

Land governance in Africa: The state, traditional authorities and the control of customary land

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Abstract

This paper discusses customary land governance focusing on the contest for control of customary land between the state and traditional authorities. Governance of land is one of the most complex issues in Africa. The complexity of this issue can be attributed to the dual land tenure system; statutory and customary tenure. Although the two tenure systems have co-existed for over a century now, there are several challenges which this duality creates when it comes to the administration and governance of land. Drawing mainly from the Zambian case study, the paper argues that although the state, as a sovereign entity, has the right to regulate the governance and administration of land under its territory, the situation is complicated by the fact that traditional authorities also claim ownership (allodial rights) over customary land. This seemingly overlapping claim to customary land leads to contestation, with the state appealing to its sovereign authority while the traditional leaders appeal to culture, history, tradition, and sometimes 'soft politics'. In some cases, the contest over customary land, sometimes result into an open contestation between the state and traditional leaders, as the Zambia case presented in this paper illustrates.

Keywords: customary land, traditional authorities, state, governance, contest, Africa, Zambia



1. Introduction

Land is one of the most basic natural resources in any country. Most human activities take place on land, and many other valuable natural resources are located on land. But the importance of land goes beyond the value of being the abode of most natural resources and a means of production; land also defines and demarcates polities, confers and shapes identities of people, communities, nations and regions. As the first *Zambian Draft Land Policy* (GRZ 2006:2) observes, ‘Land is the most fundamental resource in any society because it is the basis of human survival.’ Given the centrality of land in human activities, the governance and administration of land are at the centre of human interactions in society. In Africa the governance of land is even more critical because of the intricate embeddedness of land relations in society as well as the fact that majority of the people directly rely on land as a livelihood source. The governance of this important resource in Africa is further complicated by the presence of two separate land tenure systems which, though have co-existed for over a century now, present several challenges when it comes to the administration of land.

This paper looks at one of the land governance challenges arising from the existence of a dual or multiple land tenure systems, focusing on customary land. The paper has discussed the land governance challenges prevalent in many African countries as a result of the state and customary authorities asserting their right to control and administer customary land. This situation often leads to a contest between the two contending entities; which sometimes burst into an open contest as the *Zambian case* discussed below show. Focus in this paper is not on the contest around access to land resources, but about the rules which govern and regulate access to land. It is argued in this paper that as the demand for land increases in many African countries due to several factors including rising population, urbanisation, economic growth and environmental dynamics, the contest for the control of customary land between the state and customary authorities is likely to intensify.

The paper draws mainly from the current contest between the *Zambian government* and traditional authorities over who should be ‘in-charge’ of customary land. In this particular case, although the *Zambian state*, as a sovereign entity, has the right to regulate the governance and administration of all land (including customary land) under its territory, the situation is much more complicated by the fact that traditional authorities also claim primary ownership (allodial rights) of customary land. The paper shows that the state’s command over customary land is held in check by traditional leaders’ influence and appeal to soft power, particularly when it comes to the rural vote. Due to the strong influence traditional leaders have in rural areas even today, most African states tread carefully when it comes to asserting their sovereign right over customary land. As the *Zambian case* clearly shows, while traditional authorities are not challenging the sovereignty of the state; they are contesting the way the meaning and practical implication of state power.

1.1. Outline

The paper is organised in five sections. The next section provides an overview of land governance issues in Africa, focusing on customary land. This is followed by a profile of the land resources in *Zambia* and how the land resource is divided up into different categories of land. Following this section is a

discussion of how the different types of land in Zambia are administered. This is followed by an analysis of the current tension between the state and traditional authorities over the control and administration of customary land. The last section concluded the discussion.

2. Land governance in Africa

Land governance can be understood in simple terms as the rules and policies which regulate the exercise of power and control over land. What is entailed in land governance is not so much the day to day dynamics of accessing and using land; it is about the rules which regulate the practices around land ownership, allocation, access and use. In this sense, land governance involves general rules and arrangements (institutions), formal or informal, through which the control or authority over land is mediated and exercised. Fundamentally, land governance is about how power relations around land are configured between the different key land actors at different levels. It is important to emphasise here that the structures and rules which guide and regulate the activities of land administrators are not cast in stones; they are negotiated and contested by the different actors who often stake their claims to reconfigure the power relations around land. Lund (1998:2) has rightly described the dynamics around land governance in Africa when he observes that the structures and rules through which land is governed are ‘not enduring absolutes, but rather outcomes of negotiations, contestation, compromise and deal making—characterised by the condition he refers to as ‘open moment.’ This (open moment) occurs ‘when the social rules and structures are suddenly challenged and the prerogatives and legitimacy of politico-legal institutions ceases to be taken for granted’ (ibid). For example, in the case of Zambia, the prerogative of traditional leaders over customary land is challenged by the state’s decision to create statutory bodies to administer customary land. On the other hand, traditional authorities’ rejection of this decision indicates that the state’s power over customary land should not be taken as a given. In what way that the contest will be resolved, it will be a result of negotiation and deal making, rather than one party unilaterally asserting its power.

