

The Past in the Present: Challenges of Protecting Customary Tenure Provisions - The Chilonga Case

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Introduction

Zimbabwe, like many other African states, is still grappling with the process of reversing laws and institutions informed by the legacy of colonial rule. The institution of customary tenure through the Communal Land Act 1982² (the Act) is one such remnant of the colonial governing system. The Act was supposedly altered from the Tribal Trust Lands Act³. The alteration was superficial because there were no significant reforms that responded to the challenges faced by smallholders who were governed by this “new” Act. The recently concluded case of Chituku and Others versus the Minister of Lands and Others⁴ before the High Court of Zimbabwe (Chilonga Case) not only reminded us of the irregularities within the Act but also provided an opportunity to revisit the outstanding issues on the provisions of customary tenure as defined in the Act. The Act and its administration have implications on the nature of relations between smallholders operating in customary land areas and the state. It also affects the economic opportunities available to smallholders within a capitalist financial services and agribusiness framework. The overall consequence being that the broader tenets

of citizenship and democracy are also problematized. Besides, there are questions on whether in its current form, the Communal Land Act is not in contradiction with constitution especially when it comes to the right to human dignity⁵ as prescribed by the supreme law of the land⁶. The discussion in this paper takes a cue from these pertinent issues and focuses on three aspects of the case: the relevance of customary tenure in the 21st century, the politics of customary tenure reform and the complex web of relations that subjugate smallholders into being marginal subjects with limited rights compared to their urban based peers who are treated as citizens.

Background

In February 2021, the Government of Zimbabwe (GoZ) passed several legal instruments (refer to Table 1) aimed at setting aside 12 940 hectares (ha) in the district of Chiredzi initially for the purpose of ‘Lucerne production’ but this was later changed to ‘setting up an irrigation scheme’

Table 1- Legal instruments used to appropriate land in the Chilonga area

Date	Legal Instrument	Description
26/02/2021	SI 50 of 2021 ⁷	Amendment to section 10 of the Communal Land Act, the instrument designated 12 940 hectares of land in Chiredzi for exclusive lucerne production. The Act also prohibited the utilization of this land for any purposes except for mining activities due to the superiority of mining rights. Once the SI was instituted, occupiers of land were required to promptly vacate with all their property. An exception was made for persons who would have duly acquired permits in terms of section 9(1) of the Communal Land Act.
26/02/2021	SI 51 of 2021 ⁸	Highlighted that an area of land approximately 12 940 hectares, in the administrative district of Chiredzi ceased to be part of the Chiredzi Communal Land. This legal instrument follows up on SI 50 of 2021 by enforcing s its provisions
09/03/2021	SI 63A of 2021 ⁹	Corrected the purported irregularities in SI 51 of 2021. The purpose of the land was changed from ‘Lucerne production’ to ‘establishment of an irrigation scheme’. The previous SI did not include the eviction order of land occupants and this new instrument enforced their immediate eviction from the land.
16/03/2021	SI 72A of 2021 ¹⁰	Repealed SI 50 of 2021 by reassigning the purpose of the land in question. Under this SI, the land was now exclusively meant for irrigation activities.

The applicants, Chituku and others, argued that the GoZ’s intentions breached fundamental rights and freedoms enshrined in the Declaration of Rights and the applicants’ case was motivated by several queries. Firstly, the applicants argued that Chilonga was their ancestral

land which they occupied for over 500 years without any disruption. Their occupancy had even weathered the upheavals associated with the land displacements of the colonial period. The applicants further insisted that their land should not be categorised under Tribal Trust Lands

2 [Chapter 20:04] - Further amended in 1985, 1988, 1989, 1992, 1998, 2001 and 2002.
3 No.6 of 1979.
4 HH-02-22 (HC862/21).
5 Section 51 of the Constitution of Zimbabwe Amendment (No.20) Act 2013, hereinafter the Constitution.
6 Section 2 of the Constitution.
7 SI 50 of 2021 (Communal Land [Setting Aside of Land] [Chiredzi] Notice 2021).
8 SI 51 of 2021 (Communal Land [Excision of Land] Notice 2021).
9 SI 63A of 2021 (Communal Land [Setting Aside of Land] [Chiredzi] Notice 2021: Correction of Errors).
10 SI 2021-072A Communal Land (Setting Aside of Land) (Chiredzi) Notice, 2021.

