years old were underweight, and the under 5 mortality rate was 5% (GHI, 2013).

¹² The Consumer Price, Food Index measures a common basket of goods, with the base year 2000 represented by a value of 100. Thus, the increase from there is as follows: 2002 = 151.05, 2006 = 267.05, 2008 = 319.89, 2010 = 384.31, 2011 = 403.12. For more information on this index see <http://faostat.fao.org/site/683/DesktopDefault.aspx?PageID=683#anchor>. Data for 2012 is not directly comparable as a new base year (2009) is used, thus it is not clear if this trend continued.

¹³ HDI is a composite measure of life expectancy, education, and standard of living

1.6 TERMS OF REFERENCE FOR LAND ADMINISTRATION IN ZAMBIA

1.6.1 LAND ADMINISTRATION, GOVERNANCE, AND TENURE

Zambia has a dual land system characterised by two land categories, namely state and customary. Each land category has separate administrative systems. All land is vested in the President, but the President's administrative authority is delegated to the Commissioner of Lands. State land is primarily administered by the Ministry of Lands and is legislated by the 1995 Lands Act. On customary land, chiefs hold land in trust for their subjects, and are tasked with administering customary land in terms of land allocation, dispute settlement, and usage restriction. There is no specific state legislation to guide customary land administration *per se*; however, the Chief Act guides customary authority more broadly. With regard to management and conservation of other natural resources, such as water, forests, wildlife, and minerals, there are instances where state and customary land administration overlap or interact.¹⁴ The following section discusses the terms involved in conceptualising various aspects of land administration systems, including the definition of land itself, land administration, tenure, and governance.

1.6.2 TERMS OF REFERENCE

Zambian law understands land as including, “anything attached to the earth or permanently fastened to anything which is attached to the earth, but shall not include any mineral right in or under or in respect of any land” (Zambian Parliament, 1996, Vol. 2, p. 9). Land administration is the system that regulates the norms, procedures and records associated with specific land holdings and rights (ACU-ECA-AfDB Consortium, 2010). Effective land administration is determined by land tenure systems, cadastral infrastructure,¹⁵ and external conditions (Mulolwa, 2002).

Land tenure is the framework that determines how land is accessed and used. In the customary context this is intrinsically bound up in social relations (Kangwa, 2004). Land tenure systems determine (1) how landholdings are accessed, (2) which specific

¹⁴ Zambia Law Development Commission (ZLDC) (2013) provides a useful and current overview of various pieces of legislation that interact with customary land administration.

¹⁵ Cadastre or land information system is sometimes used as synonymous with land administration, however it is more holistically understood as being the organisational, legal, financial, and technical infrastructure that supports land administration (Mulolwa, 2002).

rights and uses are permitted to landholders (i.e. cultivation, grazing, residence, *and etcetera*), (3) how disputes are resolved, and (4) how rights are transferred to another person or terminated outright (Trade Reforms, 2003; White, 1959; Mvunga 1980; Allott, 1971).

Land tenure is relevant to both state and customary land. For example, on state land in Zambia there is leasehold tenure, which ensures individual titleholders have exclusive rights to a parcel of land. On customary land individual, concurrent and communal rights are recognized for those within a community. Customary land allocations are not typically associated with a title deed, however they may be noted in the chief's registry.

Tenure security refers to the degree to which land rights are enforced and protected. Land administration discourse tends to focus on the relationship of land titling as being essential to economic development. However, the importance of titling is rooted in the need for a source of title, which is any mechanism that provides legal recognition of ownership and facilitates secure land transfers or transactions (Mvunga, 1980).

The theoretical perspective of legal pluralism is used in this study. Legal pluralism exists when more than one legal order is operating within a given social sphere (Griffiths, 1986). Land administration in a context of legal pluralism is understood as being embedded in social structures. Therefore, customary land tenure is understood as operating within a social/political context that is multidimensional and influenced by overlapping social spheres. Land reform efforts often encounter challenges when trying to streamline land tenure systems from being multidimensional and socially embedded to systems that are one-dimensional and dis-embedded from social structures. Thus, while the tenure security often associated with Western-style titling may improve investment environments in some areas, solutions that utilise customary structures to improve tenure security may be more effective in contexts of legal pluralism (Fitzpatrick, 2005). Titling is thus understood here as one option of documentation that may contribute to tenure security (Rosset, P., *et al.* 2006).

Land governance is the overarching environment that influences land administration. The UNDP and ILC (2008) describe land governance as being concerned with allocation and security of land rights, as well as modes of ownership, and access and

use rights. Therefore, the way state and customary institutions conceptualise land and ownership influences the way land is valued and administered. Further, it determines the extent to which external factors, such as investment interests, demand and use land.

This overview of land administration systems provides us with tools to analyse customary land administration in Zambia. The manner in which land is allocated, used, and the ways disputes are resolved, has significant impact on who is able to access land, and on the degree of tenure security realized by landholders.

1.7 THESIS ORGANISATION

The following chapters are organized as follows: Chapter 2 explains the methodology and methods used for this research; Chapter 3 describes the theoretical approach of legal pluralism as it relates to customary land administration; Chapter 4 provides a historical overview of land administration in Zambia during the colonial, independence, and contemporary eras; Chapter 5 describes customary authority structures and land administration processes in the contemporary era; Chapter 6 analyses contemporary challenges to customary land tenure; Chapter 7 examines what it means for chiefs to hold land in trust for their subjects; and Chapter 8 concludes with a brief review of the key arguments and signals areas of further research.

CHAPTER 2: METHODOLOGY, METHODS, AND FIELDWORK LOGISTICS

This includes Tamara also, where you have come from.... Before the airplane started taking off it was taking off from the ground, from the land. Your houses, where you stay there, they are on the land! So land affects every person, every human being! (Focus Group Participant)

2.1 METHODOLOGY

As this study seeks a descriptive explanation of customary land administration in Zambia's contemporary context, a qualitative approach is appropriate for addressing the research question: what is the role of customary authority in Zambian land administration, and what are the implications of customary land administration for tenure security? Qualitative research aims to contribute to nuanced understanding of multifaceted phenomena and complex processes through the use of case study analysis, interviews with open-ended questions, and purposive samples (Mayoux, 2006). Specifically, this research question is addressed by employing an embedded case-study approach involving literature review, interviews, and a focus group. The primary purpose of this project is to contribute to the conceptualisation of Zambia's customary land administration, and to consider (1) how it relates to and interacts with increased demand for land and changing land imaginaries, and (2) how it influences local tenure security.

Methodologically this project aligns with Constructivist Grounded Theory, which assumes that "(a) multiple realities exist, (b) data reflects researchers' and participants mutual constructions, and (c) the researcher enters, however incompletely, the participants' world and is affected by it" (Charmaz and Belgrave, 2012, p. 349). Thus, the objective here is to provide an "interpretive portrayal of the studied world" rather than produce data that is generalizable, leads to a broad statement, or contributes to a grand theory (Charmaz and Belgrave, 2012). As such, this research contributes to knowledge accumulation in a detailed and conceptual manner (Yin 1994). It describes and contributes to the conversation of how larger phenomena affects social-interaction at the customary level, with specific reference to the context of Monze district in Zambia's Southern province in late 2012.

A constructivist approach values individual perspectives, experiences and beliefs and understands these to affect behaviour and choices. In this way, meaning is socially constructed and subjectively understood and experienced (Charmaz and Belgrave, 2012; Pidgeon, 1996). This poses a challenge with regard to representation and the (in)ability of a researcher to ever truly represent or understand a participant's reality (Hesse-Biber, 2007). Of course every researcher comes with unique perspectives, biases and assumptions. Reflexivity throughout the project is imperative to the researcher's ability to decipher the continually negotiated "give-and-take conceptual framework where who will give, who will take, and what will be given and taken is ever-present as an interactional subtext between the researcher and the researched" (Lempert, 2007, p. 248). Thus, one must be mindful of representativeness, subjectivity and objectivity, but not paralyzed into a state of indecision, because "the local 'everyday' can (and should) be interpreted in terms of wider social contexts and power relations" (Pidgeon, 1996, p. 83).

A case study approach is appropriate for answering 'how' or 'why' questions, and for addressing descriptive and explanatory research objectives. In this, many variables contribute to findings, which will be understood by (a) converging via triangulation, or (b) emerging from prior theoretical propositions (Yin, 1994). The primary case study explored in this thesis is customary land administration, and it is conceptualised as an embedded case study (as opposed to holistic) in which sub-units are used to describe the whole (Yin, 1994). Thus, customary land administration is the case study and the sub-units that inform analysis are professionals working on land issues (government, non-government, and legal), customary leaders, and rural landholders. Respondents from these categories offer nuanced perspectives on the wider system of customary land administration that, despite local variations, has similarities across the country and is referred to as one by the state. These categories are used in this study as they represent

2.2 METHODS

The initial stage of this research took place in Halifax, Canada from January to June 2012 and consisted of conducting an extensive literature review of academic journal articles, government documents, *Zambian newspapers*, and publications by international organizations and research groups. This framework allowed the primary research to be situated within the social, political and economic context of land issues in Zambia and in

Africa more broadly. Field research was conducted in Zambia from October to December 2012. In total, 36 interviews and 1 focus group were conducted. Interviewees were selected from the following categories: customary leaders (chiefs and headpersons), rural landholders, and professionals working on land issues in the government, non-government, and legal sectors. Interviewees were selected using purposive sampling initially, and then snowball sampling as the project progressed: initial interviewees suggested other contacts to potentially interview. Although initially slow, this approach proved successful and in the end the number of contacts exceeded time available.

Prior to arriving in Zambia I established organizational affiliation with Indaba Agricultural Policy Research Institute (IAPRI) in Lusaka. This particular organization was chosen because I made contact with one of their researchers during my undergraduate honours program after reading several articles and policy briefs from their website. Through this, I came to admire the work of this organization and to appreciate the intrinsic connection between agriculture and land administration. In this arrangement IAPRI agreed to facilitate this project by offering guidance relevant to field research based on their extensive experience with land and agrarian research in Zambia, office space in Lusaka, and assistance with establishing initial contact with interviewees. This was essential to understanding the national context of land administration and the various efforts being made in the government and non-government sector to improve land administration and tenure security. Further, the Executive Director provided an introductory letter to introduce interviewees to the project acknowledging the affiliation with IAPRI and lending greater legitimacy to this project.

2.2.1 INTERVIEWS AND FOCUS GROUP

I was based out of the capital city of Lusaka, centrally located in the country. This allowed for greater access to professionals working in the government, non-government and legal sectors. In total 36 interviews were conducted: 14 interviews in Lusaka, 6 in the Northwestern province, and 16 in the Southern province.¹⁶ Those in the Southern province were primarily in the Monze district but some were also in Kalomo district. In

¹⁶ Throughout this thesis the terms ‘interviewee’ and ‘focus group participant’ are used to refer to each type of respondent. When referring to both groups together, the term ‘respondent’ is used.

terms of participant categories, 15 interviews were done with government, NGO sector, or legal professionals; for the category of customary authority, 4 chiefs and 1 headperson were interviewed; and 10 customary landholders were interviewed (5 simultaneously held leasehold land).¹⁷

Selecting interviewees was largely coordinated through initial contacts. In particular, I was initially referred to Zambia Land Alliance (ZLA)¹⁸ and Caritas Zambia; two prominent NGOs in land rights advocacy. Logistics and resources permitted travel to Monze district in Southern province, and Solwezi district in Northwestern province. The key influence to go to Northwestern province was to speak to a certain chief who is highly regarded as a progressive thinker for decentralising his land administration processes to increase transparency and accountability. The data collected there were useful in the discussion of ways forward, which considered options for strengthening and formalising customary land administration to increase tenure security.

Monze district was a logical choice as it was in the province and tribe with which I had previous experience in Zambia. I was connected to the Monze District Land Alliance (MDLA), which is an NGO advocating for customary land rights and helps to resolve land disputes. The initial contact at MDLA was essential in finding interviewees, focus group participants, and especially in arranging interviews with chiefs. According to culture, newcomers should approach chiefs through a common acquaintance, rather than directly.

Interviews employed mostly open-ended questions relevant to addressing the research questions and objectives. An initial generic interview guide¹⁹ was created and then modified for each category of participant (landholders, customary authorities, and professionals working in government, NGO and legal sectors). As I became more comfortable conducting interviews and as emerging themes became increasingly obvious, the guides were used more loosely, interviews became more semi-structured in nature, and I adapted lines of inquiry throughout the interview process. Interviews were recorded

¹⁷ See Appendix E for the Respondent Table that provides basic information about respondents involved in this project.

¹⁸ ZLA is the lead NGO of land rights in Zambia; it is a network of 7 member organizations and 7 district land alliances. Caritas Zambia is one of its member organisations.

¹⁹ See Appendix F for the Generic Interview Template. This presents the types of questions asked overall, depending on the participant category. Thus, all questions were not asked of each participant.

with a digital audio recorder (with permission), and transcribed manually using Microsoft Word. Attempts were made to send a transcript to each participant post-interview.

Although most interviewees were well informed of land issues, every participant was not necessarily well versed in specifics (such as certain land rights advocated for in the Draft Land Policy, for example). Respondents were generally able to articulate all or most of the following: (1) a personal perspective on the meaning of land; (2) customary land administration processes; (3) causes of customary land disputes; (4) causes contributing to tenure insecurity; (5) perceived gains and losses of titling land; and (6) holding land under leasehold versus holding it under customary tenure. Additionally, most respondents knew of and/or explained an instance of corruption in land administration (on state and/or customary land).

The focus group was a unique opportunity to speak with village farmers and to hear respondents interact with and respond to the answers of one another. The conversation was respectful, open, and seemed to flow naturally. Participants were keen to interact with me and to respond to one another. This apparent comfort was likely due to participants' familiarity with the research assistant in attendance who is well known to the community because of his position with the District Land Alliance. He served as translator for this discussion: one participant spoke only in English and the rest spoke *Chitonga*. Of the eleven focus group participants, only 2 were female. Although less vocal than others, the women contributed several comments throughout the discussion.

2.2.2 TRANSLATION AND CONFIDENTIALITY

Interviews were mostly conducted in English. A translator was only needed on 4 occasions. Information sheets and consent forms were translated into Tonga as needed and explained verbally when necessary. Although I intended to hold all interviews in a strictly private area where conversations could not be overheard, there was a level of discomfort and/or speculation associated with activities that occurred behind closed doors. This meant that occasionally a friend or relative would sit in on interviews. I left this to the discretion of interviewees. When interviewing chiefs, it is considered inappropriate to request an interview with him/her alone. Chiefs always have a guard or advisor present to ensure safety and accountability, should false claims be made. Due to

the sensitive nature of land issues, pseudonyms are used in this thesis to protect the identity of respondents.

2.2.3 UNANTICIPATED SOURCES OF DATA

The Zambia Land Alliance's National Land Conference in October 2012 provided an overview of trending land issues in Zambia. It also offered insight into the interaction among the stakeholders, namely that of state officials, customary authority, and the NGO sector, which was representing interests of customary landholders. Notable observations include the due process and respect given to chiefs in attendance,²⁰ and the seeming candidness of state officials in highlighting the inadequacy of the dual land system. Most notable was overwhelming agreement that customary land tenure in Zambia was insecure and, simultaneously, that customary authority must be preserved for the future.

2.2.4 POSITIONING OF THE RESEARCHER

This research builds on my undergraduate honours thesis,²¹ which focused on land and food security in rural Zambia and highlighted need for further inquiry into the role of the chief in land administration. Further, this work is influenced by my previous personal experience as a volunteer in rural Zambia in the Southern province. In 2002/03 I worked for 12 months in a variety of projects as a full-time volunteer based at a rural mission station. Through this experience, I learned cultural norms and strove to understand the complex socio-economic conditions of the context around me. My motivation for this research is influenced by these past experiences, and is driven by my personal commitment to social justice and my dedication to growing as an academic. My previous experience was an immeasurable asset during fieldwork, because it provided me with an awareness of how one ought to communicate and posture to be culturally relevant. In sum, the combination of my academic intrigue and my genuine desire to understand the lived experiences of respondents guided my enthusiasm for this project.

²⁰ For example, each speaker greeted them specifically, they ate lunch separately from other conference attendees, and each had a personal guard beside them.

²¹ This research was unpublished and did not include field research.

CHAPTER 3: THEORETICAL FRAMEWORK

What happened in the history of Zambia is that when the British came they colonized Zambia and...they negotiated for land with specific chiefs, jumping this idea of land not actually belonging to the chief but to the clan. So they didn't recognize the clan they just went direct to the chief and that gave the chief some authority of some kind...more power than he had before. And that has continued unfortunately...even the...people who forged independence they again...put power to the chiefs. (Twaambo, NGO Professional).

3.1 INTRODUCTION

This research draws from the work of Legal Pluralism to argue that Zambia's customary land administration is characterised by widespread tenure insecurity due to *ad hoc* land administration and undocumented or informal land assignments in a social, political and economic context that is increasingly in want of formal land registration and/or title to support investment. Additionally, this framework informs analysis of the role of customary authority in land administration and queries what role it has in the contemporary context. To this end, Ribot and Peluso's (2003) Theory of Access is particularly useful in emphasizing social structures of power that influence resource access. This perspective encourages researchers to focus on the structures that determine who controls resource access and those who maintain access to resources by buffering social relationships with those in control. Thus shifting analysis from the dichotomy of state versus customary, or modern versus traditional. This is critical because in a context of legal pluralism it is important to understand how the semi-autonomous nature of state and customary social spheres interact and influence one another, rather than pitting them against each other or assuming they function in isolation (Moore, 1973).

The concept of semi-autonomous social fields also influences how resource access is understood at the local level, because property rights are conceptualised as being one aspect within a greater web of social relations (Ribot & Peluso, 2003; Moore 1973; Okoth-Ogendo, 1989). In this, the strategies employed by people seeking to realize rights or claims on resources are important. Indeed, such a focus enables this analysis to consider the role of customary authority in the contemporary era and the ways it may be

adapted to increase tenure security on customary land. To this end, Chanock's (1989) conceptualisation of the customary as a social and historical construct highlights the dynamism and adaptability of this sphere, dispelling its association as being static, unchanging and traditional. The lens of legal pluralism is thus generative for grasping how social, political, and economic processes determine power dynamics as related to land administration. Tenure security must be understood in relation to the nuanced normative social order of customary land administration systems.

3.1.1 CONCEPTUALISING LEGAL PLURALISM

The theoretical lens of legal pluralism is used for analysis in this project, and is defined as the “coexistence and interaction of multiple legal orders within a social setting or domain of social life” (Meinzen-Dick & Pradhan, 2001, p. 11). More succinctly, legal pluralism exists when more than one legal order is operating within a given social sphere (Griffiths, 1986). Further, legal pluralism is understood as occurring in a context where social relations are played out and/or individuals operate within multiple legal spheres (Woodman, 1996).

This approach emerged from theorization of legal development in the post-colonial context and offers a broad analysis of the relationship between state and customary laws. Although the theoretical roots of legal pluralism are post-colonial in nature, it is deeply historical in practice. Tracing such pluralism back to mid-to-late medieval times and the Middle Ages, Tamanaha (2007) describes legal plurality as existing on at least three axes: “coexisting, overlapping bodies of law with different geographical reaches; coexisting institutionalised systems; and conflicting legal norms within the system” (p. 378).

Legal pluralism contrasts with the dominant statist perception that understands state law as supreme and singular and sees other social spheres as having merely rules that can only be transformed into law through the state. Conversely, legal pluralism understands the rules of alternative normative orders as law (Von Benda-Beckmann, 2001). However, even if one understands the state to be central and to be the primary vehicle of social change, it is argued here that it remains imperative to understand society as a veritable labyrinth of normative and institutional orders. Additionally, the

effectiveness of state legal and institutional efforts to effect social, political and economic change is relative to their interaction with and their influence over alternative normative and institutional orders (Von Benda-Beckmann, 2001; Fitzpatrick, 2005). In recognizing multiple legal spheres, legal pluralism recognizes the complex interaction between law and society and permits analysis of the implications of state law on social institutions and vice versa.

Institutions are conceptualised here as a matrix of social groups, networks, and normative orders that determine inter- and intra- social group interaction. Within normative institutions cultural imaginations shape perspectives and determine value systems. In turn, such structures and values influence individual agency to obtain entitlements by determining dominant and subordinate agents (Bastiaensen, de Herdt, & d'Exelle, 2005). Indeed, the particular structure of land institutions is important. Boone (2013) argues that rural property institutions are deeply embedded in the state apparatus and political order in Africa, and that the particular structure of such institutions account for varied outcomes of land competition and conflicts.

The approach of legal pluralism allows analysis of the following: (1) the ways in which plural spheres of law influence the lived experiences of citizens; (2) the manner in which plural spheres of law interact, influence, benefit from or oppose one another; and (3) the implications of such interactions for the people living within these spheres. Analytically, this is a useful approach, because it avoids streamlining nuances of different social spheres into arbitrary categories by providing a framework within which to analyse differing legal phenomena, systems and theories, and to highlight similarity and variation among spheres (Von Benda-Beckmann, 2002). In this way, interaction among social spheres is multifaceted, complex, and characterised by deeply entrenched social-historical processes and structures. Additionally, how 'the customary' has been (re) created throughout Zambia's colonial, independence and contemporary eras is of particular interest to this study as it informs how notions of the customary influence conceptualisations of land and customary authority.

3.1.2 SEMI-AUTONOMOUS SOCIAL FIELDS AS A USEFUL CONCEPTUAL TOOL

In the Zambian context, the legal/social spheres relevant to this study are state and customary law. However, it is important to recognize that within customary law there are also customs that are the lived experiences of people within certain social spheres and these experiences are not synonymous with customary law *per se* (Chanock, 1989). For example, there are 73 tribes in Zambia, and although there are similarities among them, there are also many differences in terms of language, living patterns, marriage and funeral rituals, cultivation practices, child rearing, inheritance norms, and *etcetera*. Therefore, it is analytically useful to conceptualise Zambia's primary social spheres as plural and semi-autonomous in nature, rather than in the binary of state and customary,

The state is the largest and most encompassing sphere; however, in certain instances it gives way to customary law. Moore's (1973) influential work on semi-autonomous social fields is useful in understanding the interaction among various social spheres and how this influences land administration in terms of claims to and contestations of power:

The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance (p. 720).

As such, social fields have legitimate internal authority over local matters, while being simultaneously subject to laws of a more dominant sphere, making it semi-autonomous.

When examined through the lens of legal pluralism, it becomes clear that various social spheres have unique institutions, or normative orders, that determine particular bundles of property rights and specific ways in which claims to resources are established (Meinzen-Dick & Pradhan, 2001 and 2002). This is an internal function of a given social sphere, based on localized values or processes, yet it does not exist in a vacuum. So its internal values and processes are continually shaped and influenced by external laws, processes and values.

The relevant resource of concern to this study is land. Dominant ideology dictates that land rights ought to be determined by the state. Such land reform efforts typically attempt to streamline rights from systems that are multidimensional into one that is

singular, unified, and divorced from social networks and customs (Sage & Woolcock, 2012; Fitzpatrick, 2005; Meinzen-Dick & Pradhan, 2001 and 2002). Land rights as administered by institutions other than the state are pragmatically understood as bundles of rights that are intricately interwoven through social networks and norms.

When an external program, such as land reform legislation, is inserted into a social sphere, it can be unsuccessful at penetrating and dominating a social order. The institutional arrangements thereof are evolving social constructs that adapt and negotiate the new ‘rules of the game’ in ways that are seemingly impossible to anticipate (Bastiaensen, *et al.*, 2005; Berry, 1989). Such pervasiveness rests on the multiple and often overlapping bases for claims that provide flexibility and adaptability through the negotiation of rights and claims among various legal orders. Of course, such processes of negotiation are subject to social relationships of power, hierarchies, and contestations that directly affect the actualization or realization of rights (Meinzen-Dick & Pradhan, 2001). Thus, attempts to increase coherence among social, legal, or institutional spheres are inherently political processes (Sage & Woolcock, 2012).

Ribot and Peluso (2003) argue that when it comes to property, a rights-based analysis is incomplete because it focuses on “the *right* to benefit from things” rather than on “the *ability* to derive benefits from things”; they argue for shifting focus onto “bundles of power” within “webs of access” (p. 153; emphasis in the original). This narrows analysis to examine social relationships of power that influence political, social, and economic participation at the local level (Bastiaensen, *et al.* 2005). Analysis thus seeks to identify the multivariate ways that power influences mechanisms, processes, and social relations that affect people’s ability to access and benefit from resources.

3.1.3 CHALLENGE: IS LEGAL PLURALISM TOO BROAD TO BE USEFUL?

Proponents and critics alike acknowledge that legal pluralism is a complex and challenging concept. It is a ubiquitous perspective that, merely by its plural nature, runs the risk of encompassing everything and nothing simultaneously. A key criticism of this approach takes issue with how law is conceptualised. Those arguing from a legal centrist position argue that law is purely of the state and that other systems of social order are associated with notions of morality rather than of law. Those arguing from the side of

legal pluralism understand all normative systems as a form of law, even if they are not associated with the state (Manji, 1999). This view is critiqued for casting too wide a net, which makes it difficult to discern anything in particular. However, reality remains that the state apparatus, its regulations and laws, are one part within an ever-evolving constellation of institutions and normative orders. Interactions amongst these must be grappled with.

In juristic terms, a legal system is pluralistic when different legal bodies are applied to particular groups of people “varying by ethnicity, religion, nationality, or geography, and when the parallel legal regimes are all dependent on the state legal system” (Merry, 1988, p. 871). Legal pluralism places critical emphasis on power-dynamics and narrows focus to (a) analyse the interaction among normative orders that are fundamentally different from one another, (b) highlight the effects of historical processes on the creation of customary norms, and (c) seek to portray and articulate the dialectics among different normative orders (Merry, 1988). In placing emphasis on these three aspects analysis shifts from what could be broad comparisons among various spheres, to one that considers nuanced interaction and implications.

There is often a challenge in marrying legal pluralism’s conceptual and practical complexities resulting in confusion of meaning. This may be realized through the misunderstandings of local contexts resulting in the application of ill-fitting development solutions. The timely release of *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Tamanaha, Sage & Woolcock, Eds., 2012) provides valuable insight to this end, highlighting such tensions, as well as the value in

enhancing rigor and relevance at the nexus of legal pluralism and development policy...[as] an emergent phenomenon arising from an ongoing commitment to understanding and nurturing the political spaces wherein diverse (and often opaque) rules systems – their forms, jurisdictions, sources of legitimacy, modes of dispute resolution, and enforcement mechanisms – can be recognized, and the tensions between them constructively addressed. (Sage & Woolcock, 2012, p. 3)

Typically such tension is understood as being between state law and traditional norms. However, it is useful to understand legally plural contexts as also creating tension within their semi-autonomous spheres due to the simultaneous potential for opportunity and limitation. For example, local norms or processes may be accessible, aligned with

traditional or religious beliefs, well understood by local people, efficient, and socially legitimate, while simultaneously posing concern for gender equity, human rights, and due process, and may be vulnerable to elite capture, historical distortion, and external policy prescriptions incongruous with local norms (Sage & Woolcock, 2012). Reconciling such tensions poses a great challenge to development efforts in land access, rights and tenure security, and requires intimate knowledge of local contexts.

In the case of Zambia's customary land administration, some tension exists between the state and customary realms because the state is indeed supreme, and yet customary authority remains legitimately sovereign in rural contexts. With regard to land, for example, all land is vested in the President, but customary chiefs are to hold land in trust for their subjects. Further, the state acknowledges, welcomes, and indeed even subsidises²² customary authority. Yet state law does not provide legal guidance or backing for customary rulings, including land administration because this is understood as being beyond the state. Interestingly, the only way for a chief to be removed from his/her position prior to death is by the decree of the President.

Thus, customary authority is simultaneously an accepted, legitimate, and functioning part of state processes, yet it functions largely without documentation, rules, or legal support. Simultaneously, the state reigns supreme, yet seemingly does not have jurisdiction over customary areas and their internal dealings. It is important that such a context be analysed through a lens that accepts plurality and does not try to streamline complex structures and process into simplistic explanations, diagrams, or dichotomies. Overwhelmingly, it is imperative that analysis does not assume that the state trumps customary, but rather understands the roles of each to result from complex negotiation within a multifaceted context. Thus, a lens of legal pluralism encompasses analysis of state and customary spheres as simultaneously legitimate and as functioning parts of a whole structure. This perspective permits the strengths and weaknesses of each, as well as their interaction with one another, to be analysed.

In summary, although legal pluralism has challenges, it is useful to this analysis because it enables a perspective that understands law to encompass normative orders

²² The Zambian government provides subsidies for chiefs and paramount chiefs on a monthly basis and transportation to assist with running chiefdoms.

beyond the legal realm of the state. Further, it recognizes the semi-autonomous nature of Zambia's customary spheres to be nuanced according to local context, internally legitimate, and yet simultaneously part of the larger state apparatus. The state is both dominant and subordinate relative to the customary realm, resulting from complex processes of negotiation that are subject to dynamic historical, political, social and economic processes. Reconceptualising these spheres in this manner shifts analysis from the binary of modern state versus traditional customary to consider the interaction of complex power dynamics that determine agency among actors to either control land access or to maintain land access through nurturing relationships with dominant actors.

