Protecting Interests in Land which is Situated in Statutory and Improvement Areas in Zambia—Some Gaps in the Law

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ABSTRACT

The right to property is a human right enjoying protection of the Zambian Constitution, subordinate legislation, and regional and international instruments. The article argues that if the cost of enforcing the said legal guarantees (protection from compulsory deprivation of property rights) in the said pieces of legislation and instruments is prohibitively high, that could amount to *de facto* (indirect) denial or violation of the right to property or the implicit right to realize a return on investment by disposing of the asset. The article examines the legal, regulatory and institutional framework for the registration of titles and interests in land which is situated in statutory and improvement areas in Zambia so as establish whether or not it provides adequate incentives for effective protection of the said titles and interests. The research employs economic analysis of law, and the doctrinal and non-doctrinalapproachesto assessing the effectiveness of legal and regulatory rules, and institutions for the registration of proprietary rights and interests in land which is situated in statutory and improvement areas in Zambia. The research uses both primary and secondary sources of data in analysing the problem which is under investigation. The main finding of the research was that the said legal, regulatory and institutional framework does not provide adequate safeguards for efficient protection of titles and interests in land which is situated in statutory and improvement areas. In particular, the results of the study show that (a) after repeal of Housing (Statutory and Improvement Areas) Act, most protective provisions such those relating to registration of titles, interests, charges, and the lodgement of caveats were not reproduced in the repealing and successor law—the Urban and Regional Planning Act 2015, (b) the cost of enforcing property rights and interests in land which is situated in statutory and improvement areas under the new legal, regulatory and institutional framework is likely to be much higher than the cost which would have been incurred under the old regime.

Key words: Land, Titles, Interests, Caveats, Registration, Statutory, Improvement,Areas, Zambia.

INTRODUCTION

This article examines the Zambian regulatory and institutional framework for the registration of titles and interests in land which is situated in statutory and improvement areas so as to establish whether or not the said framework provides sufficient safeguards for effective protection of the said titles and interests. The central premise of this article is that an efficient regulatory and institutional framework for theinterim protection of interests in land is likely to enhance the quality of protection of property rights and interest in land. A central argument of this article is that the ease, speed and lower cost at which an efficient regulatory and institutional framework for the interim protection of real property rightssafeguards those rights is likely to increase access to justice bymany of modest means who acquire real property rights which is situated in the said areas.

Meaning of an Effective Regulatory and Institutional Framework for the Interim Protection of Interests in Land.

A regulatory and institutional framework for the registration of lands and interests in land is effective if it

facilitates speedy registration and enforcement of property rights and interests in land at minimum cost.[1] It should not impose burdensome procedures for the enforcement of property rights and interests of the holder.

BACKGROUND TO THE PROBLEM

The Zambian constitution guarantees the right to property.[2] The Zambian constitution also guarantees protection from unlawful deprivation of property rights and interests in land.[3]The general domestic human rights guarantee and enforcement mechanism is reinforced by the regional framework which extends the jurisdiction of the Common Market for Eastern and Southern Africa Court of Justice (COMESA CoJ) to human rights infringements by member states.[4]Similarly, under the Southern Africa Development Community (SADC) scheme, the new SADC Tribunal[5] has jurisdiction to hear and determine complaints relating to human rights violations.[6]At continental and global level, the right to property is guaranteed and declared by the African Charter on Human and Peoples Rights,[7] and the Universal Declaration of Human Rights.[8]

Anecdotal evidence suggests that most of the low-income or no-incomehouseholds in Zambia are located in statutory and improvement areas. Anecdotal evidence also shows that on account of illiteracy and the high cost of litigation a number of holders of property rights and interests in land in Zambia have been unlawfully deprived of their property rights and interests. In some cases, they could not continue prosecuting or defending their property rights and interests in courts of law due to the biting cost of lengthy and protracted litigation.[9] An argument is made that such a constraint could only serve as an impediment to justice for property rights violations. A corollary argument is made that such a constraint is likely to water down the efficacy of the regulatory and institutional framework for the protection of property rights and interests in land in safeguarding property rights and interests in land which is situated in statutory and improvement areas.

Statement of the Problem.

Against the background to the problem which has been given above, the statement of the problem may be formulated as follows:

To what extent does the regulatory and institutional framework for the registration of titles and interests in land which is situated in statutory and improvement areas provide safeguards for effective protection?

THE COMMITMENT OF SUCCESSIVE ZAMBIAN GOVERNMENTS TO SECURING PROTECTION OF PROPERTY RIGHTS IN ZAMBIA.

Successive Zambian Governments have been committed to improving the welfare of the economically underprivileged. In 1989, as a means of protecting the said social class from unlawful deprivation of property (popularly known as ‘property grabbing’), especially land which left most orphans homeless and roaming the streets, the Government of the Republic of Zambia enacted the Intestate Succession Act, and the Wills and Administration of Testate Estates Act, respectively. In furtherance of such efforts, the Government has over the years, in conjunction, with the German Government, introduced the Access to Justice Programme as a general means of increasing access to justice by the indigents and illiterates. In consolidating these efforts, the Government has also established the Lands Tribunal as a full-fledged tribunal for the effective and efficient settlement of land disputes. The simplified procedure and circuiting of the Tribunal are designed to increase access to justice by the many of our number who are poor, illiterate or semi-illiterate.

As a way of re-affirming its commitment to increasing access to justice and protection of human rights, the Government of the Republic of Zambia has in successive Development Plans undertaken to implement measures aimed at increasing access to justice, observance of the rule of law and human rights.[10] The

Housing (Statutory and Improvement Areas) Act[11] governed the declaration of improvement areas as such, ownership and transfer of land which is situated in such areas. This piece of legislation also provided for a system of registration of titles (rights) and interests in land situated in statutory and improvement areas. Once those titles or interests were registered, registration constituted notice to the whole world thereby protecting the holder from arbitrary or unlawful deprivation of property. Both theregistered titles and interests, andthe unregistered ones, could be protected further by the lodgement of caveats against further dealings or transactions in land which was situated in statutory and improvement areas.

In a bid to establish a democratic, accountable, transparent, participatory and inclusive process for urban and regional planning whichallows the involvement of communities, private sector, interest groups and other stakeholders in the planning, the Government of the Republic of Zambia enacted the Urban and Regional Planning Act No. 3 of 2015. This piece of legislation effectively repealed the Housing Act (Statutory Improvement Areas) Act.[12] Although the Urban and Regional Planning Act covers some of regulatory and institutional aspects which were in the repealed Act, most of the protective safeguards such as a system for the registration titles and interests in land, and the lodgement of caveats have been left out. This article examines the potential effect of these legislative changes on protection of titles to and interests in land situated in statutory and improvement areas.

The National, Regional, Continental and Global Human Rights Enforcement Mechanism.

In Zambia, any person who alleges that the right to property or any other guaranteed right is being, or has been or is likely to be violated in relation to them, may apply for redress to the High Court.[13] In such cases the High court has jurisdiction to issue appropriate writs and give necessary directions for purposes of enforcing or securing the enforcement of the threatened property rights or other guaranteed rights.[14]The enforcement functions of the High Court are reinforced and complemented by the functions of the Zambian Human Rights Commission (the ZMHRC). The ZMHRC has power to investigate, report and enforce human rights violations by securing appropriate redress.[15] The regional enforcement mechanism has been discussed above. In this section we briefly consider the continental enforcement mechanism.