which were eventually converted into customary land through the Communal Land Act of 1982. Despite not expressly identifying specific provisions of the constitution against which the Act was ultra vires, applicants submitted before the court that the Communal Land Act violated the right to life,¹¹ right to human dignity, right to property,¹² right to equal protection and benefit of the law¹³ and the right to culture and language.¹⁴ Secondly, the applicants challenged the colonially and racially exclusionary frameworks of customary tenure and especially how it mis-conceptualized the systems of land ownership amongst Africans. This means that the existing Communal Land Act is based on a false understanding of African land tenure systems and should be rendered ultra vires the constitution. In this process, the applicant raises glaring weaknesses in state policy making such as: the title change from Tribal Trust Lands Act to Communal Land Act without attending to the major flaws and grievances that informed the land question during the war of liberation. Remarkably, the respondent (GoZ) agreed with the applicants' critique of the Tribal Trust Land Act as well as the flawed nature of the racist colonial ideology that informed it. Thirdly, the applicants' case rested on a constitutional provision for the right to self-worth and human dignity. They argued that the GoZ's intended move would deprive them of the right to live. The respondent (GoZ) articulated that no one would be displaced because the targeted land that was largely uninhabited and that in the event of eviction, adequate compensation would be provided.¹⁵ The GoZ proceeded to argue that the courts were not the proper platform for the resolution of this kind of dispute. In hearing the matter, Justice Mafusire agreed with this position in his judgment, making reference to several cases that reinforced the argument that there is a long-held tradition in which land disputes are resolved politically. The judge concluded the case by recommending a commission of inquiry as the first step to finding a possible political solution.

The dismissal of the case did not reflect defeat on the part of the applicants, but instead, as the presiding judge suggested, the dismissal was meant to enable broader stakeholder consultations on the sticky issues raised in the case. According to the presiding judge, the consultation could be in the form of 'some sort of commission or enquiry on the whole agrarian reform, especially as it applies to communal lands . . .' (Chilonga Case Judgment, 2022). The capacity of the courts to handle the convolutions emanating from such a case came into question. There are various possible outcomes from this case. To begin with, if the applicant had succeeded in securing relief from the courts, the ripple effect would have been an investigation into the ways of limiting presidential powers. Such a move would have been high risk albeit necessary.

The possible outcome being the establishment of a new tenure regime that is neither customary nor freehold across Zimbabwe, based on a new qualification of having occupied land before colonization and holding onto it during and after colonization. Finally, the case, despite the dismissal, created ground for a broader policy and legal debate, and inquiry on why colonial vestiges such as the Communal Land Act should continue to co-exist with brave post-colonial policies aimed at reforming tenure arrangements in former large scale commercial farms. The question then would be 'why should the colonially defined customary lands be left behind when the country is undergoing comprehensive de-colonial agrarian reforms?

The Issues at Stake

As previously mentioned, this was never going to be a simple case of brave community leaders challenging a leviathan like state. It was and remains a very complex challenge of the status quo. The case problematizes the fundamentals of customary tenure, especially the issues of access to land and the ways in which it is reserved for approximately 55% of the people of Zimbabwe who make their living on these customary lands. The case also challenges on the foundations of property rights and accumulation. In terms of relief, the applicants called for the GoZ to issue them with title deeds or tradeable certification of occupation. This case is also an indelible challenge to presidential powers in the context of the controversial matter of devolution. While it is clear that customary tenure comes into question as a result of this case, it is still not clear what customary tenure entails. Thus, it is important to provide a snapshot view of its history as well as its underpinning philosophy.

Different forms of customary tenure existed across Africa, and this explains why Africa has a peculiar model of development separate from other regions. Africa is largely pre-capitalist in orientation and in the past, did not envisage an active market where land was regarded as a commodity. Customary tenure is based on what was once perceived as the dominant form of rural sociability in rural Africa: a pristine structural relationship within a lineage grouping and an ethnic clan. At the helm of the customary model is the office of the chief and its subordinate structures. The organisation for access to natural resources, production and consumption is based on principles of inclusion in or exclusion from the clan or lineage group. The hierarchy of institutions within the traditional framework establishes the criteria for access to land and the norms for defending these land rights. The clan asserts political and ritual rights over land, followed by the lineage, which establishes concrete claims over land

¹¹ Section 48 of the Constitution.

¹² Section 71 of the Constitution.

¹³ Section 56 of the Constitution.

¹⁴ Section 63 of the Constitution.

¹⁵ This is an important part of the affidavit by government which can be used for later litigation in the event of evictions and lack of compensation.

supported by actual ties of consanguinity and corporate interests, and finally use rights conferred on the household, in most instances through the male household head.

Only the products of social labour: crops and livestock, are objects of appropriation (Mafeje, 2003: 3). Recognition of certain clan domains makes it easy for lineages to maintain a steady pool of land to control any influx of strangers (non-kinspersons). In this kind of framework production, consumption and accumulation are organised at household level and sharing of labour or produce in instances of distress is among those who already have certain commonalities in movable and immovable property and are bound together by exclusive ties of mutual obligation. Thus, the lineage framework provided a mechanism of cooperation and fostered mutual sharing. The distribution system encapsulated within the lineage framework functioned as a method for reconciling the individual's total interests with those of the community (Adholla, 1962: 22). This form of social organisation also provided norms of cooperation centred on the idea of sharing between the richer and poorer members of the lineage group (Von Freyhold, 1979: 81). The implicit rules of cooperation attempted to strike a balance between the richer members who were obliged to share their surplus by compensating them with the social esteem they gained from it. On the other hand, the parasitism of the poor was held in check by the social sanctions against idleness (Von Freyhold, 1979).

