

Cornerstones of life

Searching for an equitable and appropriate land policy in modern
Southern Africa

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The search for equitable and appropriate land policies in modern Southern Africa

In Southern Africa, land sustains life. Customary patterns of land usage are tightly woven into the social fabric of agrarian cultures. Social policies must be shaped by a sympathy for the nature of customary land usage. Meaningful social policy must mesh with the multiple contexts of the past and the present. Social engineering cannot be based on point-in-time observations – society is informed by the foundations of the past more fundamentally than by the currents and eddies of the present`. Ignoring social context (the historical contextual foundation) risks the creation of irrelevant, destabilizing anachronisms.

Using an synthetic analysis of the combined historical, social and geographical context of the region, we will examine the suitability of the land policies in three characteristically representative nations – Botswana, Mozambique and Zimbabwe, with comparative references to the current situations in Zambia and South Africa.¹

Southern Africa is geographically diverse. There are delicate ecosystems found nowhere else in the world. There are cultural groups that have been living in deserts, isolated and unchanged for centuries -- nomads eking out an existence from virtually nothing. There are enigmatic monoliths built by societies long since vanished and long, deserted seashores studded with diamonds. The subcontinent has been settled for a long time, and the frequent discoveries of human fossil remains confirm this.

Pastoralists and herders have long coexisted here, and conflicts have been localized and of low intensity. Primitive weaponry, undeveloped civilizations and vulnerability to nature's whims have kept humans in a roughly even balance with nature. Starvation, drought and disease are frequent

¹ Zimbabwe, Botswana, South Africa and Zambia (amongst others) are commonly referred to as "Anglophone" nations, in that they have a strongly English social and linguistic colonial inheritance. Mozambique and Angola are similarly referred to as "Lusophone", alluding to their Portuguese colonial history.

occurrences, and accepted as part of life by people who live closely bound to the land as a source of livelihood. Internecine warfare has long been an intrinsic feature of life here, too. Although whole tribal lineages have occasionally been extinguished or enslaved, subsumed by other more populous or more powerful groups, the magnitude of these periodic events has always been small.

Central to life here is the need for land and water. Much of Southern Africa is savannah, desert or semi-desert. The coastal margins provide fertile lands, but only a small fraction of the overall subcontinent south of the Democratic Republic of Congo is humid. For approximately sixty percent of the subcontinent, the climate is predominantly arid or semiarid (De Blij and Muller, 14-15).

The bond between people and the precious land on which they live has grown more complex over ten of generations of occupation. Presenting at the 1982 Land Conference held in Botswana, H.W. West from Wolfson College discussed a "simplified model of the traditional tenure systems though to have predominated in Africa south of the Sahara during pre-colonial times". West's summary description of traditional tenure systems is especially illuminating:

The community was utterly dependent upon land, but land use was only incidental to this relationship. As these societies became more firmly established, the heads of lineages or descent groups were recognized as holding administrative powers over land. These included powers of allocation, revocation, and reallocation amongst their lineage members, and the latter received users², rights for purposes of habitation, cultivation, or grazing only.

[...] Some groups went further and attached a religious significance to land as the earth-goddess and it is from these traditional "cognatic" (i.e. relating to "cognates" or persons claiming descent from the same ancestor) interests that there arose the concept of land as a sacred family trust. The essentials of this concept are the identification of the land with the family through corporate ownership, *the continuity through time of both the family and its land holdings*, [emphasis added] and the limitations of the powers of the present land user by the rights of both the dead and the unborn.

² West also discusses the position with respect to "strangers" , who were allowed use-rights "... conditional upon the payment of periodic dues ...".

[...] Clans were seen as belonging to the land, rather than the land belonging to the clans. To be deprived of land was an emotional shock, a psychological trauma, rather than merely an economic loss.

Understanding the importance of the bond to the land for these people, it is clear that the scheme of land management or allocation adopted by African countries is likely to have a long lasting and fundamental impact on the lives of the people. A counterpoint to West's synthesis is that of Nadia Forni's more technical discussion³ on the theoretical debate relating to the origins and implications of the notion of "common property regimes". Forni proposes a structured approach to common property regimes (CPRs), recognizing that various types of common property exist, citing Moorhead's (1991) working list of major categories, which include *global international commons* (e.g. fisheries), *state common property* (e.g. rivers, national parks) and *common property resources* (e.g. grazing lands).

