AN ANALYSIS AND REVIEW OF THE LEGAL COMPLEXITIES OF LAND GOVERNANCE IN THE CONTEXT OF CUSTOMARY LAW IN SOUTH AFRICA AND ZAMBIA

BY

DIMUNA PHIRI

Student Number: 45823006

SUBMITTED IN ACCORDANCE WITH THE REQUIREMENTS FOR THE DEGREE

MASTER OF LAWS

AT THE

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: Dr NQ Mabeka

December 2022

DEDICATION

I dedicate this thesis to my late father, Mr Manuel Phiri who has been my greatest inspiration. When I enrolled for this master's degree, one of my goals was to make you proud by making my dream come true. The journey was tough, but I kept my eyes fixed on your love, support, encouragement and belief that I, too, could achieve great things. May you continue to rest in perfect peace Dad.

To my nieces and nephews Seth Phiri, Joanne Phiri, Michelle Katowa, Nathaniel Phiri and Jazelle Katowa, may this Master of Laws in Jurisprudence prove to you that you can also achieve your dreams, and that anything is possible with prayer, a positive mindset, hard work, discipline, commitment and persistence. May you stretch forth into bigger goals, and bigger dreams and attain unfathomable success.

ACKNOWLEDGEMENTS

I want to thank GOD for strengthening, guiding and giving me the confidence to complete this thesis.

I would like to express my sincere gratitude to my supervisor Dr Nombulelo Mabeka. You have been supportive, encouraging and patient in my journey to completing the thesis. Your guidance in ensuring that I stuck to my thesis topic is highly appreciated. I cannot wish for any other supervisor. You were the best.

I extend my gratitude to Joshua Simpaya, my mother Eugene Mankomba Phiri, and my siblings Cedric Phiri and Mazuba Phiri, who have been pillars of support.

DECLARATION

I **Dimuna Phiri** student number **45823006**, understand what academic dishonesty entails and am aware of Unisa's policies in this regard.

I declare that this thesis is my own, original work. Where I have used someone else's work I have indicated this by using the prescribed style of referencing incorporated in the footnotes and bibliography. Every contribution to, and quotation in, this thesis from the work or works of other people has been referenced according to the prescribed style.

I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work. I did not make use of another student's work and submitted it as my own.

ABSTRACT

The statutory legal systems in South Africa and Zambia are generally considered superior to customary laws and practices. Despite the co-existence of legal systems in both countries, it cannot be assumed that they receive equal recognition or status. Over the years, efforts to understand customary land rights in these two countries have leaned towards the statutory legal system. Each system's assumptions and underlying principles are different and cause problems when the two interact. In particular, these conflicts are significant when applied to customary land governance, especially when it aims to provide tenure security. Therefore, the dynamics of perspectives in co-existing legal systems require deeper understanding to frame approaches that lead to the realisation of customary land rights. This thesis is a comparative study of customary land governance in South Africa and Zambia. It investigates results and provides a prescriptive framework for land governance in South Africa and Zambia. This will provide insight and draw best practices between the two legal systems. The thesis argues that insisting on western legal approaches in the governance of customary land tenure misguides the development of customary law. The thesis also critically questions the dominant application of western principles and theories in law in the governance of customary land tenure.

Key Words: Customary land, land rights, tenure security, legal systems, land politics and plurality.

ABBREVIATIONS

1. ADR- Alternative Dispute Resolution
2. AU-African Union
3. BCLR- Butterworths Constitutional Law Reports
4. CC- Constitutional Court
5. CLRA- Customary Land Rights Act
6. FAO-Food Agency Organisation
7. IFAD-International Fund for Agriculture Development
8. IFPR-International Foundation for Production Research
9. LCC- Land Claims Court
10. LGAF- Land Governance Assessment Framework
11. MMD- Movement for Multiparty Democracy
12. NGO- Non Governmental Organisation
13. PLAAS- Institute for Poverty Land and Agrarian Studies
14. PPP- Public Private Partnerships
15. RDP- Reconstruction and Development Programme
16. SAJHR- South African Journal on Human Rights
17. SCA- Supreme Court of Appeal
18. ZDA- Zambia Development Agency
19. ZLR- Zambia Law Reports
20. ZNRLR- Zambia and Northern Rhodesia Law Reports

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CHAPTER 1: RESEARCH BACKGROUND AND METHODOLOGY

1.1 Introduction

Access, ownership and control of land for many rural communities in developing countries refer to sustaining livelihoods and supporting families, thereby reducing poverty.[1] Due to the complexity of land as a resource, land administration and management systems challenges have made it difficult for the majority to access, control and own land in both South African and Zambian jurisdictions.

Challenges in land are mainly rooted in institutional systems, and legal and policy frameworks that govern land administration.[2] In the case of Bakgatla-Ba-Kgafela, the South African Constitutional Court reached a decision on whether the Communal Property Association Act of 1996 permitted the existence and land holding of Bakgatla-Ba-Kgafela. The court held that Bakgatla-Bakgafela Tribal Communal Association had the right to ownership of the land, thereby affirming communities' rights to choose their own land ownership arrangements. [3] Jurisprudence reveals that the majority do not enjoy legal protection of their land rights and others due to the land rush in Africa have faced voluntary and involuntary displacements, insecurity of tenure, food insecurity and land disputes.[4] Land reform has received much attention from African states in developing laws, policies and frameworks.[5]

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1 Crabtree C, Cassey *Lay of the land: improving land governance to stop land grab*s 1st ed (ActionAid 2012) 6-10.

2 Palmer D *et al* ''Towards improving land governance '' 2009 Land Tenure Working Paper 11.

3 Bakgatla-Ba- Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority 2015 (6) SA 32 (CC).

4 Batterbury *et al* ''*Land grabbing in Africa" the routledge handbook of African Development (*2018) 573-582.

5 Manji A '' Land reform in the shadow of the state implementation of new laws in sub-saharan Africa'' (2001) *Third World Quarterly Vol* 22 No.3 327-342.

Recently, it has also been on the agendas of the African Union, other international and regional institutions, conferences and academic studies that deal with land policy issues.[6]

The South African courts also protect the right to land in customary law, as seen in cases such as *Bhe and Others v The Magistrate, Khayelitsha and Others*.[7] Parliament has drafted and passed statutory provisions that regulate land in different contexts, which includes customary law. For example, section 7 of the Recognition of Customary Marriages Act provides that both spouses are entitled to land ownership in customary law.

1.2 Background of the study

Zambia[8] and South Africa[9] both officially recognise customary and statutory systems of law.[10] Large portions of legislation in Zambia are derived from the English legal system.[11] While South Africa's legislation is from the Roman-Dutch and English legal systems,[12] both jurisdictions' statutory law is codified in acts of Parliament, and customary law is not codified in any piece of legislation.

The key elements of 'customary' law demonstrate both a strong colonial influence and continuity.[13] Colonisation and the resistance it generated involved struggles over authority, natural resources and land in South Africa and Zambia.[14]

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6 Kojo S. A *Land governance in Africa how historical context has shaped key contemporary issues relating to policy on land* (framing the debate series No. 1 ILC Rome 2012) 7-9.

8 *Bhe v Magistrate Khayelitsa and Others 2005 (1) BCLR 1 (CC); Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC).*

8 Lands Act 184 of 1995; Town and Country Planning Act 1962.

9 Section 25 of the Constitution of the Republic of South Africa, 1996 (Hereinafter referred to as the Constitution); Recognition of Customary Marriages Act of 1998.

10 The Constitution of the Republic of South Africa; Lands Act 184 of 1995; Town and Country Planning Act 1962; Recognition of Customary Marriages Act of 1998.

11 Olivier WH *et al Indigenous Law* 210 -212.

12 Rautenbach C et al *Introduction to Legal Pluralism in South Africa* (2018 LexisNexis Galigan *Modern)* 5-16.

13 Olivier WH, Bekker JC, Olivier NJJ Indigenous *Indigenous Law – Lawsa Student Paperback* (Butterworths 2004) 210 – 211.

14 Olivier WH *et al Indigenous Law* 210 -212.

Traditional leaders' authority over their subjects was undermined as the colonisers used force and coercion.[15] Indigenous people, who were the rightful owners of their land of habitation, were disrespected as the colonisers did not want to recognise the cultural rules and practices of indigenous people.[16] During the colonial era, "legal changes in material relations in the law of persons and property resulted from the expression of the new economy''.[17] It also signifies a lack of a close relationship between legal rules and actual rights in land.[18] This underlines the importance of resolving problems that arise from the overall legal system.

Statutory law is written in prescriptive texts and provides a range of benefits to people, as opposed to customary law, which is unwritten. It is argued that statutory law also provides contextual guidance on social, economic and political issues. It is also observed that statutory laws embedded in pieces of legislation are not determinative or exhaustive of customary indigenous law.[19] The legislature could not determine rules and practices that customary rural communities followed in how they governed themselves and their affairs during colonialism.[20] Customary law recognition from a colonialist perspective reflects the state's objective in using indigenous people's systems as instruments to advance the interests of colonisers.[21] White settlers, under the Native Lands Act of 1913[22] in their conquest, appropriated more than 90 percent of the land.[23] This pushed indigenous South Africans to remain in smaller portions of the land.

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15 Rautenbach C et al *Introduction to Legal Pluralism in South Africa* (2018 LexisNexis Galigan *Modern)* 7 – 9.

16 Rautenbach C *et al Introduction to Legal Pluralism in South Africa* (LexisNexis 2018) 1- 29. Colson E 'Land law and land holdings among valley tonga of Zambia' 1996 *Southwestern Journal of Anthropology* 1- 8.

18 Colson E 1996 *Southwestern Journal of Anthropology* 1- 8.

19 Ramazzotti M *Customary water rights and contemporary water legislation mapping out the interface* (FAO legal papers online 2008) 9-17.

20 Rautenbach C *et al Introduction to Legal Pluralism in South Africa* 6-16.

21 Thandabanthu N *et al* 'African customary law in South Africa post-apartheid and living law perspectives '2007 *Oxford University Press Southern Africa International Journal of the Commons* 1205-1207.

22 Native Lands Act No. 27 of 1913.

23 Ntsebeza L, R Hall *The land question in South Africa the challenge of transformation and redistribution* (University of Cape Town 2007) 1 - 8.

Section 2 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution) states that its provisions are supreme and any law contrary to the latter is invalid and inconsistent.[24]

The supremacy of the Constitution in South Africa means that enacted laws by the legislature, interpreted by the courts, should be in line with its provisions.[25] South Africa has both traditional and statutory land tenure systems recognised in terms of the Constitution and enforced by legislation. In the case of *Port Elizabeth Municipality v Various Occupiers*, [26] the Constitutional Court held that the Constitution is a source of property law and that justice and fairness should always be present when determining property relations.[27]

According to South African jurisprudence land related matters have, for a long time, brought about a lot of struggles.[28] However, land reform matters post -apartheid posed tremendous efforts in restitution.[29] The South African legislature recognised the right to land as far back as 1993. This is shown by the incorporation of the provisions of section 28 in the Interim Constitution of South Africa of 1993. Section 25 of the final Constitution has similar provisions.

Embedded in the Constitution is the right to own property in this respect, land rights under section 25 of the Constitution. This section states:

> '…(1) No one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property.
> (2) Property may be expropriated only in terms of law of general application:
> (a) for public purpose or in the public interest; and
> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court…'[30]

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24 Constitution of the Republic of South Africa 1996 (Hereinafter referred to as the SA Constitution).

25 I Currie and De *Waal The Bill of Rights Handbook* (Juta Cape Town 2014) 151 – 175, 146 – 148 and 534.

26 2005 1 SA 217 (CC).

27 Port Elizabeth Municipality v Various Occupiers 2005 1 SA 217 (CC).

28 Colasurdo C, Marlin R 'South Africa's Constitutional Jurisprudence and the Path to Democracy: An Annotated Interview with Dikgang Moseneke, Acting Chief Justice of the Constitutional Court of South Africa' (2014) *Fordham International Law Journal* 280 - 298.

29 Adebayo JO 'The Bill, the Bilkled and Billy:analysis of media framing of South African Land Expropriation Bill' 2019 *African Identities* 147 – 162.

30 Constitution of the Republic of South Africa, 1996

The construction of the above provision shows that the legislature intended to curb injustices posed by apartheid to indigenous people.[31] In the *Government of the Republic of South Africa v Grootboom*, the Constitutional Court affirmed the significance of promoting and enhancing the Bill of Rights in that government is forced to take measures to ensure land rights are realised.[32] The Constitutional Court held that:

> …The obligation created by section 28(1)(c) can properly be ascertained only in the context of the rights and, in particular, the obligations created by sections 25(5), 26 and 27 of the Constitution. Each of these sections expressly obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the rights with which they are concerned…[33]

Tsheola asserts that poor communities have been more disadvantaged as they have often suffered displacements and other rights infringements. Thereby, resulting in poor land governance and conflicts in both tenure systems.[34] Besides the provisions of the South African Constitution, there are other pieces of legislation that regulate land in South Africa. These include, Restitution of Land Rights Act 22 of 1994; the Land Reform (Labour Tenants) Act 3 of 1996; the Interim Protection of Informal Land Rights Act 31 of 1996, Deeds Registry Act 47 of 1937; the State Land Disposal Act 48 of 1961 and Sectional Titles Act 2 of 1995. Furthermore, the Expropriation Act 63 of 1975 and Communal Property Associations Act 28 of 1996 equally regulate land tenure. South Africa has faced challenges from poor land governance, such as the illegal occupation of land, displacements, food insecurity and inequalities in the distribution of land post - apartheid.[35]

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31 Ntsebeza L *The land question in South Africa the challenge of transformation and redistribution* 1 - 8.

32 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 74.

33 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 74.

34 Sebola, Tsheola ' Economics of agriculture land restitution and redistribution in South Africa willing seller willing buyer business imperatives versus social transformation' (2014) *Journal of Human Ecology* 113- 123;
Anseeuw W, Alden C From freedom charter to cautious land reform- The politics of land in South Africa 2011 University of Pretoria.

The incorporation of section 25(7) provisions in the Bill of Rights illustrates that the legislature is committed to addressing injustices and inequalities during apartheid. Section 25 illustrates that those whose land were taken away from them after 19 June 1913 due to racism laws or practices are entitled to 'restitution of that property' or 'equitable redress'.[36]

Furthermore, section 25 of the Constitution introduced the second pillar of the land reform programme 'as part of a comprehensive land reform programme to redress inequity in land ownership and transform the spatial landscape'.[37] Section 25 provides that.

> 'the state is under the constitutional duty to take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis…'[38]

Tenure security is addressed in section 25(6) of the Constitution, which states that.

> …A person or community whose tenure of land is legally insecure resulting from past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure, which is legally secure or to comparable redress..[39.]

Poor land governance reflected in pieces of legislation that encouraged apartheid and racial segregation has proven to disadvantage rural settlers in many communities.[40] Among these pieces of legislation was the Native Lands Act of 1913, which under section 1(1), prescribed limitations on ownership of land for black people. In addition, section 2(1) of the Native Trust and Lands Act of 1936 abolished black people from individually owning land. It is important to refer to the influence of the United Kingdom's legal system in South Africa as part of the background of the South African legal system, which relates to land governance.

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36 Section 25 of the Constitution of the Republic of South Africa, 1996 (Hereinafter referred to as the Constitution).

37 http://www.gov.za/issues/land-reform (accessed on 02-09-2020)

38 Constitution of the Republic of South Africa, 1996

39 Section 25(6) of the Constitution;

45 Daniel R J, Trebilcock MJ and Carson LD ''The legacy of empire: The common law inheritance and commitments to legality in former British colonies'' 2011 *The American Journal of Comparative Law* 111-178.

The United Kingdom established a rule referred to as ‘’direct rule’’ which aimed to assimilate natives under English common law[41].

The principle of *Terra nullius* was also applied. *Terra nullius* means that land not productively being used by people of its habitation was regarded vacant.[42] Such land was, therefore, repossessed by the colonial settlers from the black people. Another key principle to note that posed challenges to black people regarding their history and how they governed themselves and their affairs is the principle of *Lex nullius,* which simply states that natives were without law.[43]

The Constitution of the Republic of Zambia of 1996 (Herein after referred to as the Zambian Constitution under section (1) states that it is ‘the supreme law of the land’. All legislation, common law and doctrines of equity must be consistent with the provisions embedded in it.[44] Zambia has a ‘dual’ legal and land tenure system, in which statutory and customary laws and land tenure are recognised to some degree in the law. For example, customary land tenure is administered by the traditional authorities using customary land administration practices prevailing within their localities.

The statutory land tenure system is administered in accordance with prescribed laws. Therefore, a land tenure system includes the exercise of regulatory authority and management through land administration and governance. [45] The acknowledgement of the two land tenure systems in Zambia is granted by the Constitution and Lands Act. However, despite the fact that customary land tenure is acknowledged by statutory law, there are various shortcomings. The law does not go further in providing for how it ought to be governed. This is because, traditional practices of one tribe differ from those of the other.

41 Daniel R J *et al* 2011 *The American Journal of Comparative Law* 111-178.

42 Hu H, ‘The Doctrine of Occupation: An Analysis of Its Invalidity under the Framework of International Legal Positivism’ 2016 *Chinese Journal of International Law* 75–138.

43 Daniel R J *et al* 2011 *The American Journal of Comparative Law* 111-178.

44 Constitution of the Republic of Zambia 1996.

45 Adams M, Sibanda S and Turner S Land tenure reform and rural livelihoods in Southern Africa. 1999. Overseas Development Institute 2 – 3.

The differences in traditional practices in the country are recognised in the 'Chiefs Act under section 10 (1)' as the Act consciously confers chiefs with discretionary customary law administrative powers. Zambia and South Africa are both signatories to international and regional Human Rights instruments, such as the International Covenant on Civil and Political Rights[46], the International Covenant on Economic Social and Cultural Rights[47] and the Universal Declaration of Human Rights[48].

However, Zambia and South Africa have dualistic systems of jurisprudence which consider international treaty law separate from domestic law.[49] The extent of domestication of instruments is therefore not easy to measure, leading to various mapping exercises and audits.[50] Domestication of international treaties into national laws is important to re-enforce, promote and strengthen land rights.

Domestication impedes the ability of citizens and others to use the law to compel the government to meet its international obligations, including those recommendations of international treaty bodies. Domestication also encourages reference and contribution to the inclusion of international standards in the legal system. The Zambian legal framework consists of an array of customary and statutory laws administered through a single formal court system. Although the Attorney-General is mandated by Article 54(2)(b) of the Constitution to propose treaties and agreements to the government of Zambia, there are no systematic efforts to domesticate international instruments in Zambia. Zambia has ratified and acceded to a good number of international treaties. However, there has been an absence of a clear legal obligation to domesticate international instruments to which Zambia is a party. The lack of relevant guidelines has also contributed to an unsystematic approach to domestication.[51]

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46 The International Covenant on Civil and Political Rights of 1966.

47 The International Covenant on Economic Social and Cultural Rights of 1966.

48 The Universal Declaration of Human Rights of 1948.

49 Adjami M.E 'African courts international law and comparative case law: Chimera or emerging human rights jurisprudence' (2002) *Michigan Journal of International Law* 106- 110.

50 Macmillan JS *Justice sector and the rule of law* (Open Society Initiative for Southern Africa 2013).

51 Macmillan J S *Justice sector and the rule of law* (Open Society Initiative for Southern Africa 2013).

The dispute resolution system currently creates difficulties for lawyers, judges, magistrates and justices of the peace in Zambia to consider international treaties in courts as well as other alternative dispute resolution systems.[52]

It is prudent that the domestication of key international instruments is comprehensively done, thereby encouraging reference and contribution to the inclusion of international standards in the legal system.[53] On the other hand, Zambia has a dual tenure system, namely statutory and customary tenure, which co-exist and operate officially in society.[54]

The recognition of the statutory and customary tenure systems is embedded in the Lands Act and the Constitution.[55] The Lands Act provides for the continuation of statutory tenure and recognises the continuation of customary tenure. In as much as customary tenure is recognised by the Lands Act, it does not go further in providing for its regulation and administration. Since customary tenure is unwritten, its rules and regulations are not uniform and differ from locality to locality based on customs.

Besides the courts mentioned above, Zambia's judicial system also comprises the Lands Tribunal and the Town and Country Planning Tribunal, both established by Acts of Parliament.[56] The Lands Tribunal Act and the Town and Country Planning Act confer the Tribunals with jurisdiction to preside over land-related disputes. Before they were amended, these pieces of legislation explicitly stated that they did not apply to customary areas. Consequently, dispute resolution through the judicial system has posed a number of challenges to litigants.

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52 Macmillan J S *Justice sector and the rule of law* (Open Society Initiative for Southern Africa 2013).

53 Orago N.W The Kenyan constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective (2013) *African Human Rights Law Journal* 415- 440.

54 Mudenda F *Land law in Zambia* 2007 UNZA Press for the School of Law University of Zambia 4-7.

55 Section 7 of the Lands Act 1995 and the Constitution of the Republic of Zambia

56 Lands Act 184 of 1995, Town and Country Planning Act 1962 of the Republic of Zambia

Some of these challenges are high costs in engaging legal practitioners to litigate cases and delays because of the bureaucratic court procedures, which compromise access to justice.

This has seen the rise of Alternative Dispute Resolution (ADR), which comprises of mediation, arbitration and negotiation as key principles in dispute resolution. ADR is an effective, cheap and less time-consuming process in resolving disputes outside the courts of law.

1.3 Background to the research problem

Discussions of concern have arisen on how land invariably affects the sustainability nature of developmental growth, how benefits from it are distributed, and how they contribute to the social and economic transformation of African economies. This is shown through the efforts of the African Union, United Nations Economic Commission, Africa Development Bank and the Land Policy Initiative.

Land governance remains a struggle in addressing the complexities of customary tenure against balancing equity, efficiency, and sustainability, in the development and management of land.[57] Land governance is closely linked to three principles of life, thus, human dignity, non-discrimination and equality. In order to promote peace and harmony among individuals in society, it is essential that good land governance is promoted through systems, procedures and processes.

Accordingly, it has placed a duty on the law to identify rights that individuals have in society, thereby bringing to harmony those duties that are in conflict. In light of land governance, the legal justice system is there to provide a mechanism for resolving various types of land disputes in courts of law and other dispute resolution channels aside from the courts. In dispute resolution, there are values that the Constitution suggests are followed at all levels.[58]

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57 Mulolwa *et al Land governance assessment framework country report Zambia* (Paper delivered at the World Bank land and poverty conference in March 2017) 29 – 30.

