

**PROPERTY RIGHTS
IN ZAMBIA**

**AN ISSUE PAPER PRESENTED FOR THE COMMISSION ON
LEGAL EMPOWERMEENT OF THE POOR**

LISTS OF ABBREVIATIONS

ASP	-	Agriculture Support Programme
CHH	-	Child – Headed Household
EPWDA	-	Eastern Province Women Development Association
FAO	-	Food Agriculture Organization
JWOP	-	Justice for Women and Orphans Project
HLCLEP	-	High Level Commission on Legal Empowerment of the Poor
FHH	-	Female – Headed Household
LADA	-	Law and Development Association
MHH	-	Male – Headed Household
NGO	-	Non – Governmental Organization
NP	-	Northern Province
SLA	-	Sustainable Livelihoods Approach
SP	-	Southern Province
SPSS	-	Social Package for Scientists
ZP	-	Zambia Police

INTRODUCTION

The High Level Commission on Legal Empowerment of the Poor aims at developing new policy recommendations for the sake of reducing poverty through protected property and labour rights, within an environment that enhances access to justice and increases opportunities for legally establishing and operating businesses.

The Commission is currently carrying out a series of national consultations in order to ensure national ownership of the legal empowerment agenda and raise awareness on the correlation between poverty and informality in the four thematic areas of access to justice and rule of law, property rights, labour rights and legal mechanisms to empower informal businesses.

This is a working paper on property rights, prepared with the goal of establishing a basis for discussion in focus groups meetings and the national conference. This paper offers an overview of issues that are critical to any discussion of reforms around property rights protection in Zambia.

CONCEPT OF PROPERTY RIGHTS

By definition, a property right is the *exclusive authority* to determine how a resource is used, whether that resource is owned by government or by individuals. Private property rights have two other attributes in addition to determining the use of a resource. One is the right to determine the use; the other is the exclusive right to the services of the resource. Finally, a private property right includes the right to delegate, rent, or sell any portion of the rights by exchange or gift at whatever price the owner determines.

Property rights must be understood as a fundamental human right. As clearly pointed out by Article 17 of the Universal Declaration of Human Rights, “Everyone has the right to own property alone as well as in association with others...No one shall be arbitrarily deprived of his property”.

Throughout history, the idea of human rights has developed in close association with the idea of private property rights. They are the most important requirement of capitalist economic systems, both in the developing or the developed world. They are as important as freedom of religion and freedom of speech. In this regard, it is important to stress that private property rights are the rights of humans to use specified goods and to exchange them. That is a fundamental reason for preference of a system of strong private property rights: private property rights protect individual liberty.

Property rights are defined through law, and therefore the legal empowerment of the poor, as citizens, can only come about through ensuring the protection of those rights.

However, the majority of the world's population does not have adequate access to secure property rights, making the realization of these rights an arena for social and political contestation.

POVERTY AND PROPERTY RIGHTS IN ZAMBIA

The lack or insecurity of property rights is a fundamental cause of poverty. In other words, poverty can be reduced through formalization of property rights. This means that property rights facilitate economic transactions, ensure efficient and sustainable resource use, allow for the evolution of effective credit markets, improve the business climate and investment opportunities and ensure economic accountability and transparency. Equally, the absence of secure property rights undermines economic development and hinders governance.

Poor people generally lack effective legal recognition of their economic assets. With reference to Zambia, certain vulnerable groups are systematically disenfranchised through lack of access to property rights. These groups encompass women, children, disabled, and elders.

Women are responsible for rural households in increasing numbers. However, formal and informal property systems disenfranchise women and the cost of such inequality is enormous: without equal rights to resources, most rural women must rely on men for their physical wellbeing, economic security, and social status. At

various stages of women's lives, their rights to land are dependent upon fathers, brothers, husbands, and sons. If a woman's relationships with the men in her family terminate by death, divorce, abandonment, or other circumstances, the woman may also be left without a home or an accepted place in a community, and with no independent means to secure her survival.

Providing vulnerable groups with the right to use, own, and transfer moveable and immovable property is thus important to promote entrepreneurial activity and also provide them with a platform for building strong families and strong businesses.

