

Land, the Environment, the Constitution, and the Advancement of Zimbabwean Society

SOKWANELE LAND SERIES

AUTHOR: MANDIVAMBA RUKUNI

DEEMBER 17, 2012



Introduction

In this article I try to elevate the game and go beyond the current limited and highly contextual treatment of land in the draft Constitution. This, however, is not at all a vote of no confidence in the draft Constitution, because I believe the draft is a product of political compromises that are necessary for the nation to move forward. First, I offer a longer-term philosophical paradigm shift in Constitution making for Zimbabwe in particular and Africa generally, if we are to catalyse a sustainable renaissance and advancement of society. Secondly I would like to suggest the relevant provisions for land in the Constitution.

The Constitution making process requires a deeper level of consciousness – that is –until we Africans are true to ourselves, and dig deep into who we are, and invest more effort and resources into what makes us who we are, then we will continue to be ‘copycat’ third class citizens of the world. In crafting an advanced society we have to rediscover what is best in our cultural arsenal and improve and modernize that into our contemporary Constitutions (written and unwritten), and into our social, economic and political systems. Unless we Africans rediscover our roots and heritage, and embrace and understand, and love that which made our ancestors survive and thrive for thousands of years – unless we understand how our ancestors succeeded so well in creating a dynamic society in the past, we cannot create a new, modern African society—no matter how technically savvy we are in drafting Western-style Constitutions.

A Constitution has to be a living document that can communicate relevance and inspiration to an average Zimbabwean in the village. A Constitution has to paint a vivid picture of life in an average village and community and offer the ingredients and levers of progress at that level. All great Western societies in the world today, and upcoming Eastern societies, are built on foundations of

centuries of culture and history, and no great society is ever built on abandoning its cultural heritage. I will argue, therefore, that post-colonial Constitutions, including our draft, are still built on the mental model of a highly urbanized and Westernised society and when applied to Africa today are akin to building a house backwards—starting from the roof before installing a solid foundation. The foundation is the family, community and the environment; the roof is the State largely based in the capital city. We are attempting to strengthen the roof before deepening the foundation.

African Pathways to a Renaissance

Here is my 'General Theory' for the Renaissance of Zimbabwean and African society and the implications for Constitution making. Historically, African society was built on foundations of *strong families*, *strong communities*, and *symbiosis with the environment*. That is where citizens were formed and values of being human and social integration, economics and politics were imparted. Today, Zimbabwe and Africa still need a Constitution that is crystal clear and unequivocal about the supremacy of family, community, and the environment in moulding citizens and as the foundation of society. The State and all its instruments exist for the strengthening of family, village and community, and the environment, not the other way round.

Over the last hundred years or so, and as a result of colonisation and Westernisation, the responsibility and accountability has slowly shifted from family and community towards the State. At political independence, however, Africans hardly engaged in the deep dialogue on what kind of society we were trying to rebuild out of the post-colonial legacies. Key renaissance questions at independence would have been — and still are:

“What kind of society are we trying to build? What are the building blocks? What foundations of African culture do we keep and strengthen? What can we borrow intelligently from Western culture that we graft into our systems, localise it, Africanise it, and make it ours?”

My answers are as good today as they would have been over the last 30 to 50 years of post-colonial trial and error. Out of African heritage, I would keep the century old foundations of family, community, collective responsibility, human welfare, dignity for all, and our symbiotic relationship with nature. That is a society where civilization is possible with a minimal dose of police officers, lawyers, jails, environmental agencies and other expensive trappings of the State, which, regrettably, are ineffective anyway, or simply absent in most Africa villages. Families and communities should still look after their own orphans, rather than donate them to NGOs, Churches, Governments, Donors and Madona! African ancestors are turning in their graves at this travesty. Over the last century, these institutions have been neglected in national Constitutions and developments plans. At the same time, the State-deployed substitute institutions of local authorities and municipalities are failing miserably in developing a locally capable and advanced society.

In summary, society is falling through the cracks and over a period of just 100 years, the countryside which was self-reliant and pristine for centuries, has slid into increased crime and domestic violence; environmental decline and worsening poverty and hunger. My renaissance model for Zimbabwe and Africa is therefore: Let us Modernise, not Westernise. It is easy to mistake one for the other. Don't Easternise either. Modernise (means to take what we already have and improve it continuously) and borrow intelligently from other civilisations, just like other great nations before us. We will definitely out-compete the rest of the world at being African—more so if we modernize and advance based on our own values and strengths. The purpose of a Constitution making process for Zimbabwe is to generate such deep introspection at all levels, rekindle and rebuild a higher level 'guiding and direction giving spirit of the nation'. We are still just at the beginning in the search for a lasting soul of the nation.

Land, Environment and the Constitution

For Africans, land is much more than an economic asset. It is also a cultural and spiritual asset. Home is where your ancestors are buried. Where you live and have a job is just a 'house'! Africans believe that humans are part of the environment and not above it. The culture and its traditional religions equate environmental damage to self-destruction. People's conscience around the environment is a far better and more effective enforcement or police force. The sacredness of forests, mountains, water springs, and wildlife, however, has been relegated to taboo, superstition and witchcraft by 'modern' Middle Eastern religions and Science. Decades later neither science nor new religions have a lasting answer to the destruction of society and the environment that is happening right in front of our eyes.