2.1. Land governance framework

It is also important here to make a distinction between land governance and land administration, noting that the latter is a part of the former. Land governance as noted earlier provides the meta-framework through which land is administered. Land administration on the other hand relates to the day to day management of issues related to allocation, validation of ownership, application of the rules, resolution of disputes, keeping of records or any form of evidence etc. In other words, land governance is a broader concept which provides the rules and structures to regulate institutions and mechanisms of decision-making concerning the administration of land. Many African countries have outlined policies and legal frameworks to provide guidance on the exercise of power over land and the institutions involved in the administration of the day to day affairs of land resources (see AU/AfDB/UNECA 2010). In addition to the general legal and policy framework, there are also specific rules and guidelines which regulate the exercise of power over specific types of land. For example, there are different rules and legislation regarding customary land compared to land under a game reserve or nature conservation. These rules

(both formal and informal) outlines who has the power to make and take certain decisions and carry out particular administrative functions relating to land. As such, land governance, everywhere is not just about land, it is fundamentally about the exercise of power over land—the politics of land (see Lund and Boone 2013). Since governance of land is about the exercise of power over land, it constitutes the core of land politics, as different actors and stakeholders contest for stakes in land.

2.2. An anatomy of land governance in Africa

In Africa, the allocation of power over land, though a prerogative of the state, has been contested by various stakeholders, especially traditional leaders who often see themselves as custodians of customary land which they hold in trust on behalf of the local people. Traditional leaders' claim to land is based on social, cultural and historical ties to land (Okoth-Ogendo 1989). Unlike the modern African state whose power over land is rooted in the formal processes of political legitimacy and sovereignty, the traditional leaders' claim of power over land is deeply embedded in the social relations which link the past, present and future to the here and now (*ibid*). Thus, when traditional leaders are laying claim to or contesting rules and structures around land, they are relying not on the constitution or any other formal processes of establishing legitimacy such as statutory law, but on the social practice and cultural norms through which land has been governed and shared over centuries. Thus, customary land in Africa is an arena where there is a confluence of two different types of claims, with different sources of legitimacy.

While the state has the backing of formal processes of the law and political legitimation, traditional leaders have the backing of cultural beliefs, traditional values, lineage ties and customary norms. In many rural communities in Africa, traditional leaders' control over land is believed to be more popular and stronger than the state's claim. This is evident in the fact that many rural residents still believe that customary land belongs to the ethnic groups, and that the chiefs and the village heads are the custodians of the land, wielding the power not only to allocate, but also to interpret and adjust traditional practices and norms around land (Blocher 2006).

In most African countries, the state has not intruded much into the governance of customary land, with most states granting a large margin of autonomy to traditional authorities to govern and administer customary land (Bruce 1982, Shipton and Goheen 1992, Lund 1998). But in recent years as the demand for land grows due to mainly population growth, sustained economic growth, environmental factors and urbanisation, we are seeing a growing trend towards the reform of customary land policy and governance structures being introduced by many African states. Traditional leaders perceive these reforms as a threat not only to their power base, but also their existence, given that the institution of traditional leaders derive their power and authority from being able to control and allocate land (Lund 2006, Kabilika 2010). Though the example from Zambia presented in this paper is not representative of what is happening in other African countries, the question around the governance of customary land, which still constitutes the bulk of the land in Africa (see AU/AfDB/UNECA 2010), is featuring more prominently in land policies across the continent, sometimes raising contentious issues around how to harmonise traditional structures with modern state institutions and functions (UNECA 2007). Land being a key natural resource which is central to the survival of many people in Africa, it is not surprising that its governance

is prominently featuring in major policy debates in many countries, sometimes leading to struggles and contestations (Moyo 2008). As Nuesiri (2014:7) observes, the

Struggles for control over and access to nature and natural resources; struggles over land, forests, pastures and fisheries are struggles for survival, self-determination, and meaning. Natural resources are central to rural lives and livelihoods; they provide the material resources for survival, security and freedom.

It is therefore not surprising that when African states try to change the rules of the game surrounding governance of natural resources, local communities through their leaders, are challenging and contesting these changes, especially if there are attempt to take away the control over natural resources from local communities. Thus while governance of state land is clear and less contested, the governance of customary land is increasingly contested, especially if the state attempts to assert its ultimate authority to control customary land.

2.3. Land and the notion of statehood

The contestation between the state and traditional leaders has been sparked by the government's decision to change existing structures and rules governing customary land. As illustrated in the case of Zambia, traditional authorities are challenging the state's move to take away the land administration powers of traditional leaders by creating and delegating administrative powers to formal structures such as the *District Land Board and Customary Land Committees* (see GRZ 2015:31). It is these institutional reforms outlined in the new *Draft Land Policy* which have awakened traditional leaders who have realised that their interest and powers to administer customary land is being undermined, and they have decided to challenge and contest these changes to exiting rules. In contesting the proposed changes to the current institutional and administrative arrangement, traditional leaders have argued that the new *Draft Land Policy* does not take their interest into account. They argue that the new *Draft Land Policy* does not even mention the name chiefs, which they interpret as an effective removal of traditional leaders from the administration of customary land (Kapata 2018). In this particular case, the contest over land resources is not directly about issues of access to land; it is about the rules and structures which govern the day to day administration of land in customary areas. Although the state, as a sovereign entity, assumes the ultimate authority over all land in Zambia, the exercise of its powers over customary land can be challenged by other actors such as traditional leaders. It is important to note that what is being contested is not the territorial authority (sovereignty), but the rules which govern the exercise of power and control over customary land.