58 Constitution of the Republic of South Africa 1996 and Zambian Constitution 2 of 1996.

Dispute resolution structures require frequent assessment. The results of the assessment will be useful in addressing the challenges that disturb individuals from accessing justice.[59]

1.4 Problem statement

In recent years, there has been a rise in land-related challenges in South Africa and Zambia due to increased land demand for commercialisation and ownership in areas governed by customary law.[60] This emanates from the increased land-related challenges, and the population is growing in rural and urban areas. These challenges include insecurity of tenure, food insecurity, displacements, boundary disputes, inequality in land administration, weak and inadequate laws, policies and land grabbing.[61]

In terms of the law, land ownership is transferred by key stakeholders and the government under customary and statutory tenure systems.[62] Land governance is cognisant of customary tenure and its complexities, political economy, equality and statutory tenure systems and dimensions to improve land transfer efficiency.[63] Other challenges customary and indigenous land holders faced are broken family ties due to ineffective resettlement and lack of access to health care, education, clean water and burial sites.[64] Paramount to note is that the existence of these current challenges requires a holistic approach and broader efforts.

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59 The United Nations Entity for Gender and the Empowerment of Women. *A practitioner's toolkit on women's access to justice programming* 2018 42-60.

60 Hall. R et al *Large scale land deals in Southern Africa: voices of the people* (University of the Western Cape 2015) 43.

61 Hall. R et al *Large scale land deals in Southern Africa: voices of the people* (University of the Western Cape 2015) 43.

62 Henley G Review of social issues for large-scale land investments in Zambia wider working paper 2017 42; Section 23 of the Black Administration Act (This was repealed in the case of Bhe v Magistrate Khayelitsha and Others 2005 (1) BCLR 1 (CC), as well as the provisions of the Recognition of Customary Law Marriages Act of 1998); Proclamation R188; Olivier et al Indigenous Law 210 -212.

63 Deininger K, Hilhorst T, Songwe V *Identifying and addressing land governance constraints to support intensification and land markets operation: evidence from 10 Africa countries* 2014. 77.

64 Phiri D, Chu J *Large-scale land acquisitions in Zambia evidence to inform policy* (Paper presented at the World Bank poverty and land conference Washington D. C 2015).

Land tenure security is important in the advancement of indigenous people's social and economic wellbeing.[65] Mainly because, it enhances small scale farmers livelihood sustainability thereby reducing poverty. [66]

However, the fact that customary land rights lack legal protection, indigenous peoples face challenges in accessing land, enjoying land tenure security and they also experience constrains in controlling land.[67] Since land is an important resource for sustainable livelihoods, food security and eradicating poverty for rural populations, its effective administration and governance are of utmost importance, particularly in the customary law context.[68]

Ownership, access and control of land are cornerstones for inspiring economic empowerment and promoting local economic stability.[69] The land has equally been perked as a source of fuel and environmental amenities.[70] It appears that for communities to have secured cultural heritage, meaningful incomes and food security, it is pertinent that they have access, control and ownership of land.[71] Land ownership comes with land rights, which should be respected and upheld at all times.[72]

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65 Olivier WH *et al Indigenous Law* 210 – 212.

66 Netherlands Ministry of Foreign Affairs *Strengthening land governance for poverty reduction sustainable growth and food security* (IS-Academia 2010).

67 Henry M *Womens legal rights in Zambia policy provisions legal framework and constraints* (Paper delivered at the regional conference on women's land rights held from 26th-30th May 2002 Harare, Zimbabwe) 7-15.

68 Joala R *et al Changing agro- food systems the impact of big agro investors on food rights* (University of the Western Cape 2016) 8-10.

69 Knobel, Horn I M and Wiese M *Introduction to the Law of Property* (Juta Cape Town 2021) 43 – 51.

70 Van Der Walt and Pienaar *Introduction to the Law of Property* 3.

71 Van Der Walt and Pienaar *Introduction to the Law of Property* 3, 43 - 51.

72 Section 25 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution); Van Der Walt and Pienaar *Introduction to the Law of Property* 3 – 4 and 43 - 51.

Over the years in South Africa and Zambia, but also the rest of Africa, ineffective land governance has posed risks to land tenure security and food security.[73] These risks are also seen in land administration.[74]

The risks related to land governance and administration are rooted in law, procedural processes and institutional structures such as the ministerial bodies mandated to administer and govern land.[75] Given this, there has also been an increase in land disputes hinging on land rights violations, and this is observed in cases such as Government of the *Republic of South Africa v Grootboom and Bhe v Magistrate Khayelitsha* and Others. Resolution of these disputes is reached through the judicial system via litigation, which is initiated through a law suit by one party against another, and this has been the case in as far back as 1961.[76]

Under customary law, dispute resolution is commonly achieved through informal channels such as traditional courts.[77] Clause 4 of the Traditional Courts Bill confers powers on the traditional to harmoniously deal with customary law disputes.[78] In South Africa, land governance is among other things regulated by the provisions of the Constitution of the Republic of South Africa.[79] Section 2 states that the 'Constitution is the supreme law' of the land, and this is the basis upon which the legislature enacts laws.[80] The laws enacted by the legislature must be in line with the Constitution; if they are not, they will be invalid to the extent of their inconsistencies.[81]

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73 Henry Machina *Womens legal rights in Zambia policy provisions legal framework and constraints* (Paper delivered at the regional conference on women's land rights held from 26th - 30th May 2002 Harare, Zimbabwe) 3 - 8.

74 Hall R et al *Large scale land deals in Southern Africa: voices of the people* (University of the Western Cape 2015) 43.

75 Palmer *D et al '* Towards improving land governance ' 2009 Land Tenure working paper 11.

76 *Minister of the Interior v Lockhat* 1961 (A); Group Areas Act 36 of 1966; Olivier *et al Indigenous Law* 211 - 212.

77 Olivier WH *et al Indigenous Law* 211 – 212; Clause 4 of the Traditional Courts Bill of 2017; Cassim F and Mabeka N 'The Africanisation of South African Civil Procedure: The Way Forward' (2019) *Journal of Law Society and Development* Vol 6 1 – 20.

78 Clause 4 of the Traditional Courts Bill of 2017; Cassim and Mabeka (2019) *Journal of Law Society and Development* Vol 6 1 – 20.

79 Sections 2, 25 and 26 of the Constitution of the Republic of South Africa, 1996; Government of the Republic of South Africa v Grootboom 2001 1 SA 46 (CC).

80 Section 2 of the Constitution of the Republic of South Africa, 1996.

81 Constitution of the Republic of Zambia 1996.

The Constitution poses an obligation to promote the values enshrined in it when resolving disputes at all levels.[82] These provisions of the South African Constitution and Zambian Constitution had been used and enforced in the past by the courts, and they are still employed to invoke the right to property by customary and statutory land settlers who have been adversely affected by customary law.[83] Customary rural and peri-urban communities face challenges in ascertaining legal protection for their land rights.[84]

The 'land rush' in Africa for investments in agriculture, mining and infrastructure development has resulted in targeted communities to experience land insecurities, displacements, land disputes and food insecurity.[85] At the heart of the challenges posed by the demand for land are rooted in postcolonial issues that surround the legal status of land.[86] Property in law consists of an array of legal rules that determine the content, nature, establishment, protection, transfer and termination of various real relationships between individuals or groups of individuals and land.[87] Ownership is a real relationship with land.[88] In land tenure, one has a legal claim to surface rights.[89]

This position is illustrated in the case of *Chetty v Naidoo.*[90] It was held in this case that land ownership does not automatically confer mineral rights which are below the surface.[91] Therefore, conferment of land rights is specifically and separately to the category of each particular type of ownership.[92]

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82 Section 25 and 26 of the Constitution of the Republic of South Africa, 1996.

83 Phiri D, Chu J *Large-scale land acquisitions in Zambia evidence to inform policy* (Paper delivered at the world bank land and poverty conference Washington D.C 2015) 24 - 26.

84 Food and Agriculture Organisation *Land tenure and rural development* 2002 Rome.

85 Batterbury S P et al ''Land grabbing in Africa'' *the Routledge handbook of Africa development* 2018 573 - 582.

86 Cotula L *et al Land grab or development opportunity? agriculture investment and international land deals in Africa* 1st ed (Food and Agriculture Organisation IIED IFAD, London Rome 2009) 4 - 5.

87 Scott S *Property Law* (University of South Africa 2017) 315 - 318.

88 Knobel, Horn I M and Wiese M *Introduction to the Law of Property* 43 – 51.

89 Knobel, Horn I M and Wiese M *Introduction to the Law of Property* 43 – 51.

90 Chetty v Naidoo 1974 3 SA 13 (A); Van Der Walt and Pienaar Introduction to Law of Property 48.

91 Knobel, Horn I M and Wiese M *Introduction to the Law of Property* 43 – 51.

92 Van Der Walt and Pienaar *Introduction to Law of Property* 43 – 51;

For example, traditional leaders acquire ownership in customary law through land allocation by those in power. Some acquire ownership of the property by purchasing the land or property in question. It further refers to rules and principles used for enforcement in incidences of overlapping interests, such as corporeal rights.[93]

In terms of the law of property, possession is best described by making a distinction between the lawful holder and unlawful physical control of property.[94] The law attaches consequences to the unlawful physical control of the land while the lawful holder is in 'lawful control of the corporeal rights.[95] It is not a 'real right', but a possessor has a real relationship with the possessed property.[96]

Security of ownership of land can be enjoyed if and when the law upholds the claim for such land,[97] and this is evident under statutory tenure. Meaning that when a person is in possession of a property, this does not necessarily mean that such property will be registered under such a person's name.[98] Put differently, the fact that a person owns property does not mean that such a person may own such property by virtue of being in possession of such property. Holdership, on the other hand, is the physical control of land, either lawfully or unlawfully, with the intention to derive a benefit from it.[99] A lawful holder has a real right, while an unlawful holder only has a real relationship.

Given that customary laws are not written, land tenure security becomes a point of departure. Establishing whether the subjects of customary land tenure are considered owners, possessors or holders is paramount to this research. Identifying whether or not customary land dwellers have real rights of ownership to land or whether or not they merely have real relationships to land requires an analysis similar to the question of whether or not customary land dwellers are holders of land.

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107 Ogende O '' Some issues of theory in the study of tenure relations in African agriculture '' 1989 *Journal of the International African Institute Access Control and use of Resources in Africa agriculture* 6-17.

94 Knobel, Horn I M and Wiese M *Introduction to the Law of Property* 43 – 51.

95 Knobel, Horn I M and Wiese M *Introduction to the Law of Property* 43 – 51.

96 Knobel, Horn I M and Wiese M *Introduction to the Law of Property* 43 – 51.

97 Knobel, Horn I M and Wiese M *Introduction to the Law of Property* 43 – 51.

98 Knobel, Horn I M and Wiese M *Introduction to the Law of Property* 43 – 51.

99 Knobel, Horn I M and Wiese M *Introduction to the Law of Property* 185 – 243.

They can use it for agricultural purposes, thus being able to sell the products or alienate the piece of land for financial gain. It is important to pay attention to what constitutes property amongst indigenous people under customary tenure. In addition, it must be determined whether customary systems recognise ownership or not.

Further, in instances where they do, it is prudent to establish whether such ownership is absolute or corporate in character, who is in charge of awarding ownership and to which class of individuals or groups of individuals is it given.[100] Despite the Constitutions of South Africa and Zambia granting the right to property and non-deprivation, limitations of ownership imposed by law exist. Another limitation other than those imposed by pieces of legislation is forced by the rights of other legal subjects, in that their real rights of ownership should be respected in the realisation of one's own property rights.

This research will explore how the legal complexities of land governance in the customary law context affect South African and Zambian current laws or statutes. Once land ownership has been granted to an individual or groups of individuals, they have rights to use, control, destroy, alienate, vindicate and burden that land.[101]

Property rights are legal entitlements that both customary and statutory land dwellers have to land. They are conferred upon by virtue of their ownership of property. However, these rights are not absolute as they impose obligations. Customary land dwellers have utilised their land rights to economically empower themselves and improve their livelihoods through agriculture. Whether the full realisation of land rights is achieved in practice is a political and debatable issue.

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100 Ogende 1989. *Journal of the International African Institute Access Control and use of Resources in Africa agriculture* 6-17.

101 Tay AES ' The concept of possession in the common law of foundations for a new approach' 1964 *Melbourne University Law Review* 476.

1.4.1 South African Customary law

Intestate succession customary laws in nature proved to be discriminatory against women and children.[102] Inheritance of land has always advantaged males whilst discriminating against females based on their gender status.[103] For example, the primogeniture principle did not allow women to inherit land.[104] This principle followed the line of succession that benefited males only for decades.[105] After the Bill of Rights was promulgated, the primogeniture principle was declared unconstitutional.[106] This is shown in the case of *Bhe and Others v The Magistrate, Khayelitsha and Others*.[107] In this case, a Constitutional challenge was brought before the Constitutional Court on the constitutionality of the principle of male primogeniture as it applies to the customary law of succession.[108]

The Constitutional Court considered statutes that applied to land governance at the time to determine the level of their unconstitutionality. Section 23 of the Black Administration Act 38 of 1927 was found to be in breach and discriminatory to the right to equality and dignity upheld in the Constitution.[109] Section 1 (4) (b) of the Intestate Succession Act, 81 of 1987 was also declared inconsistent with the Constitution's provisions as it excluded any estate or part of any estate applied by the Black Administration Act.[110]

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102 Olivier WH *et al Indigenous Law* 210 -212.

103 *Bhe v Magistrate Khayelitsa and Others* para 95 -97; Olivier et al Indigenous Law 210 – 212.

104 Rautenbach C *et al Introduction to Legal Pluralism in South Africa* 1 – 350; Watney M 'Introduction to Legal Pluralism' (2012) *Journal of South Africa* Vol 1 202 – 203.

105 Rautenbach C *et al Introduction to Legal Pluralism in South Africa*; Watney (2012) *Journal of South Africa* Vol 1 202 – 203.

106 *Bhe v Magistrate Khayelitsa and Others para 95 -97; Rautenbach* C Is Primogeniture extinct like the dodo, or is there any prospect of it rising from the Ashes? Comments on the Evolution of Customary Succession Laws in South Africa' (2006) SAJHR 99 – 118. '

107 2005 (1) BCLR 1 (CC).

108 *Bhe v Magistrate Khayelitsa and Others para 1- 8; Rautenbach (2006) SAJHR 99* – 118.

109 *Bhe v Magistrate Khayelitsa and Others para 107 - 108.*

110 *Bhe v Magistrate Khayelitsa and Others para 101 - 106.*

The Constitutional Court closely looked at the rule of male primogeniture and declared it unconstitutional. [111] Similar cases that confirmed discriminatory provisions unconstitutional are the cases of *Shibi v Sithole and Others,*[112] and the *South African Human Rights Commission and Another v President of the Republic of South Africa and Another.*[113]

The South African legislature has since corrected the irregularities that stem from customary law practices in relation to land governance. Section 7 of the Recognition of Customary Marriages Act 120 1998 states that:

> '…(1) The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law;(2) A customary marriage entered into after the commencement of the Act in which a spouse is not a partner in any other existing customary marriage, a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses is an ante nuptial contract which regulates the matrimonial property system of their marriage…'[114]

This section was equally declared unconstitutional as it unfairly excluded mothers from ownership of the deceased estate in *Gumede v President of South Africa.*[115] Subsequently, in *Ramuhovhi and Others v President of the Republic of South Africa and Others*,[116] the court also considered the provisions of section 7 (1). It concluded that the provision was discriminatory based on gender, race and ethnic or social origin and that it promotes inequality in polygamous marriages between husbands and wives.[117]

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111 *Bhe v Magistrate Khayelitsha and Others para 95 - 97.*

112 *Shibi v Sithole (2005) 1 SA 580 (CC).*

113 *South African Human Rights Commission and Another v President of the RSA and Another (2005) 1 BCLR 1 (CC).*

114 Section 7 of the Recognition of Customary Marriages Act 120 of 1998.

115 *(2009) 3 BCLR 243 (CC).*

116 (2017) ZACC 41.

117 *Ramuhovhi and Others v President of the Republic of South Africa and others (2017) ZACC 41.*

It appears that various challenges women faced in practice regarding equal rights to access, control and own property in this context of land are also encouraged by legislation to some extent. In this light, the legislature drafted the provisions of the Recognition of Customary Marriages Amendment Bill to amend section 7.[118] It aims to address the issues arising from section 7 of the Act, such as unfair discrimination against women.[119]

The interpretation of section 7 of the Recognition of Customary Marriages Act adversely demonstrates consequences to those who entered customary-related monogamous marriages or marriages in community of property. For example, in practice, women's rights to land were not fully realised, although they had certain land rights. It is imperative to state that section 7 of the Recognition of Customary Marriages Act was perpetuated by patriarchy, where men are regarded as superior to women. In the case of *Mayelane v Ngwenyama and Minister for Home Affairs*,[120] the judgment rendered by the courts poses implications for women's rights to access, control and own land as well as other resources in marriage, thus, people who are married in terms of customary marriages must be treated equally and with human dignity.[121]

The power to expropriate is granted by international law based on specific requirements and conditions that have to be lawful.[122] The South African constitution has provisions on expropriation embedded in it, in that the state can exercise its powers by restitution, redistribution and tenure reform to balance land ownership.[123]

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118 Mathebula S 'A Victory for women in customary marriages' 2019 http://www.africanlii.org (date of Use 30 April 2020).

119 Recognition of Customary Marriages Amendment Bill of 2019.

120 2013 4 SA 415 (CC).

121 *Himonga and Popo 'Mayelane v Ngwenyama and Minister for Home Affairs: a reflection on wider Implications' (Claassens & Smythe 2013) 318.*

122 Kwarteng Abdul Hamid and Botchway Thomas State responsibility and the question of expropriation: A preliminary to the land expropriation without compensation policy in South Africa. *Journal of politics and law* (2019) 12- 98.

123 Boone C Property and constitutional order: land tenure reform and the future of the African state (Oxford University Press 2007) 557 – 586.

Section 25 of the South African Constitution allows expropriation without compensation of property by the state, but at the same time, redistribution of land is reduced in momentum as it also protects property rights.[124]

Parliament failed to pass an amendment to section 25 which aimed to consider land expropriation without compensation.[125] The Expropriation Bill proposes that 'A court may, where land and any improvements thereon are expropriated for land reform, determine that the amount of compensation is nil'.[126] The Bill confers the ministers with powers to expropriate land when there is a need to do so in accordance with the public interest.[127] This, however, is subject to an investigation to determine the feasibility of expropriating the land in question.[128]

1.4.2 Zambian law

After the post-colonisation period in Zambia, the English legal system was adopted and continues to exist in large portions of the legislation. The English legal system comprises equity and common law that was forced in 1911. Just as is the case in South Africa, the Zambian Constitution enjoys supremacy over all other pieces of legislation.[129] Article 1 expressly recognises and affirms the supremacy of the Zambian Constitution in Customary Law and customary practices.[130] The Constitution also provides for the expropriation of land in public interest. Article 16 expressly regulates the shield of deprivation of land.[131]

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124 Section 25 of the Constitution of the Republic of South Africa, 1996; Land Expropriation Bill of 2019.

125 Land Expropriation Bill of 2019.

126 Constitution Eighteenth Amendment Bill of the Republic of South Africa.

127 Section 3 of the Land Expropriation Bill of 2019.

128 Section 5 of the Land Expropriation Bill of 2019.

129 Constitution of the Republic of Zambia 1996; Article 1 of the Zambia's Constitution of 1991 with Amendment through 2016 (Hereinafter referred to as the Zambian amended Constitution of 1991).

130 Article 1(1) of the Zambian amended Constitution of 1991.

131 Article 1(1) of the Zambian amended Constitution of 1991.

The Zambian Constitution provides for the creation of land commissions, which are conferred with powers to alienate properties.[132] Legal pluralism is incorporated into the legal systems or reflected in the Zambian statutes.[133]

Customary law in Zambia is incorporated into legislation and case law, and substantive customary law is unwritten but practised for decades in various rural areas.[134] Legal pluralism asserts that equality is not immediately guaranteed by the mere co-existence of diverse systems. [135] Marxian draws attention to the significance of a just society that disregards inequality.[136]

Customary land tenure was also made inferior by bringing policies and legislation into force. In the case of *Kamiki v Jairus,* [137] it was affirmed by the court that customary law could only be recognised to the extent that it is not repugnant to natural justice, a good conscience, equity or any written law.[138] In the case of *Mumba v The people,* [139] the court emphasised the fact that laws that are inconsistent with the Constitution are *null and void.*[140] Land governance can be affected by the quality of its dispensation and land-related management. Weak land governance systems in all government spheres affect how power is distributed, thereby exacerbating land-related challenges in society[141.]

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132 Article 233 of the Zambian amended Constitution of 1991.

133 Phiri D Chu J *Large-scale land acquisitions in Zambia evidence to inform policy* (Paper delivered at the world bank land and poverty conference Washington D.C 2015); Cotula L *et al. Land grab or development opportunity? agriculture investment and international land deals in Africa* 1st ed (Food and Agriculture Organisation IIED IFAD, London Rome 2009).

134 Food and Agriculture Organisation *Land tenure and rural development* 2002 Rome Batterbury SP *et al* 'Land grabbing in Africa' *the Routledge handbook of Africa development* 2018. p. 573 - 582.

135 Rautenbach C *Introduction to Legal Pluralism in South Africa* 5 -16.

155 Manji A '' Land reform in the shadow of the state implementation of new land laws in Sub Saharan Africa'' *the world quarterly* Vol 22 No. 3 2001 327-342.

137 *(1967) ZR 71.*

138 *Kamiki v Jairus (1967) 71.*

139 (1984) ZR 38.

140 *Mumba v The people (1984) ZR 38.*

141 Land governance assessment framework: South Africa country report 2013.

Land governance related challenges are mainly complex and require an overhaul and in-depth analysis by looking into the broader tenure and respective jurisdictions. In the case of *Zambia Building and Civil Engineering and Contractors Limited v Georgopoulos*,[142] the court held that statutes that regulate fraud show that an agreement does not necessarily have to be in writing as long as all material terms of a contract are present.[143] The fraud-related statutes' provisions were interpreted differently in other cases and brought about confusion.[144]

However, some share that land agreements can be either oral or written.[145] If the agreements are orally decided, it is important to note that they satisfy the requirements stipulated in the statute of frauds or equity to be valid.[146] Reinforcing distinctions between reform design and reform implementation so that reformers utilize new information is key to land governance.[147]

1.5 Purpose of Research

This dissertation explores and interrogates the existing land governance legal challenges in South Africa and Zambia within the context of customary law. This is due to observations made that demonstrate that the current statutes, such as the South African Recognition of Customary Marriages Amendment Bill of 2019 and Zambia's Lands Act of 1995, do not expressly address the gaps that have been identified. While laudable efforts have been made to uphold and realise the land and resource rights of poor rural populations, many longstanding challenges remain unresolved. This dissertation examines land tenure-related issues intertwined with land governance from a customary law perspective.