3.1.4 HISTORICAL "INVENTION" AND THE CUSTOMARY REALM

Having addressed the challenges of legal pluralism relevant to this study, it is now necessary to address the historical political, social, and economic influences of colonial and post-colonial contexts on conceptualisations of the customary. It is important to confront notions of the customary in the contemporary context. Such confrontation provides a basis from which to understand conceptualisations of land and the role of customary leaders in land administration. The colonial administrative model of indirect rule intentionally created customary norms and processes under colonial administration and redefined jurisdictions and authority structures. This model essentially created a new realm of authority through which colonial administration could influence customary spheres. In turn, new power dynamics and forms of interaction were created within and among spheres.

By utilising indigenous leaders and integrating native courts into the legal system, indirect rule effectively created "a hodgepodge of coexisting legal institutions and norms operating side by side, with various points of overlap, conflict and mutual influence" (Tamanaha, 2007, p. 382). Further, to expand the reach of the law, they incorporated customary law by (1) codifying the customary, (2) applying unwritten customary law in state courts, and (3) recognising customary courts run by customary leaders (Tamanaha, 2007, p. 383). This is referred to as the "invention of tradition" as per the influential work of Hobsbawm & Ranger (1983). These scholars contend that customary norms were not entrenched but were continually recreated. However, because the concept of invention

implies a conscious creation of something new, Spear (2003) critiques this perspective as neglecting the agency exercised by indigenous leaders and glorifying that of colonizers.

In grappling with this process, it is critical to distinguish between customary and customary law. Customary comprises a body of dynamic sociocultural norms realized through entrenched social values, organization, and interaction. While customary law comprises customary norms as encoded and recognized by the state (Chanock, 1989). Thus, customary is characterised by nuanced norms of society that are intrinsically understood, utilised, and negotiated by members of a particular social group. In contrast, customary law is characterised by systematic, rigid rules disassociated from differing social/historical contexts and streamlined into codified law, applied broadly to various social groups, and negotiated by a third party rather than individuals. Essentially, it becomes “a body of norms with less flexibility, less variation, and greater reach and force than custom” (Chanock, 1989, p. 75).

With regard to land, Boone (2013) describes the realm of authority that emerged through colonialism (and later reinforced through independence) as being neocustomary land tenure regimes. Further, she frames those whom the state recognized as being chiefs or lineage heads as being “given wide powers to make up what colonialism recognized as customary land tenure”, and that they utilised this position to advance their authority and landholdings (Boone, 2013, p. 28). Despite the intrinsic difference between customary (lived experience) and customary law (as codified by state), these are often used interchangeably and thought to be equivalent (Chanock, 1989).

Notably, when European administration established authority over vast territories they sought to understand the societies they encountered through cultural explanations. Aided by work of anthropologists and missionaries, Europeans embraced systematic, broad-sweeping explanations rather than nuanced ones, and they applied them liberally to diverse groups. Naturally, it was the dominant Africans (as determined by social status/hierarchy, political position, economic status, gender, and/or age) who were most in contact with Europeans and as such, the version of ‘customary’ that was codified was inherently from the perspective of the powerful (Boone, 2013). Thus, the perceptions embraced by Europeans tended to serve the interests of the ruling Africans: “...under colonial rule African ruling groups were able to establish their morality...It was put

forward as ‘custom’ and, on the whole, gratefully accepted as both descriptive and prescriptive by the white overlords” (Chanock, 1989, p. 80).

With decolonization came calls for a revival of traditional values by embracing customary law as an inherent part of state law, and these concepts were accepted as synonymous. Although sentiments of tradition stir nostalgia and feed a powerful energy that comes with liberation, Chanock (1989) argues that such rally calls are an inherently political tool rooted in the blurring of customary (actual shared customs) and tradition (created customary law). Thus, sentiment of “revival” is nonsensical in the post-colonial period because (a) the production of and codification of customary law was a colonial project, and (b) such sentiments are wielded as powerful political tools by colonial administrations and postcolonial governments alike—both affording limited genuine political influence (Chanock, 1989). When one invokes imaginaries of what is natural or of the past, a crucial mistake often made is to confuse positive values with past practices and then to assume that “by preserving, or re-creating, past practices, positive values will thereby be advanced or defended” (Chanock, 1989, p. 76). Recognizing the inherent difference between customary and customary law or between customary and invented tradition helps to clarify whose interests are served to the detriment of others.

Colonial influence on customary norms, structures, and administration were not a one-directional domination or subsuming of powerless customary leaders by foreign overlords and structures. Rather, this process is understood here as being a “multi-dimensional, interactive historical process” (Spear, 2003, p. 4) in which aspects of customary realms were indeed lost or weakened by colonial administration. At the same time, customary institutions were simultaneously powerful and tenacious in adapting to new political, economic and administrative interests.

Colonizers and subsequently post-colonial governments were ultimately dependent on indigenous leaders, because they held legitimate authority at the local level. Therefore, if “colonial administrators were to capitalize on the illusion of traditional authority, their rule was limited by the need of those authorities to maintain their legitimacy” (Spear, 2003, p.12). Complex processes of negotiation, reinterpretation, and concession building characterised the dynamic between customary leaders and colonial administrators. This perspective recognizes the agency of both foreign and indigenous

administrators in their competition to define emerging structures and simultaneously maintain the confidence of the populous. It is argued further that the plural nature of land administration systems and their associated opacity or ambiguous nature are not errors or by-products of flawed state-building attempts. Rather, ambiguity is a part of the system that allows leaders to use land to build and maintain power (Boone, 2013).

In sum, it is posited here that rather than colonialism “inventing” the customary *per se*, what emerged from the colonial era was something new. It was neither modern nor traditional, but a new version of the customary order, resulting from complex processes of negotiation among competing bodies. In this way, “invention” is only accepted here as building upon prior structures and knowledge to create something inherently different through processes of negotiation and competition (Spear, 2003). This position is useful in recognising the agency of competing parties to influence land administration structures and practices in the colonial, independence and contemporary eras.

3.1.5 TENURE SECURITY, ACCESS, AND POWER DYNAMICS

Despite the delineation of customary law as an historical construct and the important distinction between it and the customary, there remains a tendency to discuss land administration and land tenure as existing in the binary of modern versus traditional, or state versus customary. This false dichotomy serves only to distract analysis from what ought to be the focus: that is, power relations that affect access to land. Neither state nor customary spheres exist absolutely. Both are social constructs that are continually evolving, interacting and influencing one another.

Recalling the discussion of semi-autonomous social fields, it is important to conceptualise state and customary spheres as simultaneously independent and interdependent, and as each having varying degrees of power over the other depending on time and place. It is the interaction of social relations, mechanisms and processes within and between each sphere that is the focus of analysis. Ribot and Peluso’s (2003) Theory of Access is useful in clarifying this. Their description of strands of power within bundles or webs of powers is conceptually useful:

Focusing on natural resources as the “things” in question, we explore the range of powers—embodied in and exercised through various mechanisms, processes, and social relations—that affect people’s ability to benefit from resources. These powers constitute the material, cultural and political-economic strands within the “bundles” and “webs” of powers that configure resource access. Different people and institutions hold and can draw on different “bundles of powers” located and constituted within “webs of powers” made up of these strands. People and institutions are positioned differently in relation to resources at various historical moments and geographical scales. The strands thus shift and change over time, changing the nature of power and forms of access to resources (Ribot & Peluso, 2003, p. 154).

Similarly, Okoth-Ogendo (1989) focuses on access as the critical point of analysis. To sharpen focus on the ways in which power relates to land administration, he posits the nexus of access to power and control of power as a useful heuristic through which to analyse land tenure in Africa. This permits analysis to primarily focus on social, political, cultural, economic and legal aspects that affect power relations, and highlights whose interests are served by social and political institutions. Further, he argues that in order to understand African land tenure, land need not be the initial point of inquiry; rather, one must understand how property and rights are conceptualised. Property, he suggests, must be understood as part of “the total milieu in which [people] live rather than any aspect of it” (Okoth-Ogendo, 1989, p. 7). Indeed, participant responses in this project reveal that land is inherently intertwined with social organization, cultural imaginaries, succession rights, and norms of reciprocity.

Building from this idea of land as one aspect of multifaceted social relations, Ribot and Peluso’s division of social action into access control and access maintenance is helpful. Access control “is the ability to mediate others’ access”, while the access maintenance “requires expending resources or powers to keep a particular sort of resource access open” (Ribot & Peluso, 2003, p. 159). To avoid binary thinking, these two roles are understood as simultaneously existing within the same person or institution, varying by time and place:

One individual may hold a bundle of powers whose strands include various means of controlling and maintaining access. This person will be in a dominant position with respect to some actors and in a subordinate position to others (Ribot & Peluso, 2003, p. 159).

This framework of the dynamic interaction among access control and access maintenance will inform this work by focusing on the interaction among customary authority and landholders with regard to land allocations and land disputes. Through this lens, the complexity of interaction among dominant and subordinate actors highlights multiple social and political variables that are involved in land administration processes. In the following section attention turns to a discussion of how land rights and claims are negotiated by actors operating in multiple spheres.

3.1.6 FORUM SHOPPING: NEGOTIATING RIGHTS AND CLAIMS

Land administration cannot be discussed without the notion of rights-based claims, more commonly referred to as property rights. Thus, it is important to clarify how rights are understood here. The concept of rights must be understood within a specific context: “the existence of a right is best understood in terms of a power which society allocates to its various members to execute a particular range or quantum of functions in respect of any given subject matter” (Okoth-Ogendo, 1989, p. 7). Thus, a right is a claim that is sanctioned by law, custom, or convention (Ribot & Peluso, 2003).

The real concern though, is the structures, relations, and processes that either enable or disable a right to be realized. A right is only as strong as the institution behind it (Meinzen-Dick & Pradhan, 2001). Separating construction of rights from actual rights is helpful, as the former refers to the categorical rights one has in principal, while the latter refers to the concretized specific rights one is able to realize, depending on locality, history, resource flow, ecology, social relationships, negotiation and dispute (Meinzen-Dick & Pradhan, 2001).

A specific challenge to those living in a context of legal plurality is to distinguish between rights and claims in a practical sense. In this, people struggle “to establish rights and simultaneously to maintain relationships which [embody] claims which rights would nullify” (Chanock, 1989, p. 84). This critical point of struggle tends to be grossly oversimplified as being the clash between modern and traditional. This is a false dichotomy, because each end of the spectrum is dynamic and subject to conceptualisation and interpretation, and neither end possesses inherent qualities. Thus, conceptualisations and negotiations of the customary are played out as political choices, which are realized

as Africans straddling the line between state and customary as a means of diversifying their options and using either context to their optimum benefit (Ribot & Peluso, 2003; Berry, 1993). Such tactics are referred to as “forum shopping”. This refers to taking advantage of various rights and claims in multiple social, political and economic spheres, rather than operating, for example, in either the state or the customary system.

Individuals choose which parts of various systems offer the most benefit and navigate each strategically. In a context that has seen rapid and frequent changes to social, political, and economic organization over the past century, forum shopping is a logical strategy, because people understand policy, regulations, and structures as fleeting, and they adjust strategies accordingly (Ribot & Peluso, 2003; Berry, 1993).

Given that Zambia’s land system is officially referred to as a Dual Land System characterised by state and customary laws, it is particularly easy to slip into the trap of duality. Apparent tension seems to exist between what is perceived as modern and what is perceived as customary. Although such perceptions conjure up notions of nostalgia or of a seemingly natural order, they are constructs that maintain a status quo of social relations of power. Thus, when the “external, written, bureaucratized, enforceable” orders of the state pose a challenge to the local order, the customary realm is justified as acceptable, proper, or cultural, because of its longevity. Chanock (1989) argues that this provides a basis “for accepting custom rather than descriptions of its inherent nature” (p. 74). Therefore, it is essential to recognize that the state is not the epitome of modern, nor is the customary the pinnacle of traditional. These are complex notions that interact dynamically.

Although the seeming contrast between tradition and modern is timeless, what has changed drastically over the previous century is the rapid pace at which social change has occurred (Woodman, 1996). Further, the imposition of colonial and then state law (at independence) did not mark the beginning of law and justice in Africa. Rather, European law was layered on top of pre-existing types of law. The fit among them was not seamless in the African context, because of the high value European law places on individual rights over collective and its assumption that social order is homogeneous and subordinate to the state (Woodman, 1996).

Most relevant to this discussion is the point regarding individual rights, which suggests that the root of the apparent disjuncture among competing spheres of law in Africa exists because of differing values placed on individual rights. It cannot be assumed that one necessarily prefers individual rights over rights that come with group or community membership in every aspect of one's life. Hansungule (2003) argues that the state must take a balanced approach and not protect individual rights at the expense of the collective. Both must be honoured.

The value of individual rights is certainly an area where spheres overlap. It must not be assumed that all people in a customary sphere are content only with rights derived by their community membership, and that all people under the state wish only to embrace individual rights. Rather, it is critical to understand that in some areas of an individuals' life, s/he may desire the protection and promotion of his/her individual rights more in some regards and less in others. Indeed, an individual may choose to uphold customary norms of reciprocity by sharing a portion of the harvest with community or extended family members to maintain social ties and relationships. Further, an urban person may embrace individual liberties on a daily basis (i.e. in terms of his/her education, career, political affiliation, sexuality, religion, *etcetera*), but simultaneously consider attendance at customary ceremonies and paying homage to customary leaders a priority, despite the fact that such leaders do not have authority over his/her daily life in town. In considering plurality, the nuanced overlapping of spheres must be understood. One does not necessarily negate the other.

This discussion of rights and claims is useful in analysing customary land administration, because it highlights the nuanced nature of land tenure and the rights ensured therein. The way in which land rights are embedded within a plural social context is of particular concern, because this influences the ways in which land is allocated, disputes are resolved, and the particular rights or claims that will be sought by landholders. As will be discussed in Chapter 6, while landholders want increased tenure security for their cultivated land, some only want to do so in a manner that does not clash with other social and cultural practices, such as inheritance norms. Conversely, other landholders may welcome increased tenure security regardless of the impact it has on other social aspects. Finally, the interaction between rights and social structure inherently

affects the ways in which landholders conceptualise the role of customary authority and influences the ways in which they interact with those in control of land access.

3.2 CONCLUSION

This section has shown that, while the plural nature of the legal pluralism framework poses some challenges, it also enables a perspective that is able to grapple with the multifaceted nature of customary land administration and the complex webs of social relations that affect access to land. Recognizing such plurality shifts analysis away from the binary of state versus customary to one that recognizes the semi-autonomous nature of state and customary spheres, as well as a complex of customary norms and social relations that influence resource access. Further, it encourages analysis that understands the customary realm as a historical and social construct, while simultaneously acknowledges the relevance of customary authority to rural life.

CHAPTER 4: HISTORY OF LAND ADMINISTRATION

...It is like you have first-class citizens and second-class citizens. Basically that's what [the dual land system] does...State land you can go to the bank with the paper you can get a mortgage; you can get a loan and use that as...collateral. When you are on customary land you cannot use your land as collateral because there are no [legal] papers. (Luyando, NGO Professional)

4.1 INTRODUCTION

Providing historical context is an important step in describing the roles of and relationships among the state, customary authority, and rural landholders in customary land administration. Differentiating between customs (lived experiences) and customary law (created sphere) is important, because although the latter is often a rallying point to preserve tradition and what is perceived to be static social orders of the past, it also serves as a social/political justification to preserve power hierarchies (Chanock, 1989). Indeed, the customary is highly dynamic and adaptable to changing social, political, economic contexts. Thus customary land administration ought to be analysed from the consideration of land access, as expressed by Ribot and Peluso's (2003) differentiation between those who control access to resources, and those who maintain access by investing in social relationships with those in control. This shifts analysis from comparisons between state and customary law to nuanced analysis of social relations influencing resource access.

Further, it is important to highlight the ways in which the customary is used relative to the British crown in the colonial era, and relative to the state since independence. From this, one can begin to conceptualise how landholders navigate their position between spheres: that is, forum shopping or jockeying for the most advantageous position in each. In turn, this chapter also considers how customary leaders, such as chiefs, are positioned relative to the state and to subjects. In the former, their authority is subordinate (especially given the fact that only the President can remove a chief from his throne), and in the latter they are in a dominant position with seemingly unlimited power.

With such a framework in mind, this historical overview begins in the colonial era and broadly traces the influence of the British Colonial Administration in land

administration, creating three distinct land categories of crown, reserve and trust. It then turns to the independence era, which does not radically alter the dual land administration model, but instead merely re-categorizes it. The discussion navigates from the first republic in 1964 to the third republic in 1991, from single party to multiparty democracy, and wraps up with an explanation of the 1995 Lands Act, the key piece of legislation guiding land administration in the contemporary era.

4.2 COLONIAL ERA

In the late 1800s the colonial project in Africa was rapidly expanding. Its formal inauguration is associated with the Berlin Conference of 1884-85 in which European powers partitioned land in Africa for European conquest (Hoschild, 1999). In 1899 the British South Africa Company (BSA Co.) took administrative control of Northern Rhodesia on behalf of the British Crown. The objective of the colonial project for this territory was to be a settler colony. At this time, land law was designed specifically to ensure European interests and rights to land, and to encourage their development, investment and settlement within the territory (Mvunga, 1980).

In establishing land administration, three categories of land tenure emerged in the colonial era: crown, reserve, and trust. In short, crown land was for settler use, under the jurisdiction of the British Colonial Administration (BCA) and following English law. Land was held by freehold or leasehold tenure, and formal title deeds were issued to secure ownership. Native reserves and trust land were for native use and were under the jurisdiction of customary authorities: chiefs and headpersons (Brown, 2005; Mvunga 1980). This established a two-tier system that served different land interests. European interests were to promote the purchase, development and tenure security of land by European settlers, while Africans sought to retain control over administrative and usufruct rights in their territories (Mvunga, 1980; Mvunga 1982).

4.2.1 INDIRECT RULE

Part of Lugard's (1923) Dual Mandate in Tropical Africa, the BCA in Northern Rhodesia was characterised by indirect rule (Berry, 1992). In terms of land, this is briefly described as the separation of crown from customary land administration (Home and

Lim, 2004). The crown was to have overarching authority in the colony, rather than nuanced administrative control at the local level (Berry, 1992).

This was accomplished through the creation of customary law and native reserves, administered by customary leaders who controlled the vast rural areas (Herbst, 2000; Chanock, 1989). Native interests in land were guaranteed unless they gave permission and were compensated accordingly.²³ The 1911 and 1924 Orders-in-Council formalised the crown's right to set up reserves. These were justified as being in the natives' best interests by simultaneously ensuring land rights and contact with Europeans and their associated "civilization" (Mvunga, 1980).

Simultaneously, the BCA divided rural administration into zones under specific leadership. This was an effort to organise administration from the top, while requiring minimal British presence at the local level. These processes redefined jurisdictions, realms of authority and influence, and reshaped power dynamics by creating a new realm of authority through which the colonial authorities influenced customary spheres. These changes also affected power dynamics within and among customary spheres establishing new points of overlap and competition (Tamanaha, 2007).

As colonial rulers sought to understand how land was traditionally administered they used accounts from both chiefs and headpersons, and then effectively created a new version of the customary throughout the process (Spear, 2003; Chanock, 1989; Hobsbawm, 1983). Berry (1992) argues this process was contentious and inaccurate, because British officials were trying to link access rights to social identity, while Africans were trying to renegotiate social identities. This caused confusion in the accounts of customary land administration told to Europeans.

Further, Colonial administrators also evaluated customary law according to their Victorian values, and influenced customary institutions in this regard, including in some cases reinforcing patriarchal practices and structures and tending to favour male customary leaders (Ndulo, 2011). However, records indicate that occasionally women

²³ It is recognised that the term 'native' may be offensive, however, it is used here in terms of its colonial context.

held positions of chief or headperson. For example, Chieftainess Namweemba Ufwenuka in Monze District ruled from 1936-1952 (Saha, 1994).²⁴

This reinterpretation led to a new conceptualisation of the customary, and Europeans deemed the authority of chiefs to be synonymous with territorial authority. In turn they misguidedly believed land was held by tribes when, in fact, some tribes, such as the Tonga, held land by clans (Berry, 2002; Chileshe, 2005; Kabilika, 2012; Mvunga 1980; Mvunga 1982). Further, this formalisation of fixed boundaries among chiefdoms that previously tended to be more fluid shifted power dynamics within customary structures. Previously, customary leaders had a greater degree of reciprocity or accountability among leaders, village councils, and subjects (Berry, 2002; Kabilika, 2012; Meebelo, 1971). In the African context land was seen as an abundant resource and population densities were low (Herbst, 2000). With the coming of native reserves customary authorities were officially linked to specific territories with hard boundaries. This association persisted in independence and fundamentally changed how customary authority was conceptualised and how tribes interacted.

Colonial interpretation of the customary also impacted women's land rights in terms of access, control and ownership. It was common in pre-colonial Zambia that women would access land through a male relative, such as a brother, uncle or husband, but they could not own land in their own right. However, among matrilineal tribes such as the Tonga, women's right to family land was usually ensured. With colonialism came significant challenge to rural social organization due to the migration of male labour for mining in Southern Rhodesia (Zimbabwe) and South Africa, rural-urban migration for wage employment, and the growing influence of cash crops. The net effects of such factors largely left women in charge of land usage and production decisions. However, they were not granted ownership rights nor recognized as household heads by British authorities. Thus, they were *defacto* but not *dejure* owners (ZLA and Dan Church Aid, 2005).

²⁴ For a more historical discussion on how the BCA influenced installation of customary authorities in the Monze district, see Chapters 3 and 5 in Saha (1994).

4.2.2 COLONIAL LAND TENURE: CROWN, RESERVE, AND TRUST LANDS

The British initially divided Northern Rhodesia into two administrative territories, Northeastern Rhodesia (NER) and Northwestern Rhodesia (NWR). In 1911, these merged to become known as Northern Rhodesia and although forming a single political unit, land in NWR (also known as Barotseland) could only be alienated by their customary king, called the Litunga; land elsewhere could be alienated by the BSA Co.²⁵ In 1924 the British Colonial Authority (BCA) took over formal control of Northern Rhodesia from the BSA Co. (Mvunga, 1980; Mulolwa, 2002; Hansungule 2001; Roth & Smith, 1995). In the same year the BCA launched a commission to investigate the reserves established under the administration of the BSA Co. and this led to the 1928 Order-in-Council that outlined the following:

- i) reserves were...a permanent habitat of the indigenous peoples;
- ii) Europeans could acquire land in reserves only for a five-year period if this was considered by the Governor to be in the interests of the indigenous people; and
- iii) mineral exploitation was permissible but would be regulated to ensure that the indigenous population in reserves was not unduly interfered with (Mvunga, 1980, p. 16).

Thus, native reserves were more widely established in 1929, with English law presiding over crown land and customary law over reserves. Crown land was exclusively alienated to settlers via freehold or leasehold tenure. Freehold tenure permits a piece of land to be held absolutely and indefinitely. By contrast, leasehold tenure has a limited estate determined by a given timeframe. Various lengths of estates were offered but 99 years was most common.

Reserves were primarily for native use, but Europeans could get an occupancy permit on a reserve for a maximum of 5 years. Africans could live on crown land only if employed in the formal economy, which was typically on crown land (Mvunga, 1980). Natives were displaced to reserves in order to clear the newly demarcated crown land to make it available for foreigners (Chileshe, 2005). Reserves were established with a view to encouraging European settlement, investment, mineral exploitation and agriculture on crown land (Mvunga, 1980). Colonial authorities blatantly reserved the rail line for crown land, only making passages to it for communication and transportation.

²⁵ See Appendix G for additional comment regarding the Barotseland situation in Western province.

Between 1919 and 1940 the number of settler farms along the line of rail remained constant at about 250 landholdings (Bruce & Dorner, 1982, as referenced in Chileshe 2005). In 1929 16 native reserves were created, covering 24,874,000 acres, for approximately 268,000 Africans.²⁶ Mvunga (1980) argues that the 1929 reserves resulted in displacement and movement of natives (especially in Southern province), vast inequality, and further entrenched the two-tiered land system that served foreigners over natives. Over a five-year period Africans were moved to these reservations, and soon soil exhaustion on reserves required more land to be demarcated for Africans' use (p. 21-22). Palmer (1972) argues that compensation was not offered to natives for being relocated, because the creation of reservations was justified as being in their best interest (as referenced in Chileshe, 2005).

As per notions of indirect rule, administration within the reserves was left up to the traditions/customs of the tribe and directed by the chief. The manner in which chiefs were selected varied according to tribal tradition. In some cases, such as the Tonga tribe, colonial authorities installed chiefs because they were not part of the previous social structure (Mvunga 1980). The colonial prerogative to place customary land under chiefs' authority to administer according to traditional norms did not result in clearly defined land administration norms. Although customary rules were codified and recognized by the colonial administration, there were still variances at the local level. Throughout the process of establishing chiefs with authority over specific territories, social hierarchies were both renegotiated and reinforced in different instances (Ribot & Peluso, 2003; Okoth-Ogendo, 1989; Berry, 1993).

The BCA proposed the creation of Trust Land in 1935. They were essentially the same as native reserves except for the important difference that a non-African could get a parcel of land as a "right of occupancy" on trust land for 99 years, rather than just the 5-year occupancies permitted on reserve land. Trust lands were implemented because they encouraged European investment by offering longer occupancy rights (Mvunga, 1980). The 1947 Native Trust Land Order-in-Council officially created a new third category of land tenure in Northern Rhodesia, with the qualification that land alienations within trust

²⁶ See Appendix H for a Map of Reserve land in Northern Rhodesia in 1929.

lands ought to be in the interests of both races or of the community, rather than just in the interest of the natives (Mvunga, 1980).

4.2.3 *CUSTOMARY TENURE, OWNERSHIP, AND INTERESTS IN LAND*

During the colonial era, customary land tenure was practiced on reserve and trust land areas, under the authority of chiefs. Despite assumptions that customary land was held communally, White's (1959) influential study,²⁷ based on an extensive survey across Northern Rhodesia in the 1950s, indicates that customary land tenure among tribes of Northern Rhodesia was essentially individual: "Specific land rights are acquired and exercised by individuals. Such land rights are attributes of persons, and they emerge as individualistic rights, except...where some element of lineage land holding is present" (p. 8). Further, he describes that virgin land was generally acquired by breaking land where no one else had previously done so, and that once a plot of land is claimed, an individual's right to it is secure. Rights to land were terminated by transfer, abandonment or death (White, 1959). Once an individual claimed a piece of land, it could be transferred to another person permanently as a gift or temporarily as a loan. After death, land may be inherited, as per norms associated with a particular tribe.²⁸ Abandonment of land was also a common way to terminate tenure. Notably, land was also transferred or sold for cash, contrary to assumptions that land was traditionally never sold (White, 1959).

How ownership is conceptualised is important to understanding land tenure because tenure systems entails use rights and modes of access. The distinction between rights and access is important because rights refer to who is technically entitled to access land, while access magnifies the ability of people to realize said rights while operating within complex social systems in which some people control access to resources, while others maintain strategic social relationships to ensure access is realized (Ribot & Peluso, 2003). In Northern Rhodesia, as per White (1959) and Mvunga (1980), ownership did not

²⁷ White's 1959 survey of all provinces in the 1950s (except Barotseland/Western province) is noted as an essential land record because it offers a detailed account of land tenure practices among various tribes just prior to independence. When conducting this survey White was the government Land Tenure Officer.

²⁸ Although women generally had some land rights ensured through matrilineal systems, especially access to family land, patriarchy within matrilineal systems still required women to access land via a male relative. In other patrilineal tribes this was even more so the case, including women's access to family land (ZLA and Dan Church Aid, 2005).

equate sole rights to land. Rather it entitled one to have primary rights to the land, giving one individual more rights to it than others. This is called concurrent rights and is described as follows:

[A] good example of this is to be found amongst the pastoral people...During harvest, cattle owners could take their cattle to graze in fields belonging to others. The apparent owners of these fields did not cease to be owners in this case but they continued to be landholders subject to the recognized interests or rights of others (Mvunga, 1980, p. 23).

Thus, rights are recognized concurrently, and as such, more than one person has interests in a piece of land. However, the nature of those rights differs and people are permitted to operate simultaneously or in rotation, depending on the nature of the rights, as demonstrated in the above pastoral example.

Some sections of customary land were reserved for communal use, meaning that no one had more rights to the land than anyone else. Rather, one's right to use communal resources, such as a well, river, grazing grounds, or forests, were dependent upon one's membership in the community (Mvunga, 1980). Administration of these lands was also under the authority of the chief.