Some analysts have attributed the contestation over and claim to customary land by traditional authorities to the weakness of states in Africa. The fact that traditional leaders contest for the control of customary land has sometimes been interpreted as evidence of fragmentation of the state (Jackson and Robserg 1982, Jackson 1990). For instance, it has been argued that traditional leaders are able to assert their authority over land primarily because African states are unable to project their authority over the

entire territory, especially the far flung rural areas, thereby creating a vacuum which is filled by traditional leaders who compete with the state (Herbst 2000). It has thus been argued that traditional leaders 'are often competitors to the centralised African state and are viewed as such by national leaders. The loyalties that citizens have towards these leaders, often expressed in a complex network of ethnic relations, is a significant challenge to African countries still having great difficulty... in creating a national ethos' (ibid:172). Some analysts see dominance of traditional leaders in rural areas as an indication of the inability of African states to exercise a monopoly of power over their territories; the failure to centralise power and hegemony (Jackson and Rosberg 1982). The existence of traditional leaders is interpreted as a competing power base which in the dominant theory of the state and nation-building is seen as a sign of weakness. This is clearly articulated in Tilly's (1990) notion of state formation as a process of conquering and subjugating competing entities in a specified territory. Drawing mainly from the European experience, the idea that the state should have no rivals in its territory is captured in the aphorism, 'war makes states' (Tilly 1985:170), emphasising the point that states are made by conquering all the rival entities in a territory to create a monopoly of power.

In this understanding of statehood, the presence of anything that appears to be a rival or a form of competition to the state is assumed to be a clear sign that the formation of the state is incomplete or weak. Tilly (1985) for instance, argues that, 'the people who controlled European states and states in the making warred in order to check or overcome their competitors and thus to enjoy the advantages of power with a secure or expanding territory' (1985:171). In the case of Africa, the traditional leaders' claim to control over land can then be seen as a form of competition to the state. According to this view, a properly formed state should have ultimate authority and control over land under its territory. The fact that traditional leaders contest the control over customary land in this paradigm of statehood can be constituted as a sign of weakness of the state. But this is a simplistic understanding to this complex array of issues.

Tilly's model of statehood which is built on the idea that war makes states is only relevant to 17th Century Europe (see Herbst 2000). The process of state formation today is much more complex than merely subjugating weaker entities in the territory through the monopoly of violence. In modern democracies, violence is not a legitimating tool for governments. Use of violence to silence opposition is seen as sign of weakness, and a huge democratic deficit. In fact many African states tried using the monopoly of violence as a tool for creating political legitimacy through one-party states and in some cases military rule, that precluded competitive politics which started in the early 1990s (Young 2004). The repressive nature of most of the African governments during the 1980s came close to the ideal of not tolerating competing power bases, but these states had little legitimacy, and their statehood were widely questioned (Stark 1986).

The control over customary land which most traditional leader in Africa contest is less likely to be resolved by a show of force from the state, primarily because traditional leaders are not basing their contest on force; they are contesting on their ability to garner soft power—the appeal to cultural beliefs, traditions and ethnic solidarity. This is not an issue which can be resolved through the state asserting its monopoly of violence. On the contrary, the strength of traditional leaders in rural areas is more a result

of African states alienating the traditional institutions and systems of governance (UNECA 2007, Nuesiri 2014). The governance of customary land is a complicated matter that cannot be resolved by the show of ‘hard’ power by the state through the threat of violence. The governance of customary land in particular is intricately based on the ‘soft’ power which traditional leaders exercise as the Zambian case illustrates.

3. Land in Zambia

Zambia has a total land mass of 752 000 Km². Official figures from the Ministry of land say that of this, 94 percent of the land is under customary tenure, with state land constituting only 6 percent. But this has been challenged by a number of analysts who argue that the actual land under the control of traditional authorities is much smaller than what the official stats show (see PCAL 2009, Chitonge 2015, Sitko *et al.* 2015, Honig and Mulenga 2015, Mulolwa 2016). While the land effectively under the control of traditional leaders has been declining, customary land still constitutes a large portion of land in Zambia as table 1 below show. Although land in Zambia is broadly classified into two types of tenure (State and customary land), there are effectively three categories of land which are administered by different entities (Table 1).

Table 1. Categories of Land in Zambia

	Customary	Public	State	Total
Size (Ha)	40 516 000	28 155 100	6 629 248	75 300 348
Percent	53.8	37.4	8.8	100

Source: Author based on data from (Honig and Mulenga 2015, Mulolwa 2016)

3.1. State land

This is largely land under leasehold tenure. This category of land is administered and controlled by the Commissioner of Lands through the issuance of four types of leases to private individuals, companies and trusts. The four leases are a) Ten year land record card, b) 14 year lease for un-surveyed land, c) 30 Year occupancy license (usually issued in housing improvement areas in peri-urban settlement) and d) 99 year lease. Current estimates suggest that this category of land accounts for about 16.5 percent of the total land mass and not the 6 percent which is often cited in official documents (see GRZ 2006).