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142 *Zambia Building and Civil Engineering and Contractors Limited v Georgopoullos (1972) ZR 228.*

143 *Zambia Building and Civil Engineering and Contractors Limited v Georgopoullos (1972) ZR 228.*

144 *Steadman v Steadman 1974 2 ALL .ER 977.*

145 *Krige and Another v Christian Council of Zambia 1975 ZR 152*

146 *Mijoni v Zambia Publishing Company Limited 1986 ZR Appeal No. 10*.

147 Palmer D *et al* 'Towards improving land governance' (2009) Land Tenure Working Paper 11 12 - 15.

This dissertation also refers to definitions of what constitutes property and uses them to understand the diversity of land tenure regimes within the context of customary law and how they provide for the vestment of property rights.

Furthermore, this dissertation focuses on addressing the inadequate legal recognition of the strength of rights to land and natural resources derived from customary law and the recognition of secure land rights of holders in law and practice. Land governance in the customary law context has been a topical issue in South Africa and Zambia. Several factors have instigated discussions on the importance of development and equity of land governance in the customary law context in Africa. This is because there is an increasing demand for land either by foreign investors or government-to-government partnerships on the African continent, yet, the citizens need land to be allocated to them by traditional leaders in rural areas. Therefore, this dissertation aims to close the gaps in land governance complexities in customary law.

1.6 Research Question

The research question is, are the current statutes in land sufficiently addressing legal complexities and customary land governance in South Africa and Zambia?

1.7 Methodology

The research will be guided by an analysis of various literature sources in South Africa and Zambia, including pieces of legislation, international and regional instruments, case law, textbooks, articles, thesis/dissertations, research reports and media sources.

A comparative methodology of literature will be used to put together investigative results and provide a prescriptive framework for land governance in South Africa and Zambia. This will provide insight and draw best practices between the two legal systems.

1.8 Overview of Chapters

1.8.1 Chapter One

This introduces the nub of the study, and it will show areas where there is a gap, which warrants an amendment in the current law.

1.8.2 Chapter Two

The second chapter discusses land-relevant legislation and policies applicable to land governance in South Africa within the context of customary law.

1.8.3 Chapter Three

This chapter will discuss land-relevant legislation and policies applicable to land governance in customary law in Zambia, as well as the approach followed by the Zambian courts.

1.8.4 Chapter Four

This chapter looks at the similarities and differences in law in customary land governance in South Africa and Zambia.

1.8.5 Chapter Five

This chapter provides a final conclusion and highlights the recommendations that will assist the legislature and the courts to correct and cure the gaps that are identified in this thesis.

CHAPTER 2: AN ANALOGY OF LEGISLATION AND POLICIES APPLICABLE TO LAND GOVERNANCE IN SOUTH AFRICA WITHIN THE CONTEXT OF CUSTOMARY LAW

2.1 Introduction

This chapter analyses laws, policies, court decisions and practices that influence the indigenous South African's access, ownership and control of customary land. A comprehensive historical perspective through the law is equally highlighted to show the evolution of customary land tenure and how it has been impacted. South Africa's land reform post-apartheid was thus based on repealing laws, policies, and practices and attempting to address the initiated inequalities and injustices imposed by apartheid.[148] Addressing these challenges aimed at encouraging indigenous people to enjoy land-related rights without discrimination. In this regard, South Africa's customary land tenure is analysed with specific reference to the law by principally describing the reaction of the law towards this regime.

This chapter further highlights significant measures promulgated to limit indigenous people's access, ownership and control of their customary land. Indigenous South Africans, since time immemorial, have had an intrinsic relationship with land as a natural condition of production. Land is a symbol of status and identity and not just an important resource for sustainable livelihoods through agriculture.[149] Land is also associated with spiritual, cultural, and social meanings and connections.[150] Therefore, customary law poses serious complexities, such as tenure security in the governance of land.

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148 Kloppers H, Pienaar G J 'The historical context of land reform in South Africa and early policies '2014 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 585-665.

149 Vermu R 'Without land you are nobody critical dimensions of women's access to land and relations in tenure in East Africa' 2007 *IDRC Scoping study for East Africa on women's access and rights to land and gender relations in tenure.*

150 Dannenmaier E 'Beyond indigenous property rights: exploring the emergence of a distinctive connection doctrine' 2008 *Washington University Law Review* 101.

Land held by indigenous South Africans has been subjected to involuntary vulnerabilities such as loss of land that is un-farmed or unsettled. For a long time, individual ownership of land was generally foreign to African customary tenure as indigenous people believed that land ought to be owned collectively. Other scholars argued that customary land tenure should not be compulsorily subjected to such an individualised system of ownership, which alters the nature of its existence to the people that conform to it.[151] The customary legal system in South Africa as in other African countries existed prior to colonisation. Although, it underwent various stages of recognition during apartheid up to the creation of the South African Constitution of 1996.[152]

2.2 Background

Historically, customary law is dynamic and continues to manifest in today's traditional and cultural practices.[153] Customary law in South Africa has evolved distinctively through colonisation, apartheid and constitutional democracy eras. During colonisation, Dutch settlers from the Netherlands administered Roman-Dutch Law in South Africa, and indigenous customary law was essentially not recognised during this period.[154] Customary law only began to receive the attention of recognition after the British settlers had taken over the Cape territory from the Dutch permanently in 1814.[155] Customary law recognition was first attempted in the Natal Code of 1878, amended in 1891 by the Natal Code of Native Law.[156]

However, these attempts at recognition and codification were primarily fragmental, as they apparently failed to address the dynamic existence of customary law. Nevertheless, they provided good foundational concepts for customary recognition.

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151 Shipton P and Goheen M 'Understanding African land-holding power wealth and meaning' 1992 *Journal of the International African Institute* 307- 308.

152 Wall D 'Customary law in South Africa: Historical development as a legal system and its relation to women's rights' https://www.sahistory.org.za/article/customary-law-south-africa-historical-development-legal-system-and-its-relation-womens (Date of use: 15th June 2015).

153 Bennett T W 'Re-introducing African customary law to the South African legal system' 2009 *The American Journal of Comparative Law Oxford University Press* 1–31.

154 Rautenbach C et al *Introduction to Legal Pluralism in South Africa* (LexisNexis Durban 2018).

155 Dugard J 'Unpacking Section 25: Is South Africa's property clause an obstacle or engine for socio- economic transformation?' 2018 *Southern African Journal on Human Rights* 33-56.

156 Native Lands Act of the Republic of South Africa, 1913

Although this recognition was conditional as it was given with a repugnancy clause and later improved with amendments, customary law was recognised in so far as it was not in conflict with morality and justice and did not come into discord with the written law.[157]

Customary law principles embedded in the Natal Code of 1878 included the rule of primogeniture, subjudication of children to the heads of the family, such as their fathers and control of women. [158] This rule was subsequently declared unconstitutional by the Constitutional Court in the case of *Bhe*.[159]

2.3 South African Statutes on Customary Land Tenure

This section provides highlights of land-related historical laws that encouraged discrimination through racial and territorial segregation. The essence of racially segregated laws was to limit the rights of indigenous black South Africans and encourage that they remain perpetual tenants.[160]

2.3.1 The Native Lands Act 27 of 1913

The first steps to formalise racial segregation were embedded in the Natives Land Act 27 of 1913.[161] This Act encouraged territorial segregation through provisions embedded in it that promoted racial exclusion in land acquisition and ownership, thereby posing a land-holding barrier between natives and non-natives.[162]

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157 Ndulo M *African customary law customs and women's rights* (Cornell Law Faculty Publications 2011)

158 McClendon T V 'Traditional and domestic struggle in the courtroom: customary law and the control of women in segregation- era Natal' 1995 *The International Journal of African Historical Studies* 527-561.

159 *Bhe v Khayelitsha Magistrate 2005 1 BCLR 1 (CC)*

160 Claxton H 'Land and liberation: Lessons for the creation of effective land reform policy in South Africa' 2003 *Michigan Journal of Race and Law* 538.

161 Kloppers H, Pienaar G J 'The historical context of land reform in South Africa and early policies '2014 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 585-665.

162 Kloppers H, Pienaar G J 'The historical context of land reform in South Africa and early policies '2014 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 585-665.

One of the provisions within this Act that introduced racial segregation is section 1(1), which states that:

> Except with the approval of the Governor-General –
> a native shall not enter into any agreement or transaction for the purchase, hire, or other acquisition from a person other than a native, of any such land or of any right thereto, interest therein, or servitude there over; and a person other than a native shall not enter into any agreement or transaction for the purchase, hire, or other acquisition from a native of any such land or of any right thereto, interest therein, or servitude there over.[163]

The wording of this Act proves that legislation aimed at encouraging territorial segregation on the grounds of race, as the natives were expressly prohibited from acquiring or owning land. This created a legal barrier between non-blacks and black natives who are the Indigenous people. Furthermore, the territorial segregation agenda was pushed under section 1(2) of the Native Land Act 27 of 1913 in that:

> From and after the commencement of this Act, no person other than a native shall purchase, hire or in any other manner whatever acquire any land in a scheduled native area or enter into any agreement or transaction for the purchase, hire or other acquisition, direct or indirect, of any such land or of any right thereto or interest therein or servitude there over, except with the approval of the Governor-General.[164]

This Act established the commission to identify areas where black people would be prohibited from accessing or acquiring land. These provisions also excluded natives from accessing or acquiring any interest in land in areas where only black people were permitted, and any contravention of this Act and its provisions were punishable with imprisonment.[165] This Act also prohibited sharecropping contracts between native black farmers and white landowners. This led native black farmers to experience economic hardship and difficulties in sustaining livelihoods as they had lost some of their income.[166]

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163 Native Lands Act of the Republic of South Africa, 1913

164 Native Lands Act of the Republic of South Africa, 1913

165 Native Lands Act of the Republic of South Africa, 1913

166 Davenport T 'Some reflections on the history of land tenure in South Africa seen in the light of attempts by the State to impose political and economic control' 1985 *Acta Juridica* 53-76.

In the case of the *Richtersveld* saga, a land claim was instituted in a Land Claims Court based on the following grounds: (i) A right to land ownership (ii) Rights that enabled natives to exclusively use their land and benefit from its occupation. (iii) Rights to land they acquired by virtue of occupying it for a long period of time before they were dispossessed.

The Land Claims Court held that the Richtersveld community, for purposes of the Restitution of Land Rights Act 22 of 1994, was considered. Thereby, rejected the claim of dispossession based on discriminatory racial laws and practices but that the plaintiffs were dispossessed for purposes of mining. An appeal was filed in the Supreme Court of Appeal (SCA) which held that the Ricthersveld had rights that constituted customary law interests in land due to the discovery of diamonds. The Constitutional Court in the case of *Alexkor Ltd v Richtersveld Community* held that the Natives Land Act 27 of 1913 discriminated against South Africa's black people by depriving them of their right to own land and their subsequent interests in land.[167]

2.3.2 The Native Trust and Lands Act 18 of 1936

Trust land administration in South Africa was established by the Native Trust and Lands Act 18 of 1936. The Act gave powers of trust land administration to a state agency to handle the settlement, support, benefit, and material welfare of the natives of the union.[168] The Act also gave the Native Trust the power to reserve land for natives' occupation in prescribed native areas. This Act introduced a government institution responsible for land purchase in black settlement released areas known as the South African Development Trust.[169]

Funds were used to utilize and develop the land of the Trust to advance the social wellbeing of the natives residing on Trust Land. Section 13 of the Act gave powers to the Trust to expropriate land of natives that fell outside the scheduled native areas for grounds of public interest purposes.

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167 *Alexkor Ltd v Richtersveld Community 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003).*

168 Natives Trust and Land Act of the Republic of South Africa, 1936.

169 Robinson L 'Rationales for rural land redistribution in South Africa' 1997 *Brooklyn J International Law Journal* 465-50.

Expropriation compensation was determined by the fair market value of the land without any improvements, plus the value of the necessary or useful improvements, plus the value of luxurious improvements, plus a sum of compensation for inconvenience.[170] To this end, this Act was used as a tool to promote racial and territorial segregation. The Native Trust and Lands Act 13 of 1936 disadvantaged indigenous South Africans of their land rights to acquire, own or live outside the scheduled native areas.

2.3.3 The Group Areas Act 41 of 1950

This piece of legislation was used to exclude black, coloured, and Indian people from areas that were designated for white people.[171] This legislation aimed to control the establishment of rights to land based on race. It disqualified persons from acquiring or owning land in areas they were not permitted in unless an authority granted such permission.[172]

This Act resulted in the discrimination and categorisation of native groups from white and coloured groups, thereby disturbing the enjoyment of land rights.[173] Such categorisation further led to the loss of assets and livelihoods by imposing a disproportionate burden on non-white communities, such as the removal of black, coloured, and Indian traders to remote areas without compensation from their customers.[174]

Before 1959 the Group Areas Board took into consideration the value of land and subsequent buildings on the land in calculating a basic value for compensation. However, the enactment of the Group Areas Development Amendment Act of 1959 brought a turn of events by laying down exceptions for buildings utilised for educational and religious purposes. The basic building value need not exceed the land market value it would have had if the buildings did not exist and the market value as an important component of the land.

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170 Natives Trust and Land Act of the Republic of South Africa, 1936.

171 Schoombee J 'Group areas legislation-The political control of ownership and occupation of land' 1985 *Acta Juridica* 77-107.

172 Group Areas Act of the Republic of South Africa,1950.

173 Group Areas Act of the Republic of south Africa, 1950.

174 Higgs B The Group Areas Act and its effects. *United Nations Centre against Apartheid* 1971.

This led non-white people to receive lesser compensation for their buildings and gave the Board discretionary powers to freely make decisions concerning buildings that were previously occupied by non- white people to be demolished as they did not meet the suitably for the whites.

Other effects that resulted from the establishment of group areas were the impoverishment of non-white people as the compensation that was paid to them was inadequate to purchase houses equivalent to the sizes of houses they had lost. The non-white areas lacked facilities such as hospitals, clinics, police, mail delivery, water and sanitation, tarred roads and streetlights.[175] Overcrowding was equally prevalent as the non-white areas had small occupations to accommodate the huge population. Further, this resulted in the establishment of controls that exclude non-white people from future development.

In 1959, the South African Institute of Peace Relations expressed disappointment in the group areas proclamations for Cape Town, Durban, Pretoria, Ermelo, Laerksdorp, White River, and Alexandria. Resistance to this Act reflected that it was important that the principles of justice, truth and humanity were considered gravely. Mr Nana Sita, during a Magistrate Court hearing in Pretoria on August 17, 1967 in his statement declared the Group Areas Act a cornerstone of an Apartheid policy and that its application is widely discriminatory in nature.[176]

2.3.4 The Group Areas Act 36 of 1966

The Group Areas Act 36 of 1966 has similarities with the Group Areas Act 41 of 1950 as they both advance racial and territorial segregation. This Act consolidated the law pertaining to the establishment of group areas as well as regulated land acquisition and control in those areas.[177] The Act, on the other hand, provided for exceptions in instances where it would not be unlawful for a person to occupy land or premises if the person is a bonafide servant or employee of the state.

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175 Higgs B The Group Areas Act and its effects. *United Nations Centre against Apartheid* 1971.

176 Higgs B The Group Areas Act and its effects 1971 *United Nations Centre against Apartheid*.

177 Mabin A 'Comprehensive segregation: The origins of the Group Areas Act and Its planning apparatuses' 1992 *Journal of Southern African Studies* 405–29.

Additionally, if such person is a *bonafide* visitor for a total of not more than ninety days in a calendar year of any person lawfully residing on the land or premises or is a bonafide scholar attending a school controlled or aided by the state. This Act was enforced by the South African Police, who were awarded excessive powers such as entering a suspected person's premises without a warrant for investigations and conducting examinations they saw necessary.[178]

2.3.5 The Black Administration Act 38 of 1927

The Black Administration Act was established to provide for better control and management of the natives' affairs. It created a dual system of law which was an inferior system for Africans. Aspects of the common law system were left to govern all South Africans.[179] The Act further appointed the President and vested him with powers to land tenure, tribes' Constitution, and traditional leaders' demotion.[180] In the case of *Mthebu v Letsela,* the court was presented with a question on whether to grant Ms Mthembu and her daughter the right to claim intestate property succession after Mr Letsela, the spouse to Ms Mthembu, was deceased.

The argument presented by the respondent was that Ms Mthembu was not married to the deceased in terms of customary law; and that the deceased's estate ought to be administered in line with the rule of male primogeniture as regulated by legislation.[181] The court showed reluctancy in making decisions concerning how indigenous black people handled succession issues such as male primogeniture regulated by the Black Administration Act 38 of 1927.[182] The Court stated that the rule of male primogeniture posed an infringement of rights and was inconsistent with the provisions of the Constitution, which is the supreme law.

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178 Mabin A 'Comprehensive Segregation: The origins of the Group Areas Act and Its planning apparatuses' 1992 *Journal of Southern African Studies* vol.18 no. 2 pp. 405–29.

179 Sibanda S 'When is the past not the past? Reflections on customary law under South Africa's constitutional dispensation' 2010 *Human Rights Brief* 31-35.

180 Black Administration Act of the Republic of South Africa, 1927.

181 *Mthembu v Letsela 2000 (3) SA 867 (SCA).*

182 Maimela C, Morudu N L 'The indigenisation of customary law: Creating an indigenous legal pluralism within the South African dispensation: possible or not?' 2021 *De Jure Law Journal* 54.

The Court, therefore, disregarded section 23 (4) of the Black Administration Act, which dealt with succession. After careful consideration, the court decided to maintain the rigidity of the legal regimes of indigenous people. In the case of *Bhe v Khayelitsha* Magistrate, the court was presented with a similar matter of male primogeniture. The Court struck down the whole legislative framework that facilitated the administration of intestate succession on male primogeniture and declared this rule unconstitutional.[183] The Court further highlighted that the rule of male primogeniture is discriminatory towards women and illegitimate children on the grounds of birth, gender and race.[184]

2.3.6 Restitution of Land Rights Act 22 of 1994

This piece of legislation was established to provide for restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 because of past racially discriminatory laws or practices. It also established a Commission on Restitution of Land Rights and a Land Claims Court.[185] South African history of apartheid reflects the brutal conquest of indigenous people's land that resulted in dispossession.

From the 1950s to the 1980s, separating indigenous South Africans through relocations, advancing racial designation of areas and promoting African groups as independent states was part of the apartheid policy agenda. The apartheid policies regarded indigenous South Africans as people with no rights, and their provisions were blind to the existence of these groups of people. However, indigenous South Africans began to resist apartheid systems in the 1970s and 1980s by intensifying their approaches, which led to a civil war in the country.

183 *Bhe v Khayelitsha Magistrate 2005 (1) BCLR 1 (CC).*

184 *Bhe v Khayelitsha Magistrate 2005 (1) BCLR 1 (CC).*

185 Restitution of Land Rights Act of the Republic of South Africa, 1994.

In 1994, negotiations commenced resulting in the enactment of the 1994 Interim Constitution, which resulted in the enactment of the 1996 Constitution. The interim Constitution, which came into force in April 1994, pointed out the need for restitution of land rights to be prescribed by an Act of Parliament. To this end, in November of 1994 the Restitution of Land Rights Act 22 of 1994 was passed.[186] The intended purpose for a restitution process is to empower Indigenous South Africans who suffered dispossession by racially discriminatory laws and practices. Through the provision of land restoration and other restitution remedies that promote reconciliation, development and reconstruction.[187]

The Restitution of Land Rights Act of 1994 defines a right to land as.

> Any right in land whether registered or unregistered and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question

Remedies for restitution are defined through policies and laws. The Restitution of Land Rights Act 22 of 1994 under section 42D (1) highlights that:

> If the Minister is satisfied that a claimant is entitled to restitution of a right in land in terms of section 2, and that the claim for such restitution was lodged not later than 31 December 1998, he or she may enter into an agreement with the parties who are interested in the claim providing for one or more of the following: (a) The award to the claimant of land, a portion of land or any other right in land : Provided that the claimant shall not be awarded land, a portion of land or a right in land dispossessed from another claimant or the latter's ascendant, unless - (i) such other claimant is or has been granted restitution of a right in land or has waived his or her right to restoration of the right in land in question; or (ii) the Minister is satisfied that satisfactory arrangements have been or will be made to grant such other claimant restitution of a right in land; (b) the payment of compensation to such claimant; (c) both an award and payment of compensation to such claimant; (e) the manner in which the rights awarded are to be held or the compensation is to be paid or held; or (f) such other terms and conditions as the Minister considers appropriate.

186 Restitution of Land Rights Act of the Republic of South Africa, 1994.

187 White paper on South African land policy department of land affairs, Pretoria 1997.

In this light, one major remedy the South African government has shown a preference for is restoring land that the indigenous people lost. In doing so, it is important to consider that rural communities' land regulated by customary practices and norms was held by groups of indigenous people in common before dispossession.

Restitution, in this case, would be awarded through a legal landholding mechanism to a group of people referred to as the Communal property Association.[188] However, it is paramount to note that restoration is not a right. Therefore, equitable redress is an alternative remedy if restoration is not feasible. This can be in the form of compensation payment, alternative land provision and priority development assistance. Groups of people claiming land jointly are often differentiated by class, gender, and generation. These differences have manifested in the contestation of the kind of decisions made and how land is to be used and managed.

For this reason, land claim settlement options should be facilitated intensively with groups claiming restitution. In the case of *Richtersveld Community v Alexcor Ltd,* the Court was presented with a matter on whether a community had land rights by raising a question on equitable redress. The Restitution of Land Rights Act provides that any person or community that faced land disposition by acts or practices that were racially discriminatory after 1913 had the right to lodge a claim for restitution. Therefore, to be successful in such a claim, the community needed to show customary law title to the land. The Lands Claims Court considered ascertaining whether the community could be classified as land owners. It was, therefore, clear in this case that the coloniser’s never classified indigenous communities as owners of the land nor their ability to have rights to land.

The Court recognised a community for purposes of the Act and highlighted that the reason for the land deprivation was for the exploration and mining of diamonds, thereby rejecting the claim and ownership.[189]

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188 Communal Property Association Act of the Republic of South Africa, 1996.

189 *Richtersveld Community v Alexcor Ltd 2001 (3) SA 1293 (LCC).*

The Land Claims Court's interpretation of what indigenous people consider the title to land could reflect a customary law interest, which could reflect a right to land in terms of the Restitution Act so long as the customary law was applicable. To this end, it was not proved that a custom existed before dispossession. Given the Lands Claim's Court decision, the plaintiffs appealed the matter before the Supreme Court of Appeal.