Land ownership is traditionally varied by gender, according to specific tribal customs and kinship patterns. For example, the Tonga's matrilineal system traces lineage through the mother's family, meaning that children better identify with or belong more to their mother and her siblings than to their father (Mvunga, 1982). In this way, the maternal uncles are the closest male relatives to a woman's children, and the maternal aunts are considered as additional mothers. Further, the children of maternal aunts (cousins) are considered as close as siblings, while the children of maternal uncles are not, because their lineage is traced through their mother's family (Cliggett, 2005). Such kinship patterns have great significance when it comes to accessing and using resources. Kinship determines "who is family and who is not" and in turn, also determines who can make claims on things like labour, resources, and inheritance (Cliggett, 2005, p. 17). In the case of Tonga matrilineage, definitions of who is considered family are more fluid: "Apart from the mere memory of a common maternal relative, kinsmen do not relate to

each other through a genealogical source. A common maternal relative suffices” (Mvunga, 1982, p. 4).

In such structures, the role of power cannot be overemphasized, as it directly enhances or limits the ability of individuals to access resources, and entitles some individuals with authority over access (Ribot & Peluso, 2003). Traditionally, Tonga women do not own fields in their own right, but rather access them through a male relative (Mvunga, 1982). Men traditionally gain access to land through clearing virgin land, by ploughing it, by asking permission from a headperson, or by inheriting it from a male relative (Cliggett, 2005; Mulolwa, 2002). As long as a woman lived in her natal²⁹ village she would cultivate fields given to her by a brother, uncle, male cousin or even her father. Tonga women typically followed virilocal marriage practices, which requires a woman to move to her husband’s village and cultivate the fields that he has access to (Mvunga, 1982). Upon a husband’s death, traditionally, his relatives would assume control of his land, wealth, wife and children. In the contemporary era, this tradition has largely changed to require the wife and children to return to her natal village. However, if the children are old enough to work the land, they can usually remain in the father’s village and access land and the mother can live with them. Because customary land follows clan-inheritance practices, it is important that it not be alienated to another clan via marriage. As such, women continue to be denied direct ownership rights despite the length of time one lives in her husband’s village.

With specific reference to Tonga traditions, this section has outlined that customary land tenure in the colonial era was found on reserve and trust land, and was administered by the authority of chiefs. Three types of land tenure were recognised, namely individual, concurrent, and communal land rights. Access to land varied by gender, and Tonga women typically accessed land through a male relative. Thus, women had access to land for cultivation but were not recognised as owners of it. The following section shifts focus to examine how land administration changed by transition to the independence era.

²⁹ Natal village means one’s family village or original village.

4.3 INDEPENDENCE ERA: FIRST TO THIRD REPUBLIC

The nationalist agenda in Northern Rhodesia gained momentum throughout the 1950s, and on October 24, 1964 the independent Republic of Zambia was established through the Zambia Independence Act of 1964. Kenneth Kaunda, widely known as KK, was the first President and remained in power for nearly three decades. The period of 1964-1972 is referred to as the first republic, characterised as a multiparty system but led only by the United National Independence Party (UNIP). Kenneth Kaunda gained status of a national patriarch and became a symbol of freedom and unity through his promotion of One Zambia, One Nation. This mantra is still embraced in the contemporary era.

With independence, all land was vested in the President in perpetuity on behalf of the people of Zambia. What was formerly crown land became state land, and native reserve and native trust lands were simply called reserves and trust land. This maintained the dual land system established within colonialism, as well as customary authority on reserve and trust land. Accordingly, chiefs were tasked to hold land in trust for subjects on customary territory.

Throughout the late 1960s to early 1970s, the African Socialist agenda gained momentum on the continent led by President Nyerere of Tanzania. In line with such ideology, Kenneth Kaunda promoted his distinct philosophy of Zambian Humanism, and simultaneously vied for a one-party state and planned economy (Meebelo, 1973). Central to his ideology was a call to preserve the mentality of mutual-aid and reciprocity, characteristic of African society prior to colonialism and commercial production. This was largely driven by sentiment of the traditional; such revivalism is a political tool that promotes notions of a unified past, obscures custom (actual shared customs) from tradition (created customary law), and erroneously conflates past practices as being equivalent to positive values (Chanock, 1989). The fundamental principles of this philosophy are inclusiveness, mutual aid, co-operation, communalism, egalitarianism, hospitality, generosity, self-reliance, rule by consent, and respect for human dignity, age and authority (Meebelo, 1973).

Humanism led to the initiation of the Second Republic from 1972 to 1990, which was characterised as a single party system, led by Kenneth Kaunda. Such changes were enabled through the 1969 National Referendum, which permitted the National Assembly

to make constitutional changes, including the 1972 change to a single-party state (Chileshe, 2005). In short, these constitutional changes strove to distance independent Zambia from its colonial administration, as distinguished by humanist ideology, desegregation, a harkening back to and embracing of seemingly traditional values, and national unity. In terms of land, the Humanist era sought egalitarianism via state control over land, justified as being aligned with tradition:

Land, obviously, must remain the property of the State today. This in no way departs from heritage. Land was never bought. It came to belong to individuals through usage and the passing of time. Even then the chief and the elders had overall control ... on behalf of all the people (Kenneth Kaunda, 1968 as quoted in Chileshe, 2005, p. 95).

To this end, two policies are notable: the 1975 Land Conversion of Titles Act and the 1985 Land Circular No.1.

Moses Kaunda (1995) provides a useful and concise summary of the 1975 Act as providing the following: (1) Transformation of freehold and leases beyond 100 years, to statutory leaseholds of 100 years; (2) Restricted future leaseholds to not exceeding 100 years; (3) Required the written consent of the President to transfer, assign, sublease, mortgage or charge for land; (4) Bare or unused land had no market value; (5) Restricted the size of agricultural holdings per person, as determined by the Minister of Lands; and (6) Restricted grants of land to foreigners (p. 88). In short, this act brought land more firmly under state control.

This Act was justified as aligning with traditional principles of land having no monetary value and as something that cannot be owned absolutely or indefinitely. As such, land itself could not be sold but improvements on the land could be sold (Chileshe, 2005; Roth & Smith, 1995). Customary authorities administered native reserve and trust lands. However, they were also vested in the President and as such the state determined the price for land transactions. As noted, only improvements on land could be sold, thus land prices “bore no relation to the usual free market determinants: location, potential use, supply and demand” (ZLDC, 2012, p. 7). Such notions persist in the contemporary era.

The tying of power and land here is obvious and problematic. Theoretically, the foundation of vestments rests on trust, but in practice this can be a challenge. In short,

the vesting of land means that the state has a fiduciary duty to its people to ensure their land interests are protected. Likewise, chiefs, as trustees of customary land, have a fiduciary duty with regard to customary land. The relationship is one of trustee and beneficiary, thus customary land administration ought to be in the interest of subjects. In practice though, such vesting makes the vital resource of land dependent upon and subject to the circumstance of having a benevolent leader (Hansungule, 2001).

The 1985 Land Circular No.1 permitted procedures for the conversion of customary land to statutory to allow the permanent alienation of customary land (Chileshe, 2005; Roth & Smith, 1995). This meant that conversions of customary land to statutory could be approved via the written permission of the chief. Evidence of consultation with his/her council was not required, only his or her approval to convert a particular parcel of land. However, Roth and Smith (1995) indicate that “Local authority, in the circular, had been administratively understood to mean the chief and the rural council (Section D (11))”, though this was never explicitly expressed (p. 21).

Despite this, conversion decisions were not necessarily in consultation with a rural council or with subjects. Further, customary leaders may have been ill-equipped to make such decisions, particularly when larger parcels of land were concerned: “There are no surveyors or other technical experts to help chiefs discharge their duties. Consequently, the decision is usually made arbitrarily without any clarity of such issues as the extent of the parcel of land approved” (Hansungule, 2001, p. 32). Upon approval from a customary leader, the District Council was “responsible, on behalf of the Commissioner of Lands, for processing applications, selecting suitable candidates, and making recommendations (Section 3)” (Roth & Smith, 1995, p. 21).³⁰ Further, through this circular, land could be issued to non-Zambians. Although it did not cap the amount of land that could be converted at one time, it recommended that conversion decisions concerning parcels of land larger than 250 hectares should be discussed by the relevant chief and Commissioner of Land before conversion is approved (Roth and Smith, 1995).

Concern here centres on the role of customary authority in conversion decisions, and it is twofold. On the one hand customary authority is granted essentially unilateral authority to convert land and the implications of this are permanent and irreversible. On

³⁰ See Appendix I for a diagram of the land conversion process.

the other hand, once conversion decisions have been made, customary authority has no say in matters. Yet once conversion is complete, the new leaseholders will undoubtedly affect those living on neighbouring customary land. Hansungule (2001) reminds that once land is converted, “the contract [is] be between the Commissioner of Lands (on behalf of the President) on one hand, and the lessee on the other. The chief is not a party” (p. 32). Thus, customary leaders’ are simultaneously powerful and vulnerable in this situation. The issue of land conversion will be discussed further in the following section, as the recommendations put forth in the 1985 Land Circular No.1 were formalised in statutory law with the 1995 Land Act. This remains the primary piece of land legislation in the contemporary era, but it governs only state land (Hansungule, 2001). However, before speaking to that, we must first address the transition to the third republic.

The start of the 1990s was met with a combination of global and national pressures that contributed to significant political and economic changes that saw Zambia turning away from socialism and embracing liberalisation. Burnell (1995) outlines three pressures as contributing to this change. First, the fall of the USSR was a monumental event with significant ramifications, influencing many countries in a similar direction. Second, frustrated by Zambia’s un-serviced debt load, international financial institutions pressured it toward liberalisation by tying additional loans to stipulated policy change. Third, the impact of national sentiment and organisation was imperative; for example, mass protests against the ruling party, UNIP, were organized in reaction to its political intolerance and failing economy, and provided critical momentum towards change. In October 1991 the liberal democratic ruling party, Movement for Multiparty Democracy (MMD), won 125 of 150 seats in the national assembly. This replaced Kenneth Kaunda’s presidency and initiated the Third Republic of Zambia. The MMD embraced their win and market reforms, making Zambia a liberalisation pacesetter of the region (Burnell, 1995).

4.3.1 *THE 1995 LAND ACT*

Despite the MMD’s landslide win in the election, Hansungule (2001) highlights that it was not ideology *per se* that brought them to power, rather voters were merely concerned with ousting UNIP:

The electorate did not engage the MMD to explain its position and justify its stance to adopt a radical change of the tenure system...Consequently, even though the MMD had preached a lot of things people would later find unacceptable, they still overwhelmingly voted for it (p. 4).

Thus when tenure reform was presented among other liberalisations, it was met with opposition from the populous. A poorly planned Mulungushi national land conference was held in 1993 to discuss the transitions to land markets, but several stakeholders were excluded (Moses Kaunda 1995). Notably, the vast majority of chiefs were not in attendance. Although opposition perspectives were shared by those in attendance, such as representatives from the University of Zambia, the Catholic Church, and some customary authorities, opposing views were largely under represented at this meeting (Hansungule, 2001). On the surface it appeared as if the conference results formed the basis of what became the 1995 Lands Act.³¹ However, a version of the bill was prepared and circulated at the conference, suggesting the intentions of the bill were well established prior to the conference. Of this, Hansungule (2001) argues:

This implied that the process of asking the stakeholders during the conference to reflect on the needs and priorities on land tenure, and to come up with proposals to change the system was a *fait accompli*. Government had already decided not only on change but on the content of that change, obviously with the IMF/World Bank positions in mind. The conference was just called to rubber-stamp the decision for the sake of legitimacy” (p. 6; emphasis in the original).

Contrary to the conference’s recommendations, the MMD finalized the 1994 Lands Bill without holding another conference for further consultation. It faced historic opposition when ministers around the country presented it, including the harassment of ministers and even the stoning of a minister’s vehicle in Western province (Moses Kaunda, 1995; Malilwe, Legal Professional). Based on the public’s outcry against this bill, the MMD was forced to withdraw it and President Chiluba promised extensive consultation before the next drafting. However, these consultations did not occur and the MMD pushed the bill through. Hansungule (2001) offers explanation of how this was done (p. 6), but for the sake of brevity, let it suffice to say that because the bill had been

³¹ The Land Act can be found at: <http://faolex.fao.org/docs/pdf/zam9900.pdf>

A simplified version of the Land Act can be found at: http://www.zla.org.zm/?page_id=1034

accepted by the House (and was withdrawn rather than rejected), and published publically in The Gazette prior to its withdrawal and within a 30 day timeframe, it was relatively easy for the MMD to make minor amendments and re-introduce it to the House in a manner seemingly like ‘back door’ dealings:

Before any consultation could take place, government, clearly acting under pressure from outside donors, decided to reintroduce the bill in the House after undertaking some minor amendments. For example, the word “consult”, in relation to the powers of chiefs over their land, was replaced with “approve”...intended to buy the chiefs into supporting the bill and withdrawing their opposition to it” (Hansungule, 2001, p. 6).

Further, to ensure parliamentary opposition was avoided

the President took the unusual step to convene a caucus of MMD Members of Parliament over the bill where he strictly ordered them to support and vote for it or quit. According to the Confidential Cabinet Memorandum prepared on the bill by the Attorney General, Cabinet Ministers unanimously approved the bill without any raising any comments on it, except for two ministers (Hansungule, 2001, p. 7).

In short, although seemingly sneaking the bill through in this manner was technically legal, it was neither democratic nor representative. Opposition was primarily based on suspicion of government’s intention behind the bill, and citizens argued that (1) conversion of customary land to statutory undermined chiefs’ authority, (2) unfettered alienation to foreigners could eventually lead to a minority of Zambian landholders, and (3) the removal of land ownership ceilings risked concentration of land to a few (Moses Kaunda, 1995). Contrary to this, Moses Kaunda (1995) argues that it actually increased chiefs’ power by explicitly requiring their permission in conversion, and that enabling leaseholds on customary land increases peoples’ capacity to land utilisation.

The significance of the 1995 Land Act is that it allowed for land markets, issuing of title deeds, permitted the sale of bare land (increasing potential for speculation), allowed for alienation to foreigners who are permanent residents or investors, and provided for conversion of customary land to statutory (Chileshe, 2005; Brown, 2005). Significantly, interviewees in this project noted that there is no mechanism by which to reverse converted land to being customary land again (Nyuma, Legal Professional; Gunduzani, Legal Professional). The 1995 Land Act was intended to replace the 1975 Land Conversion of Titles Act, and retains these elements from it: the vesting of all land

in the President, requires customary permission to convert land, limits leaseholds to less than 100 years, requires Presidential consent in land dealings, allows automatic renewal of leaseholds upon expiry, and prohibits unlawful settlement on vacant land (Moses Kaunda, 1995).

Contrary to the 1975 Act, the 1995 Land Act deregulated income earned from land as well as ceilings on ownership, permitted bare land to have market value by acknowledging the exchange of cash in land transactions, permitted land alienation to foreigners, and it merged the categories of Reserves and Trust land into the single category of Customary Land (Moses Kaunda, 1995). Further, the 1995 Land Act introduced the Land Development Fund to be used to open up new areas of development, and the Lands Tribunal to resolve land disputes on state land (Chileshe, 2005). However, neither received sufficient funding to work effectively, and have not had a significant role in land administration (Brown, 2005; Hansungule, Feeney, & Palmer, 1998).

Also new with the 1995 Land Act was the explicit recognition of customary landholdings, as well as the provision to convert customary landholdings to statutory leasehold. Moses Kaunda (1995) notes this was new in the sense of being recognized in statutory law, however it was recognizing “the de facto situation, as, in practice, most of the land in rural Zambia is held under customary tenure and people have been increasingly converting customary lands to leasehold tenure” (p. 90). In short, the 1995 Land Act was the lynchpin of private land markets in Zambia, broadening the divide between state and customary land. It remains the key piece of legislation guiding land administration in the contemporary era. Although it mainly addresses state land administration, it affects customary land administration by its omission of it.

4.4 CONTEMPORARY ERA: THE 1995 LAND ACT AND CUSTOMARY LAND ADMINISTRATION

Zambia’s model of Dual Land Administration persists in the contemporary era and is characterised by state and customary land administration systems. State land continues to be primarily administered according to the 1995 Land Act, which allocates landholdings via title deed and regulates land tenure by leaseholds of primarily 99 years. This form of tenure requires annual fees paid to the state, grants exclusive surface rights to the title deed holder, and is by all accounts private property, legally protected by state

legislation, and permits landholders to restrict access and sell ownership rights at market prices. Since the creation of the 1995 Land Act, state land is part of the market system, while customary land remains on the margins.

Beyond recognizing its existence and the fact that chiefs hold customary land in trust, the 1995 Land Act says little with regard to customary land administration procedures or regulations. However, the 1995 Land Act influences customary land in several ways, mainly by altering the ways in which land is conceptualised, and by creating a land market in which state land tenure is legally backed while customary land remains undocumented. Determined by local norms, customary land administration is highly contextualized and varies by tribe, chiefdom, and localized land pressures, such as mineral interests, proximity to urban centres or transport routes, and localized population pressure. Further, by its customary nature, land administration norms are not rigid, codified systems. Rather, the “principles” and “rules” of customary land tenure are often highly adaptive and in constant evolution, changing in response to cultural interactions, socio-economic change, political processes, and environmental and demographic shifts” (ZLDC, 2013, p. 4). Customary law is best conceptualised as a living law; it is not static and is continually influenced by ever-shifting social contexts (Ndulo, 2011; Hansungule, 2003). As a result, references to a dual system are misleading, because it groups all customary land administration systems into a single category when these are more aptly understood in a plural sense. However, there are enough commonalities among customary systems, relative to the state, to reference them as a whole for the sake of analysis—albeit with a consciousness of their nuanced nature (Ndulo, 2011).

Although not directly, the 1995 Land Act influences customary land tenure in at least five ways that pose significant challenge to customary land and the future of customary authority. First, the hierarchy between state and customary land was intensified because state land is protected by legislation, is largely seen as superior, and is accepted as collateral by lending institutions. In contrast, customary land remains unprotected by legislation, subject to *ad hoc* administration, and undocumented land allocations are unrecognized by lending institutions. Second, by ushering in a land market

in the mid 1990s, land values and demand for land have continually increased.³² Neither is inherently negative; however, only market value of state land is recognized. Officially, customary land is still not supposed to be sold. Consequently, for land to have market value it must first be converted to state land. Third, by acknowledging that chiefs hold land in trust but without a definition of what that means in a practical sense, the role of the chief is left open to interpretation. Fourth, by requiring solely the signature of the chief to convert customary land to statutory, the Land Act contributes to an environment that encourages non-transparent land transactions subject to corruption and alienation without consultation. Finally, the penchant to convert customary land in order to secure tenure via leasehold erodes customary territory and authority with every conversion, posing threat to the preservation of Zambian customary culture.

Although there are a number of policy frameworks and pieces of legislation that interact with 1995 Land Act and influence land administration,³³ the key policy framework that is most relevant to this work is the Draft Land Policy of 2006.³⁴ This has been in progress since 1993 and has undergone various rounds of consultation and revision and has largely remained the same since 2002 (ZLDC, 2013). It was initiated in the late 1990s in reaction to land disputes resulting from the 1995 Land Act. Zambia Land Alliance and Caritas Zambia were some of the first organizations to take on customary land rights advocacy, and both organisations have been instrumental in working with communities to educate and consult on land issues, as well as working in dispute settlement. In particular, ZLA has been a key player in liaising with government and civil society throughout the drafting process, and issued a civil society position paper in October 2007, in response to the 2006 Draft Land policy.³⁵

³² Without adequate records on land transactions and land conversions, this is certainly difficult to quantify, however, an increased demand for land is expressed by ZLDC's final 2013 report on customary land tenure security (based on the findings of a nation-wide research project). This was also expressed by the majority of respondents in this project, many with the caveat that demand for land is highly contextualised, varies across the country, and is most intense around urban centres and in regions with mineral prospects.

³³ See ZLDC, 2013, pages 16-33 for an overview of policy frameworks that affect/interact with the administration of customary land are as follows:

³⁴ To see the 2006 Draft Land Policy go to:

http://fsg.afre.msu.edu/zambia/resources/draft%20%20land%20policy_june%202007.pdf

³⁵ To see the 2007 ZLA Civil Society position paper go to:

http://www.fanrpan.org/documents/d00410/Zambia_draft_land_policy_Oct2007.pdf

ZLDC (2013) opines that the Draft Land Policy addresses the main land issues government should be dealing with, and that it provides “a reasonable foundation on which to built a robust regulatory framework of land administration in Zambia” (p. 16). In section 3.2.1 of the draft, the following land administration needs are acknowledged, among others: (1) the need for a national land policy to govern land tenure administration and land use management; (2) that some indigenous forms of tenure are inadequate for addressing various current demographic changes; (3) more people are aware of land rights and registration, but the current system is inadequate; (4) land delivery systems must be decentralised and procedures streamlined. Although this list is not comprehensive, these outline a few basic needs in terms of land administration that are relevant to this study. The Draft Land Policy is comprehensive in its explanation of land history and current challenges, and outlines possible policy approaches and their associated challenges.

In Section 3 of the Draft Land Policy, the following guiding principles are outlined, among others: (1) that land is a common heritage and national asset; (2) citizenship entails a right to land individually or collectively; (3) optimal land use among users is needed; (4) “The principle of encouraging fair and equitable access to land and secure tenure among all the people of Zambia irrespective of the abilities, race, beliefs, gender, and ethnicity”; (5) “The principle of participation, accountability and democratic decision making within communities and Government, the public and other development partners”; and finally (6) due process in land dispute resolution. Considering that Zambia’s current land administration system is built on a system structured to serve a colonial minority, these principles are a monumental shift from those that guide current land administration. Furthermore, such principles will require customary land rights be guided and backed by legislation.

Respondents of this project inform that enacting the policy has been put on hold until the Draft Constitution process is complete, because parts of the Draft Land Policy are dependent upon certain provisions hoped to be achieved in the new constitution (Luyando, NGO Professional; ZLA, 2007; ZLDC, 2013). After more than yearlong delay, the Draft Constitution was finally released to the public in October 2014 (Lusaka Times,

October 23, 2014). This is a significant step in the processes towards achieving a national land policy.

The rise of land interests combined with the absence of a national land policy puts the future of land in Zambia in a precarious situation, to the detriment of smallholder livelihoods: “People recognize the value of land [over the last ten years] and understandably want to get their hands on it both to forestall future land scarcity or as an investment. Meanwhile the government’s land policy has remained stagnant” (ZLDC, 2013, p. 16). The Draft Land Policy provides a foundation upon which to build progressive land administration legislation for both urban and rural land. However, it can only be utilised once it has been enacted, and this is contingent upon a referendum first being called to implement the new constitution.³⁶ In the absence of a finalized and enacted land policy, there is no national strategy to increase landholder tenure security, structure land-use planning, or to guide conversion decisions.

4.5 CONCLUSION

This chapter provides a foundation for understanding customary land administration in the contemporary era. It is particularly important to understand how the dual land model evolved, how the customary sphere has been continually (re)created according to changing political, economic and social contexts, and how such processes have influenced the roles of and relationships among the state, customary authority and rural landholders. This discussion demonstrates the historical influence on the customary sphere and its contribution to creating a context of legal pluralism, resulting in institutional overlaps, competition and, often, confusion (Tamanaha, 2007). Thus, the adoption of the dual land model at independence perpetuated the colonial model administering the most essential resource and failed to make land tenure secure for the rural majority.

This has important implications for the contemporary context, in which there is growing demand for land and tenure security to support investment, from basic investment at the household level to the commercial scale. By providing legal backing for state land (through state issued titles and leaseholds) while neglecting to secure

³⁶ As noted previously, the timeline for the constitution referendum has been unclear for several years; however, it is likely to be delayed even further since the 2014 death of Zambia’s President Michael Sata.

customary land in a similar manner, the former is seen as more secure in the contemporary era and is increasingly sought. Some of the strengths and challenges of customary land administration are considered in the following chapters.

CHAPTER 5: CUSTOMARY LAND ADMINISTRATION IN THE CONTEMPORARY ERA

Land is part of Zambian heritage, because everything else we shall ever do is on land. If we are going to reach higher heights, it is from the land. This land is our pride...The poor man survives because of the natural resources! The land we have today gives us our livelihood (Chief Butemwe)³⁷

5.1 INTRODUCTION

Building upon the historical discussion already undertaken, this chapter outlines customary structures in the contemporary era. This provides a foundation from which to understand customary land challenges as described by respondents of this project. An explanation of customary hierarchies is provided, with specific reference to Tonga structures in the Monze district. The roles of chiefs and headpersons within the customary structure are outlined, and the role of the paramount chief in Southern province is highlighted. Drawing on concepts of legal pluralism, the interaction among state and customary spheres is described as existing in a tension that is characterised as both complementary and competitive, at different instances. From there the discussion turns to explaining the manner in which landholdings are accessed in the customary context. This is followed by a description of the different types of customary land tenure, namely, individual, concurrent, and communal. Finally, clan land is described as a unique caveat within customary land, administered by clans rather than customary authority. This chapter provides a useful descriptive analysis of the customary context as a basis from which to grapple with contemporary challenges of customary land administration as expressed by respondents of this project.

5.2 CUSTOMARY STRUCTURES

All territory under customary authority is called a chiefdom or kingdom, and the highest authority is the chief, chieftainess, or king.³⁸ Chiefdoms are divided into multiple villages, each with a village headperson. Although chiefs hold land in trust on behalf of their subjects, authority to allocate land is largely delegated to village headpersons, who

³⁷ See Appendix J to read an extended quote by Chief Butemwe regarding the meaning of land as heritage.

³⁸ These names are used interchangeably but represent the same level of authority.

are more familiar with local history and land dealings. Chiefs and headpersons are appointed through a clan lineage, either patrilineal or matrilineal depending on tribe. Certain clans are specific to a chief or a headperson lineage (Headperson Mwaandu; Nyuma, Legal Professional; Chief Chabota; Mpimpa, Landholder; Mayaba, Landholder).

Each chief clan (often referred to as the royal line) is associated with an animal symbol representative of certain qualities or characteristics claimed by chiefs of that lineage (Chief Mweendalubi; Chief Butemwe). Tribal histories of how chiefs were originally chosen tend to be associated with a great battle or spiritual act, and are typically marked with a shrine located within the chiefdom. For example, Chief Mweendalubi explained that the original Chief Chona was a powerful man who could bring rain, treat smallpox, and conquer wars. According to legend, when enemies would invade, he transformed all the houses and trees to anthills, so that the enemy was forced to burn their spears for firewood, saving his people from conquer.³⁹

The reverence with which chiefs are held has deeply-rooted mystic connotation, bound up with notions of ultimate authority, and his/her power to understand and combat witchcraft. Of this, Twaambo (NGO Professional) explains how power is associated with Tonga chiefs:

There was no central power among the Tonga people...so...the elders of the clan were the clan leaders. They had what we may...call as prophets...the chiefdoms of the Southern province developed around these prophets. For example, Chief Monze was actually some kind of a prophet because of these extraordinary things. ...People wanted to take him as a slave ... but he would transform himself into something else and the slave traders would be lost to find him...so anything around Tonga spirituality was anchored around such people.

The spiritual power of chiefs persists today, but is primarily seen now as a balance to witchcraft in villages. Chief Kafwamba stated that his primary role as chief is dealing with matters of witchcraft. A more detailed explanation of witchcraft is beyond the parameters of this discussion, but is noted here because it highlights the chief-subject power matrix. For example, Mutinta, a Government Professional interviewee, opined that if one is going to oppose a chief, “you better have divine protection”. When authority is

³⁹ Another account of the first Chief Chona’s power indicates that, “...he used to go into his mystic abode and cause a very cold wind to blow...[causing enemies to burn] the handles of their spears and made fire to keep themselves warm” (Saha, 1994, p. 41). Regardless, he is credited with supernatural power.

associated with the divine, there are important implications for how abuses of power may be dealt with. Or rather, how they may not be dealt with. This is a powerful strand of social power that solidifies customary leaders' position to control access to resources and, conversely, entrenches subjects to the position of maintaining access by investing in a relationship with the chief, typically done by paying homage (Ribot & Peluso, 2003).

5.2.1 TONGA CHIEFDOM STRUCTURES IN THE MONZE DISTRICT

Tonga respondents of this project are primarily from the Monze district, but some are from the Kalomo district, both located in the Southern province. Participant descriptions of Tonga chiefdoms emphasize the influence of clan social structure as the primary mode of Tonga social organization. Traditionally, each clan ruled itself via a selected leader but did not have a chief, making Tonga society more decentralised than other tribes (Kabilika, 2012; Haamaundu, Landholder; Mutinta, Government Professional). Even today, it is said that Tonga chiefdom hierarchies are not as “strong” as other tribes. For example, Mutinta (Government Professional) explained that a Tonga chief in town can be “greeted by the hand”, indicating that they are more approachable than other chiefs. However, one must still follow formal procedures if greeting a chief at his/her palace.