At continental level, the African Human and Peoples' Rights Commission (the AHPRC) is the primary enforcer of human rights abuses. The AHPRC is responsible for the protection and promotion of human rights in Africa.[16] The AHPRC is also responsible for the interpretation of the African Charter on Human and Peoples' Rights (the ACHPR).[17] The enforcement role of the AHPRC is complemented by the enforcement functions of the African Court on Human and Peoples' Rights (the Court). The Court has jurisdiction to hear and determine human rights complaints from Non-Governmental Organizations and individuals.[18] However, this jurisdiction has not been effectuated since only nine (9) out of the thirty (30) states parties to the constitutive protocol have recognized the competence of the Court in that respect.[19]On the global plane, enforcement of human rights violations is undertaken by the United Nations Commission on Human Rights (the UN HRC). Theresponsibility of the UN HRC is to protect and promote human rights around the globe.[20]

It is worth noting here that in Zambia, the cost of judicial or administrative enforcement of human rights violations may be borne by the Legal Aid Board or the ZMHRC. It may be argued that such institutional arrangements are likely to increase access to justice for human rights violations in Zambia. Similarly, with litigation funding, the economically-challenged injured party may easily access regional, continental and global human rights enforcement fora. This too is likely to enhance the quality of human rights enforcement in the eastern and southern Africa region and the African continent as a whole. However, although the cost of enforcing human rights violation may be footed by other entities than the injured economically-challenged party, the benefit of enforcement will only come to that party with hidden opportunity costs. This is what Friedman meant by stating that there is no such thing as free lunch.[21]Thus, in order to maximize utility and preferences for the injured party as well as the enforcement institutions, the actual costs and opportunity costs must be lowered. Consequently, in order to further the welfare of the injured party and the

tax payers, the best course is to introduce efficient legal and regulatory rules, and institutions which lower the cost of enforcement. This view not only imports a reduction in the actual cost of enforcement but also a reduction in the difference between that cost and the opportunity costs (the difference between the cost which is imposed by the selected rules and institutions, and the cost which would have been imposed by the alternative rules and institutions). Consequently, it could be argued that in the long-run, the quality of enforcement is likely to be sustained by the difference between the actual cost of enforcement and the costs of alternative enforcement mechanisms—that is, the efficiency of the available preferences (the available legal and regulatory rules and institutions).

LITERATURE REVIEW

In Zambia, only a few studies have examined the effectiveness of the regulatory and institutional framework which governs the registration of lands and interests in land which is governed by the Lands and Deeds Registry Act. At the time of conducting this study, the authors could not find any prior work which has examined the effectiveness of the regulatory and institutional framework which governs the registration of lands and interests in land which is governed by the Urban and Regional Planning Act 2015 or its predecessor legislation.[22] Thus, to the best of the authors' knowledge, this is the first study to examine the effectiveness of the regulatory and institutional framework for the registration of titles and interests in land which is governed by the Regional and Urban Planning Act 2015.

Mandhu,[23] examines the effectiveness of the Zambian system for the registration of lands and interests in land. Mandhu correctly observes that there are two types of land tenure in Zambia, namely customary tenure and leasehold. However, in examining the effectiveness of the land registration system, Mandhu tackles only the registration system which is governed by the Lands and Deeds Registry Act. Thus, Mandhu's work does not examine the effectiveness of the regulatory and institutional framework which governs the registration of lands and interests in land which is governed by the Housing Act,[24] as the present study does.[25] Mandhu observes that the regulatory and institutional framework which is provided under the Lands and Deeds Registry Act is based on the ancient principles of the English feudal system which principles are hardly understood by lawyers and professors of law, and as such, are not best suited for the registration of lands and interests in land in Zambia where the preponderant part of the population is illiterate or semi-illiterate. Mandhu, observes further that a system for the registration of land ensures that everyone who purchases *bonafide* and for value from a registered proprietor, and enters his deed of transfer or mortgage upon the register thereby acquires an indefeasible right,[26] regardless of the infirmity of his author's title. The present work, by the authors, adopts Mandhu's view and applies it to the examination of the Zambian regulatory and institutional framework for the registration of lands and interests in land which is situated in statutory and improvement areas. There are of course general works which cover some aspects of land law and land registration in Zambia. For example, Mudenda,[27] in his work gives a general description of the regulatory and institutional framework for the registration of lands and interests in land as provided under the Lands and Deeds Registry Act without fleshing out the strengths and weakness which are inherent in the system.

Therefore, such works do not offer much assistance in understanding the problem which is under investigation in this study. As far as the economic analysis of legal rules and institutions is concerned, two pieces of literature, are of particular important, namely the work by Posner, and the work which was conducted by Kornhauster. A review of these pieces of literature is necessary because the analysis of the problem which is under investigation is this article is informed by eight basic claims of economic analysis of law which have been derived from the two basic claims which were initially made by Posner in 1973 about the economic analysis of law.

Posner's claims, which usually define the scope and depth of the debate on the philosophical basis of economic analysis of law, are as follows:[28]

i. The first claim—the positive claim— asserts that common law rules are efficient; and
ii. The second claim—the normative claim—asserts that common law rules ought to be efficient.

In both claims, 'efficiency' means the maximization of the social willingness to pay.[29] This is the willingness on the part of socio-economic agents to pay the costs which are imposed on their social behaviour and economic exchanges by legal and regulatory rules, and institutions. This implies that efficient legal and regulatory rules and institutions should facilitate economic exchanges rather than impede them, by imposing lower costs. In this sense, the high cost of complying with legal and regulatory rules is likely to lead to lower marginal yields and eventually complete disobedience of the relevant rules. This view is rationalized by the position that legal change is a response to demonstrable socio-economic needs.[30] Where economic agents are subjected to inefficient legal and regulatory rules and institutions, in order to maximize their self-interest (*preferences*), the economic agents will try and invent new usages and customs (which are 'institutions' in New Institutional Economics) which will facilitate economic exchanges at lower cost. This often leads to the creation of a gap between the current legal and regulatory rules and institutions and the conduct which they were originally designed to regulate—a situation which the great French jurist Montesquieu referred to as the separation of the law from the circumstances in which it was made or the reverse.[31] Thus, an efficient and sound law-making process will seek to incorporate the prevailing usages, customs, culture and preferences regarding the targeted socio-economic behaviour.[32] The authors argue that such a process is likely to inspire the social willingness to pay the cost which the legal rules, and regulatory rules and institutions impose on socioeconomic exchanges. And, if legal and regulatory rules and institutions are efficient in the Coase sense, they are likely to encourage economic exchanges.[33]

The Economic Analysis of Law Recalibrated.

Kornhauster observes that Posner's basic claims of economic analysis of law are ambiguous.[34] Kornhauster argues that Posner's first claim—the positive claim—could possibly mean any of the following: [35]

i. That the common law legal rules induce efficient behaviour; or
ii. That the common law legal rules are efficient; or
iii. That the law is identified by its content; or
iv. That efficiency provides the best rationale for the law in some doctrinal area.

With regard to Posner's second claim—the normative claim, Kornhauster argues, that claim could mean any of the following, namely:[36]

i. That judicial officers ought to decide cases speedily and cost-effectively;
ii. That efficiency is the criterion for assessing judicial performance; or
iii. That law-makers, whether judges, or legislators or administrators, should make efficient legal rules.