The Supreme Court of Appeal established that the Richtersveld community enjoyed exclusive rights to occupy the land for a long period without any disturbances. Their rights to land were derived from their traditional laws and customs, and they were reasonable and certain, respected and observed. This acknowledgement by the Court was beneficial in recognition of customary land rights. It also found that customary law is a source of law and that the Richtersveld community was dispossessed based on racially discriminatory practices. In addition, the Bakgatla case involved an application to transfer farmland to the Bakgatla-Ba-Sesfilkile under the Bakgatla tribe and it was alleged that the land was bought and held in trust by the Chief of the tribe.

In this case, it was established that ascertaining the rights communities have should not be through foreign legal conceptions and that reliance on authorities from textbooks to ascertain rights should be avoided.[190] The Court dismissed the application in that the farm could not be transferred under an association into the applicant's name. This case reveals the fact that the courts often rely on title deeds as an entry point to ascertain rights to land. Despite the applicant's efforts to show that they had land rights based on customary law, the Court found their argument inadequate and failed to acknowledge how evidence is often presented in a customary setting.[191]

Restitution in South Africa has faced major challenges: the slowing down of land restoration cases because of legal constraints of land acquisition, which promote the concept of willing buyer and seller, thereby increasing costs.

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190 *Bakhatla Basesfikile Community Development Association obo Descendents of Molefe Molemi and Others v Bakgatla ba Kgafela Tribal Authority and Others 2011 ZANWHC (66) 31.*

191 Du Plessis, E Frantz G 'African customary land rights in a private ownership paradigm' *2011 Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 7.

The Restitution of Land Rights Amendment Bill of 2003 addresses this problem by suggesting amendments to the current Restitution of Land Rights Act 22 of 1994 by proposing that the minister should be given powers to substantially expropriate land.[192] In 2014 the Restitution of Land rights Amendment Act 15 was passed.

This was after the Restitution of Land Rights Act of 1994 was declared unconstitutional in the Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others.[193] Furthermore, the case of *Florence v Government of the Republic of South Africa* reveals shortcomings considering compensation in that the land in question was developed into a shopping complex and parking lot after dispossession. The Constitutional Court struggled with how compensation ought to be calculated for the claimants.

To this end, the court developed a formula for compensation in this case. However, an argument of equitable redress was raised as the market value for the property at the time of assessment was ten times higher. The assumption was that, had the claimants not been disposed of, the question that arose was whether they would have developed the land in the same way. The judgement posed a complex puzzle on restitution in the form of financial compensation and the value of restitution in the form of restoration.[194]

2.3.7 Communal Property Associations Act 28 of 1996

This Act was enacted to allow the formation of communal property associations by communities to acquire, hold and manage property within a transparent, equal and democratic framework.[195] The Communal Property Association Act 28 of 1996 was established to create control frameworks and land redistribution.[196]

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192 Restitution of Land Rights Amendment Bill of the Republic of South Africa, 2003.

193 Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC

194 Dugard J 'Unpacking section 25: Is South Africa's property clause an obstacle or engine for socio- economic transformation?' 2018 *Southern African Journal on Human Rights* 33-56.

195 Jacobs P J 'Tenure Security under the communal property association Act 28 of 1996: An analysis of establishment and management procedures with comparative reference to the sectional titles Act 95 of 1986' 2011 *University of Cape Town.*

196 Mostert *Diversification in Modern studies in Property Law* (Hart Publishing 2002)

Other systems and interventions did not consider the native communities' preference for communal landholding. Land held communally by communities reflects varying interests and social identities, and statuses.[197] Static law which is not flexible does not consider the reasons why historically communities held and managed land communally.[198]

The courts established an approach to interpret community for purposes of restitution. In the case of *Department of Land Affairs, Popela Community v Goedgelegen Tropical Fruits,* it was held that a community that has been dispossessed must comprise of sufficient persons to reflect its existence. The Communal Property Associations Act 28 of 1996 has often been found insufficient to deal with matters that arise from customary law with regard to land such as tenure security, structure, and protection of land rights.[199] Private land ownership in South Africa introduced during colonisation has significantly hampered the implementation of this Act which promotes communal land holding.

2.3.8 The Recognition of Customary Marriages Act 120 of 1998

This statute repealed the Black Administration Act of 1927, which provided that women were minors and under the guardianship of their husbands. This law reflected patriarchal views, which were discriminatory towards women in property ownership, and the income that women earned was accrued to their husbands.[200] To remedy the challenges that were enhanced by the Black Administration Act of 127, the Recognition of Customary Marriages Act 120 of 1998 was established. It provides that women have the right to own, alienate or burden property in a customary marriage.

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197 Jacobs P J 'Tenure Security under the communal property association Act 28 of 1996: An analysis of establishment and management procedures with comparative reference to the sectional titles Act 95 of 1986' 2011 *University of Cape Town.*

198 Barry M 'Land restitution and communal property associations: The Elandskloof case' 28. 2010 *Land Use Policy* 139.

199 Jacobs J 'Tenure security under the communal property association act 28 of 1996- An analysis of establishment and management procedures with comparative reference to the sectional titles act 95 of 1986' 2011 *University of Cape Town*

200 Beninger C 'Women's property rights under customary law' 2010 *Womens Legal Center*

Section 7 states that.

> 7. (1) The proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law.
> (2) A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an ante-nuptial contract which regulates the matrimonial property system of their marriages. Chapter III and sections 18, 19. 20 and 24 of Chapter IV of the Matrimonial Property Act. (Act No. 88 of 19&I), apply in respect of any customary marriage which is in community of property as contemplated in subsection (2).
> (4) (a) Spouses in a customary marriage entered into before the commencement of this Act may apply to a court jointly for leave to change the matrimonial property system which applies to their marriage or marriages and the court may, if satisfied that-
> (i) there are sound reasons for the proposed change;
> (ii) sufficient written notice of the proposed change has been given to all creditors of the spouses for amounts exceeding R500 or such amount as may be determined by the Minister of Justice by notice in the Gazette; and
> (iii) no other person will be prejudiced by the proposed change,
> order that the matrimonial property system applicable to such marriage or marriages will no longer apply and authorize the parties to such marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages will be regulated on conditions determined by the court.

The above-stated section predominately applies to men as it explicitly refers to a husband(s). Although the entire section 7 was enacted to protect all parties to a marriage especially women, statistics reveal that indigent people are a majority in customary marriages and court systems are often inaccessible to them thereby rendering the provision in effective.

Additionally, the provision does not provide guidance on consequences that would arise if there is non-compliance neither does it render a marriage void. However, in the case of *Gumede v The President of the Republic of South Africa* an applicant alleged that her marriage was concluded before the commencement of this Act and requested the Act to apply the provision in retrospect. However, the Court concluded that the Recognition of Customary Marriages Act 120 of 1998 only applied to marriages that were entered into after its enactment.[201] It proposed that the section 7 of the Act be amended by the legislature to address issues of discrimination from customary law succession.[202]

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201 Recognition of Customary Marriages Act of the Republic of South Africa of 1998.

202 Gumede v the President of the Republic of South Africa 2009 (3) SA 152.

In the case of *Rahube v Rahube* the High Court held that the Upgrading Act sought to recognise land tenure rights that were acquired under discriminatory practices. The High Court further ruled that the Upgrading Act excluded women from acquiring ownership rights and that it did not provide adequate remedies upon which aggrieved persons could have their disputes resolved in a competent court.[203] The researcher suggests that section 7 should be amended to cater for wives of the deceased and the right to acquire land in terms of the customary law practices should be automatic, unless there is a dispute. In that case, a Court should be approached to amend the proprietary rights.

2.4 South African Legal framework

The South African legal system comprises of hybrid principles from Roman-Dutch, English law and customary norms and practices. This section significantly provides a review of South Africa's customary land reform. By highlighting the discriminatory laws and practices post-colonisation and during apartheid and those that have continued to impact customary land tenure.

2.4.1 Interim Constitution

The South African Interim Constitution had a property clause proposed to be embedded in it as section 28.[204] Section 28 was centred on adequately protecting property rights through the Bill of Rights and preventing any future injustices such as those posed by apartheid.[205] The other aim of section 28 was to solidify a basis upon which legislative programmes that facilitate reconstruction and restoration of rural areas were to be established.[206]

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203 *Rahube v Rahube and Others* 2018 ZACC 42

204 Section 28 of the Interim Constitution.

205 Section 28 of the Interim Constitution.

206 Chaskalson M Stumbling towards section 28: negotiations over the protection of property rights in the interim Constitution 2017 *SAJHR* 222-240.

Section 28 stated that:

> (1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such right (2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.(3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.

The interpretation of the above provision demonstrates that the same is mandatory to include the right to hold property that is entrenched in customary law and land governance policies. However, the section above received a lot of debate and criticism. Critics of this property provision asserted that incorporating it in the Constitution would create a problem threatening the vision of developing a lasting resolution for South Africa. It was also argued that incorporating a property clause in the Constitution would also freeze existing rights and prevent reform.

After extensive debates a compromise was reached and section 28 was later incorporated into the Interim Constitution.[207] Section 28 provided that property that is expropriated for public purposes should attract just and equitable compensation.[208] Subsequently, sections 121,122 and 123 were incorporated in the Interim Constitution to facilitate the drafting of laws that regulate the process of restitution, establish a Commission on the Restitution of Land Rights and an adjudication process through the courts of law[209]. The Restitution of Land Rights Act 22 of 1994 was enacted and it established a restitution programme and the Land Claims Court. In 1997 the current Constitution referred to as the final and supreme law in South Africa replaced the Interim Constitution and section 28 of the Interim Constitution was also replaced by section 25.

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207 Ntsebeza Land redistribution in South Africa: the property clause revisited" in Ntsebeza and Hall (eds.) 2007 *The land question in South Africa*110-111.

208 Section 28 of the Constitution 1994 SAJHR 131-141.

209 Miller D L C, Pope A 'South African land reform' 2000 *Journal of African Law* 167-194

2.4.2 The Constitution of the Republic of South Africa

The Constitution is “supreme law” and is embedded with an important provision in section 2. Section 2 provides that law or conduct inconsistent with it is invalid, and its obligations must be fulfilled. This provision equally applies to customary law. Discriminatory customary practices such as the rule of male primogeniture discussed in the *Bhe* case that excluded women from inheriting property were declared inconsistent based on section 2. Section 8 of the Constitution provides for the application of the Bill of Rights. It states:

> (1)The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
> (2)A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right;
> (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court (a) in order to give effect to a right in the Bill, must apply, or if necessary develop the common law to the extent that legislation does not give effect to to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1); and
> (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

Although the recognition of customary law in the Constitution is commendable, section 8 shows that the Constitution advances the principles of common law over those of customary law. The limitations posed by section 8 in the development of customary law raise concerns regarding its protection in the Constitution. In the case of *Carmichele v Minister of Safety and Security,* it was held that section 8 applies to all laws, including customary law. Section 8 reflects the apartheid system, which considered customary law subordinate to statutory law.

The Constitution, in its preamble, provides a foundation for a democratic and open society and that everyone is equal before the law and protected. Equality is therefore protected under section 9 of the Constitution. It states that:

> (1) 'everyone is equal before the law and has the right to equal protection and benefit of the law.
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

For example, it is imperative to construe the provision in light of land governance in terms of customary law. The provision illustrates that there should not be discrimination in land governance within the context of customary law. If there is, it must be justifiable in terms of section 36 of the Constitution. Further, the Harksen test should be applied when there are cases of unfair discrimination. The Constitution strives to bring about transformative principles in land governance through provisions embedded in it. Therefore, the Court's substantive analysis of Section 25 of the South African Constitution has often been related to social, cultural and economic rights in that the state can significantly engage in the redistribution of property. Section 25 of the Constitution mainly highlights obligations to racial justice and land reform.[210]

> 'Section 25 (1) provides that; no person 'may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'

This stipulation affirms the provisions of section 28 of the Interim Constitution because they both seek to preclude individuals from being deprived of property.

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210 Constitution of the Republic of South Africa, 1996.

In the case of *First National Bank SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank SA Limited t/a Wesbank v Minister of Finance 2002*.[211] Section 25 (1) was criticised in that it negatively establishes the protection of property as opposed to expressly granting land rights.[212] This provision protects indigenous South African landowners who are historically advantaged and disadvantaged. Therefore, interpretation of this provision is categorised into two key observations namely expropriation and deprivation. Deprivation in the South African context relates to uncompensated restrictions on property exploitation, use and enjoyment.[213]

Deprivation often does not attract compensation when benefits reciprocate. Landowners are affected equally when it is eminent for public purposes.[214] However, in incidences were deprivation disadvantages the property holder grossly, it can be declared unconstitutional.[215] Conversely, expropriation results in compensation and often targets earmarked property for public interest and benefits.[216] The validity of expropriation is evaluated against its consequences and whether it has been executed in line with authorising legislation.[217] The Court unpacked the observations between expropriation and deprivation by interpreting expropriation narrowly and deprivation widely.[218] This approach was noted to be progressive in the case of *Arun Property Development (Pty) Ltd. v City of Cape Town* in light of compensating landowners.[219]

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211 *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance 2002 (4) SA 768; 2002 (7) BCLR 702*

212 *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance 2002 (4) SA 768; 2002 (7) BCLR 702*

213 AJ van der Walt Property and Constitution 23–24.

214 AJ van der Walt Property and Constitution 23–24.

215 Constitution of the Republic of South Africa, 1996.

216 AJ van der Walt Property and Constitution 23–24.

217 AJ van der Walt Property and Constitution 23–24.

218 AJ van der Walt Property and Constitution 23–24.

219 *Arun Property Development (Pty) Ltd. v City of Cape Town 2015 (2) SA 584 (CC).*

The other observation by the courts is that landowners are not completely exempted from deprivation of their land rights as property rights are often balanced against other constitutional rights, namely the right of unlawful occupier to property. This will not directly comprise arbitral deprivation to the *bona-fide* owner in the *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another case*. An application was made to the court to evict 86 unlawful occupiers who comprised people with no alternative accommodation. Although the property owner had the right to develop the property, it was not the property owner's concern to provide alternative accommodation to the unlawful occupier.

However, such rights should be interpreted considering the context that displacement must be just and equitable.[220] However, the court ruled that the property owner should exercise patience as the municipality looked for alternative accommodation for the 86 people who were facing displacement. Given this background, constitutional protection and arbitral deprivation of property should be understood in light of their historical context.

Section 25 (2) provides that:

> 'Property may be expropriated only in terms of law of general application (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.'

This stipulation fetters the right not to be deprived of property. The question is, is this limitation justifiable? This question is answered with reference to case law.

For example, in the case of *Msiza v Director -General, Department of Rural Development and Land Reform and Others*.[221] The Court established that section 25 (3) considering public interest, ignites the right to award that compensation is below the market value.

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220 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another.*

221 *Msiza v Director-General for the Department of Rural Development and Land Reform and Others 2016 (5) SA 513 (LCC).*

Therefore, Section 25 (3) relates to just and equitable compensation and not market value compensation.[222] Mainly because, the determination of compensation is not only focused on market value alone as there are other factors that are taken into consideration such as renovations made on the property in question, which had increased the market value of the such property should be considered as well when awarding compensation.[223] The construction of this provision shows that the legislature intended to promote justice.

In the Harvey case, it was established that at the point of expropriation carried out in a just and equitable manner. Compensation can be determined later by the Court or by those affected.[224]

Section 25 (5) of the constitution provides that:

> *''*reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.''

The significance of this provision is that it introduced land redistribution and the importance of a land redistribution programme.

Furthermore, Section 25 (6) states that:

> ''A person or community whose tenure of land is legally insecure because of past racially discriminatory laws or practices is entitled to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.''

This provision introduced tenure security for indigenous South Africans who were disadvantaged because of race. Section 25 (5) and (6) provides authorisation for the state to advance land access and tenure security programmes. The key pieces of legislation strengthening these provisions are the Provision of Land and Assistance Act 126 of 1993 and the Labour Tenants Act 3 of 1996. These provisions obligate the state to advance land expropriation and restitution in relation to land ownership and security of tenure.

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222 *De Villiers v Stadsraad van Mamelodi 1995 (4) SA 347 (T) 35.*

223 Expropriation Bill of the Republic of South Africa, 2020.

224 *Harvey v Umhlatuze Municipality 2011 (1) SA 601 (KZP).*

Furthermore, Section 25(7) of the Constitution provides that:

> 'A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.'

This section provides for restitution for those whose properties were dispossessed. The Constitution also directs establishing a Commission on Restitution of Land Rights. The role of this commission is to receive, investigate, and settle disputes through mediation and report unsettled claims to the courts.[225] However, the implementation of land restitution has posed complexities over the years in the land reform processes with very little success. The failures of restitution relate to how the judiciary has been interpreting subsection 7 and the implementation of the Land Claims Commission provision, which has resulted in prolonged restitution processes.[226]

In *Government of the Republic of South Africa v Grootboom*, the Court ruled in favour of settlers that everyone has a right to access adequate housing. The Courts established that there is a connection between the right to access land and the right to access adequate housing. The Judge subsequently pointed out that 'rights must be understood in their social and historical context'.[227] Despite attempts of section 25 to balance competing interests, it still creates complexities that are substantive and raises conflicts.[228]

Tensions created by section 25 were highlighted in the case of *Port Elizabeth Municipality v Various Occupiers,* where the court held that:

> Although the constitution confers rights to the people, it also provides under section 36 that rights can be limited. In light of this the underlying concern is whether section 25 can be seen as a provision that guarantees rights as well as how such guarantee should

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225 Du Plessis J Land Restitution in South Africa overview and lessons learned 2004 *Centre on Housing Rights and Evictions.*

226 Dugard J 'Unpacking Section 25: Is South Africa's property clause an obstacle or engine for socio- economic transformation?' 2018 *Southern African Journal on Human Rights* 33-56.

227 *Government of the Republic of South Africa v Grootboom 2001 (1) SA 46; 2000 (11) BCLR 1169*

228 Pienaar J *Land Reform embedded in the constitution: legal contextualization* (*Stellenbosch University Press* 2014).

be interpreted.[229] In the case of *S v Makwanyane & Another* it was established that the nature of the right being limited, the purpose and the extent of such limitation should be considered. In the case of *Manamela*, it was established that a balancing exercise should be considered based on proportionality of such limitation.

A right in terms of customary law is also explicitly 58olonizati in section 39(3). Section 39(2) states that:

> …when the laws apply customary law, the "tribunal or forum must promote the spirit, purport and objects of the Bill of Rights…

In the case of *Shilubana and Others v Nwamitwa*, the Constitutional Court determined that there is a distinction between living customary law 58olonizati in the Constitution and observed by the Indigenous people and official customary law embedded in pieces of legislation that the courts interpret.[230] It is further highlighted in section 211(3) that:

> The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

The Constitutional Court has made efforts to emphasise the difference between living customary law, which refers to the law observed by the people that create it, and official customary law relates to legislative and the court's interpretation of customary law. Although the Constitutional Court asserts that customary law and customs need not be subjected to Constitutional restrictions. The Courts often leaned towards the interpretation of official customary law as opposed to living customary law, which restricts customary land rights[231]. In the case of *Bakgatla,* the Constitutional Court cautioned against restrictive approaches that rely on textbook authorities in interpreting customary law and ascertaining customary land rights.[232]

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229 Van der Walt *The property clause: a comparative analysis of section* 25 *of the South African Constitution of 1996:* Kleyn 'The constitutional protection of property: a comparison between the German and the South African approach 1997 *SAPRIPL* 402-445.

230 Bennett T W 'Re-introducing African customary law to the South African legal system' 2009 *The American Journal of Comparative Law Oxford University Press* 1–31.

231 Woodman G 'Legal pluralism in Africa: the implications of state recognition of customary laws illustrated from the field of law in *Pluralism & Development' 2011 Mostert H & Bennett* 35-46.

232 *Bakhatla Basesfikile Community Development Association obo Descendants of Molefe Molemi and Others v Bakgatla ba Kgafela Tribal Authority and Others 2011 ZANWHC 66 par 31*

In the case of *Richtersveld,* the Constitutional Court ruled that the interpretation of customary law should not be done in light of legal conceptions that are foreign to it.[233]

In addition, the Expropriation Act 63 of 1975 received opposition in that it should be repealed and that the Expropriation Bill be aligned with section 25 of the Constitution. The relevant provisions of the Expropriation Bill's objectives are to provide no compensation in incidences where land reform is the reason for such expropriation. To set out circumstances and conditions regarding the compensation amount and guide the courts on what circumstances nil compensation for property or land should be considered. In light of this, the recommendations where that section 25 needed to be amended to provide clarity regarding the expropriation of land and property without compensation and that a Constitutional Amendment Bill be passed by Parliament.

Section 7(1)(a) of the Bill does not express the notice period that should be given to commence expropriation. Throughout the provisions there is no reference to the duration of the notice given to the owner or land occupier, yet this is important for equitable justice. This is a gap that has been identified, which this thesis will cure in the last chapter.

2.5 Policy Framework on Land Reform of 1994-1997

2.5.1 The Reconstruction and Development Programme,1994[234]

Discriminatory systems introduced during colonial-apartheid dispossessed most South Africans from their land. This programme was introduced after South Africa was ranked amongst the highest countries with inequalities in income distribution which posed extremely high levels of poverty, especially for people who lived in rural areas. It identified land reform key elements referred to as restitution for those who were disadvantaged through land deprivation during apartheid.

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233 *Alexcor Ltd v The Richtersveld Community 2004 (5) SA 469 (CC)*

234 Aliber M and Mokoena R 'The Land Question in contemporary South Africa' in Daniel J, Habib A and Southall R *State of the Nation: South Africa 2004 HSRC Cape Town* 330-348.

Redistribution of land to people who are unable to afford the cost of land and tenure reform.[235] The Reconstruction and Development Programme also facilitated the Interim Constitution's development, which resulted in the 1996 Constitution. The land tenure reform introduced by the Reconstruction and Development Programme was to enable community members to access control and own land they were deprived of during colonial-apartheid.[236]

The Reconstruction and Development Programme also introduced a social-economic policy framework with a mandate of addressing past inequalities.[237] The Reconstruction and Development Programme (RDP) focused on a participatory approach to resource 60olonization in addressing housing, safe water, sanitation, deprivation, and poverty-related issues.[238] Acknowledgement was given to the fact that rural populations view land differently and that it is a source of livelihood, which should be free from discriminatory practices of 60olonization and apartheid. Therefore, the RDP programme established a land reform programme to facilitate effective land transfer through redistribution in a sustainable agriculture system.

2.5.2 The White Paper on Land Policy, 1997

This paper was established with the overall aim of land reform policy to address racial injustices, inequalities in land ownership, land dispossessions and the need for sustainable land use.[239] This paper reinforced land redistribution to improve poor people's income and quality of life. Restitution was defined as restoring restitutionary remedies for dispossessed people by discriminatory systems and legislation and providing reconstruction, reconciliation, and development, and tenure reform as identified by the Reconstruction and Development Programme.[240]

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235 Aliber M and Mokoena R 'The Land Question in contemporary South Africa' in Daniel J, Habib A and Southall R *State of the Nation: South Africa 2004 HSRC Cape Town* 330-348.