In the contemporary era, there is one level above the chiefs called the Paramount Chief, who oversees all the chiefs in the Southern province. In short, the structure descends from Paramount Chief, to Chief, to Headperson. For example, Paramount Chief Monze administers 41 chiefs and chiefdoms in the Southern province. One of these chiefs, Chief Ufwenuka of Monze district, has 192 headpersons in his chiefdom (Chief Chabota; Chief Kafwamba). However, the level of Paramount Chief is a debated category of authority among the Tonga tribe, because one clan cannot be considered over another due to the autonomous nature of the clan structure. Thus, some consider the Paramount Chief to be only a figurehead worthy of respect but without substantial authority to affect dealings within another chiefdom (Chief Mweendalubi).

Interestingly, although it is widely understood that colonial leaders installed chiefs among the Tonga clan, Saha (1994) argues that according to local tradition a pre-colonial leader in the Monze district was widely respected and known as Chief Monze.

He rose to power by the initiative of the people, due to his divine attributes, which allowed him to “cause rain, cure all diseases, and frustrate tricks of the enemies by his communication with super natural beings” (p. 13). This account resonates with the previous discussion of customary authority’s association with divinity. When the Paramount Chief became part of Tonga customary structure is not of great significance to this study, however its contestation is noteworthy.⁴⁰

With colonialism came the creation of formal customary law and the adoption of indirect rule and the chief-model for all tribes (Kabilika, 2012; Chanock, 1989). As noted, the Tonga tribe did not traditionally have chiefs. Historically, though, specific clan lines have been identified as the ‘royal’ line. Thus, leaders are selected from such lines and successors are chosen from his/her descendants. Today selection of a chief is not solely based on lineage, but also upon the character and ability of a potential leader (Chief Kafwamba; Chief Mweendalubi). An individual’s level of education is also increasingly taken into consideration (Headperson Mwaandu; Chief Mwikisa).

Similar to the chief lineage structure, headperson clans have also historically been established based on social status and length of time certain families have lived in specific areas. With the formalisation of such hierarchies, certain individuals became the headperson of a given territory and descendants became the successors. Today clan members select headpersons after considering lineage rights, as well as the personal integrity of potential leaders (Headperson Mwaandu). Headpersons deal with the everyday administrative concerns of a village ranging from family challenges to land allocations and dispute settlement. If something cannot be resolved at the village level, then neighbouring headpersons may be brought in to consult, or the matter may be taken to the chief.

Chiefs also deal with a variety of administrative issues, but most personal concerns go to the level of the chief only when they cannot be resolved by the village headperson. Such matters may include land, marriage or inheritance disputes and all matters of witchcraft (Chief Kafwamba). Serious issues may also be brought to the Customary Court, which sits at regular intervals to rule on a variety of matters. The chief

⁴⁰ See Saha (1994) for an historical account of Tonga Chiefs in Monze District of Zambia.

may sit in on these hearings, or he/she may have an appointed council with authority to rule on court cases (Chief Butemwe).

Chiefdoms are further divided into administrative zones and specific headpersons are selected by the chief to be the Senior Headperson over a zone. Senior Headpersons oversee their own village, as well as assist other headpersons in their zone with various issues. They deal especially with conflict resolution amongst headpersons (Chief Butemwe; Chief Mwikisa).

Chiefs have a council of elders, which is often composed of Senior Headpersons, as well as other individuals a chief may select as his/her advisor or to sit on the council. A chief will meet regularly with his/her council, as well as with all the headpersons of the chiefdom a few times per year. At the village level, each headperson has a committee that he/she selects from amongst community members. Typically this is a combination of young and old members, but even if elderly members are not on the council they are often still consulted on matters of land, because of the longevity of their experience there. Headpersons also often select a vice-headperson to help run the affairs of the village, attend meetings, resolve quarrels, and *etcetera* (Headperson Mwaandu). Thus, the hierarchy descends as follows: Paramount Chief (over several Chiefdoms, with a council), Chief (over a chiefdom, with a council and customary court), Senior Headperson (over several headpersons in a given administrative zone within a chiefdom), and Headperson (over a village, with a council).

5.2.2 *LINKING THE CUSTOMARY TO LOCAL AND NATIONAL GOVERNMENT*

Building upon this explanation of customary structures, it is helpful to consider how the customary sphere connects to the larger state structure. Choona, a landholder interviewee, explained the important linkages from village, to local government, to state level in the Monze context, highlighting in a practical sense the bridge between customary and state spheres. Within Monze district there are: (a) 6 chiefs (each with many headpersons within their chiefdoms)⁴¹, and (b) 20 Ward councillors representing the various wards of Monze district, as established by the state. Ward councillors are elected from among and by the rural population to function as the official link between

⁴¹ Chief Monze, Chief Mwanza, Chief Chona, Chief Siamunsonde, Chief Choongo, & Chief Ufwenuka.

Customary Authority and the Local Government or District Council to raise awareness of chiefdom concerns to the government. Ward councillors work on a volunteer basis⁴² and are associated with a particular political party. From the District Council, matters go to the District Commissioner, who links to the Provincial and then National level (Choon, Landholder).

At the national level, the Ministry of Chiefs and Traditional Affairs was established in 2011 with a view to more formally integrate the customary sphere with the state. According to Cabinet Minister, Inonge Wina, the vision of the ministry is, “A Zambia that conserves heritage, preserves cultural diversity and delivers socio-economic and environmental transformation for people of our chiefdoms to achieve national development” (Wina, Daily Parliamentary Debates, December 6, 2011). Further, Wina described the ministry as seeking “to ensure proper administration and promotion of chiefs’ affairs, traditional governance systems, conservation and preservation of Zambia’s heritage, culture, and arts for sustainable development and national identity” (Wina, Daily Parliamentary Debates, December 6, 2011).

Respondents of this study saw the creation of this ministry as positive. Previously, chiefs met in the House of Chiefs to discuss and debate pressing matters affecting customary authority. However, this was a meeting forum that ran parallel to government ministries, and did not have authority to implement decisions through state channels. Chief Mwikisa described his understanding of what the new ministry means for customary leaders:

As traditional leaders we are excited about the creation of this ministry, because it is a mouthpiece for us as traditional leaders. We have a connection or a linkage through which matters related to traditional issues can be channelled through to government. Unlike the way it was before, we were more or less like general players. We have issues that are very much related to tradition, which cannot be handled by any of the [other] ministries, but this ministry has been created specifically for that. Within that ministry we have the House of Chiefs where the chiefs meet, and where we have issues coming from the chiefdoms. These chiefdoms will be brought to the House of Chiefs for the chiefs themselves to deliberate on and find solutions to those problems. [No state law covers such issues,] so it is only the chiefs themselves who know how issues relating to the customary are supposed to be handled.

⁴² However, there is compensation from the state to cover travel and food expenses for mandatory meetings.

[Previously] all matters were ending up in court and the presiding officer on such a matter, or a judge...has no written law on which [to] base his judgment! So in most cases, we have found judgments that have been passed [there] have left much to be desired.

As he indicates, the ministry fills a void, by providing space specifically within the government for customary leaders to meet and debate and it provides clear channels of access through which concerns can be brought to the government. As indicated, the House of Chiefs still exists, but is now established within the ministry. The effectiveness of this new forum is yet to be seen, but at the time of this study, respondents from all three categories welcomed the new forum as a practical and useful advancement for customary authority. In particular, a focus group participant optimistically described it as, “a good sign of the working arrangement between customary authority and government continuing in the future.”

In trying to understand how responsibilities are divided between the state and customary spheres, comments by focus group participants were particularly illuminating. Between these spheres the division can roughly be understood as follows: personal, family, or community matters are brought to the headperson or the chief (depending on the particular issue and its severity), but matters relating to the practical (or development) needs of the community, such as a bore hole, road, education, clinic, fertilizer distribution, and the like, are considered to be concerns of the state. Participants of the focus group described this division as justified because when people elect a government, they expect something in return. By this, he meant that the government is mandated to look after peoples’ practical needs, such as providing a village borehole. People cannot expect such things to be provided by the customary leaders, because this is not their role nor do customary leaders promise to give such things to people. In some cases though, customary leaders take village concerns regarding such needs to the government officials.

Beyond describing the provision of practical needs as being the government’s mandate, focus group participants described that it would not make sense to expect such community needs to be met by customary leaders, because they do not have such resources. It was highlighted that especially headpersons are at the same income level as the subjects, so it would be totally unreasonable to expect such things from them.

Participants of the focus group explained that they live in the same village as the headperson, so they cannot expect him to meet practical needs. One focus group participant offered the following example to expand on this point:

For example...[when the] government provides...[the fertilizer] subsidy to farmers even the village headpersons, we queue together to get fertilizer! They don't provide for us.

Beyond indicating that the headperson also receives such assistance from the government, focus group participants explained further that the relationship between the state and customary leaders is not just a simple division of responsibility. In reality the two must work together, because the customary leaders understand the specific needs of the community, and the government has a budget for meeting some of those needs. Thus, when it comes to something like distributing government-subsidized fertilizer, the customary leaders are needed to coordinate the logistical and communication concerns to make it happen. The chief and headperson are closest to the rural people, so they know the needs of villages, but they do not have a budget to meet practical needs.

When it comes to the issues of small-scale farmers...I think the two work as a team or they work, you know, hand in hand. When the government would want to provide the necessities to small-scale farmers, government will not just come on its own and start distributing. They will come back to the same people they will go to the village headperson. The village headperson will make some committees within the village [which] will actually work with government so that these inputs can come down to the people, so these are working hand in hand. (Focus Group Participant)

Thus, it is not one or the other; it is both. From these excerpts, it is clear that these landholders understood the relationship between government and customary leaders to be clearly divided and complementary to one another. Other respondents of this project echoed this sentiment as well.

One interviewee in particular described this relationship to be complementary, but qualified this by explaining that the state and customary spheres become more competitive during election years. He argued, that during such times politicians aim to win confidence from customary leaders who have influence over their subjects' votes. As he succinctly argued: "any politician who opposed customary authority could never win

an election” (Fanwell, Government Professional)⁴³. Further, he argued that political interference is a challenge for customary authority, because politicians try to sway them because of their influence over their subjects. Similarly, Chikwanda (Landholder) described chiefs as being more respected than government officials, because they can influence voters; Mayaba (Landholder) suggested that chiefs have some power over the government because of this influence.

An interesting point of consideration regarding the dynamic between state and customary sphere is that of chief subsidies. Chiefs receive a monthly subsidy (often referred to interchangeably as a salary) and a vehicle from the government to assist with transport and administrative costs of running the chiefdom (Chief Butemwe; Fanwell, Government Professional; Chief Kafwamba). The issue of government subsidies for chiefs raises questions of the extent to which customary authorities are accountable to the state. As Cheelo (Government Professional) noted, “The government has slowly gone into the chiefs using different avenues, salaries is one way that compromises the status of a chief because he or she becomes more responsible to the state than to people.” Interestingly, Luyando (NGO Professional), acknowledges this concern, but highlights the need for government to support the customary sphere as part of the overall system:

It is a bit controversial, because it makes chiefs to be more subject to the government. On the other hand, it is a small amount [of money], so perhaps it doesn't do that to a great extent. Further, government needs to support customary systems, so it is good to have some form of support.

Fanwell (Government Professional) explained firmly that chief subsidies should not be questioned because they are to cover administrative and transport costs associated with running chiefdoms. Further, he argued that, “Subjects should still support the chief with tokens. And [chiefs] should still engage in some business [or type of] income to support himself and his family.” The issue of subsidies is also a matter of contention among headpersons, but this is because they do not receive any state support for their role in

⁴³ Dynamics between customary authority and state officials are indeed complex and clientelism or neo-patrimonialism is oft cited as a challenge or weak aspect to African democracies. In this regard and with data specific to Zambia, Baldwin 2012, Baldwin 2008, and Young 2009 oppose the dominant view that chiefs can overtly influence voter decisions, however Baldwin (2012 & 2008) claims that the length of relationship between a chief and an MP is likely to influence votes for that MP because it is perceived that their congenial relationship will direct public goods to the chiefdom. Similarly, Young 2009 argues that a MPs visibility in a chiefdom/constituency has more sway over votes than does private/personal gift giving. In sum, both argue that customary leaders sway voters less than clientelism rhetoric often claims.

running villages (Chief Kafwamba). Headperson Mwaandu expressed that he fully supports subsidies for the chiefs, but argues that they should also be given to headpersons. He stressed that headpersons deal with many daily issues in villages, so financial support would be appreciated, especially for transport costs.

It is helpful to consider the relationship between the state and customary authority from the perspective of legal pluralism to recognise the ways in which state and customary spheres interact as being complex and semi-autonomous in nature (Moore, 1973). Their interaction cannot be considered in a duality, but rather must be understood as multifaceted, with various points of overlap and influence. In Zambia the state is dominant over all, but as described here, the state and customary leaders are like two sides of the same coin: they have different roles to play in meeting the needs of the populous, and they are intricately connected.

Similarly, these spheres cannot be understood as being either complementary or competitive; indeed, they will interact in each manner in different instances. Recall, that each sphere has internal authority structures that have complete autonomy over some matters, but each sphere will be simultaneously subject to external authorities in others matters (Moore, 1973). Thus the relationship is continually (re)negotiated to achieve a given outcome. The state and government may complement each other in meeting a practical need, for example, the distribution of fertilizer subsidies. However, it is equally reasonable that political interests may divide or sway customary leaders and/or their subjects. Further, while the concern that subsidies influence allegiance on the part of customary leaders is a valid, yet it is also totally reasonable for the state to be expected to support the administration of customary systems—because each system depends on the other. Lund (2006) argues that where governance is not solely in the realm of the state, each sphere vies for legitimacy in public authority by negotiating, forming alliances, and competing openly and subtly. This explanation is a useful description of interaction and mutual dependence that exists between the state and customary spheres.

One of the more complex aspects of the dynamic between these spheres is the way both institutions jockey for authority. Interestingly, traditional institutions tend to identify themselves as being separate from the state; yet, they have their legitimacy enhanced by adopting characteristics of the state. They may simultaneously employ

discursive justification for their legitimacy by utilising metaphors, analogies, and symbols that link to narratives of a unified past and naturalize their position in public authority (Lund, 2006). The Ministry of Chiefs and Traditional Affairs is perhaps the clearest example of this. Customary leaders are valued for their ability to understand the local concerns and deal with customary matters. However, without the ministry, customary leaders lacked a forum at the national level within which to advocate for their subjects and to advance their role as legitimate leaders, rather than being recognised as just “general players”. In this manner, customary leaders adopted modes, characteristics, and processes of the state in order to participate more fully in the state system.

5.3 ACCESS PROCEDURES AND CUSTOMARY LAND TENURE

5.3.1 ACCESSING CUSTOMARY LAND

In understanding customary structures it is helpful to understand how land is accessed from customary leaders, and the types of tenure rights ensured in land allocations. Perhaps the most obvious strength of customary land is the relative ease through which people may access it. Often cited by respondents is the right to hold customary land “by virtue of being *Zambian*”. In this manner, customary land is claimed as a birthright. With regards to specific strengths of customary land, eleven interviewees and the focus group participants described the fact that customary land is free for *Zambians* to access as the primary beneficiaries, because it “belongs to us”, as Tilabilenji (NGO Professional) poignantly declared.

As custodians of customary land, customary leaders are obligated to find land for anyone in need of it. Although it is usually easiest for community members to get a piece of land, it is also common for people to move to a new village and request land from a headperson upon arrival. Because migration is common, many chiefs require a transfer letter or a letter of introduction for the newcomer to present to the headperson upon arrival. The process for getting free customary land is quite simple, especially considering the market value of state land. Essentially, if one wants land they simply ask the headperson, who then identifies a piece of land, registers it in the community registry, and informs the chief of the allocation. There does not seem to be set way of determining how much land is given or for determining the quality of the soil on the land allocated. However, soil degradation was noted among respondents as a concern.

Customary land holds great significance to rural landholders because of its centrality to life and livelihood. Masiku (Government Professional) described customary land as being an essential social security system or safety net, because even if a person has nothing else, they can always access a piece of customary land. Similarly, six interviewees noted the benefit of customary land as being its importance to subsistence farming, which is an essential source of livelihood for many rural smallholders. Chief Butemwe emphasized land as being a source of survival for the poor, and highlighted its essential nature to rural life:

Land is part of Zambian heritage, because everything else we shall ever do is on land. If we are going to reach higher heights, it is from the land. This land is our pride...The poor man survives because of the natural resources! The land we have today gives us our livelihood.

Given the centrality of land to rural life and livelihood, customary land administration is of critical importance to landholders.

Having outlined customary structures and how they interact with the state, as well as describing processes for accessing customary land, it is now necessary to describe the types of customary land tenure recognized in the contemporary era.

5.3.2 *INDIVIDUAL, CONCURRENT AND COMMUNAL LAND TENURE*

There are three types of land tenure recognized on customary land in the contemporary era. The first is individual land rights. This applies to the homestead piece of land, where one builds a house and constructs things such as an outdoor cooking area, maize storage bins, gardens, and perhaps some small pens for chickens, goats, cattle, *etcetera*. In such territory, it is recognized that an individual holds this piece of land and has exclusive rights to it. Although people are free to fence this area, it is not common to fence more than the garden because of cost. Further, concerns of trespassing are not commonly endorsed as is typical in western understandings of property. For example, people passing through one's land to access water, forest, road, *etcetera* is acceptable; however, negligent animal-care that results in damaged crops or gardens is frowned upon and a fee for damages is usually negotiated (Mulolwa, 2002).

The second type of tenure is known as concurrent rights, and this applies to the fields where crops are planted. This means that an individual will hold a given piece of

land for planting, but others still have the right to use that field at a certain time of year for some purpose. For example, on this type of land, everyone will know that a certain field belongs to an individual and will take extra caution to ensure their animals do not destroy crops during growing season. However, upon completion of harvest, it is understood that others may freely pass through the fields and graze their cattle on the chaff and grain left behind. Further, the cattle will contribute manure to the field, so it is a mutually beneficial arrangement. The field still belongs to the one who plants there (and has more rights to it than others), but the property rights pertaining to it are concurrent (Mulolwa, 2002).

In contrast, the third type of tenure is known as communal rights, in which no community member has more rights to it than another. Such land is open to every person in the community: animals may be grazed, fruits, herbs and timber gathered, fish caught, and water collected without limit in communal areas. This is so unless specifically limited in the interest of conservation, as determined by the chief. The only way that access can be restricted is upon direction from the headperson or chief, which may be done in an effort to conserve or preserve some resource if it is under threat. Fences are forbidden on such grounds because it does not belong to any one person (Mulolwa, 2002).

5.3.3 CLAN LAND: KATONGO LAND IN THE TONGA CONTEXT

Clan land was emphasized among Tonga respondents as an important land category because of its significance to conceptualisations of home, heritage and identity. Even those who were professionals living in town associated clan land with a sense of belonging or home. It is perhaps especially noted among Tonga respondents, because of their history as an acephalous (decentralised) society that does not have a head, and is primarily organized by clans (Gunduzani, Legal Professional). Family land or clan land is held by a group of extended family members who trace their common lineage according to matrilineal kinship patterns. The clan decides how land is to be allocated amongst its members, or they can organize to convert it into a trust (a form of state-recognized collective ownership) or into title deed. Therefore, alienation of clan land is extremely uncommon because of its association with identity and heritage.

Amongst interviewees of this project, however, Nsabata (NGO Professional) (along with extended family members) was converting his clan land into a trust, formally recognized as such by the state. This was believed to increase tenure security by formalising the clan's rights to the land and ensuring the clan's legal authority over it for future generations. This was admittedly an unusual step. However, Nsabata works in the area of land rights and felt that this was important to ensuring their clan land was collectively held and administered in the future. This was a proactive move in response to rising land values and growing land interest on a national scale. There was not a specific threat to this parcel of land at the local level. However, given his experience and awareness of land issues in the country, Nsabata took this initiative in order to preserve and protect the clan's land rights.

The Tonga concept of *Katongo* is central to understanding the profound sense of belonging associated with clan land. Although there would certainly be some tribal differences in how clan land is administered or how it is traced via lineage, the concept of belonging to clan land is applicable to other tribal contexts (Colson, 1967). *Katongo* essentially means, "His grandfather stayed there" (Miyanda, NGO Professional), or it is used to refer to "the land that has been abandoned but still belongs to the first person that was there" (Twaambo, NGO Professional). The term *Sikatongo* is the Tonga term that refers to the first person to settle at a particular place:

...*Sikatongo* is the original person who settled ... at a place, so he assumes authority over ... whatever land is there in that particular area. Not the chief, but this *Sikatongo*. So then it moves from there. That's why in most parts of Zambia actually you can go and if you ask about this concept you can confirm it. If a person settles around that area and he has lived there ... for a long time and then later they shift to another place they will still hold that as their land. *Katongo* means the land that has been abandoned but it still belongs to the first person that was there. (Twaambo, NGO Professional).

Miyanda (NGO Professional) offered the explanation that, for example, the grandfather or *Sikatongo* started out staying at 'Point A' and then shifted (moved) to 'Point C', but he left mango and guava trees at Point A as a sign to others that somebody has settled here before. So the offspring, the *Sikatongo*'s children, grandchildren, great-grandchildren and so on will claim *Katongo* land at both Points A and C where the grandfather had stayed,

and nobody can take it from them. They will continue to divide it among their offspring as the generations continue. Similarly, Mvunga (1980) and White (1959) also indicate the existence of what they call lineage land among the Lungu and Luvale people. In short, it is described as a parcel of land held by a kin group: “Relatives (whether paternal or maternal) who can trace common descent through genealogies do claim collective rights in land under the occupation of one of them (White 1959). It is important that such land remains within the clan (Mvunga, 1980). Clan land rights are granted to an individual member of the family and are ended by death or abandonment of the land; subsequently, another family member would claim it.

Eugene Kabilika (2012) offers an interesting explanation of how this unique caveat of clan land came to exist within customary territory:

During the pre-colonial period, the power to control and administer land for human settlement and use lay on the first person who settled on an area... These first persons are regarded as the real owners of the land and any alienations and allocations had to be approved by these people or their descendants. What has happened over time is that these original owners have now become the headpersons and in some instances the Chiefs as the colonialists actually installed Chiefs where they didn't exist. Headpersons and Chiefs are supposed to be chosen from clans, they don't appoint themselves. In fact they are answerable to the clans for any key decisions that they make over land. Any headperson or Chief that fails to consult the clan is a dictator and can have serious problems in his/her reign. However, due to colonial interference and now political interference more power has gone to the Chiefs as individuals at the expense of their clan and the people they lead. That is why they are now directly involved in land transactions, a duty they rarely performed in the pre-colonial period (p. 6).

Thus the Tonga clan land system was adapted to fit within the imposed colonial system and has resulted in an additional type of landholding within the customary sphere. In writing of the Gwembe Tongas, Colson (1967) indicates that as more land was opened, earlier land settlers (not colonial settlers)⁴⁴ gained more social power and retained more rights over the wider region than later settlers to the region. For example, they may have claimed a portion of all game meat hunted in the area. As new villages were established, some early settlers amassed enough social power to be chosen as headpersons. Thus, the

⁴⁴ The term ‘settlers’ is not used here in the colonial sense, rather it is used to describe a person arriving to an area to “open up” a new piece of land and “settle” it.

length of time an individual or family had been living in a given area was a factor in negotiating new social positions. As the colonial authority installed chiefs and headpersons, this was a key influence in selection decisions.

In the contemporary era, there remains an interesting provision for clan land within chiefdoms that in a sense operates parallel to headpersons' administration of land. Although this land is technically a part of customary territory (and therefore part of a chiefdom), it is considered more under the control of certain families or clans. To an outsider, there is no obvious difference, and each type of land is intermingled with the other. However, the demarcations of 'chief's land' and 'clan land' are known by community members, and the norms concerning each are clear: families allocate and administer clan land and the chief and headperson allocates the rest of customary land. These two are not in competition or in opposition to one another. People on clan land still respect and pay homage to the headperson and chief of their particular area, and they remain subject to customary leaders in every other way. The only difference is that chiefs and headpersons do not allocate clan lands.⁴⁵ In fact, in order to produce enough food, many people hold land from the headperson as well as clan land, indicating fluidity between them.

In short, the administration and use of clan land is at the discretion of each clan, and a chief's territory is administered by village headpersons. Semi-autonomous social spheres are conceptually useful here in understanding the interplay between these spheres: chiefs have authority over the territory, but administration of clan land is deferred to specific clans of early settlers (Moore, 1973). This is conceptualised here as another layer of plurality, or another layer of semi-autonomous social fields. So far this analysis has mainly considered the dynamic of such interaction between the state and customary spheres. Here the concept of clan land is understood as a clan sphere within the customary sphere—each with internal authority in some instances, but subject to external authority in other instances. Respondents did not express the negotiation of this dynamic as a challenge; rather, it was described as a natural part of the cultural context.

⁴⁵ Interestingly, if clan land was to be alienated through conversion to state land it would still require the signature of the chief to indicate approval, as per the Land Act. This is an example of disjuncture between state and customary spheres where the state requirements do not align with customary norms.

Considering this adaptation of earlier clan structures to the colonial installation of the chief model points to the two-directional influence between customary authority and colonial land administration. This two-directional influence includes the simultaneity of colonial restructuring of customary norms to accommodate the colonial model of indirect rule, and the tenacity of customary norms to withstand this restructuring through adapting their clan land model to accommodate the installation chiefs and headpersons (Boone, 2013). It is evolutions such as this, which remind us why Zambia's dual land system is better understood as one of plurality. Indeed, the customary sphere is nuanced and complex at the local level, but even more so when one considers the interaction of other spheres within it, such as clan land. The overlapping nature of these modes of land administration highlights the embedded nature of land administration within social structures, making them multidimensional and complex (Ribot & Peluso, 2003; Meinzen-Dick & Pradhan, 2001).

5.4 CONCLUSION

The previous description of customary structures as they relate to land administration is necessary for understanding the context, structure, and processes of customary land administration. This chapter outlines the organization of chiefdoms from chiefs to headpersons, and considers the responsibilities of each. Further, these organisational elements are discussed with specific reference to the customary context of the Monze district. Significantly, the interaction of state and customary spheres is analysed, and characterised by the dynamic of being both complementary and in competition in differing instances. Rather than being in opposition to one another, this interaction is summarized as being two-sides of the same coin.

Clearly, customary land is deeply valued by respondents of this project for the freedom it offers rural people in terms of its ease of access and lack of monetary fees for landholdings. Customary land is associated with heritage and identity, and respondents expressed the right to hold land as a birthright. Clan land tenure is highlighted as a unique type of land holding that has been adapted through colonialism and persists in the contemporary era. This discussion of customary structures provides a foundation from which to analyse the challenges of customary land administration in the contemporary era and its influence on tenure security, as will be addressed in the next chapter.

CHAPTER 6: CONTEMPORARY CHALLENGES: DISPUTES, ACCESSIBILITY, AND INSECURITY

When one sits on colonial land he can inherit.⁴⁶ ...He can own more hectareage than the traditional farmer...on customary land we are only given small portions of land, where you have no power...So with title deeds...you become free to do everything. (Milimo, Landholder)

6.1 INTRODUCTION

This chapter builds on the descriptive analysis of customary land administration structures in the contemporary era. This, in conjunction with the theoretical approach of legal pluralism, helps describe the roles of and relationships among the state, customary authority, and rural landholders. The following discussion is essential to addressing the research question, which seeks to analyse tenure security of customary landholders. The data referred to throughout is largely from Tonga respondents in the Monze region of Southern province. Analysis draws on perspectives from all three participant categories: professional, customary authority and landholder.

The previous description of customary structures as they relate to land administration is useful in understanding the context and how land administration ought to operate. However, it tells little about what such structures actually deliver and their influence on rural landholders. It is clear that customary land is deeply valued for the freedom it offers rural landholders in terms of its seeming ease of access, no monetary fees, and often a connection to one's past through clan land or families' longevity in a community. However, customary land administration is also fraught with challenges, and respondents of this project highlight the frequencies of land disputes, especially caused by ambiguous land boundaries or settling on land without knowing its status as state or customary territory. Further, respondents raised concern about the accessibility or availability of land due to increased demand for it. Finally, customary tenure is largely described as insecure due to the threat of being chased or pushed off land by a customary authority, alienation of land, and lack of documentation to support and protect land allocations—of course, the latter underpins both the former causes of insecurity. This chapter will address these concerns.

⁴⁶ This interviewee refers to state land as colonial land.

6.2 LAND DISPUTES

Although the process for accessing land is fairly straight forward, land disputes were simultaneously noted among participants as a common and serious problem.⁴⁷ This was apparent at the Monze District Land Alliance office by the steady stream of people I witnessed arriving with grievances for which to seek advice in November 2012, by the proceedings witnessed at the October 2012 Zambia Land Alliance national conference, and by the proliferation of Non-Government Organizations (NGOs) dealing with land rights and disputes in Zambia.⁴⁸ Additionally, national newspapers regularly feature instances of land disputes and customary land alienation associated with a plethora of causes on both state and customary land.⁴⁹

Due to the increased number of conversion disputes at the national level in December 2013, the government issued a temporary ban on selling customary land. This decree was issued despite the fact that “officially” customary land is not supposed to be sold. This highlights the unspoken yet commonly known fact: customary land is sold. So, respondents highlighting land disputes as a common problem at the local level was not a surprise and indicates that easy access to land does not necessitate clear land allocations or ensure land rights. Woolcock and Sage (2012) argue that despite customary administration being accessible, socially legitimate, and well understood by rural landholders, it can simultaneously be subject to challenges, such as land distribution inequity and the neglect of due process in resolving land claims.