However, the practice of customary tenure is far from the benign picture illustrated above. The labels 'communal' and 'customary' disguised a wide range of practices and claims to land in which individual rights sat alongside social obligations to defined groups, and in which the regulation of access to land was far from the sole prerogative of 'traditional leaders' operating according to customary rules (Alexander, 2006: 112). Although Hollerman (1952) argues that land was not property (*chinhu*) he also records in his field work notes that compensation was paid in cash to those leaving their land in Buhera by those taking it over, suggesting the existence of an informal land market (Cheater, 1990: 191). In his own research, Bourdillon (1982: 63) similarly observes the existence of land markets when he articulates that:

means have been found according to which land can be bought and sold ... as land becomes scarce, value for the land itself is added to the compensation fee, and chiefs and headmen can charge settlers a fee for the allocation of land.

Administratively, this model has gone through several distortions to the extent that in practice customary tenure is characterised by what Nyambara (2001: 778) describes as "multiple overlapping and sometimes internally inconsistent sets of rights and means of access and control", all of which were subject to contestation. In fact, the influence of chiefs on customary tenure has been exaggerated and oversimplified in both the colonial and the post-colonial state. At many stages of the development of modern Zimbabwe, the state tended have more influence on land issues and directly exercised its authority (Moyo and Yeros, 2007a).

Additionally, there are very few pristine customary areas which have not been penetrated by capitalist (individualist) based approaches to production, and by development agents who have taken on the role of 'experts' in production. Customary areas have also been affected by various local government reforms which have altered traditional authority, and, in some instances, imposed new structures such as Village Development Committees (VIDCO) and Ward Development Committees (WARDCO). Given these issues, it becomes difficult to see how we can continue to privilege lineage-based forms of organisation at the expense of other forms of social organisation and ways of holding land.

Is Customary Tenure Fit for Purpose?

The applicants attempted to do two shrewd things; firstly, they sought to prove that their ownership of land as an ethnic group predates colonization. According to their affidavit, their ancestors have continuously lived on the same piece of land for more than 500 years. The Tribal Trust Lands Act (precursor to Communal Land Act) was passed into law in 1965 as a way of accommodating African communities that had been displaced from their land due to the Land Apportionment Act¹⁶ which segregated land into, among others, white and native areas. They argued that their case was different. A broader reading of the Tribal Trust Lands Act seems to suggest that all the land where Africans were eking out an existence had been designated within the same tenure regime except for the land set aside for the yeoman class of trained master farmers who were allocated or bought small to medium scale commercial farms (see Table 2 for a detailed description of the different tenure regimes in Zimbabwe). Currently, there is no tenure regime for those who were not displaced by colonization. However, the challenge by the applicant, if it had been successful could have raised an opportunity to re-think tenurial arrangements for such communities.

¹⁶ Land Apportionment Act of 1930.

Table 2: Description of land tenure regimes in Zimbabwe since independence

Sector	Type of Tenure	Rights	Administrative arrangements	Security
LSCF	Freehold tenure based on surveying, mapping and lodged with the Deeds registry	Secure rights	Individual responsibility	Secure in a normal situation, but insecure in the context of demand for land based on historical circumstances
		Land used as collateral	Local authority's collection of unit tax	
		Use of courts to protect rights	Intensive Conservation areas	
SSCF	Freehold tenure as above	Secure rights and land may be used as collateral	Individual responsibility Local authority's collection of unit tax	Problems of inheritance and fragmentation because of pressures for access to land
Resettlement (old)	Permit system then revised into leaseholds	Rights of the authorities are prioritized more than those of the settlers	State through the Ministry of Local Government, Rural and Urban Development and now through traditional leaders.	Highly insecure because of the ministerial powers which allow for expulsion
Communal Area	Customary tenure	Usufruct rights	Traditional leaders (chiefs, headmen etc)	Secure in principle, but land cannot be used as collateral
		Private use of arable land and shared commons	Local authorities through VIDCOs and WADCOs)	
		Land can be taken without recourse to courts	State through its statutory agents	
State land	State land	Leasing, licensing, statutory allocations	State administers land through its own parastatals	Secure for the state but not so for individuals when the lease period comes to an end
A1	Offer Letter issued by the Minister through the Ministry of Lands, Agriculture and Rural Resettlement. (MoLARR)	Insecure rights Seem usufruct rights with promise of leaseholds	State and traditional leaders contesting to govern	Highly insecure as the situation on the ground is still fluid
A2	Offer letter issued by the Minister of MoLARR	Promises of leaseholds	Individual	Highly insecure as the situation on the ground is still fluid
		Highly insecure	State and traditional leaders contesting to govern	