The "tragedy of the commons"

Past history, especially that of what has now come to be widely referred to as "the tragedy of the commons"⁴, after a theory proposed by G. Hardin (1968) is illustrative of some of the complexities of a communal ownership model placed under the pressure of resource contention or scarcity. The major thrust of Hardin's theory is that a common, renewable (but consumable) resource, without adequately overarching management, will be over consumed to the point of exhaustion. This intrinsic tension between the individual's self-interest and the community's best interests are a core problem that any scheme of social governance must address. West's description is that of a scheme that is managed by a family authority. It works because the freedom of the individual to act in a purely self-interested fashion is constrained by group authority figures. The individual has no power to act on their own authority. One of the pitfalls of unmanaged, communally owned resources is the ability of an individual to incur costs (i.e. unregulated consumption of finite, shared resources) which are shared amongst all participants, instead of being accrued to the individual's "usage account," with concomitant direct cost to the user.

³ Forni's paper, from a FAO web site collection of materials relating to Agrarian Reform (Reforme Agraire) "is based on materials collected by [her] for a Ph.D. thesis (1998, unpublished)" (FAO web site)

⁴ The notion of the tragedy of the commons has since come into common usage.

The problem faced by modern African countries is the need to integrate customary land usage approaches with the needs of modern economies. Part of this difficulty comes from the modifications of customary approaches during colonial occupations. This colonial legacy has left countries like Zimbabwe with especially difficult situations.

Zimbabwe's Farms For Friends

At the 1982 Land Policy workshop, R.M Mupawose (from the Zimbabwe Ministry of Lands, Resettlement and Rural Development) proposed that: "... land policy ... has so far been focused on land redistribution, that is, acquiring land from commercial landlords and transferring it to landless peasants". It took fifteen years for Mupawose's assertions to become a reality, and during that time, the policy underwent some interesting changes. Most notably, for the first fifteen years of the redistribution program, most of the "landless peasants" that were initially targeted to receive land did not receive the distributions they were hoping for. The distressing reality is actually quite different from the plan's initial objectives. In 1997, fifteen years later, "Mugabe also suddenly announced that at long last government would begin implementing the Land Designation Act and 1500 mainly white-owned farms were identified for redistribution" (Bond and Manyanya, 39). What neither Mupawose nor Mugabe mentioned was that "recipients of the farms would include wealthy politicians ahead of land-starved peasants" (39). The unabashed inequity of the Zimbabwean reallocation scheme has sown the seeds of civil unrest that future regimes will have their work cut out to manage. To be workable, a reallocation scheme must be even-handed and egalitarian. Part of the problem specific to Zimbabwe is that the "acquirable commercial land", as Mupawose termed it in 1982, is land which has long since been adapted to modern, technology-intensive agricultural usage patterns. The difficulty with redistribution is that these farms are high-efficiency, high-intensity agro-commercial assets, orders of magnitude more productive than individual farm units of comparable acreage. The Zimbabwean reallocation policy is neither sufficiently nuanced nor flexible to take this into account. In inadequately managing what is essentially a re-nationalized resource, the Zimbabwean government has failed to act in the interests of its people.

Tobacco exports have generated massive foreign exchange revenues for the country in the past, and it is clearly in the national best interest to continue to exploit a valuable revenue stream. Inefficient farms and failed harvests are incalculable damaging, as Mugabe is now realizing to his cost. Reallocation, as a process, is like many other aspects of national management where a valuable, scarce resource is allocated by a government not well known for transparency and accountability. Corruption and nepotism have been widely documented.

Zimbabwe's recent history of dubious election results and food lines illustrates the unequivocal failure of Mugabe's government to take an opportunity to even what was an inequitable distribution of wealth.

Botswana's Sweetened Chalice

In fascinating contrast to Botswana's beleaguered northern (and in Mozambique's case, western) neighbour, a much simpler colonial history gave the newly independent government a great deal of latitude to find a manageable method of land allocation.

"In the 1890s, the colonial administration requested the chiefs of the five principal Tswana tribes (Ngwato, Ngwaketse, Kwena, Kgatla and Tswana⁵) identify the boundaries of their tribal territories" (Machacha). Machacha goes on to enumerate the singular bounty left from the days of Bechuanaland (as a British Protectorate):

"At independence, in 1966, Botswana inherited three types of tenure:

- Tribal land (native reserves): 48 per cent;
- State land (Crown lands): 47 per cent;
- Freehold land (white settlement): 6 per cent;

Since independence, significant amounts of State land have been converted into tribal land to relieve the congestion in tribal areas. Today, only 23 per cent of Botswana's land is under State control, but this figure may be lowered further as more State land is tribalized."

There are two significant elements to Botswana's land policy that distinguish it from other less successful attempts to manage a colonial inheritance.

Firstly, Botswana is country of big, open spaces. It is dry, and mostly desert. At the time of independence, overpopulation and uneven development was not a problem. Until the discovery of diamonds, Botswana's major problem was rain. If anything, given the scarcity of water, bore-holes (to tap in to aquiferous water) might have been a source of contention.