The most common cause of land disputes, cited by sixteen interviewees and focus group participants, is unclear or ill-defined land boundaries, which contribute to encroachment and multiple claims to a single piece of land over time. Focus group

⁴⁷ The number of disputes is difficult to quantify. While there are well known national cases, for which data available, many disputes occur at the local level. It is noteworthy that at the national land conference, organised by Zambia Land Alliance, one of the first items on the agenda was a cultural drama performance that depicted local land disputes in a village over boundary encroachment, inheritance, and allocation with out consultation (Benecho Arts and Culture presentation, 29 October, 2012).

⁴⁸ Unfortunately, of the organizations I consulted, none had comprehensive records or data indicating the frequency or causes of disputes in which they had been involved.

⁴⁹ For a sampling of articles in national newspapers, please see the following. (Full reference and URL is provided in reference section.) “Sata said to be”, 2013; “Arrest land ‘thieves’”, 2010; “Scam on illegal”, 2008; Mfula, W. 2014, January 10 & 2014, January 10; Zulu, I. 2014; Lumba, H. 2014; Phiri, J. 2014; Kabanda and Chibawah, 2013; Sinyangwe, H. and Lisulo, S. 2013; Lisulo, S. 2013; Ng’uni, C. 2013; Chisala C. 2013; Claver, M. 2013; Nkonde, F. 2013; Chanda, E. 2013; Kuwema, M. 2013; Mbulo, E. 2013; Sichone III, O. 2013; Sinyangwe, H. 2013, May 1 & 2013, May 3, Mwale, E. 2013. (This is not a comprehensive list.)

participants offered the explanation that without clear beacons indicating land boundaries, neighbours frequently creep over the line a little at a time, until they have been planting an ever-larger portion of one's land for several years and eventually claim it as their own.

Long time ago the old farmers were in the villages they could put a mound...to indicate this is where this one ends and no one could cross that mound...But once we have started disturbing those things now these days...So [there are] no proper boundaries now.
(Focus Group Participant)

Similarly, historical land claims are made when descendants of previous community members return to claim a piece of family land. They can be unpleasantly surprised to discover that the land they thought was theirs has since been allocated to another family or indeed, multiple families. A focus group participant describes an example of this:

For example, once I grow up I go in town to work...when I come back I will go back to... where my father used to be, where I used to live with my father. But [since] I left there were other people who came in. I don't even know how they came in; I don't know how they were given...so I don't know! And this has caused a lot of problems and disputes.

Indeed, in the case of long-term absenteeism, a headperson or chief is legitimately allowed to redistribute idle land so that it is put use. However, the confusion comes when descendants of the previous landholders return, because boundaries and allocation records are imprecise.

There may also be multiple claims to land by two chiefdoms because of unclear or contested chiefdom borders. In some instances, this can result in two headpersons allocating a single plot of land to different individuals. Confusion on the chiefdom boundaries dates back to colonial rezoning of chiefdoms; Mayaba (Landholder) explained that even in 2012 he knew of a case where two chiefs were claiming the same piece of land to be part of their chiefdom. Further, several interviewees offered examples of large-scale land alienations to investors that resulted in land disputes, but what was more common to the Southern province was village level-tenure insecurity. In particular, respondents highlighted the example of a large-scale alienation near the Kafue flats in which a chief alienated "pastoralists' cattle grazing land...to a corporate investor, and

people were fenced out of it” (Malilwe, Legal Professional). Further, a certain chieftainness was noted by Takondwa (NGO Professional) as alienating so much customary land that her “subjects have migrated [away from the chiefdom] or are crammed on small land, so food insecurity is a big problem now.” In sum, Takondwa described the influence to convert customary land as being driven by both foreign and national investors.

An example from Macha, in Choma District of Southern province, illustrates the complexity of disputes when unclear land status, undocumented land allocations, and investment interests coalesce over a particular spatial area. As described below, investment interests displaced a settlement of people living on land that was technically titled land, but it had been administered as customary land for several decades. In this case, the land dispute was not caused by boundary issues, but rather by people living on land without knowing the land status and having undocumented land allocations. Thus, a historical land allocation may be known widely but without supporting legal documentation, title trumps all. Even colonial land titles can have an effect on current land disputes if subsequent land allocations are not supported by legal title. As land value and investment interest increases nationally, some people face eviction due to insecure tenure.⁵⁰

The MDLA was involved in resolving this rather extreme case in which a dispute between the Brethren in Christ Church (BICC) in Macha (Choma district of Southern province) and a local community resulted in the forceful eviction of 3,000 people. This eviction eventually included the burning of homes in 2011. In 1906 the BICC was given a large piece of titled land in Macha from the colonial government. Several years later some of this land was given as payment to BICC Zambian preachers upon their retirement, but titles were never issued. Overtime, those retirees’ families grew, others have moved in, villages have been established, and Chiefs Macha and Mapanga have divided the area as part of their respective chiefdoms (Miyanda, NGO Professional; also see Hatimbula, E., n.d.). By 2009, 4 villages had been established totalling 222 families

⁵⁰ For further examples on land pressure from commercialisation see the following: *The Oakland Institute* issued a report on land deals in Zambia (December 2011); BBC News, Zambia land alienation. (2011, October 25). *Is industrial farming good or bad for Africa?* [Video file]; BBC World Service interview by Justin Rowlatt with Chayton CEO on March 23, 2012.

with homes on the property, and 37 more families cultivated fields and raised livestock there (Milimo, Kalyalya, Machina, and Hamweene, 2011).

In 2005, the BICC signed over 200 hectares of their land under a 35-year contract with an agricultural investor, PrivaServe. Subsequently, the 3,000 people who had been living there for between 10 and 80 years were told to get off the land by the 2009/10 agricultural season, because they did not have supporting documentation to be on that land. The community fought to keep their land, with the help of ZLA and MDLA. However, orders from the High Court in Lusaka permitted the eviction of these squatters because the BICC still held the title. Then, fire forced many from their homes in 2011; who set the fires is not clear. These evicted residents have subsequently struggled to find alternative land upon which to settle and are more vulnerable to food insecurity (Canadian Catholic Organization for Development and Peace, [video file], February 14, 2012; Miyanda, NGO Professional, was also a personal witness to the fires). At the time of the fieldwork for this project, the community was organizing to take the matter back to court. This highlights the power of legal documentation in securing land rights in a context where people stay for many years without knowing the status of the land they are on. Further, it highlights the pressure of growing land interests in Zambia and its threat to those without documentation to support land tenure.

6.3 AVAILABILITY OF CUSTOMARY LAND

Another concern raised by respondents was the availability of customary land. Twelve interviewees and focus group participants indicated that although customary land is generally available, some places face land constraints. Most of these individuals simultaneously note that even if land is available, tenure security may not be ensured. For example, two interviewees noted that accessibility is dependent upon the benevolence of a particular leader; four interviewees raised concerns of scarcity with regards to growing population, resulting in smaller plots, increased renting (and therefore lost profits), and lack of availability, especially in areas near town. Two interviewees were specifically concerned with alienation by selling customary land.

Officially, customary land cannot be sold, though as highlighted above it clearly is. A fact that even the state recognizes. As Namukolo (Government Professional) explained, it is a problem that cannot be traced because there is no evidence. If somebody

wants a large piece of land to farm as customary land or to convert to title, they pass a “brown envelope” to a customary leader, and he/she agrees to reallocate the land to that person or to alienate the land by signing his/her endorsement to convert the land. If it goes the conversion route, then the process goes to the District Council to convert the land through state channels. At this point sale price is not asked, because it is not supposed to be sold (Namukolo, Government Professional). In a similar manner, customary land conversions are seemingly unspoken and untraceable, thus highlighting the urgent need for a land audit. Rather than the oft cited statistic of 94% customary and 6% statutory, two interviewees cited that division is likely closer to 60% customary and 40% state, which would indicate a significant decline in customary territory and speak to the actual availability of land (Cheelo, Government Professional; Chief Butemwe).

There are notable weaknesses in the current mode of *ad hoc* allocation of customary land. For instance, three interviewees working for the government in the areas of Forestry, Agriculture, and Lands offered the assessments that a lack of land use planning has multiple consequences. For example, people may plant on soils that are not adequate for agriculture, and pressure may be put on other natural resources such as forests or water due to concentrated settlement patterns. Additionally, planning of infrastructure, such as transportation routes, is extremely difficult and virtually non-existent in rural areas (Cheelo; Namukolo; Mutinta). Some areas, especially around towns,⁵¹ face higher population densities, and so there may not be enough available land to allocate for all requests, or people may be given an inadequate amount of land to support subsistence farming.

Of course, notions of land availability are highly subjective and interconnected with one’s position within social institutions. Jayne *et al.* (2009) reveal useful insight regarding perceptions of unallocated land being available as being positively correlated with (a) owning other productive assets, (b) kinship to headperson, and (c) proximity to roadways and transportation routes, and negatively correlated with (d) female-household-headedness, (e) distance to town and markets, and (f) length of time family had been settled in a particular area. This highlights a key factor related to land access: despite the ease with which one can theoretically access land, the quality and quantity of land given

⁵¹ See Appendix B for a map of Zambia’s Land Pressures.

is likely to be relative to many variables, including socio-economic status, position within the headperson clan structure, location, gender, transport routes, and longevity in the community.

Throughout the course of fieldwork, respondents highlighted land scarcity as an increasing concern. As noted in Chapter 1, access to national statistics on landholdings is not available; a national land audit is currently underway, but results are not yet available. If scarcity is indeed the case, competition for land is likely to be further influenced by such variables indicating that the socially/economically marginalized or vulnerable will face greater obstacles in securing land. To this end, Jayne *et al.* (2009) highlight land distribution as integral to mitigating rural poverty and argue the need for “investment in strategic public goods and services [such as investment in infrastructure] to raise the economic value of land in the customary tenure areas and promote agricultural investment by smallholder farmers within these areas” (Jayne, *et al.* 2009, p. 5).

This is important to the discussion of customary land administration, because as accessing land becomes more difficult, chiefs face greater pressure to convert customary land to state land. Although leaseholds are seen as more secure, they are often too expensive for the rural majority. While a more thorough examination of land conversion is beyond the scope of this study, it is worth noting that thirteen interviewees indicated that conversion is increasing. Such land pressure creates a vicious cycle, because (1) as land value increases and tenure security is sought, more customary land is alienated through conversion or through local land concentration, and (2) the more land that is alienated or concentrated makes rural landholders lose confidence in customary authority to secure land tenure. These conditions increase incentive to convert and title land.

6.4 TENURE INSECURITY: CHASING, ALIENATION, AND LACK OF DOCUMENTATION

With regard to tenure security on customary land, respondents of this study largely describe customary land as being insecure: twenty-five interviewees indicated customary land is not secure, compared to four who indicated it is secure.⁵² Others said security is dependent upon various factors, such as: (1) a particular leaders’ benevolence,

⁵² Further, the focus group participants generally agreed that land tenure is insecure, but were divided on how to improve tenure security.

as consultation is not required for land decisions, and checks on authority are not always present, permitting opportunity for abuse; (2) the integrity of the landholder and the intensity of demand for land (which contributes to increased tendencies to sell or temptation for bribery); (3) external forces, such as speculation, corruption, investors and government pressure; and finally, (4) as a customary leader fully acknowledged, tenure security can ultimately depend on one's ability to live well with neighbours, the headperson and the chief. If harmony is not possible one can simply be chased away by a headperson or chief. Regarding the ability to chase people away from the village, Headperson Mwaandu explained that although this is a very uncommon in practice in his village, it is actually a benefit of the customary system, because the headperson can help bring peace if neighbours are quarrelling or an individual is somehow disrupting the community. Hanging trust in a land system on such contingencies is certainly a risk, particularly if one's livelihood is at stake. However, Masiku (Government Professional) pointed out that tenure insecurity is not peculiar to customary systems. Rather, it is present whenever there is a discrepancy between how systems and rules ought to operate, and how they are actually enforced. The point being that customary systems are not inherently insecure, but they are not always applied in an impartial manner. According to participant responses in this study, the most telling insights to tenure security are in regards to chasing, alienation, and lack of title. Significant concern was raised with regard the gendered nature of inheritance disputes. The ways in which widows can face tenure insecurity upon a husbands' death will be addressed at end of this section.

6.4.1 THREAT OF BEING CHASED FROM LAND BY CUSTOMARY LEADER

Although none of the individuals involved in this research revealed chasing to be an issue they personally experienced, it is noted as being a primary contributor to tenure insecurity by fourteen interviewees and some focus group participants. By this, they mean even the possibility that a headperson or chief could chase you from your land at any time, for any reason. This is an example of how social structures influence subordinate actors to maintain resource access by bolstering their position relative to the dominant actor. Even just the threat of potentially being chased by a customary authority is enough to make subjects act in a manner that minimizes this risk, and reinforces their

subordinate social position (Ribot & Peluso, 2003). The contribution of this to insecurity is obvious: if a real threat of being pushed or chased exists, one will be much less motivated to invest in a proper house or farm/land improvements.⁵³ Indeed, three interviewees indicated that building a “proper house” on customary land is risky, because if the headperson gets jealous he/she may chase you out and take the house.⁵⁴

The semi-autonomous social field model lends insight to this, in that within customary territory it is seemingly acceptable (or at least is commonly accepted) for a customary leader to abuse his/her position of authority by pushing or chasing. As chiefs were given more power over land, first at colonialism and reinforced through independence, customary structures of the chiefs’ accountability to village councils has been eroded (Kabilika, 2012). A legal professional interviewee, Nyuma, describes that today chiefs do not always listen to their council, and so within the customary sphere checks on the chief’s power are not necessarily there. Because of this lack of accountability, and because customary laws are unwritten, she suggested something like a constitution is needed to strengthen customary authority structures. This potential lack of accountability reinforces subjects’ need to maintain access to resources by bolstering their relationship with chiefs, who have control access to land. Thus, if a chief is not accountable to a council and abuse occurs, the abuse may not be challenged as a means to preserve one’s position relative to the authority figure (Ribot & Peluso, 2003).

Recall that state law does not back customary landholdings, and customary land administration is the jurisdiction of customary leaders. Thus, even though rural landholders are citizens of the state of Zambia, with a constitutional right to property,⁵⁵ the particular property essential to rural life and livelihood is under an authority that is not required to be accountable or to deal justly. However, several interviewees confirmed that if an individual desired and had the means to, a person could sue the chief in a court of law if wrongfully pushed from land. Despite this, fifteen interviewees confirmed that

⁵³ Interestingly, a focus group participant cited *chasing* as a concern on clan land too, because of jealousy and witchcraft fears. Referring to personal experiences, he explained that if you become too successful, relatives may want the land you are using and if you refuse can even threaten witchcraft. Thus, he considered his land from the headperson to be more secure than clan land.

⁵⁴ Of course, in many areas, rural clinics, schools and other such public goods are built on customary land and are considered secure. However, these benefit the community, and are considered different than building a “proper” family house on customary land.

⁵⁵ Note the constitution does not entail a right to land.

this is not common due to a lack of financial means, limited knowledge of such systems, as well as the high esteem with which customary leaders are held, even holding them in association with the divine. On the one hand, customary leaders are seemingly untouchable, on the other they can technically be sued in the court of law to be held to account.

Understanding such ambiguity as part of the semi-autonomous nature of overlapping institutions is an aspect of the reality of legal pluralism (Moore, 1973). At such points of overlap, multiplicity of rules and/or authority creates confusion. Drawing on this discussion of suing a chief over a land dispute is a prime example. Despite the fact that chiefs are in charge of customary land administration, subjects can technically take legal action against him/her—thus, drawing on state institutions and upon their civil rights to combat a dispute in the customary realm, regarding a resource over which customary leaders have authority. Indeed the rules here seem ambiguous, but it highlights the need for actors within a context of legal pluralism to draw on their rights and/or social identity in various spheres (Ribot & Peluso, 2003; Berry, 1993 and 1988).

6.4.2 *LAND ALIENATION*

Another factor contributing to tenure security is land alienation. Eleven interviewees highlighted alienation of land, to local elite or its permanent conversion to statutory land, as a challenge to customary tenure security. Among these, four highlight minerals, as a cause of alienation. This is dependent upon particular locations and is especially a concern in the Northwestern and Copperbelt provinces. Three interviewees indicated customary leaders' temptation to accept bribes and "selling" land as a factor contributing to insecurity. Two interviewees highlighted inadequate compensation for displacement was common, so that when alienation occurs and people must move they are often made more vulnerable. Another two interviewees commented that despite the requirement to consult with landholders before alienation and displacement, this consultation was not guaranteed. Large-scale alienations may be in the interest of things such as minerals, agriculture, biofuels, manufacturing, and tourism investment.⁵⁶

⁵⁶ German & Schoneveld (2012) provide a useful analysis of Zambia's investment policy framework, specifically in regards to biofuel investment.

Although this type of alienation is less common in Monze district, other examples of large-scale alienations or disputes exist in the Southern province, most notably the massive displacement of Gwembe Tongas in the 1950s for the building of Kariba Dam. This alienation is an exceptional instance of displacement with effects even to the present (Cliggett, 2005).

Interestingly, six interviewees noted that conversion of land often happens in the name of development, characterised by investment or commercialisation. Chief Chabota indicated that even though conversion means the customary territory is shrinking, some chiefs might choose to do so for the sake of development. Given the importance of customary land to rural life and Zambian culture, it is troubling that a choice must be made between development and preserving customary land. This choice exists because the assumption is that investment can only be made on leasehold land where private property rights are ensured by law.

Although concentration or alienation of land is often attributed to privatization, Berry (1988) argues that other factors must also be considered, such as multiple rights, partial concentration, and incomplete privatization of rights. She describes this as the concentration of rights to control land and resources, not necessarily concentration of land *per se*. For example, in a context where a multiplicity of rights and of rights holders exists, there is greater incentive to concentrate control over a valuable resource in order to control which individuals are able to access it. Thus, multiplicity has “important implications for strategies of access and resource use” (Berry, 1988, p. 59). Berry argues further, that governments play an important role in concentration of resources. This is particularly so in post-colonial Africa where government intervention has been extensive since independence: “governments do not simply administer property rights and arbitrate disputes, impartially or one-sidedly. They also exploit labor, compete for control of scarce resources, and take an active part in the allocation of resources” (Berry, 1988, p. 55). There are a multiplicity of rules governing access to land in the ways land is appropriated/alienated, and in multiple claims to particular pieces of land—often for multiple and competing uses (Berry, 1988).

Beyond outright privatization of land, concentration is also exacerbated by the commercialization of agriculture, sale of land (which does not inherently lead to

concentration), appropriation by colonial and post-colonial governments, corruption by officials within land reform efforts, and through the processes of customary land rights. With regards to customary land law, in addition to multiplicity as noted above, access to land is deeply dependent on social identity, “defined in terms of descent, traditions of origin, seniority, gender, affinity, chieftaincy, and so forth” (Berry, 1988, p. 59). In the customary context, concentration may happen in the following ways: (1) when elites gain access to customary land for commercial agriculture and then convert it to private tenure (i.e. via leasehold) over a period of time, (2) when allocation rights of land are concentrated in the hands of a few chiefs, (3) when inheritance leads to multiple claims on a piece of land, from demographic pressure by population growth, or (4) when ‘traditional’ rules or rights concerning land are reinterpreted or reactivated. In sum, “concentration and fragmentation, privatization and preservation of group-based rights may, and often do, occur simultaneously with respect to the same piece of land” (Berry, 1988, p. 62).

Examples of displacement in the Southern province tend to be related to the discovery that the land one is on is not technically customary land, even though it has been administered and used as such. Some displacement examples include the Macha case discussed earlier, or a local headperson or chief simply decides they will take back a piece of land for personal use or to re-allocate to a family member. These smaller-scale instances of tenure insecurity and/or displacement were more recognized by respondents of this project. In particular, Milimo (Landholder) related a series of personal examples. His brother had been living on and cultivating land given to him by the headperson many years before. Upon Milimo’s brother’s death, the land was simply repossessed, and his children were left orphaned and displaced simultaneously. In Milimo’s own experience, one day he discovered the headperson’s cousin cultivating and then settling on a piece of his land. That land was intended for his son to use, but instead he and his children (along with his displaced nieces and nephews) were cultivating plots that were too small and depleting the soil from over-use. He confronted the headperson about this encroachment, but Milimo received no explanation, solution, or compensation. In the interest of community peace, he let the matter slide. Dissatisfied with the manner in which the community was being run, he asked to convert his land—and his request was denied

(Milimo, Landholder). Although he attempted to mobilize his individual rights, in the end he opted to maintain his identity as a community member and subject of the chief/headperson—keeping the peace in the community in order to maintain future resource access (Ribot & Peluso, 2003; Meinzen-Dick & Pradhan, 2001).

Clearly, a lot hinges on the benevolence of a particular leader. Customary leaders are not supposed to be above the law; they are technically supposed to be subject to the law as a regular citizen. However, it is risky to challenge a leader directly or even through appropriate channels, such as the headperson's council, because rural social structures are so intertwined and embedded within other areas of life. It can be difficult to live peacefully after a confrontation, hence Milimo's decision to just move on without reconciliation or justice. Further, this exemplifies the previous point that despite the fact that there are supposed to be systematic checks on such abuses of power, through the headperson's council, the senior headperson, or the chief, if such channels are not enforced, utilised, or corrective actions taken against leaders, abuse persists.

6.4.3 LACK OF LAND ALLOCATION DOCUMENTATION

Ten interviewees cited lack of title or documentation as a main cause of insecurity, because customary land claims are not protected and cannot stand up to claims backed by a title deed. Indeed, this underpins the first two causes of insecurity, and so it is argued here that this is the most significant cause of insecurity. Neither chasing nor arbitrary alienation would be possible if land allocations were accompanied by documentation that protected people's land by law. The lack of title also means that customary landholders cannot access formal credit, because commercial banks only accept title deeds as collateral, and this influences the types and extent of land improvements that can be made. Ten interviewees highlighted this as a significant challenge to improving housing and agricultural practices noted this. Furthermore, motivation to access credit is lessened by this disincentive to invest.

When considering the matter of documentation as a means of securing land tenure, it is important to recall that titling is only one means of securing land. Any land right is only as strong as the institution behind it. Thus, how land is conceptualised has significant implications on how tenure rights are understood. A focus group participant

articulated that if one believes that land cannot be held individually, leasehold tenure is inconceivable, or if one understands leaseholds to exclude extended family members (who ought to be co-landholders), leasehold tenure offends one's conceptualisation of family structure as related to land ownership. In considering tenure security it is important to remember that securing individual rights to land via title does not necessarily appeal to every cultural perspective. According to this focus group participant, holding land as part of his extended family (i.e. clan land) rather than as an individual was a greater priority to him than was securing individual rights to land. From his perspective, title deeds were understood as a cultural threat because they served the interests of the individual over that of the extended family. Interestingly, his comments on this matter sparked vigorous debate amongst the group, highlighting that this matter is highly nuanced and important to landholders.

As discussed, tenure insecurity is a significant concern on customary land. However, some regard customary systems as being secure according to indigenous standards even if not to Western standards (van Loenen, 1999). Others point to indigenous tenure systems as contributing to tenure security because of its flexibility and relevancy to local culture (Sjaastad & Bromley, 1997). Nevertheless, Byres (2003) points to overlapping social relations and interlinking agricultural markets in the rural sector as equating to interlinking exploitation of subordinate classes by dominant ones, in more than one market at a time. This view indicates that overlapping social relations are not inherently beneficial nor do they necessitate greater tenure security. Hansungule (2001) argues that some types of customary land are more secure than others. He argues clan land is secure, while customary land administered by headpersons can be insecure. It is posited here that tenure security is likely not determined by the type of customary landholding in question, but is influenced, rather, by proximity of the customary landholding in question to other forms of tenure, such as leasehold tenure. This speaks to the interaction among various types of land tenure. When different land rights are available within ever-closer proximity, new dynamics of opportunity and competition are considered as people try to secure the land tenure option which best suits their needs (Tamanaha, 2007; Berry, 1993).

Similarly, Chileshe (2005) argues that customary land tenure is less secure when co-existing with competing or alternative tenure models, as is the case in Zambia. Plural land tenures co-existing in rural areas pose notable challenges because there are multiple stakeholders (customary authority, rural subjects, state, and individual leaseholders/investors) operating under different land tenure systems, side-by-side. This may lead to the following implications: (a) customary land allocations are influenced by market forces, and when land values increase so too does potential for corruption and/or dislocation; (b) access to ‘common’ resources (such as water or forests) may be obstructed by a neighbours’ fence; (c) conflict among social groups is more likely due to conflicting interests and values; and (d) negatively affect livelihoods of smallholders may be negatively affected (Chileshe, 2005). Thus, with regard to tenure security, it not the type of land tenure *per se*, but rather the proximity of different types of land rights to one another that creates new interests and competition.

6.4.4 *INHERITANCE BATTLES: A GENDERED CHALLENGE*

A particular challenge within customary systems that disadvantages women is inheritance disputes. As discussed earlier, women traditionally access land through a male relative, either in her matrilineage or through her husband. Although in some areas, this is changing and women can hold customary land by their own right, this remains the exception and not the norm. Widows can face serious threat of property grabbing by the late husband’s family. Traditionally, the husband’s family assumes responsibility for the deceased’s land, wife and children. In the contemporary era, typically the land is claimed but the wife and children are left to return to her family (Mpimpa, Landholder). The threat of property grabbing can be quite immediate and vicious to a grieving widow, and was noted as a concern among respondents.

Because a widow cannot inherit the husband’s land, it is commonly expected for a widow to return to her natal village after her husband’s death and cultivate land from her family. This ties into the traditional clan land structure, because land that the husband held would typically have been given to him directly from his clan land, or from the headperson. For this reason, his children can inherit his customary land but not his wife, because land must stay within the same clans/families (Tilabilenji, NGO Professional).

However, some women refuse to return to their natal village, especially if they are elderly and haven't lived there in many decades. In one instance, a widow in her sixties refused to leave her home, which was a "proper house" on customary land because her husband had been a retired headmaster. Her brother-in-law tried to force her out by starting a cemetery in her front yard, burying 17 bodies in total, before an edict from the Supreme Court ordered the burials stopped (Malilwe, Legal Professional; Hambuba, 2006).

Of course, in other situations, some widows stay on in their husband's village for many years. Luyando (NGO Professional) offered the example of his mother who has remained peacefully among her husband's family, on the same land, for more than forty-two years. Three interviewees indicated that if a widow's children were old enough to inherit and cultivate the father's fields, the widow would often be allowed to remain with her children. Thus, the children inherit the land and the woman accesses it through her children. Furthermore, if a widow is elderly, and it is doubtful she will remarry, she is more likely to be allowed to remain on the husband's land. However, if she is young and likely to remarry, she will usually be sent to her natal home to cultivate fields there. So, the fate of widows depends largely upon the benevolence of her in-laws and customary leaders, as well as her place in social hierarchy as related to age and her potential to marry again.

Zambia does have the Intestate and Succession Act of 1989, which was established to protect estate inheritance claims. (Though this pertains only to state land). It specifies that parents of the deceased will get 20%, the wife/wives 20%, children 50%, and dependents 10% of the estate. This has influenced perspectives of customary inheritance practices and sparked much debate among rural landholders and customary leaders. Employing this act as guide for inheritance matters in rural areas is met with scepticism, because it is contrary to traditional norms, most notably by favouring the nuclear over the extended family. In rural society, various social structures and norms relate to one another at different stages of life. For example, Chief Mweendalubi explained that inheritance relates to bride price, because when a woman gets married, her eldest maternal uncle collects the *laboola* from the groom and "holds it" for the bride's natal family. Upon the husband's death, her family should be able to make a claim on his inheritance. According to state law, the bride's natal family would be unable to claim part

of his inheritance because they are not nuclear family. Thus, there is disconnect between state and customary, and because many people live and negotiate in both spheres simultaneously, this causes conflict when someone is denied an inheritance claim. Yet, claiming or grabbing of what one sees as a rightful entitlement, another sees as an obstruction to livelihood. Overlapping spheres is clear here, as is the rub between rights and claims and the motivation for people to strategically navigate various spheres to maximise benefit.