This paper is based on the normative claim of economic analysis of law that legal and regulatory rules and institutions ought to be efficient. In the prescriptive sense, law-makers, whether judges, or legislators or administrators, should make legal and regulatory rules which lower transaction costs and inspire social willingness to pay those costs. In this sense also, efficient legal and regulatory rules will ensure that the cost of socio-economic exchanges are borne by the party who can minimize them the most. In this respect, Coase observes that:

[I]f a rule has the effect of minimizing transaction costs, or ensuring that such costs are borne by the person who can best minimize them, it is said to be efficient. However, if it unnecessarily increases or provides for the choice of sub-optimal exchange, it is inefficient.[37]

The disambiguation of Posner's claims of economic analysis yields eight claims about the economic analysis of law. The claims are:

i. The explanatory claim which asserts that common law rules induce efficient behaviour;
ii. The content claim which asserts that the criterion of efficiency determines the content of the law;
iii. The doctrinal claim which asserts that the criterion of efficiency rationalizes the prevailing legal and regulatory rules and institutions;
iv. The behavioural claim which asserts that economic rationality explains how individuals respond to legal and regulatory rules and institutions;
v. The causal claim which asserts that economically rational behaviour by public officials and private persons determine the content of legal and regulatory rules and institutions;
vi. The adjudicatory claim which asserts that law-makers—whether judges, legislators or administrator—ought to choose legal and regulatory rules and institutions which promote efficiency;
vii. The evaluative claim which asserts that the primary criterion for assessing the effectiveness of legal and regulatory rules and institutions is efficiency; and
viii. The design claim which asserts that policy-makers should design legal and regulatory rules and institutions in a manner which promotes efficiency.

Claims (i) to (v) are positive in character. They are based on an assumption that law-makers—whether judges, or legislators or administrators—meticulously choose efficient theories, principles, doctrines, concepts and models in creating legal and regulatory rules and institutions. Thus, the efficacy of the legal and regulatory rules and institutions so created in reducing transaction costs for socio-economic exchanges and inspiring social willingness to pay for those transactions should be tested in economic models and the real world. The said test is necessitated by the fact that the essence of legal change is efficiency.[38] The legal rules which fail the test of economic models or the real world or both are likely to be abandoned altogether. The abandonment of such rules necessitates the creation of new rules and institutions which will lower transaction costs and promote economic exchanges, and inspire social willingness to pay. Claims (vi) to (viii) above are normative in character. They introduce the concept of rationality of socio-economic agents, and with that, competition. The idea is that given a certain set of possible choices of legal and regulatory rules and institutions, rational socio-economic agents will maximize their preferences and further self-interests by choosing only those legal and regulatory rules and institutions which lower transaction costs or ensure that they are borne by a party which can best minimize them, and inspire social willingness to pay the costs of economic exchanges. This view is a blend of the theory of social change and the utilitarian theory of legal change.[39]

METHODOLOGY

This study falls into the qualitative research category. It focuses on answering specific questions which relate to the problem which is under investigation by using both primary and secondary data. The research is underpinned by the doctrinal, the non-doctrinal and the comparative approach to examining the effectiveness of the regulatory and institutional framework which governs the registration of titles and interests in land which is situated in statutory and improvement areas in Zambia. By the doctrinal approach the authors give a descriptive exposition of the applicable legal rules, and offer a complete statement of the law were applicable.[40] By the non-doctrinal approach, the authors identify the legal problem, analyse it and propose remedial changes to the regulatory and the institutional framework which governs the registration of titles and interests in land which is situated in statutory and improvement areas in Zambia.[41] These two methods were used in analysing both primary and secondary data. Primary sources of data such as relevant legislation and case law which relate to the problem which is under investigation were used. Questionnaires were administered to ten (10) local authorities (councils) in the Republic of Zambia. Secondary sources of information such as journals and other written commentaries on the primary sources were also used. A checklist of documentary sources was used, as well. And, as a possible way of avoiding subjectivity in the selection of documentary sources, the study employed non-probability sampling method—purposive sampling. Both primary and secondary sources of data were used as aids to drawing inferences, making deductions and comparisons.

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The research questions which were used are:

1. What mechanism is used for the registration of rights and interests in land which is situated in statutory and improvement areas?
2. How is priority of competing interests in the same land determined?
3. What mechanisms does the regulatory and institutional framework provide for the lodgement of caveats?
4. What remedies are available to a title or interest holder when a Council Registrarregisters a dealing in land in disregard of a lodged caveat?

FINDINGS OF THE STUDY

Questionnaires were administered to ten (10) local authorities (councils) in the Republic of Zambia. The Land and Deeds Registry personnel of respondent Councils were asked the following questions, namely:

i. How have you been registering rights and interests in council land since 2015?
ii. If your answer to (i) above involves the registration of interest, pursuant to which law have you been doing so?
iii. Have you been accepting lodgement of caveats against dealings or transactions in council land since 2015?
iv. If your answer to (iii) above is 'yes', pursuant to which law have you been doing so?

The other results of the study may be summarised in tabular form as follows:

QUESTION	FINDING(S)
1. What mechanism is used for the registration of rights and interests in land which is situated in statutory and improvement areas?	Currently there is no public system for the registration of titles and interests in land which is situated in statutory and improvement areas.
2. How is priority of competing interests in the same land determined?	Date of execution of document
3. What mechanisms does the legal, regulatory and institutional framework provide for the lodgement of caveats?	Currently, the regulatory and institutional framework does not provide any mechanism for the lodgement of caveats.
4. What remedies are available to a title or interest holder when a Council Registrar registers a dealing in land in disregard of a lodge caveat?	Currently, there are no statutory, common law or equitable remedies which are available to a title or interest holder who suffers loss on account a Council Registrar's action to register a dealing in land in disregard of a lodged caveat.

DISCUSSION

This section discusses the findings of this study in light of the regulatory rules, institutions, economic theory and the public policy which have a bearing on the regulation of the registration of titles and interests in land which is situated in statutory and improvement areas in Zambia.

The Necessity and Scope of Economic Analysis of the Regulatory and Institutional Framework.

Before we start a discussion on the necessity of economic analysis of the Zambia regulatory and institutional framework for the registration of titles and interests in land which is situated in statutory and improvement areas, it is imperative to delineate the scope of economic analysis of law and institutions. Typical economic analysis of law does not take place in the framework of a general theory of law. Rather, it addresses a

specific question about the causes, consequences and socio-economic value of a specific legal or regulatory rule or an institution, or set of legal and regulatory rules, and institutions. Thus, economicanalysis of law does not make general claims about the nature of law or institutions. In line with this view, this paper does not examine the nature of the entire body of law which governs the registration, transfer and transmission oftitles and interests in land. Rather, this paper examines the regulatory rules and institutions which govern the registration of titles and interests in land.

The Socio-Economic Function of the Interim Protection of Interests in Land.

There are three traditional devices for interim protection of titles and interests in land, namely:

i. A system for the registration of titles and interests in land;
ii. Caveats; and
iii. Interim injunctions.

The following subsections briefly discuss the usefulness of these protective devices in relation to the repealed law.

The Repeal of the Housing (Statutory and Improvement Areas) Act.