⁵ The name Botswana derives from the fact that the overwhelming majority of citizens belong to the Tswana tribe.

The second element is the establishment of the Land Boards. "With the enactment of the 1968 act, 12 main land boards were established in the country, and started operation in 1970" (Machacha).

The land boards scheme was a working compromise that has served the country well. For thirty-two years, the Land Boards have been serving as a bridge between tribal leaders and the national administration. The critical element of the Tribal Land Act (which empowers the Land Boards) is as follows:

"all the right and title of the chief and the tribe in each tribal area ... shall vest in the Land Boards ... in trust for the benefit and advantage of the tribesmen of that area and for the purpose of promoting economic and social development of all the people of Botswana" (Machacha).

A delicate combination of checks and balances limits the ability of chiefs to act unilaterally, without consultation, while investing in them the responsibility of acting in the community's best interests.

Like all schemes, the Land Board faced a major challenge resolving historical claims. Historical claims are an important problem. Regardless of the nature of title, whether it be customary, communal, individual leasehold or freehold, or any variation of tribal scheme, historical claims have the thorny characteristic of being undocumented. As the need to prove title becomes increasingly more important for contemporary administrations, the emphasis on documentary proof presents a problem for administrations attempting to validate claims for land on a historical basis. The possibly spurious claims to hereditary title over large areas by "historical occupants" has proven difficult for the Land Boards to authenticate. A governmental mandate to recognize historical claims of exactly this nature is one of the surprisingly few difficulties that the Land Boards face. Instructed to accept verbal evidence, there has inevitably been some allocation of land to persons without a true claim to it. Lack of basic resources to manage the Land Boards, as well as inadequate training and record keeping, mean that the scheme has definite scope for improvement. Botswana's main problem now, however, is not land, but people, and specifically AIDS⁶.

⁶ Botswana has the highest percentage of adult AIDS infections in the world. 33% of adults are infected. Tragically, land may become plentiful in Botswana in the future.

Turning An Honest Profit In Zambia

Zambia, to the northwest, is an odd combination of Botswana's solutions and Zimbabwe's legacy. Zambia was fortunate to escape the extreme inequity of land distribution that occurred in Zimbabwe under Ian Smith's "government". Under the relatively benign administration of Rhodes' BSAC (British South Africa Company), few large-scale white farms were created. At independence, "State land and freehold⁷ land [was] 6.3 per cent [of the total land area]" (Banda), and white colonial interests were mostly limited to copper mining. Zambia, has however, faced a problem which is becoming increasingly common, especially in South Africa and Mozambique – massive land speculation:

"Since independence, but before 1975, the prices of land escalated beyond the reach of ordinary citizens. The problem of escalation of prices of land has bedeviled many countries. In Zambia, the problem reached a climax in 1975, when the president discovered that an estate agent made a profit of K50,000⁸ overnight for a piece of land of less than a quarter of an acre. this caused an outcry from the public. To solve the problem of speculation in land, the Land (Conversion of Titles) Act, 1975 (Act 209) was passed. The effect of the act is that no dealings in land can take place without the consent of the president, and land has no value except for unexhausted improvements thereon" (Banda).

Zambia thus encapsulates two issues which are absolutely relevant to the larger discussion of land policy in Southern Africa today – massive, uncontrolled speculation, and the notion of the sole value of land being that of the "unexhausted improvements thereon" (Banda).

Speculation is a problem for indigenous people. In South Africa, beachfront real estate, once a plentiful commodity, has become unaffordable for local South Africans. Title to vast portions of Cape Province's beachfront is now held by foreigners, especially Americans. Recognizing the economic realities of the strength of the dollar against the Rand, South African real estate brokers are marketing South African real estate to foreign buyers. This is a tricky business. Are they giving away the country? At what point does foreign "investment" become foreign economic manipulation?

⁷ There is no evidence to suggest that white farms were held in anything other than freehold.

⁸ Zambian Kwacha

A Beacon On The Eastern Coast

Unlike the benign handovers from the British in Zambia and Botswana, Mozambique's vicious war of independence from Portugal, and the disastrous subsequent civil war between South African backed Renamo and Marxist Frelimo forces left Mozambique on its knees. In the 1960s, the southern capital city of Lourenco Marques (or "LM") was a world-famous resort. Four hours from downtown Johannesburg were fabulous colonial esplanades and endless feasts of absurdly cheap seafood. Perfectly unspoiled beaches were de rigueur. It seemed as though the party was never going to stop. Apartheid looked to be unstoppable. The world didn't care, and Africa's steady steam of independences seemed to have stopped with Zambia and Botswana. The Portuguese had no intention of giving up their last colonial possession, and the battle for possession turned ugly. Eventually, with the ruin of a nation, the Portuguese were gone. "This exodus was characterized by vandalism on the part of the exiting Portuguese. The new government inherited a fragmented, illiterate nation and weak administrative machinery" (LandWeb).