3.2. Public land

This category of land constitute various pieces of land reserved for specific use including nature conservation, forests reserves, game reserves, wetlands, mountain range and head water (GRZ 2015:22). Land falling under this category is administered by specific statutory bodies such as the Zambia Wildlife Authorities (ZAWA). This category of land accounts for close to 40 percent of the total land mass (8 percent under national parks, 22 percent under game management areas, and 9 percent under forest reserve areas, see GRZ 2015:16). While some of the pieces of land under this category fall in customary areas, they are effectively not under the control of customary leaders; the lands are controlled by specific

statutory bodies (Honig and Mulenga 2015). Land under forest and national parks, particularly, are tightly regulated by the delegated state agents who do not allow settlement in these areas. It is only land under game management Authorities falling in customary areas where some form of settlement may be permitted (ibid). Official figures suggest that land under game management areas covers about one-third of the total land under customary areas (GRZ 2015).

3.3. Customary land

This is the category of land is under the administration of traditional leaders. If we look at these three categories of land, it is apparent that customary leaders effectively control much less land than the publicly cited figure of 94 percent. If we take the statement in the New Draft Land Policy that public land includes all pieces of land in customary areas which are ‘not allocated exclusively to any group, individual or family’ (GRZ 2015: 22), it becomes obvious that customary leaders control less than half of the land, although the official category of the land may still be customary land (Table 2).

Table 2. Land Categories in Zambia by Size (2015)

Public Land			State Land			
	Hectares	% of Total land		Hectares	% of Total land	% of State Land
National Parks	6 024 028	8	Crown land	3 647 748	4.8	55.0
GMA*	16 566 077	22	Farm Blocks	531 500	0.7	8.0
Forest	6 777 031	9	Urban Land	1 400 000	1.9	21.1
Wetland	7 304 134	9.7	Settlement Schemes	300 000	0.4	4.5
Total Public Land	36 671 269	48.7	Resettlement Schemes	750 000	0.99	11.3
			total	6 629 248	8.8	100
			Forest on state	876 995	1.2	11.7
			Total	7 506 243	9.9	100
Forest Land			Customary Land			
	Hectares			Hectares	% of Total	
Local Forest in GMA	505 476		Local Forest on Customary Land	1 363 403	1.8	
Local Forest on Custom	1 363 403		National Forest on Customary land	3 161 303	4.2	
Local Forest state	359 218		Total	4 524 706	6.0	
National Fore GMA	2 087 524		Remaining Customary land	35 991 294	47.8	
National For Customary	3 161 303					
National Forest on State land	517 777					
Total Forest Land	7 994 701					

Source: Author based on (GRZ 2015, Mulolwa 2016, and Honig and Mulenga 2015).

*GMA= Game Management Areas. There is overlap in land jurisdiction because one piece of land can be under game management, forest and national parks.

Figures in Table 2 above do not include the land which has been converted from customary to leasehold tenure by private individuals since the policy to convert customary land to leasehold tenure came into

effect in 1995. Even if we take a conservative estimate that 8.6 percent of total land had been converted from customary land by 2012 (see Sitko *et al.* 2015:17), it is apparent that the land effectively under the control of traditional leaders is much less than the 94 percent which is widely cited. This is reinforced by the fact that the ‘discovery of mineral resources practically terminates customary control and creates large spheres of state control on customary domain’ (GRZ 2015:16).

Analysis of the trends in land dynamics in Zambia show that the share of land effectively controlled by customary leaders is declining rapidly, especially in the last two decades, due to the process of converting customary land to leasehold tenure (see Chitonge *et al.* 2017, PCAL 2009, Sitko *et al.* 2015). A report by the Parliamentary Committee on Land captures the situation of land that is effectively under the control of traditional leaders more succinctly,

After accounting for state lands, commercial farms, wetlands, game management areas, national parks, and the proposed farm block schemes, it becomes clear that the potential for expansion of customary farm land is not as great as commonly perceived. In addition, leasehold land has continued to increase in size (owing to the conversion of customary land to leasehold tenure), that leaves only an estimated 37 percent as customary land controlled by traditional leaders (PCAL 2009:12).

The New Draft Land Policy also acknowledges that customary land is increasingly coming under pressure from growing demand for urbanisation, investment and the growing national population (GRZ 2015). The creation of Farm Blocks has also take away almost 1 million hectares from customary land (Table 3).

Table 3. Name, Size and Location of Farm Blocks in Zambia

Name	Size '000 Ha	District	Province	Status
Kalumwange	100	Kaoma	Western	Proposal
Luena FB	100	Kawambwa	Luapula	Proposal
Manshya	147	Mpika	Nothrer	Proposal
Mikelenge	100	Solwezi	Noth- Western	Proposal
Mungu	65	Kafue	Lusaka	Proposal
Musakashi	100	Mufulira	Copperbelt	Exploration
Mwase- Phangwe	100	Lundazi	Eastern	Proposal
Nansanga	100	Serenje	Central	Exploration
Senanga Citri	1.2	Senanga	Western	Proposal
Simango	100	Livingstone	Southern	Proposal
Total	913.2			

Source: Zambia Development Agency (2011).