In an attempt to establish a democratic, accountable, transparent, participatory and inclusive process for urban and regional planning,[42]the Government of the Republic of Zambia has enacted the Urban and Regional Planning Act No. 3 of 2015. This piece of legislation repealed and replaced the Housing (Statutory Improvement Areas) Act.[43] Although the Urban and Regional Planning Act makes provision for some aspects of land planning, administration and governance which were in the repealed and replaced Act, most of the protective safeguards such as the system for the registration of titles and interests in land, the office of Council Registrar, the system for the lodgement of caveats have been left out of the Urban and Regional Planning Act 2015.

The Purpose of the Public System for the Registration of Titles and Interests in Land.

A public system for the registration of titles and interest in land serves the following purposes, namely:

- Providing a reliable mechanism for determining priority among competing interests in the same land;
- Providing collateral takers with an opportunity to know with reasonable certainty and predictability the ranking of their security interests;
- Ensuring that the title or interest of every land owner or mortgagee or transferee is thoroughly investigated once and for all and placed on the public register. And a perusal thereof will give an intending purchaser all necessary information about previous dealings in the land;
- Ensuring that the registration of the land holder's title or interest of a mortgagee or transfereeis an insurance against any adverse claims by others (third parties) and is indispensable to the validity of all transactions relating to the land in question;[44] and
- Ensuring that instruments are registered not merely as documents, executed between the parties, but by reference to the land itself.[45]

Thus, the registration of titles and interestsin land in thepublic system serves as notice to the whole world of the existence of such titles and interests. Failure to register makes the registrable titles or interests void against the purchaser notwithstanding that the purchaser had notice of them.[46] There is thus, no risk of loss of priorityof the titles and interests in land to a *bonafide purchaser* for value without notice.[47] The authors argue that a system for the registration of titles and interests in land to the extent that it ensures certainty of the ranking of competing titles and interests in the same land, avoids unnecessary litigation, and protects prior titles and interests from adverse claims is likely reduce the cost of dealings in land. The authors also argue that these positive features of a system for the registration of titles and interests in land

are likely to promote dealings in land and inspire social willingness to pay for the registration fees which may be imposed by the councils and central government. Thus, a public system for the registration of titles and interests in land is likely to serve as an efficient regulatory device. And as such, the system should be promoted on account of the potential efficiency.[48]

The Effect of Repeal of the Housing Act on the System of Registration.

When the Housing (Statutory and Improvement Areas)Act was repealed and wholly replaced by the Urban and Regional Planning Act 2015, it ceased to have legal force in its entirety.[49] Consequently, Part III of the Housing Act which established the Council Lands and Deeds Registry, and the office of Council Registrar ceased to have legal effect as well. In this respect, in view of the continued practice by councils to accept and register titles and interests in land which is situated in statutory and improvement areas, a question may be asked, 'pursuant to which legal source do councils do that?'

A) Statutory Instrument Survival Instinct?

When a statute is repealed, a statutory instrument which is made under the repealed law subsists as long as it is not inconsistent with the repealing statute, until it is repealed by a subsequent statutory instrument.[50] On the contrary, Part III of the Housing Act was part and parcel of the Principal Act as opposed to subsidiary legislation. Consequently, it is submitted that it ceased to have force on the date on which the Urban and Regional Planning Act 2015 came into force.

B) Authority from the Local Government Act?

The powers and functions of a council which is established pursuant to section 3 of the Local Government Act 2019[51] are generally stipulated in section 16 of the Local Government Act (LGA) and spelt out in detail in the First Schedule to the Act.[52] By Paragraph 9(d) of the said schedule, a council has power to:

Provide for and maintain …the registration of such transactions in connection with land charges as may be prescribed in any writtenlaw relating to land charges.

From the underlined portion of the foregoing provision, it is clear that a council could only register transactions which relate to land charges in accordance with the provisions of another written law. Thus, there must be an external source which provides for registration, by a council, of such transactions failing which registration would be incompetent. This view is fortified by section 11 of the repealed Housing Act which:

1. Established the Council Registry of Lands and Deeds;
2. Established the office of a Council Registrar; and
3. Established a system of registration of titles, interests and charges on land situated in statutory and improvement areas.

An argument is made that in the absence of an external legal source which re-establishes the Council Registry of Lands and Deeds, the office of the Council Registrar, and a system for the registration of titles, interests and charges on land which is situated in statutory and improvement areas, there is no legal basis for the continued acceptance and registration, by council's, of the said titles, interests and charges.

Constraints relating to the narrow scope of section 9(d) of the First Schedule to the Local Government Act 2019.

It is worth noting that the scope of section 9(d) of the Second Schedule to the Local Government Act is restricted to dealings in land which are related to 'charges'. A question may be asked, what then is a 'charge'? Lord Atkin, in *National Provincial and Union Bank of England v Charnley*,[53] observes that:

[W]here in a transaction for value both parties evince an intention that property, existing or future, shall be made available as security for the repayment of a debt, and that the creditor shall have a present right to have it made available, there is a charge, even the present legal right which is contemplated can only be enforced at some future date, and though the creditor gets no legal right of property, either absolute or special, or any legal right of possession.[54]

As far as interests in land are concerned, only the following are transactions which involve the relationship of lender and borrower and confer a present legal right on the lender to have recourse to land in satisfaction of a debt, namely:

i. Legal mortgages;
ii. Equitable mortgages; and
iii. Traditional charges.

This characterisation effectively leaves out agreements for the sale of land (outright transfers and transmission of titles), transfers and transmission of limited interests in land and licences. From the first author's service in councils in Zambia, anecdotal evidence suggests that transactions for the sale of land, and transfer and transmission of absolute and limited interests in land far outnumber those that relate to legal and equitable mortgages and charges. Therefore, the authors argue that the narrow scope of this possible alternative mechanism for the registration of titles and interests in land is likely water down its efficacy in facilitating the registration of transactions in land which is situated in statutory and improvement areas in Zambia. As a possible way of enhancing the efficacy of this possible alternative mechanism, it proposed that its scope be extended to the following transactions in land, namely:

i. Outright transfersand transmission of title;
ii. Transfer and transmission of absolute and limited interests in land; and
iii. Licences to use land.

C) Authority from the By-Laws?

None of the respondent councils indicated that they have continued to accept and register titles, interests and charges on land situated in statutory and improvement areas on the authority of a by-law which was passed by the council for that purpose. Even if such a by-law existed as an external source—for by-laws are a form of written law in Zambia,[55] its scope would be restricted to the scope of section 9(d) of the First Schedule to the LGA—which governs transactions in land relating to legal and equitable mortgages, and charges.[56]

As a possible way of enhancing the efficacy of the Urban and Regional Planning Act 2015 in ensuring effective administration and governance of dealings in land, proposals are made for the enactmentof a statutory instrument which facilitates the following in relation to land which is situated in statutory and improvement areas, namely:

1. The establishment of Council Registry of Lands and Deeds;
2. The establishment of the office of a Council Registrar; and
3. The establishment of a system for the registration of:

i. Titles to land;
ii. Absolute and limited interests in land;
iii. Licenses over land;
iv. Legal and equitable mortgages;
v. Traditional charges on land; and
vi. Matters connected or incidental to the aforesaid.[57]

The instrument could be dubbed *'Statutory and Improvement Areas (Registration of Titles, Interests and Charges in Land) Regulations'*. The authors argue here that such a regulatory and institutional framework is likely to lower transaction costs for dealings in land. The authors also argue that such a framework isalso likely to avoid unnecessary litigation over the existence and priority of competing titles or interests in the same land. The authors argue further that the said positive features of the proposed framework are likely to promote socio-economic exchanges, and inspire social willingness to pay for the registration and administrative fees which may be associated with dealings in land which is situated in statutory and improvement areas in Zambia. Of course, the last argument is made with *proviso* that the efficacy of the model in that respect is tested in economic models as well as in the real world.