In the customary sphere, widows are left to navigate the channels of authority and plead their case. How this is done is explained clearly in a 2010 documentary, produced by Justice for Widows and Orphans Project (JWOP)⁵⁷ in Lusaka. This documentary presents the story of a woman, Esther Phiri of Kapiri Mposhi district of Central Province. Her husband passed away in 2008, leaving her widowed with ten children. Subsequently her mother-in-law tried to push her from her customary land but Esther refused to leave. One day a man arrived from Lusaka declaring he had purchased this land, and he proceeded to uproot her 10 hectares of crops and forcefully evict her. Widows are without state protection, because the Intestate and Succession Act of 1989 is applicable only to state land. So, Esther consulted the headperson of the area, who referred her to the Chief's councillor. He told her she must move off the land. She appealed to Chief Muconchi directly, and upon evaluating the situation, the chief told her she must leave without compensation. JWOP was able to speak to the chief again, and he said he would reconsider her case. The ending of this story is unknown, but it shows that the customary norm, as expressed through the chief and his councillor, disadvantages widows, as does state law in its silence on matters of customary land inheritance.

6.5 RELATING THE DATA TO THEORY

Having outlined customary challenges according to the views expressed by respondents of this project, the discussion now turns to consider these in relation to the theoretical framework of legal pluralism. This lens considers complex interaction among social spheres pertaining to customary land administration, and adds conceptual depth by providing space to grapple with a reality that understands plural spheres to be interacting in a multifaceted manner. In the case of customary land administration, respondents

⁵⁷ This is a member organization of Zambia Land Alliance.

expressed concern regarding land disputes, the availability/accessibility of customary land, tenure insecurity and gendered inheritance disputes as being magnified under specific leaders who are not administering land as custodians but rather as owners. Therefore, tenure security is largely dependent upon the benevolence of a particular leader.

Mvunga (1980) describes this shift in the role of the chief as being rooted in the confusion between control of access and control of benefit. The former is the authority to administer access to a resource (administrative function), and the latter is the right or authority to gain from the alienation of a resource (profit). In addressing legal pluralism, this analysis considers challenges in relation to the role of social power and position in influencing resource access. In Zambia's customary sphere, customary leaders are in a position of higher social power, and subjects are subordinate to them. Individuals' bundles of powers are mediated by negotiation of complex social webs of interaction. Thus, some chiefs and headpersons control access to land and subjects nurture their relationship with such leaders to enable or maintain access. This creates and reinforces hierarchies of power in relation to land access (Ribot & Peluso, 2003). Further, as customary authority structures have eroded, some chiefs are not made to be accountable to a customary council. This enhances their position of power and makes it even more difficult for subjects to challenge decisions or claim their land rights, because in this case they are challenging a powerful individual without the support and structure of the customary institution.

Customary authority is a significant part of Zambian culture. As such, the idea that customary land tenure is made insecure due to customary leaders is indeed a sensitive challenge to face. Customary leaders are highly respected among respondents of this project, and it is clear that they have a significant role in rural life and culture. Perhaps less clear though, is what their role ought to be in relation to land, and how such processes can be made more just. Raising such questions is difficult because of the imbedded notion that customary land administration is a replica of the past and should therefore be preserved. In this sense, notions of the customary are used as a rallying call back to something of the past (Chanock, 1989). It is often tempting to conceptualise normative orders in the binary of modern versus traditional, and to understand them as

being separate from one another, which, of course, they are not. Modern and traditional orders are intertwined in a multifaceted manner, making them neither categorically different or fundamentally the same. Thus, understanding customary land administration in the contemporary era as an embedded part of the larger state structure enables one to see that it is not an artefact of the past that ought to be preserved via non-confrontation.

It is important to query whose interests are served by institutions that are shaped, influenced and governed by law, namely that of customary land administration. To this end, this analysis has utilised three useful lines of inquiry within legal pluralism: (a) the interaction among different normative orders, (b) the effects of historical processes on the creation of customary norms, and (c) the portrayal and articulation of the dialectics among different normative orders (Merry, 1988). Thus, the on-going conversation among state and customary spheres is described as interacting in a complex manner, such as that of semi-autonomous social fields (Moore, 1973). Interaction among institutions influences and is influenced by people operating in more than one sphere to strategically negotiate or navigate each to best serve their interests. Therefore, the focus here has been and must be on power relations among actors, as influenced by legal and institutional pluralism.

Respondents of this study describe land access as being context specific and tenure security dependent upon the benevolence of the particular leader of an area. For example, in some cases widows may live in the deceased husband's village peacefully and securely for decades, while a widow in another village is chased away; similarly, one landholder may cultivate crops securely on land given by a headperson for a lifetime, while another landholder awakens one day to find half his land reclaimed and reallocated by the local headperson. Thus, changes in leadership may influence tenure security positively or negatively.

To analyse power relations Ribot and Peluso (2003) differentiate between rights-based access (as determined by law, custom, or convention) and access mechanisms (determined by structures or relations). The latter mediates the former, so that realised resource access is determined by complex and overlapping power relations that intervene where rights, laws, or custom allegedly avail. Accordingly, one's ability to access technology, capital, markets, labour, employment, knowledge, authority, social identity

(i.e. age, gender, ethnicity), and the negotiation of other social relationships or characteristics, such as friendship, trust, reciprocity, patronage, *etcetera*, in turn influence resource access (Ribot & Peluso, 2003). In the case of customary land, access is the critical point of inquiry. Thus, this analysis has examined how land is accessed through customary structures and the ways in which they enable or disable people from accessing land. As demonstrated, challenges to land access are rooted in partial or irregular application of customary norms as per the chief and headman. As such, tenure security is made insecure and is largely dependent upon particular leaders.

This elaboration is useful in articulating the nature of legal pluralism in a manner that simultaneously allows one to capture the complexity of the bundles of power that are intricately intertwined within access webs, without becoming lost in a haze of plurality. From this perspective, it becomes evident that the ability of a smallholder on customary land to blatantly claim his or her customary land rights is highly dependent upon the particular context. If action to this end is taken, it has implications for virtually every other aspect of life. Similarly, by reflecting on the example of Milimo (Landholder) whose land was reclaimed and allocated to the headperson's cousin, one recognises the complexity of the interaction among spheres. Milimo's decision to not challenge the headperson by asserting a claim to that land in the interest of keeping peace in the community and maintaining his positive identity as a community member and subject of the chief is an understandable response, despite the injustice of the circumstance.

Social structures and relations influence rights in a multifaceted manner. They force individuals to weigh the pros and cons of asserting their rights in one area, which is often at the expense of rights or peace in another area of life. In sum, individuals and groups who are marginalised by limited access to technology, capital, markets, labour, employment, knowledge, authority, social identity (i.e. age, gender, ethnicity), and the negotiation of other social relationships/characteristics, such as friendship, trust, reciprocity, patronage, and *etcetera*, in turn have less power to exert claims in resource access.

Social identity as a determinant of land access is significant, because social identities were enshrined/codified in colonial and postcolonial versions of customary law, which "often served to reinforce rather than attenuate the importance of social identity or

status as determinants of access to land and landed assets” (Berry, 1988, p. 63). When land access is determined within a framework of entrenched social identities, social stratification is increased through systems of interlinking exploitation. This stratification is characterised as powerful agents filling multiple roles in various spheres or holding overlapping positions of power, causing weaker agents to face exploitation in multiple sectors (Byres, 2003; Randriamaro, 2005). Thus, social identities are also characterised by multiplicity and are negotiated in nuanced ways according to context—making them also subject to definition (Berry, 1988). How meanings of social identities are understood and negotiated influence how resources are accessed, used, and controlled. This implies that people will inevitably jockey to improve their own position through use of, or redefining of identities to make the system advantageous for themselves.

Customary land administration is understood here as a dynamic aspect of rural life and culture that has a significant role to play in Zambia’s future. However, what that role is as it pertains to land administration, must be questioned, challenged and reshaped in a manner that ensures customary land tenure security. In particular, it is important to acknowledge the competition of land interests that exist when different types of land tenure exist within close proximity to one another. Customary land tenure and administration do not exist in a vacuum. Therefore, as different forms of land tenure influence land rights and interests, it is necessary to adjust customary land administration to function more effectively within that context to secure land tenure.

6.6 CONCLUSION

This chapter provides a foundation from which to understand some of the practical processes and challenges of customary land administration. Undeniably, access to land is intrinsically bound up in social structures of kinship and power, which positions some to permit or limit access to land and others to maintain social relationships to gain or maintain such access. The inherent value of land as a means to livelihood for rural landholders who are dependent upon subsistence agriculture cannot be overstated. On one hand, customary land administration provides a system of relatively accessible land that is free from rental fees and largely available to those who seek it. On the other hand, customary land administration processes tend to not be transparent and various challenges arise as a result. First, land disputes occur frequently, primarily over

ambiguous land boundaries or unknown land status. Second, the availability of land depends upon the benevolence of particular customary leaders, and is constrained in some areas by population growth and the arbitrary selling of customary land. Third, tenure insecurity on customary land is largely caused by the threat of being chased by a local leader, alienation of land to large and small-scale interests, and is underpinned by a lack of documentation to protect rights.

The approach of legal pluralism aids analyses in three key areas. The first is interaction among social spheres (from local to national). Second, legal pluralism provides a lens for examining the historical effects on conceptualisations of the customary. Finally, it seeks to portray and articulate various dialectics among different normative orders (Merry, 1988). From this perspective the interaction among social spheres in the contemporary era reveal social structures and power relations that influence (1) smallholders ability to access customary land, (2) customary leaders' ability to uphold or abuse positions of authority, and (3) the level of tenure security with which customary land is held.

CHAPTER 7: CONCEPTUALISING THE ROLE OF CUSTOMARY AUTHORITY TO HOLD IN TRUST

As a chief you are the custodian of the people's culture, you are responsible for their livelihood, you are also responsible for their protection...So when we talk about 'holding land in trust for the people', land in the chiefdom is held communally. I don't rule by decree. We rule by consensus...It is the people's property, so the chief is just the chief administrator of [customary] land.
(Chief Butemwe).

7.1 INTRODUCTION

From the discussion thus far, it is clear that customary authority plays a significant role in Zambian rural life. Given customary authority's embedded nature in social structures, its continuation in the future seems certain. Less clear, however, is the nature and scope of customary authority going forward. This dynamic demands urgent consideration because of its significant impact on rural land access and tenure security. This chapter considers the ambiguity created when customary leaders are tasked to hold land in trust within a context of legal pluralism, where different types of land tenure and value compete within close proximity. First, is a discussion of what role customary leaders ought to fulfil given their charge to hold land in trust, followed by respondents' comments regarding the role of the chief as owner versus custodian of customary land, as well as respondents' expressed level of trust in customary authority. The analysis then turns to consider the significance of the ambiguity between customary leaders' role as owner versus custodian of customary land. Leaders and subjects alike confuse the role of customary leaders in land administration, conflating the responsibilities of ownership and custodianship. For rural landholders, dependent upon customary land for livelihood, it is risky to live within a system that assumes those with authority to administer land will perform their duty properly, with no built-in checks on power and mechanisms of accountability. The following discussion explores the ambiguity surrounding the role of chiefs in land administration, the implications of this for landholding subjects, and considers the role of customary leaders in Zambia's future.

7.2 TO HOLD LAND IN TRUST: AN AMBIGUOUS CONCEPT?

7.2.1 *SITTING ON THE PEOPLE'S THRONE*

In conceptualising the role of customary authority in the contemporary era, it is

helpful to consider notions of what a chief ought to be to his/her subjects. Chief Butemwe explains that a chief ought to be a compassionate leader for his/her people and that the chief must understand his/her position of authority as being the “people’s throne, it belongs to the subjects who can freely access it”. Further, Chief Butemwe quoted Robin Short (1973)⁵⁸ to describe the leadership role a chief ought to fulfil:

[The Chief] is the land...he is to every man what every man makes him, and what he makes himself. He is infinitely more than the elected chairman of a county council...Though it is difficult to become an African in imagination and to “feel” him as they do, one quality they desire above all others. They desire a Chief of calm and equal temper who was the same yesterday as he will be tomorrow. They do not need necessarily a conqueror...but a pillar on whom they can lean, a rock to whom they can turn, and whom they may touch. ...it is his sameness that they will value. ...The whole world...is changing at such a fast pace that the peoples need a landmark, something and someone who will not change, but... will look all changes in the face ...and choose only the best of them for their people (Short, 1973, p. 102).

This rightfully acknowledges outsiders’ struggle to understand the seemingly innate connection between subject and chief, and clearly draws on notions of tradition and connection to the past (Chanock, 1989). The description of the chief being like a steady rock, pillar, and landmark to guide people through turbulent changes appeals to one’s humanity: change invokes the tendency to cling to normalcy and consistency. Thus, Short’s emphasis of a chief’s sameness and predictability holds weight in describing what a chief ought to be to his/her people. Saha (1994) describes the chief-subject relationship as part of a “structural hierarchy” in which “a chief was respected because he was a chief and yet it is equally true to suggest that his position was superior because he worked for his people” (p. 25). This aligns with the previous description of the chief sitting on a people’s throne: that requires accountability and stability. This also resonates with perception that entrusting customary leaders to hold land in trust for their subjects is an appropriate means of protecting and administering this vital resource.

Chief Butemwe’s quote at the beginning of the chapter provides a clear explanation of a chief’s role to hold land in trust for his/her subjects, emphasizing the role

⁵⁸ A former District Commissioner of the Northern Rhodesia Government Service wrote *African Sunset* in 1973 as a memoir regarding his experiences during de-colonization. His perspective is remarkably sympathetic to the African experience throughout colonialism and de-colonization.

as one of being a custodian and an administrator. Further, he describes the position of chief as sitting the people's throne and as holding delegated authority:

Those of us that hold these positions of chieftainship must know that it is delegated authority. And we are doing it in trust and on behalf of the people that have entrusted us with this and so first and foremost, this is a people's throne. And because it is a people's throne that is why everybody has access to it, and so those of us that serve must know that we are serving the interests of the people and at the pleasure of the people. Immediately, if one chief forgets that process, for one reason or the other, that is a recipe for anarchy and you know that there is not going to be any peace at all. Yes, sometimes the people may keep quiet because they have so much respect for these thrones and that should, in fact that should be the point that should render – should cause those of us who hold these thrones to think, that we must not in fact be able to...we must not abuse the people. We are there for their own good...if I take care of the people well, the people will take care of me.

From his description it is clear that the relationship between customary leaders and subjects ought to be one of mutual benefit, respect, and trust. Particularly noteworthy is his emphasis on power relations. He articulates that people may be afraid to challenge the decisions of customary leaders out of respect for the throne, which he says should in itself be a reminder to leaders to not abuse their position of power. Chief Butemwe is well known for achieving something close to this ideal in his chiefdom by deliberately decentralising land administration in his chiefdom through creating official bureaucratic structures and policy for the decision-making process. His structures emphasize consultation and multiple authorising signatures at each level of decision-making to ensure accountability, which will be discussed later in this chapter.

Having contrasted this ideal description of the role customary leaders ought to fulfil with the contemporary challenges covered in the previous chapter, there is an apparent disconnect between what a chief's role in land administration ought to be and what it is in practice. Mvunga (1980) describes this as a disjuncture between control of access and control of benefit—the former being a function of administration and the latter of ownership. The following discussion focuses on such ambiguity to consider how it is created, whose interests it serves, and the challenges it presents to tenure security.

7.2.2 *WHAT DOES IT MEAN TO HOLD LAND IN TRUST?*

Recall that all land in Zambia is vested in the President, and chiefs hold customary land in trust for their subjects. This role for chiefs is acknowledged in the 1995 Land Act, the Constitution, and the Chief Act 1996. These regulations essentially state that chiefs must follow customary law, as long as it does not contradict statutory legislation or the constitution, and it provides no further guidelines as to the extent or nature of customary authority (Sichone, 2008). The structure of vesting land in the President, and then delegating customary land to chiefs as trustees assumes a fiduciary responsibility between (1) the state and its citizens, and (2) chiefs and their subjects to administer land in the interest of citizens of Zambia (Hansungule, 2001). This arrangement is problematic, however, without further guidance by policy or legislation (both from the state apparatus and from within customary institutions) to structure customary land administration or to indicate, for instance, the terms by which land may be alienated through conversion to state land or the terms by which land may be reclaimed from a subject by a chief or headperson. In the final report of a national study on customary land administration the Zambia Law Development Commission highlights this challenge:

The vestment of land in the President seems to create a lot of difficulties with regard to the actual administration of customary land. Traditionally, customary land vests in the chieftaincy as trustees for and on behalf of the people who dwell thereon. In line with the proper construction and intention of the regulatory framework of land in Zambia, the true owners of land in Zambia are the people. Therefore, the people must be engaged and involved in the administration and alienation of land (ZLDC 2013, p. 5).

This vesting and trusteeship is problematic because it is sufficiently vague to allow it to be melded to political or personal agendas, and it contributes to conceptual ambiguity about the role of the chief as an administrator or owner of customary land. Chief Butemwe offers an example of how such agendas may play out in a practical sense:

We still have some chiefs that would unilaterally [decide to take an]... investment and they do it on their own. Then at that stage you ask, whose 'interests are you serving?' And sometimes you have... political forces...coming through to resolve that or the courts of law, the higher courts of law, come in to resolve that. And that is an unfortunate kind of situation. What is driving some these kinds of

things? One, it is purely the economic things that have come in. If say for instance someone that is bringing an investment is not ready...to share with the community but they just want to share with the chief, that is abuse of authority. That is abuse of the authority...Secondly, I think it is just the selfishness in the individuals and the human heart. Thirdly, sometimes power gets to the heads of those that have been given these positions.

Indeed, the critical question is “whose interests are being served?” If it is personal or political agendas, then the responsibility to hold land in trust is not being served.

By vesting land in the President on behalf of the people, and then further entrusting its administration to trustees, without legal guidelines to provide sufficient limitations on their authority, “Who owns customary land?” becomes a legitimate question with no clear answer (Advisor to Chief Mweendalubi). The arrangement of trusteeship contributes to a context that relies on the circumstance of having benevolent leaders at the state, chiefdom, and village levels. Such institutional structures are framed well by Bromley’s (1989) description of common property regimes and the nexus of rights and duties therein:

...institutional arrangements define one individual vis-à-vis others... We can characterize these relations between two (or more) individuals (or groups) by stating that one party has an interest that is protected by a *right* only when all others have a *duty*. Property is a right...that is only as secure as the duty of all others to respect the conditions that protect that [right]. When one has a *right*, one has the expectation in both the law and in practice that one’s claims will be respected by those with *duty* (p. 871; emphasis in the original).

Understanding the role of chiefs to hold land in trust as a duty to protect the interests of his/her subjects is the crux of this matter. However, the difficulty remains to challenge, correct, or limit those in such positions of power when they do not honour their duty.

Indeed, the tying of customary authority to the administrative function of holding land in trust, combined with the traditional association of customary leaders’ spiritual powers, has contributed to the far reaching misconception that chiefs are the owners of land. This is increasingly realised as the right to alienate land as they see fit and often for personal gain and via permanent conversion of customary land to statutory. For instance, to permanently convert a parcel of customary land to statutory, the only thing required is

the relevant chief's signature of permission. Beyond that, state representatives at the District Level ought to verify that people are not living on this land. However, a participant disclosed that this does not necessarily occur, because civil servants tend to feel uncomfortable verifying the chief's work on his/her territory. Consequently, the signature is typically the final authority on conversion (Mutinta, Government Professional). Further, there are no mechanisms within the process to ensure that subjects are consulted regarding the permanent conversion of customary land. It is technically legal for chiefs to alienate land through conversion, if it is in the community's best interests. Again, there are no mechanisms to ensure due process is taken in determining those best interests, although local customary councils are assumed to be functioning as a check on power (Nyuma, Legal Professional). Despite this assumption, Chapter 6 indicates that small-scale tenure insecurity on customary land is a concern for respondents of this project, and that customary councils' ability to serve as a check on power, is often compromised where land is being unjustly administered or converted without consultation.

Confusion regarding the chiefs' specific administrative duties with regard to land is rooted in the disjuncture between control of access and control of benefit (Mvunga, 1980). Control of access indicates an administrative or custodial function, while control of benefit assumes a profit, improved wellbeing, or convenience. In reference to personal property, the latter is sensible: one ought to be able to transact personal property as one sees fit and for personal benefit. However, in reference to administering land that is rightfully owned by the people of Zambia but vested in the President and held in trust by chiefs, the function of the administrator ought to be strictly the former. To confuse the functions of control of access and control of benefit has grave consequences. When control of benefit is combined with control of access, then the administrative function is seeking personal profit. In turn, if one is merely to have an administrative function, without deriving personal benefit, this role is more clearly understood as custodial and requires in-built structures of accountability, such as legislation or via traditional council, to ensure that land transactions follow due process. Without such structures, however, there is wide margin for abuse of power when customary land is alienated as if personal property.

One interviewee shared a case that illustrates the risk of abuse of power by a customary leader. The interviewee described how a customary leader alienated vast tracts of land to investors without consulting the traditional council or subjects. As opposition increased, this leader refused to meet with subjects. In one particular transaction, a parcel of more than 10,000 hectares was alienated to a corporation. Later, it became known that the alienating chief was also a shareholder in that corporation. This is a clear example of combining the functions of control of access and control of benefit to work all spheres to one's favour (Nyuma, Legal Professional).⁵⁹ Further, control of benefit does not necessarily entail monetary gain; other benefits may include wielding customary land to gain social power. An abuse of power may be in the interest of improving or serving family relations rather than for monetary profit, such as in previous examples of land being reallocated to a headperson's relative. In a context of plurality and institutional overlap, differing notions of rights, including legal, customary, or conventional, can all be claimed and used by actors to "enhance their own benefits—to maintain their own access or gain control over others' access by choosing the forum in which to claim their rights,"—thus shaping who controls and who maintains access to resources (Ribot & Peluso, 2003, p. 163). Customary leaders can exploit spaces of ambiguity to administer land as owners rather than custodians, which in turn perpetuates the ambiguous nature of subjects' land rights and tenure security.

7.3 PARTICIPANT VIEWS ON HOLDING LAND IN TRUST

7.3.1 OWNERSHIP VERSUS CUSTODIANSHIP

The ambiguity surrounding what it means for a chief to hold land in trust centres on the misconception that chiefs are the owners of customary land. Such confusion was noted in this study: 11 interviewees plus focus group participants indicated that chiefs are not the owners but rather the custodians of customary land, while 6 interviewees indicated that chiefs are the owners of customary land. Of the latter group, one indicates chiefs were the owners before colonization and are also thus in the present; another indicates that as owners, chiefs must look after the land and the people; finally, another indicates that chiefs own most of the land in Zambia, referencing the common statistic

⁵⁹ I tried to contact the subjects involved in this situation, but because it was an active case they did not want to participate in an interview.

that customary land accounts for 94% of Zambia's land. Of the 11 interviewees who understand the chief as custodian, Lipepo (NGO Professional) stated that if customary leaders do not act on behalf of their people they "forget who made them chief in the first place!" Headperson Mwaandu describes to hold in trust as being a chain of authority from the President, to chiefs, to headpersons, to the people, and that customary leaders are "custodians of land on behalf of ancestors." Focus group participants expressed the view that ultimate authority over land rests with the state, but that to hold in trust means customary leaders are entrusted with power to administer land, but that the land is intended for the use of Zambians. Miyanza, a large-scale landholder, operating on both customary and leasehold land understood the state system as a check on customary authority's abuse of power, stating that chiefs should not "bulldoze his people", but if this happens people can get a government minister involved because "at the end of the day, the government has power over land."

The matter of protection against customary abuses of power is worthy of further consideration. As noted previously, subjects have the legal right to sue customary leaders. Whether or not they do is another matter entirely. When asked if people can sue a chief or a headperson, 15 interviewees affirmed this to be correct and 3 denied it. As noted previously, Mutinta (Government Professional) declared that if one were to sue a chief they would need "divine protection". Another Government Professional, Namukolo, said he has never heard of this happening, but acknowledged it could be possible if a tract of land over 250 hectares was being contested.⁶⁰ Finally, Milimo (Landholder) declared that chiefs could not be sued over land issues, because they are the owners of land; he elaborated further that technically people can sue but they never would do so because it is offensive and disloyal to the chief.

Interestingly, although the 15 affirmative responses concerning the ability to sue a chief far outnumbered the negative, they were nearly all followed by a qualifying explanation of why this is largely unheard of in rural areas where chiefs seemingly have ultimate authority. Also, eight interviewees indicated it is rarely practiced because rural landholders are usually not well educated about their rights or about how to navigate the

⁶⁰ Land conversions over 250 hectares require direct approval from the President (Commissioner of Lands) in addition to the chief's signature of permission. There have been instances where this processes has been corrupted however, and some large parcels beyond this limit have converted to leasehold.

legal system. Further, even if they are well informed of the system and their rights, legal battles are an extremely difficult undertaking for people who are remotely located from the centralised court system and economically unable to hire legal counsel. The matter of loyalty to one's chief is another obstacle, as three interviewees highlighted. The ideal alternative is to negotiate with a chief, preferably with the assistance of a paralegal to ensure rights are honoured. Four landholders emphasized that customary leaders are not untouchable, they are part of a larger structure, they are also accountable to the legal system, and that people should use that system for protection. For example, one interviewee explained that one could take an unfair headperson to the chief for reprimand, but if it is the chief that is being unjust then one could go to the district commissioner or an MP to intervene (Mayaba, Landholder). Finally, another landholder declared that many people have taken chiefs to court because of land alienations and the courts have been "helpful" with this (Haamaundu, Landholder).

The concept of holding land in trust is not well defined in terms of customary leaders' practical responsibilities and the limits on their authority. Further, the ability to hold customary leaders accountable is also not clear due to associated notions of loyalty to and respect for customary leaders, as well as the accessibility of the legal system to rural landholders.

7.3.2 RELATIONSHIP BETWEEN CUSTOMARY LEADERS AND SUBJECTS

The challenges of differentiated agents operating within plural institutional structures of social, economic and political inequity are multifaceted. Despite this, respondents of this project expressed a level of trust and/or comfort in approaching customary leaders with their problems, although responses varied among participant groups. Among landholders 7 interviewees and focus group participants indicated trust in (or comfort in approaching) customary leaders, while 2 did not. Among professionals, 6 expressed trust for customary leaders, while 5 did not. Among customary leaders, 4 described the relationship with subjects to be positive and trusting, although two customary leaders offered the following qualifiers to their positive responses. Chief Mwikisa added that customary authorities sometimes mismanage land, and Chief Butemwe pointed out that sometimes people are quiet when abuse happens because of

respect for the throne, and that it is most important for leaders to remember that customary authority is delegated authority (Chief Mwikisa; Chief Butemwe).

Among landholders, most respondents felt comfortable taking their concerns to the headperson or to the chief. Further, they understood the headperson to be especially approachable because subjects live in the same community with him. Milimo, a landholder, confirmed this general sentiment but also offered the qualifier that some headpersons do abuse their position. Mutete expressed that while people generally respect the chief “so much,” it ultimately depends on the disposition of the particular leader.

Similarly, Kayombo explained that, “chiefs are more respected than the President”; however, money today influences their land decisions. Among the landholders who did not express trust for customary leaders, Miyanza explained that a headperson can cause troubles, for example, he/she can arbitrarily reclaim land after returning from town drunk. Further, a headperson’s reprimand for such action depends on the chief, suggesting that reprimand may not necessarily occur. Similarly, Mayaba expressed disincentive to produce on customary land because if one is too successful then the headperson or chief can “push you around.”

Among professional interviewees, responses regarding the relationship between customary leaders and subjects initially appear to be almost balanced between positive and negative answers. However, on the affirmative side, every participant qualified their statement with an acknowledgment of weakness or abuse of power, and so the affirmative answers in this category are understood as being “yes, but...” responses. Among the NGO professionals, it was indicated that customary leaders are trusted, but: (1) honorariums are abused (Lipepo); (2) some leaders arbitrarily chase people or convert land (Takondwa); (3) chiefs do not always understand all the risks involved in land decisions (Miyanda); and (4) it depends on the particular customary leader (Tilabilenji). Interestingly, one professional working in the NGO sector indicated that customary leaders are not trusted because rural people are unprotected by unwritten laws, and that although it is known that customary systems need greater accountability, chiefs want the ambiguity because it gives them more power (Nsabata). One professional working in the government sector expressed that chiefs are trusted but from his perspective, benevolent chiefs are the minority, and most chiefs are corrupt (Namukolo). Other government professionals describe customary leaders as being untrustworthy, because a rural person can be moved at any time (Cheelo), and customary leaders can be corrupted and poor people have no defence (Mutinta).

From the responses represented here, it appears that a level of trust exists for customary leaders and that subjects generally feel comfortable to approach a local leader with a concern. However, it is apparent that abuse of authority is regarded as common. How these two are reconciled is not clear. Positioning this data within the wider context of this study, it can be explained by the apparent respect respondents have for the customary throne and customary institutions more broadly. It was clear to me throughout this study that customary authorities hold an important place in society. Further, while respondents acknowledge the flaws among customary institutions and individual leaders, the value of the institution and of the throne remains. This indicates that customary authority has a role to play in Zambia's future, and so it is important to grapple with the apparent ambiguity surrounding the role of the chief to hold land in trust and to consider ways of strengthening customary land administration processes.