LAND, HOUSING INFORMALITY, AND POVERTY

A reliable predictor of extreme poverty and hunger is rural landlessness. The poor are usually landless or land-poor. Inadequate right of access to land, and insecure tenure of those rights, often result in entrenched poverty and are significant impediments to rural development and the alleviation hunger.

The dual legal system

Land and housing play a pivotal role in the livelihood of Zambians. According to the Zambian constitution, the land can be acquired through customary or statute law:

- Under the statute law, Zambians can apply to the Ministry of Land for state land for lease. The process is characterized by several administrative requirements that lower possibilities of vulnerable groups, such as women, in accessing state land. These requirements range from providing proof of capacity to develop land (in this case, the proof is given by a bank statement indicating the amount of money in the bank) to filling in technical application forms which illiterate women are not able to provide.
- Under the customary law, Zambians can apply to the traditional authority in the area who will give the land for individual use, for a limited period of time or for indefinite use.

It must be pointed out that customary laws have several conditions that make access possible only through a male relative. As a matter of fact, women are often perceived as property belonging to someone and therefore cannot own property themselves. The contrary would undermine the husband's authority. To sum it up, under customary practices related to land rights, men have easier access to land than women.

It is also important to note that the bulk of the ethnic groups in Zambia are patriarchal. This leads married women to leave their natal homes in order to settle in their husbands' villages, where they might be allocated fields by their husbands.

Even when women own lands through unwritten rights, they have little incentive to produce because, despite playing a pivotal role in the agriculture sector, they do not have the right to decide over the variety of crops to cultivate. The lack of full participation in decision making has also discriminated and weakened women's rights.

Marital property rights

Since marriage can be either under custom or statute law, women's marital property rights are regulated by the regime governing their marriage.

Women married under the statute law have their property rights protected by the British Matrimonial Causes Act, and the Married Women's Property Act. According to these Acts, women are entitled to have a share in the matrimonial property, including the husband's property, and the jointly owned and acquired property.

Women married under customary law are not protected by the above mentioned Acts. Accordingly, their property rights stem from traditional norms which do not foresee an equitable share of the marital property. As a matter of fact, women are entitled to kitchen utensils, what they came with into the marriage and whatever the husband has given them as gifts. The bulk of the household assets are thus controlled by men.

The consequences of lack of property titles

Many reformers argue that once informal land holders receive a property title, they can leverage their legitimized asset to increase their net wealth, be more

productive, be less reliant on wage labour, and more able to withstand economic shocks. In short, property titles are believed to bolster land values, and increase investment and access to credit for owners.

However, without a proper and secure title to their land, people may be deprived of the means, opportunity and incentive to leverage their land and resources in a productive way. More specifically, lack of property titles disadvantages owners because of the following hurdles they cope with daily:

- Live in fear of eviction. Without enforceable property rights, residents of informal settlements are subject to forceful eviction even after many years of residence. They must fend for themselves or pay bribes to local slum lords in order to defend their right to occupy land, to protect it from harmful encroachment, and to settle disputes.
- Have less access to public infrastructure than titled land owners. As a matter of fact, many people living in informal settlements do not have access to municipal utilities such as water and electricity.
- Must defend their property, thereby diverting time and effort from productive activities, such as investment. This means that the lack of protection of tenure and of the lack of legal leverage for economic activity decreases productivity.
- Have little incentive to invest in their land because there is no guarantee that the resultant increase in value will accrue to them, especially if eviction is a possibility.
- The land and shelter disenfranchisement of the poor affects the availability and quality of the housing stock and prevents the development of an adequate housing stock over time.
- Do not have easy and fair access to credit. Without formal property titles, small entrepreneurs often have difficulty obtaining loans to start businesses. It is also important to highlight that in Zambia 95 % of commercial bank loans to businesses are secured by land. Without a title to use as collateral, they lack access to credit. As a consequence of this, if women or other vulnerable groups cannot access to bank loans they are forced to access finance informally.

PROPERTY GRABBING

Property grabbing is a troubling subcategory of tenure insecurity stemming from traditional practices and customary laws which place vulnerable groups in a subordinate status with respect to property rights. Women, the group most affected by this burden, often face forcible eviction from their homes and their land by family member, traditional authorities and or neighbors.