D) Rules Governing Priority of Competing Interests in the Same Land Situated in Statutory and Improvement Areas in Zambia.

A question may be asked, in the absence of a public system for the registration of titles, interests in land, which rules would govern priority of competing interests in the same land? Of course, common law priority rules serve as a fall-back. At common law the priority of competing interests in the same property is determined by the date of execution of the document which creates the interest(s) in question. Priority of competing legal interest is determined by the date of their creation.[58] Similarly, priority of competing equitable interests is determined by the date of their creation. In the event of competition between a prior equitable interest and a later legal interest, the prior equitable interest enjoys priority with *proviso* that a legal interest of a *bonafide* purchaser for value without notice of the prior equitable interest takes priority. Therefore, a bona fide purchaser for value without notice obtain good title free of the prior equitable interest.

The Inherent Shortcoming of the Common Law Priority Rules.

Firstly, since prior transactions and dealings in land are not memorialized or registered, subsequent purchasers of land may not have knowledge all the facts about a particular property. Where prior owners pass away without leaving any record, subsequent purchasers may obtain title subject to prior burdensome encumbrances. As noted above, such information is made readily available to prospective purchasers at an affordable fee by a public system for the registration of titles and interests in land. Thus, at a prescribed fee, prospective purchasers can assess this information before can they engage in any dealing(s) in land. Secondly, the common law rules are susceptible to fraud and forgery since the document which carries the date of creation of the transfer or charge or mortgage is usually in the exclusive possession of the party who is claiming priority. There is thus, high likelihood that such an interested party might backdate the document in an attempt to ensure that their interest ranks ahead of the interest of the other party. Such shortcomings in the common law priority rules are likely to discourage dealings in land and hinder thegrowth of the real estate business in Zambia. In particular, there are a number of underprivileged peoplewho have been allocated land by councils and or the Ministry of Lands but are unable to develop due to lack of an income. The very lack of income makes it increasingly difficult for such a group to access bank loans since banks have moved away from asset-backed loans.[59]For such a group, it may be prudent to sell offthe land and start up some small scale business or use the proceeds to develop the other parcels of land ifthey have two or more parcels. However, as noted above, the very lack of a public system for the registration of titles and interests in land is likely to discourage dealings in land and make it increasingly difficult for the said group to dispose of land. The authors argue here that such a situation is tantamount to a *de facto* denial/violation of the right to property. This view is rationalized by the fact that the right to own property imports the right to dispose of property. As the authors observe elsewhere:

The right of disposal of property of any description is inherent in ownership—the right to acquire property. Since acquisition presupposes transfer of property, the right of disposal coexists with the right of acquisition. [60]

Hirschl observes that effective enforcement and preservation of property rights (the right to property being a classic negative right) requires a detailed registration and protection apparatus.[61]This view imports a

positive obligation on the part of the Zambian Government to ensure that there is in place an effective regulatory and institutional framework for registration and enforcement of property rights and interests.[62] In the context of this article, the positive obligation points to the reintroduction of the Council Registry of Lands and Deeds, the office of Council Registrar, the rules for the registration of rights and interests in land which is situated in statutory and improvement areas, the systems for the lodgement of caveats, and the determination of land disputes in the Lands Tribunal. However, to the extent that the classical understanding of the right to property recognizes a positive obligation, the obligation is limited to the implementation of an appropriate regulatory and institutional framework for the protection and enforcement of property rights and interests against third parties.[63]It certainly does not import a positive obligation to confer new property rights and interests on private persons or the compulsory transfer of the same from one private person to another.[64]Such an obligation is not only likely to undermine the right to self-determination but also make the protective sphere of the right to property uncertain and undermine human dignity rather than enhance it. As Mchangama observes:

[S]uch a human right would make the protective sphere of the right to property illusory and undermine rather than strengthen human dignity. Moreover, a positive duty to fulfil the right to property would make the application of this right wholly arbitrary and incompatible with the requirement of legal clarity and foreseeability on which the respect for the rule of law depends.[65]

The right to property also imports a negative obligation to refrain from arbitrary deprivation of property.[66] Along these lines, it could be argued that the move by the Zambian legislator to abolish the Council Lands and Deeds Registry, the office of Council Registrar, the system for the registration of rights and interests in land which is situated statutory and improvement areas, and the system for the lodgement of caveats amounted to *de jure* violation of the right to property. Thus, as a possible way of enhancing the quality of the right to property in Zambia, it is proposed that a public system of registration of titles and interests in land be re-established as aforesaid. Such a system traditionally establishes priority by time of lodgement.[67] This is likely to reduce fraud and forgery and, provide reliable evidence since the evidence of time of lodgement would be in exclusive custody of a neutral entity—a party which is not party to litigation—the Council through its Lands and Deeds Registry. The proposed system for the registration of rights and interests in land which is situated in statutory and improvement areas would not exist in isolation. It would require the reestablishment of the Council Lands and Deeds Registry as well as the office of the Council Registrar. It would also require the transfer of the jurisdiction to hear and determine the disputes which relate to land which is situated in statutory and improvement areas from subordinate courts to the Lands Tribunal.

The Purpose of a Public System for the Lodgement of Caveats.

A public system for the lodgement of caveats on land which is situated in statutory and improvement areasceased to exist with the repeal of the Housing (Statutory and Improvement Areas) Act. Under the repealed Act, caveats fell under Part IV.By section 26 of that Act, a caveat could be lodged in the Council Lands and Deeds registry by any person under the following circumstances, namely:

1. Where a person was claiming to be entitled to or to be beneficially interested in any land or interest therein by virtue of any unregistered agreement or other document or transmission, or of any trust expressed or implied, or otherwise howsoever; or
2. Where a person was transferring any land or interest therein to any other person to be held in trust; or
3. Where a person was claiming to be a purchaser or mortgagee of any land.

