

**LAND TENURE, HOUSING RIGHTS AND GENDER -  
NATIONAL AND URBAN FRAMEWORK:**

# **Z A M B I A**



**UN-HABITAT**

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*Law, Land Tenure and Gender Review Series: Southern Africa*

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## **FOREWORD TO SOUTHERN AFRICA LAW AND LAND TENURE REVIEW**

Africa is currently the region of the world that is witnessing the most rapid rate of urbanisation. The Southern African sub-region is no exception. The chaotic manifestations of rapid urbanisation include poor and inadequate infrastructure and services, urban poverty and the proliferation of slums and informal settlements. The precarious nature of land tenure characterizing these settlements renders millions of people vulnerable to evictions. Their illegal status further hinders their access to basic infrastructure and services, a key challenge that has to be overcome in order to attain the Millennium Development Goals of improved water and sanitation, gender equality, health, education, nutrition and the prevention of diseases.

Through the generous support of the Government of the Netherlands, UN-Habitat is pleased to publish its review of the legal and policy frameworks governing urban land tenure in Southern Africa. In addition to an overview of the situation in all ten countries of the sub-region, the present report contains four case studies which analyse the specific cases of Lesotho, Mozambique, Namibia and Zambia. These case studies provide a comprehensive examination of the laws and policies governing urban land tenure, with a special focus on their impact on women's rights to land and housing. National experts in each country have conducted extensive research to reveal the often-complex legal issues which hinder or enable the efforts of Governments, local authorities and their civil society partners in improving the living conditions of the urban poor. The study reveals that the sub-region is characterised by overlapping legal regimes. These include pre-colonial customary law which co-exists with a mixture of outdated and often draconian colonial laws and more recent legislation.

Strengthened security of tenure for the urban poor of Southern Africa is an essential step towards sustainable urbanisation and development of the sub-region. Without secure tenure, the prospects for local economic development, a safe and healthy environment, and stable homes for future generations to grow up in will remain bleak. Secure tenure alone will, however, not be sufficient and a clear message that emerges from this review is that good local governance is essential for tenure security programmes to achieve their desired goals and effectiveness.

This review contains findings and recommendations for both immediate and longer-term law reform to strengthen the tenure rights of all people, especially the poor and women. While they will further guide and inform UN-HABITAT's normative work through its two Global Campaigns for Secure Tenure and Urban Governance, it is my sincere hope they will contribute to furthering broad-based dialogue and engagement in land reform and security of tenure in all countries in Southern Africa in support of attaining the Millennium Development Goals.

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## Abbreviations

|        |  |
|--------|--|
| AG     | Administrator General  |
| AIDS   | Acquired immunodeficiency syndrome   |
| AU     | African Union  |
| Cap    | Chapter  |
| CBO    | Community-based organisation   |
| CCJDP  | Catholic Commission for Justice, Development and Peace                     |
| CEDAW  | Convention on the Elimination of All Forms of Discrimination Against Women |
| CESCR  | Covenant on Economic, Social and Cultural Rights                           |
| CIC    | Children in Crisis   |
| CLIP   | Copperbelt Livelihoods Improvement Programme                               |
| CLRC   | Copperbelt Land Rights Centre  |
| DC     | District Commissioner  |
| DDCC   | District Development Coordinating Committee                                |
| EFZ    | Evangelical Fellowship of Zambia   |
| HIV    | Human immunodeficiency virus   |
| HSIA   | Housing (Statutory and Improvement Areas) Act                              |
| IRUD   | Integrated Rural Development Initiative                                    |
| ISA    | Intestate Succession Act   |
| LAZ    | Law Association of Zambia  |
| MMD    | Movement for Multiparty Democracy  |
| NAPSSF | National Association for Peasants and Small-scale Farmers                  |
| NGO    | Non-governmental organisation  |
| NGOCC  | Non-Governmental Organisations Coordinating Committee                      |
| NHA    | National Housing Authority   |
| NHP    | National Housing Policy  |
| NLACW  | National Legal Aid Clinic for Women  |
| PDCC   | Provincial Development Coordinating Committee                              |
| PHI    | Presidential Housing Initiative  |
| PRSP   | Poverty Reduction Strategy Plan  |
| PSRP   | Public Service Reform Programme  |
| RDC    | Residents Development Committee  |
| SADC   | Southern Africa Development Community                                      |
| SIDA   | Swedish International Development Assistance                               |
| UNIP   | United National Independence Party   |
| WLSA   | Women in Law in Southern Africa  |
| YWCA   | Young Women's Christian Association  |
| ZAW    | Zambia Alliance of Women   |
| ZCEA   | Zambia Civic Education Association   |
| ZLA    | Zambia Land Alliance   |
| ZNBS   | Zambia National Building Society   |

## Executive Summary: Southern Africa

This report was commissioned by UN-Habitat to review the laws and land tenure of a selected number of southern African countries. It involved the appointment of country specialists who researched and produced country chapters for their respective countries namely, Lesotho, Mozambique, Namibia and Zambia. A regional expert was appointed to produce a regional overview to serve as a source document for the country reports, as well as provide overall coordination of the project. The project was carried out over a period of roughly one year, which began in March 2004.

The economic, social and political diversity of the region precludes one from reaching sweeping conclusions. Nevertheless it is possible to recognise a number of common themes. The recommendations that flow from this work obviously have to be considered in the light of the difficult socio-economic conditions prevailing in the region. Among the worst poverty levels in the world as well as high HIV/AIDS infection rates need to inform any reform initiatives, and infuse a sense of realism and strategic thinking into any conclusions or recommendations. This also means that all reforms should have poverty alleviation as their foremost priority, followed closely by a concern with the interests of vulnerable groups like people infected or affected by HIV/AIDS. Because poverty and HIV/AIDS have the greatest impact on women, all initiatives must prioritise the importance of women's rights to fair and equal treatment, as well as their specific needs and challenges.

The first area of reform that arises in the region is the need for constitutional review in a number of the countries. The degree of reform required varies depending on the country, but they all reflect a number of shared concerns. Firstly, there is a widespread need to enshrine and strengthen the right to adequate housing. With this right come related aspects of service provision as well as the prevention of unlawful evictions. Secondly, constitutional reform that eradicates against women is essential. While all the constitutions within the region appear to prohibit overt discrimination on the basis of gender, many allow for such discrimination where customary law is applicable and where customary law permits it.

Across the region a number of other areas of law also have to be tackled as a matter of urgency. The first category is land laws, which have to be reviewed and revised to provide flexible and practical methods of ensuring secure land tenure rights for the poor. This includes the recognition of existing tenure arrangements through simple, cheap, informal and incremental systems. Another important area of legal reform recommended is changing laws that deal with marital and inheritance rights. The influence of marital and property laws has often not been linked to land reform initiatives. Many of these laws however discriminate against women in the acquisition, control and inheritance of land and housing. Laws that discriminate against women on issues of marital property and inheritance rights should therefore be repealed. This means that both men and women should have equal rights over marital property during and after the marriage or death of a spouse, irrespective of how they are married. A third priority area for law reform is the need to review high planning and building standards to facilitate provision of land and

housing for poor people. Finally, law reform is also needed in most countries of the region to regulate better the relationship between landlords and tenants, with a view to promoting rental as a secure and useful form of land tenure for those people who require it.

Legal reform is successful only within a supportive framework. Tied to reform initiatives, is the need for supportive structures of implementation. The first is local government. A key recommendation in this work is for the creation of capacitated and functioning local government with a clearly defined mandate for managing land and housing issues. The second is judicial reform. It is recommended that dispute resolution mechanisms on issues dealing with land are made simpler, easier to access and more recognizable to people at local level. Civil society is an important driver of legal reform. Support for strong civil society organisations with an urban land focus is therefore recommended. Many recent reform initiatives have stalled, and a vigilant and active civil society is important to sustain the reform drive. The role of traditional leadership in land reform also cannot be overlooked. Traditional leaders still command a lot of legitimacy and are closely linked to land allocation and local dispute resolution. Traditional leadership should be incorporated more into reform initiatives and traditional leadership's decision-making processes must become more transparent and accessible. Finally, structures in government involved in land often perform their task in an uncoordinated manner due to overlapping mandates and unclear roles. A key aspect of reform is the creation of well-defined mandates and lines of responsibility among institutions involved in implementing and administering land and housing programmes.

Capacity building is a recurring theme upon which many recommendations are based. There are many structures that need to be capacitated to ensure the success of these reform initiatives. Structures within government are the first category. Local government, departments directly dealing with land matters and the judiciary all need larger budgetary allocations as well as more and better-trained staff. In recognition of the reality of limited government ability to provide for this, it is recommended that cheaper and more innovative ways are found to increase capacity. This includes partnerships with the private sector, the use of trained technicians rather than professionals for certain tasks and more efficient revenue collection and spending. Capacity also has to be built in community structures and NGO's. Civil society in most of these countries is not active and requires support.

The reform initiatives have to be backed up by monitoring and evaluation initiatives. For these initiatives to succeed it will be essential that efficient and effective systems of data collection and data management are established. It is also strongly recommended that data in future be disaggregated according to gender. This serves as a useful tool to measure the success of the reform initiatives in altering gender biases and to inform ongoing law and policy review. Related to data collection is the need for further research. One particular recommendation in this respect stands out. The effects of HIV/AIDS on urban land rights are unknown, although the agreed view is that it makes households and women in particular, more vulnerable to dispossession. This is an area requiring more and detailed research so that appropriate and specific interventions can be formulated.

Finally, an important and recurring aspect that influences reform is attitudes. Many recommendations that emerge from the reports are aimed at defeating long held patriarchal attitudes in society. These attitudes impede the equal treatment of women at virtually all levels of society, in households, communities and government. Many recommendations call for equal representation of women in decision-making bodies. Government organs like the legislature, judiciary and departments dealing with land are singled out. Traditional leadership structures should also be expanded to incorporate women and other marginalized groups. Additionally education and awareness is recommended as a way of gaining acceptance for reform from the public. It is however generally acknowledged that it is difficult to change attitudes without long and sustained efforts.

There is significant clamour for reform of land and housing laws and policies across Southern Africa. Laws that deal with land in general are being re-examined and more progressive laws suggested to replace them. The core finding of this report is there is need to sustain the momentum of these reform initiatives, and in many instances to expedite them to achieve lasting results.

Law and Land Tenure Review

SOUTHERN AFRICA  
REGIONAL REVIEW

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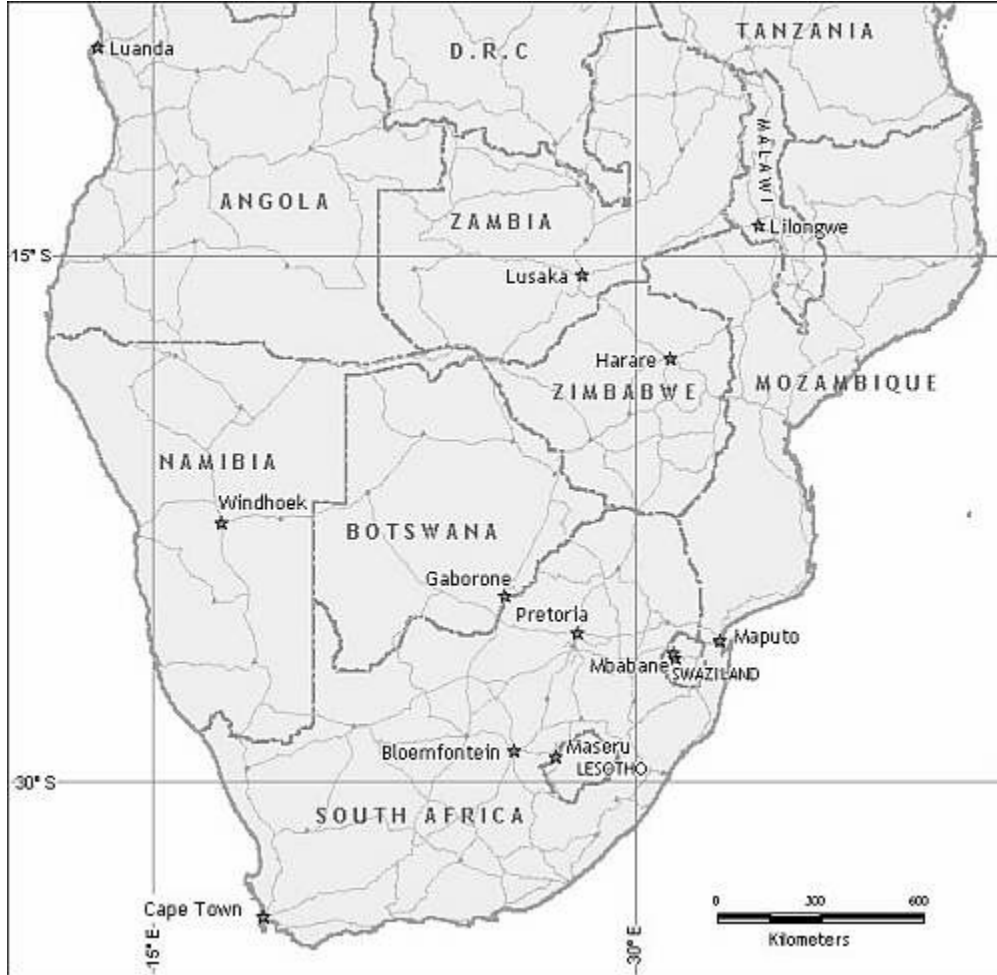
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Figure 1.1 Map of Southern Africa



# 1 Introduction

This overview introduces four separately published reports covering law and land tenure in Lesotho, Mozambique, Namibia and Zambia. It provides an overview of trends and issues emerging in the Southern African region. Almost all the countries in the region are engaged in processes of land law reform.<sup>1</sup> Although the focus of much of this law reform is the region's rural land, there are also many examples of new laws being formulated and discussed that deal specifically with urban land. In addition, a feature of the region is that boundaries between urban and rural tend to be indistinct. This, together with a widespread tendency to "import" customary laws and practices from the rural areas to the towns and cities, means that it is not always helpful to distinguish too sharply between urban and rural land laws. It is also interesting to note that while every country in the region has a land ministry, their primary concern is rural land. Urban land is dealt with as a secondary concern of ministries of local government and planning. To date, no country in Southern Africa has a dedicated policy framework within which to manage the urbanisation process.

All countries in the region face the considerable challenge of capacity shortfalls. Not only do the various government departments and municipalities lack suitably skilled or experienced personnel, but they also lack the financial resources to either train or hire new recruits, or to procure professional services from the private sector.

Southern African governments receive, or have received, donor support for their land law reform processes. Obviously, the overriding rationale for donor support for land law reform is that it can alleviate poverty. Beneath the umbrella of poverty alleviation, donor support for land law reform tends to be motivated by two main concerns. First, there is a concern with the often unequal effects of land law on women, but also on certain ethnic and racial groups. Second, and perhaps more importantly, there is a widely held belief that the economic development of the region requires firmer, more individualised and more secure land rights in order to promote investment in the region's economies. This second concern inevitably adds weight to those voices advocating the increased privatisation of land rights in Southern Africa.

Some key contextual features of the entire Southern African region include:

- Poverty: the region includes some of the poorest countries in the world. Low levels of economic activity, leading to weak government revenue flows, hamper efforts to address land reform, and increase dependence on international donors;
- Wealth gap: high levels of income inequality prevail across the region. Countries such as Namibia and South Africa are among the most unequal countries in the world;
- HIV-AIDS: the global epidemic has hit Southern Africa the hardest of any region in the world. While considerable research has been done in some

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<sup>1</sup> For an overview, see SARP (2003). *Seeking Ways out of the Impasse on Land Reform in Southern Africa*. Notes from an Informal "Think-tank: Meeting".

countries on the epidemic's impact on rural land holding patterns<sup>2</sup> there has been very little equivalent research done in the urban areas;

- Gender division: although it is unwise to oversimplify this point, access to land rights is largely determined by gender, with women's land rights often being secondary rights, in that they are derived from land rights held by their husbands or other male relatives;<sup>3</sup> and
- Colonial history: all the countries in the region suffered under various forms of colonisation from the mid-17<sup>th</sup> century through to the second half of the 20<sup>th</sup> century. This has had a marked impact on land rights, although this impact varies from country to country. Each country has also responded to the colonial legacy of skewed and unequal land allocations in different ways, inevitably involving some form of redistribution of land rights. Patterns of land ownership inherited from the colonial era have also contributed to a number of cases of weak governance, as well as civil conflict.

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<sup>2</sup> This research highlights especially the way in which women's land rights are negatively affected by the phenomenon of HIV-AIDS. See, Strickland, R. (2004). *To have and to hold: women's property and inheritance rights in the context of HIV-AIDS in Sub-Saharan Africa*. ICRW Working Paper.

<sup>3</sup> Walker, C. (2002). *Land Reform in Southern and Eastern Africa: Key Issues for Strengthening Women's Access to and Rights in Land*. Report on a desktop study commissioned by the FAO.

**Table 1.1 Social development indicators Southern Africa<sup>4</sup>**

| Country<br>(with<br>total<br>pop.) | Access to<br>services<br>(% of<br>total pop.)<br>2000 |            | Age group as a<br>percentage of<br>total pop.<br>(2002) |       |     | Poverty                     |                | Income<br>distr.<br>(share of<br>income<br>held by<br>groups)<br>1989-<br>2000) |             | Urban-<br>isation          |                                    | HIV/Aids<br>estimates (end<br>2001) |                          |
|------------------------------------|---|------------|---|-------|-----|-----------------------------|----------------|---|-------------|----------------------------|------------------------------------|-------------------------------------|--------------------------|
|                                    | Safe water  | Sanitation | 0-14  | 15-64 | 65+ | % population < \$1<br>/ day | Per capita GDP | Richest 20%   | Poorest 20% | Urban population<br>growth | Urban pop. Growth<br>as % of total | Adult rate (%)                      | Aids orphans (0 –<br>14) |
| Angola<br>(13 million)             | 38  | 44         | 50  | 52.7  | 3.1 | n/a                         | 2,053          | n/a   | n/a         | 5.3                        | 35.5                               | 5.5                                 | 100,000                  |
| Botswana<br>(2 million)            | 95  | 66         | 41.3  | 55.3  | 2.3 | 23                          | 8,244          | 70.3  | 2.2         | 4.2                        | 49.9                               | 38.8                                | 69,000                   |
| Lesotho<br>(2 million)             | 78  | 21         | 46.2  | 65.7  | 5.0 | 43                          | 2,272          | 70.7  | 1.4         | 5.3                        | 31.3                               | 31.0                                | 73,000                   |
| Malawi<br>(11 million)             | 57  | 76         | 44.6  | 51.8  | 3.5 | 42                          | 586            | 56.1  | 4.9         | 4.5                        | 29.5                               | 15.0                                | 470,000                  |
| Mozambique<br>(18 million)         | 57  | 43         | 42.4  | 53.6  | 3.6 | 38                          | n/a            | 46.5  | 6.5         | 6.6                        | 34.3                               | 13.0                                | 420,000                  |
| Namibia<br>(2 million)             | 77  | 41         | 38.1  | 49.6  | 3.4 | 35                          | 6,410          | 78.7  | 1.4         | 3.9                        | 31.9                               | 22.5                                | 47,000                   |
| South Africa<br>(45 million)       | 86  | 87         | 30.7  | 60.4  | 4.3 | 7                           | 10,132         | 66.5  | 2.0         | 3.4                        | 58.4                               | 20.1                                | 660,000                  |
| Swaziland<br>(1 million)           | N/a   | N/a        | 41.8  | 54.5  | 2.8 | n/a                         | 4,503          | 64.4  | 2.7         | 4.2                        | 27.0                               | 33.4                                | 35,000                   |
| Zambia<br>(10 million)             | 64  | 78         | 45.6  | 53.7  | 2.3 | 64                          | 806            | 56.5  | 3.3         | 2.7                        | 40.1                               | 21.5                                | 570,000                  |
| Zimbabwe<br>(13 million)           | 83  | 62         | 43.4  | 52.1  | 3.1 | n/a                         | n/a            | 55.7  | 4.6         | 4.3                        | 36.7                               | 33.7                                | 780,000                  |

<sup>4</sup> World Bank. (2004). *African Development Indicators*.

## 2 Legal systems of the region

In addition to the continuing application of African customary law, which is a feature of all countries in the region, there are three main settler legal systems in Southern Africa: Roman-Dutch law<sup>5</sup> (Botswana, Lesotho, Namibia, South Africa, Swaziland and Zimbabwe); Portuguese colonial law (Angola and Mozambique); and English law (Malawi and Zambia). In general, the form of the settler legal system does not seem to exert much influence over land and housing policy. There are some differences in approach, however, that may be attributable to underlying legal systemic differences, particularly in relation to marital property and inheritance issues.

**Table 2 1Main settler legal systems**

| <b>Settler legal system</b> | <b>Southern African countries</b>                                       |
|-----------------------------|---|
| Roman-Dutch                 | Botswana<br>Lesotho<br>Namibia<br>South Africa<br>Swaziland<br>Zimbabwe |
| Portuguese                  | Angola<br>Mozambique  |
| English                     | Malawi<br>Zambia  |

First, the Portuguese legal system inherited by Mozambique and Angola is a so-called civilian system. The main difference between common-law and civilian systems is that, in civilian systems, each judicial decision is taken to be a fresh interpretation of the civil code as applied to the facts of the case. This tends to reduce the significance in civilian systems of past judicial decisions, and consequently the role of the courts in the development of land and housing rights.

The second possible significant difference relates to the dominant position of ownership in Roman-Dutch common law, in comparison to English and Portuguese land law, where freehold is less hegemonic. In Mozambique, the socialist-inspired policy of state land ownership thus finds support in Portuguese colonial law, which also favoured state land ownership and private use rights. In Zambia, the influence of English land law may have bolstered the post-independence preference for leasehold over freehold tenure, although that country's post-independence land reforms were, like those in Mozambique and Angola, also carried out within a socialist framework.

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<sup>5</sup> Roman-Dutch law was introduced to Southern Africa by Dutch colonisers in the 17th century and has remained the basis for a number of legal systems in the region.

Thirdly, the *superficies solo cedit* rule in Roman-Dutch law (in terms of which anything permanently attached to land is regarded as part of the land<sup>6</sup>) means that in Botswana, Lesotho, Namibia, South Africa and Zimbabwe the distinction between land and housing rights is one of emphasis rather than law. In the absence of a purpose-designed statute, such as the Sectional Titles Act in South Africa,<sup>7</sup> it is not legally possible in these countries to separate rights to a structure from rights to the land on which the structure is built (which is not to say that separate rights to land and structures do not feature in extra-legal land allocation practices<sup>8</sup>). Generally speaking, land *policy* is equated with rural land reform in the countries where Roman-Dutch legal tradition holds sway, whereas housing *policy* is mostly given an urban inflection. Within these separate policy domains, the term “land rights” is used to emphasise the preoccupation of rural land reform with land as a productive asset, and the term “housing rights” to connote the right to shelter and tenure security.

In practice, legal systemic differences are a less significant determinant of the approach to land and housing policy than the colonial legacy in each country. For example, in Mozambique, the current difficulties over the continued application of colonial law have more to do with the nature of Portugal’s withdrawal from that country, and the ensuing civil war, than with the character of the received legal system. Post-independence land speculation was the immediate reason for Zambia’s turn to state land ownership.

Although each of the different legal traditions inherited in the Southern African region had a different name for it, they nevertheless all provided for some form of transferring land rights to an unlawful occupier of that land, for a prescribed period of time, where the lawful occupier had neglected his or her land. Various called adverse possession, prescription or *usucapião* in the different countries of Southern Africa, the common-law roots of this doctrine have almost all been translated into new statutes that spell out the criteria for obtaining land rights in this way.<sup>9</sup> Any differences in the common-law approach to this question have therefore been rendered irrelevant.<sup>10</sup>

All countries in Southern Africa have dual legal systems in the sense that both customary law and inherited colonial common law are applicable (in addition to pre- and post-independence statute law). The exact time of reception of colonial common law differs from country to country. For example, Roman-Dutch law was imported into the Protectorate of Bechuanaland (now Botswana) on June 10 1891,<sup>11</sup> and into Basutoland

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<sup>6</sup> See van der Merwe, C. G. (1987). *The Law of Things*. para 144 (in relation to structures built on land, the *superficies solo cedit* principle supports a form of original acquisition of ownership known to Roman-Dutch and modern South African law as inaedification.

<sup>7</sup> Act 95 of 1986.

<sup>8</sup> Royston, L. (2002). Security of Urban Tenure in South Africa: Overview of Policy and Practice. in A Durand-Lasserve and L Royston (eds). *Holding Their Ground: Secure Land Tenure for the Urban Poor in Developing Countries*. pp. 165-81.

<sup>9</sup> See, for example, Art. 12(b) of the 1997 Mozambique Land Law and section 3(4) and (5) of the Extension of Security of Tenure Act 62 of 1997 (South Africa).

<sup>10</sup> In practice the prescribed time periods for this form of land acquisition can vary widely, from 10 years in Mozambique to 30 years in South Africa.

<sup>11</sup> McAuslan, P. (2004). *Tensions of Modernity*. Paper presented at the University of Reading Centre for Property Law IVth Biennial Conference, p. 6.

(now Lesotho) by the Cape General Law Proclamation 2B of 1884.<sup>12</sup> The time of reception of colonial common law is obviously less important than the date of independence, for it is the latter that determines the degree to which the independence government has had the opportunity either to abolish or harmonise the dual legal system.

### 3 International law

Most countries in the region are party to the main international and regional human rights instruments. In the appendix the most relevant international human rights conventions are listed and an overview is provided of which countries are party to which instruments.

### 4 Land reform in the region

One of the main distinctions relevant to land reform in Southern Africa is between those countries that had substantial settler populations and those that did not. South Africa, Namibia and Zimbabwe all still have significant settler populations, holding large areas of land, especially agricultural land.<sup>13</sup> In comparison, the majority of the settler populations of Mozambique, Angola, Zambia and Malawi left those countries shortly after independence. Within this group of countries there is a further distinction between, on the one hand, Mozambique and Angola, where the independence governments were not hampered by the duty to compensate departing settler landowners, and, on the other hand, Malawi and Zambia, where initial land reform efforts were constrained by the duty to compensate. The third main category consists of Lesotho and Botswana, neither of which had significant settler populations. Swaziland is unique in the sense that, although it had significant settler land ownership, much of this land was repurchased by the Swazi people during the last century.<sup>14</sup>

The first main consequence of these differences is that in countries with significant settler populations the land question in the immediate aftermath of independence has tended to

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<sup>12</sup> Selebalo, Q. C. *Land Reform and Poverty Alleviation: Lesotho's experiences during the last two decades*. Paper presented at the SARP Conference on Land Reform and Poverty Alleviation in Southern Africa, p. 2.

<sup>13</sup> In Zimbabwe, until very recently, roughly 50 percent of all agricultural land was in the hands of a few thousand white farmers. In South Africa, 87 percent of the land surface was under settler control. The amount of land currently owned by the white minority group is unknown, but the basic landholding pattern has not changed greatly since the transition to democracy in 1994. In South Africa, by the end of 2000, six years after the transition to democracy, less than 2 percent of agricultural land had been redistributed. See Sibanda, S. (2001). *Land Reform and Poverty Alleviation in South Africa*. Paper presented at the SARP Conference on Land Reform and Poverty Alleviation in Southern Africa, Pretoria. (4-5 June 2001).

<sup>14</sup> The Swazi Land Proclamation Act, 1907 reserved 37.6 percent of the land for occupation by the Swazi people, and the remainder for settler occupation. The first land repurchase programme commenced in 1913, and has been resumed at various intervals. By 1991 one third of the land targeted for repurchase had been acquired. See Alfred Mndzebele 'A Presentation on Land Issues and Land Reform in Swaziland' paper presented at the SARP conference on Land Reform and Poverty Alleviation in Southern Africa (June 2001).

be dominated by rural land reform, especially land redistribution. In countries with limited human and financial resources, such as Namibia and Zimbabwe, this has resulted in prioritisation of laws that aim to redistribute commercial farmland over laws aimed at urban tenure reform. Thus, in Namibia, the Agricultural (Commercial) Land Reform Act, 1995, which provides for redistribution of commercial farm land, was enacted within five years of independence, whereas the draft Flexible Land Tenure Bill, which provides innovative, low-cost tenure forms for the urban poor, has yet to find its way to parliament. The main reason for the delay in enacting the Flexible Land Tenure Bill appears to be the absence of a political champion in government.

The second important effect of the distinction between “settler” and “non-settler” countries is the symbolic significance of land ownership as the preferred form of land tenure in the former group, where land ownership was invariably the exclusive preserve of the settler minority. In South Africa, especially, this has influenced the forms of tenure that have been made available in urban housing programmes, which show a distinct preference for ownership. By contrast, in Zambia, the departure of the settler population freed the independence government’s hand to abolish private land ownership. Without ownership as a dominant tenure form it was possible to experiment with alternative forms of tenure in the urban setting.<sup>15</sup>

The different historical legacies in the region have also influenced patterns of urbanisation, although here the causal link between the size and permanence of the settler population, and the urbanisation rate, is harder to isolate from other factors. For example, South Africa is now experiencing very high rates of urbanisation to its industrial centres, following a long period of influx control, which lasted until the mid-1980s. Yet in Mozambique, where the settler population departed en masse in 1975, the annual percentage urban growth rate is the second highest in Africa, at 6.6 percent. Indeed, apart from Zambia, all of the countries in the region register urban growth in excess of 3 percent.<sup>16</sup> In none of them is this process particularly well understood.

The table below compares the degree of urbanisation prevailing in each of the region’s countries.<sup>17</sup> It is significant that only one country in the region has more than 50 percent of its population currently living in urban areas.

**Table 4.1 Urbanisation prevailing in Southern African countries**

| Country    | Total population (millions) | Urban population as % of total |
|------------|-----------------------------|--------------------------------|
| Angola     | 13.1                        | 35.5                           |
| Botswana   | 1.7                         | 49.9                           |
| Lesotho    | 1.8                         | 29.5                           |
| Malawi     | 10.7                        | 15.5                           |
| Mozambique | 18.4                        | 34.3                           |

<sup>15</sup> See specific references to the relevant provisions of the *Zambian Housing (Statutory and Improvement Areas) Act [Cap 194]* in Chapter 5.

<sup>16</sup> *Op. cit.*, 4.

<sup>17</sup> World Bank. (2004). *Little Green Data Book*.

| Country            | Total population (millions) | Urban population as % of total |
|--------------------|-----------------------------|--------------------------------|
| Namibia            | 2.0                         | 31.9                           |
| South Africa       | 45.3                        | 58.4                           |
| Swaziland          | 1.1                         | 27.0                           |
| Zambia             | 10.2                        | 40.1                           |
| Zimbabwe           | 13.0                        | 36.7                           |
| Southern Africa    | 117.3                       | 42.8                           |
| Sub-Saharan Africa | 688.9                       | 33.1                           |

The dual legal systems found in all the countries in the region recognise, to a greater or lesser degree, customary laws, which are inherently patriarchal. In some of the countries, such as South Africa and Namibia, the independence constitution specifically asserts the normative priority of equality rights over rights to culture.<sup>18</sup> In others, such as Lesotho, patriarchal forms of land holding are constitutionally entrenched.<sup>19</sup> The constitutional position in a country obviously affects the degree to which land reform and urban tenure laws can address gender discrimination. In Namibia and South Africa, new laws applicable to areas under customary law guarantee minimum representation for women on district level land management bodies.<sup>20</sup> And in Zambia the national gender policy mandates that 30 percent of all land parcels allocated in urban areas are to be set aside for women. In Lesotho, by contrast, the Deeds Registries Act, 1997 “empowers the Registrar to refuse to register a deed in respect of immovable property in favour of a married woman whose rights are governed by Basotho law and custom, where such registration would be in conflict with that law”.<sup>21</sup>

The table below sets out the way in which land is broadly categorised in the region as state-owned ‘trust’ land, privately owned rural land or state-owned public purpose land (including urban development).

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<sup>18</sup> See section 9 (equality) read with section 30 (language and culture) of the 1996 South African Constitution. Section 30 reads: “Everyone has the right to ... participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights”.

<sup>19</sup> See section 17(4)(c) of the Lesotho Independence Order, 1966 (exempting customary law from the constitutional prohibition against discrimination).

<sup>20</sup> See the Namibian Communal Land Reform Act, 2002 and the South African Communal Land Rights Act, 2004.

<sup>21</sup> Selebalo, Q. C. (2001). *Land Reform and Poverty Alleviation: Lesotho’s experiences during the last two decades*. Paper presented at the SARP Conference on Land Reform and Poverty Alleviation in Southern Africa, June 2001 p. 7.

**Table 4.2 Patterns of land distribution in Southern Africa<sup>22</sup>**

| Country      | State-owned 'trust' and/or customary tenure              | Privately owned rural land | State-owned public purpose (including all urban) land |
|--------------|--|----------------------------|---|
| Namibia      | 43%  | 39%                        | 18%   |
| South Africa | 14%  | 67,5%                      | 18,5%<br>(8,5% urban)                                 |
| Zimbabwe     | 51%<br>(trust 42%;<br>resettlement<br>9% <sup>23</sup> ) | 30%                        | 19%   |
| Botswana     | 71%  | 6%                         | 23%   |
| Lesotho      | 95% <sup>24</sup>  | 5%                         | -   |
| Malawi       | 67%  | 11%                        | 22%<br>(3% urban)                                     |
| Mozambique   | 100% <sup>25</sup>                                       | -                          | -   |
| Swaziland    | +/- 56%  | 25%<br>(approx.)           | 19%<br>(approx.)                                      |
| Zambia       | Predominant <sup>26</sup>                                | -                          | -   |

## 5 Land and housing movements in the region

The position of nongovernmental organisations (NGOs) in the land sector varies considerably from country to country. The strongest NGOs tend to be more active in the rural areas than in the towns and cities, with notable exceptions being the Namibian Housing Action Group and the Homeless People's Federation in South Africa. Many NGOs in the region have strong ties to international NGOs and donors, with Oxfam, Ibis, the UK government's Department for International Development (DFID) and German development agency GTZ being particularly prominent.