When I chaired the Land Tenure Commission in 1993/4 I visited a few communities in some Communal Areas where, surprisingly, forests and mountains were still intact. In those communities, the **system of traditional leadership** and religion was still effective. I put emphasis on **system** because the major error in our draft Constitution is putting emphasis on **traditional leaders**. This is a serious error because the African traditional system of leadership was effective only because of the collective wisdom and responsibility of the Dare/Idhale/Kotla and NOT because of the individualised wisdom of the Chief. Chiefs had no executive powers and simply endorsed the will of the people just as today the President signs into law a bill passed by parliament. The Constitution, therefore, has to elaborate much more on the traditional system of *leadership* not just the role of *leaders*.

The Constitution has to offer guidance on the decentralized system of traditional leadership structures, their roles, responsibilities, accountabilities, how they function, and how they form part of the system of local administration working with State agencies at all levels. It is these structures, in my opinion, that offer scope for strengthening land and environmental governance systems. Traditional leaders may chair these structures and the Constitution has to be clear on their impartial leadership role at all levels. They need to refrain from taking executive positions, but be guardians and stewards of community processes. They must serve as the conscience of the people and be the last port of call in ensuring the integrity of the processes and systems.

The future of land and its impact on local and national economic development depends on strong and accountable systems of local government. A Constitution has to provide guarantees and a framework for managing and securing people's land rights and ensuring structures that discharge good and effective governance, especially at village level where the majority of land owners function daily. The draft Constitution is obviously burdened by the fact that the GPA and GNU are preoccupied with the immediacy of political party differences around the various contradictions and controversies of the Fast Track Land Reform Programme. I dare say that the nation would have to first resolve that colonial legacy of the land issue before we can expect longer term and more visionary provisions in the Constitution. So I won't dwell on the current draft Constitution except to re-enforce the need for closure on the land acquired from white farmers as a more solid basis for re-visiting the Constitutional provisions.

Land Governance and Administration

I cannot over-emphasise the need for the Constitution to focus on the foundation of society and local systems of governance. All great societies have highly developed legal and administrative provisions at local level. And this goes across all political ideologies. In the United States, local or county level due process is elaborate and empowering. In China local area due process is also highly developed, providing valuable social and business capital needed for local development. So this is not an ideological/political discourse on 'devolution', rather it is a pragmatic proposition that development in the end is about people. And where people are at local level is where their participation in social and economic process has to be facilitated and guaranteed.

That is real empowerment—whether it is the US version driven by national ideals of markets, democracy and technology, or it is the Chinese version driven by national ideals of the omnipresent State and values of an old Confucian civilisation. For Zimbabwe and Africa we can borrow this quality intelligently from China and the US, as long as we base the solution on African values of family, community, collective responsibility, and the environment; and as long as we stay away from values promoting individualism, consumerism and greed, as these are accelerating the demise of African society.

The goal is to secure land rights and have in place a land governance system that can effectively enforce people's land rights as well as enforce laws and regulations that protect the rights, the environment, and other community and national interests. In the end we need rock solid local government and administration. The following Constitutional provisions are therefore vital:

The constitution must provide for multi-form tenure and offer secure rights for all forms of tenure;

- There is need for a highly decentralize Administrative Court system to effectively address issues of land rights, water rights, and environmental protection; local level traditional courts or authorities may be subordinated to the Administrative Courts for this purpose;
- In support of the Administrative Court at community level, there may be civilian boards serviced by the State that function as apolitical Land and Environmental Governance structures. These structures require training and support in functioning as arbitrators and adjudicators on land, water and environmental enforcement agencies;
- The Constitution must recognise and confirm that all peoples who are ordinarily occupying agricultural land, without breaking any law, have some rights which have to be spelt out, even if the occupiers do not have formal paperwork such as leases and titles;
- The Constitution must confirm that customary land belongs to the family and community, and not the State. These rights predate the State. Customary land rights are as legally valid as formal title deeds and leases even without paperwork. Customary rights to land extend to the family and, as such, to spouses and children who must all enjoy those rights and be consulted in front of a competent court before mutation. Land laws must therefore recognise these rights and all those holding land under customary rights must be protected by the law;
- A system must be developed by the State that will allow those approved Land and Environmental Governance structures to oversee a voluntary process of land and farm registration.
- The treatment of Customary law within the context of customary international law has to be based on current realities on the ground; those holding customary rights to land and natural resources have to be protected by international law;
- Compulsory acquisition of land by the State has to be provided for with clarity of purpose and procedure to be followed as well as provision for contestation in courts of law;
- Compensation for land held under a private freehold will be negotiated by buyer and seller. Compensation for land held under a state lease will be for improvements only if it reverts to the State, and will be renegotiated if the lease is acquired by new occupier. For land held under customary rights, compensation is payable for improvements only and it accrues to the whole family or community.

Conclusions

I have argued for a far-sighted process of Constitution making and I will continue to argue that Culture should not be regarded as a relic. Rather it is the living and imbedded DNA that we fall back on in re-generating our society—especially in tough times when we search for the 'soul' of society. I am all for being modern and active members of global society. We have to be there and we have deal and trade with the others. We can sell what we have and buy what we need, but we should

never sell the African Soul, no matter. Our Constitution must describe vividly the society we are and what we are aiming to improve into. The Constitution must be about its people and the society they form. As development is ultimately about people, it must be about helping people to help themselves. It is about building their own capacity to govern themselves, especially at local level where land and the environment define the past, present and future.

<http://www.sokwanele.com/land-environment-constitution-and-advancement-zimbabwean-society/15122012>