Note: The different documents come up with different names and sizes of the proposed farm blocks. The figures here are taken from the most recent report.

As the land effectively under customary authorities dwindle, traditional leaders are aware that this is effectively usurping their powers, and they are contesting this through various avenues.

3.4. Land governance in Zambia

Zambia, like many other African countries, since the introduction of colonial rule, has a dual land tenure system: customary and statutory land tenure. In pre-colonial times, land was governed through the customary land systems which varied according to the local cultural norms and practices. Although the practices around land varied from community to community, one of the common elements of customary tenure system was that land governance was based on the customary norms, practices and values. In this governance system, traditional leaders played a central role, though they were not regarded as owners of the land-land belonged to the community as a collective (Bruce 1982). The primary responsibility of those who were vested with the power to administer land was to ensure access to land for all members of the community. The introduction of statutory tenure saw land in the then Northern Rhodesia, through the *Northern Rhodesia (Crown and Native Lands Order in Council 1928-1963)* divided into two categories: *crown land* which was administered through British common law statutes, and *reserve land* which was administered through customary norms and practices (see Bruce 1982). Accordingly, two different sets of institutions were established and assigned to administer the two categories of land.

In terms of land governance as defined above, the colonial government still provided the broader framework which regulated the control over reserve land, although the colonial government allowed traditional leader to administer land according to the local land norms and cultural practices. Although

there have been significant changes to the rules and structures governing land in Zambia after independence, the dual system has continued, with what used to be crown land now being administered by the Commissioner of Lands, while what used to be reserve and trust¹ lands being administered by traditional leaders, through customary 'living law.' Thus, traditional leaders have been administering customary land from the time of first settlement of African communities. Most African states have always recognised and accepted this fact, including the role of traditional leaders when it comes to customary land. Not only that, but the two important laws in the country, with regard to land (the *Constitution and the 1995 Lands Act*), have both recognised customary and the institution of traditional leaders. For example, *Section 165 of the Constitutions* asserts that, 'The institution of chieftaincy and traditional institutions are guaranteed and shall exist in accordance with the culture, customs and traditions of the people to whom they apply.' Similarly, *Section 254* has clearly recognised the existence of customary land stating that 'Land shall be delimited and classified as State land, customary land and such other classification, as prescribed.'

With specific to land administration, the Lands Act No 29 of 1995 (1995 Lands Act) also recognises both customary land and the administrative role of traditional leaders. Section 7(1) of the 1995 Lands Act stipulates 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 and any provision of this Act or any other law shall not be so construed as to infringe any customary right enjoyed by that person before the commencement of this Act.

Section 8(2) and (3) clearly allocates a central role to traditional leaders (chiefs) in the administration of customary land. These two sections make it clear that traditional leaders have a strong say in what happens to customary land. The recognition and role of traditional leaders when it comes to customary land is further reinforced in Section 4, which states that the, 'the President shall not alienate any land situated in a district or an area where land is held under customary tenure... without consulting the Chief ... in the area in which the land to be alienated is situated.'

In terms of legal rules, there is sufficient recognition of traditional leaders and their role in the administration of land. However, there are contestations around the interpretations of these statutes as one would expect. As noted above, it is the interpretations of the rules which create an 'open moment' where contending parties challenge the dominant interpretations, and offer alternatives.

¹ Reserve land was specifically meant for use of indigenous people. Trust land was a category of 'unclassified land' called silent land and was meant to be allocated to the anticipated large inflows of European migrants after the Second World War. When the anticipated influx of Europeans did not occur, silent land was released for use by indigenous people. Reserve and Trust lands together constitute what is referred to as a customary land.

4. Contest for the control of customary land in Zambia

There are several contestations around the control of customary land, but in this paper focus is on the contest between the state and traditional leaders. Like in any other contest, the two sides to the contest present different views, interpretation of rules and arguments to support their position. The state for instance has presented several arguments to justify its proposal to reform the administration of customary land in Zambia. While the state acknowledges that customary leaders have been effective in ensuring access to land for the local residents, it has argued that these land 'rights are never registered, although their recognition is guaranteed.' The lack of registration of the land is one of the reasons given to support the proposed reform of customary land administration and governance (ibid).

The state has also argued that some traditional leaders are abusing their powers over customary land and are alienating large pieces of land to foreign investors at the expense of the local residents. The former Minister of Lands in a press statement argued that,

...while it is true that there are a number of chiefdoms that have been working closely with the Government in looking into the best interests of their subjects, and Government is grateful for that cooperation and support from these chiefdoms, it is equally true that there are certain cases in which our people have been exploited by practices that are inconsistent with the law (Minister of Lands 2013).

The state's argument has been that not all traditional leaders are abusing their powers to administer customary land, but there are some who are misusing their powers by selling customary land to foreigners and urban elites. To support his argument, the minister went on to state that,

...my office is overwhelmed with cases of Zambians who are complaining of being displaced from their ancestral and family lands in preference for investors and the urban elite at the expense of vulnerable communities including women, youths and differently abled persons. This is against the pro-poor policy of the PF Government which seeks to promote the welfare of all vulnerable groups (ibid).