The effect of an effective caveat was that, save for documents which had been accepted for registration prior to the lodgement of the caveat, so long as a caveat remained in force, the Council Registrar could not make any entry on the register which may have the effect of charging or transferring or otherwise affecting the land or interest protected by such caveat.[68] Any person who was affected by the lodgement of a caveat

could summon the person who had lodged the caveat to appear before 'court'[69] and show cause why the caveat should not be removed.[70] Upon proof of proper service of summons on the person who had lodged the caveat, the court could either confirm the interest protected by the caveat or indeed order removal of the caveat.[71] The court could also make other orders which were just under the circumstances of a particular case.[72]A person who lodged a caveat without reasonable cause could be condemned to pay compensation to any person who suffered loss or damages as a result of the caveat.[73] Thus, not only did section 31 of the Housing Act protect the interest of the person which was affected by the caveat but also ensured that the protected interest could only be defeated under the watchful and just eye of the court. Since anecdotal evidence from practice shows that caveats were rarely challenged in the subordinate courts and more so in the Lands Tribunal, the caveat relieved land owners and holders of interests in land from the time, cost and emotional drain of litigation. This was more so in cases where fraud or other means of property deprivation were involved. For fear of criminal prosecution, parties who engaged in dishonest or fraudulent designs could not dare to challenge the lodgement of the caveats. This way, caveats served as a reliable device for curbing fraud in land dealings. Another positive feature of the repealed regulatory and institutional framework was the introduction of the Lands Tribunal.[74] This meant that any person who was aggrieved with the decision or direction of a Council Registrar or wanted to challenge the lodgement of a caveat could go to the Tribunal.[75] An argument is made that given the specialist knowledge of the bench of the Lands Tribunal, the relaxed rules of procedure and practice, and their statutory obligation to deliver judgment within sixty (60) days from the last date of hearing of the complaint,[76]the Tribunal is likely to serve as an efficient forum for the enforcement of titles, interests and charges on land which is situated in statutory and improvement areas. The economic benefits of circuiting—taking justice to the people—and the low cost of commencing and maintaining proceedings in the Tribunal, are likely to enhance the efficiency of the Tribunal. It could be arguedalso that the protectiveness and cost-effectiveness of the caveat and the adjudicative efficiency of the Tribunal are likely to increase the efficiency of the regulatory and institutional framework for the protection of titles and interests in land which is situated in statutory and improvement areas. Such effective features are also likely to inspire the social willingness to pay for the registration and administration costs (fees) which may be associated with the registration and enforcement of titles and interests in land which is situated in statutory and improvement areas in Zambia.

Practical Consequences of Abrogating the System of Caveats.

Let us assume that A–legal owner of Stand No. 10 Ndola—agrees to sellthe said stand to B at a fixed price. B pays a quarter of the price on agreement. The rest of the price is to be paid in a month's time. B defaults on his payment obligation. One month on, C, without notice of the subsisting agreement between A and B, offers to purchase Stand No. 10 Ndola at twice the price in the agreement between A and B. B catches wind of the transaction between A and C and lodges a caveat at a fee so as to protect his equitable interest in Stand No. 10 Ndola. Inadvertently, thecaveat form ismisplaced resulting which the agreement between A and C isregistered. Subsequently, a certificate of title is issuedin the name of C. Aggrieved by this turn of events, B has commencedlegal proceedings against the Council and C in the Ndola High Court. Should the Council makegood the loss of B in the event that C is held to be a bona fide purchase for value without notice?[77]

The starting point is whether or not the court would take judicial notice of a statutory duty which was passed under a repealed law—the duty not to register any document that has the effect of transferring, charging or otherwise affecting land the subject of a caveat?[78]Of course a repealed statute, save for accrued rights and obligation, cannot be a source of rights and obligations actionable in courts of law or tribunals.[79] Along these lines, B's action for breach of statutory duty is likely to fail. Perhaps B could take the negligence route in which case the determinant question would be whether or not the court would readily recognize a duty of care which the Council might owe B? It should be recalled here that both B and the Council are likely to be labouring under the mistaken position that the lodgement of caveats is still backed by law. It should also be appreciated that had B known or sought legal advice s/he would have known that there is no legal basis for

the lodgement of caveats in the Council Registry of Lands and Deeds. Equally, the Council would not have accepted the fee and the caveat form for registration had they been advised to the aforesaid effect. In light of these observations, it may be argued that the recognition of a duty of care on the part of theCouncil—thereby recognising new categories of negligence—is highly unlikely.Firstly, B's loss is purely economic in nature.[80] Secondly, B is a member of huge class of persons investing in real estate and has no special relationship with the Council.[81] Thirdly, B's loss has been caused by a third party—A, and there is no general duty to confer protection against such loss. It would therefore follow that the existence of a public system for the registration of titles and interests in land would only have aided the establishment of priority of B's interest without more. Still, it would have been incumbent upon B to pursue her/his claim against A and C in whichever forum s/he deems appropriate. Fourthly, the Council had no more power than to establish and maintain a system for the registration of charges in land. Fifthly, councils in Zambia face well-known financial challenges which make it increasingly hard for them to meaningfully discharge their statutory functions. Against this backdrop, it is difficult to see how A's wrongful act could reasonably and fairly be foreseen by the Council. It is also hard to see how the Council could reasonably be regarded as having assumed responsibility to register B's interest in Stand 10 Ndola when the duty to maintain a registry for other interests in land than charges no longer exist. And, on account of the aforesaid, it is difficult for the court to develop a novel category of negligence incrementally with analogy to established categories. Perhaps, the injured party, B, could allege breach of the statutory duty of the council to establish and maintain a system for the registration of land charges in line with section 9(d) of the First Schedule tothe LGA. However, a caveat is not a charge within the meaning of the term 'charge' as espoused by Lord Atkin in *Charnley*. Consequently, such a claim is likely to be struck off on a preliminary point of law. Itmight help the cause of the injured party, B, if s/he took the common law route and commenced an actionfor a declaration that the agreement for the purchase of Stand 10 Ndola between A and B was executed prior to the agreement between A and C. However, as noted earlier, the susceptibility of the common law priority system to fraud and forgery makes this route quite unreliable. As a possible way of ensuring that councils continue collecting revenue from the lodgement of caveats, and protecting interests of the title-holders and the interest-holders, proposals are made for the enactment of rules which would facilitate the lodgement of caveats and payment for fees for the same. For this purpose, the provisions of Part IV of the repealed Housing (Statutory and Improvement Areas) Act could come in handy with minor modifications. The statutory instrument could be styled *'Statutory and Improvement Areas (Lodgement of Caveats) Regulations'.*

Advantages of Using a Caveat over a Court Injunction.

The following are the advantages of using a caveat as a device for the interim protection of interests in land which is situated in statutory and improvement areas:

1. A caveat is much easier and quicker to prepare—by filling-in a caveat form in the prescribe form. Injunctions on the other hand are more complex to prepare needing the expertise of a legal practitioner—there is summons, affidavit in support, certificate of exhibits and certificate of urgency, and a draft order;
2. A caveat takes effect immediately after effective lodgement whereas an injunction needs proper service to be effected on the restrained party after it has been granted by the court;
3. Consequences for disobedience of a caveat flow on account of effective lodgement whereas disobedience of an injunction is not punishable unless a penal notice is inserted in the injunctive order which has been served on the restrained party;[82]
4. A caveat is generally much cheaper than an injunction. The summons, affidavits, certificates of urgency and exhibits and ordersare all expenses;[83] and
5. A caveat is much easier to obtain.[84]All a caveator needs to do is disclose the interest that the caveat is intended to protect. On the contrary, in case of an injunction, disclosure of an interest in the property[85] which the injunction is intended to protect is not enough.[86] The court has to be satisfied that

> the applicant would suffer irreparable injury—injury that is substantial and cannot be atoned by damages — if the injunction were not granted.[87] Consequently, if the damage that is likely to be suffered by the applicant can be made good by damages, an injunction will not be granted. Even after finding that the applicant is likely to suffer irreparable injury, the court will weigh which side of the suit is likely to suffer more injury if the injunction were granted or not granted. In this respect, the court must weigh the applicant's need for protection against the corresponding need of the respondent to be protected against injury and determine where 'the balance of convenience' lies.