Source: Moyo, 2004

The applicants also sought to challenge the underpinning principles of customary tenure. The underlying philosophy of customary tenure is centred on the politics of belonging within a defined lineage grouping that ensures access to land and related benefits (Adholla, 1962, Murisa, 2009). The

GoZ's policy is informed by colonial era anthropologists who exaggerated the idea that there is no individual ownership of land within customary tenure areas. Rather, there exists well recognised uninterrupted usufruct rights which belong to individual families and are passed

on from one generation to the other within customary tenure areas. The system has worked, albeit unevenly for more than five centuries. Threats of land grabs and eviction have historically been rare in many areas, and this explains why there has not been a rush to secure the land through other means. The ongoing state led attempts at grabbing land from communities for other land uses debunks the taken-for-granted “security” of customary tenure, and could be the trigger for many communities to consider other secure forms of tenure meaning that this could be the opportune time to reconsider customary tenure and some of its problematic provisions.

The Economic Dimensions of Customary Tenure

In the case under discussion, the applicants make a radical move away from the usual understanding of customary land as a commodity that cannot be traded but one that must be kept in trust for the next generation. They request that the GoZ must provide them with individual title deeds or tradeable certificates of occupation. It is important to note that this request is being made in Zimbabwe, a country that has literally rowed against the capitalist tide of property rights for the past twenty years by wiping private property (freehold tenure) for approximately 4,500 large scale commercial farmers who owned around 39% of arable land. The GoZ is yet to clarify its alternative vision to private tenure, but, if the Chilonga case is representative of broader sentiments amongst those who hold customary land, then there will be need for a more inclusive dialogue on preferred tenure regimes.

Besides, the influence of customary tenure-based forms of social organisation is waning. Studies carried over time in Zimbabwe’s customary areas (see for instance, Bratton, 1986; Moyo, 1995, 2000; Murisa, 2009 & 2013) have demonstrated that customary based forms of mobilisation are no longer predominant in the organization of farm production. The influence of lineage forms of local organisation of communities for production (labour, sourcing of inputs and extension advice), is waning and in its place emerges a variety of local associational forms that organise beyond the confines of belonging within a lineage group. Localised production groups, marketing cooperatives and other ad hoc mechanisms, such as labour beer parties (nhimbe), which mobilise beyond the ethnic and lineage framework, dominate the organisation for production and exchange in rural Zimbabwe. Bratton’s (1986) study of communities belonging to local farmer groups in Hwedza District of Mashonaland East province demonstrates that these institutions tend to be more influential than conventional hierarchies. Furthermore, the intrusion of the market and the state has led to the emergence of more autonomous production approaches that do not necessarily receive

leadership guidance from traditional structures. Murisa (2009 & 2013) demonstrates how recipients of land during the Fast Track Land Reform Programme managed to establish alternative forms of social organisation that enhanced collective action for production and marketing outside of the traditional customary tenure framework.

It is imperative to examine the impact of customary tenure on production vis-a-vis other tenure forms. Customary tenure areas remain underdeveloped, characterized by rondavel huts and poverty with uneven investments in houses with corrugated iron sheets and running water within the household. The majority have literally been dancing on the same spot since independence despite receiving government production inputs. There is very limited socio-economic transformation. On the other hand, their counterparts who are farming on private property (freehold tenure), have been able to make major investments on and off the farm to the extent that when they were displaced, they demanded upwards of US\$30billion compensation for improvements on the farm. For instance, between 1980 and 1984 the number of dams in the commercial farming areas increased by 50 percent from 7 000 to 15 000 irrigating nearly 400 000 ha, compared to only 50 000 ha within communal areas (Rukuni, 1994b). What explains this difference? Could it be the assumption about the superiority of the white race? It is true that in most cases customary tenure areas are associated with poor soils, they in are situated in drier regions (NR 4&5), are overcrowded and individual families have on average 2 to 4 ha for personal use. They were designated as subsistence farmers. Yet, in, other countries which are way more developed, such as Vietnam, Indonesia, and China, land sizes of 2 to 4 ha are considered medium sized and appropriate for successful commercial farming. Perhaps the real difference lies in how land is held. Farmers in freehold tenure benefited from being part of a capitalist ecosystem which provided financing and agribusiness support, whilst those in customary areas were at the mercy of government subsidies which remain inconsistent and provided for on a season-to-season basis. Could it be that freehold tenure provided better incentives for long term investment? Customary tenure-based smallholders mostly receive support from government in the form of subsidies. Instances where these recipient farmers grow to become self-sustainable are rare. Smallholder agriculture remains the domain of subsidies. Could it be that the way land is held determines investment strategies, production patterns and deploying entrepreneurial capabilities?