In Angola and Mozambique, the NGO sector has been ravaged by decades of civil war, but has recently emerged as a strong force. The participation by civil society in the drafting of the 1997 Mozambican Land Law is perhaps the best-known regional example of civil society involvement in policy-making.<sup>27</sup> In Angola, the Land Forum (*Rede Terra*)

<sup>22</sup> Op. cit., 3.

<sup>23</sup> Resettlement land refers to redistributed land, which has passed into state ownership though allocated to beneficiaries.

<sup>24</sup> The figure includes urban and public purpose land.

<sup>25</sup> The figure includes urban and public purpose land. There has been considerable alienation of communal land in the form of concessions to entrepreneurs, mainly foreign.

<sup>26</sup> In 1975 all land was vested in the president, freehold land rights extinguished & converted to 100-year leaseholds. Provision for freehold rights have been reintroduced.

<sup>27</sup> Conceição de Quadros, M. (2002). *Country Case Study: Mozambique*. Paper presented at the Workshop on Integrating Land Issues into Poverty Reduction Strategies and the Broader Development Agenda,

was formed in 2002 and is attracting donor support, although it has yet to play a significant role in shaping policy.<sup>28</sup> Namibia provides a possible good practice example in the partnership formed between the national government, the Namibian Housing Action Group and the Shack Dwellers' Federation of Namibia to implement the block system of land tenure. The Zambia Land Alliance is a coalition of civil society organisations that has been strongly critical of the policy process leading up to the adoption of the land policy in that country.<sup>29</sup> Pursuant to these criticisms, the alliance was invited to partner the government in coordinating civil society contributions to the policy process. It is yet to be seen to what extent the views gathered by the group will change the published draft policy.

There is only one regional NGO operating in the land sector: Women and Law in Southern Africa (WLSA). It is active in Botswana, Malawi, Mozambique, Swaziland, Zambia and Zimbabwe. Land Net Southern Africa, a network of organisations and individuals concerned with land policy, which operated briefly, supported by DFID, is no longer operative because of funding problems. DFID is however investigating support for an experience-sharing and learning network between NGOs in the region (the Southern Africa Regional Land Reform Technical Facility).<sup>30</sup>

**Figure 5.1 NGO participation in policy-making**



Kampala, April 2002. Tanner, C. (2002). *Law-making in an African Context: the 1997 Mozambican Land Law*. FAO Legal Papers Online #26, March 2002.

<sup>28</sup> Op. cit.,1.

<sup>29</sup> Zambia Land Alliance. (2002). *Initial Position Paper on the Draft Land Policy*. Paper presented to the Zambian Government Land Policy Technical Committee Lusaka Province Workshop, December 2002.

<sup>30</sup> For more information on this initiative Lelanie Swart at DFID Pretoria can be contacted on +27 12 431 2100. An important regional source of land-related information is the website of the Southern Africa Regional Poverty Network – [www.sarpn.org.za](http://www.sarpn.org.za).

## Women's movements

Many women's coalitions in the region are loose alliances that are formed around specific issues, such as the Justice for Widows and Orphans Project in Zambia. In Swaziland women's NGOs came together on constitutional issues, fighting for recognition of women and children's rights. Professional organisations have also been instrumental in advancing women and children's rights through research, advocacy and litigation. Many women's organisations have been involved in law reform processes. The Gender Forum, for example, spearheaded the fight for legal reform in women's rights in Mozambique's Family Law of 2004.

Although some coalitions are formalised and survive beyond specific projects,<sup>31</sup> many disintegrate after they meet their objectives, or after the initiative for which they were formed fails to yield results. They also often face political and social resistance. Many women's movements in the region have also not been as forceful or organised around land and housing rights as they have been on other issues.<sup>32</sup>

## 6 Slums and informal settlements

As noted earlier, all countries in the region are experiencing relatively rapid urbanisation, with mostly inappropriate or non-existent policy responses. None of the countries actively resists the growth of informal settlements. However, the absence of resources, weak local government capacity, and a reluctance to acknowledge the permanence of new urban migrants prevent effective management of this issue.

At a regional level, there is no clear trend towards regularisation of informal settlements. The Zambian Housing (Statutory and Improvement Areas) Act represents perhaps the most comprehensive attempt so far to enact a legal framework for regularisation. In South Africa, regularisation has largely been ignored in favour of mass-produced, subsidised housing.<sup>33</sup> After nearly 10 years of implementing this approach, the South African housing minister announced a major new housing policy direction in September 2004, which supports "in situ upgrading in desired locations". However, it remains to be seen how this will be translated into practice.<sup>34</sup> In Namibia some regularisation has occurred in the absence of a dedicated legislative framework (see Chapter 4).<sup>35</sup>

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<sup>31</sup> A good example is Zambia's umbrella Non-Governmental Organisations Coordinating Council (NGOCC), which is recognised by government and is represented on leading government and quasi-governmental institutions such as the Law Reform Commission. It submits regular reports and recommendations to parliamentary select committees on issues affecting women and children, and mounts media and advocacy campaigns. Similarly, in Mozambique, the Women's Coalition survived the end of the Family Law initiative.

<sup>32</sup> Such as the increase of women in decision-making positions and on violence against women.

<sup>33</sup> See Huchzermeyer, M. (2004). *Unlawful Occupation: Informal Settlements and Urban Policy in South Africa and Brazil*. cap. 6. It is however important to note that as early as 1995 the new South African government enacted legal provisions for upgrading, in the Development Facilitation Act, but these provisions have not yet been used.

<sup>34</sup> See Press Statement by LN Sisulu, Minister of Housing, on the Public Unveiling of the New Housing Plan, September 2 2004, available at [www.housing.gov.za](http://www.housing.gov.za). As the current housing subsidy programme was not specifically designed and geared for informal settlement upgrading, the new programme is instituted in

Throughout the region there is a blurred distinction between urban and rural land, both on the edges of towns and cities as well as in dense settlements in rural areas, the latter often resulting from land redistribution projects (Namibia, South Africa and Zimbabwe). A second reason for the blurred urban-rural distinction is the continuing importance of customary law in land allocation practices on the urban periphery. In Botswana, for example, the land boards are “involved in the process of allocating tribal land for urban use and development”.<sup>36</sup> This could produce conflict between the boards and the land development procedures laid down in the Town and Country Planning Act.<sup>37</sup> The conflict between customary and modern law is explored in detail in each of the four reports.

In countries with extensive private land holdings, the primary problem facing informal settlement dwellers is the illegality of their occupation. In contrast, state ownership of land, e.g. in Mozambique and Zambia, means that there is less legal opposition to informal settlements. Regardless of the underlying legality of a household’s occupation of land, the absence of basic service provision is a common and persistent problem across the region.

There are some good examples of informal settlement organisations developing and implementing innovative practices to secure the tenure and improve the conditions of their members. These include the Shack Dwellers Federation of Namibia’s pioneering block system and the South African Homeless People’s Federation’s community-led social surveys of informal settlements.

### Women in slums and informal settlements

Although gender disaggregated data is sketchy, literature indicates that in most of Southern Africa, the poorest of the poor are women, and their lack of access to land and housing has largely been due to their limited access to resources.<sup>38</sup> Scarcity of jobs especially for women and inadequate wages to purchase housing means that women have little chance to own decent housing. Other problems such as poverty, illiteracy, violence, high costs in freehold and leasehold titled land, HIV/AIDS and unfair inheritance and divorce laws, also tend to force women into slums and informal residential areas. HIV/AIDS, poverty and pregnancy are noted as keeping adolescent women in slums<sup>39</sup>.

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terms of section 3(4) (g) of the Housing Act, 1997, and will be referred to as the National Housing Programme: In Situ Upgrading of Informal Settlements. Assistance takes the form of grants to municipalities to enable them to respond rapidly to informal settlement upgrading needs by means of the provision of land, municipal services infrastructure and social amenities. It includes the possible relocation and resettlement of people on a voluntary and cooperative basis, where appropriate.

<sup>35</sup> See also World Bank (2002). *Upgrading of Low Income Settlements Country Assessment Report: Namibia*. (Reporting on informal settlement upgrading in Windhoek on the basis of City Council Guidelines).

<sup>36</sup> Op. cit., 11.

<sup>37</sup> Ibid.

<sup>38</sup> Op. cit., 49.

<sup>39</sup> Caldwell, J. & Caldwell, P. (undated). *Fertility Transition in Sub-Saharan Africa*, see [www.hsrcpublishers.co.za](http://www.hsrcpublishers.co.za)

Women are also often excluded in land or housing allocation. Expulsion of women from marital homes (sometimes without divorce) also often forces women into poor housing areas. In some countries retaining marital power of the husband in statute books, laws restrict the registration of immovable assets in married women's names. As in formal settlements, the man is still the owner of the house except in women-headed households.<sup>40</sup>

Few upgrading projects have catered explicitly for women. Land redistribution also often fails specifically to target women. A good example of the exception to this rule is Namibia, which did not initially target women as potential beneficiaries, although this changed and there is now a deliberate effort to include women in the National Housing Strategy.

**Table 6.1 Land distribution and upgrading projects in Southern Africa**

| Country      | Scheme                            | Objective   | Services   | Women   |
|--------------|-----------------------------------|---|--|---|
| Angola       | Self-finance urban infrastructure | Shelter for internally displaced urban migrants                           | 2,210 houses for 16,702 people; 12 km of power lines; 70 km of clean water; 23 km of drainages; 29,000 km paved road | No statistics   |
| Lesotho      | Urban upgrading Project           | Improving living conditions for slum dwellers and providing housing units | Housing for 267 families   | 134 female headed households  |
| Namibia      | Nations Shelter Strategy          | National Housing Policy   | 3,400 housing units with additional 1,300 families per year  | No statistics available but there is a deliberate effort to include women |
| South Africa | Alexandra Renewal Project, etc.   | Generally increasing housing units  | 1 million low-cost housing units in six years  | No statistics available   |

(Source: [www.grida.no/aeo/214.htm](http://www.grida.no/aeo/214.htm) accessed December 30 2004)

## 7 Tenure types and systems

The vast majority of land in the region is still held under customary tenure, mainly in the rural areas, although the proportion of land held in some or other form of individualised

<sup>40</sup> Keller, B. Phiri, E. and Milimo, M. (1990). *Women and Agricultural Development*. in Wood, A. P. et al (eds). *The Dynamics of Agricultural Policy and Reform in Zambia*. pp. 241-262.

title (not necessarily ownership) is increasing. Accurate figures for the amount of land held under different tenure forms are not available. In Zambia, where 94 percent of the land is officially “customary land”, the actual proportion of land held under customary tenure is decreasing as the process of conversion to leasehold tenure under the Lands Act, 1995, gathers momentum.<sup>41</sup> A similar process of conversion is underway in Mozambique. In all countries in the region attitudes towards land tenure are undergoing a dynamic process of evolution. In urban areas this process is particularly complex, as customary attitudes, rules and practices are adapted to fit within the more “modern” tenure laws either inherited from the colonial powers or enacted since independence.

As noted earlier, in countries where the Roman-Dutch legal system applies, ownership tends to be the dominant form of tenure. There has, however, been some experimentation with group ownership and other more flexible forms of tenure. In South Africa, the Communal Property Association Act, 1995, which was originally designed as a vehicle for rural land reform, has been used in the so-called Peoples’ Housing Process, which is the “self-help” part of the government’s urban housing programme. There has also been considerable donor support for cooperative housing in South Africa, although many of the initial schemes have struggled to succeed, for financial reasons. Informal backyard rental continues to be a major tenure form in both South Africa and Namibia. Across the region it is also common to find private rental arrangements between the owner or primary occupant of a plot or structure and tenants, or sub-tenants, renting a part of the main property. This phenomenon is especially evident in Lesotho where a large number of residents of Maseru, the capital, live in *malaene* homes, which are rooms specially constructed by private individuals in a row formation and then rented out on an individual basis.

The exception to the dominance of ownership in Roman-Dutch-law countries is Zimbabwe, where the government recently announced its intention to convert all freehold titles into 99-year leaseholds.<sup>42</sup> If implemented, this policy will shift the land tenure system in that country closer to that of its northern neighbour, Zambia.

The draft Namibian Flexible Land Tenure Bill provides for two innovative and closely linked forms of tenure: a type of group ownership of surveyed urban land with individual rights in unsurveyed plots, subject to conditions laid down in the constitution of the group (“starter title”); and individual rights to measured (but not formally surveyed) plots in a surveyed “block erf”. The thinking behind this is not unlike the thinking behind the Zambian Housing (Statutory and Improvement Areas) Act. What these two pieces of legislation have in common is a shared commitment to informal settlement regularisation through the creation of local level registries, in which people are able to acquire rights in informally surveyed land or unsurveyed (but readily identifiable) plots. The intention in

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<sup>41</sup> See section 2 of the Zambia Land Act, 1995 (defining “customary area” as meaning the area described in the Schedules to the Zambia (State Lands and reserves) Orders, 1928 to 1964 and the Zambia (Trust Land) Orders, 1947 to 1964. This formulation effectively freezes the proportion of land held under customary tenure in Zambia at the colonial level, notwithstanding the fact that the Lands Act provides for the conversion of customary tenure into leasehold.

<sup>42</sup> *The Herald*, Harare, June 8 2004.

both cases is to provide an adequate level of tenure security, capable of supporting municipal infrastructure investment, without incurring the costs of formal surveying. In Zambia, where the local level registry system has been in operation since the mid-1970s, the system has largely succeeded in providing security of tenure to residents of informal settlements, but not in supporting loan-finance for improved housing. The installation of basic services has also been hampered by overly ambitious and costly service standards, which have proved impossible to maintain.<sup>43</sup>

Article 12 of the 1997 Mozambican Land Law provides an interesting example of how tenure security can be provided by statute without the need for surveying. There is some evidence to suggest that the provision in this article for acquisition of land after 10 years' occupation in good faith provides an effective form of security of tenure for the residents of informal settlements. However, the continued uncertainty over the application of the Land Law in urban areas, and the delay in adopting the Urban Land Regulations, may progressively undermine this position. It is also doubtful whether the device used in Art. 12 of the Land Law can be replicated in other countries where land on the urban periphery is in private ownership. In South Africa, for example, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998, tries to strike a balance between procedural protection against arbitrary eviction and enforcing the rights of private owners to evict people who illegally occupy their land. In Zambia, the recent eviction of people from land owned by the Catholic Church<sup>44</sup> indicates the limitations of that country's Housing (Statutory and Improvement Areas) Act in protecting people whose occupation of land has yet to be legalised.<sup>45</sup>

## 8 Land management systems

In all the countries in the region there is a stark distinction between formal and informal land management systems. Even in South Africa, where most of the land surface is surveyed and mapped, the land management system applicable in the former "homeland" areas is in a chaotic state, with existing documentation either outdated or destroyed. The Communal Land Rights Act, 2004, was in part enacted to remedy this situation.

In respect of land falling under customary law, one of the more contentious issues has been the attempt to subject land allocation by local chiefs to democratic control. Botswana provides an early and thus far successful example of this phenomenon, with the land boards in that country playing a legitimate and accepted role, not only in tribal land

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43 In addition to the similarities between the Zambian and Namibian experiences of local registries there are also some important differences. For example, in Zambia there is no possibility of upgrading a registered right from the local registry to the "mainstream" registry, whereas in Namibia this is possible.

44 The first of these incidents took place in November 2002. Armed police acting on behalf of the Catholic Church demolished 600 houses in an illegal settlement in Lusaka's Ng'ombe residential area. The squatters who had been resisting eviction over the six months prior to this date were taken by surprise by police who razed their structures without removing household goods. Police beat and apprehended about 10 of the squatters who blocked the road leading to the disputed land to protest the destruction of their homes (see Zambia report).

45 Section 9 of the Land Act, 1995 provides that "[a] person shall not without lawful authority occupy or continue to occupy vacant land". Thus, where land is not declared as an improvement area under the Housing (Statutory and Improvement Areas) Act, residents of informal settlements are vulnerable to eviction.

management, but also increasingly in the allocation of land on the urban periphery.<sup>46</sup> By contrast, in South Africa, the Communal Land Rights Act took more than five years to negotiate and, in its final form, largely preserves the land management functions of traditional councils, some of which were created by the apartheid state.<sup>47</sup> In Mozambique and Zambia there has been no attempt thus far to “democratise” customary land management systems. Rather, legislation in both these countries provides for the conversion of customary tenure to leasehold tenure.

Lesotho represents perhaps the most complete form of interdependence of customary and formal rules in relation to urban land management. The primary evidence of secure tenure that is accepted by the courts as a basis upon which to issue a lease title is a certificate signed by a chief, known colloquially as a “Form C”.

One of the more innovative developments in the region has been the decision to create local level registries in Namibia and Zambia, independent of but connected to the formal deeds registry. This has allowed simpler, more appropriate and less costly forms of land administration to develop, catering to the needs of the urban poor.

Across the region, the tensions inherent in trying to manage comprehensive, up-to-date, responsive and accessible registries of private land rights, cadastral surveys and public land inventories within a context of limited capacity and highly constrained resources are enormous. These tensions play themselves out in different ways but are most frequently characterised by highly inefficient and inaccurate systems that cost their respective governments a great deal more than they benefit them. In some countries, as indicated above, innovative solutions to this problem are arising, from both the formal and informal sectors, but these innovations have not yet been tested at scale.

A further challenge to effective land management is the question of building standards. Primarily as a result of the region’s colonial legacy most countries have one set of building standards applicable to the urban areas previously reserved for settler occupation and a different set applicable to other areas. South Africa, Namibia and Zimbabwe are all examples of this phenomenon. In other cases the authorities have simply never been able or willing to apply building standards to the more marginal urban areas, as has been the case in Mozambique. Across the region however there is a growing realisation that lower building standards inevitably result in higher levels of access to land and housing for the poor, through lowering the cost of the final housing product. This has resulted in various policy initiatives, particularly in Zambia and Namibia, to revise building standards to a more realistic level.

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<sup>46</sup> Op. cit., 11.

<sup>47</sup> For criticisms of this Act, Cousins, B. & Claassens, A. (2004). *Communal Land Rights, Democracy and Traditional Leaders in Post-apartheid South Africa*. in Saruchera, M. (ed) *Securing Land and Resources Rights in Africa: Pan African Perspectives*. pp. 139-54; Cousins, B. (2004). The Communal Land Rights Act: Likely to Face Constitutional Challenge. *Umhlaba Wethu* No. 1, August 2004; Cousins, B. (2004). The Continuing Controversy Over the Communal Land Rights Bill of 2002. *ESR Review*, Vol. 5 No. 4.

## 9 Women's rights to land and housing in the region

### 9.1 Constitutional provisions

The table below shows the position of non-discriminatory clauses in the constitutions of Southern African countries.

**Table 9.1 Constitutions and non-discriminatory clauses in Southern Africa**

| <b>Country</b>  | <b>Right to equality</b>  | <b>Discrimination on basis of sex prohibited</b>   | <b>Right to land, housing or property recognised</b>  |
|---|---|--|---|
| Angola  | Yes, Art. 18  | Yes, Art. 18   | No  |
| Botswana  | No. While Art. 15 recognises equality, customary law is allowed to compromise the right to equality   | No. Art. 15 excludes discrimination on grounds of sex  | No, only protection from deprivation of property in Art. 8  |
| Lesotho   | Yes, Art. 19  | Yes, but Art. 18 (b) and (c) allows for discrimination in personal law and customary law   | No, only protection from deprivation of property in Art. 17   |
| Malawi  | Yes, section 20:  | Yes, Sections 20 and 24 including marital status and gender  | Yes, Sections 24 and 28   |
| Mozambique  | Yes, Arts. 66 and 67  | Yes Art. 69  | Yes, Art. 86 right to ownership of property recognised and guaranteed   |
| Namibia   | Yes, Art. 10 (1): " <i>all persons shall be equal before the law</i> ". Art. 14 provides for equal rights to men and women on dissolution of marriage | Yes, Art. 10 (2): " <i>no person may be discriminated against on grounds of sex, race, colour, ethnic origin, religion, creed, socio-economic status</i> " | Art. 16: " <i>all persons shall have the right to acquire own dispose of all forms of property individually or in association with others ...</i> " |
| South Africa  | Yes section 9: " <i>everyone is equal before the law...</i> "   | Yes, section 9 includes grounds of pregnancy and marital status.   | Yes section 26: " <i>everyone has the right to have access to adequate housing</i> "  |
| Swaziland (this is a draft document still under discussion) | Yes sections 15, 21 and 29 have provisions that recognise the right to equality   | Yes, in section 21. There is also a section on rights and freedoms of women  | No only protection from arbitrary deprivation of property   |
| Zambia  | Equal worth of men and women recognised.  | Yes in Art. 23 which also allows for discrimination in personal law and customary law  | No only protection from deprivation of property in Art. 16  |
| Zimbabwe  | Yes, Art. 9   | Yes in Art. 23 which also allows for discrimination in personal law and customary law  | No, only protection from deprivation of property  |

Some key points:

- Apart from Malawi, in the rest of the region, no specific mention is made of women in provisions that relate to property rights. This leaves the recognition and enforcement of women's rights to land, housing and property to the interpretation of the law;
- Apart from Namibia, where ratified international instruments are self-effecting, most Southern African countries have signed and ratified international instruments but have not domesticated them for local use;
- The constitutional provisions relating to equality and non-discrimination can be avoided in some instances. Often customary law is used, for instance in Botswana, Lesotho, Swaziland, Zambia and Zimbabwe;
- In practice, recognition of women's rights in the constitution does not automatically result in the actual enjoyment of the rights. This is largely due to attitudes. Often, socioeconomic circumstances, for example the war in Angola, interferes with implementation of these laws;
- The right to adequate housing is recognized in the South African Constitution but not in the constitutions of the other countries and cannot therefore be enforced in court. Equally legislation on housing has no specific reference to women as a disadvantaged class of people;
- Joint tenure by couples, although permitted in the subregion, is not a common phenomenon due to sociocultural factors;
- Patriarchal attitudes, where men have always been the heads of homes and documental evidence of ownership or occupancy of land and housing has always been given to men, also impede women's access;
- A lack of resources and knowledge about opportunities for ownership of land by women is also cited as a problem;
- Commercialisation and privatisation of land and housing ownership has compromised access to land by women previously provided under customary land tenure. Market pressure and individual registration processes are compromising traditional rights of women, for instance in matrilineal societies;<sup>48</sup> and
- War in some countries and the prevalence of HIV/AIDS in almost the entire region has disproportionately affected women's land and housing rights.

There have been some government efforts to improve the situation, including affirmative action provisions and law reform. However, a great deal more must be done to ensure that women in the region access and enjoy their rights to land, housing and property.

Legislative provisions that disadvantage women or discriminate against them need to be amended or repealed; the trend where women can only access land and property by virtue of their roles as wives, daughters or sisters has to be reversed as these are mere secondary rights; implementation mechanisms need improvement; sociocultural barriers need to be removed; and poverty levels and HIV/AIDS need to be addressed with a gender and rights perspective in mind. Larger and more coordinated efforts need to be made by civil

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<sup>48</sup> Women's Rights to Land and Property, [www.unchcs.org/csd/documents](http://www.unchcs.org/csd/documents)

society given that the political will is not always there. Above all attitudes towards women need to change.

## 9.2 Marital property rights

Marital property rights law is not always clear – a mixture of legislation of the former colonial rulers of each respective country and the local customary rules and practices. Generally, married women are considered to be under the guardianship of their husbands. This means that even when the woman buys the house or property, it is often registered in the name of the husband.<sup>49</sup>

### *Under customary laws*

Most women in Southern African are married under customary law. Marital property rights under custom also depend on whether the marriage is matrilineal or patrilineal (which in turn are either *matrilocal*, where the man moves to the wife's home, or *patrilocal*, where it is the wife who moves). The marital property rules under custom are similar to the rules of persons married out of community of property. The property a man comes with into the marriage is to be used for the benefit of the family. The property the wife comes with is hers as is that which she acquires during the marriage. However, while men will acquire immovable and larger kinds of property including housing, women acquire smaller property and seldom housing. After the marriage is dissolved the woman may take her smaller property but is not entitled to the larger property acquired during the marriage.

Women experience difficulties in accessing marital property, especially upon dissolution of marriage and often solely depend on the good will of their former husbands. Even where the customary law court has awarded property settlements to women, the High and Supreme courts have overturned such judgments.<sup>50</sup> Many customary laws - for instance Ushi and Chibwe customary law in Zambia - entitle women to a reasonable share of the marital property.<sup>51</sup>

In some countries, for instance Swaziland and Lesotho, women are still regarded as legal minors. Husbands have the marital power to administer the joint property and represent their wives in civil proceedings. In Botswana, a couple married under customary law can actually choose to be exempt from customary rules to an extent that a customary law marriage can either be in or out of community of property.<sup>52</sup> However a woman married under customary law is held to be a legal minor and requires her husband's consent to buy land or enter into contracts. The position of women married under customary law is

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<sup>49</sup> Women and Law in Southern Africa Research and Educational Trust (WLSA). (2001). *Critical Analysis of Women's Access to Land in the WLSA Countries*.

<sup>50</sup> *Mwiya Vs Mwiya* 1975 ZLR; *C Vs C* SCZ, 2000 (Zimbabwe).

<sup>51</sup> *Chibwe Vs Chibwe*, Appeal No.38/2000 SCZ (Zambia) This was a marriage under Ushi customary law and the woman also got a house which had been built by the husband on a plot that was in her name and a restaurant and an award of \$4000 for damages arising from the husband's attempt to defraud her of the house (see SCZ Appeal No. 123, 1998)

<sup>52</sup> Center On Housing Rights and Evictions (COHRE). (2004). *Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women*. p.42.

summed up in the Zimbabwe High Court decision in *Khoza Vs Khoza*<sup>53</sup> where a woman was deprived of the parties' communal land and marital home built jointly and maintained by her for 23 years because the marriage was patrilocal.

There are, however, some positive developments. In Mozambique, the passage of the Family Law of 2004 changed things for women by recognising customary law marriages and non-formal unions. Now women married under custom can claim marital property. Although it is a progressive piece of legislation, it defines a household, which is the basis for allocation of land, as a "set of people living in the same home under the authority of the head of the household, married or in de facto union." It has been argued that this leaves room for the land to be allocated to the man, who under patriarchy is considered to be the head of the household.<sup>54</sup>

#### *Under statute*

Most statutory marriages provided can either be in or out of community of property. For marriages in community of property all the belongings and debts of husband and wife are combined into a joint estate. On dissolution of marriage these are divided equally to the parties. Marriages out of community of property keep each party's debts and assets separate, and on dissolution each takes their portion.

People are generally married out of community of property. In some countries, for example Zimbabwe, those who choose to marry in community of property have to sign a special deed to this effect. Marital power is excluded<sup>55</sup>, although women still have to be "assisted" in registering property and property transactions.<sup>56</sup> Where marital power is retained over women by men – for example in Swaziland and Lesotho – it effectively nullifies any rights to property that accrue to women. This is because property will often be registered under a husband's name. Women married out of community of property have to be assisted by their husbands to register property in Swaziland.

Some positive developments have occurred. In Botswana, passage of the Deeds Registry Amendment Act 1996, allowed women married in community of property to register immovable property in their names and eliminated the requirement for women to be assisted in registering land. However this amendment only limits marital power over immovable property, so that men still retain it over movable property. Similarly, in Namibia, the Married Persons Equality Act was passed so that women married in

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<sup>53</sup> HH 106 see also WLSA. (1997). *Paradigms of Exclusion: Women's Access to Resources in Zimbabwe*. p.54-55. The couple had been married for 23 years and the wife had built and maintained the matrimonial homestead during this time. Upon dissolution of marriage the court denied her any right to the matrimonial home and residence on grounds that the marriage was patrilocal. She was awarded the family's town house in Bulawayo yet her means of subsistence was farming. The matrimonial home was on communal land.

<sup>54</sup> Women and Law in Southern Africa Research and Educational Trust-Mozambique. (1997). *Families in a Changing Environment in Mozambique*, pp. 132-133

<sup>55</sup> The Married Persons Property Act of 1929 excludes marital power from marriages entered into after 1929

<sup>56</sup> Section 15 (1) of the Deeds Registry Act, 1996. A Deeds Registry Amendment Bill (2001), which is aimed at removing this, is still pending.

community of property can now register property in their own names. In Lesotho, the Married Persons Equality Bill has been pending enactment since 2000.

#### *Joint ownership of marital property*

Joint ownership by married couples is not common. In Zambia, for instance, only 12 percent of housing units transferred were held in joint ownership of couples.<sup>57</sup> In Zimbabwe, 98 percent of the resettlement area permits of farming and grazing land are held by husbands and only 2 percent by wives – and women married under customary law cannot hold property jointly with their husbands. On the dissolution of a marriage there are some difficulties in the settlement of property due to the kind of laws in operation. In Malawi there is a provision for jointly held property, but not for common property. There seems to be a problem in calculating the women's contribution to common property because most women's contribution is in reproductive labour, which is not quantified.

### 9.3 Inheritance rights

Most of Southern Africa has a dual legal system, meaning property rights are governed by two systems of law. Consequently the rules of inheritance are derived from both systems.

#### *Under customary law*

Under the customary law system, inheritance is, with a few exceptions, determined by rules of male primogeniture<sup>58</sup>. This means the oldest son of the senior wife (in cases of polygamy) is the heir. Ultimately the heir is always a male relative, never a female.

Male preference is effected whether under matrilineal or patrilineal principles. So while under matrilineal societies the female line is used to inherit, (most of the region is matrilineal) property normally passes to the nearest matrilineal male, usually a nephew of the deceased person and not necessarily the sons. In patrilineal societies it goes to the sons. The daughters therefore do not inherit in their own right and can only be assigned land to use by the inheriting male (who may be their cousin, brother or uncle). In most societies, the order of priority is thus always male, with male descendents, ascendants, siblings, collateral males, then only widows and daughters. Women are at the end of the inheritance list and are therefore unlikely to inherit.

Patrilocal marriages, where the woman moves to the husband's homestead, also often make the widow vulnerable to expulsion from the matrimonial home. In cases of matrilocal marriage, women inherit their mother's property, but the heir to a deceased father's estate is a maternal male. In Islamic communities, for example in Mozambique, daughters are entitled to a quarter of the estate according to Islamic law. This does not always happen however as customary laws distort this practice.

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<sup>57</sup> *Zambia Daily Mail*, July 5 2004, p7

<sup>58</sup> The South African Constitutional Court in the case of *Bhe V Magistrate, Khayelitsha and others*, CCT 49/03 (2005 (1) BCLR 1(CC)) has however ruled against this practice.

Widows' inheritance rights are also subject to certain conditions. In some cases, they may only inherit if they comply with certain customary rituals.<sup>59</sup> Often, where customary inheritance is controlled by an act,<sup>60</sup> patriarchal attitudes and male preference and dominance in property ownership and inheritance are a problem.

Finally, in countries where the constitution still allows the application of customary law in inheritance matters, such as Lesotho, Zambia and Zimbabwe, High Court decisions have ensured the continuation of this practice in spite of the fact that it clearly discriminates against women.<sup>61</sup>

In general, women in Southern Africa have a very limited right to inherit; they often only have a secondary right to use the property of the deceased husband or father.

#### *Under statute*

The effect of the inheritance and succession statutes in the region is to vary the provisions under customary law.

In Lesotho, the Draft White Paper on Land does not support the radical abolition of customary law, but the conversion of customary law rights to common law rights.<sup>62</sup> Proposals have been made to the effect that decisions about who should get rights in land including through inheritance would be determined by who would make the most proactive use of the land. Currently, one is obliged to show that they have moved away from customary law to be able to bequeath property to daughters in a will. However, the Lesotho Land Act of 1997 allows widows to stay in the matrimonial home provided they do not remarry, thereby giving the widow usufruct rights and not ownership rights. Therefore women do not inherit property but acquire a right to use the property.

In Botswana and Namibia, inheritance under the statute is tied to the marriage regime for people married under Civil Law (i.e., in or out of community of property). The Administration of Estates Act 1979 in Botswana allows men to exclude their wives from the will if the marriage is out of community of property. In Zimbabwe, the key statute dealing with inheritance is the Administration of Estates Act (as amended by Act No. 6 of 1997). The customary law heir, usually a male, now only receives traditional heirlooms (the name and traditional knobkerrie) and ownership of the matrimonial home devolves to the surviving spouse. The rest of the estate is shared in equal portions between the surviving spouse and the children of the deceased. The Deceased Persons Family

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<sup>59</sup> Women and Law in Southern Africa Research and Educational Trust-Swaziland, *Inheritance in Swaziland: Law and Practice*, 1994, 56-57. In Swaziland, these rituals are traditional mourning rites, (kuzila) and kungenwa (levirate or widow inheritance).

<sup>60</sup> For instance Namibia's Communal Land Reform Act 2002 read with Art. 66 of the constitution

<sup>61</sup> See the Women and Law in Southern Africa Research and Educational Trust-Zimbabwe. (2001). *Venia Magaya's Sacrifice: A case of Custom Gone Awry*. Venia Magaya Case 1998 SC 210; 1999 1 ZLR 100 (Zimbabwe); *Chilala Vs. Milimo* LAT 09/99 (Zambia); and *Tsosane and Tsosane*, 1971-73 Lesotho Law Reports 1 (Lesotho).

<sup>62</sup> Walker, C. (2003). *Land Reform in Southern and Eastern Africa: Key Issues for Strengthening Women's Access to and Rights in Land*. Report to FAO. See also [www.oxfam.org.uk](http://www.oxfam.org.uk)

Maintenance Act is also relevant. Somewhat superseded by the Administration of Estates Amendment Act, it gives usufruct rights to the widow and children.

In Malawi the distribution of the estate depends on whether the marriage was patrilineal or matrilineal. In patrilineal marriages, half the share goes to the widow, children and dependants and the other half to customary heirs; if it was matrilineal, the wife, children and dependants get two-fifths and the customary heirs three-fifths.<sup>63</sup> The personal chattels of the deceased go to the widow, who is also entitled to dwell in the matrimonial house as long as she remains chaste.