It is interesting here to note that as a way of validating the legitimacy of the proposed reforms, the state is positioning itself as the protector of the poor people being exploited by the greedy traditional leaders. In doing this, the state is creating reasonable grounds for intervening in the administration of customary land. In order to support the state's position, the minister appeals not only to the fact that traditional leaders are exploiting the poor, but also that they are acting against the law. Circular No. 1 of 1985, is cited as the law which is being flouted by traditional leaders, which states that the local authorities are not allowed to alienate customary land to leasehold in excess of 250 hectares (GRZ 1985:3).

This is one area where there has been abuse in some parts of the country by a few greedy leaders where foreigners and in some cases rich Zambians are secretly approaching

traditional leaders, chiefs and headmen, and are acquiring huge portions of land in excess of 250 hectares at the expense of the local people. Government will not allow this abuse to be perpetrated by a few at the expense of other innocent Zambians (Minister of Lands 2013).

The allegations of flouting the existing law provides strong grounds for proposing to review and reform the administration of customary land by traditional leaders. The proposed reforms are then expected to close the loopholes in the system so that traditional leaders do not have the chance to exploit local residents and abuse their powers in the course of administering customary land. We see here the state asserting its powers over the governance of customary land by appealing to the law. The state is also appealing to its responsibility to promote the general welfare of the people, and protect the poor from exploitation. As we shall see later, traditional leaders also claim that they are acting in the interest of their people, protecting their culture and identity.

In addition to these, the state has also alleged that traditional authorities are not transparent and accountable in the way they administer customary land. To improve transparency and accountability in the administration of customary land, the state has proposed to establish statutory bodies at the district and chiefdom levels to take over the responsibilities of land administration. The other argument that state has presented to support its move to reform the administration of customary land is that the state wants to ‘open up’ rural areas to development by promoting the flow of investments. According to state officials, this is in line with the government policy of poverty reduction through investments. The argument is that if the administration of customary land is not reformed it would be difficult to attract investment into rural areas because the land rights are not registered and therefore insecure. The Zambian government has, since the adoption of liberal economy policy in 1991 when the Movement for Multi-Party Democracy (MMD) came to power in 1991, been advocating for measure aimed at ‘opening up the country-side’ to investment (Mudenda 2006, FSRP 2010). It is believed that the only way to ‘open up’ the country side is to reform the administration of customary land so that it can create more secure rights in land for long term investments.

Related to this argument is the idea that customary land is not efficiently used. According to the Zambian government, Zambia has a lot of under-utilised land, primarily in customary areas, and the argument has been that to promote efficient use of the land, it is necessary to reform the way customary land is administered (ZDA 2011). The state has also argued that customary land, as it is governed now, does not adhere to modern principles of land conservation, mainly due to ‘lack of land use controls’ and the associated overuse and degradation (GRZ 2015:16). The state has also argued that customary settlements occur in a spontaneous and disorderly manner making it difficult to plan land use properly. To overcome these problems, the state has proposed to reform customary land administration and management structures, with the objective of promoting secure access to land and equitable share of land resources in rural areas.

4.1. Traditional leaders' response to the proposed land reforms

While traditional leaders are not contesting the proposed reforms, they are particularly opposing the proposed structures and rules for administering customary land. At the National Land Validation Meeting held on March 28, 2018, the 22 representatives of the 288 chiefs in Zambia stormed out of the meeting stating that they reject the proposed land policy. The chairperson of the House of Chiefs (which is a statutory body established to deal with matters related to traditional governance) argued that they decided to reject the proposed Draft Land Policy because 'there is no mention of Chiefs in the draft policy document, thereby implying that the institution of Chieftaincy was being abolished' (see Kapata 2018: 2). It was also alleged that the concerns raised by traditional leaders in the earlier draft were not taken into account in the revised draft. Traditional leaders are also contesting the fact that only 22 out of 288 chiefs were invited to the validation meeting.

Aside from the procedural issues relating to chiefs being consulted over the draft land policy and the number of chiefs invited to the National Validation Meeting, the substantive contestation is around the control over customary land. Traditional leaders are very much aware that customary land is rapidly disappearing as a result of converting customary land into state land, and they are interpreting this as something that threaten their existence. Although some chiefs have been reported to be 'selling' customary land to foreign investors and rich Zambians, there are many who are realising that when customary land is depleted they will have no source of power, and this is why they are contesting the move by the state to divest the administration of customary land from traditional leaders to statutory bodies.

Although there has been no systematic response to the problems associated with the way customary land is managed cited by the state, traditional leaders have argued that customary land belongs to them. They say that they defended the land against colonial invasion, and will defend against anyone who attempts to take the land away from them. They argue that they have inherited the land from their ancestors and vow to keep it for generations to come. Thus, traditional leaders are not just looking on; they are trying to find ways to contest the state by appealing to tradition and culture as a response to what they are interpreting as threats to their existence. For instance one paramount chief, in an effort to mobilise his fellow chiefs to reject the state's proposal to take away the role of administering customary land from traditional authorities, sent out a petition to all the 287 chiefs in Zambia asking them to sign it as proof that they are against the proposed reforms (see Kanyanta 2014).