Customary Tenure versus Freehold Tenure (Private Property)

The global debate on what works better between customary tenure and private tenure remains unsettled. Garret Hardin’s 1968 essay aptly entitled ‘The tragedy of

the Commons' played a major role in shaping neoclassical policy prescriptions on land tenure from the 1970s well into the 1980s. In brief, Hardin argued that a shared village grazing pasture would tend to get overused and eventually destroyed because more people utilised the common grazing ground without paying for the cost of maintaining it, a phenomenon known in economics as 'free riding'. This view inspired a variety of land reforms with a general trend toward market-oriented access to, and the privatisation of land through private entitlement. The premise was simple: individualised tenure offers the best certainty in land rights, which in turn provides incentives for sustainable use and facilitates access to credit for investment in agriculture and natural resources, hence, contributing to increased productivity and improved natural resource stewardship (ECA, 2004: 15). Hernando De Soto, referred to by others as the genius of property rights, also weighed in the debate by claiming that many resources in the developing world are literally 'dead capital'. He argued that 'the major stumbling block that keeps the rest of the world from benefitting from capitalism is its inability to produce capital. Capital is the force that raises the productivity of labour and creates the wealth of nations' (DeSoto, 2000:5). De Soto goes on to say:

The poor already possess assets they need to make a success of capitalism. But the only problem is that they hold these resources in defective forms: houses built on land whose ownership rights are not adequately recorded [customary tenure] because these assets are not adequately documented, these assets cannot readily be turned into capital, cannot be traded outside of narrow local circles where people know and trust each other, cannot be used as collateral for a loan and cannot be used as a share or against an investment.

The opposite is true in the West where every parcel of land is represented in a property document, the title deed. DeSoto (2000) recommends legally integrated property systems that can convert their work and savings into capital. One of the ways of doing this is through titling programs. DeSoto's argument is more nuanced than Hardin's tragedy of the commons or free rider problem. It makes a compelling argument based on the true observation of entrepreneurial capabilities amongst the poor.

However, freehold tenure or land titling is not a silver bullet. In Kenya, a study carried out by Rutten (1992) in one of the three Maasai districts, where the individualization of title was pursued through the establishment of group ranches, with funding from the World Bank and the UK's Department for International Development (DFID), showed that grazing land had diminished by well over 40 percent over the period 1982–1990, leading to increased vulnerability and destitution of pastoralists, and to accelerated wanton environmental degradation. Land titling in Rwanda

gained prominence as a positive example of the benefits of land titling. In a report prepared for the ODI on the relationship between property rights and rural household welfare, the study found that there is no evidence to support the expected outcomes of the conventional economic view on the link between stronger property rights and investment gains (Henley, 2013). The same report argued that there is a weak association between land rights and incentives than previously postulated. Security of tenure may be unimportant compared to other constraints faced by rural households. Other studies by the World Bank have demonstrated that while improved security is essential, this does not have to be achieved through asserting private property rights. In fact, other forms of tenure including common property and a range of registration systems can achieve the same result.

In 2009, the Nobel Peace Prize Committee awarded the prize for Economics to the now late Elinor Ostrom, Professor of Development Economics at Indiana University, together with Professor Oliver E. Williamson. Professor Ostrom was being recognized for her work on common property regimes; could this be a signal of a paradigm shift from the Hardin-inspired period? Essentially, Ostrom (1990) argued that far from a tragedy, the commons, if supported by the right institutions, could be managed from the bottom-up towards shared prosperity. She forcefully argued that other solutions besides privatization exist, and these entail stable institutions of self-government which can be created if certain problems of supply, credibility, and monitoring are solved. In terms of land tenure, the argument seems to suggest a rethinking of customary and/or communal forms of tenure with an adequate institutional framework to address challenges of supply, production, and preservation.

The Hardin and Ostrom debates on property rights and management have a significant bearing on how the debates on land tenure have evolved in Zimbabwe since 2003. Basically, the debates have been inspired by Hardin, while very limited scholarly attention has been devoted towards exploring ways in which customary tenure, the 99-year lease and the A1 permit could be used to unlock value for agricultural production, except maybe for scholarly interventions by the late Sam Moyo and Ian Scoones. It has been argued that strengthening of tenure through freehold, will lead to increased access to credit but very little has been said about the possibilities of eventual land concentration amongst a few owners due to private sales of land. Cases of freehold tenure-related land concentration have been observed in an earlier study of resettlement (Murisa, 2009).

It is important to note that whilst customary tenure is prevalent in many African countries, it remains the least supported by capitalist markets or rather remains outside

of formal financial commodity circuits. It is the place where the labour reserve (surplus labour) is kept when not needed in the formal economy but more importantly, it is a site of production (agricultural commodities) and reproduction value (labour for the capitalist economy) without due compensation from the capitalist sector. In other words, customary tenure areas subsidise social reproduction within the capitalist sectors, especially urban economies.