Widows in polygamous marriages have to share the property meant for the widow. In Zambia each widow is entitled with her children absolutely (i.e. to the exclusion of other beneficiaries) to her homestead property (property in the house or room she occupies) and the common property (used by all family members) is to be shared between the widows.<sup>64</sup> Similar provisions exist in the South African Intestate Succession Amendment Act (2002) and the Zimbabwean Administration of Estates Amendment Act 1997. This is difficult because there is often only one of each item and unless these are sold, sharing is impossible. If the widows continue using this common property, problems of maintenance often arise.

Apart from Mozambique, women in informal unions are not entitled to inherit their deceased partner's property. In Mozambique, women who have lived with their partners for more than one year are entitled to inherit property.

#### *Dispossessing widows*

Dispossessing widows of property, though a criminal offence in most of the region, is a common practice and a big problem in the region.<sup>65</sup> This is because the statutes are often a compromise on the customary law position, or conflict outright with custom and are therefore not fully accepted. Traditionally, widows could continue accessing the property left by their deceased husbands when they joined the household of the one entitled to inherit, but this practice is dying out especially due to HIV/AIDS. As a result husbands' relatives are grabbing property from widows, especially those who are refusing to remain as part of the family (through widow inheritance).<sup>66</sup>

The high incidence of HIV/AIDS has worsened dispossession of widows. The table below illustrates the scale of the problem.

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<sup>63</sup> Sections 16 and 17 of the Will and Inheritance Act. See also Women and Law in Southern Africa Research and Educational Trust- Malawi, *Dispossessing the Widow*, 2002

<sup>64</sup> Section 10 of the Zambian Intestate Succession Act, Chapter 59 of the laws.

<sup>65</sup> For instance in Zambia the highest number of complaints made to the police in 2002 and 2003 were those of "depriving beneficiaries of deceased's property".

<sup>66</sup> Conteh, M. Le Beau, D. & Iiping, E. (2004). *Women Face Discrimination From Cradle to Coffin: Women's Rights to Property in Namibia*. Abstract presented at women's land rights workshop in Lusaka, 2004 citation not yet available. See also the United Nations. (2004). *Report of the United Nations Secretary General's Taskforce on Women and Girls in Southern Africa*.

**Table 9.2 HIV/AIDS infection rates in Southern Africa**

| Country      | % of adult population infected with HIV/AIDS <sup>67</sup> |
|--------------|--|
| Angola       | 5,5  |
| Botswana     | 38,8   |
| Lesotho      | 18   |
| Malawi       | 15   |
| Mozambique   | 13   |
| Namibia      | 22,5   |
| South Africa | 20,1   |
| Swaziland    | 33,4   |
| Zambia       | 21,5   |
| Zimbabwe     | 33,7   |

Generally, the epidemic has made women more vulnerable to disinheritance. In some cases, relatives often delay the administration of the estate, waiting for the beneficiaries to die. As a result a lot of widows and their children fail to access anti-retroviral therapy because they cannot access the property (including money) they are entitled to<sup>68</sup>.

#### 9.4 Affirmative action policies

The Southern African countries signed the Blantyre Declaration<sup>69</sup> under which 30 percent of people in decision-making positions should be women. Apart from Mozambique, state parties have not yet implemented this declaration. Affirmative action measures have often been attempted but have not been entirely effective.

- Women are still underrepresented in elected positions. In Zambia's 2001 elections, only 19 women were elected into a 120-seat parliament. Women constitute less than 10 percent of senior government officials. There are more far more men than women in formal wage employment;<sup>70</sup> and
- Many positive laws that address affirmative action issues are yet to be enacted due to the reluctance of law-making institutions. In Lesotho for instance, the Married Person's Equality Bill, which is meant to abolish women's minority status and allow them to register land in their names, has been pending since 2000.

<sup>67</sup> UNAIDS. (2002). *Report on the Global HIV-AIDS Epidemic*.

<sup>68</sup> For instance in Zambia.

<sup>69</sup> SADC declaration on Gender and Development 1997.

<sup>70</sup> Zambia Association for Research and Development and SARDC-WIDSAA. (1998). *Beyond Inequalities: Women in Zambia*. P. 25.

There have been some positive developments. In Mozambique, the Land Act contains a clause entitling women to property rights. The Family Law in Mozambique also recognises customary marriages and informal unions between men and women. Some governments have made efforts to allocate land to female-headed households. In Zambia, the draft land policy provides for 30 percent of all land allocated being reserved for women. In Namibia, there are schemes to assist female students who have financial problems to improve enrolment, retention and completion of education.

Implementation is a major stumbling block to these initiatives. In Zambia, for instance, land allocated to women was far away from the city, was undeveloped and without any services. Service charges and survey fees were also unaffordable to many women. A regional audit of the states' implementation of the Southern African Development Community Declaration on Gender and Development and its addendum on violence against women and children shows a relatively poor picture,<sup>71</sup> yet the compliance period has come to an end (1987-2005).

### 9.5 Best legislation, policies and practices on gender issues

Some of the legal and policy provisions and practices are good, and replication in other countries should be considered. The following fall into this category:

- Provisions in Mozambique's Land Act 1997 and the Family Law that recognise the right of women to own land and allow for the joint registration of property;
- The initiative by Mozambique's National Survey and Mapping Department to give women applicants title in the absence of male applicants, contrary to local custom;
- A mass sensitisation programme on women's land rights and the initiative to integrate it into literacy programmes were good practices, as was the joint initiative in Namibia by the United Nations Food and Agriculture Organisation, local authorities and NGOs to guarantee women's rights through access to information and resources;
- The draft land policy in Zambia, which provides for 30 percent of all land demarcated to be set aside for women, and the remaining 70 percent to be competed for by both men and women as an affirmative action measure;
- Law reform proposals in Lesotho for the harmonisation of laws and the repeal of discriminatory provisions that hamper women's property rights;
- Upgrading schemes for informal settlements and slums are a good practice. Special attention, however, needs to be paid to women so that they can benefit from these schemes. The urban upgrading scheme of Lesotho is a good example, where female-headed households benefited; and
- The Statutory Housing and Improvements initiative in Zambia where people in informal settlements were given licences is also a good practice because they can use these as collateral for credit to improve their housing situation.

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<sup>71</sup> See <http://216.239.59.104/custom?q=cache:19QFIm85YyoJ:www.genderlinks.org.za>

## 10 Racial and ethnic equality

In countries like Namibia, South Africa and Zimbabwe stark inequalities remain between the patterns of land holding by the descendants of white settlers and those of indigenous Africans. This is primarily because of the harsh restrictions on urban land ownership by blacks implemented prior to independence. The high cost of acquiring land in these formerly white areas, together with well-off neighbourhood resistance to the settlement of poor people close to their homes, has meant that these unequal patterns of land ownership persist. In South Africa, the 1995 Development Facilitation Act was enacted to encourage local government planning towards integration, but its effect has been limited to date.

Also largely as a legacy of colonial “divide and rule” policies, there are some examples of ethnic tension between various groups, especially in relation to access to land and housing. In some cases these tensions are reflected in particularly insecure tenure rights for certain ethnic minorities, such as the San in Botswana. Generally however, the process of urbanisation has resulted in communities that are more ethnically diverse than in the past.

In addressing the range of issues relating to race, gender and ethnicity it is important to note that governments in the region vary widely. Some are guided by, and generally follow, progressive new constitutions, while others are guided by more traditional and conservative philosophies. These differences tend to manifest themselves starkly in the land and housing sector, especially insofar as the rights of women are concerned.

## 11 Regional recommendations and priorities:

Because of the region’s diversity it is not appropriate to make detailed recommendations on this scale. Detailed recommendations are made at the conclusion of each country report. However, it is clear that there are a number of initiatives on a regional level that could strengthen land rights, and especially those of women, and which could also benefit from the support of organisations such as UN-HABITAT. The various instances of good practice emerging from the region could form the basis for a well-focused testing and rollout of these experiences on a wider scale.

Initial recommendations for further action within the region are set out below:

- (1) **Women’s land, housing and property rights are compromised by discriminatory laws. There is need for law reform.** The relevant statutes need to be harmonised and updated and the international instruments need to be domesticated. Constitutions should make unequivocal commitments to gender equality.
- (2) **Develop country-specific, step-by-step strategies for improving security of tenure of residents of informal settlements, particularly women.** The assistance and support of UN-HABITAT’s Global Campaign for Secure

Tenure as well as the Cities Alliance's "Cities without Slums" programme will be essential for the realisation of this objective. The recently established African Ministerial Conference on Housing and Urban Development<sup>72</sup> (AMCHUD) is setting up a secretariat that should provide continental leadership in the development of innovative urban land management practices.

- (3) **Clarify the legal basis for tenure where the formal, informal and customary tenure systems overlap.** While there can never be a quick fix to the problem of overlapping tenure systems, there is a great deal to be done by both national and local governments to clear up the existing confusion. This needs the development of effective conflict-resolution mechanisms as well as the provision of alternative land for persons who may have to move as a result of conflicting rights to the same land. It will be very useful to model efforts in this regard on the Namibian and Zambian good practices relating to the creation of local level registries and flexible new tenure forms for residents of informal settlements.
- (4) **Design pragmatic and equitable strategies for managing informal settlements.** This is an ongoing challenge, also without a likely quick fix. Nevertheless it is imperative that countries in the region accept that informal settlements are a reality that cannot be wished away. Instead they have to be integrated into the existing urban fabric. Upgrading of these settlements will a key element in the success of these strategies.
- (5) **Accommodate anticipated effects of migration, social changes and HIV/AIDS in all policies and plans.** Data collection and information management techniques have historically been very weak in the region. The impact of HIV/AIDS on women's land, housing and property rights for instance needs to be extensively investigated. Gender disaggregated data needs to be compiled. Increasingly, however, data collection has grown stronger. It is essential that resources and capacity are developed, with the assistance of development partners.
- (6) **Strengthen regional social movements and NGOs involved in the urban land sector.** The region is poorly served by social movements and NGOs, especially ones operating at the regional scale. Prevailing poverty, as well as the so-called brain drain evident throughout Africa, necessitates the focused support and assistance of development partners.
- (7) **Strengthen organs of the African Union to exchange information on best practices and establish regional standards for urban tenure security.** AMCHUD provides a timely opportunity to build networks between African Union member states. The secretariat, supported by UN-Habitat, will provide technical and administrative assistance to member states.
- (8) **Encourage donor support to national governments to develop dedicated urbanisation policies.** To date most donor support has been directed towards rural development in Africa. New institutions such as the New Partnership for Africa's Development's Cities Programme, the Commission for Africa and AMCHUD provide vehicles for concerted action to ensure that donor support

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<sup>72</sup> For more on the AMCHUD's Durban Declaration and the Enhanced Framework for Implementation see the UN-Habitat's website [www.unhabitat.org/amchud](http://www.unhabitat.org/amchud).

is focused on empowering Southern African countries to meet their urbanisation challenges.

- (9) **Support initiatives to develop new, innovative and appropriate practices for land registration and cadastral survey in the region, building on some emerging good practices.** UN-HABITAT is shortly to launch a global network of “Land Tool Developers” and it is imperative that this network reflects the innovative practices emerging from Southern Africa, as well as promoting greater understanding within the region to effective innovations elsewhere in the world. Specific efforts, perhaps through the organs of AMCHUD, should be made to ensure that the region benefits from the activities of this network.
- (10) **Focus governments’ attention on ensuring a more prominent place in poverty reduction strategy papers for more equitable and efficient land management and gender issues.** In the recent AMCHUD Durban Declaration African countries committed themselves to prioritising the potential of good urban land management in economic and social development, as well as poverty reduction and “mainstreaming” these in their poverty reduction strategy papers. This initiative deserves to be supported and strengthened.

## Introduction

### *Origins of report*

This is one of four reports that examine in detail land tenure systems and law reform in selected southern African countries: Lesotho; Mozambique; Namibia; and Zambia. The preceding regional overview provides a broad summary of issues across the region, i.e. over and above the four countries selected for individual study, and highlights key themes upon which the four country studies are based. The country reports flow from an extensive examination of laws, policies and authoritative literature, in addition to a wide range of interviews. Each country report is authored by a resident specialist consultant. UN-HABITAT, the sponsor of the project, conducted a workshop to set the research agenda.

### *Themes*

In this report examination of land tenure has been considered broad enough to cover matters regarding housing, marital property issues, inheritance, poverty reduction and local government. An additional important aspect of the study is its focus on gender and its relationship to each of these issues.

### *Structure*

The report is structured to capture the wide-ranging topics mentioned above. Standard headings have been used across all four reports, with some inevitable variation.

The first part of the report sets the scene for the study, providing a brief historical background, followed by a snapshot of how the governments and legal systems of the country function in relation to the subject matter. There is a discussion of the socioeconomic conditions. The section concludes by examining the level of civil society activity in the countries of study.

The next section, on land tenure, is the core of the report, defining the various types of land in the country and the relevant constitutional provisions, laws and policies. The chapter also attempts to define what rights accrue to the holders of various types of land.

The next section examines housing rights, including related matters such as the accessibility of services like water and sanitation. It deals with constitutional matters and relevant laws and policies.

The next subject area is inheritance and marital property issues. The initial emphasis here is on determining whether a constitutional provision that prevents discrimination on grounds of gender is provided. Issues of marital property rights hinge on whether both men and women enjoy equal property rights under the law. An important matter that influences this right is the applicability of customary law – an issue of enormous importance in southern Africa.

A section is then dedicated to examining the country's poverty reduction strategies or similar initiatives and their relationship to the primary themes of the report.

The section on land management systems maps the institutions involved in land management and administration, and how far their functions filter down to the local level. This section also analyses the relationship this formal bureaucracy has with informal settlements and their dwellers. The section concludes with a selection of court decisions on land and housing rights cases.

Local laws and policies are then scrutinised to determine how they address land and housing rights, as well as their relationship with national laws.

Implementation of land and housing rights is the next topic of discussion. It addresses how successful the actual delivery of these rights has been.

The final sections draw on information provided in the previous parts of the report. The best practices section tries to identify any positive and possibly replicable practices that have emerged. The conclusions section infers from the previous section, identifying problems and constraints to land and housing rights delivery. The final part of the report makes recommendations. These are designed to be realistic, taking into account the specific conditions in the subject country.

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| Marriage Act  | 50  | 5  |
| National Housing Authority                          | 195 | 12 |
| Probate (Resealing) Act                             | 61  | 5  |
| Public Health (Building Regulations)                | 295 | 17 |
| Property Transfer Tax Act                           | 340 | 19 |
| Rating Act  | 192 | 12 |
| Rent Act  | 206 | 12 |
| Subordinate Courts Act                              | 28  | 3  |
| Supreme Court Act                                   | 25  | 3  |
| Supreme Court and High Court (Number of Judges) Act | 26  | 3  |
| Lands Act   | 184 | 12 |
| Town and Country Planning Act                       | 283 | 16 |
| Trust Restrictions Act                              | 63  | 5  |
| Valuation Surveyors Act                             | 207 | 12 |
| Wills and Administration of Estates Act             | 60  | 5  |
| Worker's Compensation Fund Act                      | 271 | 15 |
| Zambia National Provident Fund (NAPSA) Act          | 273 | 15 |
| Zambia Police Act                                   | 107 | 8  |

### **British statutes**

|   |  |
|---|--|
| Married Women's Property Act 1882             |  |
| Matrimonial Proceedings and Property Act 1970 |  |
| Matrimonial Causes Act 1969 and 1973          |  |

### **Cases**

|  |    |
|--|----|
| <i>Chibwe v Chibwe</i> .....   | 43 |
| <i>Henry Mpanjilwa Siwale and 6 others V Ntapalila Siwale.</i> .....   | 52 |
| <i>Re estate of Jeffrey Msoni, Nzamane Old Local Court, 'B' Grade, Case No. 41 of 1973, (unreported)</i> ..... | 52 |
| <i>Re estate of Mekelani Mphanza, Mpezeni Local Court, 'B' Grade Case No. 50 of 1975, (unreported)</i> .....   | 52 |
| <i>Re Estate of Mwananshiku</i> .....  | 48 |
| <i>Re estate Penya Daka</i> .....  | 52 |
| <i>Richard J.C. Musonda v Florence C. Musonda</i> .....  | 49 |

**Figure 2 Map of Zambia**



# 1 Introduction and Background

## 1.1 Historical background

The history of modern Zambia dates back to the end of the 19th century, when Lewanika of the Barotse kingdom of western Zambia granted concessions to representatives of the British South Africa Company. The British South Africa Company administered the territory as Northeastern and Northwestern Rhodesia until 1911, when the two were joined to form Northern Rhodesia. In 1924, the whole area became a British protectorate. Land within the Barotse kingdom itself was excluded from colonial legislation and left to be administered by the king and his subordinates.<sup>73</sup>

In this period land was categorised into two types: Crown land and Native Reserves, while a third category of Trust land was added in 1947.<sup>74</sup> When Zambia became an independent republic in 1964, Crown land became state land and the rest continued to be categorised as Reserves and Trust land. At independence, state land comprised 6 percent of the total land area, while the balance of 94 percent was made up of the Reserves and Trust land.

A 1969 referendum and economic reforms in 1970 led to consolidation of political power behind the United National Independence Party (UNIP), led by Kenneth Kaunda, and the nationalisation of industrial and commercial interests. This effectively gathered together the political and economic strands of the nation's power base and gave Kaunda and his ruling UNIP the mandate to deal with even the most entrenched interests in land.

### *1975 Land Reforms*

The land reforms of 1975 were based on Kaunda's philosophy that land should not be subject to speculation by "inhuman exploiters" and resulted in the nationalisation of land. Freehold tenure was abolished and converted into 100-year statutory leases. State consent was required for all dealings in land, except for land under customary law (Reserves and Trust land). Customary tenure could be converted into leasehold, but the philosophy underlying the 1975 reforms was that the land still belonged to the whole community.

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<sup>73</sup> M, Chulu. & Beele, E.M. (2001). *Land Law and Policy in Zambia after Kaunda*. in Lungu, J. and Akombelwa, M. (eds.) *Land Policy and Reform: The Moses Kaunda Memorial Lectures*, ICARES Workshop Proceedings, No 2, Kitwe.

<sup>74</sup> In 1928, the Northern Rhodesia (Crown Lands and Native Reserves) Orders-in-Council were passed giving legal effect to the categories under which land in the territory was to be administered. Crown land could be alienated to European settlers under English law. Native Reserves meant land set apart "for the sole and exclusive use of the natives of Northern Rhodesia". Non-natives could only acquire limited interests in land in these reserves. In 1947 this scheme was revisited and the Northern Rhodesia (Trust Land) Orders were passed giving effect to a third designation of land in the territory. Trust land referred to land set apart "for the sole use and benefit, direct or indirect, of the natives of Northern Rhodesia". Land under this category could be alienated to non-natives as long as they could show that the land would be used for the direct benefit of the native population. There was a feeling at this time that separate development was not beneficial for the "natives" and a separate category of land needed to be introduced within which non-natives could acquire rights of ownership, thus bringing them into direct contact with the natives. Within Trust land, non-natives could acquire interests up to 99 years.

The 1975 Land (Conversion of Titles) Act abolished the operations of the land market and introduced the concept that “land has no value”, thereby banning the sale of vacant, unused land. In fixing the maximum sale price, the value of the land was to be disregarded and only the “un-exhausted improvements”<sup>75</sup> upon the land could be valued and sold. All transactions became subject to scrutiny by the Government Valuation Department in order to ascertain the value of the un-exhausted improvements upon the land.

The major effect of the 1975 changes was to reduce cases of land speculation rather than opening up the resource to the ordinary Zambian. This, in part, has led to the current difficulties in which access to land for the poor and disadvantaged has been mostly by way of invasions of vacant land as well as through illegal allocations by ruling party officials. The reforms did not achieve what they were intended to achieve, and instead hampered development as mortgages could not be created on vacant, unused land. In addition, the requirement for presidential consent in the fixing of sale prices precipitated long delays in the processing of land transactions, frustrating both vendors and buyers. This led to the creation of a black market in which transactions were conducted between parties who agreed a sale price different from that which was reflected on the documents submitted for official purposes.

### *Housing*

In 1974, the government passed a housing law recognising the rights of people living in unplanned settlements, and showing commitment to the provision of basic minimum infrastructure in such areas.<sup>76</sup> This paved the way for implementation of a programme on sites and services, and squatter upgrading, with financial support from the World Bank. Local council certificates of title were issued to holders of plots in site and service areas, and 30-year occupancy licences to holders of plots in upgrading areas. The upgrading projects were begun initially in Lusaka and achieved a measure of success. This success was not, however, replicated in the Copperbelt and other line-of-rail towns, and therefore did not affect the majority of marginal groups in the rest of the country. In the land reforms of 1975, the operation of real estate agents was prohibited, rent control measures were adopted, local authorities were urged to prevent unauthorised settlements and measures were taken to counter corruption in local authority housing.

### *The economy*

The Zambian economy has gone through a number of shocks and stresses following the collapse of copper prices in 1975 and rising oil prices. From 1976 the IMF imposed strict conditions as a basis for access to further external financial assistance. By the 1980s a more comprehensive and radical reform programme became necessary and the Zambian government was compelled to introduce a 40 percent devaluation of the currency as well

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<sup>75</sup> Unexhausted improvements refer to all activities undertaken with a view to improve the land by way of constructing buildings or other infrastructure upon the land.

<sup>76</sup> The Housing (Statutory and Improvement Areas) Act of 1974 (Cap.194).

as elimination of subsidies and price controls.<sup>77</sup> As the exchange rate further deteriorated, rising inflation resulted in higher prices for the staple food (maize) and gave rise to social and political concerns, as evidenced by the food riots of 1986.<sup>78</sup>

In 1987 the government suspended the Structural Adjustment Programme. It unilaterally imposed a moratorium on debt repayments, revalued the exchange rate and reinstated some of the subsidies. A New Economic Recovery Plan (NERP) was announced as an alternative to the IMF/World Bank programme. The NERP sought to achieve similar objectives to the Structural Adjustment Programme, using a different framework and different tools. NERP, however, failed and in 1991 the Movement for Multiparty Democracy (MMD) came to power determined to re-establish relations with the international community and restructure the economy in line with their traditional conditionalities. Chief among the new government's policies was the privatisation of all state-owned enterprises, removal of all kinds of subsidies and reform of the legal framework.

#### *1991 land reforms*

The MMD came to power in October 1991 after defeating the UNIP government, which had ruled Zambia since independence in 1964. Among its promises, the new government vowed to deliver wide-ranging legal reforms, including reform of the land law. Economic value for undeveloped land and the right of private land ownership were reintroduced. The separate categories of Reserves and Trust land were collapsed into one category of customary land. A uniform legal framework for both leasehold and customary tenure was envisaged. Tenure conversion and land allocation of customary land, combined with recognition of customary rights and repeal of discriminatory statutes that still harboured racial overtones, was announced. Conversion of customary rights into statutory leasehold, however, meant a form of land privatisation, as the act of transferring to leasehold creates individual rights over the land, effectively privatising it even though it is in an area of customary land.<sup>79</sup>

The Land Act of 1995 introduced additional provisions intended to limit or control unauthorised occupation of land.<sup>80</sup> In the urban areas, squatting or "invasion" of land has tended to occur mainly where the land has been vacant for long periods and is perceived to have no identifiable owner. The concept of land ownership in traditional African society is one where the community owns all land on behalf of its members and one only needs the consent of either the headman or chief, or indeed the community, to settle in a particular area. This is acceptable in rural village settings, but in urban areas this approach leaves the land "invaders" vulnerable to eviction, or to occupation of land that

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<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> Land held under customary tenure cannot be alienated by the president without taking into account the local customary law on land tenure or consulting the chief and the local authority concerned. Under no circumstances can land be alienated for a period exceeding 99 years unless it is in the national interest and is approved by a two-thirds majority of the National Assembly.

<sup>80</sup> Section 9 (1) and (2) of the Land Act 1995 states that "A person shall not without lawful authority occupy or continue to occupy vacant land" and that "any person who occupies land in contravention of [this section] is liable to be evicted."

is not suitable due to contamination, or which is liable to flooding or other natural disasters.

## 1.2 Legal system and governance structure

The Zambian legal system and governance structure provides for three main branches of government: an executive, a legislature and a judiciary.

### *The executive branch*

The executive branch is headed by the president who is the head of state and of the government and commander-in-chief of the Defence Force.<sup>81</sup> The president is authorised by the Constitution to dissolve the National Assembly, establish and dissolve government ministries and departments subject to the approval of the National Assembly, and appoint such persons as are required by the Constitution or other laws. He is assisted by a vice-president, who is appointed by the president from among the members of the National Assembly.<sup>82</sup> Government affairs are divided between 21 ministries. A minister, assisted by a deputy minister, runs each ministry. Some portfolios have two deputy ministers. In addition, the offices of the president and vice-president each have a deputy minister assigned to them. Each of the nine provinces also has a minister in charge of its affairs. The current cabinet is made up of 66 ministers and deputy ministers. Provincial ministers for each of the nine provinces are responsible for coordinating government business at provincial level. Only five of the ministerial portfolios are currently headed by women.<sup>83</sup>

### *The legislative branch*

The legislative power of the Republic of Zambia rests in parliament, a composite body made up of the president and the National Assembly.<sup>84</sup> The president calls parliament to meet, orders elections and gives final approval to laws but does not play an active role in parliamentary matters. The National Assembly is responsible for making laws, approving proposals for taxation and public expenditure and keeping the work of the government under scrutiny.<sup>85</sup>

The National Assembly is composed of 150 elected members<sup>86</sup> and not more than eight members nominated by the president and the speaker of the assembly.<sup>87</sup> Members are elected for a term of five years on the basis of universal adult suffrage and by secret ballot in which persons aged 18 years and above and permanently resident in Zambia are

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<sup>81</sup> Cap. 1 art. 33(1).

<sup>82</sup> Cap. 1 art. 45.

<sup>83</sup> At the time of writing the five portfolios headed by women were sport, youth and child development, housing and local government, lands, information and broadcasting services, and community development and social services.

<sup>84</sup> Cap. 1 art. 62.

<sup>85</sup> <http://www.parliament.gov.zm/index.php>

<sup>86</sup> There are 150 parliamentary constituencies. The present composition of the House is as follows; MMD (in government) 73, opposition parties including independent members, 74; nominated members, eight; vacant, three.

<sup>87</sup> Cap. 1 art. 63(1).

eligible to vote. The current parliament has only 17 female MPs, who constitute 11 percent of the total membership of the house.

### *The judicial branch*

The Zambian judicial system is made up of courts arranged in a hierarchy, with four primary levels.<sup>88</sup>

#### ***Local Courts***

At the base, the Local Courts are presided over by senior presiding, presiding and ordinary justices. The Local Courts are divided into Grade A and Grade B courts and their jurisdiction is limited according to the grade.<sup>89</sup> Local Courts of either grade can determine matrimonial or inheritance claims that are based on African customary law; when they do they are limited to claims not exceeding 13,889 fee units for Grade A courts, and for Grade B courts, 16,667 fee units.<sup>90</sup>

#### ***Subordinate or Magistrates Courts***

At the next higher level, the Subordinate Courts are presided over by senior resident, resident, Class I, II and III magistrates. These are appointed by the Judicial Service Commission.<sup>91</sup> The jurisdiction of a Subordinate Court depends on its class rating and the type of magistrate presiding. The jurisdiction varies between classes, not only in amount, but also in actions that can be tried. While all Subordinate Courts may hear certain cases based on marriage and family law, certain other types of cases in those areas are restricted to the higher Subordinate Courts. Subordinate Court jurisdiction does not extend to include matters in which the validity of a will or validity of a marriage other than a customary law marriage is in question. If title to land is in dispute, a Subordinate Court may only adjudicate the matter with the consent of all parties.<sup>92</sup> These restrictions may, however, be superseded by orders issued by the chief justice, increasing the jurisdiction of a Subordinate Court.<sup>93</sup>

#### ***High Court***

The High Court has an establishment of 30 puisne judges<sup>94</sup> in addition to the chief justice, who sits *ex officio*.<sup>95</sup> The High Court has unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law.<sup>96</sup> It also has jurisdiction for

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<sup>88</sup> Purdy, R. (1984). *The Zambian Judicial System: A Review of the Jurisdictional Law* in Ndulo, M. (ed.) Law in Zambia. East African Publishing House, Nairobi.

<sup>89</sup> Cap. 29 s 68.

<sup>90</sup> These fee units are calculated at a rate of 180 Kwacha per unit. Statutory Instrument No. 7 of 2001 under the Local Courts (Amendment) Rules, 2001. (US\$1 was worth K4,280 on August 30 2005.)

<sup>91</sup> Cap. 28 s 5.

<sup>92</sup> Cap. 28s 23.

<sup>93</sup> Cap. 28 s 24.

<sup>94</sup> Cap. 26 s 3.

<sup>95</sup> Cap.1 art. 94 (3). The president appoints the puisne judges, subject to ratification by the National Assembly, on the advice of the judicial service commission. Art 95(1).

<sup>96</sup> Cap. 1 art. 94(1). The only exceptions are matters in which the Industrial Relations Court has exclusive jurisdiction under the Industrial Relations Act.

the administration or control of property or persons.<sup>97</sup> The court is also given broad jurisdiction in the areas of probate and marriage law.<sup>98</sup>

### ***Supreme Court***

The Supreme Court is composed of nine judges, including the chief justice and the deputy chief justice.<sup>99</sup> The president appoints these judges subject to ratification by the National Assembly.<sup>100</sup> The court has jurisdiction to hear and determine appeals in all kinds of cases. The Supreme Court acts primarily as the final court of appeal in Zambia for most matters. Appeals resulting from High Court decisions and certain Subordinate Court decisions regarding rental and tenancy rights under the Rent Act<sup>101</sup> and the Landlord and Tenant (Business Premises) Act<sup>102</sup> go to the Supreme Court. Any person aggrieved by a decision handed down by the Lands Tribunal can appeal to the Supreme Court within 30 days of the matter being adjudicated.<sup>103</sup>

### ***Lands Tribunal***

The Lands Tribunal falls under a category of administrative tribunals that are not ranked as courts. All decisions handed down by such tribunals are subject to appeal as above.<sup>104</sup> The 1995 Lands Act created the Lands Tribunal, which is intended to handle land cases in a cheaper, simpler and more efficient way. However, the tribunal is still too technical to be accessible to disadvantaged groups. Further, the tribunal, based in Lusaka, rarely travels to hear cases in other provinces where it is most needed. Furthermore, it “has no jurisdiction to handle cases on customary land”. This effectively leaves out the poor, most of whom hold land under customary law.<sup>105</sup>

Since the advent of colonial rule, Zambia has maintained a “dual legal system”. The organisation of the judiciary maintains the local (formerly native) courts system as indicated above, which is separate and distinct from the English or statutory courts system, which administers statutory law and English common law. This duality in the legal system assigns a superior position to English law over existing indigenous laws. This can be a cause of conflict at the family level in that the majority of Zambians are subject to customary law in the areas of marriage, succession, child custody and property rights, and yet these same areas are also governed by statutory law.<sup>106</sup>

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<sup>97</sup> Cap. 27 s 9(2).

<sup>98</sup> Op. cit., 96.

<sup>99</sup> Cap. 26 s 2.

<sup>100</sup> Cap.1 art. 93.

<sup>101</sup> Cap. 206 s 7.

<sup>102</sup> Cap. 193 s 25.

<sup>103</sup> Cap. 184 s 29.

<sup>104</sup> Bota K. Telephone interview with the author, May 11, 2005.

<sup>105</sup> Machina, H. (2002). Women’s Land Rights in Zambia: Policy Provisions, Legal Framework and Constraints. *Paper presented at the Regional Conference on Women’s Land Rights*, Harare, Zimbabwe, 26 – 30 May 2002.

<sup>106</sup> Kachingwe K. (2004). Why customary law should be gender-friendly. *Times of Zambia*. June 10.

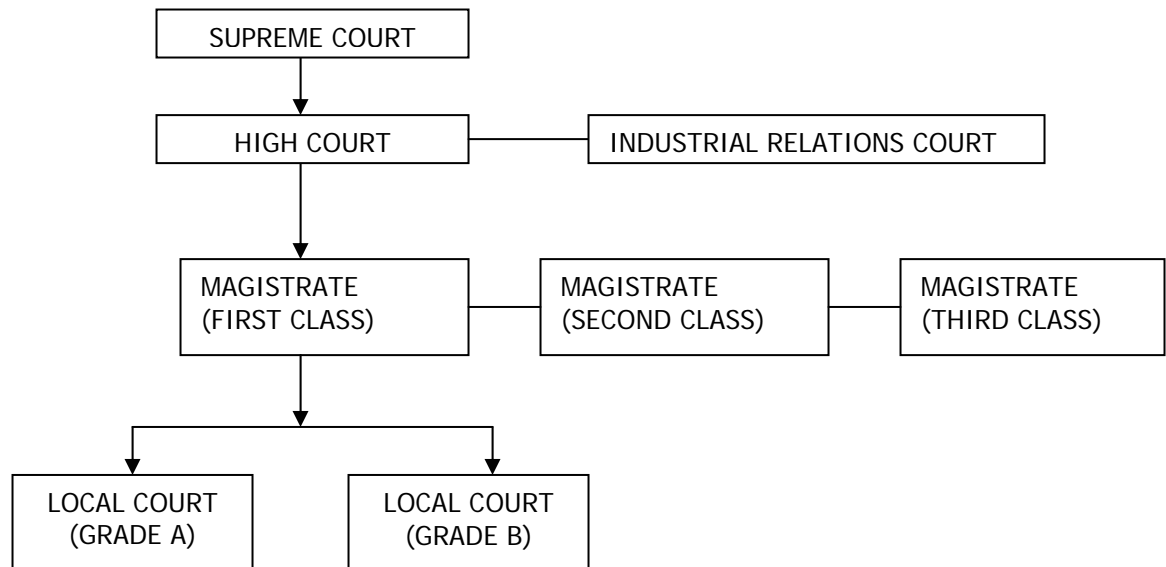
**Table 1.1 Jurisdiction of various courts in land matters**

| <b>Court</b>                     | <b>Jurisdiction</b>   |
|----------------------------------|---|
| Supreme Court                    | Final court of appeal   |
| High Court                       | <p>Unlimited or original jurisdiction to hear and determine any civil or criminal proceedings except in labour matters for which the Industrial Relations Court has exclusive jurisdiction. In particular the court has jurisdiction to:</p> <p>Decide on compensation for future interests extinguished under the Trusts Restrictions Act 1970 (Ss. 2 and 6).</p> <p>Decide on legality or otherwise of caveats against dealings with land (Ss.2 and 81 Lands and Deeds Registry Act 1914).</p> <p>Settle disputes relating to or in connection with property under the Lands Acquisition Act 1970.</p> <p>Decide on whether a person is a member of a body corporate under the Land (Perpetual Succession) Act, 1926 (S.11)</p>   |
| Subordinate (Magistrates) Courts | <p>All personal suits whether arising from contract or tort or both, where the value of the property, debt or damage claimed does not exceed K30 million for a court presided over by a Principal Resident Magistrate, K25 million for a court presided over by a Senior Resident Magistrate, K20 million for a court presided over by a Resident Magistrate and K10 million for a court presided over by a Magistrate First Class.</p> <p>Jurisdiction to hear and determine actions for the recovery of land depending on the value of the land in question or the amount of rent payable per annum and issue eviction orders. A magistrate First Class can hear claims up to K5 million or rent for K1.2 million, Resident Magistrate up to K20 million or rent for K4 million, a Senior Resident Magistrate up to K25 million or rent for K5 million and a Principal Resident Magistrate up to K30 million or rent for K6 million.</p> <p>Can hear and determine cases under the Landlord and Tenant (Business Premises) Act, where annual rentals are as stipulated above.</p> |

Source: Kaunda, M. (1993)<sup>107</sup>

<sup>107</sup> Kaunda, M. (1993). *Land Policy in Zambia: Evolution, Critique and Prognosis*. Unpublished PhD Thesis, University of Cambridge, Cambridge. The table has been updated to reflect the current status in the jurisdictional limits of the courts.

