

WHY ZIMBABWE NEEDS TO MAINTAIN A MULTI-FORM LAND TENURE SYSTEM

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INTRODUCTION

An important recommendation of the Commission of Inquiry into Land Tenure Systems in Zimbabwe (1994) that I chaired was that Zimbabwe should maintain a multi-form tenure regime. The commission recommended that each tenure instrument be made more secure by explicitly identifying the land rights and ensuring greater continuity of those rights by the holder. Moreover, legal and institutional provisions and capacities can enforce such rights for all land, including land held under customary tenure. In this article I will make recommendations on how to strengthen the multi-form tenure system and discuss how this can be applied to improving land investment and values again in Zimbabwe. Those interested in exploring the principles, theory and practice in securing land rights for sustainable development should read my other article.¹

UNDER WHAT CONDITIONS IS AGRICULTURAL LAND BANKABLE?

Banks and financing institutions look at two main things in financing a farming business: *viability/profitability* and *collateral security*. Viability or profitability is the first necessary condition for any financing. Farmers with a track record at a bank can continue to get financing without much separate or additional collateral security. If a farmer is making money and his/her business dealings are open to the bank, the bank will increase their **trust** of the farmer and their business over time. Just having a title does not necessarily lead to financing, particularly for new and inexperienced farmers with no track record of farming profitably. Banking is ultimately about trust. This point is crucial to remember in the debate on tenure in Zimbabwe (and Africa generally), as this debate has become quite ideological. In most of industrializing Asia, agricultural growth was maintained at a high level based on

¹Rukuni M. 1999. Land tenure, governance, and prospects for sustainable development in Africa. Policy Brief #6. Natural Resources policy Consultative Group for Africa. Washington DC. Natural Resources Institute.

small farms with no collateral security because the business environment and economic policies were favourable.

Banks in Zimbabwe are also looking forward to the resolution of disputed land, as discussed in my last article. Government urgently needs to review and update the land administration systems, so that the government and local government systems, the judiciary and the finance sector all have access to one registry and administrative system that is sufficiently accurate, reliable and decentralized to provincial and districts centres, where transactions can be completed and disputes resolved amicably. Tenure security is ultimately about capacity to protect and enforce land rights.

THE NEEDS AND CHALLENGES IN REFORMING TENURE

Following the Fast Track land reform program, Government is now seeking to improve tenure security for the farmers and allow farmers to use their land holdings as collateral security to raise finance for development and farming operations. The current 99-Year Lease is still inadequate for banking purposes. On the other hand, the Government is sceptical about giving freehold title for the fear that white farmers buying land again may reverse the gains of land reform. So the question is *“How does policy arrive at a secure tenure that is bankable whilst at the same time maintaining the gains of land reform?”* Bankability and sustainable development issues also apply to all other land tenure instruments in Zimbabwe besides the 99-Year Lease.

A QUICK LOOK AT THE CURRENT TENURE INSTRUMENTS

The following are the current tenure instruments in Zimbabwe:

- **Traditional usufruct on State Land** for Communal Areas
- **Freehold Title** for some Large Scale Commercial and some Small Scale Commercial farms
- **Short-term Leases** for some Small Scale Commercial farms, and some Large Scale farms
- **99 -Year leases** for a few so far of the A2 resettlement
- **Offer letters** for most A2 resettlement who still hope to qualify for a 99-Year Lease
- **Permits** for Model A Old Resettlement and for A1 Fast Track resettlement

The Constitution and the future consolidated land law(s) will have to be clearer for every category of land as to what rights the land occupier will have. *Land tenure security can generally be defined as the certainty of continuous use.* To secure tenure, land rights for each category of land occupier have to be clear and enforceable. Each tenure regime should enjoy the same 4 categories of rights. What differ are specifics of each of the 4 categories of rights and how that is administered and enforced.

The BASKET OF LAND RIGHTS includes:

- **Use rights:** rights to grow crops, trees, make permanent improvement, harvest trees and fruits, and so on.
- **Transfer rights:** rights to sell, give, mortgage, lease, rent or bequeath
- **Exclusion rights:** rights to exclude others from using or transferring
- **Enforcement rights:** refer to the legal, judicial, institutional and administrative provisions to guarantee use, transfer, and exclusion rights and to resolve disputes.

HOW CAN ALL THESE TENURE INSTRUMENTS BE MADE MORE SECURE?

Here are my recommendations in strengthening further the current instruments:

TRADITIONAL USUFRUCT ON STATE LAND FOR COMMUNAL AREAS:

Communal Lands should cease to be State Land and the State should recognise in the constitution and law, the validity of customary rights as follows:

- Constitutional provisions: The national Constitution should recognise traditional and customary land rights unconditionally. Whosoever enjoys such rights can legally claim them even if they do not hold a formal title, permit, lease, or any piece of paper in order to own and defend those rights. This is because the traditional systems know how to recognise customary rights and adjudicate.
- Modernise don't Westernise customary tenure: Customary tenure recognises the same basket of rights and is as secure as any Western title system if its integrity is restored and strengthened. While land registration may be desirable in the long run, this should be carried out in a series of well-considered phases so as to avoid prejudicing those holding customary rights to land. In essence this is process of registering the customary rights, not changing the rules of ownership.
- Strengthen capacity of communities to administer and adjudicate: Before any system of registration can be affected, it is important to reform the laws and the local administration systems so that they have the capacity to engage and strengthen customary land rights systems. This capacity has to be built all the way down to the community level where traditional systems will continue to play a central role in administering the system. Community level land boards and administrative structures are essential for adjudication and dispute resolution as well as updating the land registers.
- Voluntary before systematic registration: Once land administration capacity is evident at community level and well integrated and part of the modernized traditional system, then voluntary registration of land can begin. Land registration is costly for government, the community and the land occupier, and it is important for Zimbabwe to avoid systematic land titling, as the costs

may outstrip the benefits. Voluntary registration to start with will eventually pave the way for comprehensive systematic titling using the evolutionary principle. GPS and satellite imagery technology has reduced the cost and speed of titling. The social and community processes, however, need time and have to be based on principles of mutual respect, mutual accountability, and mutual benefit between government, traditional communities, and customary land-rights holders in question.