The learned judge in the Chilonga case recognizes the conundrum that the GoZ faces in terms of customary tenure. He joins others in raising the fear that the granting of ‘... title carte blanche to users and occupiers of communal lands may result in undesirable consequences’ which include foreign ownership of land or concentration of land amongst financing institutions due to failure to repay loans. However, it is also important to consider the fact that the case in front of the judge is a proposed land grab which may eventually lead to foreign ownership of the same land. The fear that land titling may lead to the occupiers disposing of the land either voluntarily or involuntarily is well documented. What is less documented is the actual evidence on the ground on what happens after land titling and the issuing of tradeable certificates for customary tenure areas. The lessons from Kenya and Rwanda and other places provide insights on what could possibly happen in Zimbabwe, thereby challenging a cut and paste approach to this issue.

Customary Tenure and Land Governance

Operationally, customary tenure is akin to wading in murky waters. Over the years, traditional authorities have modified the provisions of this otherwise egalitarian system of land administration. Illegal land sales presided over by chiefs and other lineage elite were very common across the length and breadth of Zimbabwe. Different studies record the practice of illegal land sales: Dzingirai (1994) in Binga (Matabeleland North), Yeros (2002a) in Shamva (Mashonaland Central), and Chimhowu and Woodhouse (2008) in Svosve (Mashonaland East). More interesting is the fact that it was not only chiefs engaged in the practice but other rural elites and RDC officials, even though there is no provision in the Communal Land Act for outright land sales. These actors were taking advantage of the ineffectiveness of the Act and the institutional measures in place. The Rural District Councils do not have the capacity to follow up on these processes nor the moral influence to oppose such land transactions. The unofficial land transactions led Cousins et al. (1992) to question whether available evidence on ‘private’ transactions suggests that a ‘market’ in land that allows ‘strangers’ into the otherwise neatly organised lineage

structures is emerging in the communal lands, thus, destroying the customary framework of social organisation.

Moreover, there is overall institutional and general confusion when it comes to the administration of customary tenure areas, especially the contestations between Traditional Authority and Rural District Councils (RDCs). The Communal Land Act (1982 amended in 2002) fails to appreciate the real contestations and competition between RDCs and traditional authority. The Act stipulates that the RDCs should:

grant consent only to persons who, according to the customary law of the community that has traditionally occupied and used land in the area concerned, are regarded as forming part of such community (CLA, 1982 amended in 2002).

Conversely, the act does not specify how the RDCs will verify this complex issue of belonging, especially because lineage and clan affiliations are determined by the elders of those groups. In fact, smallholders in customary tenure areas were subordinated to a fusion of authority revolving around an awkward ‘institutional mélange’ in a similar situation to practice under late colonialism. This fusion of authority included elected RDCs, traditional chieftainships and the local ruling party cell structures from 1980 until 1996 (Tshuma, 1997: 90). The GoZ was at some point also disgruntled with traditional authority. In 1985, the Ministry of Lands passed the Communal Lands Development Plan which promoted the establishment of surveyed and planned ‘economic units’, consolidated villages and state control of tenure through a leasehold system. The plan condemned communal tenure and dismissed customary leaders as the “conservative guard of an unproductive system” (GoZ, 1985).

The forms of social organisation developed through customary tenure have also come under attack. Archie Mafeje was one of the early and forefront critics of forms of social organisation that emerge out of customary tenure, arguing that it was highly undemocratic, patriarchal and, in many instances, oppressed women (Mafeje, 1993 & 2003). Although the lineage-based form of organisation has made provisions in the event of the death of the male head of the family, in practice, the surviving widow and minor children have often been removed from the land or reduced to unpaid labour for the lineage group. This notion of a form of social organisation that is in equilibrium, was mostly dominant prior to the introduction of petty commodity-based forms of rural production that compete to serve capitalist markets. The introduction of a market value of rural goods and the practice of trade in rural goods contributed towards exploitative social relations within the lineage group, where the more competent

17 Native Land Husbandry Act of 1951.

preferred to use their surplus to establish relations which brought more tangible benefits while those left behind found themselves exploited. Rather than viewing the lineage-based forms of social organisation as sustainable mechanisms of balanced social reproduction, it became an instrument of accumulation by establishing criteria of ‘inclusion’ and ‘exclusion’ when issues of access to natural resources such as land are under consideration. These are considered crucial criteria for gaining access to vital resources and organising forms of social reproduction.

Customary tenure was also widely abused by traditional authorities. Initially, the government’s underlying objective of the local government reforms was to officially usurp the land-allocating powers of chiefs in a manner very similar to the Native Land Husbandry Act¹⁷ (NLHA), and to introduce new social relations of production that were not defined by belonging to a lineage grouping. In terms of land allocation, the Communal Land Act as read in the Regional, Town and Country Planning Act¹⁸, requires a rural district council to “have regard to customary law relating to the use and allocation of land allocation”.¹⁹ These measures were, however, resisted by chiefs who had enjoyed land allocation powers in the final decade of colonial rule. Such allocation of land has been restricted in terms of the Traditional Leaders Act.²⁰ The traditional leaders regularly involved themselves in land administration and they were often at ‘loggerheads’ with elected authorities (Alexander, 2003: 587). A decade long struggle between elected and customary authority over control of land ensued. In 1994 the government’s Commission of Enquiry into Land Tenure commented that:

there is evidence that the dissolution of traditional authority and their role in land and natural resources matters at independence was premature, and currently, there is widespread resistance to VIDCO/WADCO structures as credible authorities over land and natural resources (Land Tenure Commission, 1994:33).