These stringent requirements no doubt make the process of obtaining an injunction more rigorous, lengthier, costlier and less likely than a caveat.The authors argue that the lower cost of caveat and the ease of getting it make this legal device more efficient than an injunctive order. The authors also argue that the lower cost ofa caveat and the relative ease of obtaining it are also likely to inspire social willingness to pay for the fees which are associated with it. And as such, caveats should be promoted over injunctive orders. Further, the said positive features of a caveat are likely to encourage dealings in land and contribute to economic growth. It is submitted that the enactment of rules for the lodgement of caveats as proposed above is likely to enhance the effectiveness of regulatory and institutional framework for the registration of titles and interests in land which is situated in statutory and improvement areas in Zambia.

CONCLUSION

The general conclusion which has been reached in this article is that the regulatory and institutional framework for the registration of titles and interests in land which is situated in statutory and improvement areas in Zambia does not provide adequate safeguards for effective protection of titles and interest in land. In particular, it was noted that after the repeal of the Housing (Statutory and Improvement Areas) Act, most protective provisions such those which related to the registration of titles, interests, charges, and the lodgement of caveats were not reproduced in the repealing and successor law—the Urban and Regional Planning Act 2015. It was also noted that in the absence of a public system for the registration of titles and interests in land, the common law priority rules could serve as a fall-back. In this regard, it was noted that a public system for the registration of titles and interests in land is much more protective of titles and interests in land than the common law rules. Further, it was noted that the continued registration of caveats by councils is without legal support, and the 'purported caveator' who suffers loss or damage as result of the violation of the caveat has no cause of action against the council. Furthermore, it was noted that lack of a public system for the registration of titles and interests in land which is situated in statutory and improvement areas in Zambia amounts to*de facto* denial or violation of the right to property.It was noted that caveats are cheaper and easier to obtain than court injunctions, and are more protective of property rights than the latter. The article has demonstrated that a public system for the registration of titles and interests in land which is situated in statutory and improvement areas in Zambia is likely to enhance the protection of property rights and promote dealings in land and contribute to economic growth.

FOOT NOTES

[1] 'Efficient' should be construed along these lines.

[2] See, the Zambian Constitution, Arts 11, 16, Chapter 1 of the Laws of Zambia.

[3]*ibid*

[4] See, the COMESA Treaty 1993, Arts 7(1)(c), 23, 26.

[5] The old SADC Tribunal was suspended following a ruling against Zimbabwe in 2008. For the background to the new Tribunal, see: Gerhard Erasmus, 'The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law' (2015) Tralac Working Paper No. US15WP01/2015.

[6] See, SADC Treaty 1980, Arts 4(c), 6(1); SADC Protocol on the Tribunal 2010, Art 33 (new jurisdiction provision). For a thorough discussion of the new and old jurisdictional regime, see: Gerhard Erasmus, 'The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law' (2015) Tralac Working Paper No. US15WP01/2015.

[7] African Charter on Human and Peoples Rights, Art 14.

[8] Universal Declaration of Human Rights, Art 17(1)(2).

[9] Zambian courts are overburdened with litigation. A simple civil case could take years to dispose of due to huge workloads and understaffing of the courts. Huge workloads are mainly attributed to the sharp increase in the domestic and foreign population, and fewer courts of law—most districts do not have Subordinate Courts while most provincial centres do not have High Courts. As a possible solution to this shortcoming in the court justice system, the Zambian Government has undertaken to review and enhance the legal aid policy, establish high courts in provincial centres, and increase access to justice awareness as a means of increasing access to justice: See, the Seventh National Development Plan 2017-2021, at pp. 105- 106.

[10] See, Sixth National Development Plan 2011-2016, Table 30, item No. 4, at p. 35, and the Seventh National Development Plan 2017-2021, p. 105

[11] Chapter 194 of the Laws of Zambia

[12] See, the Urban and Regional Planning Act 2015, s 75.

[13] Zambian Constitution 1995/1996/2016, Art 28(1)(a)(b).

[14]*ibid*

[15] Zambian Constitution 2016, Art 230(1)(2)(3)(a)-(f).

[16] African Charter on Human and Peoples' Rights, Arts 30, 45(1)(2)(3)(4).

[17]*ibid*

[18] African Charter on Human and Peoples' Rights Protocol on the Establishment of the African Court on Human and Peoples' Rights, Art 1.

[19] See, African-court.org, accessed 21 September, 2020.

[20] United Nations Charter, Art 68.

[21] See, Milton Friedman, *There Aint No Such Thing as Free Lunch* (Open Court Publishing Company 1975).

[22]The predecessor Act is the repealed Housing (Statutory and Improvement Areas) Act.

[23] Mandhu, F., 'Land Registration under a Dual Land Tenure System in Zambia (Master of Laws Thesis, University of Zambia 2000) 1-140.

[24]Repealed and replaced by the Urban and Regional Planning Act 2015.

[25]Now repealed and replaced by the Urban and Regional Planning Act 2015.

[26] For this view, see, Pollock, F., *The Land Laws* (3rd edn, Sweet and Maxwell 1896) at 233

[27] See, Mudenda, F.S., *Land Law in Zambia: Cases and Materials* (UNZA Press 2007)

[28]Posner, R.A., *Economic Analysis of Law* (8th Revised edn, Aspen Publishers 2011), (herein, 'Posner (2011')).

[29]*ibid*

[30] See the utilitarian theory of legal change as espoused by Clark: Robert Clark, 'The Interdisciplinary Study of Legal Evolution' (1981) 90 Yale Law Journal 1238, at 1241-1242.

[31] Charles-Louis Montesquieu, *The Spirit of Laws* (Revised Edn, Prometheus 2002).

[32] North argues that formal legal rules (the common law, equity and legislation) are efficient if and only if they are based on the informal rules (usages, conventions, customs, beliefs and culture): Douglas North, 'The New Institutional Economics and Development', in Harris J., Hunter J. and Lewis M.C. (eds), *The New Institutional Economics and Third World Development* (Routledge 1995) at 17-26.

[33] See below for Coase's view of efficient legal rules.

[34] Kornhauster L., 'The Economic Analysis of Law' (2001) Stanford Encyclopaedia of Philosophy 1, (Kornhauster (2001)).

[35]*ibid*

[36]*ibid*

[37] Coase, R.H., *The Problem of Social Cost* (CreateSpace Independent Publishing Platform 2016) 1-44.

[38] Horowitz D., 'The Quran and Common Law: Islamic Reform and the Theory of Legal Change' (1994) 42 American Journal of Comparative Law 244.

[39] The idea here is that the abandonment of inefficient legal rules and institutions will create a gap between the current legal rules and institutions and the prevailing culture, customs and beliefs (socio-economic behaviour). The disparity between the legal rules and institutions, and socio-economic behaviour, as the social change theorists and the utilitarian theorists argue, leads to the creation of new legal rules and institutions which reflect the current socio-economic behaviour. For the social change theory of legal change and development, see Epstein R.A, 'A Static Conception of the Common Law' (1980) 9 Journal of Legal Studies 253, at 269-275. For the utilitarian theory of legal change see, Clark R., 'The Interdisciplinary Study of Legal Evolution' (1981) 90 Yale Law Journal 1238, at 1241-1242.