236 Aliber M and Mokoena R 'The Land Question in contemporary South Africa' in Daniel J, Habib A and Southall R *State of the Nation: South Africa 2004 HSRC Cape Town* 330-348.

237 Turok I 'Restructuring or reconciliation? South Africa's reconstruction and development programme' 1995 I*nt J Urban Reg Res* 305-318.

238 Department of Land Affairs White Paper on South African land policy, 1997.

239 Department of Land Affairs White Paper on South African land policy, 1997.

240 Kloppers H, Pienaar G J 'The historical context of land reform in South Africa and early policies' 2014 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 585-665.

The government undertook the implementation of ‘willing buyer, willing seller’ principle and provided resources for redistribution transactions.[241]

However, the principle of ’willing buyer, willing seller’ worked against the land redistribution programme with no positive results in ensuring that disadvantaged people are removed from the position of being land less. Hence the need for an amendment in the constitution to allow expropriation without compensation to proceed and address this human rights development challenge. What is interesting about the white Paper is that it acknowledges the financial constraints the state has in making socio-economic priorities.[242]

2.6 Conclusion

This chapter describes the South African Constitution's distinctive features in light of customary law. It demonstrates that the framework upon which customary land tenure is governed is insufficient to fully realise land rights. This demonstration is through an analysis of laws and policies and how they interact with customary norms and practices. However, the chapter demonstrates that the Constitution and other statutes provide fundamental ideals necessary in navigating regimes that are repressive to attain democracy. Overall, this chapter establishes a wider legal and policy framework for building property rights and how customary law principles embedded in the Constitution and other statutes affect property rights realisation. Lastly, the gaps identified in statutes that are discussed in this chapter, such as the Recognition of Customary Marriages Act, particularly the omission of women or the wives of the deceased, will be addressed in the last chapter.

241 Lahiff E *et al ‘’*Market-led agrarian reform: policies performance and prospects’’ 2007 *Third World Quarterly* 1417-1437.

242 Department of Land Affairs White Paper on South African land policy,1997.

CHAPTER 3: AN ANALOGY OF ZAMBIA'S LEGALISATION APPLICABLE TO CUSTOMARY LAND GOVERNANCE

3.1 Introduction

A comprehensive historical perspective through the law is highlighted to show the evolution of customary land tenure and how it has been impacted. Zambia's land reform post-colonisation was based on repealing laws, policies, and practices and attempting to address the initiated inequalities and injustices imposed due to colonisation.[243] In this regard, Zambia's customary land tenure is analysed with specific reference to the law by principally describing the reaction of the law towards prevailing customary land challenges. The customary legal system in Zambia existed prior to colonisation, as in other African countries. Customary land tenure insecurities in Zambia also stem from colonisation and the resistance it generated in struggles over authority, natural resources and land.[244]

Systems transition of land allocation during the pre- and post-colonial periods, looking at three tribes in Zambia, were experienced, which brought to light the lack of a close relationship between legal rules and actual rights in land.[245] In this light, understanding customary land dwellers' relationship to land, in terms of the law, has often been characterised by limited access, constrained control of land and insecure land tenure. Customary land rights are not fully recognised and protected in statutory law.[246] Although, colonisation introduced colonial objectives and ways of land governance, the Zambian people had and continue to have an inherent customary relationship with land as a natural condition of production.

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243 Mudenda, F. *Land Law in Zambia, Lusaka,* (2007 UNZA Press for the School of Law University of Zambia) 188- 193.

244 Chanock M 'A peculiar sharpness an essay on property in the history of customary law in colonial Africa' 1991 the *Journal of African History* 65-88.

245 Colson E 'Land law and land holdings among valley tonga of Zambia' 1996 Southwestern *Journal of Anthropology* 1- 8.

246 Machina H, *Womens legal rights in Zambia: Policy provisions, legal framework and constraints* (Paper delivered at the Regional Conference on Women's Land Rights, held from 26th -30th May 2002, Harare, Zimbabwe)

This means that customary land is considered a major resource in farming activities for livelihood sustainability by communities.[247] Indigenous peoples associate land with social, cultural, and spiritual connections and individual and family economic development.[248]

The history of law in Africa has always been a contentious topic. The fact that statutory law is written in prescriptive texts provides a range of benefits to people, as opposed to customary law, which is unwritten. It also provides contextual guidance on social, economic, and political issues. The unwritten nature of customary law in the administration of land has posed several challenges to land rights and land tenure security.

Thereby disturbing their livelihoods, participation in the global market, and economic development. In the recent past, new customary land tenure interventions have emerged in Zambia, such as formal documentation of land. This has brought about the protection of customary land rights, settling disputes such as inheritance, boundary, and displacements, providing tenure security, aiding corruption and serving as a sustainable measure for communities. Chimhowu notes that, under customary tenure, there are reasonable assumptions in rights to access, control, and own pieces of land in that once formally recognised conditions of welfare improve.[249] However, the welfare of this improvement still requires investigation as, in certain instances, formalisation may not address issues of security of customary land tenure.[250]

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247 R Vermu 'Without land you are nobody': critical dimensions of women's access to land and relations in tenure in East Africa' *IDRC Scoping study for East Africa on women's access and rights to land and gender relations in tenure* 2007 7-35.

248 Dannenmaier E 'Beyond indigenous property rights: exploring the emergence of a distinctive connection doctrine' 2008 *Washington University Law Review* 101.

249 Chimhowu A. *'*A new African customary land tenure. Characteristic, features and policy implications of a new paradigm*' 2019 Oxford, Elsevier Ltd, 81: 897–903*

250 Chimhowu A. *'*A new African customary land tenure. Characteristic, features and policy implications of a new paradigm*' 2019 Oxford, Elsevier Ltd, 81: 897–903*

3.2 Zambia's Legal Framework

Zambia comprises two legal systems, namely customary and statutory legal systems. The customary legal system existed before the statutory legal system was introduced during colonisation. Despite the co-existence of legal systems, it is never obviously assumed that they receive equal recognition and status. The statutory legal system and laws are usually superior as opposed to customary laws and practices and therefore end up being unitary.[251]

This is reflected in the land property rights being codified into pieces of legislation for them to provide tenure security. The dominance of this approach signifies that customary systems do not provide adequate land tenure security. The laws introduced through the statutory legal system during colonisation had no reflections of the Zambian people's social, economic, and political expectations.[252] Nkrumah emphasises the importance of identifying the legal system within the desires of society by stating that

> 'There is a ringing challenge to African lawyers today. African law in Africa was declared foreign law for the convenience of colonial administration, which found the administration of justice cumbersome by reason of the vast variations in local and tribal custom. African law had to be proved in court by experts. But no law can be foreign to its own land and country, and African lawyers particularly in the independent African states, must quickly find a way to remove this judicial travesty. The law must fight its way forward in the general reconstruction of African action and thought and help to remold the distorted African picture in all other fields of life. This is not an easy task, for African lawyers will have to do effective research into the basic concepts of African law, clothe such concepts with living reality and give the African a legal standard upon which African legal history in its various compartments could be hopefully built up. Law does not operate in a vacuum. Its importance must be related to the overall importance of the people the state.'[253]

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251 Phiri D. 'A legal analysis of disjunctions between customary and statutory land tenure regimes in Zambia' 2022 *Journal of Legal Pluralism and Critical Social Analysis 54:1, 96-116 pp 97.*

252 Mudenda. UNZA Press for the School of Law University of Zambia 2007, 223-224

253 Nkrumah K. ''Ghana. Law in Africa'' 1962 *Journal of African Law 6* (2) 105.

The researcher concurs with Nkrumah that there must be proper measures in place that enhance the legal system's jurisdiction. But also, that the law should be relevant to the needs of the people it is applied to.

3.3 The Constitution of 1996

The Constitution explicitly recognises the existence of customary law. It sits at the apex of the statutory legal framework. All other pieces of legislation enacted by parliament ought to be consistent with it, or else they shall be invalid to the extent of their inconsistency.[254] In the Zambian case of *Kamiki v Jairus (1967) ZR 71*, *it* was held that customary law could only be recognised to the extent that it is not repugnant to natural justice, a good conscience, equity, or any written law.[255]. In the Zambian case of *Mumba v The People (1984) ZR 38*, the courts highlighted that laws that are inconsistent with the Constitution are *null* and *void*.[256] This is rightly so in relation to statutory and customary laws. However, the interactions between the statutory and customary legal systems in Zambia are yet to be resolved in a way that fully enables the enjoyment of customary land rights, mainly because these rights are often infringed upon as statutory and customary legal systems are usually in conflict with each other.

One of the most significant parts of the Zambian Constitution is Part III, the Bill of Rights, which offers justiciable and guaranteed protection of rights. The advantage of entrenching the Bill of Rights is that the guaranteed rights cannot be taken away or modified lightly. But the disadvantage is that the range of guaranteed rights can be improved qualitatively and incrementally only through the cumbersome and costly referendum process. The Constitution under Article 16 states that:

> '…Except as provided in this Article, property of any description shall not be compulsorily taken possession of, and interest in or right over property of any description shall not be compulsorily acquired, unless by or under the authority of an

254 Constitution of the Republic of Zamibia, 1996
255 *Kamiki v Jairus (1967) ZR 71*
256 *Mumba v The people (1984) ZR 38*

> Act of Parliament which provides for payment of adequate compensation for the property or interest or right to be taken possession of or acquired'…[257]

Although the Constitution provides for the guaranteed protection of rights, the right to non-deprivation of property in Article 16 does not sufficiently protect customary land holders. This is evidenced in the rising cases of customary land displacements due to Foreign Direct Investment projects and those induced by the State.[258] Given the rising insecurities under customary land tenure, it is prudent to establish whether the deprivation of land rights has legitimate social and economic impacts on indigenous peoples. If the rights of indigenous peoples are impacted negatively, then it can be averred that they have been arbitrarily deprived of their land rights, as constitutionally protected.[259]

The case of *Chona v Evergreen Farms Limited*[260] reflects that the right to enjoy land varies as it depends on various rights ranging from full ownership to the ability to access and control land.[261] In this light, it is important to note that the enjoyment of land under customary tenure is limited by many factors, such as the chief being the custodian of the land and all land being held by the president. This, in practice, reflects that customary land dwellers have limited entitlements to land.[262] Customary land tenure in practice has shown that there are few rights in the bundle of land rights that are enjoyed by its subjects. One may have the right to access land but will not have the right to ownership or control due to social and cultural factors.

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257 Constitution of the Republic of Zamibia, 1996

258 Phiri, D., and J. Chu. 'Large-Scale Land Acquisitions in Zambia: Evidence to Inform Policy' 2015 *Institute for Poverty Land and Agrarian Studies* 19-27.

259 Phiri and Chu. 2015. *Institute for Poverty Land and Agrarian Studies* 19-27.

260 *Chona v Evergreen Farms Limited 1996 HP/2727*

261 *Chona v Evergreen Farms Limited (1996) HP 2727*. Before the defendant acquired the land in question, the plaintiff exercised the right of way for over 20 years. The defendant was therefore bound by this right of way.

262 Mudenda. 2007. UNZA Press for the School of Law University of Zambia 205-210

3.4 Zambia's Statutes on Customary Land Tenure

This section highlights Zambia's land-related laws that historically impacted customary land tenure during and post-colonisation.

3.4.1 British South African Company Royal Charter of 1889 and Orders in Council of 1899-1959

The purpose of this Charter was for the colonialists to acquire customary land for economic purposes such as mining and agriculture through established concessions used to administer and alienate land.[263] During colonisation, customary law administration of justice was first attempted in Article 14 of the 1889 British South African Company Charter, which stated that:

> ''…In the administration of justice to the said people or inhabitants, careful regard shall always be placed on the customs and laws of the class or tribe to which parties respectively belong but subject to British laws which may be in force in any of the territories previously mentioned and applicable to the people or inhabitants thereof…''[264]

The British South African Company made claims and asserted land and mineral ownership of the entire Northern Rhodesia by virtue of the concession.[265] They further asserted that this claim was substantiated by virtue of the declaration of protectorate status.[266] However, the validity of this claim was contested by the Chiefs. This claim was challenged in court in the case of *Cox v African Lakes Corporation and Petitt v African Lakes Corporation.*[267]

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263 Mudenda. 2007. UNZA Press for the School of Law University of Zambia. 205-207

264 British South African Company Charter, 1889.

265 Ndulo, M. *Mining rights in Zambia*, Kenneth Kaunda Foundation, Lusaka, 1987, p.25

266 Mudenda. 2007. UNZA Press for the School of Law University of Zambia 205-210

267 *Cox v African Lakes Corporation and Petitt v African Lakes Corporation (1901) 205.* The contestations of this case were on the validity of an agreement that was entered into with a chief on the collection of strophantus seeds in his territory to the defendant. Judge Nunan held that the agreement was ultra vires and invalid for want of consideration. The Judge noted that the chief had no powers to enter into such an agreement as the legal ownership of the land had passed to the Sovereign of Great Britain by way of treaties signed by those who preceded him.

In this case, the court focused on the claim's validity and the allegation that protectorate status translated to land ownership. It was held in these cases that Chiefs had lost authority due to the established colonial rule. In the case of Re Southern Rhodesia, the allegation that protectorate status translated to land ownership was rejected, and the natives were the land owners.[268]

The Order in Council of 1899 also recognised customary law by providing that:

> '…There shall be a court of record known as the High Court of Northern Eastern Rhodesia with full jurisdiction on civil and criminal, over all persons and over all matters within North-east Rhodesia subject to the provision contained hereinafter with regard to native law and customs.'

3.4.2 Orders of 1964

These Orders came into force upon Zambia gaining its independence, and it stripped the British Sovereign of all rights relating to Crown land. The order bestowed all territorial powers to the President and provided instructions and guidance on exercising power. These Orders also vested all land in the country in the president. These orders conferred powers on the president to control all land in the country, including land owned by the British Sovereign before independence. The Orders in Council promulgated prior to independence were not revoked, but they should be construed with exceptions, modifications, adaptations, and qualifications necessary to conform with the Independence Order of 1964.[269]

3.4.3 States and Reserves Order of 1964

The purpose of this Order after independence was to transfer authoritative powers regarding crown land and other immovable property, including native reserves in Northern Rhodesia and the President of the Republic of Zambia.[270]

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268 Re Southern Rhodesia (1919) AC 211

269 Mudenda. 2007. UNZA Press for the School of Law University of Zambia 216-217

270 Mudenda, F. 2007. UNZA Press for the School of Law University of Zambia. 216

3.4.4 Trust Land Order of 1964

The promulgation of the Trust Land Order of 1964 aimed to transfer Native Trust Land to the President and bestowed him with authoritative powers. Before independence, these powers were conferred on the Secretary of the State.[271] This was done to promote and develop land governance and customary tenure.

3.4.5 Gwembe District Order in Council of 1964

This Order formerly conferred the President of Zambia with exercisable powers over the administrative affairs of Gwembe District.[272] The 1964 Order removed administrative powers from the Governor, who had territorial powers awarded to him by the Order of 1959.[273] The Order of 1959 was established to address problems that arose during the construction of the Kariba Dam and the overwhelming trust land and reserve portions.[274] The Governor of the district of Gwembe was given special powers to grant land and fishing rights and develop administrative regulations for the district.[275]

3.4.6 Local Courts Act of 1966

Local courts have the authority to preside over customary land or property disputes if proceedings constitute a civil wrong. Customary land disputes should be presented to the local court within the area of authority where the property is situated.

The Local Courts Act provides under section 12(1) that:

> "Subject to the provisions of this Act, a local court shall administer(a) the African customary law applicable to any matter before it in so far as such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law; (b)

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271 Mudenda. 2007. UNZA Press for the School of Law University of Zambia 216

272 Mudenda, F. 2007. UNZA Press for the School of Law University of Zambia 216

273 Section 3 of the Gwembe District Order in Council of 1964.

274 Mudenda, F. 2007. UNZA Press for the School of Law University of Zambia 216

275 Mudenda, F. 2007. UNZA Press for the School of Law University of Zambia 216

> the provisions of all by-laws and regulations made under the provisions of the Local Government Act and in force in the area of jurisdiction of such local court."[276]

In line with this provision, regarding customary land disputes that may arise among inhabitants in a village or chiefdom, the local courts within that area will have jurisdiction to preside over such matters. The certification process is not repugnant to natural justice or morality; neither is it incompatible with the provisions of any written law and, most importantly, the Constitution. In practice, Local Court justices are encouraged to be familiar with the customary practices and rules on land that prevail in their localities as they preside over disputes. If they are unsure about a particular practice, they must consult traditional leaders or call upon them as witnesses in court.

3.4.7 Subordinate Courts Act of 1972

The Subordinate Courts Act confers jurisdiction upon all subordinate courts in Zambia to preside over cases that hinge on customary law. Disputes on customary land tenure can be presided over by the Subordinate Courts or Magistrates Courts. The Subordinate Courts Act provides in section 16 that:

> '…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 cases and matters where the parties thereto are Africans, and particularly, but without derogating from their application in other cases, in civil cases 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 cases 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...[277]

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276 Local Courts Act of the Republic of Zambia, 1966.

277 Subordinate Courts Act of the Republic of Zambia, 1972. Section 16

The court, in the case of *Chibwe v Chibwe*[278] affirmed the above-stated provision by stating that customary law is recognised in Zambia by the Constitution, provided that its application is consistent with any written law. However, even if the Subordinate courts have jurisdiction to hear customary land treated disputes, customary landholders who live in rural areas face geographical challenges in accessing the courts as they are situated only in urban areas.

Customary landholders are equally disadvantaged by the technicalities of the court process, the financial demand to institute proceedings, and the lengthy period it takes to resolve disputes in court. Interpretation of the above-stated provision reveals that customary law is considered inferior even in land disputes that arise on customary land tenure. The fact that the provision subjects the courts to only apply customary law in instances when it is not repugnant to justice, equity and good conscience shows that statutory law supersedes customary law when there is a conflict of laws.

3.4.8 Intestate Succession Act 5 of 1989

Zambia's law of succession today is of a dualist nature. Colonisation impacted succession by introducing the English system reflected in legislation and developed through court decisions. Zambia has the customary law of succession, which comprises customary practices which the courts of law have also developed. For a very long time, customary law of succession did not receive recognition in pieces of legislation until recently when the Intestate Succession Act 5 of 1989 was amended to extend to customary land. Intestate succession and testate succession are both subject to the Constitution. In that, they must both not be inconsistent with the provisions stipulated in the Constitution. Succession regulates the finalisation and devolution of a deceased estate who has either died testate (with a valid will) or intestate (without a will).

[278] *Chibwe v Chibwe (2000) ZMSC 59*

Once a person dies, he/she leaves behind entitled rights and duties imposed by law or traditional cultural norms and practices. What the deceased leaves behind extends to his or her spouse, parents, children, siblings and other relatives.

Succession prescribes the order in which people ought to inherit. Intestate succession applies when one dies without leaving a will, where an executed will becomes inoperative for one or two reasons, an executed will that does not dispose of the entire estate of the deceased and a will that does not comply with the formalities of executing a valid will. Consequently, if one dies without leaving behind anyone capable of inheriting from him and the deceased does not leave behind a valid will, the state will use its powers to acquire his estate, which will devolve to the state after the deceased's liabilities have been paid out. Despite intestate or testate succession, impediments are still influencing the capacity of beneficiaries to inherit. These are reflected, for instance, in customary principles that are patriarchal or matrilineal in nature.

However, property rights are recognised in the Zambian Constitution and prohibit all forms of discrimination based on one's race, sex, or marital status. In the case of Phiri v Phiri and Another, the court held that the deceased estate's beneficiaries were the applicant, who was the wife to the deceased and their child. There was a contention that the mother-in-law to the applicant, who was the deceased mother, should inherit. However, the courts rejected that proposal by stating that the mother-in-law shall not be considered a dependent entitled to a share of the deceased estate. Section 7 of the Intestate Succession Act was used to support this reasoning. This section asserts

> '… where an intestate leaves-
> (a) a spouse, children, dependents but no parents, the proportion of the estate which the parents would have inherited shall be shared equally between the surviving spouse and children on the one hand and the dependents on the other;"
> (e) a spouse and children but no parents or dependents, the portion of the estate which the parents and dependents would have inherited shall be shared equally among the surviving spouse on the one hand and the children on the other…'

The court asserted that the applicant was entitled to a life interest in the house and to hold the same as a tenant in common with the deceased's children in accordance with Section 9 of the Act, which provides that:

> "…(1) Notwithstanding section five where the estate Includes a house the surviving spouse or child or both, shall be entitled to that house:
> Provided that-
> (a) where there is more than one surviving spouse or child or both they shall hold the house as tenants in common; and
> (b) the surviving spouse shall have a life interest in that house which shall determine upon that spouse's remarriage.."

The court pointed out that whether or not the applicant contributed to the building of the said house or the extension thereof was immaterial. The fact that the applicant has another house of her own is equally immaterial. What is material is the fact that the house in issue forms part of the deceased's estate. The respondents are not entitled to put the said house on rent without the applicant's consent as a tenant in common by operation of the law. Therefore, the court ordered that 'subject to any debts or other liabilities, thirty-five per cent (35%) and sixty-five per cent (65%) of the estate of the deceased to devolve upon the applicant and the three children of the deceased, respectively.[279]

Although the Intestate Succession Act provides women with some form of protection, there are ongoing impediments to their inheritance rights. Customary principles that are patriarchal in nature do not conform to gender equality advancements that are promoted by the Constitution, and other international and regional instruments are widely applied to inheritance and used to ensure that male relatives inherit land and property to the exclusion of widows. Therefore, the Intestate Succession Act's historical development has received a lot of criticism over the years, leading to its amendment.

However, regardless of the Intestate Succession Act having been amended to protect women's rights, there are still many long-standing challenges regarding women's rights to inherit from their deceased spouses.

279 *Phiri v Phiri and Another (2016) HPA 45*

3.4.9 Lands Act 29 of 1995

The Lands Acts of 1995 is a reform instituted in the third republic, and it is rooted in the liberal economic policy of the Movement for Multiparty Democracy (MMD) Government. The aim was to liberalise the land tenure system and economy. This approach resulted in a review of the customary land tenure system and the removal of infringements that disturbed the free alienation of land and other barriers posed by the Lands Act of 1995. Traditional leaders, NGO's and political parties in the opposition resisted the enactment of the new Lands Act. Parliament rejected the Lands Bill when it was first presented, alleging that it never went through a consultative process. The government countered this allegation, stating that the Ministry of Lands undertook consultations in various provinces and solicited recommendations to improve it.[280]

On the contrary, meaningful consultations were never undertaken with the key stakeholders such as communities and traditional leaders. Despite great opposition, the Lands Bill was passed in Parliament, followed by presidential assent. There was much external pressure to ensure that the World Bank and other donors passed the Lands Bill. This was a condition for continued donor assistance and lending.