**Figure 1.3 Structure of courts in the Zambian judicial system**



***Governance structure***

The Zambian public service is managed at national level by the secretary to the cabinet. This office is responsible for the management and coordination of the public service. The secretary to the cabinet is the head of government administration, which comprises sector ministries and statutory bodies, provincial and district administration.

Provincial administrations are headed by deputy ministers, who are assisted by permanent secretaries with supervisory responsibilities for sector ministries at provincial level. The various departments of the sector ministries are in turn headed by provincial heads of department, who are answerable to their respective ministries on all technical matters and to the provincial permanent secretaries on all daily administrative matters.

Provincial Development Coordinating Committees (PDCCs) are responsible for coordinating development activities at provincial level. However, these committees have no legal basis for their existence and this has tended to impede their effectiveness.

***District administration***

At the district level, there is a dual local governance system. This embodies devolved locally elected governments whose powers and functions are described by the Local Administration Act of 1991.<sup>108</sup>

<sup>108</sup> Chiwele, D.K. (2002). *Local Governance, Participation and Accountability: The Zambia Case Study*. European Forum on Rural Development Cooperation, Agropolis, Montpellier, France, September 4-6 2002.

A District Commissioner (DC) is responsible for coordinating sector ministerial departments responsible for implementing government programs at the district level as well as those of the local authorities operating under the Local Government Act.

District Development Coordinating Committees (DDCCs) have been established for coordinating the planning of development activities at district level. As in the case of the PDCCs, there is no legal backing for these committees and the DCs who chair the DDCCs have no legal authority to discipline the sector ministry personnel at district level. This has contributed to the operational ineffectiveness of these committees.<sup>109</sup>

### ***Local government***

The local government system operates at district level and is composed of city, municipal, district and township councils or management boards.<sup>110</sup> There are 72 districts in Zambia, each one is run by an elected council. A council consists of the MPs in the district, two representatives appointed by chiefs in the district and all the elected councillors in the district.<sup>111</sup> For every city or municipal council, a mayor and a deputy mayor are elected annually by the council from among their members.<sup>112</sup> The number of councillors depends on the number of wards in a district. In the major urban centres this number can be between 20 and 30. At the time of writing women made up about 20 percent of the number of councils polled.<sup>113</sup>

According to the Local Government Act, councils are supposed to be funded by monies appropriated by parliament to cover such functions as provision of water and sanitation, health services, fire services, road services, police services, primary education, and agricultural services.<sup>114</sup>

Local governments in Zambia are faced with wide-ranging financial pressures due to the loss of many of their income-generating activities. The period between 1960 and 1972 was one of the most successful for Zambian local authorities. During this period, they received grants from central government based on a predetermined formula and were also responsible for electricity distribution. The period between 1973 and 1980 saw the withdrawal of housing unit grants and a gradual reduction of all other grants. Land was declared to have no value by the central government, thereby undermining local property rates tax. Electricity distribution was also withdrawn from local authorities. In 1980 the Local Administration Act was adopted, which decentralised the system of local

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<sup>109</sup> The National Decentralisation Policy: Towards Empowering the People. Office of the president, Cabinet Office, Lusaka, March 2002.

<sup>110</sup> Cap. 281 s 3.

<sup>111</sup> Cap. 281 s 9(1).

<sup>112</sup> In the case of a township or district council, a chairperson and vice-chairperson are elected in a similar manner. Cap. 281 s 16 (1).

<sup>113</sup> Both Kitwe and Ndola have 25 councillors each and only five in each case are female, while Mufulira has 24 councillors (all male) with one vacant ward (information provided by Directors of Administration at respective councils in interviews on March 14 2005 at Mufulira Municipal Council, March 15 2005 at Kitwe City Council and March 17 2005 at Ndola City Council.

<sup>114</sup> Cap 281.

government. Many functions performed by central government were assigned to local authorities without corresponding resources.<sup>115</sup>

Since 1991, several measures have been introduced that have had detrimental effects on local government finances. These include the complete withdrawal of central government funding to local governments; the transfer of responsibilities for motor vehicle licensing from local authorities to the Road Traffic Commission; a large increase in the number of properties exempted from property taxation by the Rating Act of 1997; the sale of council housing by central government to sitting tenants at below market values,<sup>116</sup> thus reducing both the asset base and rental incomes of councils; and a central government instruction prohibiting the eviction of rental or purchase defaulters from council houses.<sup>117</sup>

As a result of these measures many councils face serious problems in meeting their payroll and other statutory obligations.<sup>118</sup>

In 2003 the government adopted the draft decentralisation policy. The policy's aims are "to ensure efficient and effective delivery of services to all citizens through a fully decentralised system of government characterised by open, predictable and transparent policy making and implementation processes which maintain sufficient linkages between the centre and periphery".<sup>119</sup> Through this policy it is hoped to take development to the subdistrict (village) level by way of local authorities engaging with the communities through the formation of Area Development Committees, which will replace the Residents Development Committees (RDCs). Polling districts will be used as catchment areas for development committees and councils are expected to work with these committees in the same way as they have done with RDCs. Area Development

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<sup>115</sup> Ndeke, F.T.J. Chitembo, A. and Dauskardt, R.P.A. (1999). *Widening the Resource Base of Kitwe City Council*. SINPA 'Support to the implementation of the National Plan of Action (Zambia)'. Institute for Housing and Urban Development Studies (IHS), Rotterdam. NB: The Local Administration Act is different from the Local Government Act. The latter sets out the institutional structures for local governance while the former deals with the decentralised system of local government.

<sup>116</sup> All houses built before 1959 were given away free of charge. On June 17 1996, the *Zambia Daily Mail* carried an article entitled "Kitwe tenants demand refund from council". The report stated that "sitting tenants in Kitwe who bought houses before president Chiluba directed local authorities to give away those built before 1959 free of charge are demanding a refund of the money paid to the council to enjoy the presidential decree". The Kitwe Town Clerk responded by saying that the circular from government on the disposal of houses was silent about sitting tenants who had bought the houses before the presidential directive and appealed to higher authorities for guidance.

<sup>117</sup> Op. cit., 114.

<sup>118</sup> In an article entitled "Council seeks K350m. for survival", the *Zambia Daily Mail* of June 12 1996 reported that the Ndola City Council was scouting for about K350 million as an injection of capital for the council to stay afloat and cover employees' salaries. The poor state of financial affairs was attributed to the stagnation of income, as the resource base had not changed since 1993, while the cost of labour had increased by 184 percent of basic pay during the same period. The town clerk was mandated to borrow K100 million from the Zambia National Commercial Bank as an overdraft and K250 million from Finance Bank to cover the month's salaries, while pledging its Kafubu Inn and Ambassador Hotel as collateral for the loans. A report on the Kitwe City Council's financial performance (Supra note 40) indicates that overdraft facilities have been used as "rolling borrowing" with outstanding overdrafts in April 1999 of K234 million serviced at 55 percent.

<sup>119</sup> Office of the president. (2000). *The National Decentralisation Policy (DRAFT)*. Cabinet Office, Lusaka.

Committees will be involved in all development matters affecting their areas. For some development projects communities will be expected to contribute 25 percent of the cost in either labour or cash. The policy has yet to be given legal backing by parliament.

### 1.3 Socioeconomic context

Zambia is a landlocked country covering about 753,000km<sup>2</sup>, or 2.5 percent of Africa's continental surface area. It shares borders with Angola, the Democratic Republic of Congo, Tanzania, Malawi, Mozambique, Zimbabwe, Botswana and Namibia. Censuses conducted in 1980, 1990 and 2000 reported total populations of 5.7 million, 7.8 million and 9.9 million respectively. The 1970-1980 period witnessed the largest population growth rate of 3.1 percent a year, followed by 2.7 percent a year between 1980 and 1990, and 2.4 percent a year from 1990 to 2000. The population is relatively young, with 51 percent between the ages of 15 and 64 and only 2.7 percent over the age of 65. Figures from the 2000 census indicate that 65 percent of the population live in rural areas and 35 percent live in urban areas. The country's population density stands at 13 people per square kilometre.<sup>120</sup> The cities of Lusaka, Ndola and Kitwe have the largest population concentration. The Copperbelt Province, home to Ndola and Kitwe, is the most populous province.

Most households are headed by males, although the 2000 census shows that one in five households (20 percent) are headed by women. The 2000 census also estimates an Overall Dependency ratio of 96.2 and a Child and Aged Dependency ratio of 90.6 and 5.4 respectively. The majority of male household heads were married (88.4 percent), while most female household heads were widowed (45.5 percent). The average household size for Zambia was five people.<sup>121</sup>

According to the Living Conditions Monitoring Survey of 1998, 73 percent of the population live in poverty. Poverty in rural areas affects 83 percent of the population, while in urban areas 56 percent of the population lives in poverty.

Diseases such as HIV/AIDS have exacerbated this situation. In 2000 it was estimated that 16 percent of the population aged between 15 and 49 years was HIV-positive. This amounts to more than 1 million affected people, of whom close to 600,000 are estimated to be women.<sup>122</sup> A far higher percentage of non-infected people are directly affected by the presence of the disease: the pandemic has produced an estimated 600,000 orphans. By 2014, the expectation is that 974,000 children will be orphaned. Households with orphans are increasingly headed by grandparents. Research in Zambia's Northern Province revealed that female-headed households keep about three times as many orphans as male-

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<sup>120</sup> The most densely populated provinces are Lusaka (65 people per square kilometer) followed by the Copperbelt (53 people per square kilometer). Population growth rates for these two provinces stood at 3.4 percent p.a. for Lusaka and 0.8 percent p.a. for the Copperbelt during 1990-2000. For the same period the rural population grew at a rate of 3.0 percent p.a. while the urban population stood at 1.5 percent p.a.

<sup>121</sup> UN Food and Agricultural Organisation (FAO). (2004). HIV/AIDS, gender inequality and rural livelihoods, Zambia.

<sup>122</sup> Joint United Nations Programme on HIV/AIDS. (2002). Estimated number of people living with HIV/AIDS, end 2001.

headed households. Of female-headed households taking care of persons with AIDS, 84 percent perceived the future as bleak.<sup>123</sup>

Moreover, stigmatisation that results from HIV/AIDS-related deaths makes integration of surviving widows and orphans into the extended family system difficult.<sup>124</sup>

The 2000 census gave a total of 1.8 million housing units classified according to type.<sup>125</sup> The most common form of housing is traditional housing,<sup>126</sup> which constitutes 62.4 percent of all housing units. More than 86 percent of housing units in rural areas are traditional housing (non-conventional) compared with 14.7 percent in urban areas. Conventional housing was the majority type in urban areas (60.2 percent).<sup>127</sup> Non-conventional housing made up over one-third of all housing in Zambia. These are mostly houses constructed with mud-brick walls.<sup>128</sup> About two in three units have grass/thatch/straw roofing, and the same proportion have floors constructed with mud or clay.<sup>129</sup>

About 78 percent of housing units are occupied by single households while 1.9 percent are shared. Eighty percent of housing units are self-built, with only 12 percent purchased, 4 percent acquired freely, and 3 percent inherited. Due to high interest rates, mortgaging is very rare in Zambia. The practice of employers providing free accommodation or at minimal rentals is still carried on in most public institutions, as well as some parastatal and private organisations.<sup>130</sup> The figure for those housed in this way stands at 47.7 percent. This indicates that a large portion of the housing market has continued to be catered for under housing policies that date back to the colonial era.<sup>131</sup> Of those housing units rented from landlords other than state institutions and private companies, the largest

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<sup>123</sup> Op. cit., 121, pp. 1, 4 and 6.

<sup>124</sup> Justice for Widows and Orphans Project, (2003) [Brochure].

<sup>125</sup> The types include traditional, mixed, conventional flat, conventional house, mobile house, part of commercial building, improvised/make shift, collective/institutional, unintended and others (unclassified).

<sup>126</sup> Traditional (non-conventional) housing is generally built of poles plastered with mud and thatched with grass (round huts). However, different ethnic groups have their own ways of building. In Luapula province, for example, houses are made in the more conventional square or rectangular form using sun-dried mud bricks and roofed with corrugated iron sheets rather than grass thatch but these are still referred to as non-conventional houses.

<sup>127</sup> Conventional housing in this case means housing built with modern building materials and built to an approved standard in compliance with municipal bylaws. The majority of housing units in Lusaka Province (82 percent) and Copperbelt Province (64 percent) are conventional housing.

<sup>128</sup> These are sometimes referred to as Adobe or Kimberley bricks. They are usually handmade and left to dry in the sun and are to be distinguished from bricks made by industrial processes.

<sup>129</sup> Central Statistical Office. (2000). Report on Migration and Urbanisation, Lusaka.

<sup>130</sup> These include the two universities, government colleges and boarding schools, government institutions such as the police and prison services and the few remaining parastatal organisations.

<sup>131</sup> The practice of employer-provided or subsidised housing goes back to the colonial era when expatriates working in the civil service and the mines were provided with government or mine-owned housing on the basis that they would return to their home countries after expiration of their contracts and did not therefore need to own housing in this country. Although it can be argued that this represents a drain on public resources for those organisations that derive their income in part from government grants, the lack of an affordable mortgaging mechanism means that many parastatal and public service employees would be left without suitable accommodation in the absence of such provision.

percentage comprises those rented from individual or private landlords (91.8 percent). Since the sale of council houses, renting from local councils constitutes an insignificant percentage of the housing market (0.7 percent).

The percentage of households with access to safe water in the 2000 census was slightly above 49 percent, while only 15 percent had access to proper toilet facilities and 16.7 percent had access to electricity. Centrally organised garbage disposal facilities are not available and 62 percent of households therefore dispose of their rubbish by burying it or dumping it in a pit. Urban households generally have better access to facilities than rural households. The proportion of households with access to proper sanitation facilities was higher in urban than in rural areas, as was the number of households with access to safe water and electricity. In terms of energy used for cooking and lighting, 60.9 percent used wood for cooking and 50 percent used kerosene for lighting.

## **1.4 Civil society**

### *Organisations in informal settlements*

Since independence, political leadership structures have existed in most informal settlements. The reasons for this go back to the pre-independence nationalist movement, when the struggle for independence had its strongest support among the African working classes who made up the majority of squatters.<sup>132</sup> After independence, party organisation was firmly entrenched in informal settlements as this gave the settlements a form of legitimacy in the eyes of the party and government. The imposition of a “one-party participatory democracy” under Kaunda’s UNIP in 1972 further confirmed this direction. The policy of party supremacy was quickly grasped by local party leaders in informal settlements, who organised residents to support UNIP. This organisation was based on constituencies, branches and sections. At the lower levels, party leaders organised the residents of these areas efficiently, allocated land, controlled building activities and resolved any conflicts.<sup>133</sup>

The implementation of the Housing (Statutory and Improvement Areas) Act of 1974 (HSIA) required a mechanism for community participation. The concept of Residents Development Committees (RDCs) was introduced due to a shortage of central government capacity to cope with the needs of urban communities in housing.<sup>134</sup> RDCs evolved as a tool for local level organisation and as way of channelling community needs to the local authority level.

In all matters of community development in informal settlements in urban areas local authorities deal with the respective RDCs. The local authorities facilitate the activities of RDCs by helping them conduct non-partisan voluntary elections. The leaders elected in this process are expected to concentrate on developmental projects in their areas and have

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<sup>132</sup> Schlyter, T. & Schlyter, A. (1979). *George – the Development of a Squatter Settlement in Lusaka, Zambia*. Swedish Institute for Building Research, Gavle.

<sup>133</sup> Op. cit., 127.

<sup>134</sup> Zimba, W. Interview with the author, August 2004.

no involvement in party activities. Organisation within the settlement itself is based on a system of zones. A zone is made up of about 50 households. The zones elect zone sub-committees and from these members the community elects 12 to 14 RDC members, some of whom will be women. Outside of these formalised structures various other groupings have arisen to cater for different needs in the peri-urban communities around Zambia's urban areas. These include faith-based community organisations providing home-based care for HIV/AIDS patients, local land alliances and others catering for small-scale farming communities based on the peripheries of many of the urban areas.

### *Civil society organisations*

The growth of civil society in Zambia can be traced to the rise of the MMD in the run-up to the 1991 elections. Over this period, civil society operations became quite strong and now extend to issues of governance, gender, HIV/AIDS, education, poverty alleviation, care for orphans and vulnerable children, public health and many others.

The relationship between the government and civil society has not been entirely smooth. The government tends to see civil society as an antagonist rather than a partner in governance and development.<sup>135</sup> In 2001, the government of Frederick Chiluba initiated debate on a proposal to amend the Constitution to enable the incumbent president to stand for a third term. The OASIS Forum<sup>136</sup> was constituted at the height of this debate to give voice to the concerns of the citizens. Since then OASIS has become a key player in all aspects of governance in the country. There are a number of other civil society organisations focusing particularly on issues of land, housing, women's and children's rights and access to legal aid.

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<sup>135</sup> *Saturday Post*, July 3 2004.

<sup>136</sup> The Forum's members include the LAZ, Zambia Episcopal Conference, EFZ and NGOCC. *Times of Zambia*, July 6 2004.



### ***National Legal Aid Clinic for Women (NLACW)***

NLACW was established in 1990 as a project under the Women's Rights Committee of the Law Association of Zambia (LAZ). Three clinics are run, one each in Lusaka, Ndola and Livingstone. The clinic was established to provide affordable legal aid to women and children from marginalised social sectors at minimum fees. The three clinics handle all cases presented to them as long as they involve women and children. The clinics are also involved in making women more aware of their rights through counselling, workshops and seminars, giving legal advice, and distribution of newsletters and pamphlets.<sup>137</sup>

### ***Justice for Widows and Orphans Project***

This non-profit Lusaka-based NGO was established to educate widows and orphans about their basic human rights, to promote and safeguard those rights, and to advocate for legal reform. The project started operating in 2001 and formed a network among nine NGOs and government departments.<sup>138</sup> Since 2001, the network has established support groups in Kafue, Monze, Kabwe (in Makululu and Kawama) and Chipata. Training of target groups (widows, orphans, community leaders and government officials) focuses mainly on inheritance rights. The project also organises general awareness-raising programmes on television and radio, and holds workshops at community and national levels. It also

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<sup>137</sup> Response to written request for information directed to Ndola Clinic dated August 17 2004.

<sup>138</sup> The network member organisations are: WLSA, NLACW, ZCEA, CCJDP, YWCA, Forum for Democratic Process, the judiciary, social welfare and police, and the VSU.

documents case studies and seeks to address the consequences of HIV/AIDS through counselling, survival skills training and treatment.

### ***Women for Change***

This Lusaka-based NGO works directly with women in the community. Women are empowered to identify their own concerns and to analyse causes and effects. This is done through role-plays, songs, drama and participatory training sessions that help to illustrate the negative impact of discrimination on women and of the community as a whole. Women for Change has also embarked on a training programme for all traditional leaders in Zambia, covering women and children's land rights, and shelter. The organisation has noted that various cultural practices that negatively affect women, such as sexual cleansing, early marriages, polygamous marriages, wife inheritance, domestic violence and property grabbing, have declined in its areas of operation.<sup>139</sup>

### ***Law and Development Association***

The association, also based in Zambia's southern region, facilitates human rights education through awareness raising (radio) programmes, among rural communities.

### ***Catholic Commission for Justice, Development and Peace (CCJDP)***

The CCJDP is a body set up by the Catholic Church to advocate for the economic, social, cultural and political rights of the most vulnerable. Since 2000, the commission has run a paralegal programme aimed at reducing human rights violations. The programme runs workshops, seminars, radio programmes, drama performances, and conducts legal education in schools. It also trains paralegal advisers whose main tasks are to give advice and assist in conflict resolution at community level, and provides legal representation for vulnerable women and children. The paralegal advisers are trained at the national office of the CCJDP in Lusaka in collaboration with the University of Zambia's School of Law. After training, the paralegal advisers, who work on a voluntary basis, are expected to avail their services to their respective communities. Funding for the programme is received from the Catholic Agency for Overseas Development and Oxfam. An evaluation of the impact of the programme is due to be carried out in the year 2006.<sup>140</sup>

### ***Young Women's Christian Association (YWCA)***

The YWCA runs drop-in centres around the country for women and children in crisis situations. The Kitwe centre reports that they receive many cases related to the administration of deceased estates.<sup>141</sup> These cases usually relate to administrators and family members wanting to evict the widow after the death of the husband. The centre's advisers instruct families not to evict widows but instead explain the provisions of the Intestate Succession Act. They have found that the traditional attitudes of family members continue to prevail in the way in which issues of deceased estates are dealt with, which is that the house and property of the deceased belong to the family members –

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<sup>139</sup> Centre on Housing Rights and Evictions (COHRE). (2004). *Bringing Equality Home: Promoting and Protecting Inheritance Rights of Women, A Survey of Law and Practice in Sub-Saharan Africa*. pp. 197-198.

<sup>140</sup> Mushinge, D. Interview with the author, 17 March 2005.

<sup>141</sup> Matanda, B. Interview with author, 14 March 2005.

especially surviving parents –and that the woman was “only married” to their late family member. As such she has no rights to the property.

### ***Zambia Land Alliance (ZLA)***

The ZLA is a network of civil society organisations advocating for just land policies and laws that take into consideration the interests of the poor. The alliance began in 1997 in a response to the land reform process initiated in the early 1990s. The objectives of the alliance include lobbying and advocating for “all-inclusive” policies and laws, carrying out research, raising awareness, and networking with relevant institutions.

The alliance is composed of four full-time member organisations.<sup>142</sup> Under the current Land Policy Review project, the alliance is working with a wide range of partner organisations, extending to village level.<sup>143</sup>

### ***Oxfam***

Since 2000 Oxfam has been running the Copperbelt Livelihoods Improvement Programme (CLIP) based in Kitwe. The programme has laid the foundation for the development of a locally based network of land alliance partners from its operational areas in Kitwe, Mufulira and Chingola. Oxfam recently launched a Copperbelt Land Rights Centre, the objective of which is to become a one-stop shop for land information and advocacy, including on women’s land rights, particularly among poor peri-urban communities.

### ***Women and Law in Southern Africa (WLSA)***

WLSA is an educational and research trust operating in seven countries in southern Africa. Its mission is to change the legal situation of women in southern Africa. WLSA Zambia runs a legal aid project in Monze, a rural district in southern Zambia, where mobile clinics are held every fortnight and many land-related disputes are received. Although HIV/AIDS is related to the disputes, this has only recently come out in the clinics following the introduction of a Prevention of Mother to Child Transmission of HIV/AIDS pilot project by the Ministry of Health. People in Monze are now openly discussing AIDS and have a name for it in the local language.

### ***Habitat for Humanity***

Habitat for Humanity is part of a non-profit ecumenical Christian housing mission.<sup>144</sup> The organisation works by motivating community groups to organise themselves into self-help housing cooperatives.

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<sup>142</sup> These are the Law and Development Association, Women for Change, Catholic Commission for Justice and Peace, and Zambia Civic Education Association.

<sup>143</sup> Some of these organisations are PANOS Southern Africa, Community Based Natural Resource Management and Sustainable Development, ZAW, Transparency International-Zambia, Green Living Movement, WLSA, Integrated Rural Development Initiative and the National Association for Peasants and Small-scale Farmers.

<sup>144</sup> Habitat for Humanity fact sheet.

### ***African Housing Fund***

The African Housing Fund aims at supplementing the efforts of the Zambian government and other development organisations in poverty reduction by assisting the urban and rural poor through community participation and integrated self-help initiatives in the provision of affordable, decent shelter, access to clean water, sanitation and energy supply and the improvement of living conditions through the provision of micro-credit schemes. Its objectives are achieved through building material loans to beneficiaries for the construction and improvement of their shelter.

## **2 Land Tenure**

Land in Zambia is classified into two main categories: state land and customary land.<sup>145</sup> Since the land reforms of 1975 abolished all freehold estates there is no category of private land as all land is held on a statutory lease from the state. State land means all land that is not located within a customary area.<sup>146</sup> This definition includes land along the railway line extending from Livingstone in the south to Chililabombwe in the north, all land under the jurisdiction of town and city councils, protected forest areas, game management areas and national parks. State land comprises 6 percent of the total land area of Zambia, while the balance of 94 percent is made up of customary land.<sup>147</sup>

Although the demand for land has increased considerably, and more applicants are seeking land in customary areas, there are no accurate estimates of the amount of land in customary areas that has been converted to leasehold land.<sup>148</sup>

### **2.1 Relevant constitutional provisions**

Three provisions in the Constitution have a direct bearing on land and housing rights. Article 16, the property clause, follows the basic neo-Nigerian formulation in prohibiting the compulsory acquisition of property except on payment of adequate compensation. The various exceptions to this prohibition in Art. 16(2) include any law relating to abandoned, unoccupied, unutilised or undeveloped land; actions taken for purposes of implementing a comprehensive land policy or policy effecting uniformity of common law and customary law; and any law providing for the conversion of titles to land from freehold to leasehold. These provisions effectively immunise land reform policies and laws from constitutional attack under the property clause, but may in certain

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<sup>145</sup> Prior to 1995 there were three categories, namely State and, Reserves and Trust land. Since 1995 the latter two have been consolidated into customary land.

<sup>146</sup> Section 2, Lands Act No. 29 of 1995.

<sup>147</sup> The areas comprising customary land are described in the schedules to the Zambia (State Lands and Reserves) Orders, 1928 to 1964 and the Zambia (Trust Land) Orders, 1947 to 1964 contained in Appendix 4 of the Laws of Zambia. Although the orders themselves have been repealed by Act No. 29 of 1995, the descriptions remain valid for purposes of defining the areas of customary land. According to the Commissioner of Lands the amounts of land under the two categories are now in the ratios of about 10 percent state land and 90 percent customary land. A process is currently underway to document all the land parcels that have been converted from customary tenure to leasehold (Interview on June 8 2004).

<sup>148</sup> Op. cit, 141.

circumstances weaken the rights of informal rights holders and people living under customary tenure.

Article 23 prohibits the enactment of discriminatory laws. Discrimination includes differentiation according to race, tribe, sex, and marital status. However, once again there are certain exceptions to this general prohibition, namely laws that apply customary law to people to the exclusion of other law (Art. (4)(d)) and laws that differentiate with respect to adoption, marriage, divorce, burial, devolution of property on death or other personal laws. These exceptions make it possible to unfairly discriminate between people in the areas of customary law and family law.

## **2.2 National laws related to land and property rights**

Land and property rights in Zambia are regulated according to provisions found in various statutes, among which are the following:

### *Agricultural Lands Act (Chapter 187, Volume 12)*

This Act provides for the establishment of the Agricultural Lands Board and prescribes its composition, membership, powers and functions. Its principal duty is to provide a legal framework for tenant farming schemes on agricultural land.

### *Common Leasehold Schemes Act (Chapter 208, Volume 12)*

This Act makes provision for the division of land and buildings into units with separate titles through the creation of common leasehold schemes.

### *Housing (Statutory and Improvement Areas) Act (Chapter 194, Volume 12)*

The HSIA provides the legal framework for the minister of local government to declare illegal or informal settlements as improvement areas, making it possible for local authorities to begin the process of regularising these settlements so that services (water, sewerage, electricity, roads and drains) can be extended to them. It also makes provision for the granting of occupancy licences for owners of parcels of land in these settlements.

### *The Lands Act (Chapter 184, Volume 12)*

This Lands Act streamlines the previous land categories into two main categories: state and customary land. The Act provides for the continuation of leaseholds and leasehold tenure. It further provides for the statutory recognition of customary tenure and for the continuation of customary into leasehold tenure. Thus, leaseholds can be allocated on both state and customary land. The Act confirms that all land vests absolutely in the president of Zambia, who may alienate state land to any Zambian and, to a limited extent, to non-Zambians. However, the president may not alienate customary land without first considering local customary law; permission must be obtained through consultations with the appropriate chiefs and the local authority, and persons whose interests would be affected must also be consulted. Chiefs can, however, issue a letter of consent, without prior demarcation and without a thorough check.

In practice, foreign investors start from the top and may obtain leasehold over customary land, which may lead to eviction of the local community. In some cases local communities' river access has been blocked by private owners.<sup>149</sup>

The Act is gender neutral, without any specific reference to women's land rights. As many customary areas are held by men, it is difficult to see how women may apply for conversion of their customary land right to leasehold. The establishment of a Land Development Fund and a Lands Tribunal are also regulated and a number of previous statutes are repealed.<sup>150</sup>

*Lands Acquisition Act (Chapter 189, Volume 12)*

This Act makes provision for the compulsory acquisition of land and other property. The Act operates on the basis that any land may be compulsorily acquired if it is in the national interest to do so. Not less than two months' notice must be given in the event that the government wishes to repossess any piece of land, although the president can direct that less notice be given. Compensation is payable for any property acquired under the Act and can be given in monetary terms or by replacement with land.

*Lands and Deeds Registry Act (Chapter 185, Volume 12)*

This Act provides for the registration of documents, the issuing of Provisional Certificates of Title and Certificates of Title, and the transfer and transmission of registered land.

*Land Survey Act (Chapter 188, Volume 12)*

This Act makes provisions for the registration and licensing of land surveyors, for the manner in which land surveys shall be carried out, and diagrams and plans connected to such surveys prepared. It also provides for the protection of survey beacons and other survey marks, the establishment and powers of a Survey Control Board, which is responsible for the registration and licensing of land surveyors, and for the exercise of disciplinary control over such surveyors.

*Town and Country Planning Act (Chapter 283, Volume 16)*

This Act makes provision for the appointment of planning authorities, the establishment of a Town and Country Planning Tribunal, the preparation, approval and revocation of development plans, the control of development and subdivision of land, the assessment and payment of compensation in respect of planning decisions, and the preparation, approval and revocation or modification of regional plans.

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<sup>149</sup> Information shared during the UN-HABITAT Regional Workshop on Law, Land Tenure and Gender Review in Southern Africa, Johannesburg, May 5-6 2004.

<sup>150</sup> The laws that are repealed through the Land Act are: the Land (Conversion of Titles) Act, 1975, the Zambia (State Lands and Reserves) Orders, 1928 to 1964, the Zambia (Trust Land) Orders, 1947 to 1964, the Zambia (Gwembe District) Orders, 1959 to 1964, and the Western Province (Land and Miscellaneous Provisions) Act, 1970.

### 2.3 Customary law

In the context of land tenure, customary law is applied wherever not doing so would result in undue hardship to the parties involved. Local Courts,<sup>151</sup> as well as Subordinate (Magistrates) Courts, have jurisdiction to apply African customary law to any matters brought before them as long as such law is not repugnant to natural justice or morality, or incompatible with the provisions of any other written law.<sup>152</sup> In matters concerning real property, Local Courts can only determine cases in which the property at issue is located within their jurisdiction.

Customary land is held under the customs and traditions governing land use and ownership. These differ from place to place and are usually not documented, but there are common features in the various forms of customary tenure. To obtain a title deed in customary areas, one identifies land through a village head or chief. The identified land is sketched and endorsed by the chief and accompanied by his/her handwritten letter to the council of the area in which the land is situated after which the application is sent to the Commissioner of Lands for approval. For land in excess of 250 ha, the commissioner seeks clearance from the minister responsible for lands before approving the application.<sup>153</sup>

### 2.4 Land policy

A draft National Land Policy document was first prepared in 1993 after the first national land conference. It then landed on the shelves until 2002, when it was taken to cabinet, which approved the draft in principle that same year. Cabinet directed the Ministry of Lands to take the draft for further public consultations.<sup>154</sup>

The overall objectives of the land policy are to

- Recognise and promote people's right of access to land and provide land information for the country's socioeconomic development; and
- Improve land delivery.

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<sup>151</sup> Section 12(1)(a) of the Local Courts Act, Cap. 29 of the Laws of Zambia.

<sup>152</sup> Section 16 of The Subordinate Courts Act, Cap. 28 of the Laws of Zambia.