7.4 AMBIGUITY: IMPORTANT STRUCTURAL COMPONENT OF POWER

7.4.1 SEPARATION OF POWERS AND LEGITIMISING

Whether or not rural landholders see the land as being theirs but held in trust, or as belonging to the chief to dispose of as he/she sees fit is critically important. The view rural landholders choose influences their position relative to the chief and headperson as either a beneficiary with a legitimate claim to make on the land or a subject fully dependent on customary leaders' benevolence to bestow land, giving and taking as they see fit. As has been argued throughout, the rightful role of chiefs in this capacity is one of custodian and administrator of land in their chiefdom, with authority over land allocation and dispute settlement. As discussed, the majority of this responsibility is usually delegated to headpersons within the chiefdom (Chileshe, 2005). This definition was expressed by the 3 legal professionals interviewed in this project, each noting insufficient policy to determine and limit authority as contributing to the opacity surrounding what it means practically to hold land in trust. Chief Mweendalubi's advisor also expressed the desire for clearer rules for land administration, as it would assist in running the chiefdom more consistently and transparently. It is noteworthy that the ambiguity by which customary spheres can tend to be governed is recognised even by some of the leaders. As the advisor expressed, clearer rules would make their jobs easier too. Boone (2013) describes this ambiguity as being caused by "a low degree of *formal separation* between

economic and political power” (p. 312; emphasis in the original). This plays out as land access being obtained through political obligation and personal relationship, and through customary leaders “wield[ing] considerable latitude in deciding how land is allocated, who keeps it, whose rights can be taken away, and who wins in ordinary land disputes” (p. 312). In relation to the state, this dynamic is the result of the state protecting group rights over individual rights by reinforcing the land-based communal identities of indirect rule. In turn, this makes individual landholders “vulnerable to the exercise of local authorities’ administrative and land prerogatives” (Boone, 2013, p. 313).

The legitimacy of customary institutions is conceptualised relative to the state. Lund (2006) argues that in contexts of institutional pluralism the state and traditional institutions vie for public authority by negotiating, forming alliances, and competing openly. Through this, public authority “manifests itself in an ambiguous process of being and opposing the state” (p. 689). In this manner, traditional institutions identify as being separate from the state, and yet have their legitimacy enhanced by adopting characteristics of the state. In this way, social life is “constantly (re-) produced and sanctioned, but not necessarily by one single body of ‘state’, but by a variety of institutions, which, in so doing, assume public authority and some character of the state” (Lund, 2006, p. 689). This posture of customary institutions contributes to simultaneous and competing narratives of unity and disunity with the state. Traditional institutions may employ discursive justification for their legitimacy by utilising metaphors, analogies, and symbols that link to narratives of a unified past and naturalise their position in public authority (Lund, 2006; Chanock, 1989). This naturalisation of their position, combined with their association with divine power, and the ambiguity surrounding their administrative role over land makes it difficult for subjects to challenge power abuses among customary leaders.

The role of the chief to hold land in trust and the ambiguity surrounding the limitations of this authority to administer land as a trustee or as an owner is an integral aspect of the state-customary dynamic, characterised by legal and institutional plurality. It is precisely this ambiguity that enables actors at all levels to negotiate rules of the system to their benefit, and to jockey for more advantageous positions of power. There is

ambiguity both between the state and customary leaders, as well as between customary authority and subjects; however, the latter has been the primary focus of this study:

Laws are often written so that decisions or transfers of powers are to be made by executive decree or subject to the approval of a president, a minister, or an appointee or administrator, maintaining ambiguity over who really holds the power to allocate rights of access to particular benefits” (Ribot & Peluso, 2003, p. 163).

Without a clear concept of who owns the land and what authority is associated with said ownership, the power dynamics and associated conflicts or contestations of power are influenced by the institutional structure (Boone, 2013). The actors involved and the specific role they hold within the institutional structure shape the manners in which power dynamics play out. So “power relations allow particular groups of national and local actors to capture the momentum of institutional confusion to reinforce their own interests” and to reinforce or challenge land claims (Ansoms, Wagemakers, Walker, & Murison, 2014, p. 244). This ambiguity forces subordinate agents to invest in social relationships to maintain or gain access, because “discretionary decisions or transfers establish insecure arrangements or privileges that decision-making agents can change at will, rather than establishing users’ rights” (Ribot & Peluso, 2003, p. 163). In short, operating in an environment that depends on the proper functioning dynamic of rights and duties (Bromley, 1989), or of control of access and control of benefit (Mvunga, 1980), among actors who hold differing positions of social, economic, and political power in intricately overlapping institutional spheres is a risky gamble at best, and a recipe for abuse and exploitation as worst. The precariousness of this context contributes to smallholder land tenure insecurity in rural Zambia.

7.5 WAYS FORWARD

From this discussion it is evident that customary authority holds a significant place in Zambia’s social, political, and economic landscape; however, it is also true that much debate exists as to the qualitative substance of that role. Interestingly, only 4 interviewees of this study indicated that the loss of customary authority (and/or customary land) in Zambia’s future would be a positive thing. This position was supported by sentiments expressing that: (1) tenure would increase if all land was leasehold; (2) as leaseholds increase conflict will decrease, because there will be fewer

inheritance disputes; (3) if people have to pay land rates, they will have more incentive to produce and develop the land; and (4) customary authority is oppressive so state land is better. Given the customary land challenges discussed throughout this study, is especially noteworthy that respondents overwhelmingly indicate that a decrease or loss of customary authority (and/or customary land) in Zambia's future would be a negative thing: eighteen interviewees expressed this position largely supporting their perspective by stating that such a loss would (1) mean a loss of culture, heritage, and/or identity, (2) increase social deprivation and loss of a critical social safety net, (3) lead to a landless rural population because state land would be the only option for land, and it is too expensive for rural people, and (4) increase poverty because investors would take over. One participant highlighted that customary authority is not inherently bad, only that there are bad leaders within the system. Further, 3 other interviewees indicated the need to preserve customary authority for the future, and also to improve it by: (1) increasing formalisation, (2) streamlining the multiple customary systems into a unified land system, and (3) integrating the best part of customary and statutory land systems into one national system. Finally, with regard to what the loss of customary authority in Zambia's future would mean, one customary leader expressed the following:

...if everything is given away it therefore means that customary authority will cease to exist, and God forbid! We know that the customary authority is the peoples' property and it is the peoples' security, it is the peoples' strong hold. Customary authority is the peoples' hiding place. Customary authority is the voice for the voiceless (Chief Butemwe).

Thus, despite the apparent weaknesses of customary systems, their continuation in Zambia's future seems to be desired. There are various efforts being made at the state, NGO, chiefdom, and village level to reform customary systems to be stronger or more accountable going forward. At the state level, the creation of the Ministry of Chiefs and Traditional Affairs in 2011 was a significant effort to more formally integrate the customary sphere into the state. The implications of this are unknown, but respondents generally perceived the implications to be positive. This is part of a larger state effort to redesign the customary system from the top down and, some would argue, diluting or co-

opting customary systems in the process (Fanwell, Government Professional).⁶¹ At the NGO level, significant reform efforts are being made through Zambia Land Alliances' Traditional Certificate program. This program has been introduced in some districts as a pilot program. In this program, the district land alliance works with chiefs to agree upon and write down rules for land administration and tenure, the ultimate goal is to introduce a certificate program, verified by clear boundary markers and multiple authorising signatures, by which to secure landholdings. It is a difficult and lengthy process to get all chiefs on board and in agreement as to the specific rules of land administration (Miyanda, NGO Professional). Finally, at the village level, Chief Butemwe is known widely for intentionally decentralising his authority over land administration. He has established relevant committees, policies, and procedures, which are well known and understood by subjects and headpersons. Through transparent processes, land is administered and land conflicts resolved. Significantly, Chief Butemwe cannot make a land decision without the consent of these committees. By the time land decisions reach the chief, he remains the authorising signature (as per state law)—but he has purposefully created accountability structures so that power does not rest on one person.⁶² Such efforts at all levels corroborate the position taken here: that customary authority has a role to play in Zambia's future, but it must be improved and formalised in order to create transparency, accountability and to improve land tenure.

7.6 CONCLUSION

By focusing on the ambiguity surrounding the role of chiefs to hold land in trust, this discussion has grappled with the implications of how this role is conceptualised, either as owner or custodian of customary land. Contrasting the role of the chief to be trustee of land for subjects, who are considered the true owners of customary land, with current practices that see some chiefs alienating or reclaiming land arbitrarily and thus contributing to tenure insecurity, it is argued that such practices are an abuse of power. In turn this highlights the structural weakness of customary institutions, because there are few mechanism to limit power or create accountability. Participant responses indicate that

⁶¹ To see one of the proposed models of this restructuring see Appendix K.

⁶² The decentralisation efforts and restructuring of customary processes lead by this particular chief are a significant point of interest and worthy of further research.

although there is confusion over the role of the chief in land administration, the system itself remains valuable to most respondents. Similarly, this research shows that respondents express respect and/or trust for customary leaders, while simultaneously acknowledging widespread abuse of power within the system. By discussing such challenges from an analysis of ambiguity it is highlighted that customary land systems are dependent upon those with authority to control access. Those with such authority have a duty to protect the interests of their subordinates, because they have a right to access and hold customary land. However, when this position of authority is confused with the right to benefit from a resource, this duty is corrupted and land is dealt as if it is personal property and for personal social, political, or economic gains. From this perspective, it is evident that if Zambia's customary land administration systems are to serve the majority of rural landholders who are dependent upon subsistence agriculture for livelihood, they must change their structures to clearly define and limit the authority of customary leaders in land administration.

CHAPTER 8: CONCLUSION

Given the centrality of land to rural life in Zambia, this thesis has explored the nature of customary land administration and its influence on rural landholders. The slogan ‘land is life’ is more than just a quip to customary landholders. Indeed, it is an essential truth for Zambia’s rural majority who depend upon subsistence agriculture for survival. The overarching objective of this research has analysed the roles of and relationships among the state, customary authorities, and rural landholders in the administration of customary land in Zambia.

Specifically, this thesis addresses the role of customary authority in Zambian land administration, and the implications of it for tenure security. In order to accomplish this, this thesis did the following: (1) provided a description of how customary land and authority are conceptualised and administered; (2) explored how changing conceptualisations of land in colonial and independence eras have influenced the contemporary role of customary authority in land administration; and (3) it examined the strengths and challenges of customary land administration as it relates to tenure security in the contemporary context.

According to respondents of this project, the research concludes that customary land is at a critical juncture, in which its administration is characterised by widespread tenure insecurity due to *ad hoc* land administration and undocumented or informal land assignments. This is particularly problematic because the current social, political and economic context is increasingly in want of formal land registration and/or title to ensure land rights are protected. The researcher posits here that customary land administration in Zambia is in urgent need of formalisation to increase tenure security and support investment, such as proper housing and agricultural inputs.

The lens of legal pluralism proved useful in this study for conceptualising customary institutions as part of the larger state structure, characterised by semi-autonomous social spheres with various points of overlap which contributes to multiplicity, competition and, at times, confusion (Moore, 1973; Tamanaha, 2007). Respondents described the relationship between state and customary spheres as being complementary—summarised in this work as being two sides of the same coin. However,

this study highlighted the most significant tension between these spheres as pivoting on the issue of tenure security. Currently the sole means by which to legally secure land rights in Zambia is by leasehold tenure on state land. While some respondents welcomed this option as sufficient, others felt it did not align with customary social organisation, norms, and values.

In describing how customary land and authority are conceptualised and administered, respondents overwhelmingly characterised customary land as being essential to rural life and livelihood, and as an intrinsic aspect of Zambian heritage and birthright. Thus, this thesis demonstrates that as chiefs have the responsibility to hold customary land in trust for their subjects, they in turn have an integral role as the custodians of rural livelihood and culture. This thesis describes customary land as essential to rural life, and as a valuable social safety net that is worth preserving for future generations. However, this work argues that the customary sphere must not be conceptualised as a static artefact of the past, worthy of preservation for the sake of tradition. Rather, it argues that the customary sphere must be understood as a vital institution that meets the essential need for rural landholders to have access to land. By providing land that is free, rural landholders are able to survive by producing on customary land.

In exploring the influence of historical processes on how the role of customary authority is conceptualised in the contemporary era, this work demonstrates that customary structures were significantly altered throughout the colonial, independence, and contemporary eras. Customary land administration was described as being rooted in notions of tradition and of a shared past. However, it is argued that the customary realm is neither modern nor traditional, but is part of a dynamic interaction with other types of land tenure and interests operating in close proximity.

Respondents described leasehold tenure as the only means by which to secure land tenure to support investment. The implication of this arrangement is that customary land must be sacrificed via conversion in order to secure tenure. Because these different types of land tenure are not legally recognised as equal, customary land administration is conceptualised as being in conversation with and influenced by leasehold tenure. Thus, in juxtaposing leasehold and customary land tenure as two parts of the national land system, the former is framed as superior and backed by law. In contrast, customary land tenure is

seen as inferior and insecure. Respondents of this study expressed the desire for greater tenure security on customary land, without needing to convert it to state land.

Further, this study shows that colonialism's indirect rule increased the power of customary chiefs, by giving them greater authority over land transactions. In this regard, this study shows that in the Tonga context of Zambia's southern province, colonial processes imposed the chief-headman model onto their previous model of social organisation, characterised by a decentralised clan structure. This imposition built upon and reinforced social hierarchies, as well as created new relationships of social power by assigning new positions of authority. Respondents expressed that this increased power in the contemporary era causes some customary leaders to ignore customary accountability structures, such as customary councils, and to alienate land without consultation. This contributes to land being administered in an *ad hoc* and non-transparent manner and causes land tenure insecurity. In the Tonga context, this was characterised by respondents as being small-scale, widespread tenure insecurity.

In examining the strengths and challenges of customary land administration as it relates to tenure security in the contemporary context, respondents of this study reasoned that customary land is valuable because there are no monetary fees, it is accessed relatively easily through a local headperson, and it is essential to supporting subsistence livelihoods. Further, land is understood as part of Zambian heritage, identity, and birthright. Respondents expressed the centrality of land to rural life as having the utmost significance.

Of customary land challenges, respondents indicated the primary concerns as being land disputes, limited land availability in some areas, and tenure insecurity. Land disputes were described as being caused by ambiguous land boundaries, and people living on land without knowing its status as statutory or customary. Land availability was described as being limited in some areas due to higher population densities (especially near towns). In other instances it was limited by the alienation of customary land through conversion to leasehold. Respondents largely described land availability as being dependent upon the benevolence of particular leaders. Tenure insecurity was detailed as being caused by the threat of being chased away by a customary leader, by land alienation or local reallocation, and by gendered inheritance land disputes, which

negatively affects widows. Thus, respondents described tenure insecurity to be fundamentally underscored by a lack of documentation by which to secure land rights.

To grapple with such challenges, access was used in this study as the critical point of analysis by which to understand how power-relations influence land access. Specifically, customary leaders were framed as having power to control access to land, while subjects had to maintain access to it by buffering their relationship relative to customary leaders (Ribot & Peluso, 2003). Accordingly, customary land access is intrinsically shaped by social-political relationships of dominant and subordinate actors. This study finds, when customary leaders mismanaged land, by alienating it without consultation, for example, such abuses were not necessarily challenged by subjects due to the subjects' need to maintain their social position relative to the chief. Thus leading land access to be explained in this study as being inherently shaped by dynamics of social power.

In examining the role of customary leaders in land administration, this work analysed what it means for chiefs to hold land in trust for their subjects. It was discovered that due to the erosion of customary accountability structures (i.e. making decisions in consultation with a customary council), some chiefs were able to abuse positions of authority by making unilateral decisions to alienate or convert land. This was described as competing conceptualisations of what it means for chiefs to hold land in trust. This blurs the distinction between the functions of control of access (administrative function) and the control of benefit (profit function) (Mvunga, 1980). Consequently, when holding land in trust is conceptualised as the chief owning land or as having ultimate authority over it, this is an abuse of power.

As Chief Butemwe described, customary authority is delegated authority from the people to the chief. He also explained, that customary leaders must remember that they are sitting on the people's throne, and they are accountable to deal land justly, in the subjects' best interests. In terms of land administration, chiefs hold land in trust and are therefore a trustee of customary land. Chiefs are properly understood as being custodians or administrators of customary land and rural culture. This study argues that formalisation is needed in order to correct this disjunction and to restore chiefs to the

proper role of custodianship, with functioning structures (such as customary councils) to limit power over land, to ensure accountability, and increase tenure security.

In considering ways forward, alternative means of increasing tenure security must be investigated. It is reasonable to expect that a legally backed form of customary land tenure is possible. This would enable customary land to be preserved as a valuable social safety net for future generations, and it would enable customary landholders to make improvements on their land with confidence that their rights to it will be ensured. This study highlights two noteworthy efforts to this end. The ZLA Traditional Certificate Program is one such effort. Pilot projects of this program were underway in two regions at the time of this study. Further research of this initiative is needed to understand its effectiveness over the long term. One critique of this program is that it does not achieve legally backed title to secure tenure, and so it is criticised for not going far enough. It is posited here however, that this program lays important groundwork needed to achieve legally backed tenure on customary land in the future. The second such effort worthy of further study is Chief Butemwe's self-motivated decentralisation of his authority over land administration. He is widely known and respected for taking this radical step in the name of transparency and tenure security. Further study is required, however, to understand how he did this, what his motivations were for doing so, and the overall effectiveness of this particular model for improving tenure security.

In closing, it was abundantly clear from respondents of this study that customary authority in Zambia has a critical role to play in Zambia's future. However, the nature of that role in the administration of land is questioned. Customary land administration in the contemporary era is described here as problematic and as contributing to land disputes and tenure insecurity. This thesis argues that customary land administration is in need of formalisation to increase tenure security and enable landholders to invest as they wish, in things like proper housing and agricultural inputs. Land is central to life. It is essential to rural livelihoods, and holds intrinsic value for Zambian identity and heritage. Customary land administration must be formalised to enable tenure security for landholders in the contemporary era, as well as preserve customary land for future generations. The slogan 'land is life' is a powerful truth for rural landholders, and it must be honoured by the manner in which customary land is administered.

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APPENDIX A: HOUSEHOLD ATTRIBUTES BY LAND ACCESS AND EDUCATION 2003/2004

Table 3. Household Attributes by Land Access and Education, 2003/04

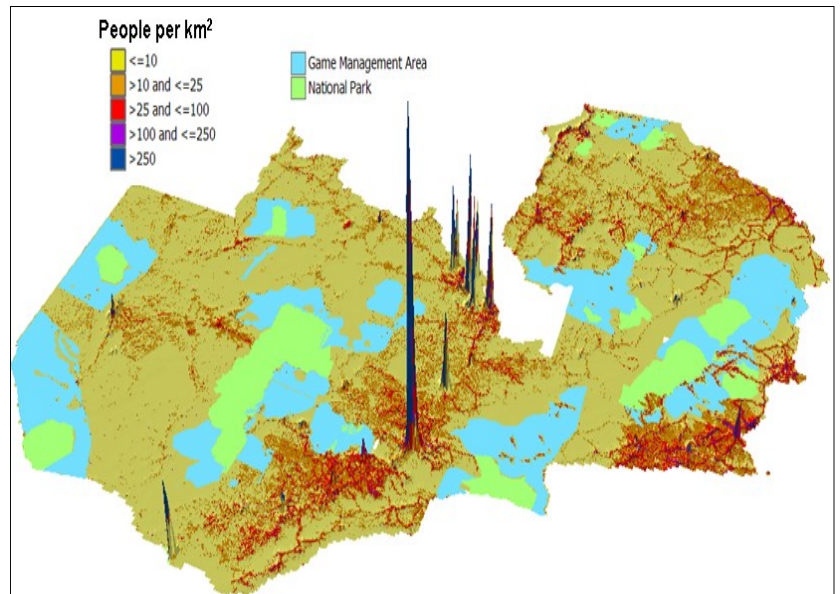
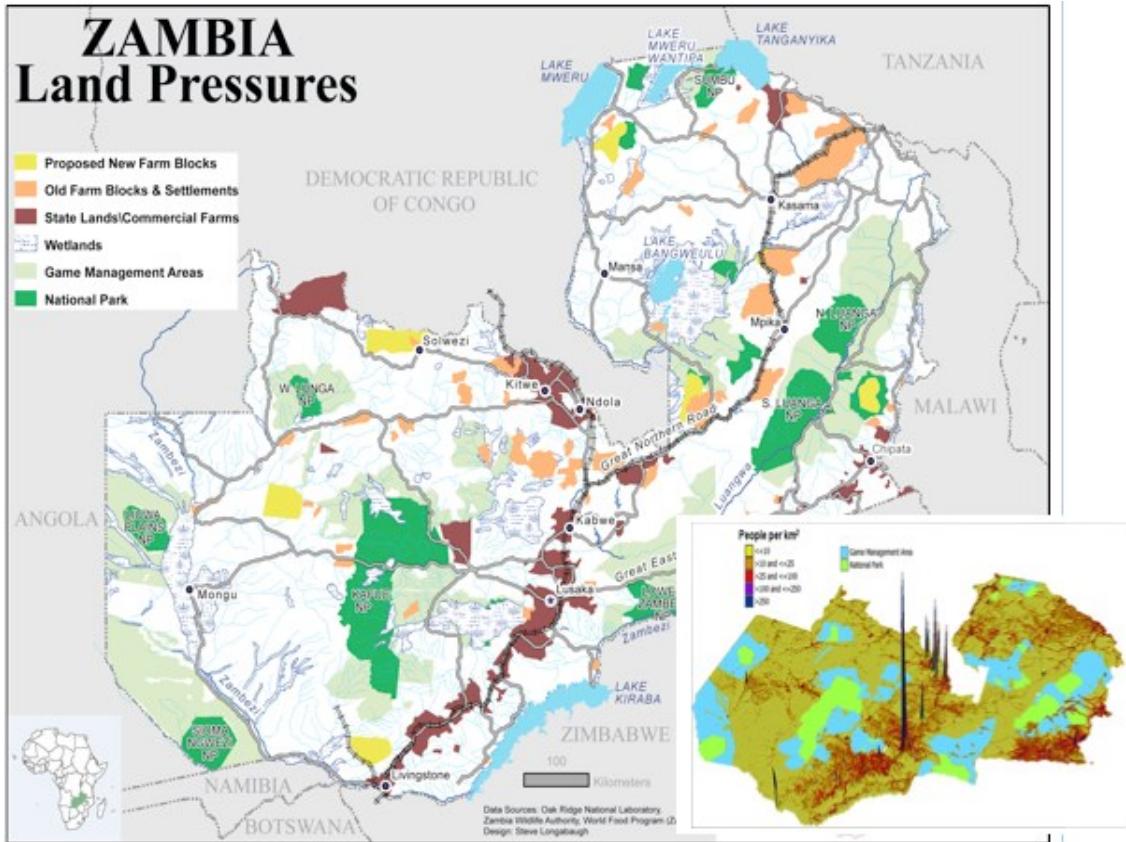
Landholding Size Tercile	Education tercile	1 (0 - 1.4 hectares)			2 (1.4 - 2.4 hectares)			3 (> 2.4 hectares)		
		1	2	3	1	2	3	1	2	3
Total		0-6	7-8	9-19	0-6	7-8	9-19	0-6	7-8	9-19
----- median value -----										
No. of observations	6826	966	721	619	752	765	725	602	830	846
Land Access										
Landholding size	3.10	0.70	0.80	0.80	2.00	2.00	2.00	6.90	6.90	8.10
Landholding size	0.60	0.20	0.20	0.20	0.60	0.40	0.40	1.70	1.20	1.30
Demographic										
Household	5.80	4.20	5.30	6.00	4.80	6.10	7.10	5.30	6.60	7.90
Female headed	24.00	40.50	28.80	19.60	26.60	20.70	16.50	23.10	13.60	13.20
Age of household	44.20	44.90	41.00	40.20	45.20	43.20	42.90	49.60	44.40	46.60
Level of	5.20	2.00	5.40	8.80	2.60	5.40	8.20	2.70	5.40	7.90
Assets										
Draft animals	36.04	28.40	22.80	29.50	34.10	36.80	34.80	55.30	39.80	46.00
Income										
Gross value of	183.10	101.10	100.50	144.90	164.10	184.90	200.80	227.60	273.00	299.30
HH per capita	78.70	57.00	58.10	105.50	65.90	69.60	98.50	80.40	86.40	108.40
Crop income share	72.30	74.70	66.30	53.30	81.20	75.40	63.80	84.70	78.80	68.30
Off-farm income	24.60	22.90	31.00	44.20	16.00	21.40	31.80	12.60	17.80	27.50
of which:	3.90	5.90	4.10	3.80	3.30	2.90	3.40	2.50	3.30	4.60
own	11.90	10.80	15.90	16.00	8.60	12.60	11.70	7.30	10.90	13.70
non-	6.40	2.40	5.40	21.80	2.30	3.70	14.70	1.60	2.60	7.80
	2.40	3.80	5.40	2.60	1.70	2.10	1.90	1.20	0.90	1.40
Livestock product	3.10	2.50	2.70	2.50	2.80	3.20	4.40	2.60	3.40	4.20

Source: Post Harvest Survey (PHS) and Supplemental Survey to the PHS, 1999/00, CSO. US\$ are computed at 2000 exchange rate.

Chart Source: Jayne *et al*, (2008), p. 12.

Based on data from Zambia's 1999/2000 Post Harvest Survey and the 1999/2000 Supplementary Survey to the Post Harvest Survey conducted by Zambia's Central Statistics Office. Sample size is 8,000. Because the surveys are specifically agricultural, landlessness was not included; however, through identifying households that do have land, landlessness was estimated at approximately 4%. Small-scale farms are classified as being between 1 and 20 hectares, and commercial farms are excluded from the surveys. Control over land is not identified by title but rather by the area over which households have control, mostly through customary usufruct rights. Income in these surveys is considered to be the sum of crop, livestock and non-farm incomes, and landholdings includes cropped and fallow land, wood lots, gardens and rented lands under households' control (Jayne *et al*. 2008, p. 3).

APPENDIX B: LAND PRESSURES MAP OF ZAMBIA

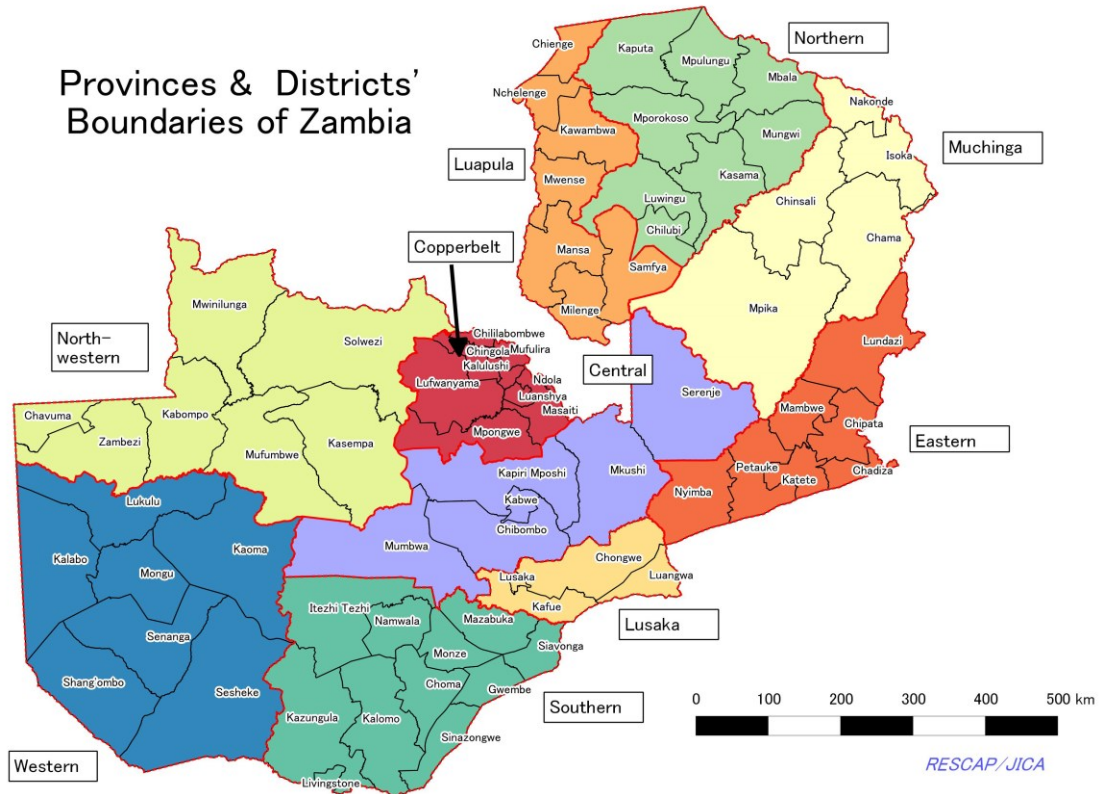


Note from FSRP:

This map reflects preliminary work and will be edited further based on additional consistency checking and refinements. The shape and location of the “Proposed New Farm Blocks” is an approximation based on a map obtained from MACO. The shape files showing “Old Farm Blocks and Settlement Schemes” is made up of probably not more than 3-4 Farm Blocks, with the rest being settlement schemes. The number of settlement schemes accounted for is still being updated. Shape files for local and national forest are also missing from the map.