Traditional Leaders have also opposed the policy of converting customary land into leasehold tenure; they have argued that it should be possible to give some form of certificate or title without converting the land to state land. This was articulated in a communique issued by a group of Traditional Leaders from different part of Zambia who bemoaned the loss of customary land, and urged the Zambian government to recognise the documents being issued by traditional leaders on customary land. The noted that,

Once land is converted from customary tenure to leasehold the land does not revert to customary tenure at the expiry or cancellation of the lease. This means that there is a net

loss of customary land without corresponding benefits to local communities. There is insecurity on customary tenure as some people are displaced from their land due to large scale land acquisitions without regard to their land rights. ... to ensure tenure security, some chiefs are issuing documents to ascertain user rights and ownership of pieces of land by families. However, such documents are not currently recognized by government (ZLA 2008).

Traditional leaders have also contested the idea of vesting all land in Zambia, including customary land, in the president. They have argued that vesting customary land in the president has rendered traditional leaders' and local people's rights to customary land highly tenuous by effectively giving the president the powers of eminent domain on customary land (Kanyanat 2014). They have in fact recommended that the vestment of land in the president should be removed from the draft land policy and replaced with the classification of land into different categories as envisioned in Section 254 of the Constitution (see Kapata 2018). Traditional leaders have accused the state of disregarding the cultural rights of Zambians by disrespecting the customary practices around land in rural areas. They have argued that the main problem with land in Zambia is not that traditional leaders are not willing to release land for development (Chizyuka *et al.* 2006), but the state has no capacity to administer land in Zambia without the traditional leaders.

In responding to the traditional leaders' walk out of the validation meeting, the Minister of Lands was at pains to explain the new policy and how it has not abolished the institutions of chieftaincy and the traditional leaders' responsibility to administer customary land. Not surprisingly, the Minister, instead of invoking the 'monopoly of violence' of the state and dismiss the claims and the protest of the traditional leaders, adopts a mollifying approach, saying that the Ministry 'shall continue to seek opportunities to engage with the Traditional Leaders who are key stakeholders to the process. Clarification on the specific issues brought up by the Traditional Leaders at the National Validation Meeting shall be communicated in writing through the office of the Clerk of the House of Chiefs' (Kapata 2018:5).

4.2. The state-traditional leaders contest

As it may be evident by now, at the heart of the contest between the state and traditional leader in Zambia is the bid to control customary land. A glance at how the contest has played out suggest that traditional leaders are a force to be reckoned with; that they are not being side-lined. When they walked out of the Draft Policy validation meeting, an outsider may say the state should still go ahead and validate the policy without the traditional leaders. After all, the state has received the mandate from the people of Zambia to govern the country including the land, while the traditional leaders are actually unelected rulers. The reality however points to the inadequacy in the monolithic conception of the power of the state as expressed in the notions of states as having a monopoly of power through violence or war (Tilly 1990). What the contest examined in this paper highlights is the view that power is never absolute, and this is clearly evident here. The powers of the state with regard to the governance of customary land

appears to be checked by traditional leaders. One may wonder where did the traditional leaders get such powers when they have no army, they do not control the courts or guns? Baldwin (2011) finds it puzzling that in agrarian societies where land carries so much weight, the politicians would cede the power to control and allocate land to traditional authorities who are not part of the bureaucratic state system. It is therefore interesting to examine what is happening in this case, particularly the source of the power the traditional authorities seem to wield.

4.3. Traditional leaders' power base

The power of traditional leaders in Africa derives from a complex mixture of traditional and the precepts of modern democracy. During the early days of independence, there was a widespread view that the post-colonial African states would wipe away the corrupted forms of traditional governance structures and replace them with centralised monolithic, bureaucratic institutions based on constitutional and statutory rule (Baldwin 2011, Nuesri 2014). But to the contrary, the importance and power of traditional leaders in Africa is actually being revived (see UNECA 2007, Nuesri 2014). In Zambia it has been observed that, 'Anyone who has intensively and over an extended period of time participated in post-independence Zambian society, cannot help to be aware of the great importance still attached to chiefs. Nor is this importance limited to rural districts outside the line of rail' (Binsbergen 1987:140). Even in countries which have tried to ban or discredit traditional forms of governance, these leaders have continued to survive and command a lot of influence in society and national politics (Baldwin 2011). We see this in Zambia where the state does not take a confrontational approach with chiefs when they protest and reject the draft and policy. Instead the state seeks to engage with the traditional leaders, treading carefully not to roughen their shoulders.

The debate on the state and traditional leaders in Africa has been raging for some time now. While some analysts have argued that traditional leaders because they are not elected leaders, their exercise of power over critical resources such as land compromise the values and principles of democracy (see Ntsebeza 2006), others have argued that institutions of traditional leadership are important and compatible with the principles of democracy and the doctrines of modern statehood (Logan 2008). To understand the seemingly puzzling situation, one has to turn to the structure and practice of democratic politics in Africa. If we look at the composition of the electorate in Africa, majority of voters (roughly 65 percent) are actually in rural areas under or with strong trust in traditional leaders. Thus, for politicians who seek to win elections in Africa, they cannot afford to antagonise the rural vote.