- Family Trusts and Foundations: In the medium to long run it should be possible to offer a Deed of Grant to the Family Trust or jointly held by spouses for arable and residential land. Inheritance should be with the surviving spouse and then surviving children who can anoint an heir or form a family trust or company.
- Common property land: For grazing land and other common land the Deed of Grant should be made in the name of a Community Trust or Foundation who will look after the natural resources and pass appropriate by-laws with the power to exclude other communities.
- Traditional Councils: The Traditional Councils from village to District level should be incorporated into the National Judicial system, including powers to constitute with other local stakeholder representatives, as a Land Board or Local Administrative Court assisted by Government officials from Lands, Justice and Agriculture Ministries.
- Tradability: Arable and residential land should be tradable legally only between dwellers of communal lands.
- No consolidation of land holdings should be allowed legally until Zimbabwe has reached a minimum of 50% urban population ratio and until the national unemployment figures are sustainably within single digit percentage range.
- Foreigners: No sales of customary land to foreigners should be allowed.

FREEHOLD TITLE FOR SOME LARGE SCALE COMMERCIAL AND SMALL SCALE COMMERCIAL FARMS:

This tenure tool should be maintained. No sales to foreigners should be allowed. Foreigners should be allowed short to medium term rental leases on land with title deeds.

SHORT-TERM LEASES ON SMALL SCALE COMMERCIAL FARMS:

Any leases older than 10 years should be converted to a Deed of Grant without further delay. The Deed should be granted in the name of both spouses. Where the original leaseholders are deceased, then the Deed should be granted in consultation with all surviving children so that either the grant goes to the heir-apparent child and his or her spouse. Alternatively, the surviving family establishes a Family Trust or Company with appointed Trustees or Directors making decisions. This group of farms all started in the colonial period when black 'master farmers' were allocated small-scale farms on a short

term lease that they could convert to a title (deed of grant). Although all of them had the right to convert to title, most did not.

99-YEAR LEASES FOR SOME OF THE A2 RESETTLEMENT:

The 99-Year Lease should be strengthened as follows:

- **Compensate previous owner:** Quittance will strengthen the 99-Year Lease by avoiding legal contestation. Since government has to compensate for 'improvements only', the lease holder should assist government by contributing at least a portion of the value of improvements acquired, as well as through annual rentals, even if initially these are nominal;
- **Include a 10-year sunset clause for land development:** The leaseholder should in a maximum of 10 years fulfil State requirements in land improvements (fence, homestead, water, etc.) to be considered a serious landowner and farmer.
 - If the land holder fails to fulfil this condition in 10 years then the State should repossess the land and offers fair compensation for any improvements;
 - If the leaseholder wishes to exit before the 10 years then she/he can either sell the lease to the State for the value of improvements or sell it to another qualified A2 beneficiary.
- **Simplify the 99-Year Lease** so that collateral rights and State rights have equal recourse at law in foreclosure.
- **Sale of 99-Year leases:** Sales should be legal and allowed only between buyers and sellers in the same category of land reform.
- **No consolidation of holdings should be permitted** until Zimbabwe is a fully industrial nation.

OFFER LETTERS FOR A2 RESETTLEMENT:

Holders of these should be given the following options:

- Apply for a 99-Year lease by going through the process discussed above;
- Sell the Offer Letter either to another willing purchaser who qualifies as above;
- Sell Offer Letter back to the State for a nominal fee and land to be reallocated on a stricter basis for qualifying.

PERMITS FOR MODEL A OLD RESETTLEMENT AND A1:

Should be revised as follows:

- Deed of Grant for arable and residential land should be given in favour of joint ownership by spouses or a family trust. Inheritance should be with the surviving

spouse and then surviving children who can anoint an heir or form a family trust or company.

- For grazing land and other common land the Deed of Grant should be made in the name of a Community Trust or Foundation who will look after the natural resources and pass appropriate by-laws with the power to exclude other communities encroaching on their common property.
- The system of land administration needs strengthening on similar lines to what I have outlined for Communal Lands so as to pave the way for voluntary and systematic titling and land registration. This can happen sooner for resettlement areas.

If we look at the process of commercialising land, then all resettlement land should be first and communal land last.

NEED FOR RESIDENTIAL LAND FOR RURAL CITIZENS AS PART OF A “ZIMBABWEAN DREAM”

All Zimbabweans deserve to live in a country where there is abundant and affordable food, and that each family has a home. My recommendation is that the Government shifts its policy from emphasising expensive urban housing to encouraging smaller rural settlements. Every Zimbabwe boy and girl at attaining the age of majority should qualify for a land grant from the local community in areas designated as “rural residential areas”. The size can vary from 0.1 to 0.4 of a hectare or so. She or he can apply to any local land board with automatic title. This is also a way of dealing with the gender balance in land, affording young Zimbabweans to own their own piece of land for housing before they get married. Botswana has applied this policy successfully.