The 1995 Lands Act 29 is the law that governs land acquisition and has enabled Government to set aside land for large-scale land-based investments. This Act grants the president the right to alienate land to both Zambians and non-Zambians under certain conditions. These conditions are (1) non-Zambians with permanent residency and (2) non-Zambians defined as investors according to the Zambia Development Agency Act of 2006. The Lands Act of 1995 also provides for establishing the Lands Tribunal, whose jurisdiction is to settle disputes relating to land, including matters of compensation.

[280] Mudenda. 2007. UNZA Press for the School of Law University of Zambia 216

The Lands Act of 1995 was enacted to provide a framework for the regulation, governance of land administration and the continued bestowing of land to the President and alienation of land by the President. Section 3 (1) provides that:

> …Notwithstanding anything to the contrary contained in any other law, instrument, or document, but subject to this Act, all land in Zambia shall vest absolutely in the President and shall be held by him in perpetuity for and on behalf of the people of Zambia…[281]

The Lands Act of 1995, under section 3 (4), further states that the President cannot alienate customary land. Section 3(4) states that:

> "…(a) without taking into consideration the local customary law on land tenure which is not in conflict with this Act;
> (b) without consulting the Chief and the local authority in the area in which the land to be alienated is situated, and in the case of a game management area, and the Director of National Parks and Wildlife Service, who shall identify the piece of land to be alienated;
> (c) without consulting any other person or body whose interest might be affected by the grant; and
> (d) if an applicant for a leasehold title has not obtained the prior approval of the chief and the local authority within whose area the land is situated…"

This provision, in a nutshell, relinquishes the powers conferred to the President. The stipulations allow the chiefs to allocate land in terms of the Act. The chiefs must do this, together with traditional councillors. In the case of *Still Waters Limited v Mpongwe District Council and Others*,[282] land was allocated to Still Waters Limited by the chief without consulting the traditional councillors. The court held that it was important that the chief consulted the traditional councillors before allocating the land to Still Waters Limited and that failure to do so resulted in the land allocation being *null and void*. This was also upheld in the case of *Mupwaya and Another V Mbaimba.*[283] Section 3 can be interpreted to reflect that there is no individual absolute land ownership on customary or statutory tenure systems. What is owned are rights to land, which are limited by the rights of others and the law. Limitations that are imposed by the law are usually influenced by several factors in the social, cultural, economic, and political spheres.[284]

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281 Lands Act of the Republic of Zambia, 1995

282 *Still Waters Limited v Mpongwe District Council and Others (2003) ZMSC 144*

283 *Mupwaya and Another V Mbaimba (1999) SCZ 41*

284 Scott S. *Property Law.* Pretoria. University of South Africa 2017

Ownership of land in Zambia is linked to the principle reflected in the Latin maxim *plus iris in album transferre potent quad ipse haberet,* which means ‘’no one may transfer more rights to another person than he has himself.’ However, because of ineffective enforcement systems and mechanisms that regulate land administration and management in Zambia, we have a society where people can illegally transfer land ownership under customary land tenure to the detriment of the community and sole owner. Hence the challenges of dispossession of communities under customary tenure due to large-scale land allocations by chiefs to investors.

The Lands Act of 1995 also provides for the statutory recognition and continuation of customary tenure and ‘the conversion of customary tenure into leasehold tenure’.[285] The Act states that ’every piece of land in a customary area which immediately before the commencement of the Lands Act was vested in or held by any person under customary tenure Reserves and Trust land shall continue to be so held, and recognised and any provision of the Lands Act or any other law shall not be so construed as to infringe any customary right enjoyed by that person before the commencement of the Lands Act.’ This provision entails that customary tenure is legally recognised in Zambia. The Lands Act of 1995 only recognises customary tenure but does not provide for its administration. It can be inferred that the Act fails to provide customary tenure security and protect entitlements.[286]

Further, uncertainties and ambiguities in customary land tenure are caused by irregularities posed by upholding statutory tenure superior to customary tenure.[287] This has, therefore, affected the recognition, protection, and realisation of land property rights under customary land tenure in Zambia. There are varying views of land ownership; others regard it as the most absolute right, while others state that ownership is not absolute. The view that land ownership is not absolute was reached in the case of *National Hotels Development Corporation T/A Fairview Hotel v Ebrahim Motala (2002) ZR 39 (S.C).*[288]

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285 The Lands Act of 1995 of the Republic of Zambia

286 Mushinge A, Mulenga S ‘Legal pluralism and tenure security: Exploring the relationship between statutory and customary land tenure in Zambia’ 2016 *International Journal of Social Sciences Studies* 7-17.

287 Mushinge & Mulenga. 2016. *International Journal of Social Sciences Studies* 7-17.

288 *National Hotels Development Corporation T/A Fairview Hotel v Ebrahim Motala (2002) ZR 39*

The Lands Act of 1995 also provides for the conversion of customary tenure to statutory tenure. It states in section 8 (1) that:

> "…Notwithstanding the recognition and continuation of customary tenure, any person who holds land under customary tenure may convert it into a leasehold tenure not exceeding ninety-nine years on application, in the manner prescribed, by way of a grant of leasehold by the President; or by way of any other title that the president may grant or by any other law…"[289]

Considering the highlighted Lands Act of 1995 provisions, it suffices to state that the Act recognises customary land. However, it poses several gaps in addressing customary land administration challenges that have given birth to the insecurity of customary tenure. The gaps posed by the Lands Act of 1995 include; a lack of provisions for the registration of customary property rights, and informal and uniform systems of customary land administration across the country. Conversion of land rights from customary to leasehold tenure requires the approval of the chief and local authorities in the area where the land in question is situated to be valid and subsequently granted by the president.

In the case of *Siwale v Siwale,* the deceased was given 400 hectares of land by the colonial authorities after consultations with the chief. No formal certificate of title to land was acquired by the deceased as it was customary land. Before the deceased's death, the respondent, who was the youngest son of the deceased, received a letter requesting him to settle in Lusaka. After the deceased's demise, the respondent decided to apply for a title deed to the deceased's property in his own name without consultation from other family members, including his other siblings.

Despite efforts made by the family to engage in discussions with the respondent, when they came to learn of the fact that the respondent had land registered in his own name, he was not co-operative. The family, therefore, decided to institute legal proceedings.

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289 Lands Act of the Republic of Zambia ,1995

The Supreme Court held that failure to obtain consent from all the persons and authorities required is a breach of section 8 (3), which affirms that the land in question for conversion should be identified with extents and a plan.[290] Although the chieftainess gave her consent, the fact that the district council did not approve such an application should not be taken lightly. Therefore, the Supreme Court declared the certificate of title issued null and void and ordered that the certificate of title be submitted for cancellation and that the land is vested in the applicants.

Given the fact that there are many shortcomings of the Lands Act of 1995, a National Land Policy was approved to address current land challenges. The National Land Policy was officially launched on the 11th of May, 2021. This marked a long journey of decades of consultations, validation and period drafting and reviews. This policy is important because it guides the land sector for both Customary and Statutory land tenure. It sets out a vision of '*transparent land administration and management systems for inclusive sustainable development by the year 2035,'* The National Land Policy aims to promote equitable access, control and ownership of land and promotes nondiscrimination. It also endeavours to promote customary land tenure security and enhance sustainable and productive management of land resources by upholding transparent and cost-effective mechanisms of administration, including the settlement of land disputes.

Furthermore, short comings of the Lands Act of 1995 have resulted in the establishment of a Customary Land Administration Bill that ought to have been passed in 2014. This Bill seeks to address current and future customary land challenges and provide guidance in the transfer of ownership, control, and accessibility of land.

290 Lands Act of the Republic of Zambia, 1995

The Bill focuses on the following key issues: 'equal status of customary and statutory tenure; boundary disputes between chiefdoms and villages; uniformity of land administrative systems; registration of customary tenure; legal status of the dispute resolution system under customary tenure; defined and uniform dispute resolution systems; documentation and record keeping; security of customary tenure; inheritance issues; gender inequalities; land conversions; equal distribution of resource; decentralisation of the Lands Tribunal in all the provinces.'[291] The Land Act of 1995 and customary land administration have the same common purpose. They both seek to provide a fair opportunity for land distribution or allocation.

3.4.10 The Chiefs Act of 1995

The institution of Chiefs is one of the oldest in Zambia. The Chief's Act of 1995 was established for the purposes of the Chiefs installation, recognition, and administration of customary law.[292] Section 10 (1) of the Chiefs Act of 1995 gives chiefs the powers to administer customary law in accordance with customary norms prevailing in their jurisdictions. The Act also asserts that the discharge of such functions need not be contrary to the Constitution or any written law nor repugnant to natural justice or morality. Since customary law is rooted in traditions, some various unwritten rules and regulations govern the rights and duties of the existing 73 ethnic groupings uniformly hence the administration of land by chiefs and the rights and duties that ought to be exercised in land ownership are different from one local area to another.

In order for a custom to become law, it needs to be known, followed and enforceable by the community. Examples of customary law practices include; the allocation of land through the patrilineal or matrilineal lineage and the non-allocation of land to women. Customary practices are dynamic and evolving and have been in existence since the pre-colonial era.[293]

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[291] Customary Land Administration Bill of the Republic of Zambia, 2014

[292] Chiefs Act of the Republic of Zambia, 1995

[293] African Human Security Initiative. *The criminal justice system in Zambia; Enhancing the delivery of security in Africa* 2009 Africa Portal, 133

Factors that determine what is considered customary law refer to commonly observed, practised and used customs. However, law does not permit chiefs to allocate more than 250ha of land.

However, in instances where land has been unfairly grabbed, communities and individuals can invoke their rights to land by claiming ejectment against resettlement and compensation. This is asserted in the case of *Still Waters Limited v Mpongwe District council and Others and Siwale and Others v Siwale.*[294] The court held in these cases that allocating customary land to Still Waters Limited was contrary to the procedure implemented under customary law and subsequently declared the land allocation *void ab initio*.

In the case of J*ohn Malokotela v Majaliwa Sitolo Muwaya and Thaya Odemy Chiwala*,[295] A succession dispute ensued, and the High Court had to determine whether the selection of the defendant as a Chief was in line with the customary practices exercised in the Chiwala Chiefdom.[296] The customary practice required that a chief be installed from the royal lineage. The court, therefore, held that the installation was invalid as it did not follow the customary practices of succession prevailing in the chiefdom.

3.4.11 Zambia Development Act of 2006

The enactment of the Zambia Development (ZDA) Act of 2006 aimed to promote trade and investment activities and facilitate the concept of a one-stop shop for investment. ZDA equally plays an integral role in harmonising government and private investment in infrastructure through Public-Private Partnerships (PPPs). However, the push for economic development through this Act has posed challenges to customary land holder communities. They have faced displacements and unfair resettlement and compensation packages.

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294 *Siwale and Others v Siwale (1999) ZR 84*

295 *John Malokotela v Majaliwa Sitolo Muwaya and Thaya Odemy Chiwala.* (2010) Z.R.357.4.*T his case was on allegations regarding a successor after Chief Musokotwane's death. The Plaintiff was elected as the successor after a royal family meeting but the defendant contended that he was prematurely elected. The Judge held that allegations from the defendants that the plaintiff was prematurely elected were unreasonable and therefore nullified.*

296 *John Malokotela v Majaliwa Sitolo Muwaya and Thaya Odemy Chiwala. (2010) Z.R.357.4*

Land acquisitions are driven by the interests of local and foreign investors, including government, in agriculture, mining, tourism, peri-urban and urban development. Interests in land for investment have resulted in community members in different parts of the country where land acquisitions are being done to be displaced. The communities that have suffered most at the hands of these acquisitions are those living on customary land. At the heart of these displacements sit concerns of socio-economic impacts towards the displaced communities and their voices and spaces of participation in these land acquisitions.

ZDA's objective is to "foster economic growth and development by promoting trade and investment in Zambia through an efficient, effective and coordinated private sector led economic development strategy", among other objectives related to specific investment priorities.[297] ZDA also assists foreign investors in navigating the regulatory framework. ZDA is the institution mandated with promoting trade and investment in Zambia. ZDA holds a unique position to attract investments for both foreign and domestic investors. For investor companies holding investment licenses, the provisions of ZDA.

ZDA works closely with the Ministry of Lands Natural Resources and Environmental Protection to establish land banks for priority investments such as farm blocks. However, in practice, several long-standing challenges have arisen, such as weak land acquisition processes on customary land through chiefs and displacements of local communities leading to disputes.

Customary Land is being acquired for various investment purposes ranging from below 1000ha to over 100,000ha in Zambia. Land acquired over 1000ha is large-scale. Recently Zambia has experienced a wave of increase in large-scale land acquisitions. Given the various shortcomings posed by investment projects to customary landholders, it can be concluded that the ZDA Act's investment interests supersede the land rights of customary land holders. This is evidenced by many customary land displacements in the country.

297 The preamble of the Zambia Development Act of 2006

The ZDA Act equally fails to promote and protect rural communities' land rights where investment interests are prevalent.

3.4.12 The Lands Tribunal Act of 2010

This Act provides for the powers and functions of the Lands Tribunal to efficiently settle both customary and statutory land tenure-related disputes in a cheaper and timely manner. However, the Lands Tribunal has ended up not being accessible to poor communities who have suffered customary land injustices. It is currently technical and unfriendly to many members of society. Section 25 of the Lands Act of 1995 states that a person may bring a matter before the Lands Tribunal either in person or through a legal practitioner. The challenge with this provision is that it disadvantages those who do not have the financial capacity to pay for the services of a lawyer.[298] For an exceptionally long time the operations of the Lands Tribunal have been centralised and restricted to Lusaka, the capital city of Zambia. Circuit courts have been established over the years to hear land matters in different parts of the country. However, rural communities have not been able to access the services of the Tribunal due to geographical barriers.

3.4.13 The Gender Equality and Equity Act of 2020

This Act establishes the Gender and Equity commission and prohibits discrimination by encouraging women's participation. It acknowledges that men and women are surrounded by different social, cultural, economic, and political factors that limit their land rights. Cultural practices under customary land tenure have been noted over the years to negatively impact women's ability to access, control or own land and expose them to laws that are discriminatory.[299]

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298 Hansungule M. 'African courts and the African Commission on human peoples' rights.' 2002 *African Human Rights Law Journal* 239-557

299 Phiri, D., and J. Chu. 'Large-Scale Land Acquisitions in Zambia: Evidence to Inform Policy' 2015 I*nstitute for Poverty Land and Agrarian Studies* 19-27

Despite women's significant contribution to food security in the agriculture sector, [300] the Constitution under Article (23) (3) protects from discrimination on the grounds of sex, but customary laws and practices, on the other hand, discriminate against women in land allocations.

Discrimination based on gender is highlighted in the case of *Matonka v M'tonga and Another.*[301] The applicant contended that the respondents were in breach of the law by omitting her to inherit from the deceased estate as a biological daughter. She called upon the respondents who were administrators of the deceased estate to disclose the extent of the estate for purposes of distribution and administration to all beneficiaries. The applicant further highlighted that the respondents did not distribute the estate as prescribed by the law and called upon the court to hear from the respondents on how they distributed the estate. The court passed a decision in light of the Intestate Succession Act and ordered the respondents to administer the estate in accordance with the law. Section 5 of the Intestate Succession Act was invoked, and it provides that:

> ''…(1) Subject to sections eight, nine, ten and eleven the estate of an intestate shall be distributed as follows: (a) twenty per cent of the estate shall devolve upon the surviving spouse; except that where more than one widow survives the intestate, twenty per cent of the estate shall be distributed among them proportional to the duration of their respective marriages to the deceased, and other factors such as the widow's contribution to the deceased's property may be taken into account when justice so requires; (b) fifty per cent of the estate shall devolve upon the children in such proportions as are commensurate with a child's age or educational needs or both; (c) twenty per cent of the estate shall devolve upon the parents of the deceased; (d) ten per cent of the estate shall devolve upon the defendants, in equal shares: ''Provided that a priority defendant whose portion of the estate under this section is unreasonably small having regard to his degree of dependence on the deceased shall have the right to apply to a court for adjustment to be made to the portions inherited and, in that case, Part III of the Wills and Administration of Testate Estates Act shall apply, with the necessary changes, to the application…''

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300 Hall, R., J. Gausi, P. Matondi, C. Nhancale, D. Phiri, P. Zamchiya, and T. Muduva. ''Large Scale Land Deals in Southern Africa: Voices of the People.'' *Institute for Poverty, Land and Agrarian Studies (PLAAS), University of the Western Cape 12-15.*

301 *Fred M'tonga & Another v Matonka (2021) ZMCA 42*

3.5 Conclusion

This chapter describes the Zambian Constitutions' distinctive features considering customary law. It demonstrates that the framework upon which customary land tenure is governed is insufficient to fully realise land rights. However, the chapter demonstrates that the Constitution and other statutes provide fundamental ideals necessary in navigating regimes that are repressive to attain democracy. Overall, this chapter establishes a wider legal framework for land rights in reference to customary land tenure.

In addition, Zambia's legal framework is not determinative or exhaustive in the provision of guidance to land governance and administration or provisions of customary land tenure security. Therefore, it is prudent that customary law interventions are constantly assessed against those under statutory law in the furtherance of land rights. This equally calls for an analysis of outcomes posed by colonisation. These outcomes require a closer look at the factors determining and disturbing the enjoyment of the right to ownership under customary land tenure. In instances of competing interests, customary tenure has been classified as 'insecure' because it fails to meet the required legal standard of security.

The gaps identified in this chapter also reveal that the laws confine the existence and development of customary law to what statutory law would like it to be. The laws also fail to consider the fact that customary land is characterised as a trans-generational asset by its holders; hence there is an increase in land disputes. The laws do not interpret customary law within frameworks that recognise that customary land holders have a social and spiritual relationship with land. Statutory laws fail to acknowledge that customary land administrative and governance structures function in ways that are specific to their tasks. Therefore, efforts in customary land governance should be directed towards frameworks that allow for effective institutional arrangements, legal and policy, and dispute resolution mechanisms that aim to achieve positive and sustainable outcomes.

CHAPTER 4: SIMILARITIES AND DIFFERENCES IN LAW OF CUSTOMARY LAND GOVERNANCE IN SOUTH AFRICA AND ZAMBIA.

4.1 Introduction

This chapter provides a customary land governance and zooms into the legal complexities of land governance in customary law in South Africa and Zambia. South Africa and Zambia were notorious for high levels of inequality in terms of land. [302] The imposition of colonisation in South Africa and Zambia altered customary land relations and governance and continues to be a crucial underpinning of land inequality.[303]

Throughout the colonial period, inequitable distribution of land resulted from economic regimes driven by social, economic and political inequalities. The customary land institutional arrangements have patterns of diversity in conferring land rights, social relations, cultural norms and values, land use, livelihoods and inheritance.[304] This diversity relates to the social and political relational dynamics. The heterogeneity of customary land tenure systems makes it impractical to prescribe systematic and standardised problem-solution interventions.[305] Although, there is flexibility in nature in defining legitimate land rights and boundaries.

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302 Frankema. E. 'The colonial roots of land inequality: geography, factor endowments, or institutions?' 2010 *Economic History Review Vol. 63, No. 2 . 427.*

303 Frankema. E. 'The colonial roots of land inequality: geography, factor endowments, or institutions?' 2010 *Economic History Review Vol. 63, No. 2 . 427.*

304 Cousins. B. 'Characterising "Communal" Tenure: Nested Systems and Flexible Boundaries' in Aninka Claassens and Ben Cousins (eds), *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act 2008. University of Cape Town Press*.

305 Claassens A, Cousins B (eds). *Land, Power and Custom: controversies generated by South Africa's Communal Land Rights Act 2008.* Cape Town, University of Cape Town Press 109-137.

4.2 Similarities Between South African and Zambian Customary Land Governance

4.2.1 Politics of customary land governance

Laws and policies introduced during colonisation were discriminatory and promoted racial segregation of land. Discrimination and racial segregation of indigenous peoples are reflected in South Africa in pieces of legislation, including the Group Areas Act; the Black Administration Act and the Natives Land Act.[306] These laws all posed land holding barriers between natives and non-natives.[307] However, the *Alexkor Ltd v Ricthtersveld* case, promoted indigenous peoples customary land rights which were infringed upon due to racial discrimination and segregation.[308]

In Zambia, the regulations that promoted racial discrimination and segregation of land are the British South African Company Royal Charter of 1889 and the Orders in Council of 1899-959. In the Re Southern Rhodesia case, the court upheld land rights of indigenous people by rejecting allegations that aimed to affirm that protectorate status translated to land ownership.[309] Discrimination and racial segregation of indigenous peoples followed after the principle of indirect rule was applied in South Africa and Zambia during colonisation.

306 Kloppers H, Pienaar G J 'The historical context of land reform in South Africa and early policies '2014 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 585-665.

307 Kloppers H, Pienaar G J 'The historical context of land reform in South Africa and early policies '2014 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 585-665.

308 *Alexkor Ltd v Richtersveld Community 2004 (5) SA 460 (CC).*

309 *Re Southern Rhodesia (1919) AC 211.*

The purpose of the indirect rule principle was to open both countries directly to the foreign market, [310] create economic opportunities for the colonial entrepreneurs by giving them access to land, cheap sources of labour, capital and supply colonial industries with secure imported raw materials.[311]

Furthermore, the colonialists considered the administrative networks of indigenous people weak, which needed strengthening through modernisation with a colonial administrative system.[312] This approach in South Africa and Zambia dispossessed indigenous producers from their land and other assets used for production, leaving indigenous people with few options to sustain their livelihoods other than selling their labour to survive.[313] The principle of indirect rule is a concept that describes the uneven formation of colonial legacies.[314] Indirect rule is a form of political control that introduces power hierarchies.

Governance at a local level is delegated to the traditional authorities, who are power holders to enforce political authority on behalf of the colonialists in areas the colonial state could not reach. The principle of indirect rule was introduced after direct rule failed, which was the initial approach of the British colonial government.[315] During the application of the direct rule, the state maintained and administered laws and policies without intermediaries such as traditional authorities.[316] The colonial office in Britain stated that the direct rule principle was an administrative system attempt for people not yet able to stand by themselves under the strenuous conditions of the modern world.[317]

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310 Naseemullah A. Staniland P. 'Indirect rule and varieties of governance' 2016 *International Journal of Policy, Administration and Institutions* 29 (1) 13-20.

311 Naseemullah 2016 *International Journal of Policy, Administration and Institutions* 29 (1) 13-20.

312 Naseemullah 2016 *International Journal of Policy, Administration and Institutions* 29 (1) 13-20.

313 Pradella, Lucia. 'Marx and the Global South: Connecting History and Value Theory.' 2007 *Sociology*, JSTOR vol. 51 no. 1,146–61.