[40] For a detailed discussion of this approach, see, Salter, M. & Mason, J. (2007). Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research. Essex. Pearson Education Limited.

[41] Dobinson, I. & John, N. (2007). Qualitative Legal Research, in McConville, M. & Chiu, W.H. (eds). (2007). Research Methods for Law. Edinburgh. Edinburgh University Press.16-45.

[42] This is a process which effectively facilitates the involvement of communities, the private sector, interest groups and other stakeholders in land planning, administration and governance.

[43] See, the Urban and Regional Planning Act 2015, s 75.

[44]See, Lands and Deeds Registry Act, ss 33, 35.

[45] See, Lands and Deeds Registry Act, s 12. For paragraphs (iii)-(v), see, Dr Patrick Matibini, 'The Bonafide Purchaser Rule—One Must Be Careful When Purchasing Land,' Zambian Daily Mail, 12th July, 2012, at 9-13; see also, Samamba, Lennox Trivedi, 'The Challenge of Determining Priority of Collateral Interests in Non-Company-Investor-Held Securities,' International Journal of Research in Social Sciences, Vol. 3, February, 2018.

[46] See, *Hollington Bros vs Rhodes* [1925] 2 ALL ER 578n*; Midland Bank Trust Co. Ltd vs Green* [1981] A.C. 513. This judicial position appears to be the net effect of the holding by the Supreme Court of Zambia in *Krige and Another vs Christian Council of Zambia* [1972] ZR 152, that "…an unregistered registrable document is void for all intent and purpose and as such of no effect whatsoever both at law and in equity."

[47] In, *Jane Mwenya and Jason Randee vs Paul Kapinga*, Appeal Number 4 of 1998, the Supreme Court of Zambia held that unregistered registrable interests in land, within the registration period, could be defeated by a bonafide purchaser for value without notice.

[48] Efficiency of the system for the registration of titles and interests in land (the legal rules and institutions which govern such processes) should be tested in economic models and the real world, as observed above.

[49] Once the repealing part or entire piece of legislation comes into effect, the repealed part or entire piece of legislation ceases to have legal effect: See, the Interpretation and General Provisions Act, s 13, Chapter 2 of the Laws of Zambia.

[50] See, the Interpretations and General Provisions Act, s 15.

[51]Act No. 2 of 2019, Chapter 281 of the Laws of Zambia.

[52] See, Local Government Act 2019, S 16(2).

[53] [1924] 1 KB 431.

[54] *Charnley* at 449-450.

[55] By-laws in Zambia are a form of statutory instrument and as such a written legislative source: See, the Zambian Constitution, Arts 7(c), 266 (Definition of, 'statutory instrument').

[56] The Second Schedule is not subordinate legislation since it forms part of the Principal Act: See, the Interpretation and General Provisions Act, s 9.

[57] By section 74(1) of the Urban and Regional Planning Act 2015, the Minister has power, by statutory instrument, to make regulations for the implementation, administration and operation of the provisions of the Act.

[58] The Latin maxim *'qui prior est temptore potior est jure'* which is literally Anglicized as *'he who is first in time has the strongest claim in law'*.

[59] Anecdotal evidence shows that banks and other lending institutions have moved to income-backed or linked loans.

[60] Samamba Lennox Trivedi, 'Enduring Title Retention Clauses and the Requirement of Double Registration—Of Full Bloods and Aliens' (2019) 7 The Law Association of Zambia Journal 72-90, at 72.

[61] Hirschl R., '"Negative" Rights vs "Positive" Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-liberal Economic Order' (2000) 22(4) Human Rights Quarterly 1060-1098.

[62] For the existence of the positive obligation to fulfil the right to property, see: Geneva Academy of Humanitarian Law and Human Rights, 'Legal Opinion on the Right to Property from a Human Rights Perspective' (2010); Eide A., Krause C. and Rosas A. (eds), *Economic, Social and Cultural Rights: A Text Book* (2nd Revised Edn, Martinus Nijhoff Publishers 2001).

[63] See, Jacob Mchangama, 'The Right to Property in Global Human Rights Law' (2011) CATO INSTITUTE Policy Report 2011.

[64]ibid

[65]*ibid*

[66] *ibid*

[67] By section 14(1) of the repealed Housing (Statutory and Improvement Areas)Act, priority of registrable documents was determined by date of registration and not by date of execution. See also, the Lands and Deeds Registry Act, s 5, Ch 185 of the Laws of Zambia.

[68] Section 29 of the Housing (Statutory and Improvement Areas) Act (repealed)

[69] Prior to the 2010 amendment, the subordinate court was the forum for determining propriety of a caveat. After the 2010 amendment, the Lands Tribunal took over as appropriate forum. By section 2(a)(b) of the Housing (Statutory and Improvement Areas Amendment) Act No. 42 of 2010, the word 'Court' in the principal Act was replaced with 'Lands Tribunal' wherever it appeared. For appellate purposes, a new section 46A was introduced into the principal Act by requiring any person aggrieved with a decision or direction of a Council Registrar to appeal to the Lands Tribunal.

[70] Section 31(1) of the Housing (Statutory and Improvement Areas) Act (repealed).

[71] Section 31(2) of the Housing (Statutory and Improvement Areas)Act (repealed)

[72]*ibid*

[73] Section 31(3) of the Housing (Statutory and Improvement Areas) Act (repealed)

[74] By Act No. 42 of 2010, the repealed Housing Act was amended to transfer the jurisdiction to hear and determine disputes relating to land which is situated in statutory and improvement areas from the Subordinate courts to the Lands Tribunal: See, Housing (Statutory and Improvement Areas) Amendment Act No. 42 of 2010, s 2.

[75] See, Lands Tribunal Act 2010, s 4(1)(a)(e), 2 (Definition of 'person in authority').

[76] See, the Lands Tribunal Act No. 39 of 2010, s 12.

[77]Which, is highly likely to be the case.

[78] This duty was imposed by section 29 of the repealed Housing (Statutory and Improvement Areas) Act.

[79] See, the Interpretation and General Provisions Act, s 14(3)(c).

[80] See, *Yuen Kun Yeu vs Attorney General of Hong Kong* [1988] A.C. 175; *Caparo Industries Plc vs Dickman* [1990] 2 A.C. 605; *Customs and Exercise Commissioners vs Barclays Bank Plc* [2006] UKHL 28.

[81]*ibid*

[82]*Beatrice Nyambe vs Barclays Bank Plc* [2008] ZR, Vol. II, 195; *Sitima Tembo vs National Council for Scientific Research* [1988-1989] ZR 4.

[83] Further, an injunction is not a self-supporting cause of action. The moving party needs to establish a separate cause of action in contract or tort or other causes of action: *Ash vs Lloyd's Corp.* [1992] O.J. No. 1585 (C.A) at para 15. The moving therefore needs to have filed a statement of writ endorsed with a full statement of claim or some other originating process. This is effectively an additional cost to the party seeking to protect proprietary interests in land.

[84] Grant of an injunction by the court is discretionary: *American Cyanamid Co. vs Ethicon Co. Ltd* [1977] AC 396, at p. 406.

[85]*American Cyanamid,* at pp. 406-420.

[86] Such proof satisfies the requirement that there be a serious case to be tried.

[87]*Shell and BP (Z)Ltd vs Conidaris & Others* [1975] ZR 174.