The Traditional Leaders Act formally restored customary chiefs’ land allocation role in communal areas (although this can be said to be tokenistic with allocation notionally subject to approval by the Rural District Council) and created a governance structure that resembled a hybrid between the 1982 District Development Committees and the 1969 model for ‘tribal’ governance by customary chiefs.

The Politics of Customary Tenure Reform

Transitions from colonialism have, in many cases, failed to comprehensively deracialise civil society and democratise the local state by reforming customary authority. In the

urban areas, independence tended to deracialise the state but left civil society intact, to the effect that historically accumulated privilege (usually racial) was embedded and defended in civil society (Freund, 1997: 102). In terms of countryside reforms, Mamdani (1996: 24–25) articulates:

a consistent democratisation would require dismantling and re-organising the local state, the array of the Native Authorities organised around the fusion of power, fortified by an administratively driven customary justice and nourished through extra-economic coercion.

It is important to stress that most of the customary tenure areas are a political base for the ruling party. It is not by coincidence. At the beginning, in 1980, the GoZ sought to carry out reforms especially in customary tenure areas beginning with the Prime Minister’s Directive on Decentralisation (1984–1985) which provided for the creation of a hierarchy of representative bodies at village, ward, and district levels. The local development committees: the Village and Ward Development Committees (VIDCOs and WADCOs), also composed of elected members, were charged with the responsibility of defining local development needs (Mutizwa-Mangiza, 1985). These development committees were described as “democratic institutions of popular participation to promote the advancement of development objectives set by government, the community and the people” (Alexander, 2006:108).

However, there was soon to be a U-turn on the part of government especially on the subject of traditional authority. The then Minister of Local Government, Edison Zvobgo’s stated that:

We felt in the end, we could not do away with our traditions . . . we therefore agreed that chieftainship was part and parcel of our culture (1982:np).

These sentiments also served to diminish the importance of some of the goals behind local government reforms, such as the need to democratize local government practice. There was a political goal to this turn around. The post-colonial government had discovered, like its predecessor, that Traditional Authority is better suited to serve its interest of consolidation of power (Murisa, 2013). In the process, the post-colonial government chose to relegate those in customary tenure areas into perpetual subordination to the state and ruling party through a variety of measures including the Communal Lands Act, Traditional Leadership Act, and a variety of state sanctioned subsidy programs.

¹⁸ [Chapter 29:12].

¹⁹ Section 8(2)(b) of the Act.

²⁰ Section 26(1) of the Traditional Leaders Act [Chapter 29:17].

Policy Suggestions

The Impact of the Chilonga Case on Broader Customary Tenure Concerns

Ultimately, the Chilonga case is about security of tenure. It questions whether people on customary land feel confident enough to continue eking an existence on their smallholdings without interruption. Security of tenure in this instance is understood as the perception by people that their rights to land will be recognized by others as legitimate and protected in the event of specific challenges. There are many ways in which people feel secure about their rights to land including, (i) having a full set of use and transfer rights of sufficient duration to recoup any labour and capital

they invest in land or property and (ii) when they can enforce those rights against the claims of others.

Zimbabwe has unfortunately earned pariah status over property rights due to the way the Fast Track Land Reform Programme was conducted. The imminent grabbing of land in Chilonga serves to reinforce the perception that Zimbabwe has no respect for property rights. There is need for the GoZ to adopt and implement best practices when it comes to land tenure. Table 3 below provides examples of widely accepted best practices when it comes to security of tenure. In a nutshell, security of tenure is possible when there is democratic accountability, a flexible and open market, regulation against capture, when women’s rights are guaranteed, and a low administrative burden is in place.