The traditional leaders' influence over rural residents is strongly tied to the cultural beliefs, collective identity, which in turn are connected to the chiefs control over customary land. It is in this sense that land resources are critical not just as a means of production but also a source of power, and traditional leaders know this pretty well, just as politicians and state officials do. Politicians across Africa tread this path equivocally, sometimes forging alliances with traditional leaders while at other times threatening to discipline them (see Herbst 2000, Baldwin 2011). This seemingly contradictory behaviour by the state is actually a perfectly rational behaviour on the part of politicians (Chitonge 2018). This is why the contest over customary land administration in Zambia is not a straight forward case of the state showing

its power to govern, but a game of seeking and forging alliances.

In this regard, the real power of traditional leaders come from the people's perception trust in the institution of traditional leaders to administer land. In a study in Zambia, local residents were asked whether they would prefer the state or the traditional leaders to administer customary land, and majority of the respondents indicated that they would prefer customary land to be left in the hands of traditional leaders and this is the reason they gave: 'customary land is better because... even people without money are getting customary land, but if the land is under the state it means that everyone will have to buy land, and those without money will not have land' (LURLAP FGD 2014). Baldwin (2011) in a survey of more than 19 African countries, including Zambia, found that majority of the people believe that traditional leaders should have the primary responsibility to administer customary land. It seems that traditional leaders enjoy a lot of support from the local community when it comes to matters of customary land. This is despite reports that some of the traditional leaders are involved in the alienation of customary land. For example in Zambia, there have been several stories especially in the print media reporting that an increasing number of traditional leaders are involved in the selling of customary land to foreign investors who offer them huge sums of money which they pocket.

One example is an article in the *Pots Newspaper of Monday, 10 January 2011*, which claims that many chiefs have become corrupt and selfish. But still people trust these leaders and many would like these leaders to continue administering customary land. Part of this trust is rooted in the belief that customary land belongs to the chief. In a study in Zambia, when residents were asked about who owns land, there was an overwhelming response and validation of the view that chiefs are the owners of the land. In one chiefdom, when we asked residents about what would happen to the people who have managed to get title deeds on customary land if they do not cooperate with the chief, residents believe that the chief has the power to cancel the title deed if the title holder is not cooperating (LURLAP 2014). Such beliefs have given the chiefs a lot of support from the local population even when they are actually abusing their authority as reported in the media and the government. Control over land is critical and this is why traditional leaders are contesting the proposal to take away this responsibility from them.

4.4. Land vestment

The other central issue related to the administration of customary land is the idea of vesting all land in Zambia in the president. The new Draft Land Policy has maintained the provision that all land in Zambia is vested in the president who holds it in trust on behalf of the Zambian people. While the New draft policy has acknowledged that the 'vestment of land in the President is one of contentious clauses in the post-multiparty democratic dispensation' (GRZ 2015:15), it does not regard the issue of customary land as a problem in this case. It only mentions the concern that vesting land in the president leads to political interference in the management of land. But for traditional leaders, as noted earlier, their main contention is that vesting all land including customary land in the president amounts to the failure to recognise the rights of local people to control customary land. They argue that this has led to a great deal of confusion when it comes to customary land. Certainly, the issue of vestment has been problematic to the point of being ambiguous in both policy and law. For example, while section 7 (subsection 1) of

the *1995 Lands Act* recognises customary land and defends the vesting of customary land in traditional leaders, Section (1) that vests all land in the head of state (republican president), clearly undermines the same rights recognised for traditional authorities. If all land in Zambia is vested in the president, a second vesting of the same land in customary authorities only leads to ambivalence and confusion. Although there have been a view that traditional leaders are not vested with the land but are only given the responsibility to administer customary land by the president, this is not the interpretation and understanding held by traditional leaders. They always see themselves as custodians of customary land in their respective communities, and the often act accordingly. The contest the fore is partly created by this ambiguity regarding customary land. When one looks at the broader political and economic context to the 1995 Lands Act in Zambia, it is evident that the MMD government's intension was clearly to do away with customary land, and this is at the moment the heart of the contest, though the Draft Policy seeks to appease traditional leaders by assuring them that the state is not trying to take away their responsibility to administer customary land.

5. Conclusion

This paper has examined the intensifying contest over the control of customary land in Africa, drawing from the Zambian case. The paper has shown that the contending parties present different views and understanding of governance of customary land. The state argues that the current way customary land is administered lacks transparency, accountability, efficient planning, efficient use and security, and that this make customary land prone to abuse by traditional authorities. The state is using these concerns as justification for reforming customary land administration and structures, proposing to replace the current structure with statutory bodies which are expected to be more transparent and accountable to the people. Traditional leaders on the other hand are protesting against these proposed reforms and have rejected the draft land policy arguing that its intention is to abolish the institution of traditional leadership. At the centre of this contestation, it is argued in this paper is the quest for control of customary land, with both parties well aware that control of land confers power and influence. We see in this case that traditional leaders have power to hold the state in check. While it is puzzling that the state has ceded the power to control one of the most important natural resources land, the dynamics nature of democratic politics in Africa make this perfectly sensible if seen from that angle. The influence demonstrated by traditional leader in the case of Zambia does not lie only in the cultural and ethnic allegiance, but also in the control over land and the rural vote.

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