“Nothing in this Act shall deprive a Subordinate Court of the right to observe and to enforce the observance of, or shall deprive any person of the benefit of, any African customary law, such African customary law not being repugnant to justice, equity or good conscience, or incompatible, either in terms or by necessary implication, with any written law for the time being in force in Zambia. Such African customary law shall, save where the circumstances, nature or justice of the case shall otherwise require, be deemed applicable in civil causes and matters where the parties thereto are Africans, and particularly, but without derogating from their application in other cases, in civil causes and matters relating to marriage under African customary law, and to the tenure and transfer of real and personal property, and to inheritance and testamentary dispositions, and also in civil causes and matters between Africans and non-Africans, where it shall appear to a Subordinate Court that substantial injustice would be done to any party by a strict adherence to the rules of any law or laws other than African customary law”.

<sup>153</sup> Republic of Zambia, (2002), *Draft Land Policy*. Ministry of Lands, Lusaka.

<sup>154</sup> Information provided by Henry Machina, Coordinator of the ZLA, by email of June 9 2005.

**Table 2.1 Specific objectives of draft National Land Policy**

- Promote equal opportunity for access to land while recognising customary and leasehold tenures;
- Redress the gender imbalance and other forms of discrimination in land holdings by providing security to all land holdings and creating opportunities for development;
- Improve timeliness and accuracy of land information delivery system;
- Improve the capacity of physical planning in order to strengthen the land delivery system and promote coordination among institutions directly involved in physical planning;
- Ensure that the covenants and conditions under which land is held are adhered to;
- Promote increased revenue generation from land;
- Support initiatives by local investors and, where appropriate, assist foreign investors through the provision of land;
- Maintain a clear description of Zambia's international boundary with its neighbours;
- Encourage people with special needs and other disadvantaged groups to own land;
- Develop and enhance the capacity of the Lands Tribunal to quickly deal with land dispute matters; and
- Address the pressures and need for land of urban populations.

The policy aims to reserve 30 percent of new leasehold lands for women and persons with special needs. In addition, women and persons with special needs will be allowed to compete for the remaining 70 percent available for all other applicants. This is already being put into effect and, according to the Commissioner of Lands,<sup>155</sup> this means that more than 50 percent of the leasehold titles currently being registered by his office are being issued to women in their own names, as there is no community of property in Zambia.

However, this positive intention is ambiguous in that it does not specify how much land should go to women and what proportion “groups with special needs” should acquire. The definition of the latter groups is also not provided in the document. In reality, land administrators have problems implementing this provision.<sup>156</sup>

Further, this provision only applies to urban state land where there can be many applicants for land at the same time. In customary areas it is rare to have many applicants at one go, which makes it difficult to apply this provision. In addition, there is no clear mechanism to monitor women's progress of acquiring land. Statistics on land ownership are not only difficult to obtain but are also not gender disaggregated. This is compounded by the patriarchal mindsets of government land administrators, which prevents them from allocating 30 percent of advertised land to women. Much of the remaining land is under the control of traditional rulers, most of whom are conservative and see no reason why women should own land, especially if they are married.<sup>157</sup>

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<sup>155</sup> Interview with the author, June 8 2004.

<sup>156</sup> Op. Cit., 141.

<sup>157</sup> Ibid.

Finally, the fees for these plots are high and lease conditions require owners of land to carry out substantial development on their land within 18 months from the date of alienation. This condition is likely to pose difficulties for women and other disadvantaged groups who might have difficulties mobilising funds within the stipulated period.<sup>158</sup>

**Table 2.2 Draft Land Policy strategies**

In order to achieve the above objectives, the following strategies are foreseen:

- Link lands information systems at Headquarters to offices at all levels;
- Establish an inter-ministerial Coordinating Committee for the purpose of bringing together the various physical planning authorities;
- Review the various pieces of legislation that relate to land matters;
- Sensitise the public on procedures and advantages of holding land on title;
- Ensure that lessees pay ground rent commensurate with the zoning of the area;
- Encourage investment especially in rural areas;
- Conduct surveys, and construct beacons through the usage of maps and other technical records;
- Enforce the Ministry's policy of ensuring that thirty percent (30 percent) of land which is demarcated is allocated to women and groups with special needs; and
- Create a conducive environment for the operation of the Lands Tribunal to facilitate the amicable settlement of land disputes.

### *Institutional framework*

An effective institutional framework for land delivery and management should stress the need for an integrated approach that includes a wide range of stakeholders. The current institutional arrangement places responsibility on the Ministry of Lands to formulate and coordinate the implementation of statutes related to land management in Zambia.

To attain and implement the policy objectives outlined above it is appreciated that some of the statutes governing the functions of the Ministry of Lands require amendment if the land delivery system is to conform to the demand for land and be universally accepted. For example, institutions dealing with land still lack coordination. Procedures governing land for settlements, agriculture, water, forestry and environment are still fragmented in various policy and legal frameworks that are dualistic in nature (customary and statutory) and administered by various ministries, some of which have unclear roles in relation to land. This causes lack of coordination among the sectors dealing with land and breeds inefficiency in land administration. Additionally, most people are unaware of these laws and policies. Thus, there is urgent need to review and revise all land-related statutes with the view of updating and harmonising them.

### *Policy process*

In 2002, after the Ministry of Lands announced that cabinet had approved the draft policy and directed that it be subject to further consultation, a Draft National Land Policy

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<sup>158</sup> Mtamira C. (2002). Presentation during the African Regional Civil Society Consultation on Women and Adequate Housing, Nairobi, October 31 2002.

Consultative Project was started. The government had started consultations in Lusaka province but due to limited resources could not continue the consultation process. Civil society organisations and cooperating partners expressed concern and, after broad consultations with stakeholders, the civil society organisations entered into a joint partnership agreement with the government to combine the limited resources and undertake a joint countrywide consultation process. With support from cooperating partners (the Finnish Embassy, GTZ, HIVOS, Oxfam and PACT Zambia) and the Ministry of Lands, the Land Policy Technical Committee achieved the following:

- District and community level consultations in all provinces of Zambia, with about 3,500 men and women attending the workshops. This resulted in provincial reports;
- Radio programmes on Zambia National Broadcasting Corporation (ZNBC) and community radio stations (Radio Lyambayi in Western province, Radio Breeze and Maria in Eastern province, Radio Phoenix in Lusaka and Radio Ichengelo on the Copperbelt province);
- Collaboration with other concerned organisations;
- Making of a ZNBC television documentary in Kitwe; and
- Publishing of newspaper articles.

The target for completion of the consultation process was June 30 2004. The technical team started redrafting the policy in April, and planned to visit four countries in the region for comparative studies. This input would be incorporated ahead of a national conference. At the time of writing it was anticipated that the policy would be sent to cabinet later in 2005.

In the view of the Commissioner of Lands, the consultation process has not been particularly successful, as the groups consulted used the opportunity to register complaints rather than to make constructive contributions to the policy. It is therefore not expected that the draft will change much as a result of this process. The new policy does not propose substantive changes to the land tenure system and merely commits itself to strengthening the existing system and making it more user friendly.<sup>159</sup>

### *Gender policy*

Since the attainment of independence in 1964 there has been no explicit national gender policy. However, in an effort to increase the role of women in socioeconomic development, the Fourth National Development Plan of 1989 to 1993 included a chapter on Women in Development.<sup>160</sup> After 1991, the Zambian government decided to formulate a National Gender Policy with a holistic approach, ensuring that both women and men participate fully and equitably in the development process.

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<sup>159</sup> Op. Cit., 147.

<sup>160</sup> [www.gender.gov.zm](http://www.gender.gov.zm)

Under this policy, as mentioned earlier, the government is setting aside 30 percent of all land parcels available for alienation to female applicants, irrespective of their marital status.<sup>161</sup>

The gender policy recognises the basic human rights of women, but needs to go a step further in ensuring that women's rights are respected. It is apparent that Zambian cultural heritage in as far as women are concerned has a greater influence on their position in society. Women must have effective and independent rights in land – effective rights being rights not just in law, but also in practice – and independent rights being rights that women enjoy in their own capacity, independent of those enjoyed by men.<sup>162</sup> The government department responsible for implementing the policy is the Gender in Development Division under a permanent secretary in the cabinet office.

## 2.5 Tenure types

Under the existing legislative framework, there are five main types of tenure in Zambia:

- Customary tenure;
- Registered leases under the Lands and Deeds Registry Act [Cap. 185];
- Registered leases and occupancy rights under the HSIA;
- Unregistered leases; and
- Informal rights in illegal informal settlements.

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<sup>161</sup> The Commissioner of Lands emphasised that this policy is being adhered to and that there is no bar to joint registration of property under the current land registration regulations. In practice this means that joint registration in the name of both spouses is very rare. See UN-HABITAT. (2005). *Shared Tenure Options for Women: A Global Overview*.

<sup>162</sup> Kangwa, J. (2004). Report of the Proceedings, Oxfam Partners Land Workshop March 29-30 2004, Mindolo Ecumenical Foundation, Kitwe.

**Table 2.3 Formal tenure types**

| <b>Type</b>                                       | <b>Characteristics</b>   | <b>Legal basis</b>  |
|---|--|---|
| Customary tenure                                  | <p>Obtained through permission of headman or chief.</p> <p>Matrilineal and matrilineal groups of northern Zambia: husband is granted land rights by in-laws in his wife's village, which he forfeits upon dissolution of marriage.</p> <p>Matrilineal and patrilineal groups of southern Zambia: any fields acquired by the man upon marriage or prior to it belong to him. The wife has only a right of cultivation and to half share of the standing crops upon marriage dissolution.</p> <p>Patrilineal and patrilineal tribes of eastern Zambia: inheritance on the basis of primogeniture (the eldest son of the senior house in the case of polygamous marriages).</p> <p>Bilateral groups of western Zambia allow inheritance only by the children of the deceased both male and female who get equal shares of the property.</p> <p>Customary land can be converted into leasehold as described below.</p> | <p>Governed by customs and traditions relevant to the particular ethnic grouping</p> <p>Sections 2 and 7(1) of the Lands Act</p> <p>Customary Tenure (Conversion) Regulations apply when converting to leasehold tenure</p> |
| Registered lease for 14 years                     | <p>Issued on both customary and state land on the basis of a "sketch plan" (requires no cadastral survey before registration). Holder of this lease must develop the land within 14-year period for lease to be renewed. It may be mortgaged and transferred to third parties, but in practice most banks do not accept 14-year leases as basis for mortgage.</p>  | <p>Lands and Deeds Registry Act [Cap. 185]</p>  |
| Registered lease for 99 years                     | <p>Issued on both customary and state land registered in cadastre. A diagram showing an accurate measure of the size of the land parcel and coordinates indicating the precise boundaries of the property must be provided. Mortgages are easier to obtain for this lease. Joint leasehold for spouses is available on request or "optional".</p>  | <p>Lands and Deeds Registry Act [Cap. 185]</p>  |
| Registered lease in statutory housing areas       | <p>"Council Certificate of Title" is registered in local council property register. The plan registered by the council must include information on "the area and dimensions of each piece or parcel of land identified by a serial number". Valid for 99 years. Can be mortgaged and transferred.</p>  | <p>Section 4(2) HSIA [Cap. 194]</p>   |
| Registered occupancy licence in improvement areas | <p>A 30-year occupancy right or "occupancy licence" is registered in local property register. The council plan need only indicate the 'location of each building identified by a serial number'. Can be mortgaged and transferred but in practice most banks do not accept this lease as basis for mortgage.</p>   | <p>Section 37(2)(f) HSIA [Cap 194]</p>  |

| <b>Type</b>                             | <b>Characteristics</b>   | <b>Legal basis</b> |
|---|--|--------------------|
| Unregistered lease or rental            | Regulated by a tenancy contract signed and witnessed by both parties, which need not be a registered document. In practice this form of agreement applies to dwelling houses in the high and medium cost formal residential areas. | Rent Act, 1972     |
| Informal rights in informal settlements | Informal renting and subletting, based on unwritten (verbal) agreement.<br>Illegal subdivision and occupation of land in expanding illegal settlement.   | None               |
| Adverse possession or prescription      | Not applicable in Zambian land law.  | None               |

### *Customary Tenure*

Customary tenure is acquired by obtaining permission from the chief or headman to open up an area of virgin land or by a grant of land from one person to another. The concept of sale of land under Zambian customary law has not been satisfactorily resolved. Since all land is owned by the state, land cannot be sold, whether it is under customary tenure or registered leasehold. What is sold are improvements on land, such as buildings.

The continuing validity of customary tenure was recognised in section 7(1) of the Land Act, which provides that “every piece of land in a customary area which immediately before the commencement of this Act was vested in or held by any person under customary tenure shall continue to be so held and recognised”. As pointed out elsewhere in this chapter, customary rights may be converted into registered leasehold under section 8 of the Land Act read with the Customary Tenure (Conversion) Regulations. Strictly speaking, however, land so converted does not cease to be land in a customary area as the definition of customary area in section 2 of the Land Act defines this portion of the Zambian land mass inflexibly as “the area described in the Schedules to the Zambia (State Lands and Reserves) Orders, 1928 to 1964 and the Zambia (Trust Land) Orders, 1947 to 1964”. Although both these sets of orders were repealed by section 32(2) of the Land Act, their respective schedules continue to define the customary areas of Zambia.

### *Leases under the Lands and Deeds Registry Act*

Registered leases under the Lands and Deeds Registry Act may be either of 14 years or 99 years duration.<sup>163</sup> The cadastral information in respect of the 14-year lease is simpler than that for the 99-year lease, and does not, for example, include an accurate measure of the size of the land parcel, or coordinates indicating the precise boundaries of the property. The holder of a 14-year lease must develop the land by the expiry of the lease, failing which it will not be renewed. Both types of registered lease may in theory be mortgaged and transferred to third parties for the residual period of the lease. However, in practice, banks generally prefer the 99-year lease when granting mortgages.

The Common Leasehold Schemes Act provides for the issuance of registered leases for people living in blocks of flats. Before its enactment, it was not possible for people living in this form of accommodation to hold title to the separate units in which they lived. In this case, cadastral information is given with respect to the parent parcel of land while the units are identified separately.

### *Leases and occupancy rights under the Housing (Statutory and Improvement Areas) Act*

The HSIA [Cap 194] provides for two types of tenure on land leased to municipal councils by the president. The first type, in Statutory Housing Areas, is a form of registered leasehold, which differs from the forms registered under the Lands and Deeds Registry Act in that the register is maintained by the council, i.e. a local property register. According to section 4(2) of the Act, the plan registered by the council must include

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<sup>163</sup> Section 3(6) of the Lands Act provides that the president may not alienate (i.e. grant a lease in respect of) land for longer than 99 years.

information on “the area and dimensions of each piece or parcel of land identified by a serial number”. The second type, in Improvement Areas, takes the form of a 30-year occupancy right. In this case, the council plan need only indicate the “location of each building identified by a serial number” (Section 37(2) (f)).<sup>164</sup> Both types of tenure are mortgageable and transferable, but again in practice, banks are unwilling to grant loans against the security of these two tenure types. In both cases the land comprising a statutory or improvement area must first be leased to the council by the president so that the council holds the head-lease and then issues under-leases to the occupants in its jurisdiction.

### *Unregistered leases*

The letting of dwelling houses under the provisions of the Rent Act, 1972 is controlled by unregistered leases that set out the rights and obligations of landlord and tenant as private individuals. The relationship between the parties is regulated by a tenancy contract signed and witnessed by both parties, which need not be a registered document. In practice this form of agreement applies to dwelling houses in the high- and medium-cost formal residential areas. There is a time limit attached. Unregistered leases can only be effected for periods less than 12 months. Anything above 12 months must be registered.<sup>165</sup> The Rent Act specifies a formula for calculating the maximum rental or “Standard Rent” that may be charged in respect of dwelling houses.<sup>166</sup>

### *Informal rights in illegal settlements*

In the informal areas and illegal settlements, informal renting and subletting are quite common. These generally take the form of unwritten (informal) agreements between landlord and tenant to pay an agreed sum on a monthly basis. Many of those who engage in this form of activity either let a room or rooms in their own home or build structures specifically for renting out where a number of rooms may each be rented to different individuals or family units.

Illegal subdivision and occupation of land occurs mainly where there is an existing illegal settlement that is expanding with the passage of time.<sup>167</sup>

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<sup>164</sup> Secs.7 (3 & 4) and 39(2) of Cap. 194 state that where two or more persons are entitled as tenants in common to undivided shares in any land, only one council certificate of title will be issued. However, the council registrar may, in his absolute discretion, issue separate titles to each person in respect of their individual share of the property. In the case of occupancy licences, not more than one license may be issued to any one person.

<sup>165</sup> Nyirenda, W. (2005). Interview with the author March 23 2005.

<sup>166</sup> “Standard Rent” refers to the rental agreed between landlord and tenant on the date the premises are let. Where this is not agreed the court can determine a monthly rate of one and one-quarter percent of the cost of construction plus market value of the land. Where this information is not available the court may determine the standard rent to be such an amount as it considers fair and reasonable having regard to the standard rent of comparable premises in the neighbourhood.

<sup>167</sup> In Kitwe, Chipata Compound provides an example of an illegal settlement where the city council has refused permission to upgrade because the settlement is in a low-lying area close to a major river (the Kafue River). The settlement has recently been expanding without authorisation from the council as the residents take it upon themselves to subdivide adjacent land for new residents coming into the area.

## 2.6 Main institutions involved

The institutional framework places the Ministry of Lands at the centre of all land matters. The ministry is responsible for the formulation and coordination of all legislation that is related to land management in the country.

### *Ministry of Lands*

The Ministry of Lands is divided into four departments, three of which deal directly with matters of land administration, namely (a) the Lands Department, (b) the Lands and Deeds Registry and (c) the Survey Department.

### *The Lands Department*

Under *Zambian law* all land is vested in the president on behalf of the people of Zambia. The president delegates the powers of land administration to the Commissioner of Lands, who is charged with the responsibility to make and execute grants and dispositions of land subject to the special and general directions of the minister responsible for land. The Commissioner of Lands is the head of the Lands Department and administers land throughout the country. The Lands Department is divided into three sections: Land Administration, Legal and Estates, and Valuation. The Land Administration Section has administrative responsibility for all land matters in the country in addition to ensuring the proper development of areas planned by the local authorities under the direction of the Department of Physical Planning in the Ministry of Local Government and Housing and the Land Husbandry Section of the Ministry of Agriculture and Cooperatives.

### *The Lands and Deeds Registry*

The principal function of the Lands and Deeds Registry is to register ownership and real rights in and over immovable property in order to provide security of title; ensure a complete record; provide easy access to information; ensure speedy registration of all documents lodged; and be cost effective. As such the registry keeps a record of all land transactions and issues title deeds to all land situated in state land areas, as well as customary land that is being converted to statutory leasehold.

Over the years a number of consultancy studies have been undertaken with the view of implementing improvements in the land delivery system.<sup>168</sup> A regional lands office was set up in Ndola in 1995 in an attempt to decongest the Lusaka headquarters but, due to inadequate funding, this move has not yielded the intended results.<sup>169</sup> The failure to implement an online link between Ndola and Lusaka has hampered its effectiveness. A

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Another typical case is that cited in the case of Chainda Township (Supra note 161) where the adjacent community invaded private farmland that they perceived to have remained dormant for a long time.

<sup>168</sup> For example Swedesurvey. (1984). *Report on Consultancy Studies in the Lands Department*; Halcrow Fox and Associates, and Clyde Surveys Limited. (1988). *Zambia Land Delivery System*. 1988. Consultancy Report for Ministry of Lands, Water and Natural Resources.

<sup>169</sup> In 1995 the minister of lands announced that a regional lands registry would be set up at Ndola to serve the needs of land developers in the Copperbelt, Northwestern and Luapula Provinces. However, at a recent workshop a deputy minister admitted that the office was operating below capacity due to insufficient funding to enable a computer link between the regional office and the headquarters in Lusaka.

system that was put in place at the Lusaka headquarters with funding from the Swedish government has since been discarded and a new consultant engaged to install a different computer system. At present there is a move to improve this position by enabling the Ndola office to download transactions from the headquarters on a monthly basis.

The problem with devolving responsibilities from Lusaka lies in the nature of the functions of the land registry. Under the Lands and Deeds Registry Act only the registrar defined under that Act is authorised to sign statutory title deeds. Under a devolved system the registrar could continue to play the role of guardian of the land registry while district registrars dealt with the daily administration of title deeds. This would decongest the Lands Department and bring the issuing of titles closer to the people being served. It would remove the need travel to Lusaka for all those who want to have titles issued.

### ***Survey Department***

The Survey Department is responsible for the provision of accurate land information to the general public and to specific sectors. The land information is made available through the provision of surveys and mapping services. The department is divided into cadastral, survey and mapping branches. The cadastral branch is responsible for the accurate fixation and recording of legal title and addresses issues of boundary disputes. The mapping services branch deals with services related to the production and revision of national topographic and specialised mapping. The survey services Branch deals with the establishment and maintenance of a reliable national control network for use in cadastral mapping, engineering and other surveys.

### ***The Lands Tribunal***

The Lands Tribunal is a statutory, administrative body under the Ministry of Lands whose objective is to arbitrate in disputes arising under the Lands Act.

### ***Office of the vice-president***

Through the Department of Resettlement, the office of the vice-president identifies land for resettlement schemes, particularly for retirees and other urban residents in need of land so that they can own land on title and have some means of earning a livelihood. To identify suitable areas and have them designated, planned, demarcated and developed, the office is required to work in close collaboration with the Ministry of Lands.

### ***Ministry of Legal Affairs***

Land holding entails legal procedures that are enshrined in various statutes and covenants. The Ministry of Legal Affairs acts as legal adviser to the Ministry of Lands in the interpretation of land law and the overall management of land matters as well as the drafting of new laws to enable government achieve its objectives in land management.

### ***The Government Valuation Department***

Through the Government Valuation Department, the Ministry of Local Government and Housing advises the Ministry of Lands (Estates and Valuation Section) on property valuation and any other matters pertaining to real estate management. The department

also utilises property data from the Lands and Deeds Registry of the Ministry of Lands to prepare valuation records.

#### *District councils*

District councils, under the general direction of the Ministry of Local Government and Housing, have the power to control the development of land in their areas. The Local Government Act empowers councils to prohibit and control the use of land and buildings and the erection of buildings in the interest of public health, safety and the proper and orderly development of the council area. Councils have the power to deal with state land, in which they act as agents of the state under the direction of the Commissioner of Lands, and land falling under the HSIA.

#### *Ministry of Agriculture and Cooperatives*

Through the Land Husbandry Section, the Ministry of Agriculture and Cooperatives is responsible for identifying, planning, demarcating and recommending land for agricultural purposes, and monitors land use changes. The ministry plays a crucial role in identifying and opening up suitable land for agricultural use.

#### *Ministry of Commerce, Trade and Industry*

The Investment Centre under the Ministry of Commerce, Trade and Industry cooperates with the Ministry of Lands in identifying suitable land for various developmental projects. The ministry facilitates the speedy registration of companies to assist would-be investors acquire land for various investments.

#### *Ministry of Environment, Natural Resources and Tourism*

The Ministry of Environment, Natural Resources and Tourism provides advice to the Ministry of Lands on the suitability of land for specific purposes such as natural resource conservation and protection of the environment. The Zambia Wildlife Authority under the tourism portfolio gives concessions on land in areas demarcated as game management areas and national parks. The authority, working through the Protected Areas Planning Unit, prepares development plans with land information produced by the Ministry of Lands and also regulates the development of tourism enterprise. The ministry assists entrepreneurs in the identification of land suitable for tourism purposes including land in game management areas.

### 3 Housing

After independence in 1964, the Zambian government tried to redress the rural-urban imbalance created during the colonial era and employed policies that were aimed at creating better social and economic conditions in both urban and rural areas.<sup>170</sup> Among these were policies to pursue the provision of housing and infrastructure. In its early

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<sup>170</sup> Khonje, G.A.C. (1983). *Consumer Acceptability of Low-Cost Housing in Zambia*. Unpublished PhD Thesis. University of New South Wales, Australia.

stages, the UNIP government initiated a development plan system that involved the preparation of five-year plans covering the social, economic and physical development of the country. A total of four development plans were initiated covering the periods 1966-1970, 1972-1976, 1979-1983 and 1989-1993.

The housing policies implemented during this period indicate a gradual policy shift from providing complete (conventional) low-cost housing to aided self-help schemes and squatter upgrading. This came to be regarded as the most viable route to housing access for the low-income majority of the population. The shift was in recognition of the fact that the unauthorised areas represented social and economic capital that could not simply be brushed aside.<sup>171</sup>

The policy of squatter upgrading has, however, been criticised on the basis that, even though the sites and services programmes were welcome innovations, the amount of investment that was actually targeted at the poor could not bring about fundamental changes in the lives of the squatter populations. In 1974, total housing expenditure was approximately K43 million, of which only about K6 million was spent on squatter upgrading under the Second National Development Plan.<sup>172</sup> Substantial funding was, however, allocated towards the development of high-cost housing for the expansion of the civil service in the first two plan periods.<sup>173</sup> Between the end of the First National Development Plan and the start of the third, the number of traditional and squatter units rose from 59.4 percent to 65 percent, while upgraded units dropped from 20.4 percent to 10.3 percent, and sites and services dwellings rose only marginally from 2.6 percent to 3.8 percent. These figures indicate that the programmes for low-cost housing provision did not have a significant impact on the poorer sections of the housing market.

Since then, housing provision in the conventional sense has come to a standstill and many poor households strive to create shelter incrementally from their own savings. Available evidence indicates that many poor urban households who obtained plots of land in the 1970s under the sites and services schemes are still unable to complete buildings that were, in some cases, begun 30 years ago.<sup>174</sup>

Planning and building legislation is based on the Town and Country Planning Act<sup>175</sup> and the Local Government (Urban Building and Drainage) Regulations of 1968. Both laws are basically British colonial planning and building legislation. The Local Government Act has been amended over the years to allow for changes in the structure of local

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<sup>171</sup> Kasongo, B.A. & Tipple A.G. (1990). An Analysis of Policy Towards Squatters in Kitwe, Zambia. *Third World Planning Review*, Vol.12, No.2, pp.147-165.

Rakodi, C. (1989). Self-Help Housing: The Debate and Examples; Upgrading in Lusaka, Zambia and Hyderabad, India. *Habitat International*, Vol. 13, No.4, pp.5-18.

<sup>172</sup> Knauder, S. (1982). *Shacks and Mansions: An Analysis of the Integrated Housing Policy in Zambia*. Multimedia Publications. Lusaka.

<sup>173</sup> Rakodi, C. (1986). Housing in Lusaka: Policies and Progress. in Williams, G.J. (ed.), *Lusaka and its Environs*. The Zambia Geographical Association, Handbook Series No. 9, Lusaka.

<sup>174</sup> Kangwa, J. (2004) A place of one's own in Kitwe, in Home, R. & Lim, H. *Demystifying the Mystery of Capital*. Glasshouse Publishers, London.

<sup>175</sup> Chapter 283, Volume 16 of the Laws of Zambia.

governance, but the building and drainage regulations have not been changed since independence. These regulations deal with materials and methods of construction and are based on specifications that relate to conventional designs rather than performance standards. As such they specify materials and minimum dimensions to be used. Any variation in these, even though meeting the performance standards, would be unacceptable in terms of the existing legal framework. This effectively limits the variety of materials and methods that can be used and hinders future research and development of other types of materials and construction that can satisfy the same health and safety requirements.<sup>176</sup>

Traditional houses in rural areas were never meant to be regulated by these standards. However, all structures in urban areas are required to conform to these standards. The majority of those who build homes in informal settlements follow patterns based on the traditional way of house building and, by and large, use materials and methods that conform to traditional standards because they understand these rather than the imported urban standards. This is one area where research in indigenous building materials and methods would help to evolve patterns of housing that conform to people's needs. As long as they meet the requisite health and safety standards, such materials could be sourced locally and affordable for the majority.<sup>177</sup>

### 3.1 Relevant constitutional provisions

The right to adequate housing is not laid down in the Constitution. Articles 112 (d) and (h) of the Constitution say that the state shall:

- Endeavour to provide clean and safe water, adequate medical and health facilities and decent shelter for all persons, and take measures to constantly improve such facilities and amenities; and
- Strive to provide a clean and healthy environment for all.

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<sup>176</sup> Mashamba, M.S. (1997). *The Construction Industry in Zambia: Opportunities and Constraints under the Structural Adjustment Programme and the Enabling Shelter Strategy*. Unpublished PhD Thesis, University of Newcastle Upon Tyne, Newcastle.

<sup>177</sup> The National Housing Policy recognises this as an impediment to progress in realising appropriate, affordable housing. It states that some public health regulations and building bylaws and other regulations are inappropriate and do not serve the needs of the majority of the population. This situation has greatly reduced activity in the housing sector. Standards set for both the formal and upgraded informal housing sectors are in part outdated and counter-productive due to restrictive construction and public health requirements; restrictive minimum development clauses; and inappropriate standards that hamper the adoption of simplified designs and more widespread use of local materials and technologies. It also indicates that the availability of appropriate and affordable building materials is paramount towards the achievement of adequate housing. Current conventional construction materials are not readily affordable for reasons of capital-intensive technology in materials production and inappropriate construction technologies; prohibitive prices of building materials caused by high input costs and high transportation costs; inappropriate standards and bylaws that reduce the range of approved materials and building technologies; inadequate and uncoordinated research, development and promotion of low-cost and appropriate building materials; and lack of affordable finance for small-scale building materials production and procurement.

Both of these provisions commit the Zambian government to pursue policies aimed at the realisation of decent living conditions and access to affordable medical and health care.

Part IX of the Constitution lays down certain directive principles of state policy. These principles are expressly stated to be non-justiciable, meaning that they do not give rise to rights that can be enforced in court.

The realisation of these policies has greatly been hampered in the last 10 years by the government's pursuit of liberal economic policies that saw the removal of subsidies and imposition of harsh conditions for the majority of the population. The removal of publicly subsidised health services and environmental programmes such as anti-malarial spraying and garbage collection has resulted in an environment that is unsafe and a threat to human life. Crowded urban living conditions in poorly constructed houses have given rise to ever-increasing levels of respiratory diseases which, coupled with the HIV/AIDS pandemic, do not lend support to the realisation of these principles.

### **3.2 Relevant housing legislation**

The most relevant laws related to low-income housing are listed below.

#### *Rent Act (Chapter 206, Volume 12)*

This Act makes provision for restricting rent increases, determining standard rents, prohibiting the payment of premiums and restricting the right to possession of dwelling-houses, and for other purposes connected to the relationship of landlord and tenant of dwelling -houses.

#### *Housing (Statutory and Improvement Areas) Act (Chapter 194, Volume 12)*

This Act provides the legal framework for the minister to declare illegal or informal settlements as improvement areas, making it possible for local authorities to begin the process of regularising these settlements so that services (water, sewerage, electricity, roads and drains) can be extended to them. It also makes provision for the granting of occupancy licences for owners of parcels of land in these settlements. The Act also provides for the declaration of housing areas falling under the jurisdiction of a local authority as statutory housing areas so that councils can give certificates of title to holders of plots in these areas once they have fulfilled the requisite conditions.

### **3.3 Housing policy**

In 1996 the government launched the National Housing Policy (NHP), which was drawn up after a process of nationwide consultation spearheaded by representatives from both the private and public sectors. The consultative process included workshops in all nine provinces and culminated in a National Conference on Housing in March 1995. The NHP recognises the pressure exerted on infrastructure and social services countrywide by rapid population growth, which is compounded in urban areas by continued migration from

rural areas.<sup>178</sup> The policy goal of the NHP is to provide adequate, affordable housing for all income groups in Zambia.<sup>179</sup> However, the formal documentation of the housing policy merely confirms previously undocumented reforms, which for the most part had already begun to be implemented under the Enabling Shelter Strategy of the early 1990s.<sup>180</sup>

### *Implementation of the National Housing Policy*

In 1998 the cabinet inaugurated the Presidential Housing Initiative (PHI) to spearhead the implementation of the NHP. The PHI raised national expectations and was widely debated. It was seen as the beginning of the end to Zambia's housing problems.

The PHI was to operate as an implementation unit under the National Housing Authority (NHA) to revive housing construction, undertake upgrading of unplanned settlements and to create employment in the building sector. To fulfil these objectives the PHI was tasked with identifying, mobilising and drawing in resources from both local and external sources to create a housing revolving fund.<sup>181</sup> In practice, however, the PHI operated as a separate unit with its own management and tender procedures. The cabinet decision was never given the legal backing of parliament and after the 2001 elections the PHI was dissolved, its functions and assets passed on to the NHA.

### *Impact of PHI*

The impact of the PHI can be stated with regard to three of its objectives:<sup>182</sup>

- To revive the dormant housing construction sector – Only one site in Lusaka (the Chainama site, meant to be the showpiece of the scheme) was partially developed. Even then this project did not cater for those sectors of the urban population that were most in need of proper housing. Houses designated as the low-cost house type in the scheme were so expensive that middle management civil servants could not afford to buy them;

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<sup>178</sup> According to the NHP the housing backlog (as at 1996) stood at approximately 846,000 units, which would require a building rate of 110,000 units over 10 years.

<sup>179</sup> To achieve this goal, the NHP put across the following major objectives; allocation of a minimum of 15 percent of the national annual budget to housing to support a sustainable housing development programme; provision of serviced land for housing development and streamlining of the land allocation process; streamlining of building standards, regulations and other controls so that they accord with the capabilities, needs and aspirations of the various sections of the population; encouraging the production and use of local and affordable building materials; assisting the poor to acquire decent shelter through alleviation of their affordability problems; fostering housing areas that are functional, healthy, aesthetically pleasant and environmentally friendly, and the preparation of a national housing implementation strategy.

<sup>180</sup> Schlyter, A. (1998). Housing Policy in Zambia: Retrospect and Prospect. *Habitat International*, Vol. 22, No. 3, pp.259-271.

<sup>181</sup> Makasa, P. (2003). *Housing and Urban Development Initiatives as a means towards alleviation of Poverty: The Case of the presidential Housing Initiative in Zambia*. Paper for Institute of Local Government Studies, Madina, Ghana.

<sup>182</sup> Ibid.

- Upgrading of unplanned settlements – The project achieved nothing in terms of interventions against the proliferation of squatter settlements nor did it provide resources to upgrade existing ones; and
- Employment creation – It was expected that construction would create informal and formal income-generating activities, but none of this took place. The level of employment created was far less than was expected. One reason was a preference for foreign labour; construction labourers were imported from Malaysia at the expense of unemployed Zambians.