314 Naseemullah 2016 *International Journal of Policy, Administration and Institutions* 29 (1) 13-20.

315 Ranger. T. 'The invention of tradition revisited: the case of Africa.' 1993 *Legitimacy and the state in Twentieth Century- Essays in Honour of A.H.M.Kird Greene London Palgrave*

316 Mamdani M 'Indirect Rule, Civil Society, and Ethnicity: The African Dilemma. Social Justice'1996 *Scientific Research an Academic Publisher* 23, 145-162.

317 Ranger. T. 'The invention of tradition revisited: the case of Africa.' 1993 *Legitimacy and the state in Twentieth Century- Essays in Honour of A.H.M.Kird Greene London Palgrave.*

Therefore, the Native Reserves and Authorities Portfolio regarding Land in South Africa and Zambia was part of diversified techniques of power since the success of the colonialist agenda was tied to the stable flow of labour. The approach aimed at subjecting and aligning indigenous people to implement the British strategies and agenda without clumsy rejection by indigenous people.[318] The strategies are shown in the colonial production of rational economic subjects and the systematisation of rural social and political structures. The focus of colonial power was to produce economic subjects who were motivated to adopt practices and new habits, which had indirect implications against them within the system that engineered the initial dispossession.[319]

Colonialists' power and techniques were not based on coercion, command or bribery. Instead, they were fundamentally subtle.[320] This subtle approach followed after the exclusive reliance of violence approach failed to meet colonial desired results.[321] Meaning, the wider political economy of the colonial system played a key role in shaping subjects and traditional rulers by constraining them in specific ways that enabled framing and conditions land governance possible.[322]

This intervention took a forced entry by pushing indigenous people into capitalist wage relations and disturbing modes of production that were previously prevalent. Marxist scholars assert that this is a form of primitive accumulation by dispossession.[323] Whilst the indirect rule approach was structured to create a two-tiered approach that separated the rulership of black and white people. This approach saw the wider manifestation of the colonial policy reflected in the creation of native authorities and native reserves.

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318 Frederiksen T 'Authorising the Natives: Governentality, dispossession, and the contradiction of rule in colonial Zambia' 2014. *Annals of the Association of American Geographers* November Vol. 104, No. 6. 1273-1290.

319 Frederiksen 2014 *Annals of the Association of American Geographers* 1273-1290.

320 Frederiksen 2014. *Annals of the Association of American Geographers* 1273-1290.

321 Frederiksen 2014. *Annals of the Association of American Geographers* 1273-1290.

322 Frederiksen 2014. *Annals of the Association of American Geographers* 1273-1290.

323 Glassman J. 'Critical geography III: Critical development geography' 2010. *Progress in Human Geography*, *35*(5) 705–711.

However, the system of native authorities and creation of native reserves undermined the indigenous people, failed to improve their wellbeing and led to dispossession.[324] The native reserves and native authorities also produced new forms of racial discrimination and economic subjectivity through tools that influence behaviour such as market relations and education programs.[325] The colonial rule also aimed at creating separate racial judicial systems. This is reflected in the native courts system approach which was a particular racial and legalistic form of political control.[326] A relationship between the customary and colonial legal systems was codified by the native authorities legislation and the British administration. The aim of this approach was to transfer colonial tasks to indigenous traditional authorities with an aim of empowering and preserving political customary structures and governance.[327]

In contrast, the authority given to traditional authorities, namely, chiefs had conditions. Customary law existence and administration was allowed to prevail in so far as it did not undermine colonial British supremacy and was not inconsistent with morality and natural justice.[328] However, in the 1980's historians critically began to analyse the principle of indirect rule in South Africa and Zambia.[329] The application of indirect rule marked disjunctions from market-oriented policies that were liberal to protecting rural indigenous people from modernity to socially conservative ideas.[330] The principle of indirect rule reveals an ambiguity in that it was based on conservative social ideas, and on the other hand, it aimed at facilitating change through colonial interventionist indigenous farming systems.[331]

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324 Frederiksen. T. 'Authorising the Natives: Governentality, dispossession, and the contradiction of rule in colonial Zambia'' 2014. *Annals of the Association of American Geographers* November Vol. 104, No. 6. 1273-1290.

325 Frederiksen 2014 *Annals of the Association of American Geographers* 1273-1290.

326 Mamdani M. 'Indirect Rule, Civil Society, and Ethnicity: The African Dilemma. Social Justice'1996 *Scientific Research an Academic Publisher* 23, 145-162.

327 Frederiksen 2014. *Annals of the Association of American Geographers* 273-1290.

328 Frederiksen. T. 'Authorising the Natives: Governentality, dispossession, and the contradiction of rule in colonial Zambia' 2014. *Annals of the Association of American Geographers* November Vol. 104, No. 6. 1273-1290.

329 Ranger T. The invention of tradition in colonial Africa. 1983. Cambridge University Press pp.1.

330 Green E. 'Indirect Rule and Colonial Intervention: Chiefs and Agrarian Change in Nyasaland, ca. 1933 to the Early 1950s' 2011 *The International Journal of African Historical Studies*, Vol. 44, No. 2 pp. 249-274.

331 Green *The International Journal of African Historical Studies* 249-274.

Colonial administration intervened in rural areas of both countries from the 1920s onwards to make institutional and technological changes to farming methods.[332] The colonial rulers considered indirect rule as a strategy to prevent the rise of capitalists' relations of production but to protect colonial protectorates from modernity traumas, promote economic development and partly consolidate pre-capitalist structures.[333]

Presently, customary land tenure debates in South Africa and Zambia confirm that the indirect rule principle is a historical governance source of land-related issues and a culprit of the centralisation of power. This is because social-economic realities and differentiations of power relations and local politics are currently overlooked in national customary land governance efforts that are supposed to spearhead democratic reforms. Legislation in South Africa and Zambia still reveals that the complexities and realities of customary land governance do not take cognisance of how customary land tenure systems govern and operate in practice. Although, customary structures of land governance have shown resilience during and post-colonisation.[334]

It is highly paramount to consider that land rights are inserted in social units and relationships and that the social identities are layered in character, multiple and overlapping.[335] Land rights are also derived from a social unit and are individual and communal in character. Access to land is nested in the customary administrative and management systems of governance, which are separated from control of land with flexible boundaries as opposed to those of statutory land tenure. Different models influence indigenous peoples' customary land governance.

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332 Green 2011. *The International Journal of African Historical Studies* 249-274.

333 Green E. 'Indirect Rule and Colonial Intervention: Chiefs and Agrarian Change in Nyasaland, ca. 1933 to the Early 1950s' 2011 *The International Journal of African Historical Studies* Vol. 44, No. 2 pp. 249-274.

334 Cousins. B. 'More than socially embedded: The distinctive character of 'communal tenure' regimes in south Africa and its implication for land policy' 2007 *Journal of Agrarian Change* vol.7 No.3 293.

335 Cousins 2007 *Journal of Agrarian Change* vol.7 No.3 293.

Within these models are divergent interests which are anchored on the following factors; decision-making, governance arraignments, participation process, procedural fairness, and alignment to technical, financial and administrative capabilities. Over the years, the South African and Zambian governments have placed economic development as a major priority by channelling resources to achieve economic growth. This has led to political interferences towards customary land tenure governance as economic interests in ventures such as mining, agriculture and infrastructure development have often bypassed targeted communities' interests.[336]

For instance, the Constitutions of South African and Zambia cloth traditional leaders the powers to be custodians of the land in their respective localities. This has led to land grabbing and displacements emerging in South Africa and Zambia because of the political class differentiation strategies introduced during colonisation.[337] Land access, control and ownership differentiations are exacerbated by colonial land-related inequalities reflected in existing laws and policies in the two comparative countries. This has resulted in the abuse of power by the traditional authorities who have been allocating land on a large-scale for investment in the name of economic development without consulting subjects, thereby displacing communities.

The Constitutions of South Africa and Zambia also vest discretionary powers to the state executives to expropriate land for the public interest. This process is often susceptible to discrimination towards customary land holders and corrupt practices. Similarly, the processes of expropriation have procedural rules that are one-dimensional in advancing the interests of the state without careful consideration of the affected parties.

336 Amoo.S. Law and development and the expropriation laws of Zambia.

337 Lumumba O, Kanyinga K. 'The Land Question and Sustainable Development in Kenya'. 2008 Draft paper for the Regional and World Summit on Sustainable Development (WSSD) Dialogue Initiative: An African Perspective on Land and Sustainable Development. Make sure that you follow the citation style that I sent you. There is 1cm apart between the footnote number and the the first word of the footnote.

In South Africa this is reflected in the case of *Government of the Republic of South Africa v Grootboom,* [338] where the court ruled in favour of settlers who were displaced in that everyone has a right to access adequate housing. The court established that there is a connection between the right to access land and the right to access adequate housing. The judge also pointed out that 'rights must be understood in their social and historical context'.[339]

In Zambia, this is reflected in the case of *Zambia National Holdings Limited and Another v Attorney General.* The court held that interested persons in rural communities do not only include those who physically occupy land but that it extends to those who sustain their livelihoods by having access and user rights to resources. [340] In South Africa, Section 25 of the Constitution shows that the legislature intends to reduce injustices regarding expropriation, and this approach is also reflected in the Expropriation Bill.[341] This similar approach is reflected in Zambia in the Municipal Corporations Act.[342] It reduces arbitrariness and corruption in that it requires that affected parties are allowed to be heard by the minister.[343] These sorts of procedures create mechanisms that involve affected parties in the process of expropriation. Therefore, to progressively move forward, customary law practices regarding land governance are considered together with the responsibility that land management and local institutions play.

4.2.2 Integration and the plurality of laws

Customary laws that govern customary land face denial in their potential contributions to jurisprudence in South Africa and Zambia.

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338 *Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000)*

339 *Government of the Republic of South Africa v Grootboom 2001 (1) SA 46; 2000 (11) BCLR 1169.*

340 *Government of the Republic of South Africa v Grootboom 2001 (1) SA 46; 2000 (11) BCLR 1169.*

341 Expropriation Bill of the Republic of South Africa, 2020.

342 Municipal Corporation Act of the Republic of Zambia.

343 Municipal Corporation Act of the Republic of Zambia.

The focus in the field of jurisprudence since colonialism in both countries demonstrates a plurality consciousness influenced by western legal positivists theories and approaches, which have impacted the way customary laws are perceived.[344] This colonial bias strongly reflects the denial of the existence of proper customary law in a social context and ignores the diversity of many cultures and languages. Customary land governance systems in South Africa and Zambia guide customary authorities, institutions, human behaviour, relations and enforcement.[345]

In post-colonial South Africa and Zambia, the statutory legal systems introduced during colonisation are still in operation through legal pluralism. Legal pluralism has allowed for the parallel existence of the statutory and customary legal and land tenure systems in South Africa and Zambia. However, the two legal and land tenure systems' co-existence reveals conflicts in the ways they interact. They require resolution to encourage the full realisation of customary land rights. The customary legal and land tenure systems are mostly analysed as a unit of the statutory legal and land tenure system, which has affected the development of customary law.

The constitutions of South Africa and Zambia contain supremacy clauses that affirm that legal or normative orders inconsistent with the constitution's provisions are invalid to the extent of their inconsistency. In South Africa and Zambia, customary land laws' have thus been subjected to specific requirements in order for them to be recognised or considered applicable. These requirements are reflected in the Constitutions of both countries, and they state that; customary practices and norms should not be contrary to the principle of natural justice, public order, equity, good conscience and morality.

344 Woodman G.R, Obilade A.O. *African law and legal theory.* 1995 New York, New York University Press 225- 460.

345 Woodman 1995 New York, New York University Press 225- 460.

The Constitutions of South Africa and Zambia are supreme laws in the statutory legal frameworks. They both provide for the recognition of the traditional leadership and operations of customary law in so far as it is not inconsistent with the Constitution or other statutory legislation enacted by Parliament, or else they will be "invalid" to the extent of their inconsistency.[346] These requirements were upheld in South Africa in the case of *Bhe v Khayelitsha Magistrate*[347] and Zambia in the case of *Kamiki v Jairus.*[348]

Although there are certain customary practices on one hand that are derogatory like the rule of male primogeniture which was declared unconstitutional. There are other customary norms and practices that are progressive. Despite both countries' constitutional recognition of customary law, they do not resolve the inherent conflicts between human rights and customary norms and practices regarding the right to culture.[349] Therefore, it is clear to note that conflicts in law undermine the practice and development of culture as they impose that customary practices should be evaluated so that they constantly remain in accordance with the provisions of the statutory legal framework. For instance, the South African constitution under section 25 enforces the shield of the right to access land. Section 39 asserts the development of customary law when courts interpret the Bill of Rights, which in this thesis is section 25.

The Zambian Constitution provides that the traditional authority or chiefs' observance of customary law is subject to applicable legislation and customs. The courts must apply customary law subject to any legislation that specifically deals with customary law. This is similar to section 36 stipulations of the South African Constitution. The enjoyment of the right to culture regarding the land is also limited under Article 23, which prohibits discrimination on the ground of sex.

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346 Constitution of the Republic of South Africa, Constitution of the Republic of Zambia.

347 *Bhe v Khayelitsha Magistrate 2005 (1) BCLR 1 (CC).*

348 *Kamiki v Jairus (1967) ZR 71.*

349 Wall D 'Customary law in South Africa: Historical development as a legal system and its relation to women's rights'https://www.sahistory.org.za/article/customary-law-south-africa-historical-development-legal-system-and-its-relation-womens (Date of use: 20th November 2022).

Some customary laws and practices only allocate land to males and not females. Therefore, customary law practices of land governance and administration have proved incompatible with human rights guaranteed by the Bill of Rights and civil rights granted by the Constitution and other provisions of legislation enacted by Parliament.[350] Examples of customary practices that have since been declared inconsistent with the Constitution of South Africa on inheritance relate to the rule of male primogeniture, which was brought before the courts in the case of *Bhe v Khayelitsha Magistrate*.[351] The rule of male primogeniture implied that women ought to be excluded from inheriting. This rule was challenged in this case and declared inconsistent with the Constitution.

In the case of *Mthembu v Letsela*, the court declared the exclusion of women from inheriting property unconstitutional. The court was presented with a question on whether Ms Mthembu and her daughter had the right to claim intestate succession of the property after her spouse Mr Letsela and father to her daughter was deceased.[352]

Similarly, in Zambia, the issues of women's exclusion to inherit were challenged in the case of *Phiri v Phiri and Another*.[353] In this case, the court held that the deceased estate's beneficiaries were the applicant, the deceased's wife, and the deceased's surviving child. The contention that the deceased mother should inherit the estate was dismissed. The court stated that the mother-in-law is not considered a dependent entitled to a share of the deceased estate. The court pointed out that whether or not the surviving spouse contributed to the building of the house or the extension thereof was immaterial.

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350 Wall D 'Customary law in South Africa: Historical development as a legal system and its relation to women's rights'https://www.sahistory.org.za/article/customary-law-south-africa-historical-development-legal-system-and-its-relation-womens (Date of use: 20th November 2022).

351 *Bhe v Khayelitsha Magistrate 2005 (1) BCLR 1 (CC).*

352 *Mthembu v Letsela 2000 (3) SA 867 (SCA).*

353 *Phiri v Phiri and Another (2013/HP/0593 ZMHC.*

Customary land tenure systems in South Africa and Zambia do not similarly confer land rights as the statutory legal system.[354] Resultantly, neither do customary land tenure systems conform to stringent requirements like those imposed by statutory law.[355] In both countries, customary land rights are often discriminated when there are competing interests with statutory tenure. This has steered up debates and advocacy of customary law to be considered superior in its own right and allow it to adequately protect, promote and realise customary land holders rights.

4.3 Differences Between South African and Zambian Customary Land Governance

4.3.1 Politics of customary land governance

South Africa comprises British, Roman-Dutch Law and customary legal systems, while Zambia comprises British and customary legal systems. When the British colonial principle of indirect rule was applied in South Africa, the ideological strategy was designed for colonial officials to win legitimacy.[356] It became the basic template for inequality, resulting in racial segregation and apartheid.[357] The principle of indirect rule steered debates over traditional authority, and political identities and these debates have continued to shape the politics of South Africa post-colonisation. On the other hand, in the 1920s Zambia saw a colonial transition from the British South African Company.

354 H.W.O. Ogendo. O. 'Social issues of theory in the study of tenure relations in African agriculture' 1989 *Journal of the International African Institute* 11.

355 H.W.O. Ogendo. O. 'Social issues of theory in the study of tenure relations in African agriculture' 1989 *Journal of the International African Institute* 11.

356 MYERS, J. C. Indirect Rule in South Africa: Tradition, Modernity, and the Costuming of Political Power. Boydell & Brewer, 2008 vol 33. 120-145.

357 MYERS, J. C. Indirect Rule in South Africa: Tradition, Modernity, and the Costuming of Political Power. Boydell & Brewer, 2008 vol 33. 120-145.

It was chartered by the British authorities with a mandate to control South-Central Africa and end rural unrest.[358] The interventions were aimed at furthering extractive capitalism and colonial rule in Zambia. Therefore, land governance inequalities in South Africa and Zambia vary in scope based on their degree of colonial history and foreign ownership.[359] The extent to which the characteristics of customary land systems operate in South Africa and Zambia vary given the different complexities in colonial history, diverse state interventions and responses. Large expropriation of land during colonisation was extensive in South Africa where 87 percent of land is alienated to white settlers but occurred to a minimal extent in Zambia.[360] Racially related differentiations in economic power associated with land access, ownership and control are one of the major sources of land conflict in South Africa but not in Zambia.

Under section 25 (3), the South African Constitution considers the right to award just and equitable compensation, not market-value compensation.[361] This is because the determination of compensation is not only focused on market value alone since there are other factors that ought to be considered. Such as renovations made on the property in question, which had increased the property's market value.[362] Zambia's Land Acquisition Act under section 10 provides that the minister pays compensation on behalf of the government in incidences of compulsory land acquisitions.

However, the Act fails to provide how compensation is determined. Section 11 (2) of this Act provides that if a dispute ensues regarding the amount of compensation, that dispute shall be referred to a selected committee of the national assembly. The compensation amount resolution of the committee shall not be disputed and presented in any court of law on the grounds that it is inadequate.[363]

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358 Frederiksen. T. Authorising the Natives: Governentality, dispossession, and the contradiction of rule in colonial Zambia. *2014. Annals of the Association of American Geographers* November Vol. 104, No. 6. 1273-1290.

359 Moyo S. 'Land in the political economy of African development: Alternative strategies for reform' 2007. *Africa Development* Vol XXXII, No. 4.1-34.

360 Moyo S. 'Land in the political economy of African development: Alternative strategies for reform' 2007. *Africa Development* Vol XXXII, No. 4.1-34.

361 *De Villiers v Stadsraad van Mamelodi 1995 (4) SA 347 (T) 35.*

362 Expropriation Bill of the Republic of South Africa, 2020.

363 Land Acquisition Act of the Republic of Zambia, 1970.

This provision raises criticism regarding impartiality in that it subjects citizens who are in dispute with the government to a parliamentary body for adjudication, thereby violating the principles of natural justice as the government is made a judge in its own case.

Although Zambia has no legislation that specifically governs the administration and management of customary land, South Africa enacted the Customary Land Rights Act. Critiques suggest that this Act removes decision-making powers at individual and household levels by shifting the balance of power towards the authority structure of a group, such as traditional councils and chieftaincy and the Minister as prescribed by the Act. The outcome of this approach is that it does not secure land rights but instead undermines the land rights of customary landholders.[364] The relationship between democracy and custom competes in the CLRA and the Traditional Leadership and Governance Framework Act.[365] The tensions these pieces of legislation have raised reveal that there is limited consideration of the practices, values, political identities and liberal democracy associated with customary systems.[366]

4.3.2 Integration and the plurality of laws

Despite the shared circumstances in the plurality of laws in South Africa and Zambia, significant differences exist. The South African constitution is more progressive than the Zambian Constitution in that it provides a comprehensive list of socio-economic rights that are interlinked and dependent on the right to own property. The purpose of this comprehensiveness aims to help those that are disadvantaged due to the implication of apartheid.

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364 Cousins. B. 'More than socially embedded: The distinctive character of 'communal tenure' regimes in south Africa and its implication for land policy'' 2007. *Journal of Agrarian Change,* vol.7 No.3. 281-315.

365 Ntsebeza L. 'Democratic decentralisation and traditional authority: dilemmas of land administration in rural South Africa' 2004.*The European Journal of Development Research* 71-89.

366 Comaroff. J, Comaroff J.L. *Law and disorder in the post colony Chicago, 2006 The University of Chicago Press.*

The difference between South African customary legal frameworks is that, South Africa enacted land-related provisions and laws for customary land governance. Namely, the Constitution and Communal Property Association Act 28 of 1996. Section 13 of the Communal Property Association Act 28 of 1996 affirms the implementation of the provisions of section 25(6) of the Constitution.

The South African Communal Property Association Act reveals a version of customary land tenure developed due to apartheid and colonial policies.[367] The Communal Property Association Act provides that land boundaries ought to be surveyed and registered prior to the transfer of ownership of communal land from the state to the communities. This provision possess challenges and creates grounds for conflicts as land rights in communal areas are nested with overlapping characters.

4.4 Comparative analysis of the approaches followed by the courts of law in disputes resolution

Interpretation of legal principles in legal systems that are drawn from different sources such as those of South Africa and Zambia, have often been regarded as complicated.[368] Legal analysis is the traditional methodology that has been used for a long time to interpret legal principles in statutory legal systems.[369] However, this approach has also been applied to customary legal and land tenure systems in South Africa and Zambia with little consideration of their layered character, which is distinct in nature as it is unwritten, dynamic and passed on from generation to generation.[370] The theoretical approaches used by courts in South Africa and Zambia's legal analysis and interpretation are legal positivism, natural law and customary law.

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367 Cousins. B. 'More than socially embedded: The distinctive character of 'communal tenure' regimes in south Africa and its implication for land policy' 2007 *Journal of Agrarian Change,* vol.7 No.3 281-315.

368 Pienaar, G. 'The Methodology Used to Interpret Customary Land Tenure' 2012 *Potchefstroom Electronic Law Journal* Vol. 15, No. 3. 155.

369 Pienaar 2012 *Potchefstroom Electronic Law Journal* 155-183.

370 Bennett TW. 'African Land - A History of Dispossession' in Zimmermann R and Visser DP Southern Cross 1996 *Civil Law and Common Law in South Africa,* Juta Kenwyn 65-94.