Property grabbing is a widespread problem which occurs after somebody's death. Since the majority of the population dies without a will, the division of the deceased's estate is left to his or her relatives. Where the deceased is the man, the widow has not access to the property and assets left by her husband because these items are considered belonging to the deceased's family.

In order to tackle this burden, phase out the incidents of property grabbing, and thus protect the rights of the widows, the GRZ passed the Intestate Succession Act in 1989. This Act deals with estates of persons who did not leave a will. More specifically, following the husband's decease, the widow is entitled to receive 20% of the deceased's estate, his children are entitled to equally share the 50%, his parents 20%, and other relatives are allowed to receive 10%.

In order to the Interstate Succession Act to be effective, there must be a change in attitudes and beliefs. Awareness and advocacy campaigns about the law must be raised among people in order for them to implement the Act. These campaigns should be jointly carried out by civil society organizations such as the Eastern Province Women Development Association (EPWDA) and the Law and Development Association (LADA). They should encompass legal education programs on local radio stations and distribution of information material in local languages to individuals and institutions. These NGOs have the comparative advantage to raise awareness among vulnerable groups and train paralegals who deliver legal advice, handle investigation and provide support to women and vulnerable groups whose property rights have been denied.

However, it is important to stress that the above mentioned Act holds for land held under statutory law. On the contrary, land held under customary tenure and homesteads built thereon are excluded from this Act.

As 80% of land is held under customary tenure, rights to inherit property thus rest with the deceased man's family. Property grabbing carried out by the

relatives of the deceased man are therefore widespread, although increased training of local court officials may have resulted in a slight decrease in the practice.

ACCESS TO LEGAL SYSTEMS AND PROPERTY RIGHTS

According to the Zambian Constitution, the protection of property rights is recognized by both a system of written statutory law and unwritten customary law. Statutory law stems from the English law, while customary law is based on national traditions and customs.

Both customary and statutory laws handle property rights issues with disparity. This is a result of "contradictory provisions" of the Constitution whereby article 11 guarantees the equal status of women and article 23 permits discriminatory laws to exist in the area of personal law, and customary law in any matter. As a result of this, when local Courts – the most accessible courts to people living in rural areas – deliver judgments that come from Customary law and are against statutory law, the two legal systems can easily clash.

With reference to access to formal legal institutions, it is important to underline that before a property rights case is brought to court there are several obstacles to the implementation of the statutory law. This often happens because poor and vulnerable people do not have enough knowledge or awareness about entitlements to their rights. The result is that many women are, for instance, not aware of the possibility to bring to court their late husband's relatives accused of property grabbing. Women who indeed manage to go to the court must also face relevant hurdles ranging from fear of witchcraft to the possibility of losing their social safety networks. Without a proper moral support they can easily give up and suffer in silence.

On the other hand, when the case is brought to court it will face several challenges due to the fact that Local Courts Justices do not enjoy effective trainings for their post. As a consequence, the judgments they deliberate stem from their understanding of traditional and cultural norms and practices, which are often discriminatory vis-à-vis women's rights.

It must be stressed that access to formal legal system appears daunting to the majority of the population. More specifically, it is impossible for more than 90% of Zambians to enter this system and thus to benefit from all the security, organization, information, capital, and the expanded national market that statutory law can provide.

The reasons why people living in the “extralegal” system have created a self-organized system of institutions that allows them to access to property rights is due to the obstacles that must be overcome in order to access the legal system. These rights, as already discussed, are governed by traditional norms which have proved to be discriminatory towards vulnerable groups such as women. Accordingly, if the aim is to bolster and ensure access to property rights for all, there is a need to uphold the informal laws existing in the above mentioned self-organized systems.

REFORMS

Since the Constitution recognizes the dual legal system, protection, enhancement and access to property rights can be effective only if there are changes in both customary and statutory laws.

Engaging with the informal system

Given that the majority of disputes over property rights are resolved at the local customary level, any comprehensive access to these rights needs to take greater account of informal justice systems and actors. Overlooking such systems will not change problematic practices existing in customary laws and will undermine access to property rights.

The engagement with the informal system is also deemed necessary since the bulk of support to property rights has been channeled only to the ones existing in formal systems.