Table 3: Seven Principles of Land Tenure

Principle	Description
Democratic accountability	To ensure the representation and participation of critical actors (landholders, farmers’ representatives, etc.) in the land administration system tailored to serve the needs of different forms of land tenure. Democratic control of this is afforded through the state having rights to regulate and intervene in land administration in line with national economic development goals.
A flexible market in land (Including allowing sales, rentals, and leases)	To allow trading up and down in land size in line with investment and production capacity and skill (although with regulation by the state – see below), while providing safeguards against land concentration and multiple holdings.
Regulation against capture	By elites or speculative investors to avoid inefficient and inequitable consolidation of land holdings and land disenfranchisement, especially of the poor and women. Safeguarding against the danger of mass or distress sales of land and rapid speculative land accumulation by local or foreign elites and companies, in times of economic hardship, and the reversal of redistributive gains is critical in the Zimbabwean context.
Facilitation of credit and investment	Through the provision of land and other assets as mortgaged collateral and the provision of bank credit guaranteed against land, combined with other credit guarantee mechanisms (for example, linked to farm equipment, livestock, buildings, urban assets etc. – see next section). This entails providing clear rules and regulation of farm investment partnerships, and pooled investment initiatives (e.g. cooperation in irrigation, agro-processing infrastructure etc.); and measures which enhance other forms of cooperation.
Women’s access	Guarantees of women’s access to land, as independent, legally recognised land holders, with the ability to bequeath, inherit, sell, rent and lease land (for example through clearly defined and enforceable requirements for joint recognition of land holdings in leases, permits and titles, as well as administrative mechanisms to ensure equitable treatment of gender related land issues. Supporting the application of laws against discrimination, safeguarding women’s succession rights; and the division of rights on divorce (see earlier blog in this series.
A low administrative burden	Both in terms of technical complexity and overall cost – of cadastral surveys, land registration and land administration more broadly. This also entails enforcing the levying of reasonable service charges for costly land titling services (e.g., surveying, valuation, registration, etc.), especially for ‘formalising’ leasehold property rights.
Revenues	Through survey, title, lease and permit fees and setting incentives to discourage under-utilisation through land taxation is an important condition for an effective land tenure regime.

Land Tenure and Economic Recovery

The discussions on land tenure have unfortunately only focused on former large scale commercial farms and in the process ignored approximately 39% of Zimbabwe's arable land. Given the two decades long collapse of the urban formal economy, this could be the opportune moment to revisit customary tenure as a possible catalyst for reviving rural based economic production. Land holdings remain small but unlike twenty years ago, significant technological advances have been made which allow for intensive agriculture. Instead of evicting the smallholders of Chilonga, the government should consider establishing production-based partnerships. New conversations on land tenure will hopefully resolve the problem of tradability which has limited prospects for investments in customary tenure-based areas.

However, the recent government led manoeuvres to expand land under irrigation will probably, as the Judge presiding over the Chilonga case predicted, lead to an increase in public interest litigation over new land conflicts. Whilst in the previous round of land redistribution (the Fast Track Land Reform Programme), government positioned itself as a champion of resolving a colonial era grievance, in this instance, it is most likely going to be a class-based struggle. The peasantry pitted against a government that has chosen the side of business (including foreign investors). It is perhaps important to mention that Zimbabwe is not alone; the rest of African countries have gone through two decades of what others have called agrarian neo-colonialism under the guise of large land investments. These large-scale land investments are mostly driven by the export imperative in many developing countries. The phenomenon of large-scale land investment grew in the aftermath of the 2007 and 2008 food shortages and riots. Many countries (especially the oil rich countries) that had traditionally depended on importing food suddenly realized the ineffectiveness of that model. Instead, they elected to purchase vast tracks of land across Africa for production into their countries. It seemed as if Zimbabwe had been spared from this form of agrarian capitalism up until recently, when the new government announced that 'Zimbabwe is open for business.' The Chilonga case is probably a tip of the iceberg when it comes to ongoing land deals in Zimbabwe.

Customary Land Tenure and Implications on Democracy

The relationship between land tenure and democracy is perhaps the most compelling for reforms but rarely discussed. Those who dwell in customary tenure areas have no direct relationship with civil courts, where private property disputes are resolved, but instead, must go through traditional courts. Those based in customary tenure areas remain subjects of the chief and subject to a variety of discretionary fines. Besides, the chiefs have over the years become junior appendages of the ruling party through various measures which include salaries for chiefs, vehicles, rural electrification and power that comes with being entrusted to distribute subsidies. Furthermore, the exclusion of customary tenure areas from formal financial services has left these households at the mercy of government led subsidies. The subsidies from government are laced with political interest. They are used as an incentive to support the incumbent party. In many instances, elected officeholders take the lead in the distribution of these subsidies.

The process of re-imagining democracy will also have to tackle ways of ensuring that those in customary tenure areas have; (i) a direct relationship with civil courts when it comes to their property (ii) can independently secure financial services from private players and (iii) can introduce new social organisation innovations without seeking permission from traditional authority. These three conditions are the hallmark of a thriving civil society and a necessary ingredient for democracy. Besides, this is nothing new in Zimbabwe. The Fast Track Land Reform Program led to the introduction of permissory tenure that is statutorily defined within A1 areas. The permissory tenure, when fully implemented will have a direct relationship with government (and especially civil courts). The land beneficiaries are strangers to one another, and they have created new forms of social organisation undergirded by local farmer groups (see Murisa, 2009, 2013, Moyo et al., 2009). These developments give the immediate impression of the expansion of citizenship to the countryside, suggesting that the hallmarks of civil society have been attained. The concluding question then would be: what stops the government from implementing similar reforms in the customary tenure areas?

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