### **3.4 Tenure types**

The main tenure type related to housing is rental. The Rent Act 1972 [Cap 206] governs relationships between landlords and tenants with respect to dwelling houses, while the Landlord and Tenant (Business Premises) Act governs the relationship between landlords and tenants of business premises.

The land reforms of 1975 abolished the operation of estate agents, but since the enactment of the Lands Act 1995, the estate agency business has been revived. In the high- and medium-cost conventional housing areas, private individuals who own homes and want to put them up for rent can either advertise in the national newspapers or place their homes with an estate agent who will look for suitable tenants. Once a suitable tenant is secured, a tenancy agreement, which is in the form of a contract stipulating the terms and conditions of tenancy, is usually drawn up and signed by the parties to the tenancy. The agreed rentals are payable usually on a quarterly basis or other period agreeable to the parties. Rental protection is afforded under the Rent Act of 1972, which stipulates the maximum rentals that may be charged.

#### *Gender policy*

There are no direct references to housing in the gender policy.

### **3.5 Main institutions**

#### *Ministry of Local Government and Housing*

The Ministry of Local Government and Housing is charged with the responsibility of assessing land for human settlement, industrial and commercial development. Through the Department of Physical Planning and respective local authorities, the ministry is responsible for the preparation of structural and regional plans to guide town and rural development. In addition, city and municipal councils are responsible for recommending applicants for land. Consultations on land matters among chiefs, councils and the ministry ensure that land is not only made available for allocation but also that customary rights of local people are not infringed. The ministry is also responsible for administering the provisions of the HSIA.

### *The Department of Physical Planning and Housing*

This department works with councils to develop district strategic development plans. These plans set out the zoning patterns that have to be followed by each council in allocating land. In situations where priority needs are identified, areas may be rezoned to meet these needs but in such cases the law requires that an application be made to the minister to approve such modification. The Ministry of Finance and National Planning has also introduced a regional planning section, which is duplicating the functions of the Ministry of Local Government and Housing.

### *Ministry of Works and Supply*

The Ministry of Works and Supply is responsible for the administration and maintenance of all government property throughout the country.

## 4 Inheritance and Marital Property Rights

Inheritance in Zambia is governed by both customary and statutory law. The inheritance procedures that are followed in a particular case depend upon whether the marriage is a customary law marriage or one contracted under statutory law. Tribal origins also play a crucial role in the way in which estates are administered due to different customs and traditions among the patrilineal, matrilineal and bilateral groups.

### *Customary law marriage*

Under customary law, a marriage may be monogamous or polygamous, but only the man can contract a polygamous union. Customary marriages are therefore potentially polygamous since there is nothing to stop the man from taking a second wife during the subsistence of the marriage.<sup>183</sup> A marriage under customary law must meet four minimum requirements relating to consent, bride price and puberty of the bride.<sup>184</sup> It can be dissolved either at a family gathering or at a Local Court.<sup>185</sup> The first-mentioned way of dissolving a customary marriage leaves this institution open to a lot of abuse and is particularly disadvantageous for women in a society where men traditionally hold power in family life.

### *Statutory law marriage*

Marriages contracted under the Marriage Act entail a union between one man and one woman.<sup>186</sup> A marriage certificate is evidence of the marriage<sup>187</sup> and only one ground for

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<sup>183</sup> WLSA. (undated). *Inheritance in Zambia: Law and Practice*.

<sup>184</sup> The marriage must fulfill the following conditions: the consent of the woman's as well as the man's competent relatives; the consent of the parties to the marriage; the payment of the bride price; and the bride must have attained puberty.

<sup>185</sup> Grounds for divorce can include barrenness, adultery, disrespect of in-laws, pressure from a man's relatives, laziness, etc.

<sup>186</sup> The Marriage Act, Cap 50 of the Laws of Zambia. Under the Marriage Act, one of the parties to the marriage must give 21 days notice (Section 6) to the registrar in the district in which the marriage is to take place. After the 21 days and within 3 months from the date of notice, the registrar will issue a certificate if s/he is satisfied that the prescribed conditions have been fulfilled.

divorce, i.e. irretrievable breakdown, is admissible.<sup>188</sup> Marriages contracted under the Act are expected to remain monogamous; if one of the spouses contracts another marriage they become guilty of bigamy. In spite of the fact that it is an offence under the Act, some men go on to contract other marriages because it is very difficult to enforce the available remedies. This leaves women married under the law in a vulnerable position even though they have the protection afforded by the law. This is clearly demonstrated in the case of *Lillian Mushota v Doreen Mwila alias Mushota*.<sup>189</sup>

There are a number of safeguards in relation to marriage under the Act. Upon separation and after divorce, a woman married under the Act can claim maintenance, whereas under customary law maintenance can only be claimed after divorce. Upon divorce a woman can claim a share of the marital property,<sup>190</sup> whereas under customary law whether or not a woman gets a share depends upon the applicable customary law.

Most Zambian marriages contracted in urban areas integrate both custom and statutory requirements.<sup>191</sup> The payment of *lobola* (bride price) is such an integral part of the marriage process that no marriage will be regarded as valid without these customs having been exercised.<sup>192</sup>

#### 4.1 Relevant constitutional provisions

Art. 16 provides for protection against deprivation of property, which may only be carried out under an act of parliament providing for payment of adequate compensation.

Art. 11(1) recognises and declares every person in Zambia to be entitled to the fundamental rights and freedoms of the individual, whatever “his sex”. However, the same article states that the entitlement of these rights and freedoms is subject to limitations contained in Part III related to Fundamental Rights and Freedoms. Art. 23(1) prohibits discrimination and Art. 23(3) defines ‘discriminatory’ as “affording different

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The following conditions must be satisfied by sworn affidavit: that at least one of the parties has been resident within the district for at least 15 days; that the parties are not less than 21 years old, or if one of the parties is below that age, written consent from one of his/her parents is annexed to the affidavits; that there is no impediment to the marriage; and that neither of the parties is married under customary law.

<sup>187</sup> Section 31.

<sup>188</sup> Evidence of “irretrievable breakdown” may include adultery, sexual perversion, cruelty, willful neglect, desertion, voluntary or judicial separation lasting at least two years.

<sup>189</sup> High Court Case No. 2000/HP/0078, ZR. The facts were that Dr. Remmy Mushota (deceased) was married to Lillian Mushota in accordance with the Marriage Act from 1983 up to the time of his death. While this statutory marriage was still subsisting, he purportedly married Doreen Mwila under customary law. The court held that the second marriage was invalid from the beginning and that Lillian Mushota was the only lawful widow of the deceased.

<sup>190</sup> This is well illustrated in the case of *Chibwe v Chibwe*.

<sup>191</sup> This is the same whether one comes from a matrilineal, patrilineal or bilateral group.

<sup>192</sup> For instance, when a man identifies a girl that he wants to marry, he will approach a maternal uncle and if the family approve they will choose a go-between who ensures that the marriage procedures are followed properly. The go-between will inform the parents of the girl who in turn inform the family on her mother’s and father’s sides. If the man is accepted, the girl is called to confirm the relationship. After this, discussions take place between the man’s go-between and the family representatives from the girl’s side focusing on the bride price.

treatment to different persons wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed”. However, Art. 23(4) specifically excludes from the application of the non-discrimination clause all laws:

“With respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (and) For the application in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons.”

These exceptions effectively make it possible to unfairly discriminate between people in the area of customary law and family law, which in practice mostly affects women.

The United Nations Committee on the Elimination of Discrimination Against Women, which monitors state compliance with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), has expressed concern at these contradictory provisions.<sup>193</sup>

The fourth constitutional review process, meant to develop a people-driven Constitution, is underway. Citizens have submitted proposals on changes they want to see in the Constitution. The women’s movement has also submitted proposals for amendment. One such submission proposes amendment of Art. 23 in the Constitution’s Bill of Rights by broadening the scope of the non-discrimination clause and removing the derogation clauses under it. The “Minimum Standard Document for Women and Children’s Rights” was developed by women’s organisations and used as the basis for the submissions. This document borrowed from some of the more progressive constitutions in the region, such as those of Namibia, Malawi and South Africa. Most submissions relate to human rights contained in the Bill of Rights, which is sacrosanct and can only be opened by referendum.<sup>194</sup> So far the government has refused to hold a referendum on account of the cost of such an exercise. There is a lot of uncertainty and controversy around the review process and there are fears that this article may not be amended.<sup>195</sup> Various civil society bodies oppose the current process, advocating for a broader based process.

## **4.2 Legislation related to inheritance rights**

### *The Intestate Succession Act No. 5 of 1989*

This Act provides for the administration of deceased estates. It does not apply to land under customary tenure, property that belongs to a chieftainship or family property. Land under customary tenure and chieftainship property is administered according to the customs and traditions of the particular ethnic or tribal grouping. The Act provides for the appointment of administrators in Section 15(1):

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<sup>193</sup> CEDAW, (2000). *Concluding Observations*.

<sup>194</sup> Art. 79(3) and (4) of the Constitution.

<sup>195</sup> McMillan, J. E-mail communication with the author, May 30 and June 2 2005.

- (1) In a case where a person has died without leaving a will (intestate) the court may grant letters of administration to any interested person upon application to the court to do so;
- (2) If more than one person applies for letters of administration, the court can grant letters of administration to any one or more of them. Under such circumstances the court will use its discretion in determining which of the parties has the greater and more immediate interest in the estate; and
- (3) In cases where no one applies for letters of administration, the Administrator General or a creditor of the deceased may be granted letters of administration.

**Table 4.3 Order of succession according to the Intestate Succession Act**

| Order of succession  | Variants  |
|--|---|
| <p>1: (Sec 5(1)):<br/> <i>Surviving spouse</i> receives 20 percent; where there is more than one widow, this is distributed in proportion to the duration of their respective marriages to the deceased and the widow's contribution to the deceased's property; <i>natural children</i><sup>196</sup> receive 50 percent in proportion to age and educational needs or both; <i>parents of the deceased</i> receive 20 percent; <i>dependants</i><sup>197</sup> receive 10 percent in equal shares.</p> | <p>Section 7(a): If there are no parents, the proportion of the estate, which the parents would have inherited is divided equally between the surviving spouse and children on the one hand and the dependants on the other.</p>  |
| <p>2: (Section 6(a)):<br/>           If there is <i>no spouse</i>:<br/>           the spouse's portion goes to the children in proportion to age or educational needs or both.</p>   | <p>Section 7(b): If there are no children, the children's share of the estate is divided between the surviving spouse, the parents of the deceased and the dependants in the following proportions;<br/>           * 20 percent to the widow<br/>           * 20 percent to the parents<br/>           * 10 percent to the dependants</p> |
| <p>3: (Section 6(b)):<br/>           If there is <i>no spouse or children</i>, the aggregate portion that would have been inherited by the spouse and children goes to the parents of the deceased in equal shares.</p>  | <p>Section 7(c): If there is a <i>spouse, children, parents but no dependants</i>, the dependant's portion is inherited by the parents in equal shares.</p>   |
| <p>4: (Section 6(c)):<br/>           If there is <i>no spouse, children or parents</i>, the estate is divided among the dependants in equal shares.</p>  | <p>Section 7(d): If there is a <i>spouse and dependants but no children or parents</i>, the children's and parent's share of the estate goes to:<br/>           * The surviving spouse (20 percent)<br/>           * The dependants (10 percent)</p>  |
| <p>5: (Section 6(d)):<br/>           If there is <i>no spouse, children, parents, or dependants</i>, the estate is divided among the near relatives in equal shares.</p>   | <p>Section 7(e): If there is a <i>spouse and children but no parents or dependants</i>, the parents and dependants portion is distributed equally between the surviving spouse and children.</p>  |
| <p>6: (Art. 1014):<br/>           If there is <i>no spouse, children, parents, dependants or near relatives</i>, the estate devolves upon the State.</p>   | <p>Section 7(f): If there is a <i>spouse but no children, parents or dependants</i>, the children's, parents and dependants portion is distributed equally between the surviving spouse and near relatives.</p>   |

<sup>196</sup> "Child" means a child born in or out of marriage, an adopted child, or one conceived but not yet born.

<sup>197</sup> "Dependant" in relation to a deceased person means a person who was maintained by that deceased person immediately prior to his death and who was-

- (a) a person living with that deceased person; or
- (b) a minor whose education was being provided for by that deceased person; and who is incapable, either wholly or in part, of maintaining himself.

Apart from the stipulations in the table above, the Act makes further provisions for dealing with the matrimonial home and chattels of the deceased.<sup>198</sup> Generally, where land or a house is held under a state lease, the surviving spouse can stay in the matrimonial home until remarriage or death. S/he therefore does not inherit the land or house, and cannot transfer, will or sell the property, as s/he only holds a limited interest. Where there is more than one surviving spouse or child or both they shall hold the house as tenants in common.<sup>199</sup> While the Act does not apply to land under customary tenure or property that belongs to a chieftainship as well as family property, it acknowledges polygamous customary marriages with this provision.

The Act does not specifically guarantee women's rights to property and certain sections of the Act actually operate to disinherit women. For example, Section 9 deals with the house of the deceased as part of his estate, without taking into account that this house might have been a matrimonial home to which the wife contributed. The home is seen as the deceased husband's estate because it was registered in his name. The widow only gets a life interest, which she has to share in the case of her husband having more wives. In contrast, a male surviving spouse could remain in the house, even if he remarries.

The HIV/AIDS pandemic has further deteriorated the situation for women: in practice, widows suffering from HIV/AIDS are told they should leave the land, since they will die soon anyway. When women try to have land registered in their own name, they face a lot of pressure from the community and the family not to do so.<sup>200</sup>

In deciding upon who will be the administrator of the property, families usually sit together after a funeral in a meeting commonly referred to in Bemba as "*Isambo lya mfwa*", which literally translated means "a discussion of the death". This meeting discusses all the events leading up to the death of the deceased and what should happen to the family left behind. It is in this meeting that a decision is made on who should be appointed as administrator of the estate. Since there is an option for the appointment of more than one person as administrator, the law would be more useful at this point if it stipulated that the surviving spouse should in all cases be appointed as administrator of first resort with the option of joint administratorship with another family member should the family so wish. This would protect many poor widows who tend to get left out, especially where there are high-value assets to be administered. The formal appointment

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<sup>198</sup> Where the intestate in the case of a monogamous marriage is survived by a spouse or child or both, the spouse or child or both of them, as the case may be, shall be entitled equally and absolutely to the personal chattels of the intestate; where the estate includes a house the surviving spouse or child or both, shall be entitled to that house; provided that where there is more than one surviving spouse or child or both they shall hold the house as tenants in common; and the surviving spouse shall have a life interest in that house which shall determine upon that spouse's remarriage; where the estate includes more than one house the surviving spouse or child or both shall determine which of the houses shall devolve upon them and the remainder shall form part of the estate; where the intestate is survived by more than one widow or a child from any of them, then, each widow or her child or both of them shall be entitled absolutely to the homestead property of the intestate; and in equal shares to the common property of the intestate.

<sup>199</sup> Section 9 of the Intestate Succession Act, Chapter 59.

<sup>200</sup> Op. cit., 158.

of an administrator is effected by a court order after the family has reached agreement. In most cases the court justices will require the presence of the widow to testify agreement to the appointment of the administrator. Where this is not forthcoming the court can advise the family to go back until they have resolved the issue satisfactorily.<sup>201</sup>

#### *The Wills and Administration of Testate Estates Act (Chapter 60, Volume 5)*

Like the Intestate Succession Act, this Act does not apply to land held under customary law. This Act allows any adult of sound mind to decide what will happen to their property after their death by writing a will. The power of the testator is not absolute under the Act as courts can vary the contents of a will if it is felt that these are unreasonable in their failure to make provision for a legitimate dependant.<sup>202</sup> A dependant is defined as the “wife, husband, child or parent” of the deceased, while a “child” includes a child born out of wedlock, adopted or unborn. “Marriage” includes polygamous unions.<sup>203</sup> Section 65 prohibits the “intermeddling” of property with those entitled to the property as determined by the courts or by a will. An unauthorised person who deprives an entitled person of his/her property or any part of it has committed an offence and is liable to a fine or imprisonment. This clause could be used against the common practice of property grabbing by in-laws, although it only applies to land other than customary land.

#### *The Administrator General’s Act (Chapter 58, Volume 5)*

This Act provides for the establishment of the office of the Administrator General (AG) who is empowered to administer an estate in the absence of an executor or administrator.<sup>204</sup> In addition the AG can appoint district secretaries or town clerks to act as agents of the AG and to perform duties in relation to a deceased’s estate.<sup>205</sup> The AG has no mandate to act where the concerned family appoints an administrator.

### **4.3 Legislation related to marital property rights**

Under the English Law (Extent of Application) Act, the current English laws on divorce and property adjustment apply to Zambia. The relevant statutes include the Married Women’s Property Act of 1882, the Matrimonial Proceedings and Property Act of 1970 and the Matrimonial Causes Acts of 1969 and 1973.<sup>206</sup> These all refer to “Christian” or monogamous marriages. However, while these laws have been further amended in England, such amendments have not taken place in Zambia. The Matrimonial Causes Act of 1973, for example, is outdated and the Ministry of Justice appointed a committee of experts under the Law Development Commission in 2004 in order to revise this Act. In the meantime Zambian courts have been persuaded by English judgements based on the

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<sup>201</sup> Mwansa. Interview with the author, March 15 2005.

<sup>202</sup> In *Re Estate of Mwananshiku*, the testator excluded his second wife after orally telling her that she was no longer his wife during an argument. She contested the will and the court ruled in her favour ordering that she be given something from the estate.

<sup>203</sup> Wills and Administration of Testates Act, No. 6 of 1989, Section 3.

<sup>204</sup> Administrator-Generals Act, Cap 58 of the Laws of Zambia.

<sup>205</sup> Section 4.

<sup>206</sup> Law Association of Zambia. (2001). *Making the Law Work: A Collection of Court Judgements*. National Legal Aid Clinic for Women.

English amended Matrimonial Causes Act. It is not yet clear whether this revision will bring about a unified system of marriage laws.

The Marriage Act (cap. 50) does not contain provisions related to marital property regimes such as in or out of community of property. The Matrimonial Proceedings and Property Act of 1970, which applies to persons married under the Marriage Act, defines family assets as those things acquired by either or both parties with the intention that they should be continuing provision for them and their children during their joint lives and used for the benefit of the family as a whole. Under this definition, family assets therefore include capital items such as the matrimonial home, the furniture in it and other revenue producing assets, which may be owned by the family. The current position of the courts is that capital assets have to be divided between the parties while revenue-producing assets have to be allocated to both parties. In a case where the wife has looked after the home and family for many years, the court can conclude that the matrimonial home was acquired and maintained by the joint effort of both husband and wife<sup>207</sup>. Thus, property belonging to either party and acquired during the marriage is treated as joint property, which is how women married under the Marriage Act may be awarded property in their husband's names.

As many men wish to keep their property separate, few choose to contract marriage under the Act. Property acquired prior to the marriage or inherited may not be treated as joint property, although this is subject to an order of the court under the Matrimonial Causes Act. This Act, also solely applicable to persons married under the Marriage Act, contains provisions on maintenance and property adjustments upon marriage dissolution. Section 25 provides that the court in adjustment orders shall have regard to all circumstances, including the standard of living enjoyed by the family before dissolution, age of parties and duration of marriage, as well as contributions made by parties to welfare of the family, including any contribution made by looking after the home or caring for the family. On the basis of this section the courts have attempted to use a 50-50 rule, where the property is shared as equally as possible. In practice, the courts' discretion in such matters has meant different interpretations of what 50 percent constitutes.<sup>208</sup>

The committee of experts that is to revise the Matrimonial Causes Act will also look into the question of whether the law should explicitly provide for community of property.<sup>209</sup>

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<sup>207</sup> A case that illustrates this is *Richard J.C. Musonda v Florence C. Musonda* in which the husband sued for divorce, which was duly granted. The family had extensive matrimonial property, which became the subject of a Supreme Court appeal filed by the wife. The court granted the appeal and held that all family assets that were bought during the subsistence of the marriage (i.e., furniture and other household items) by either of the parties be shared equally; that a set of chicken runs on the farm where the matrimonial home was located be allocated to the husband and three-eighths of the value of the home be allocated to the wife

<sup>208</sup> *Op. cit.*, 195.

<sup>209</sup> Universal joint tenure means that all property brought into or acquired in marriage in any manner is jointly held. Presumed joint tenure means that there is a presumption that a married couple holds the property acquired during marriage jointly, but either spouse can prove that certain property is individually held (usually property that is inherited or gifted to one of the spouses only).

Of the women married under the Marriage Act, few take matrimonial property cases to court. The Matrimonial Causes Act, however, leaves a lot of issues to the discretion of the judges. The judges tend to accept the arguments brought forward against women's attempts to obtain matrimonial property. In most of the cases, where women did go to court, they were unsuccessful because the judges:

- Deemed the value of the contribution of women to be insignificant;
- Considered significance in terms of cash, not in terms of indirect contributions such as home making, rearing of children or childcare;
- Ruled that customary law did not give rights to women to own homes;
- Ruled that the wife had misbehaved and did not deserve any share of the property or home;
- Considered that the wife was still young and could still get married again and earn a living; and
- Considered that the marriage had not subsisted long enough for the wife to be given anything. In one case, nine years was seen as not long enough.

In summary, a lot of the judges in these cases completely ignored the women's contribution to the matrimonial property. In various court cases, it even appeared that people had to keep receipts of what they had bought, which is highly impractical.

Lack of money, lack of knowledge, lack of legal literacy, and pressure from families and the church all act against women to take their cases any further. Even those women that resist all that pressure have to face the long and tedious legal systems – most women are not willing or able to pursue the cases through the courts. The prevailing societal attitude is that there must be something wrong with a woman who pursues her case through court; she is ostracised. Many women therefore prefer to drop such cases.<sup>210</sup>

#### **4.4 Customary law**

Customary law is mainly tribal in origin and covers many different systems. The majority of Zambians, including those living in urban areas, still conduct many family-related activities in accordance with customary law. However, this should not be understood to mean that there is a common set of rules that apply in all the regions of the country. Even within the different tribal areas there are local variations, but by and large the broad principles remain similar throughout the country.<sup>211</sup>

Under customary law, women's assigned roles in society have largely contributed to a negative perception of their position and influence on family matters.<sup>212</sup> At almost every stage in their lives they are under the guardianship of a male person – be it their fathers,

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<sup>210</sup> Op. cit., 158.

<sup>211</sup> Ndulo, M. (1987). *Mining Rights in Zambia*. Kenneth Kaunda Foundation, Lusaka.

<sup>212</sup> Chuulu, M. B. (2001). *Traditions, Culture and Customary Law Relating to Rights of Women and Children*. Paper presented at Sensitization Workshop on Gender-Based Violence. Mulungushi International Conference Centre, Lusaka. December 6-7 2001.

brothers, uncles, husbands or sons.<sup>213</sup> Under custom women are discriminated against in terms of accessing land, as land rights are normally given to the head of the family, who is always a man. Customary law does not recognise women as heads of households.

#### *Inheritance practices in different ethnic groups*

Inheritance under customary law depends upon the particular tribal group. The 73 different ethnic groups in Zambia can be classified into matrilineal and matrilocal groups; matrilineal and patrilocal groups; patrilineal and patrilocal groups and bilateral groups.<sup>214</sup>

#### ***The matrilineal and matrilocal groups***

This system is generally found among the Bemba of Northern Province, where the man moves to his wife's home. This system developed from a Bemba practice that required a man to work for his in-laws as a form of bride price and to prove that he was capable of looking after their daughter. Under this system, the man acquired rights over land in his wife's village by way of a grant from the in-laws and on dissolution of the marriage the man forfeited his rights. His rights were derived from the wife and depended on the subsistence of the marriage. With regard to succession, descent among the Bemba is traced through the mother's line and ordinarily it is the brothers, sisters, nephews and nieces who are entitled to a share in the deceased's estate.

#### ***The matrilineal and patrilocal groups***

In this system, which is generally found among the Tonga of Southern Province, bride price was generally paid in the form of cattle, with the woman moving to the husband's village. Any fields belonging to the husband in the village, which may have been acquired upon marriage or prior to it, belong to the man. The woman has only a right of cultivation. On cessation or dissolution of the marriage, the wife forfeits her right of cultivation. In the event of divorce she is only entitled to a half share of the crops. With regard to succession, the Tonga practice levirate succession and priority is given to the brothers and nephews of the deceased. The successor assumes responsibility for the children of the deceased and the widow becomes his wife.<sup>215</sup>

#### ***Patrilineal and patrilocal group***

The Ngoni of Eastern Province provide the best example of this system of tribal inheritance practice. Under Ngoni customary law, inheritance is on the basis of primogeniture.<sup>216</sup> This principle reflects the potentially polygamous nature of customary

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<sup>213</sup> Kabazo, C. (2004). Why customary law should be gender-friendly. by Kachingwe, K. *Times of Zambia*. June 10, page 6.

<sup>214</sup> Op. cit., 183. The matrilineal and matrilocal groups trace descent through the female line. The residence pattern practiced requires the newly married couple to move in or near the bride's mother's house (uxorilocal marriage). The matrilineal and patrilocal groups also trace descent through the female line. The residence pattern practiced requires the newly married couple to move in with or near the husband's father's house (virilocal marriage). The patrilineal and patrilocal groups trace descent through the male line. The residence pattern practiced is the same as in the previous category. The bilateral group traces descent through both male and female lines and residence can be with either kin line.

<sup>215</sup> Op. cit., 183.

<sup>216</sup> Mvunga, M.P. (1980). *Land Law and Policy in Zambia*. University of Zambia Institute for African Studies, Lusaka. Inheritance by the eldest son of the senior house. Seniority of a house is determined by the

marriage and the patrilineal nature of Ngoni society.<sup>217</sup> Under Ngoni custom the choice of an heir rests with the family elders and almost automatically this will be the eldest sane adult male child.<sup>218</sup>

### ***Bilateral group***

This system is found among the Lozi of western Zambia. Inheritors under Lozi customary law are children of the deceased, both male and female, who get equal shares of the property. Where there are no children, the brothers of the deceased inherit equally. The widow does not have the right of inheritance in as far as her husband's land is concerned. Her entitlements are her clothing, cooking utensils and a share of the crops.

## **4.5 Administration of estates (inheritance procedures)**

The requirement to appoint an administrator is the first step in the process of distributing a deceased's estate. Under the Intestate Succession Act the family must appoint an administrator who is authorised only to distribute the estate in accordance with the rules laid down by the Act. Land held under customary tenure, chieftainship and family property<sup>219</sup> is excluded as it has to be dealt with under customary law.

In practice, most ethnic groups hold a family council to appoint an administrator following the burial of the deceased. In some cases this can happen on the same day or the day after the burial. This council is usually composed of all family members on both sides who were present at the funeral. The appointment of the administrator in the family council is followed by endorsement through the issuing of a court order. The court usually insists on seeing the widow and asking her categorically if she approves the appointment.<sup>220</sup> Once this is done the administrator's duties are to pay the debts and

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sequence in time in which different wives get married to the same husband. Thus the first wife married to a man creates the senior house and the following wives create junior houses in their order according to the respective dates of marriage. It is the eldest son of the senior house, and not the eldest son of a father, who inherits the father's estate.

<sup>217</sup> Ibid. In this context, primogeniture means inheritance of a man's estate by his eldest son, where all his children are born of one and the same wife; inheritance by the eldest son of the senior house, where children are born of various wives in a polygamous marriage; and inheritance by the eldest male person who by virtue of belonging to a class of paternal relatives can be described as the deceased's nearest blood relative.

<sup>218</sup> Ibid. Mvunga cites a number of cases which illustrate this principle among the Ngoni:

In *Re estate of Mekelani Mphanza* (Mpezeni Local Court, 'B' Grade Case No. 50 of 1975, unreported) the first son of the deceased who was survived by a widow and nine children was appointed administrator.

In *Re estate Penya Daka* the only surviving son of the deceased was appointed administrator.

In *Re estate of Jeffrey Msoni* (Nzamane Old Local Court, 'B' Grade, Case No. 41 of 1973, unreported), a younger son was chosen over an elder daughter.

All these cases illustrate the preference for male issue even over a senior surviving daughter and indicate that in many cases the traditional bias against females is very deeply rooted and thus contributes to the negative way in which women in general are treated but even more so the widows.

<sup>219</sup> Family property may be property that is inherited from an ancestor or acquired jointly by members of the same family. See the case of *Henry Mpanjilwa Siwale and 6 others V Ntapalila Siwale*.

<sup>220</sup> Op. cit., 183. This does not guarantee the widow's approval, however. The WLSA research (pg. 218) quotes a case where the family meeting appointed an administrator without the widow being present. When she was taken to court and asked if she approved she said yes, but when interviewed later she said: "I am

funeral expenses and estate duty if payable and to effect distribution of the estate in accordance with the rights of the persons interested in the estate under the Act.<sup>221</sup>

According to the Act, the role of the administrator should end with the distribution of the estate. However, this role is frequently misunderstood because it is confused with the customary concept of a successor.<sup>222</sup> Under customary law the successor takes up the role of a husband/wife whereas under statutory law the meaning of administrator is entirely different.<sup>223</sup>

Under the Wills and Administration of Testate Estates Act the execution of the estate takes place only when the court has granted probate (an order authorising the execution of the will). Probate can only be granted after the will has been proved to be valid. After this the person named as executor has authority to deal with the estate. Where an executor is not named the court will appoint one. His/her responsibility is to pay all debts, taxes and funeral expenses, and distribute the balance of the estate in accordance with the will.

Local Courts hear cases related to the rights of people married under customary law in respect of property, inheritance, marriage and divorce. Although statutory law is supposed to take precedence, judgements rarely reflect this and often discriminate against women, especially in inheritance rights cases. Local Courts often do not apply the percentages mandated by the Intestate Succession Act in distributing estates, leaving women with nothing.<sup>224</sup>

## 5 Poverty Reduction Strategy Paper (PRSP)

The Zambian PRSP gives a fairly comprehensive picture of the historical roots of poverty in Zambia, reviews the status quo and provides a good idea of where the government's priorities lie in terms of poverty alleviation. Urban land, rural land and gender emerge as clear priorities for poverty alleviation.

The PRSP states that many people will continue to depend upon the informal sector for their livelihoods and measures should be put in place to help them achieve this. These should include the facilitation of credit schemes, marketing and technological information, and the provision of infrastructure such as industrial estates. Access to

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not happy with that man being appointed as administrator because it means he will be in charge of everything. I said 'yes' because I was confused by the proceedings and didn't know what was going on. I have never been in court before. I don't know. I was somehow scared."

<sup>221</sup>Ibid.

<sup>222</sup>Op. cit., 216. According to Mvunga, the problem lies in the interplay between customary and statutory law at the appointment or selection process. Under customary law the person selected is literally understood to be the heir while the court designates them the role of an administrator.

<sup>223</sup>The WLSA interviewed an administrator who is quoted as saying about the widow "She refuses to sleep with me. She is a difficult woman." The confusion here was caused by the fact that the customary concept of successor meant that he was inheriting the widow as well as the property of the deceased.

<sup>224</sup>Human Rights Watch. (2002). *Suffering in Silence, The Links Between Human Rights Abuses and HIV Transmission to Girls in Zambia*, p. 59.

physical assets that improve the productivity of land are a prerequisite to the involvement of the poor in income-generating activities, and the PRSP recognises the dominance of agriculture as a livelihood activity for the poor. In this respect their access to secure land is recognised as a critical priority.

The PRSP states that unavailability of urban land as an asset for the poor reduces their ability to access capital for income-generating activities. According to the paper, this arises from the fact that many informal areas are illegal, and the inhabitants do not have titles to their dwellings.

The framework that guides agricultural policy is liberalisation, and in concert with this, the government has been “streamlining the land tenure system to make it receptive to the policy of liberalisation”<sup>225</sup> (p. 54). Efforts geared towards achieving this have revolved around granting leasehold tenure.

In terms of gender, the PRSP sets an appropriate background by highlighting that poverty affects women acutely, acknowledging the very small share of women in formal employment and their higher vulnerability to contracting HIV/AIDS. Gendered aspects of land reform are also given explicit attention. It is noted that women have limited access to, and control of, productive resources, which makes them more vulnerable to poverty. To remedy this, the PRSP repeats the commitment in the National Gender Policy to “reserve 30 percent of all allocations of land for women applicants” (p. 53).

Urban land receives scant attention in the PRSP. The urban poor are mentioned only by way of passing reference and, significantly, this deals with their inability to raise funds for business purposes because of lack of title. The solutions advocated therefore are oriented towards financing income generation/businesses, for instance the creation of credit markets and microfinance.

Rural land issues dominate the PRSP, and it provides a useful indicator of the general attitude on land policy. The policy hinges on liberalisation and attracting the private investor. By creating an enabling legal and policy environment through formal titling to land, ensuring predictability in commercial transactions and guaranteeing property rights, it is envisaged that investors will be lured into large-scale commercial farming. Gendered land issues are sufficiently recognised and addressed, including related aspects of inheritance laws, except that the affirmative action relates to undeveloped land, which for many poor women still presents difficulties as they often cannot raise the finance to develop the land within the stipulated time frame. Crucial to gendered poverty alleviation, however, is implementation, and in the context of pronouncements that are very private-sector oriented, this will remain a challenge.

A significant omission is the issue of shelter, which is not dealt with in its own right. Considering that current estimates put overall poverty at 80 percent of the population, the

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<sup>225</sup> Republic of Zambia. (2002). *Poverty Reduction Strategy Paper*. [http://poverty.worldbank.org/files/240\\_Zambia\\_PRSP.pdf](http://poverty.worldbank.org/files/240_Zambia_PRSP.pdf)

question of shelter is crucial for the poorest sector of the population. Deliberate strategies aimed at improving shelter access to the poor or the quality of shelter should have been included in the paper.