Legal positivism provides that the law should be analysed as it is. This was a school of thought by the founders of this theory, Jeremy Bentham (1748-1832) and John Austin (1790-1859) who were associated with the love for order and classification of the law as is by distinguishing historical and functional analysis from formal analysis.[371]

The legacy of this theory concentrates on adherence to strict authoritative rules as they appear in legislative measures, formal precedents and immemorial custom.[372] On the other hand, natural law focuses on the law as it ought to be. This reflects that the social and moral circumstances should be sufficiently considered in the application of legal principles.[373] The theory of natural law originated from early Roman and Greek philosophers. [374] Aristotle (384-322 BC) emphasised the necessity for formal laws created in reason and that distinctions should be made between natural and common, and positive laws.[375] This theory developed over the years and is now being considered as embracing valid principles that are universally accepted by legislative interventions of humans.[376] This theory focuses on morality as a considerable legal order to be adhered to, and that recourse to authority should not aim to supersede natural reason. This theory does not aim to create separation between moral and legal issues and serves as a basis upon which historical laws can be tested.[377]

Interpretation of statutory laws in South Africa and Zambia is also anchored on the literal, golden and mischief, and purposive rules. The literal rule aims to preserve the separation of powers by upholding the law in its plain and ordinary sense, even in instances where it is illogical.[378]

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371 Dugard. J. 'The Judicial Process, Positivism and Civil Liberty' 1971 *Southern African Legal Journal* 181- 200.

372 Dias R.W.M. 1970 *Jurisprudence,* London Butterworths 3 rd ed, 555-558.

373 Dias R.W.M. 1970 *Jurisprudence,* London Butterworths 3 rd ed, 555-558.

374 Dias R.W.M. 1970 *Jurisprudence,* London Butterworths 3 rd ed, 555-558.

375 Dias R.W.M. 1970 *Jurisprudence,* London Butterworths 3 rd ed, 555-558.

376 Dias R.W.M. 1970 *Jurisprudence,* London Butterworths 3 rd ed, 555-558.

377 Dias R.W.M. 1970 *Jurisprudence,* London Butterworths 3 rd ed, 555-558.

378 Manning,J.F. 'Separation of powers as ordinary interpretation' 2011 *Harvard Law Review*, *124*(8),1939–2040.

The courts also apply the golden rule by investigating whether the intention of Parliament is conveyed in the legislative provisions. The mischief rule is used to investigate the gaps and apply remedies to the ambiguities in laws. The purposive approach considers parliament's intention by ensuring that the law is effective. However, despite customary law's unwritten and dynamic nature, it has been subjected to comparisons with these rules of interpretation against statutory laws in incidences where laws conflict. This is demonstrated in South Africa in the Upgrading of Land Tenure Rights Act which has a provision that translates the transfer of land ownership to an organ in a community. In the Kwadinabakubo community, a dispute ensued after land was transferred to the traditional council, as the provision of the Act was interpreted to refer to the traditional council as an organ.

However, this sort of enactment and purposive interpretation of laws bypasses the layered dynamics of customary practices and norms in land-related decision-making. This is because it overlooks the importance of consensus in communities decision making. In Zambia, a similar dispute arose in the case of *Mpongwe Farms Limited and Others v the Attorney General*. Customary land was grabbed from the petitioners without their consent, rendering them squatters in a Forest Reserve after being displaced. The Customary land owners contended that the provisions of the Lands and Deeds Registry Act violated their rights as protected by the Constitution. These rights include the right to life, personal liberty, protection from inhumane treatment, deprivation of property, and protection from discrimination, among other rights. Some of the concerns raised by the petitioners were that they were denied legal protections and privileges as rural customary tenure residents.

Further, they were also denied adequate protection of their customary land rights and privileges.[379] This case also reveals that customary land tenure is often regarded as subordinate to statutory land as the law, processes and procedures are often not applied or followed well when it comes to customary tenure.[380]

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379 *Alexkor Ltd v Richtersveld Community 2004 (5) SA 460 (CC).*

380 Pienaar, G. 'The Methodology Used to Interpret Customary Land Tenure' 2012 *Potchefstroom Electronic Law Journal* Vol. 15 No. 3 155-183.

This case also shows that the methodology used under customary land is that of legal positivism and natural law with little consideration of customary law.[381] Legal positivism refers to an analysis of 'the law as it is in comparison to the law as it ought to be' also known as natural law.[382] The history of the legal positivism principle reflected a rigid approach to authority and rules as opposed to considering the moral implications of legal customs and laws and universally valid principles.[383]

However, it was developed over the years and has had an influence on the South African and Zambian legal systems.[384] Criticism of legal positivism asserts that the approach of this concept fails to sufficiently consider the social and moral circumstances that surround a case.[385] The application of the principles of legal positivism and natural law by the courts is also evident in the South African case of *Alexkor Ltd v Richtersveld Community.*[386] In this case, the Land Claims Court and Supreme Court of Appeal were inclined to reach their judgement based on established statutory principles without consideration of the customary law.[387] In this case a land claim was instituted in a Land Claims Court (LCC) based on the following grounds: (i) A right to land ownership (ii) Rights that enabled natives to exclusively use their land and benefit from its occupation. (iii) Rights to land they acquired by virtue of occupying it for a long period of time before they were dispossessed. The Land Claims Court held that the Richtersveld community, for purposes of the Restitution of Land Rights Act, was considered.

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381 Pienaar, G. 'The Methodology Used to Interpret Customary Land Tenure' 2012 *Potchefstroom Electronic Law Journal* Vol. 15 No. 3 155-183.

382 *Alexkor Ltd v Richtersveld Community 2004 (5) SA 460 (CC).*

383 Dias R.W.M. 1970 *Jurisprudence,* London Butterworths 3 rd ed, 555-558.

384 Dias R.W.M. 1970 *Jurisprudence,* London Butterworths 3 rd ed, 555-558.

385 Dias R.W.M. 1970 *Jurisprudence,* London Butterworths 3 rd ed, 555-558.

386 *2004 5 SA 460 (CC).*

387 Pienaar, G. 'The Methodology Used to Interpret Customary Land Tenure' 2012 *Potchefstroom Electronic Law Journal* Vol. 15 No. 3 155-183.

The Land Claims Court held that inhabitants of Richtersveld were not sufficiently civilised and had no ownership rights to the land.[388] That is why the colonial government regarded it as *terra nullius.*[389] The LCC rejected the claim of dispossession based on discriminatory racial laws and practices but that the plaintiffs were dispossessed for purposes of mining.[390]

An appeal was filed in the Supreme Court of Appeal (SCA), which overturned the LCC's decision and held that the Richtersveld community had land rights that constituted customary law interests prior to annexation by the British.[391] The Constitutional Court (CC) held that the Natives Land Act 27 of 1913 discriminated against South Africa's black people by depriving them of their right to own land and their subsequent interests in land.[392] To this end, the approach followed by the SCA aimed at reaching a determination of indigenous land title and whether it could be similarly considered in South African law as other jurisdictions with a history of colonisation.[393] The SCA held that the only considerable indigenous land acquisition requirement is that of exclusive occupation by the indigenous people in that area prior to the crown's sovereignty acquisition.

Despite the SCA not giving sufficient recognition of the indigenous land ownership, the court saw it prudent to discuss annexation and the rights it ignites.[394] This was considered by looking at international law and how sovereignty can be established over new territory either by cession, conquest or occupation if the land was inhabited,[395] thereby reaching a conclusion that the Richtersveld community was adequately civilised and the land was not *terra nullis at the time of annexation.* This case was appealed to the CC, which considered the unique characteristics of indigenous law as part of South African law.

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388 *Alexkor Ltd v Richtersveld Community 2004 (5) SA 460 (CC).*
389 *Alexkor Ltd v Richtersveld Community 2004 (5) SA 460 (CC).*
390 *Alexkor Ltd v Richtersveld Community 2004 (5) SA 460 (CC).*
391 *Alexkor Ltd v Richtersveld Community 2004 (5) SA 460 (CC).*
392 *Alexkor Ltd v Richtersveld Community 2004 (5) SA 460 (CC).*
393 The Constitution of the Republic of South Africa, 1996.
394 *Alexkor Ltd v Richtersveld Community 2004 (5) SA 460 (CC).*
395 *Alexkor Ltd v Richtersveld Community 2004 (5) SA 460 (CC).*

The Restitution Act substantiated the CC decision that the Richtersveld community had a customary law interest to the land in question.[396]

The CC further highlighted that the determination of the right of ownership to land must be referenced with the common law, indigenous law and custom.[397] The CC held further by stating that indigenous law must be considered an important part of the law. This case demonstrates that the lower courts are more inclined to adhere to statutory legal principles whilst disregarding customary law. However, this necessitates that the characteristics of customary land tenure require peculiar evidence to prove indigenous people's land rights. Before customary law was recognised with specific reservations and conditions in the constitutions of South Africa and Zambia, colonials ignored it for a long time.

In both South Africa and Zambia, it is clear that restrictions have been placed around the application of customary law in so far as it is not inconsistent with the Constitution and other written laws or repugnant to the rule of natural justice or morality. In both countries, this approach has created a conflict of laws as constitutions provide that customary law can only be applied to land-related issues if it is in accordance with the statutory legal system. The recognition of customary law in the Constitution and other statutes is a progressive development.

To this end, the repugnancy clauses enshrined in the South African and Zambian constitutions create a conflict of laws between customary law, common law and statutory law. The defect of these provisions is that the constitutions are undermined as the validity test for customary law by virtue of swapping the customary law in dispute and which is considered repugnant to public policy with common law. This, in turn, eliminates the courts' ability to develop and validate section 39 of the South African Constitution, which states that:

> '…(1)When interpreting the Bill of Rights, a court, tribunal or forum—
> must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

396 *Alexkor Ltd v The Richtersveld Community 2004 (5) SA 469 (CC).*

397 *Alexkor Ltd v The Richtersveld Community 2004 (5) SA 469 (CC).*

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill…'

In addition, the Zambian Constitution under section 24 provides that:

'…(1) The Bill of Rights, as provided for in Part, is fundamental to constitutionalism and shall be the basis of Zambia's social, political, legal, economic and cultural policies and state action.
(2) The rights and freedoms set out in the Bill of Rights
(a) include rights and freedoms which are consistent with this Constitution but not expressly provided for, except those that are repugnant to the morals and values of the people of Zambia…'

Suffice it to say that customary law can be recognised as far as it is not in conflict with the colonial legal systems procedures, the stipulations of the bill of rights, principles of public policy and natural justice in South African and Zambia. This is a derogatory state of affairs which requires resolution, and this thesis addresses this in the last chapter.

4.5 Conclusion

This chapter reveals limitations in the realisation of customary land rights in the South African and Zambian legal and land tenure systems. The chapter shows that legality, substantive and procedural content of customary law is dependent on the colonial statutory legal system. Thus, the legal systems of South Africa and Zambia are structured hierarchically, where the Constitution is at the apex and legislation, customs and practices form the pyramid of the legal system. The courts of law are also clothed with judicial powers to ensure that the supremacy of the Constitution is maintained both in spirit and content in the legal system's pyramid.

However, it is prudent that customary land tenure regimes are considered distinct from colonial legal forms of private land ownership as they are dynamic in character. In order to avoid challenges that have been posed by land tenure reform policies and laws, it is apparent that the courts in both jurisdictions follow the natural law and legal positivism theory principles when dealing with land customary law disputes.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS FOR ACHIEVING SUSTAINABLE CUSTOMARY LAND GOVERNANCE.

5.1 Introduction

Chapter 1 sets out the approach of the dissertation by highlighting the problem in customary land governance. Chapters 2 and 3 analyse laws, policies, court decisions and practices that influence urban and rural communities' access, ownership and control of customary land in South Africa and Zambia. A comprehensive historical perspective through the law is equally highlighted in South Africa and Zambia to show the evolution of customary land tenure and how it has been impacted. Chapter 4 provides a customary land governance comparative analysis of similarities and differences in laws in South Africa and Zambia. And further analyses the court's approach to resolving disputes in both jurisdictions. It then analyses these similarities and differences in relation to applied legal approaches, principles, techniques and experiences in South Africa and Zambia. Chapter 5 concludes this dissertation and provides recommendations that are relevant in the design of customary land governance interventions in South Africa and Zambia.

5.2 Conclusion

Effective customary land governance is critical not only for the protection and prosperity of communities but also for promoting justice and equity in society. This dissertation analyses the South African and Zambian Constitutions' and legislative frameworks, highlighting distinctive features that surround customary land governance in law and in practice. The Constitutions of South Africa, Zambia, and other statutes provide fundamental ideals necessary in navigating regimes to attain democracy. The courts of law are also clothed with judicial powers to ensure that the Constitution's supremacy is maintained in spirit and content in the legal system's pyramid.

However, customary land tenure is dynamic in character and distinct from statutory legal forms of private land ownership. Interventions are participatory and transparent in enacting, amending and repealing laws that regulate customary land tenure. Although South Africa and Zambia have made tremendous progress in realising indigenous people's land rights post-colonisation, there are still outstanding issues that require resolution. This thesis shows that the legality, substantive and procedural content of customary law depends on the colonial statutory legal system. And that the legal systems of South Africa and Zambia are structured hierarchically, where the Constitution is at the apex and legislation, customs, and practices form the pyramid of the legal system. Conflicts between the statutory and customary legal systems in customary land governance often ensue from legal provisions, customs and practices. These conflicts are exacerbated by competing interests, such as the insecure classification of customary land tenure, when it fails to meet the required legal standard of security.

The statutory legal frameworks for both countries reveal that the laws confine the existence and development of customary law to what statutory law would like it to be. The laws also fail to consider the fact that customary land is characterised as a trans-generational asset by its holders, hence, the rising number of land disputes. Equally, the laws do not interpret customary law within frameworks that recognise that customary land holders have a social and spiritual relationship with land. Statutory laws do not acknowledge that customary land administrative and governance structures function in ways that are specific to their tasks. Uncertainties and ambiguities in customary land tenure are caused by irregularities posed by upholding statutory tenure as superior to customary tenure. This has, affected the recognition, protection and realisation of land rights under customary land tenure.

The statutory legal system’s approach in the interpretation of laws is also anchored on rules which aim to uphold the law even in instances where it is illogical. Other statutory rules aim to investigate whether the intention of Parliament is conveyed in the legislative provisions, and investigate gaps and apply remedies to the ambiguities in laws. But, also consider Parliament’s intention by ensuring that the law is effective.

This dissertation further demonstrates that the frameworks in both countries upon which customary land tenure is governed are insufficient in fully realising land rights. While economic development is important, state officials tend to selectively implement and enforce sections of the law that aim to advance the agenda of investments to the detriment of communities. The pursuit of economic growth in South Africa and Zambia, at times, foster injustice and undermine land tenure security. This dissertation reveals that customary land acquisitions by investors often prove that customary communities do not have tenure security as they are not engaged in the process of free, prior and informed consent. These loopholes in the process have led to the dispossession of communities, followed by inadequate compensation.

Security of land tenure is tied closely to the organisation of legitimate power in a community, and it requires transparency in decision-making by the public management. Recognising customary land tenure in both countries signifies that the statutory legal procedure can protect communities' land rights. Once these land rights have been infringed upon, they can be invoked by applying Constitutional and other legislation provisions. However, the legal frameworks in South Africa and Zambia have laws that are not harmonised together, and they currently fail to protect communities from dispossession.

5.3 Recommendations

The statutory legal frameworks are not determinative or exhaustive in the provision of guidance to customary land governance and administration and the provision of customary land tenure security.[398] Therefore, it is prudent that statutory law interventions are constantly assessed against customary law in land governance, and, customary landholders should be actively consulted in formulating and reforming laws and policies.[399]

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398 Frankema. E.'The colonial roots of land inequality: geography, factor endowments, or institutions?' 2010 *Economic History Review Vol. 63, No. 2 . 427.*

399 Cousins. B. 'More than socially embedded: The distinctive character of 'communal tenure' regimes in south Africa and its implication for land policy' 2007. *Journal of Agrarian Change,* vol.7 No.3. 281-315.

The end goals of legislation regarding customary land tenure should be articulated and identified clearly by legislators and policy makers.[400]This approach will help interpret laws in ways that do not weaken the protection of customary land rights.[401]

When synergising customary and statutory land governance systems, there are benefits in carefully identifying differences and similarities.[402] These differences and similarities can then be creatively used to achieve effective outcomes in the protection, promotion and realisation of customary land tenure. [403] Customary land communities and local state actors should be proactively involved in legal and policy discussions, as their involvement will assist in conceptualising laws that aim to achieve better results.[404] Involving communities and their leaders in legislative and policy interventions helps identify contradictions and other critical issues that have not been covered or resolved adequately in legislation.[405]

The statutory legal frameworks must also recognise customary land tenure as equal in weight with statutory land tenure to avoid overlapping conflicts between the two land tenure systems in governance.[406] Good customary land governance should be established, and oversight and safeguard mechanisms should be integrated in laws and policies, institutional arrangements and judicial structures in ways that provide accountability and promote justice.[407]

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400 Southern Cross 1996 Civil Law and Common Law in South Africa, Juta Kenwyn 65-94. Bennett TW. 'African Land - A History of Dispossession' in Zimmermann R and Visser DP

401 Southern Cross 1996 Civil Law and Common Law in South Africa, Juta Kenwyn 65-94. Bennett TW. 'African Land - A History of Dispossession' in Zimmermann R and Visser DP

402 Pienaar, G. 'The Methodology Used to Interpret Customary Land Tenure' 2012 *Potchefstroom Electronic Law Journal Vol.15, No.3.155*

403 Allot A. African Law. An introduction to legal systems 1968.

404 Cousins. B. 'More than socially embedded: The distinctive character of 'communal tenure' regimes in south Africa and its implication for land policy' 2007. *Journal of Agrarian Change,* vol.7 No.3. 281-315.

405 Ntsebeza L. 'Democratic decentralisation and traditional authority: dilemmas of land administration in rural South Africa' 2004.*The European Journal of Development Research* 71-89.

406 Cousins. B. 'More than socially embedded: The distinctive character of 'communal tenure' regimes in south Africa and its implication for land policy'' 2007. *Journal of Agrarian Change,* vol.7 No.3. 281-315.

407 Palmer *D et al* 'Towards improving land governance' 2009 Land Tenure working paper 11.

This approach will increase the ability of traditional leaders, communities and government bodies to promote and enforce equitable land governance processes.[408]

Specific mechanisms that relate to greater customary land recognition in its role and legality should be designated satisfactorily within the statutory legal framework. In order to include a participatory process in customary land governance interventions, it is paramount to evaluate laws and policies concerning community consultations as they have shortcomings in providing guidance and enforcement to processes.

Efforts in realising communities' land rights should aim to serve the cultural, political, social and economic institutions upon which customary land communities are organised.[409] This approach should aim to adapt to democratic and innovative ways that maximise local participation. The role of the governments in South Africa and Zambia should be to promote the establishment of structures at the local level that foster democratic control and regulation and prevent oppression and discrimination towards the vulnerable members of the community.[410] Efforts in customary land governance should aim to understand the context of a community's political and social dynamics and the complexities of obligations related to land access, use and control.[411] This approach allows customary land governance systems of protection and security to exist within their own frameworks as opposed to what statutory law might want them to be.[412] The statutory legal system must be assessed on how it influences decision-making under customary land tenure.

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408 Palmer *D et al* 'Towards improving land governance' 2009 Land Tenure working paper 11.

409 Cousins. B. 'More than socially embedded: The distinctive character of 'communal tenure' regimes in south Africa and its implication for land policy' 2007. *Journal of Agrarian Change,* vol.7 No.3. 281-315.

410 Ntsebeza L. 'Democratic decentralisation and traditional authority: dilemmas of land administration in rural South Africa' 2004.*The European Journal of Development Research* 71-89.

411 Cousins. B. 'More than socially embedded: The distinctive character of 'communal tenure' regimes in south Africa and its implication for land policy' 2007. *Journal of Agrarian Change,* vol.7 No.3. 281-315.

412 Cousins. B. 'More than socially embedded: The distinctive character of 'communal tenure' regimes in south Africa and its implication for land policy' 2007. *Journal of Agrarian Change,* vol.7 No.3. 281-315.

It is also important that the different levels of power and authority in decision-making in a customary community are recognised in land governance interventions.[413] This is because the complex and dynamic decision-making process of land-related matters is political and integral to peoples' customary land rights. It is recommended that the validity of customary land laws should not be determined by applying statutory interpretation rules, as this approach signifies that the only legitimate sources of law are written rules, regulations, and principles that have been expressly enacted, adopted, or recognised by a governmental entity thereby undermining customary laws.

Therefore, efforts in customary land governance should be directed towards frameworks that allow for effective institutional arrangements, legal and policy, and dispute resolution mechanisms that aim to achieve positive and sustainable outcomes. For accurate approaches in land governance, customary land rights must be understood in light of relationships and resources which are subject to uncertainties based on livelihood in the social and political community setting.[414] When dealing with customary land tenure, instead of aiming to define rules within a legal system in a coherent way, land governance interventions should seek to allow the flexibility of customary law and not seek to specify all the rules from the onset.[415] However, it is important to note that customary laws can be inequitable, like the principle of male primogeniture discussed in this dissertation.

To this end, customary land governance interventions should not override the approach of determining land rights and security of tenure through a messy and dynamic process. It is recommended that the factors that determine and disturb the enjoyment of land rights under customary land tenure are closely reviewed.[416]

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413 Cousins. B. 'More than socially embedded: The distinctive character of 'communal tenure' regimes in south Africa and its implication for land policy' 2007. *Journal of Agrarian Change,* vol.7 No.3. 281-315.

414 Moyo S. 'Land in the political economy of African development: Alternative strategies for reform' 2007. *Africa Development* Vol XXXII, No. 4.1-34.

415 Moyo S. 'Land in the political economy of African development: Alternative strategies for reform' 2007. *Africa Development* Vol XXXII, No. 4.1-34.

416 Palmer *D et al* 'Towards improving land governance' 2009 Land Tenure working paper 11.

It is also recommended to adequately realise and protect customary land rights by considering their historical, cultural, social, economic, legal and institutional context.[417] In order to avoid challenges that land tenure reform laws and policies have posed, it is apparent that the courts in both countries follow efforts that aim to improve land conflict resolution.[418]

There is a need for intensified capacity development in customary land. This is because customary land tenure characteristics differ from common law principles and other statutory legal concepts, and land tenure cannot be described in light of these concepts.[419] Harmonisation of laws and policies is key to promoting equitable customary land governance, and national governments should ensure that they devote the resources necessary for efficient implementation and enforcement.

417 Ntsebeza L. 'Democratic decentralisation and traditional authority: dilemmas of land administration in rural South Africa' 2004.*The European Journal of Development Research* 71-89.

418 Frederiksen. T. Authorising the Natives: Governmentality, dispossession, and the contradiction of rule in colonial Zambia. *2014. Annals of the Association of American Geographers* November Vol. 104, No. 6. 1273-1290.

419 Pienaar, G. 'The Methodology Used to Interpret Customary Land Tenure' 2012 *Potchefstroom Electronic Law Journal Vol.15, No.3.155*

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