In order to ensure effective engagement with informal systems, the following recommendations are proposed:

- Support legal empowerment programs: capacities of communities need to be strengthened so as to hold village institution accountable of protection of property rights.
- Support legal awareness activities – by both state and informal actors – with the aim of building general community legal awareness
- Introduce law students to informal justice systems. Classroom instruction that focuses on such systems would in fact allow to productively work with informal justice systems.
- Provide support to development of policies to improve practices of informal justice systems so that they comply with human rights standards.
- Empower community members to be more assertive and capable of protesting in case they consider that their property rights are not respected. This is based on the assumption that if people are aware of their property rights they may protest in case these ones are infringed upon.

- Support monitoring of informal justice mechanisms by government and civil society organization.
- Support monitoring of informal justice mechanisms by government and civil society organizations. However, it is important to bear in mind that the decisions of informal justice mechanisms and the conduct of informal justice actors are already subject to some degree of “informal” monitoring by the local communities to whom they are morally accountable.
- Advocate for the production of written records of informal decision. This would facilitate the monitoring and increase accountability of informal justice mechanisms with communities.
- With reference to access to land, reforms of property rights regimes must allow for formal recognitions of customary land rights as the basis for inclusive property systems that include vulnerable groups.

Customary land should be included under the Intestate Succession Act, along with recognition of a widow’s right to inherit the family house rather than simply have a life interest.

Both the Constitution and the Land Act should recognize squatter’s rights so as to allow an occupier of land to apply for legal title after occupation over a number of years. The lack of recognition of squatter’s rights is thus a gap in the legal framework that needs to be addressed.

- There is the need to review existing customary laws and the role of informal justice institutions in upholding these laws. In particular, there is a need to train local court justice officers and to tackle gender discrimination in accessing property rights. With this aim, train of paralegals is deemed necessary.
- Enhance legal protection to unwritten rights. This is important given that in rural areas many lands are held under customary tenure where governments provide little or no legal protection to such unwritten rights. As a consequence of customary rights, titles may be legitimate in terms of locally recognized claims to land, but have no formal legal qualities.
- Involvement of community leaders from the onset of activities is important in order to support changes in traditional norms and customary laws. As reported, during the survey, by a household in Northern Province highlighted the Agriculture Support Programme (ASP) has

already undertaken effective actions with the involvement of local leaders.

Review and uphold statutory laws

As highlighted earlier, the problem with the existing legal system is that in practice it only applies to the minority of the population regarding business, and property. Statutory laws are perceived as creating top-down barriers and costs that keep people on the outside.

The main problems of such system are thus the following: most property rights are standardized to facilitate search and use; information is seldom stored in a fixed place in each village or neighborhood; registration procedures are unnecessarily burdensome for poor property owners.

In order to overcome these problems and thus enhance and protect property rights it is crucial to review and uphold statutory laws.

In view of the fact that the Country is undertaking a constitutional review process, the following recommendations could enrich the draft constitution:

- Promoting the protection and respect of property rights cannot be left to the courts alone but also to other democratic institutions designed specifically to provide protection to property rights. These watchdog institutions include the Human Rights Commission, the Anti-Corruption Commission, the Commission for Investigations, the Police Public Complaints Authority and the Judicial Complaints Authority. Fostering synergies among these institutions would also facilitate the implementation of joint and coordinated actions aiming at developing a strong property rights culture.
- In order to ensure that property rights are widely known, promoted and protected, it is important to ensure that NGOs work hand-in-hand with courts and human rights commission and other watchdog institutions. These synergies are also pivotal in carrying out sensitization campaigns.
- There is the need to review existing statutory laws and the role of formal justice institutions in upholding these laws.
- Improve fair access to credit so as to allow vulnerable groups to access property.

- Facilitate land/titling registration process. As it was mentioned earlier, the technical registration process does not encourage women and illiterate to undertake it.
- Revision of the land policy with the aim of ensuring its accessibility to all vulnerable groups. Ensuring that women's names appear on land records, that their rights are enshrined in communal property systems, and that the inheritance rights of widows and daughters are established and protected would go a long way towards improving their condition, and are essential to empowerment and the promotion of entrepreneurial activity.
- Provide technical assistance to Victim Support Units so as to strengthen their role in protecting and handling property rights issues.