## 6 Land Management Systems

### 6.1 Introduction

Zambia employs a system of deeds registration that has been influenced by South African cadastral surveying practices. All transfers affecting private and state land must be registered in the Lands and Deeds Registry and cadastral surveys are undertaken in the 6-10 percent of land under the direct control of the state.<sup>226</sup> Cadastral surveys on traditional land are undertaken when an applicant applies to convert the land to leasehold tenure.

Every document relating to land presented for registration must describe the land by reference to a diagram or sufficiently detailed plan that has been approved by the Surveyor General. Section 25(1) of the Land Survey Act is framed in such a way that it “ousts the jurisdiction of the court”<sup>227</sup> in that the beacons defining any parcel of land once lawfully established cannot be brought into question by any court of law. The courts cannot inquire into the legitimacy of the placing of the beacons once the Surveyor General has approved a diagram resulting from such survey. This fixed boundary system has been largely responsible for the absence of litigation relating to boundary disputes.

The Land Survey Act does provide for the settling of boundary disputes and the issuing and signing of boundary agreements. However, these provisions are rarely invoked as boundary disputes are quite rare, which may be interpreted as a sign of how well the system operates. Unfortunately, the strict application of the cadastral survey system has been at the expense of the overall mapping of the country.<sup>228</sup>

Fourteen-year leases are issued where it is not possible to obtain an approved diagram in the immediate term, and act as an intermediate form of title. The requirement to examine every survey before approval of the diagrams gives rise to a lengthy process, which is equivalent to the survey and data compilation itself and can take up to two years.

The status of cadastral surveying in Zambia has been in need of revision for some time. However, attempts to do this have failed to achieve any perceived benefits. The requirements for licensing of land surveyors have been a particular weakness of the system, resulting in a shortage of licensed surveyors.

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<sup>226</sup> Dale, P.F. (1976). *Cadastral Surveys within the Commonwealth*. HMSO, London.

<sup>227</sup> Op. cit., 165.

<sup>228</sup> Op. cit., 226.

Figure 6.1 Organogram of Ministry of Lands

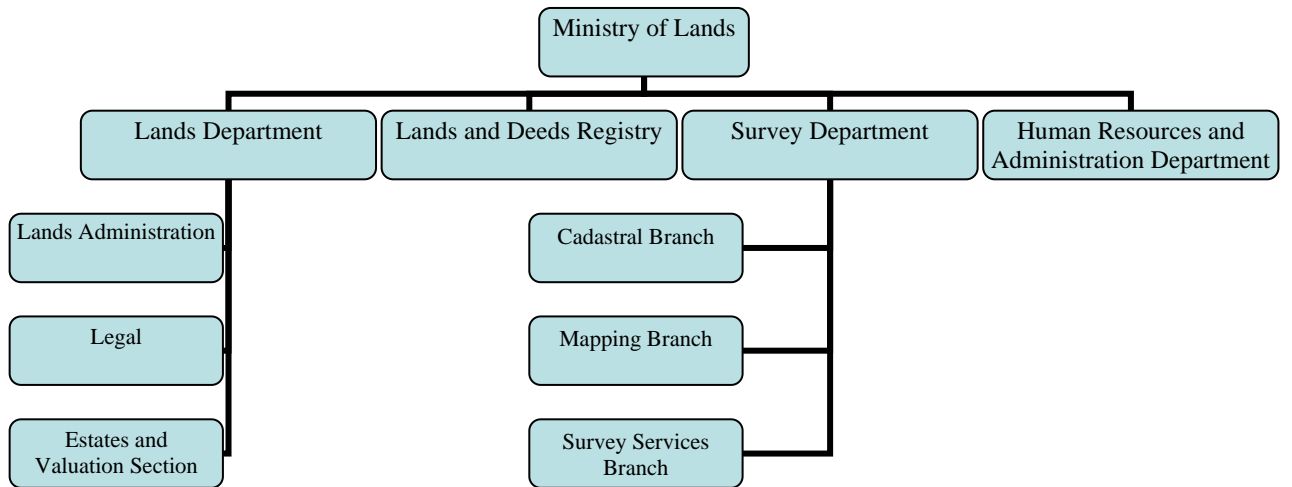
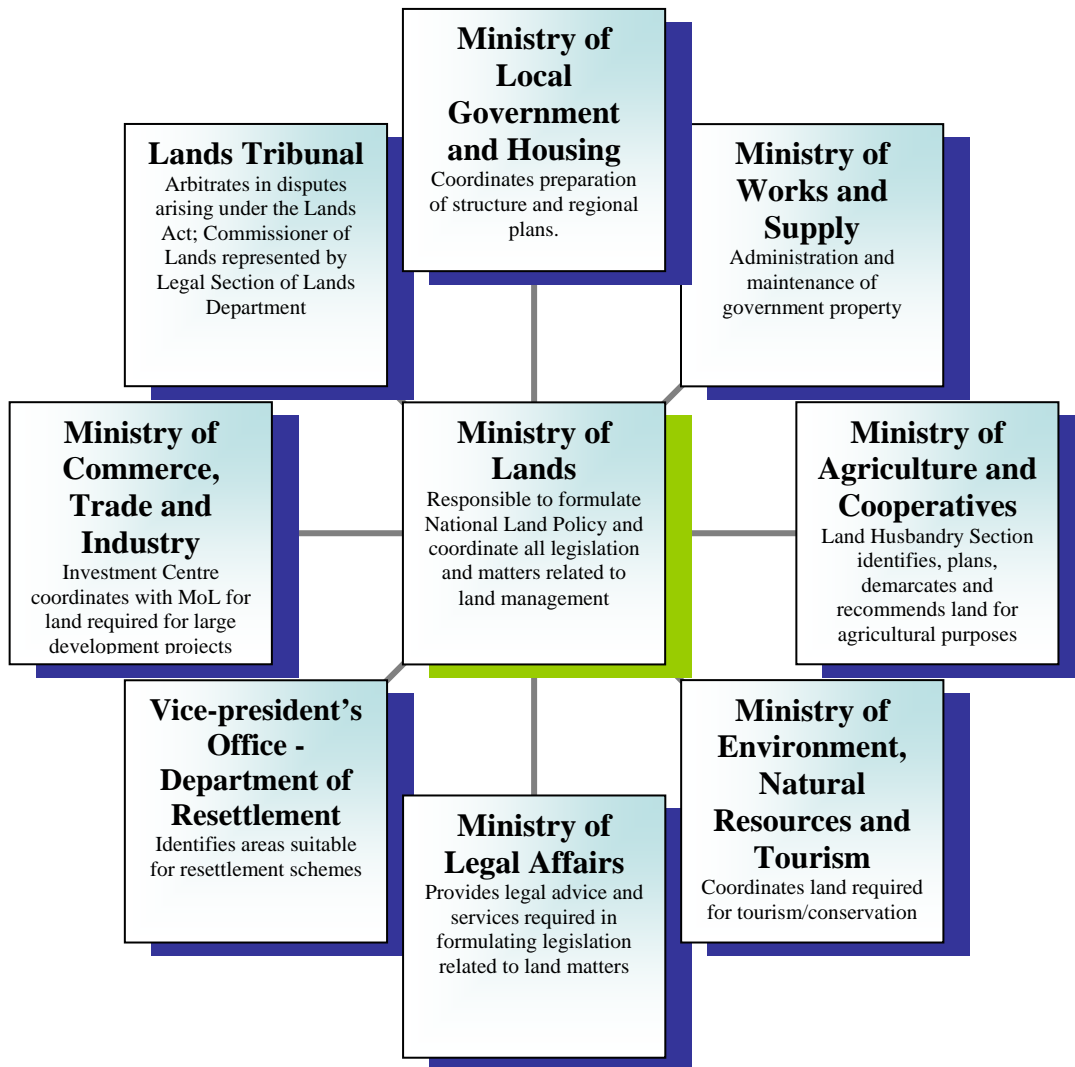


Figure 6.2 Institutional framework for land management in Zambia



Institutions dealing with land still lack coordination. Procedures governing land are still fragmented in various policy and legal frameworks that are dualistic in nature (customary and statutory), administered by various ministries, some with unclear roles on land. This causes lack of coordination among the sectors dealing with land and breeds inefficiency in land administration.

The absence of a national land audit, indicating to what extent customary land has been privatised and what percentage of customary land has been converted into state land (for example for the use of parastatals), also blocks a clear overview for those dealing with land.

## 6.2 Informal settlements and the formal system

In the early 1970s the Zambian government embarked on a squatter upgrading programme. The World Bank provided funding while the government put in place the legal framework under the HSIA.

This legal framework applies to areas that were formerly classified as illegal as well as existing formal townships where the cost of individual surveys would be too expensive for the owners. Under this system, former squatter areas can be declared as improvement areas while conventional housing and site and service areas can be declared as statutory housing areas.

In the case of improvement areas, the change process requires that the area be rezoned under the terms of the Town and Country Planning Act, Cap. 283 of the Laws of Zambia. In such a case, the local authority concerned prepares a layout plan that shows the extent of the area being rezoned as an “Improvement Area”. This is submitted to the Surveyor General for approval. Once approved, it is declared an improvement area and the council is granted a head lease or block title for the whole area. This has the effect of changing the legal status of the area so that it is officially recognised and can have services and infrastructure extended to it. This provides the means by which secure tenure can be conferred upon residents of poorer peri-urban areas. The requirements of the Land Survey and Lands and Deeds Registry Acts do not apply to Statutory and Improvement Areas. However, this is simply an intermediate stage since individual plot holders must build a permanent structure with the approval of the planning authority before they can apply for the issue of a council certificate of title.

“Improvement Area” status enables local authorities to facilitate the process of upgrading so that roads, water and other infrastructure can be incorporated in the planning for the area. Once this requirement is complied with, residents are issued with 30-year occupancy licences while the area goes through the process of upgrading. These are later replaced by council certificates of title, which carry the same effect as if the landowner were obtaining a direct lease of the land from the state.

Under the HSIA, the Kitwe city council had issued 10,348 council certificates of title for statutory housing areas as of June 2002. The Kitwe city council and the Zambia National Building Society (ZNBS) indicated that financial institutions accept these documents as security for mortgages although the number of mortgages created since the sale of council houses began in 1996 has been quite low.<sup>229</sup> This may be due to the fact that many residents who have lost jobs due to the privatisation of the mines and other industry are unable to afford finance. To qualify for mortgage assistance from the ZNBS an applicant must be in formal employment and should be an account holder with the building society for at least six months.

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<sup>229</sup> Manager, ZNBS. Interview with the author, 2002.

In Lusaka, the city council in conjunction with the Swedish International Development Assistance (SIDA) embarked on a land tenure initiative in December 2000.<sup>230</sup> A pilot study has been conducted in Chaisa, an informal settlement six kilometres to the north of the main city centre. The project consisted of three components: communication and participation aimed at involving the community and making them aware of the importance of secure tenure; surveying and mapping to establish a geographic database of property owners and boundaries; and computerisation of the Lusaka City Council Deeds Registry and records system. The project went on to carry out a systematic adjudication of the whole area and residents have now been issued with occupancy licenses. At the close of the project in October 2003, about 1,040 occupancy licences had been issued, which represents 40 percent of the occupancy rights holders. Out of these only two cases were of joint ownership while it was found that 380 women (14 percent) held occupancy rights to houses.

The successful implementation of this pilot project indicates that it is possible to achieve good results if the modalities for issuing occupancy licences are put in place and the staff is trained adequately in how to handle the procedures. The development of training manuals from this pilot should be a logical next step so that the process can be replicated in other informal settlements around Lusaka and the rest of the country.

#### *Land allocation procedures*

Before urban land is allocated it must, in theory, be surveyed and serviced. However, due to various constraints, it is not possible for these conditions to be met at all times. Two routes are followed depending on the type of land that is being allocated. For land that is already numbered and surveyed, the applications received by a local authority go on a file created specifically for that plot in the district council registry. For unsurveyed plots, all applications received go on a general file.

Members of the public applying for plots are generally required to fill in a form listing all relevant personal details. They are also expected to attach supporting documents, such as bank statements, as proof of ability to develop the plot applied for. The required forms are Annexure A for all types of land and Annexure C for agricultural land.

In the past, councils interviewed applicants, but this procedure has been discontinued because it proved too time consuming. Once application forms are received, a public works committee initially processes them before they are sent to the full council meeting. The full council then approves the applications as recommended by the public works committee. Three applicants are usually recommended for each plot available and these names are then forwarded to the Commissioner of Lands with a copy of the relevant extract of council minutes. The affirmative policy for women applicants is applied by giving priority to their applications. Before an approved applicant can commence building activity, they must have a letter of offer from the Commissioner of Lands. Once

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<sup>230</sup> Lusaka City Council/Swedeseurvey Land Tenure Initiative, (2003). *Urban Land Management programme*, Final Report, October 2003.

this is obtained, the applicant has six months within which to put up a slab on their plot and 18 months in which to complete the building.

These requirements favour those with financial ability and hence cut out the poor and unemployed from contesting for these plots. There needs to be parallel provision with simplified requirements to cater specifically for the needs of poorer applicants. The absence of such a mechanism is one of the possible causes of the many land invasions that give rise to the informal areas surrounding many of Zambia's major towns.<sup>231</sup>

#### *State land*

For applications on state land, the Commissioner of Lands normally prepares a letter of offer after the recommendation of at least three applicants from the relevant local authority. In respect of allocations on state land, councils only act as agents of the central government. The length of lease on state land is 99 years.

#### *Customary land*

Land allocation procedures on customary land have been dealt with in the Customary Law section.

#### *Statutory housing areas*

Under provisions of the HSIA, councils are given a head lease from the Commissioner of Lands and they in turn have the right to allocate plots to applicants by giving a 100-year lease. Only one plot can be allocated to any one individual in a statutory housing area so as to avoid the danger of down-raiding, in which more affluent members of society get two or more adjoining plots and consolidate them to make one large plot, thus depriving the poor of access to land.

#### *Problems and constraints*

The problems and constraints faced by councils in land alienation include insufficient serviced land, double allocation due to poor recordkeeping and abuse of the system by council officials who obtain land only to resell it.<sup>232</sup> The servicing of new residential developments on virgin land is particularly problematic. A service charge is levied on all newly acquired plots before the owners can begin to develop the land. This charge is supposed to be equivalent to the cost incurred by the council in providing roads, drainage, street lighting, water and sanitation services. In theory, the services should be delivered before any building takes place. However, what happens in practice is that councils allocate plots and once owners have paid the service charge and any other levies due to

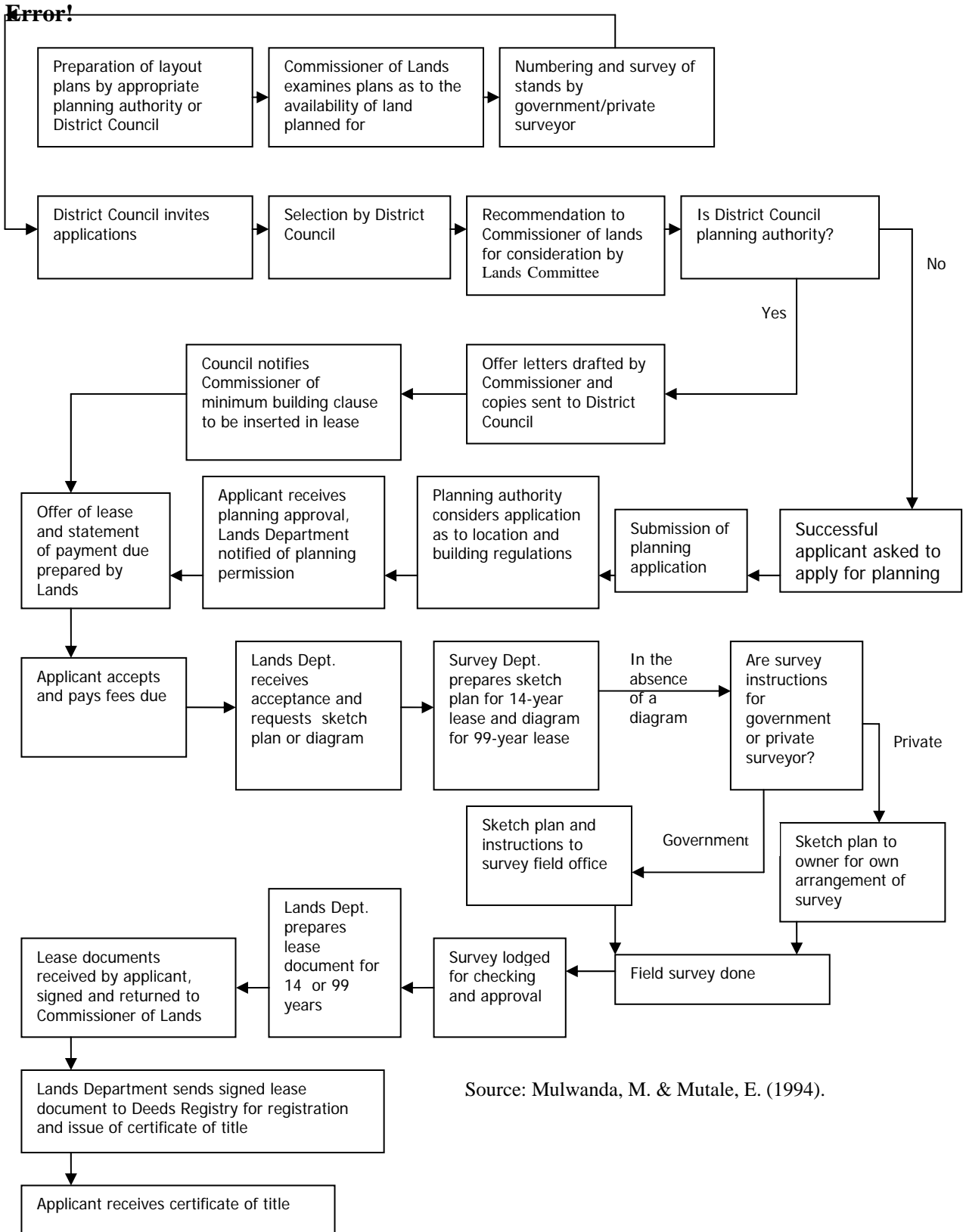
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<sup>231</sup> An administrative circular was issued in 1985 setting out the general policy guidelines regarding the procedure to be followed by all councils in the administration and allocation of land. It sets out guidelines on preparation of layout plans, allocation of urban and agricultural land, land in customary areas and allocation of land to non-Zambians. The circular has not been updated since it was issued.

<sup>232</sup> Mundia, I. (2004). *Current Land Alienation Procedures at Kitwe City Council*. Presentation by Director of Legal Services, Kitwe City Council. Also the *Times of Zambia* of June 14 2004 reported that two councillors from the Lusaka City Council had been arrested in connection with the illegal allocation of plots near a railway line in Lusaka.

the council, they are allowed to begin building. Quite frequently the services follow at a later stage and in most cases not all the services enumerated above are actually provided. Where they are provided, they are frequently at a lower standard than expected. More research in the collection and management of service charges is necessary to understand how councils use these funds nationwide.

**Figure 6.3 Land allocation procedures**



Source: Mulwanda, M. & Mutale, E. (1994).

### 6.3 Dispute settlement mechanisms

The 1995 Lands Act established a Lands Tribunal as a cheap and efficient means of settling land disputes. The tribunal has jurisdiction to inquire into, adjudicate upon and make any awards and decisions in any dispute relating to land under the Act.

With regard to appearances before the tribunal the Act states that “a person appearing as a party before the Tribunal may appear in person or through a legal practitioner at his own expense”.<sup>233</sup>

On the face of it, the provision that people can represent themselves is a progressive step. However, the forms and procedures required for appearance before the tribunal are so technical that they defeat the purpose of this provision. Section 23(5) intends that a petitioner can come to the tribunal and give oral or hearsay evidence. Again this is an attempt to minimise the technical requirements that apply to giving evidence before the tribunal. But in practice this provision also appears not to have succeeded.<sup>234</sup>

But even more fundamentally, the idea of a tribunal as a middle-course justice system has been destroyed by the Act itself. As pointed out, the idea was to have a cheap, simple and efficient mechanism for the resolution of disputes. But in practice, the tribunal is too technical to allow easy participation by laypersons. Consequently, many people that have disputes feel too intimidated to appear before the tribunal.<sup>235</sup>

The tribunal operates from Lusaka, which imposes a burden upon all to bring their cases to the capital. To assist the less privileged, it is important to understand how conflict resolution works at the local level and then codify these structures into local land tribunals and allow them to operate on behalf of the poorer members of society. This will ensure that methods of conflict resolution are available that meet the needs of the poor and are flexible, easy to understand and use at minimal cost.<sup>236</sup> Appeals against decisions of the Lands Tribunal go to the Supreme Court where parties need legal representation.

### 6.4 Relevant jurisprudence

*Rosemary Chibwe v Austin Chibwe – Marital Property*<sup>237</sup>

Austin Chibwe sued Rosemary Chibwe for divorce before the Local Court in Mufulira under customary law, alleging among other things unreasonable behaviour and adultery with some unknown person. The Local Court granted the divorce on the said grounds. However, Mrs. Chibwe appealed to the Magistrates Court on the grounds that the Local Court had misdirected itself in dissolving the marriage on unestablished grounds and not applying their minds to the question of maintenance and property adjustment of the

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<sup>233</sup> Section 25 of the Land Act.

<sup>234</sup> Op. cit., 105. On page 8, “Section 23 (5) provides that ‘the Tribunal shall not be bound by the rules of evidence applied in civil matters’. But practice shows that the Tribunal Secretariat insists on properly drawn forms and affidavits before the matter can be entertained.”

<sup>235</sup> Ibid.

<sup>236</sup> Ibid.

<sup>237</sup> Op. cit., 206.

property acquired during the subsistence of the marriage. She also alleged that the Local Court justices were prejudiced in favour of her husband in handling the case before them.

The magistrate heard the evidence and sat with assessors in Ushi customary law, under which the parties had gotten married. The magistrate dismissed the appeal and confirmed the decision of the Local Court. Mrs. Chibwe then appealed to the High Court.

When the case was heard in the High Court, the High Court Commissioner considered Ushi customary law and ruled that Mr. Chibwe should pay his former wife a lump sum of K10 million with simple interest of 10 percent from the date that judgement was delivered to dissolve the marriage up to the determination of the appeal. Mrs. Chibwe appealed against this decision and took the matter to the Supreme Court.

In the Supreme Court, it was held that the lower courts had misdirected themselves in not considering the fact that Mr. Chibwe had acquired a lot of property during the subsistence of the marriage. These properties included leaseholds, household goods and business premises. It was found to be a misdirection that the lower courts which had sat with the assessors in Ushi customary law made no reference to that law in dissolving the marriage and in the property adjustments.<sup>238</sup> The justices held that customary law in Zambia is recognised by the Constitution provided its application is not repugnant to any written law. Accordingly, they ruled that, in accordance with the Ushi customary law, Mrs. Chibwe was entitled to a reasonable share in the property acquired during the subsistence of the marriage. They held further that the law applicable both in the High Court and the Supreme Court in divorce matters is normally the English law of divorce. This is by virtue of the English Law (Extent of Application) Act as read with Section 11 of the High Court Act. They cited Section 24 of the Matrimonial Causes Act, which deals with property adjustment. Under this section a party to divorce proceedings, provided he/she has contributed either directly or in kind (that is by looking after the house), has a right to financial provision. The percentage is left to the court's discretion. The court therefore ordered the transfer of one income-generating property to Mrs. Chibwe and a lump sum to be assessed to meet the costs of educating the five children of the family.

*Fainess Banda v Edward Kansofwe – Land, Council house, tenancy*<sup>239</sup>

The facts of this case were that Fainess Banda's late husband, Lackson Chimimba, was the legally recognised tenant of a house in Matero Township in Lusaka. The couple had lived in the house from 1954 up to 1988 when they moved to another house in Mandevu Compound. Kansofwe, Lackson Chimimba's cousin, was asked to occupy the house on a caretaker basis. He continued to pay rent to the Lusaka City Council on Chimimba's tenancy card. When the presidential directive to sell to sitting tenants was made, Kansofwe claimed that he had a right to buy as sitting tenant. However, Fainess Banda applied to the council as legal tenant, was allowed to purchase the house and was issued with a council certificate of title. The court held that, from the facts on record, Fainess

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<sup>238</sup> The Ushi are matrilineal.

<sup>239</sup> Op. cit., 206

Banda, as widow of the late legal tenant, was legally entitled to purchase the house and therefore ordered that Kansofwe yield possession to her.

*Henry Mpanjilwa Siwale and 6 others v Ntapalila Siwale* - customary land, family interest, alienation.<sup>240</sup>

In 1928 David Siwale was allocated 400 hectares of land by the colonial authorities. He settled on this land and developed it. However, he did not obtain formal title to this land because it was in a customary area. In October 1977, he invited his youngest son to settle on this land. After the death of his father, the son applied for title deeds in his own name for the property. He did not, however, consult any of his older brothers because they had not shown any interest in the land and had neglected their father. He was issued with a title for 200 hectares of the land in 1984.

The older brothers contended that the land was family property. After considering the evidence the court found that it would not be in the best interest of the family to include the names of the older brothers on the title deed and dismissed the application. The matter was appealed and went to the Supreme Court for hearing. The Supreme Court held that:

- (1) In relation to land under customary tenure, the president shall not alienate any land situated in a district or an area where land is held under customary tenure without consulting any other person or body whose interest might be affected by the grant; and
- (2) The older brothers were quite clearly affected by the grant of title deeds to their younger brother and for these reasons, the appeal was allowed and an order made that the older brothers be included on the title deed relating to farm No. 5032, Nakonde.

#### *Tembo Vs Tembo*

Mrs. Tembo obtained a loan from the Bank where she was an employee to assist her husband Mr. Tembo develop farm land acquired in his name. Later on Mr. Tembo was called into foreign service and Mrs. Tembo gave up her career to join him. During his tenure of office she traveled to Zambia to attend to the development of the farm and acquisition of new property. The marriage broke down and she returned to Zambia almost destitute - without a job, allowance or pension. She sold one of the properties (residential plot) and business equipment used in a hair salon business she had run. By this time the farm was extensively developed with several houses on it. Mrs. Tembo went to live in the main house at the farm. Settling property in the matter, the court gave Mrs. Tembo a residential plot with a store room on it with an order for Mr. Tembo to build a house there for her. Mr. Tembo was awarded the farm with all houses on it. The court said Mrs. Tembo had sold one property and had therefore already derived benefit.

The formula the court employed was not a 50% share according to Mrs. Tembo and that of legal rights activists.

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<sup>240</sup> *ibid*

## 7 Local Laws and Policies

Local authorities are empowered under the Local Government Act to make local laws and implement them in their area of jurisdiction. The sale of council housing has reduced the levels of available finance for Zambian local authorities and as a result many of them have begun to seek other methods of financing their operations. In this regard councils in the major cities and towns have begun to impose parking fees<sup>241</sup> on motorists in the respective town centres and charging for services such as application forms for land, which were previously provided free of charge. However, these measures are not yielding sufficiently high levels of revenue. In respect of the parking charges it was anticipated that motorists would buy weekly or monthly permits that would enable sufficient levels of revenue to be realised. Evidence from Kitwe and Ndola indicates that the permits system has not worked well and instead motorists pay for hourly permits that are then used for a whole day. Other levies such as those on businesses not included in the retail category have been suggested but bylaws have not received approval from the Minister of Local Government.<sup>242</sup>

Utilities such as water and electricity are paid for at the point of consumption but defaulting customers usually have their power or water cut off and the companies concerned impose reconnection fees, as well as demanding settlement of all arrears.

## 8 Implementation of Land, Housing and Property Rights

In the immediate post-independence era, the Zambian government pursued policies aimed at redressing the social imbalances of the colonial period and engaged in rapid improvements to housing and the provision of basic services and infrastructure. The decline in copper prices in the mid-1970s had a negative effect on the government's vision of improved housing supply and services, and efforts begun in this period stagnated or came to a virtual standstill in the ensuing decade.

The MMD government brought about policies that aimed to roll back the state from many spheres of economic activity, leading to the privatisation of the mines and other unprofitable parastatal companies. In the wake of the privatisation programme, the government embarked upon the sale of parastatal, government, mine and council housing in a bid to “empower” citizens to own their housing.

The statistics on housing and access to basic services give a clear indication of the implementation of these rights in Zambia. These indicators serve to show that Zambia has

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<sup>241</sup> Op. cit., 118. In the same article, it was reported that the Ndola City Council was exploring new ways of raising finance from parking fees and charging the informal sector “some form of rates”. “We are exploring new ways of raising revenue like parking fees for which we have made considerable consultation and we have got a quotation from South Africa(sic)” the council’s public relations officer was quoted as saying.

<sup>242</sup> Directors of finance at Kitwe and Ndola city council. Interviews with the author, March 15 and 17 2005, respectively.

a long way to go before supply adequately meets demand for housing and attendant social infrastructure.<sup>243</sup>

## **8.1 Inadequacy of housing**

The housing policies implemented after independence indicate a gradual shift from providing complete (conventional) low-cost housing to aided self-help schemes and squatter upgrading. Performance in squatter upgrading schemes fell below expectations due to inadequate funding as well as technical and community development problems. The consequence of this policy shift has been that a large majority of the housing stock is informal, poorly serviced or not serviced at all. Access to amenities such as clean water and proper sanitation, roads, drainage and street lighting are at a low level and in many parts of the country have regressed. The development of infrastructure and communal services received inadequate funding, and the subsequent work done was substandard, leading to quick deterioration of roads and drainage systems. Street lighting, where provided, suffered because of poor maintenance and a lack of proper back-up services.

Although the government has committed itself to prioritising housing in national policies, most households are actually experiencing a decline in access to basic essential services.

## **8.2 Absence of affordable finance**

The absence of an adequate institutional framework to enable the poor to access affordable finance for house construction is a major failure. The Zambia National Provident Fund, the Zambia State Insurance Corporation and the ZNBS were set up to provide pension fund services, insurance services and building finance respectively. The conditions attached to ZNBS loans are prohibitive for the poor and the unemployed.

It is possible to envision how these three bodies could have structured their operations to provide low-level financing specifically targeting low-income applicants in need of housing finance. However, they have concentrated their incomes on building projects that benefited the elite sections of society rather than the poor. In the early 1980s the Zambia State Insurance Corporation, the Zambia National Provident Fund and ZNBS became major providers of housing and office accommodation in all the urban centres in Zambia with some of the most prestigious housing and office projects in the country.

One of the main objectives enunciated by the NHP is the creation of a mechanism to mobilise housing finance from the public and private sectors, and international agencies, and to develop mechanisms to assist vulnerable groups. The PHI created under the Chiluba MMD government tried to develop low-cost housing. But due to the poor

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<sup>243</sup> The NHP estimated that, taking into account all the homeless families and the need to replace substandard dwelling units, the backlog of housing in 1996 stood at approximately 846,000 units. To clear the backlog over a 10-year period would require a building rate of about 110,000 dwelling units per annum (page 7). The census of population in 2000 gave an overall figure of 10.3 million inhabitants. Using an average household size of six persons gives approximately 1.7 million housing units in 2000. If the number of informal units were 70 percent of the total this would mean that the number of units in this category in 2000 had grown to about 1.2 million.

economy and the escalating cost of building materials, the low-cost houses soon became unaffordable for the low-income groups that they were intended to cater for.

### 8.3 Access to land

Access to land in post-privatisation Zambia has become critical, particularly for many former miners and others who lost employment when the mines and parastatals were privatised. Many smaller companies and industries servicing the mines were affected by the uncertainty that earlier surrounded the mines sale, with further job losses resulting.<sup>244</sup> As a result, many of the retrenched workers sought to “go back to the land” in the peri-urban areas surrounding the Copperbelt towns, with the consequence that forest reserve land, private and mine land has been invaded by squatters. Efforts are being made to resolve issues of illegal squatting in conjunction with the local authorities and major development NGOs, including Oxfam, WorldVision and Care International. Oxfam has been particularly active in this area by assisting peri-urban communities to gain legal tenure to land that they occupy. In this respect, the organisation has provided funding for the establishment of a Copperbelt Land Rights Centre, intended to provide a one-stop shop for land advocacy among low-income peri-urban communities.

With the implementation of the policy by government to allocate 30 percent of all land to female applicants, it still remains to be seen how well the local authorities will perform in redressing the traditional gender imbalances in this area

### 8.4 Security of tenure and evictions

The issue of security of tenure is a crucial one in these circumstances. A number of studies have shown that this is a critical factor in ensuring the enjoyment of a right to adequate housing and improving productivity, particularly among small-scale farming communities.<sup>245</sup> The CESCR recognises a variety of tenures including informal settlement. All persons should possess a degree of security of tenure that guarantees their protection from forced eviction.<sup>246</sup> The 1995 Lands Act explicitly prohibits illegal squatting and the Constitution offers no protection of a right to housing or basic squatter’s rights.

Three major actions against squatting in the recent past illustrate the Zambian government’s implementation of the provisions of Section 9 of the Lands Act 1995. All

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<sup>244</sup> The first offer received for the sale of the copper mines from the Kafue Consortium (Avmin of South Africa, Phelps Dodge of USA, Noranda Mining of Canada and Commonwealth Development Corporation of UK) was rejected by government as unacceptable. The Consortium eventually pulled out of negotiations and for a period the Zambian government had to continue supporting the mines while looking for other buyers. This period of uncertainty impacted negatively on the mines themselves as well as other industries servicing the mines (see Kaunda, F. (2002) *Selling the Family Silver: The Zambian Copper Mines Story*. Interpak Books, KwaZulu-Natal.)

<sup>245</sup> Kenny, T. (2000). *Zambia: Deregulation and the denial of human rights*. Queen Elizabeth House, Oxford University.

Hansungule, M. Feeney, P. & Palmer, R. (1998). *Report on Land Tenure Insecurity on the Zambian Copperbelt*. OxfamGB, Zambia.

Care International Zambia. (2000). *Copperbelt Livelihood Improvement Project (CULP) Progress Report*.

<sup>246</sup> Ibid.

the incidents enumerated have been carried out against residents of informal settlements in and around Lusaka. Two of the incidents took place in November 2002, while a third took place in September 2004.