Source: Food Security Research Project, 2010.

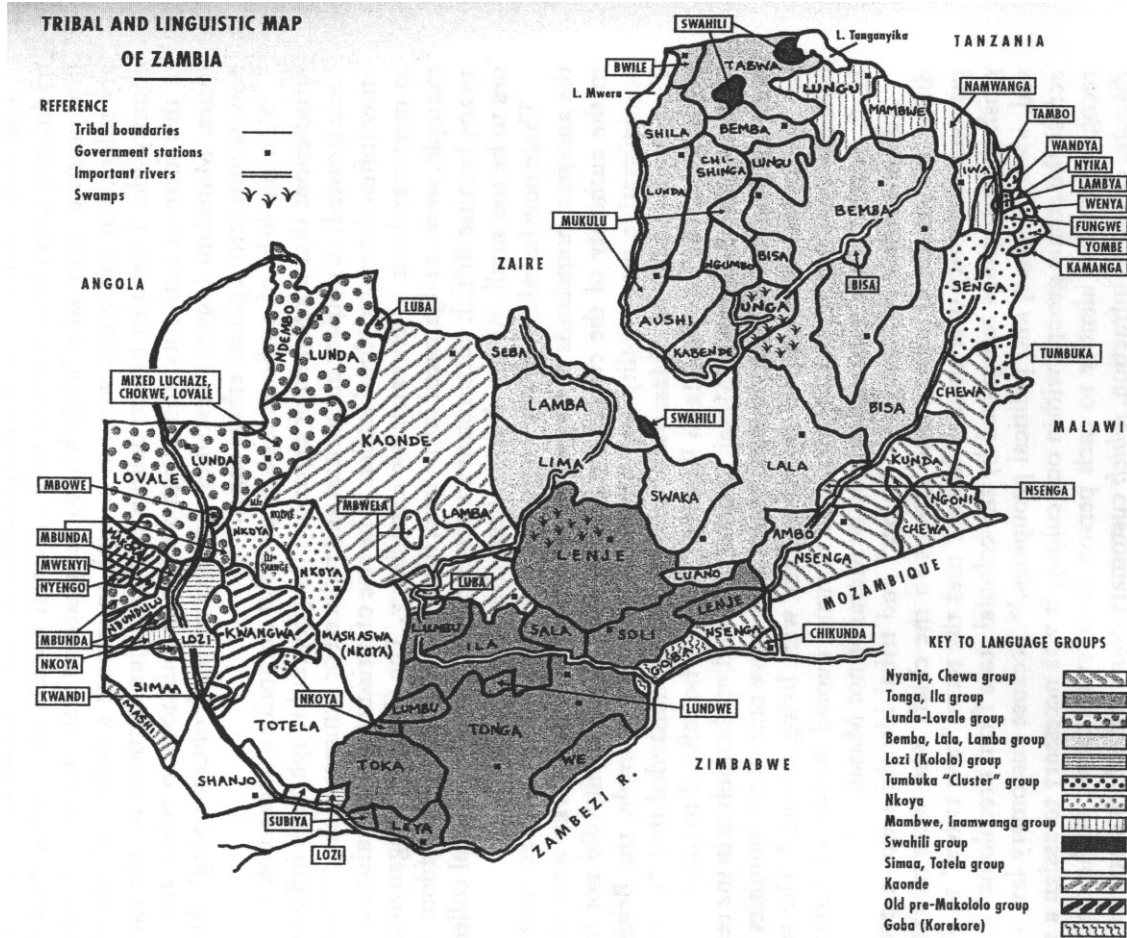
APPENDIX C: MAP OF ZAMBIA



The provinces are as follows, with relevant capital cities in parentheses:
Central (Kabwe), Copperbelt (Ndola), Eastern (Chipata), Luapula (Mansa), Lusaka (Lusaka), Muchinga (Chinsali), Northwestern (Solwezi), Northern (Kasama), Southern (Choma), Western (Mongu)

Source:
<http://mmservice.web.fc2.com/RESCAP/documents/zambia-province-district-map2013-Jan.jpeg>

APPENDIX D: TRIBAL MAP OF ZAMBIA



Tribal Territories of Northern Rhodesia circa 1935.
As presented in Boone, C. (2013), p. 31. Source: Survey Department of Zambia.

APPENDIX E: RESPONDENT TABLE

This table provides basic information about respondents of this project.

	2012 DATE	PSEUDONYM	SEX	RESPONDENT CATEGORY	TRIBE/TOWN	LIVE	EDUCATION	TYPE OF LAND	SIZE OF LAND
				PROFESSIONAL					
1	09-Oct	Nyuma	F	Legal sector	Lusaka	Urban	Law degree	State	20 acres
2	23-Oct	Gunduzani	M	Legal sector	Lusaka	Urban	Law degree	State	
3	27-Nov	Malilwe	F	Legal sector	Tonga/Ila	Urban	Law degree	State	2 Ha
4	24-Oct	Twaambo	M	NGO sector	Tonga	Urban	University	State + Clan	Urban plot
5	01-Nov	Akufuna	F	NGO sector	Lusaka	Urban	University	State	
6	02-Nov	Mubanga	F	NGO sector	Bemba/Luvale	Urban	College	State	Various plots
7	05-Nov	Lipepo	M	NGO sector	Lozi	Urban	Social worker	State	
8	12-Nov	Takondwa	M	NGO sector	Lusaka	Urban	Degree	State + conversion	
9	13-Nov	Nsabata	M	NGO sector	Tonga	Town	Degree	State + Clan	
10	13-Nov	Miyanda	M	NGO sector	Tonga	Town	Degree		
11	19-Nov	Tilabilenji	M	NGO sector	Nsenga	Town	Certificate	State + Clan	
12	23-Nov	Luyando	M	NGO sector	Lusaka	Urban	Degree	State	Urban plot
13	12-Nov	Cheelo	M	Government	Tonga	Urban	Degree	State + Clan	5 Ha
14	19-Nov	Masiku	M	Government	Taewa-Bwile	Urban	PhD	State	10 Ha
15	26-Nov	Fanwell	M	Government	Lusaka	Urban	PhD		
16	27-Nov	Wongani	M	Government	Lusaka	Urban	Masters		
17	29-Nov	Namukolo	M	Government	Lozi	Town	Degree	State	
18	08-Dec	Mutinta	M	Government	Tonga	Town	PhD	State	10 Ha
19	17-Nov	John	M	Missionary	Foreign	Rural		Customary	1 acre
20	10-Dec	Markus	M	Missionary	Foreign	Rural	Masters	State	
									<i>Continues on next page</i>

	2012 DATE	PSEUDONYM	SEX	RESPONDENT CATEGORY	TRIBE/TOWN	LIVE	EDUCATION	TYPE OF LAND	SIZE OF LAND
				CUSTOMARY AUTHORITY					
21	14-Nov	Chabota	M	Paramount Chief	Tonga	Rural		Customary	
22	14-Nov	Mweendalubi	M	Chief	Tonga	Rural	Certificate	State	
23	15-Nov	Kafwamba	M	Chief	Tonga	Rural	Teaching	State	20 x 20 Ha
24	30-Nov	Mwikisa	M	Chief	Kaonde	Rural	Diploma	Customary	
25	30-Nov	Butemwe	M	Chief	Kaonde	Rural	Diploma	Customary	
26	22-Dec	Mwaandu	M	Headperson	Tonga	Rural	Diploma	State	89 Ha
				LANDHOLDER					
27	10-Nov	Miyanza	M	Farmer	Tonga	Rural	Degree	State + conversion	300 Ha, 77 Ha
28	15-Nov	Mpimpa	M	Farmer / vice-headperson	Tonga	Rural	Police force training	Customary + Clan	6 Ha
29	15-Nov	Choonaa	M	Farmer	Tonga	Rural	Grade 11	Customary + Clan	5-8 Ha
30	15-Nov	Mweeda	M	Farmer	Tonga	Rural	Diploma	Customary + Clan	8Ha
31	29-Nov	Mutete	M	Farmer	Solwezi	Town		State	20 Ha
32	30-Nov	Kayombo	M	Farmer	Solwezi	Town		Getting state	10 Ha
33	30-Nov	Chikwanda	M	Farmer / Farmers Union	Solwezi	Rural	Certificate	State	50 Ha
34	13-Dec	Mayaba	M	Farmer & Teacher	Tonga	Rural	Diploma	State + Customary	48 Ha + 13 Ha
35	14-Dec	Haamaandu	M	Farmer	Tonga	Rural	Military training	State	600 ha
36	17-Dec	Milimo	M	Farmer	Tonga	Rural	Diploma	Customary	90 Ha
				FOCUS GROUP					
1	14-Nov	Focus Group	9M, 2F	Farmer Focus Group	Tonga	Rural		Customary	Range: 2 - 7 Ha/ person; Mean 4.33 Ha/ person

APPENDIX F: GENERIC INTERVIEW TEMPLATE

Decision-making processes concerning customary land in Zambia

Section A: Background Information

- A1. Please tell me a bit about yourself.
How old are you?
Are you married?
Do you have children?
Where do you currently live?
How long have you lived there?
What do you do for employment?
How long have you been doing this job?
- A2. Can you tell me about your family?
What part of the country is your family from?
Where did you grow up?
Do you still have family in that area?
Did your family farm when you were growing up? Do they farm now?

Section B: Connection to land and agriculture

- B1. Do you have land?
If not, why not? Would you like to have land?
If so, how much land do you have?
- B2. Do you participate in agricultural activities now?
Is this land near to where you grew up?
- B3. How did you gain access to this land?
Please describe the process that you had to go through to get land.
Is this process the same for everyone?
- B4. What property rights do you have on this land? For example,
Is it customary or statutory land?
Do you have formal title for the land?
What are you able to do on the land? (i.e. build, cultivate, *etc.*)
Are other people allowed to use this land? (i.e. Access to water, *etc.*?)
Can you sell or rent the land?
- B5. Do you participate in agricultural activities?
Describe these activities (i.e. crops, livestock, *etc.*)
Do you live at the same place as you farm?
If not, how regularly do you go to your farm?
Does anyone else participate in agriculture on your land?
Why do you participate in agriculture?
- B6. Please describe what value land has to you.
i.e. is it important for spiritual reasons? Livelihood? Inheritance for your children? Investment/income?
Do you plan to return to this land when you retire/finish working?

Section C: Decision-making processes

- C1. In your experience, how do people decide what land each family is able to use?
- C2. Are there disagreements over land use? What happens when disagreements occur? How are disagreements resolved?
Are disagreements common?
Can you describe a situation where people disagreed over land use?
- C3. Can you describe the Chief's role in the community?
Can you describe the chief's agricultural activities?

How is the chief chosen? How long does s/he remain a chief?
Do you know of a situation when a chief was removed from his role by force?
Describe.

- Can you describe the role of headman in the community?
 Can you describe the headman's agricultural activities?
 How are headman chosen? How long do they remain headman?
 Do you know of a situation when a headman was removed from his role by force? Describe.
- C4. (If you know) Is the amount of land controlled by your chief and the people of your village the same as it was when you were a child? Do the villagers (in your home village) farm the same amount of land that they did when you were a child.
- C5. Who is included in the process of making decisions in villages?
 How do people interact with the Chief?

Section E: Political institutions and land legislation

- E1. What do you know about land legislation or land regulations?
 E2. Can you tell me about the state's plans for land?
 E3. Can you describe how the government and chiefs interact with regard to land?
 E4. Have you heard of customary land being converted to state land?
 What do you think about this?
 Can tell me about a particular situation of land conversion?
 E5. What changes are needed to improve access to land in for rural people?

Section F: Pressures influencing land conversion decisions

- F1. How does the chief make decisions?
 Do they consult with any one or get advice from other people?
 F2. How much contact does the chief have with the government?
 Can you describe the relationship between the state and chiefs?
 F3. If a decision to convert customary land is made that you are not happy with, would you blame the chief or the government?
 Can you tell me about a decision that you have not agreed with?
 Can you tell me about a change to land use or ownership that you have agreed with or thought was a good policy?
 F4. Can you describe potential positive outcomes of converting customary land?
 F5. Can you describe potential negative outcomes of converting customary land?

Section G: Simultaneous identity as a subject and a citizen

- G1. When you consider the future of Zambia are you influenced by the opinion of the chief or of the president? Why?
 G2. Who do you think understands the lives of ordinary Zambians best, customary or government officials?
 G3. If you have an opinion about a policy or a proposed change in your community can you speak to the chief (or headmen)? Can you speak with someone from the government?
 If yes: Tell me about a time that this has happened.
 If no, why not?
 G4. Does the chief ever consult with you or other people in the community about decisions?
 Does anyone from the government ever ask you or other people from the community about decisions?
 Tell me about a time when this happened.
 G5. How do you identify yourself: as a citizen of Zambia or as subject of your chief? Why?
 Do you struggle to understand which is your identity?
 Are these two identities in opposition to one another?

Section H: Livelihood implications of land conversions

- H1. How does conversion of customary land effect people's ability to make a living?
Describe the impact on households and individuals, if their farms get smaller over time.

- H2. Do you know of people who do not always have enough to eat? Thinking of these people only, how much land do they have available for agricultural activities?
What is their greatest challenge in getting enough food?
How is land related to hunger?
In your opinion, how can hunger be improved?

- H3. If you have a farm, how much of what you produce do you keep to eat? How much do you sell? How much do you give away? (i.e. %)
Is this division typical of your neighbours?

- H4. Describe your responsibilities to provide food for your family. (i.e. are you responsible to provide food for extended family or only immediate?)

Section I: Concluding questions

- I1. Is there anything else related to customary leaders and/or land that we have not talked about that you would like to talk about?
Is there anything that you would like to comment on further?

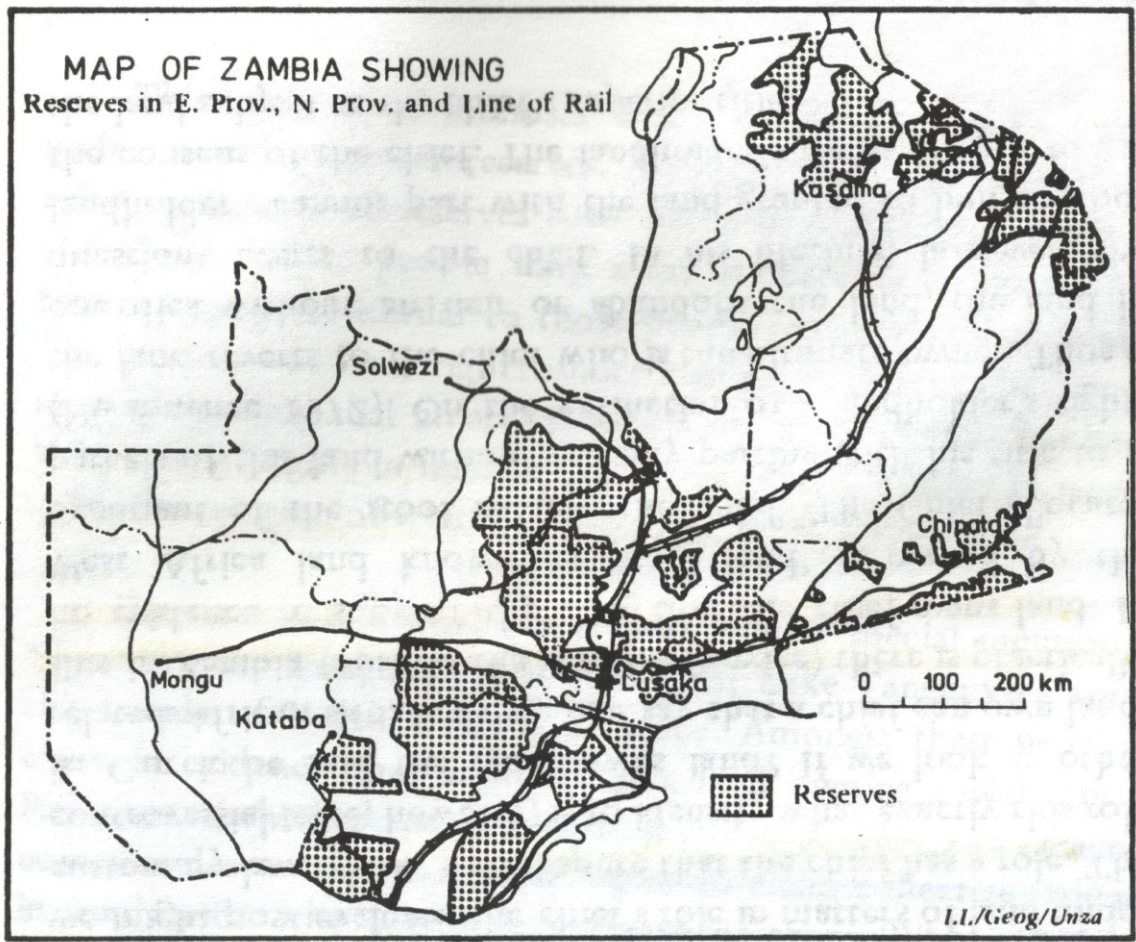
- I2. Can you suggest any other people that might be interested in participating in this study?

APPENDIX G: A NOTE ON BAROTSELAND

Initially, this territory was divided in two separate administrative territories: North Eastern Rhodesia (NER) and North Western Rhodesia (NWR). This is important to note here as it has implications for the contemporary context with regard to the question of Barotseland, now known as Western province. NER and NWR were established as separate protectorates, but were merged in 1911 to become Northern Rhodesia (Mvunga, 1980). The situation in NWR was slightly different, because NWR granted mineral rights to the BSA Co. but maintained the Litunga's (the King's⁶³) sovereignty to a more significant degree than did chiefs in NER. When the British crown took control of the region from the BSA Co. a 1924 Order in Council permitted the British governor to alienate lands anywhere in the territory, except in Barotseland (Hansungule, 2001). Barotseland joined Zambia at independence through the Barotseland Agreement (BLA) of 1964, which maintained the Litunga's sovereignty within his territory, making it a distinct nation within the newly independent state. However, the BLA of 1964 was not honoured long after independence, and was nullified with the 1970 Land and Miscellaneous Provisions Act, which made Western province on par with other provinces and vested its' land in the President. However, land administration remained with the Litunga (Mvunga, 1980; ZLDC July 2012; Roth & Smith, 1995, p. 19). Separatist factions within Western province persist to the present to contest the abrogation of the BLA 1965 and demand the Litunga's sovereignty.

⁶³ Litunga is the name of the king in NW. The tribe of that region is called Barotse or Lozi (used interchangeably). The NWR territory is now known as known as Western province or Barotseland.

**APPENDIX H: MAP OF NATIVE RESERVES OF
NORTHERN RHODESIA IN 1929**



Source: Mvunga (1980), p. 22.

APPENDIX I: LAND CONVERSION DIAGRAM

Procedure for land conversion, beginning with the chief's permission

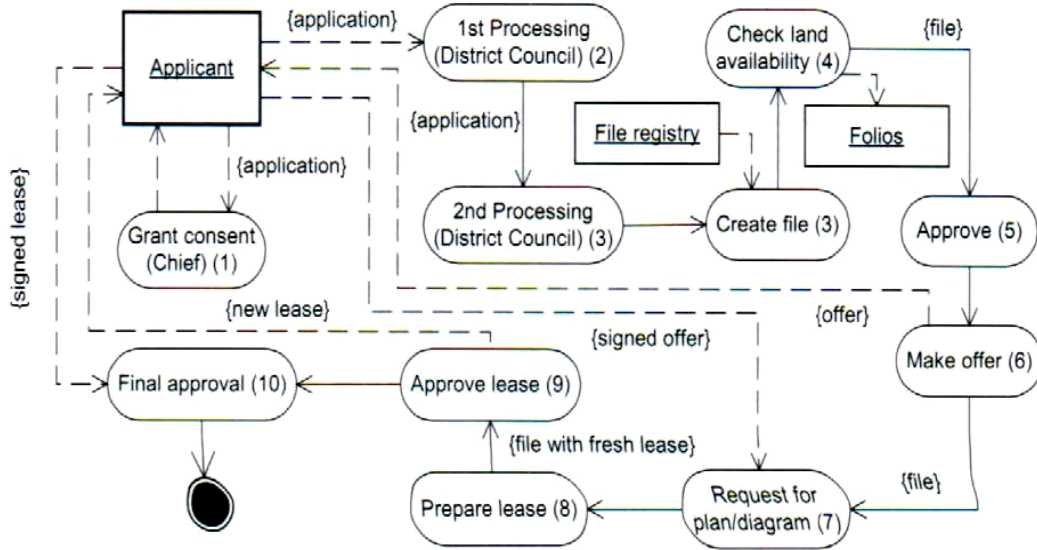


Figure 3.5.3-1 Land allocation

Source: Mulolwa, A. (2002). p. 68.

APPENDIX J: QUOTE REGARDING THE MEANING OF LAND TO ZAMBIANS

Extended passage from Chief *Butemwe* regarding the meaning of land as heritage:

“Yes. Land is part of Zambian heritage, because everything else we shall ever do is on land. If we are going to reach higher heights, it is from the land. This land is our pride. And therefore everything must be done to protect its sovereignty. And sovereignty is a relative term: sovereignty at the village level, for instance we need to protect the sovereignty of customary land. But on the national level we need to protect, whether it is customary or leasehold, it is still Zambia’s land. So there must be an understanding, which should help us to protect this.

There is a need for people to be able to say, “this is our survival.” And the environment today, if we don’t take care of the environment, and most of which is from the land, if we unilaterally cut down trees, destroy the land for mining, destroy the land for this and that, destroy our rivers – how are we going to survive? The poor man survives because of the natural resources!

The land we have today gives us our livelihood. We are subsistence farmers. We survive on the land. The land today gives us our nutrition. Mushrooms that everyone else gets, comes from the land and it is food. It is our nutrition. Many of our people are not able to access medical service. For instance to get to Solwezi, [many] kilometres from here, if they have an emergency, the health centre [in the village] cannot handle those big things. And when they cannot go, how do the people survive? Our people are still rich in the knowledge of which root, which tree can give you healing for what ailment, so we survive. Many of our communities survive because they are able to do what? Get the roots of this particular tree, which is growing on the land and have healed [themselves]. Even some of the diseases that do not have answers in medical science we have the answers at the customary level, because we know which tree to go to. Now, the more we clear the land, clearing the trees means that we are also losing the property to heal ourselves.

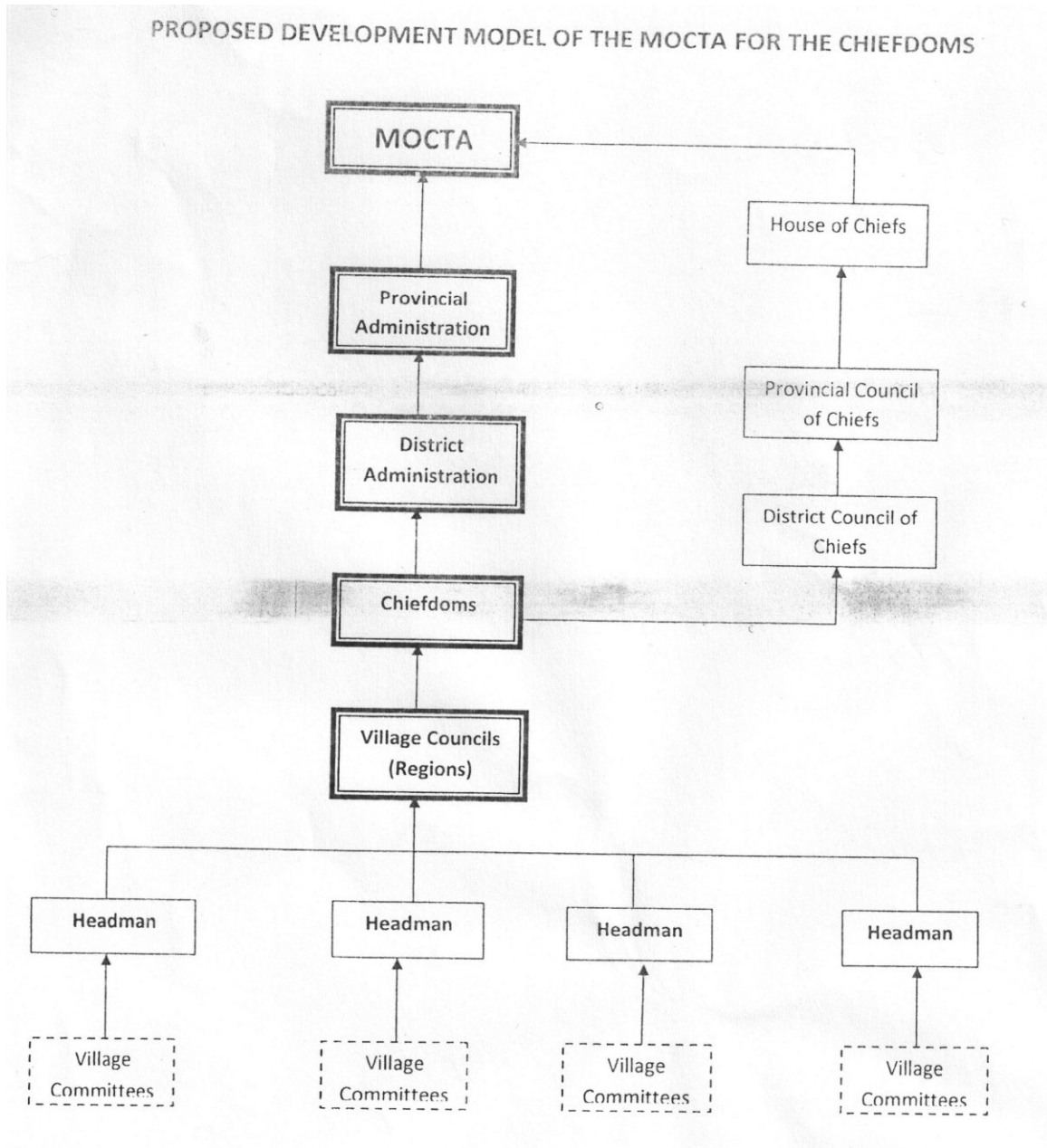
So this is the reason we think that land is our heritage. It is our heritage! We cannot continue to destroy this land anyhow. So we must jealously guard [it]. Many of our people do not survive on the health systems, they survive because of the traditional knowledge that they have for herbs. So...this is our heritage and this is our survival. You know, it is our survival. The rivers, it is our survival. So we need to take care of this environment and then this environment will also take care of us. It is a shared responsibility, but the environment will not speak to us, but when the environment speaks to us it speaks very harshly and we are not able to pay the price the environment will demand. The more trees we cut, we have lesser rainfall. The more trees we cut it means we are destroying, for instance, in Zambia, the Northwestern province holds the headwaters of about three of our biggest rivers in Zambia – the Zambezi river, which runs throughout most of Zambia up to the Indian Ocean, beginning with Northwestern, then it goes into the Congo, it goes into Angola and then back into Zambia, then it shares waters with Namibia, we share the waters with Botswana, we share the waters with Mozambique, then into the Indian Ocean. Now, that Zambezi River has its headwaters in

this province. So the more trees we cut down and the more land we destroy, it means that we are also endangering Zambia and the sub-region that depends on the headwaters waters that come from the Zambezi River here. The other bigger river, Kafue; Kafue must be the [second largest] river in Zambia. It has its headwaters in Northwestern province. Kabompo the deepest [river in the world]...Kabompo River is the deepest and it has its headwaters in Northwestern province. And these sustain Zambia! If we are going to just give away all the land, destroy all the trees... we are going to have the rivers drying up...Life for the people is going to become poorer and poorer. It means that even the trees that we use for our medicines will not be able to grow, so I think to that extent, land is our heritage.

Even our national anthem, “one land and one nation is our pride!” That is what we sing in our national anthem! So...the land is our heritage. When you look at our flag for instance, the green is talking about the environment, that environment sits on the land. It is our heritage. Look at the other colours that have been put there, orange, is talking about the mineral wealth of this country – it is our heritage! Of course the eagles and what have you, where do they find their solace? It is in the vast forest that we have on the land. And so I think that indeed to a great extent, and the poor man of course, most of Zambia population live in the rural areas, where do they survive – it’s the land!

Land is our heritage. And so, ma’am, I think that everything must be done [to protect it]. But over and above that, the environment here, we know that it knows no boundaries, the carbon dioxide will go flow over Congo and what have you and continue and then get into the sky destroy the ozone layer and everything else. More and more trees that we are cutting down and burning is destroying the ozone layer and then even those in Canada are affected by the negative affects of what we are doing with the land here. Therefore the protection of land is not just about the local people, it is about the whole globe. So we must have a global perspective on land, because we are all citizens of one globe. Indeed, the land is our heritage.”

APPENDIX K: MINISTRY OF CHIEFS AND TRADITIONAL AFFAIRS (MOCTA) RESTRUCTURING MODEL



Source: Interviewee, Government Professional, 2012.