The first of these incidents took place on November 14 2002.<sup>247</sup> In this incident, armed police acting on behalf of the Catholic Church, demolished 600 houses in an illegal settlement in Lusaka's Ng'ombe residential area. The squatters, who had been resisting eviction over the six months prior to this date, were taken by surprise. Police razed their structures without removing household goods. Police also beat and apprehended about 10 of the squatters who blocked the road leading to the disputed land to protest the destruction of their homes.

The squatters complained that they had paid a former MMD official who allocated them the plots and were surprised to learn that the land belonged to the Catholic Church. "We were allowed to build our houses on this land by some MMD officials and do not know what dispute the government had with the Catholic Church over this land," said one resident. Another produced a certificate of ownership bearing an MMD Ng'ombe stamp dated September 8 2001, signed by a chairman and secretary. The certificate of ownership for the plot in the ungazetted township did not, however, indicate a plot number but gave measurements as 20 by 25 metres. A representative of the Catholic Church said that the land belonged to the church, which obtained title deeds in 1964.

The second incident took place on November 26 2002 in an informal settlement known as Kalikiliki.<sup>248</sup> A 14-year old boy was shot and killed and a man injured as violence flared up between police and residents who were outraged at the demolition of their homes by the Lusaka city council. The list of casualties included several police officers, who were rushed to the University Teaching Hospital after some residents responded to the destruction of their homes with missiles. In this incident, council workers raided the settlement in the early hours of the morning with two graders. The officials ordered residents out of their homes to facilitate the demolition of their structures. Residents, infuriated by the sight of their homes crumbling into dust, vented their anger on one of the graders, which was then set on fire. Regular police reinforced the council officials and opened fire, hitting the teenager, who died on the spot. A stray bullet injured another man in the leg. The residents picked up whatever missiles they could find and retaliated, leaving some policemen injured.

The third incident took place on October 31 2004 and involved a piece of land for which the legal owner had title deeds.<sup>249</sup> Part of the farm was fenced off, however, a part was left unfenced and this portion was encroached upon by illegal squatters. Once again party officials were involved in the illegal allocation of land. The owner obtained a court order requiring the estimated 500 squatters to vacate the land. The law firm acting on behalf of

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<sup>247</sup> Police demolish 600 houses. *Times of Zambia*, November 15 2002.

<sup>248</sup> Boy dies, cops hurt in riot as residents hit back at council demolition squad. *Zambia Daily Mail*, November 27 2002.

<sup>249</sup> Squatters, police clash: over 30 residents arrested as they resist eviction, *Times of Zambia*, September 1 2004.

the owners had tried to enforce the court order for some months without success when it was decided to call in the police. In the ensuing action, more than 30 people were arrested and several others wounded as police executing the order were met with resistance from the squatters. Police raided the area early in the morning and ordered everyone to vacate immediately. The residents started throwing stones and other missiles. The police responded with tear gas. Chaos reigned as a group of 100 policemen, some on horseback, in motor vehicles and on foot pursued the crowd of protesting squatters into the nearby Chainda township and fired tear gas indiscriminately in the market, bars, houses and any other places they suspected to be harbouring the resisting squatters.

These cases illustrate the difficulty the government faces in dealing with illegal squatting. The use of party cadres to generate support among illegal or informal settlement dwellers has a long history dating back to the struggle for independence and is a well-known strategy of party politics in Zambia. It is not enshrined in any written law but the politicians and the people know that when it comes to the power of the vote, illegal or informal settlement dwellers have a lot of power. There has always been an ambivalent attitude towards illegal squatting because whichever party is in power derives support from these settlements.<sup>250</sup>

To deal with this situation it is necessary to depoliticise the issue of illegal squatting and informal settlements and allow the law to take its course. The kind of resistance experienced in the abovementioned cases indicates that the communities concerned believed that they had a right to stay where they were. Under the existing political machinery they have always been protected by the party, and are in most cases unaware that Section 9 of the Lands Act 1995 makes squatting illegal.

Delays in implementing the provisions of the HSIA affect the overall implementation of land and housing rights in the informal areas around the main cities of Zambia. The Racecourse settlement in Kitwe is an informal area where the land occupied by the illegal settlement consists of land zoned for industrial purposes and a former horse-racing circuit. In 1995, the Kitwe city council rezoned the area<sup>251</sup> of industrial land to conform to the needs of the township for residential land but the area has not yet been declared as an improvement area. Part of the difficulty in having the area declared an improvement area lies in the council's inability to fund a cadastral survey so that a plan of the proposed upgrading area can be submitted to the Surveyor-General in accordance with the requirements of the Act.<sup>252</sup>

## **8.5 Property grabbing**

One of the worst forms of rights violations with regard to inheritance and marital property is the practice of "property grabbing" after the death of a spouse. When the Intestate Succession Act became law in 1989, it was expected to deal a significant blow to the practice of property grabbing. The Young Women's Christian Association

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<sup>250</sup>Op. cit., 180.

<sup>251</sup>*Zambia Daily Mail*, January 14, 1995.

<sup>252</sup>Director of Community Environmental Health Services, Kitwe City Council. Interview with the author. Kitwe City Council on March 15 2005.

indicates that in the year 2000 it handled 268 cases of property grabbing reported to its drop-in centres. The highest number of cases against women and orphans has been those connected to property grabbing.<sup>253</sup> The NLACW continues to receive many inheritance cases that violate the rights of women after the death of their husbands. These cases make up 90 percent of the matters submitted to the clinic.<sup>254</sup> The Zambia Law Development Commission attributes the ineffectiveness of the law to a general lack of knowledge of its provisions. The commission advocates the outlawing of some traditional practices such as forced sexual cleansing of widows, which not only violates their rights but also increases the chances of contracting HIV/AIDS.<sup>255</sup>

Recent evidence indicates that efforts to address these issues are beginning to bear fruit. The Kapisha Ward in Chingola is host to the Luano/Kapisha Paralegal Desk run under the CCJDP. The desk has been running since 2001 and works in the Kapisha settlement, part of which is an informal settlement, and part of which is a site and service area. The programme provides legal aid and advice to vulnerable women and children. It has also been running awareness seminars on community issues and human rights issues. Only two cases of property grabbing had been brought to the desk in the 12 months leading up to December 2004. When asked to comment on this, the desk coordinator said that indications were that community members were beginning to understand and accept the legal position.<sup>256</sup> At the YWCA Kitwe Drop-in Centre, 13 cases of property grabbing were recorded for the year 2004,<sup>257</sup> while the NLACW in Ndola had only two cases for the same period.<sup>258</sup> In relation to the issue of sexual cleansing it was revealed both at the Kapisha Paralegal Desk and the YWCA Drop-in Centre in Kitwe that these cases are declining as families understand the dangers of contracting HIV/AIDS under these circumstances.

In recognition of the problem of property grabbing and other forms of abuse the formation of the Victim Support Unit of the Zambia Police Service has been a welcome innovation. The unit works with affected parties to assist in recovering property that has been taken away by relatives of the deceased. It is also actively involved in prosecuting cases of domestic violence and child abuse. The unit was established in 1994 as part of the Public Service Reform Programme under the Zambia Police (Amendment) Act No. 14 of 1999<sup>259</sup> and operates at all police stations around the country.

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<sup>253</sup> Masuzyo, C. (2002). Intestate Succession law condemned. *Times of Zambia*, October 6 2002.

<sup>254</sup> Ibid.

<sup>255</sup> Ibid.

<sup>256</sup> Musonda, C. Chimfwembe, A. & Mwansa, E. (2005). Interview with the author, March 15 2005.

<sup>257</sup> Op. cit., 141.

<sup>258</sup> Data provided by NLACW in Ndola on 17 March 2005.

<sup>259</sup> Chimbelu, E. (2005). Interview with the author, March 14 2005.

Sec. 53 of the Amendment Act states that (1) There shall be a Victim Support Unit at all police stations to be administered by police officers appointed by the Inspector-General. (2) The functions of a Victim Support Unit shall be: (a) to provide professional counseling to victims of crime and to offenders; and (b) to protect citizens from various forms of abuse. (3) Police officers in the Victim Support Unit may coordinate with the civil society and professional bodies in carrying out their duties.

## 9 Best Practices

Under international human rights law, secure tenure is one of the seven components of the right to adequate housing, which is linked to the right to land.<sup>260</sup> Zambia's experience in this area revolves around the creation of an intermediate form of title known as an occupancy licence that is issued to residents of informal or illegal settlements that are undergoing the process of upgrading.

A pilot study undertaken in 2000 with assistance from SIDA in Chaisa, an informal settlement in Lusaka, involved the local community in the adjudication process to formalise ownership and enable the transfer of occupancy licences to the community. Participatory and gender-sensitive approaches including community meetings to transfer knowledge to the community were a key part of the process. At the institutional level, knowledge and technology transfer were key parts of the process to ensure sustainability and replicability of the project. The involvement of local community officials and the location of offices for the transmittal of legal tenure documents within the community created a sense of ownership of the process.

The management of water supplies in informal settlements has improved under a World Bank-sponsored scheme that uses water vending kiosks. In the Racecourse settlement on the outskirts of Kitwe, a piped water supply was installed (with the help of a World Bank loan) to the Nkana Water and Sewerage Company under the Urban Restructuring and Water Supply Project. The water system is managed jointly under the terms of a Memorandum of Understanding entered into between the Nkana Water and Sewerage Company, the Kitwe City Council and the Racecourse RDC. A system of vending kiosks was installed at various points within the settlement. The kiosks are run by community members who charge the residents for each 20 litre container of water purchased. The money is then collected by the RDC and paid to the water utility.

The police Victim Support Unit is an innovation that has helped to curb incidences of property grabbing. The dissemination of its activities through women's NGOs such as the YWCA and NLACW, and the media, is enabling women to realise that they are not completely helpless when confronted with such situations.

## 10 Conclusion

This review of the law and land tenure arrangements that pertain to land, housing and inheritance rights in Zambia is an attempt to synthesise a very wide area that covers the legal, political, and social spheres. The work attempts to bring together the different pieces of legislation that relate to the mechanisms for delivering land and housing and inheritance rights but also looks at how the Constitution provides the legal basis upon

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<sup>260</sup> Augustinus. C. & Benschop, M. (undated). Security of Tenure – Best Practices. UN-HABITAT Land and Tenure Section, Shelter Branch.

which these rights are premised. The key pieces of legislation are discussed within the context of the issues raised.

The HSIA is a key piece of legislation in the Zambian government's efforts to enable its citizens to move from situations of illegality and informality, and to acquire decent housing. The Act envisages the provision of an enabling framework within which informal and illegal settlements can be regularised so as to enable the delivery of infrastructural and other social services. The importance of this enabling framework can be seen in what has been achieved under the Act.

In the initial stages, the Act facilitated the development and upgrading of many informal settlements around Zambia's urban centres. The Act provided local authorities with the tools to begin re-planning the many informal settlements and provided a platform upon which many low-income families were able to improve the quality of their shelter with assistance made possible under a World Bank facility. However, since the 1970s, little progress has been made, mainly because of the absence of a financial framework within which the provisions of the Act can continue to be implemented.

While the Kaunda legislation of 1974 envisaged the legalisation of squatter settlements under the provisions of the 1974 Housing Act, the Chiluba administration made it illegal for anyone to occupy land without proper authorisation, relying upon the provisions of the 1974 Act to deal with existing squatter areas.

The 1974 Act was meant to redress the historical imbalances in housing provision under the colonial administration that had led to the creation of illegal settlements on the fringes of the urban areas. At the time it was put in place technical and financial mechanisms were evolved to improve the housing situation of many poor urban residents. A technical support infrastructure had been created in 1971 with the coming into being of the National Housing Authority (NHA) under Act No. 16 of 1971.<sup>261</sup> The NHA was established principally to make better provisions for the development and control of housing throughout the country. Part of its mandate was the clearance and redevelopment of squatter areas and to undertake research into housing matters, building standards and appropriate construction materials.<sup>262</sup> For a number of years the NHA fulfilled its mandate of providing technical expertise that supplemented the efforts of the local authorities in the implementation of the 1974 Act in both upgrading schemes and the sites and services schemes. The changes in local government that came into being with the Local Administration Act, 1980 changed the face of local government by decentralising functions to the local level while at the same time withdrawing the levels of funding previously enjoyed by local authorities.

Thirty years after the HSIA was passed, it has clearly not had the intended effect on the provision and improvement of low-cost housing. The implementation problems that have made this difficult relate in part to the circumstances under which the Act came into being. Further, while the HSIA provided the legal framework to improve housing, very

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<sup>261</sup> Chapter 195 of the Laws of Zambia.

<sup>262</sup> Cap. 195 s 21

little effort was made to streamline building regulations so that they could fit the needs and capabilities of the residents for improvement and statutory housing areas. There has been little change in the area of building regulations, so that in effect, most buildings in these areas are illegal in as far as the existing legal framework is concerned. The NHP indicates this as one of the hindrances towards the attainment of the goal of affordable housing for many in the low-income bracket and lists the restrictive building regulations and the requirement to use materials whose cost in technology terms is very high.

Although the HSIA restricts the allocation of land in statutory and improvement areas it has been found to be quite weak in that there are no monitoring mechanisms to stop people from acquiring more than one plot. This has inevitably led to situations where more affluent people buy into these areas and construct large properties, depriving the poor who are meant to be the major beneficiaries. The affordability problems of the poor have become worse since the Act was first enacted, as unemployment has become very high, with the majority that are affected being residents of low-income communities.

## 11 Recommendations

Zambia is a state party to a number of United Nations, African Union and other international conventions and charters including the Universal Declaration of Human Rights, CESCRC and CEDAW. Under the Millennium Development Goals the Zambian government has committed itself to all the gender instruments and conventions, including the Beijing Platform for Action and the SADC Declaration of 1997, and its addendum on Violence against Women.

In view of the government's commitments to these international instruments, it is imperative that the Constitution is amended so that the legal framework can domesticate these obligations. The directive principles of state policy that set out the state's commitment to the provision of decent shelter have no time frame and are non-justiciable. While demonstrating government's good intentions, these principles in themselves will not result in improved living conditions for the poor majority of the citizenry. Government needs to go beyond merely demonstrating its good intentions to ensuring that it is actively promoting the principles it is committed to. The absence of a clear strategy in the PRSP to deal with the need to provide decent shelter, and the lack of support demonstrated towards the NHA over the last 10 years, indicate a lack of focus and political will in the area of shelter provision for the poor.

### 11.1 Law and policy reform

#### *Constitution*

There is an urgent need to amend the Constitution, in particular Art. 23(4), which discriminates against women. Another provision should be included in the Constitution, which declares customary laws to be null and void to the extent that they are discriminatory. At the time of writing a constitutional review process was underway.

The right to adequate housing, which includes access to land, services, affordability etc. (see CESCR General Comment no. 4) should be explicitly recognised in the Constitution.

Both the Constitution and the Land Act of 1995 do not recognise squatter's rights. The absence of a provision in Zambian law for an occupier of land to apply for legal title after occupation over a number of years (adverse possession) is a gap in the legal framework that needs to be addressed.

#### *Land Act*

The absence of any formal safeguards relating to the protection of women's rights in the land law needs to be addressed. The 30 percent affirmative allocation principle needs to be written into law and monitored in effect. With the current institutional problems relating to the allocation of land, there is need a for a monitoring system to ensure that the policy is properly implemented. In addition, an affirmative credit programme should accompany the 30 percent affirmative allocation principle. Without credit, women who are allocated unserviced, undeveloped land have no means to actually develop it and keep the title before the deadline for development expires.

While joint title and registration of land between spouses is an option in Zambia, there is evidence that this option hardly ever leads to actual joint titling/registration. Instead what is needed is a presumption of joint title for the plot of land and/or house that is shared by both spouses that can be changed into sole title if both spouses come forward to indicate that this is their wish. Such a rule protects women's interest to a much larger extent and it is recommended that such a provision is included in the Land Act.

#### *Local Government (Urban Building and Drainage) Regulations of 1968*

Amendment of these regulations should recognise more flexible building standards and materials, allowing for cheaper local materials that can still satisfy health and safety requirements, particularly for Improvement Areas and informal settlements. Such areas could also be isolated as "special zones" within the master plans, allowing for more flexible rules in such areas.

#### *Rent Act*

Stricter controls should be put in place to deter landlords in informal settlements who build barrack-type housing in which individual rooms are rented out to families without corresponding sanitation provision.

#### *Marriage law*

The formulation of a marriage law that takes cognisance of the current, different regimes and formalises them under one uniform legal code is imperative. A choice of marital property regimes should be given in the Marriage Law, with the accrued community of property, or community of property system as the default regime, which would protect women's rights within marriage more than in the current situation.

### *Inheritance law*

Customary land should be included under the Intestate Succession Act, along with recognition of a widow's right to inherit the family house rather than simply have a life interest. The current situation is in effect a gendered bias (which is contrary to international human rights law) and fails to recognise women's contribution to the realisation of such an asset.

The conflicting roles of an administrator under statutory law and customary law need to be harmonised. This should be done while taking cognisance of local tradition, under which quite often the administrator is in the position of a beneficiary as well.

The inheritance procedures should be simplified and made more accessible.

### *National Gender Policy*

Its objectives should be integrated with other policies.

## **11.2 Governance**

The number of women MPs, judges, ministers and local councillors needs to be increased.

There should be a transparent budgeting process involving civil society and the public to ensure accountability in the disbursement of service charges revenues collected by local councils.

We recommend stricter supervision and independent auditing of land allocation in local councils through submission of annual returns to the Lands Tribunal, Administrator General or other autonomous body.

## **11.3 Capacity building**

### *Marriage*

If different marital property regimes are introduced in a new Marriage Law, it is important to ensure that married couples are properly informed about the marital regime they wish to be married under, and the rights and obligations offered by each.

### *Training of land officials*

Land Tribunal officials and judges dealing with land, housing and inheritance cases need to undergo training on the urgency of being accessible to the poor. The officials and judges also need to be trained on the plight of widows, so that they can ensure that widows fully understand what they agree on during the court session.

## **11.4 Land management**

The division between local and central government land registration systems creates the sense that one type of title is inferior to the other. A reform of the registration requirements under the HSIA and the Lands and Deeds Registry Act should be

undertaken to harmonise the two systems so that they can be dealt with under a single legal framework since the function performed by council land registries and the Lands and Deeds Registry under the Commissioner of Lands is essentially the same. The simpler survey requirements for site and service and improvement areas can continue to be accommodated under this new framework without the need for significant changes to the institutional structures involved. The institutional structure for land registration could take the form of a district land registry dealing with all land registration matters in a particular district as this would make the registration process more effective, accessible and accountable to the needs of the local people in that district.

### **11.5 Coordination**

A link must be established between the marriage register and the land registers, in order to be able to see whether a land titleholder is married or not.

There should be increased coordination between ministries regarding land, housing and gender issues.

We recommend an integrated land information and management system implemented by the Lands Registry, allowing for input and queries from the ministries involved in land management and local councils to resolve the double allocation of land.

### **11.6 Implementation**

The NHA has a legal mandate in the upgrading of squatter settlements but has been sidelined over the last decade. Government should allow the NHA to play its role in the management of urban housing and land by ensuring that implementation of the NHP is handled by NHA and requisite funding is provided.

The “land tenure initiative” started by Sida and the city council in Lusaka could be replicated and upscaled under the general direction of the NHA together with the Ministry of Local Government and Housing for all urban areas with informal settlements.

There should be urgent application of provisions of the HSIA to remaining illegal settlements where there are no impediments to their regularisation.

We recommend dialogue between government and microfinance institutions to find alternative ways of obtaining credit for low-income groups with council certificates of title.

Gender disaggregated data should be collected.

### **11.7 Simplify procedures**

Forms and procedures that are required for the appearance before the Lands Tribunal should be simplified, and the Lands Tribunal should be decentralised to district level.

## **11.8 HIV/AIDS**

There should be a national policy to address issues of orphans and vulnerable children with respect to inheritance and property issues, and incorporation of HIV/AIDS strategies in all national policy frameworks.

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Kitwe tenants demand refund from council. *Zambia Daily Mail*, June 17 1996.

Boy dies, cops hurt in riot as residents hit back at council demolition squad, *Zambia Daily Mail*, November 27 2002.

## List of persons and organisations interviewed

### **LUSAKA**

Ministry of Lands

Mr. N. Inambao, Commissioner of Lands

Ministry of Local Government and Housing

Mr. Wina, Assistant Director Physical Planning.

### **KITWE**

Mrs. Mbaluku, Lawyer/Lecturer

Zambia Police Service, Victim Support Unit

Chief Inspector Chimbela

Mr. W Zimba, Settlements Officer at Kitwe City Council, August 2004.

Directors of Finance at Kitwe and Ndola City Council.

### **YWCA**

Mrs. Bernadette Matanda, DIC/CIC Counsellor

Mr. Mbaimbai, Director, Administration

Mr. Mwila, Director, Finance

Mrs. I. Mundia, Director, Legal Services

Ms I. Muuka, Director, Community, Environmental and Health Services.

### **William Nyirenda and Company (Advocates and Notaries Public)**

William Nyirenda, Senior Partner

Kennedy Bota, Lawyer.

### **MUFULIRA**

Mufulira Municipal Council

Mr. G. Kaluba, Deputy Director, Administration

Mr. D. Mulenga, Paralegal Adviser (Minambe).

### **NDOLA**

Ndola City Council

Mr. E. Makungo, Director, Administration)

Mr. M. Moonga, Deputy, Director Finance

Mrs. J. Sinkala, District Planning Officer.

### **NLACW**

Mrs. K. Chisanga, Senior Legal Officer.

### **CCJDP**

Mrs. D. Mushinge, Paralegal Coordinator.

### **CHINGOLA**

Luano/Kapisha Paralegal Desk

Mr. A. C. Chimfwembe, Desk Coordinator

Mrs. C. Musonda, Paralegal Adviser  
Mr. E. Mwansa, Paralegal Adviser.

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## Appendix I: International human rights law and Southern Africa

Equal land, housing and property rights are recognised in various international human rights instruments, including:

The Universal Declaration on Human Rights (UDHR)<sup>263</sup>:

- Article 17 recognises every person's right to own property and prohibits arbitrary deprivation of it;
- Article 25 confirms the right to an adequate standard of living, including housing;
- Article 2 entitles everyone to the rights and freedoms laid down in this Declaration, without discrimination; and

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<sup>263</sup> *Universal Declaration of Human Rights*, adopted on 10/12/1948 by General Assembly Resolution 217 A (III), UN GAOR, 3<sup>rd</sup> Session.

- Article 16 entitles men and women to equal rights as to, during and upon dissolution of marriage.

#### The International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>264</sup>:

- Article 11(1) recognises the right to adequate housing<sup>265</sup>;
- Article 2(2) prohibits discrimination; and
- Article 3 recognises equal rights between men and women.

#### The International Covenant on Civil and Political Rights (ICCPR)<sup>266</sup>:

- Article 3 recognises equal rights between men and women;
- Article 17 lays down the right to protection from arbitrary or unlawful interference in a person's home;
- Article 23(4) requires appropriate steps to ensure equal rights as to, during and upon dissolution of marriage (including marital property rights); and
- Article 26 confirms that everyone is entitled to the equal protection of the law, without discrimination on any ground, including sex, race and ethnicity.

#### The International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)<sup>267</sup>:

- Article 5 (d) paragraph (v) recognises the right to property, while paragraph (vi) confirms the right to inherit; and
- Article 5(e) paragraph (iii) recognises the right to housing. These housing and property rights include the right to return.<sup>268</sup>

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<sup>264</sup> *International Covenant on Economic, Social and Cultural Rights*, adopted on 16/12/1966. General Assembly Resolution 2200 (XXI), 21<sup>st</sup> Session, Supp. No. 16, U.N. Doc. A/6316 (1966), 993, U.N.T.S. 3, entered into force on 3/1/1976. As of June 2005, 151 states had become party, while 66 states had signed but not (yet) ratified.

<sup>265</sup> The right to adequate housing consists of the following elements: (1) legal security of tenure irrespective of the type of tenure; (2) availability of services, materials, facilities and infrastructure; (3) affordability; (4) habitability; (5) accessibility (including access to land); (6) location; and (7) cultural adequacy. See UN Committee on Economic, Social and Cultural Rights, General Comment No. 4 on the Right to Adequate Housing. See UN Doc. EC/12/1991/41 (1991). For full text see:

<http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/469f4d91a9378221c12563ed0053547e?Opendocument>

<sup>266</sup> *International Covenant on Civil and Political Rights*, adopted on 16/12/1966 by General Assembly Resolution 2200 (XXI), Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171. The ICCPR entered into force on 23/3/1976. As of June 2005, 154 states had ratified the ICCPR, while 67 had signed it.

<sup>267</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted on December 21 1965 by General Assembly resolution 2106 (XX), entry into force on January 4 1969. As of June 2005, 170 states were parties to this Convention, while 84 had signed but not (yet) ratified.

<sup>268</sup> See UN Committee on Elimination of Racial Discrimination, *General Recommendation nr. XXII on Article 5: Refugees and Displaced Persons*, 1996. Available on: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/fed5109c180658d58025651e004e3744?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/fed5109c180658d58025651e004e3744?Opendocument)

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>269</sup>:

- Article 13 requires the elimination of discrimination against women in areas of economic and social life to ensure women's equal right to bank loans, mortgages and other forms of financial credit;
- Article 14(2)(h) confirms women's right to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications; and
- Article 15 accords women equality with men before the law, and recognises their equal right to conclude contracts and administer property.

The Convention on the Rights of the Child (CRC)<sup>270</sup>:

- Article 27 recognises the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

The Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries<sup>271</sup>:

- Article 7 recognises the right of indigenous and tribal peoples to their own decisions regarding the land they occupy or otherwise use;
- Article 8(2) confirms the right to retain own customs and institutions, where these are not incompatible with international human rights;
- Article 14 requires the recognition and protection of the right to ownership and possession over the lands which indigenous and tribal peoples traditionally occupy, and the right of use for subsistence and traditional activities; and
- Article 16 stipulates that relocation from land has to be done with free and informed consent, the right to return or equal land and compensation.
- The African Charter on Human and Peoples' Rights (ACHPR)<sup>272</sup>: Article 18(2) and (3) require states that are party to the charter to ensure that "every" discrimination against women is eliminated, and that the rights of women and children are protected.

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<sup>269</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*, adopted on 18/12/1979, General Assembly Resolution 34/180, U.N. G.A.O.R., 34<sup>th</sup> Session, Supp. No. 46, U.N. Doc. A/34/36 (1980), entered into force 3/9/1981. As of March 2005, 180 states had become party.

<sup>270</sup> *Convention on the Rights of the Child*, adopted on 20/11/1989 by General Assembly Resolution 44/25, U.N. Doc. A/44/25, entered into force on 2/9/1990. All states except U.S.A. and Somalia have become parties.

<sup>271</sup> *Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries*, Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session. Entered into force on 5 September 1991. Convention 169 was ratified by 17 countries. See <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169>

<sup>272</sup> *The African Charter on Human and Peoples' Rights* adopted on 17/6/1981 by the Eighteenth Assembly of the Heads of State and Government of the Organisation of African Unity, entry into force on 21/10/1986, ratified by 35 states.

The African Union Protocol on the Rights of Women in Africa (“Women’s Protocol”)<sup>273</sup>:

This protocol, linked to the African Charter, is a treaty in its own right:

- Article 7(d) recognises women’s equal rights to an equitable share of joint property deriving from separation, divorce or annulment of the marriage;
- Article 8 commits the states that are party to the protocol to take all appropriate measure to ensure (a) effective access by women to judicial and legal services, including legal aid; (b) support initiatives towards providing women with access to legal aid; (c) sensitisation to the rights of women; (d) equipping law enforcement organs to effectively interpret and enforce gender equality rights; (e) equal representation of women in judiciary and law enforcement organs; (f) reform of existing discriminatory laws and practice;
- Article 9(2) binds state parties to ensure increased and effective representation and participation of women at all levels of decision-making;
- Article 16 recognises women’s right to equal access to housing and to acceptable living conditions in a healthy environment, irrespective of marital status;
- Article 19(c) commits state parties to promote women’s access to, and control over, productive resources, such as land, and guarantee their right to property;
- Article 21(2) recognises the equal rights of sons and daughters to inherit property; and
- Articles 22-24 commits state parties to undertake special measures for elderly women, women with disabilities and women in distress.

The table below provides an overview of which countries in southern Africa are party to these different human rights instruments.<sup>274</sup>

| <b>Treaty</b> | <b>Angola</b>  | <b>Botswana</b> | <b>Lesotho</b> | <b>Malawi</b>  | <b>Mozambique</b> |
|---------------|----------------|-----------------|----------------|----------------|-------------------|
| ICESCR        | YES<br>a: 1992 | NO              | YES<br>a: 1992 | YES<br>a: 1993 | NO                |
| ICCPR         | YES<br>a: 1992 | YES<br>s: 2000  | YES<br>a: 1992 | YES<br>a: 1993 | YES<br>a: 1993    |

<sup>273</sup> The African Union Protocol on the Rights of Women in Africa was adopted on 11 July 2003 in Maputo, Mozambique. Assembly/AU/Dec. 19 (II).

<sup>274</sup> After country representatives have signed an international or regional agreement, their head of state has to approve it. Upon such approval the signed agreement is ratified. Whether ratification is necessary or not is stated in the agreement. If a state has not signed and ratified such agreement, it can still accede to the treaty at a later date. By ratifying or acceding to an international or regional agreement, the state becomes party to it is bound to the obligations laid down in that agreement. If the state only signs but does not ratify, it is nevertheless bound to do nothing in contravention of what is stated in that agreement. In this Table, the letter S stands for “signed”, the letter R represents “ratified” and the letter “A” indicates “acceded”.

|  |                           |                |                           |   |                |
|--|---------------------------|----------------|---------------------------|---|----------------|
|  |                           | r: 2000        |                           |   |                |
| Optional Protocol to ICCPR of 1966 <sup>275</sup>              | YES<br>a: 1992            | NO             | YES<br>a: 2000            | YES<br>a: 1996                            | NO             |
| ICERD  | NO                        | YES<br>A: 1974 | YES<br>a: 1971            | YES<br>a: 1996                            | YES<br>a: 1983 |
| CEDAW  | YES<br>a: 1986            | YES<br>A: 1996 | YES<br>s: 1980<br>r: 1995 | YES<br>a: 1987                            | YES<br>a: 1997 |
| Optional Protocol to CEDAW of 1999 <sup>276</sup>              | NO                        | NO             | YES<br>s: 2000<br>r: 2004 | NO<br>s: 2000, but<br>not yet<br>ratified | NO             |
| CRC  | YES<br>s: 1990<br>r: 1990 | YES<br>A: 1995 | YES<br>s: 1990<br>r: 1992 | YES<br>a: 1991                            | YES<br>a: 1991 |
| Convention 169 on Indigenous and Tribal Peoples                | NO                        | NO             | NO                        | NO  | NO             |
| ACHPR  | YES<br>r: 1990            | YES<br>R: 1986 | YES<br>s: 1984<br>r: 1992 | YES<br>r: 1989                            | YES<br>r: 1989 |
| Women's protocol to ACHPR of 2003 (not yet entered into force) | NO                        | NO             | YES                       | NO  | NO             |

| Treaty                             | Namibia        | South Africa              | Swaziland      | Zambia                    | Zimbabwe       |
|------------------------------------|----------------|---------------------------|----------------|---------------------------|----------------|
| ICESCR                             | YES<br>a: 1994 | NO<br>s: 1994             | YES<br>a: 2004 | YES<br>a: 1984            | YES<br>a: 1991 |
| ICCPR                              | YES<br>a: 1994 | YES<br>s: 1994<br>r: 1998 | YES<br>a: 2004 | YES<br>a: 1984            | YES<br>a: 1991 |
| Optional Protocol to ICCPR of 1966 | YES<br>a: 1994 | YES<br>a: 2002            | NO             | YES<br>a: 1984            | NO             |
| ICERD                              | YES<br>a: 1982 | YES<br>s: 1994<br>r: 1998 | YES<br>a: 1969 | YES<br>s: 1968<br>r: 1972 | YES<br>a: 1991 |
| CEDAW                              | YES<br>a: 1992 | YES<br>s: 1993            | YES<br>a: 2004 | YES<br>s: 1980            | YES<br>a: 1991 |

<sup>275</sup> The Optional Protocol to the International Covenant on Civil and Political Rights enables the Human Rights Committee (the monitoring body established under this Covenant) to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant. States that have signed and ratified or acceded to this Optional Protocol recognise the competence of the Human Rights Committee to do so.

<sup>276</sup> The Optional Protocol to the Convention on the Elimination of All Discrimination Against Women enables the Committee on Elimination of Discrimination Against Women (the monitoring body established under this Convention) to receive and consider communications submitted by or on behalf of individuals or groups of individuals, claiming to be victims of any of the rights set forth in this Convention. States that have become party to this Optional Protocol recognise the competence of the Committee on Elimination of Discrimination Against Women to do so. The Optional Protocol was adopted in 1999 and entered into force in 2000.

|   |                           |                           |                           |                           |                           |
|---|---------------------------|---------------------------|---------------------------|---------------------------|---------------------------|
|   |                           | r: 1995                   |                           | r: 1985                   |                           |
| Optional Protocol to CEDAW of 1999              | YES<br>s: 2000<br>r: 2000 | NO                        | NO                        | NO                        | NO                        |
| CRC   | YES<br>s: 1990<br>r: 1990 | YES<br>s: 1993<br>r: 1995 | YES<br>s: 1990<br>r: 1995 | YES<br>s: 1990<br>r: 1991 | YES<br>s: 1990<br>r: 1990 |
| Convention 169 on Indigenous and Tribal Peoples | NO                        | NO                        | NO                        | NO                        | NO                        |
| ACHPR   | YES<br>r: 1992            | YES<br>s: 1996<br>r: 1996 | YES<br>r: 1995            | YES<br>s: 1983<br>r: 1984 | YES<br>s: 1986<br>r: 1986 |
| Women's Protocol to ACHPR of 2003               | YES                       | YES                       | NO                        | NO                        | YES                       |

\* S = signed; R = ratified; A= acceded.