In the 1980's, the famous Polana Hotel was a staff mess for Frelimo officers, on leave from the jungle fronts where Renamo would fire at them with shiny new South African rifles. Shiny new Russian land mines ensured that the road from Johannesburg to what was now called Maputo, was no place for armored vehicles, never mind Toyota Corollas. Nobody went to Maputo anymore. People remembered the giant prawns and the infinity of blue seas and the Polana Hotel, but they knew better than to go anywhere near the border. People crossed that border in the middle of the night, Renamo into South Africa and Frelimo into Zimbabwe. The politics were complex and the war was bloody. Farms were burned. People fled. Hundreds of thousands of people left their traditional homes in fear of their lives. Whole areas were depopulated.

Finally, the conflict ended. Peace came uncertainly. With peace came the question of reconstruction and the need for normalization.

Today's Mozambique under Joaquim Chissano is moving quickly into the twenty-first century, having posted impressive year-on-year growth numbers. People around the world are paying attention to Mozambique, and the country has a bright future. Mozambique's future looks bright for a reason. That reason is a unique piece of legislation, which may be one of the most forward-looking, egalitarian and representative pieces of law making that the subcontinent has seen. The quagmire that the Portuguese left behind had all the potential for disaster that Ian Smith's departure left for Robert Mugabe's government. Charting a course through the landmines would be a serious challenge.

The massive upheavals of the war of independence in the 1970s weren't the end of land-based difficulties for the Mozambicans. Christopher Tanner, with the UN's Food and Agriculture Organization (FAO) has written a concise assessment of the post-independence situation in his exhaustive 1997 paper, "Law Making in an African Context: The 1997 Mozambican Land Law":

"Independence led to a socialist agrarian model however, and many were disappointed. Instead of being returned to their original owners, colonial plantations were nationalized, expanded in some cases, and managed by the State in the name of the people. Other land was subject to "villagisation" and co-operative programs with roots in the Tanzanian experience. All of these new policy prescriptions once again radically altered the relationship of rural people to both their land and the State" (6).

Tanner has been substantially involved in the legislative process leading to the 1997 Land Law. Uncharacteristically (at least, for Africa), the return on a massive scale of former inhabitants to their abandoned homesteads was mostly trouble-free. Tanner elaborates:

"Meanwhile the scale of the migration back into rural Mozambique after the war served to emphasize an important and irrefutable feature of the landscape. It was indeed remarkable that the most abandoned land was reoccupied with relatively few problems. This feat was due in large part to the survival and continuing legitimacy of traditional or customary land management systems. It was evident that any new policy or legislation would have to take this reality fully into account" (7).

In an even more uncharacteristic move, possibly belying the Marxist origins of the state apparatus, and partly in response to an FAO project which "raised [several] points and argued that the existing law was not protecting all the diverse resources that local people need to maintain production strategies and allow for future needs" (Tanner, 14), the government sanctioned work on a review of land policy –

"Officially sanctioned research on the 'land question' began in the early 1990s, under the auspices of the then 'Ad Hoc' Land Commission and with support from the University of Wisconsin Land Tenure Center and USAID. Field-based reports from different parts of Mozambique began filling in the complex picture of land occupation and documented the range of issues discussed above. National Conferences were organized in 1992 and 1994, and especially in the

second of these, the true complexity and scale of the land question began to emerge more clearly" (11).

The government's initial approach was to attempt to, through a combination of validation mechanisms, allocate individual title to occupants of land, essentially creating a title-based system. According to Tanner, "Progress was slow and expensive however, with just tens of cases completed over several years" (13).

The main challenge facing the government during this period (1990-1997) was the need for a coherent land policy that addressed the needs of individual farmers, the State and private enterprise. Individual farmers had largely returned to their previous holdings and were operating according to pre-existing customary law, but traditional (and one might argue, sustainable) farming methods have the characteristic of using more land than they appear to be, at any one point in time. To correctly understand how much land a traditional community is using, it is necessary to view the land use patterns over several years, because yearly and seasonal usages vary. Land which is apparently unused (and therefore potentially ready for settlement or reallocation), may in fact be part of a "typical African farm system" (14). As Tanner observes, some resources "may be regenerating and apparently unused as part of the lengthy crop rotation cycles commonly seen in this kind of system" (14). To view this land as unoccupied would be a mistake, and to settle it, disastrous.

Private enterprise, at the same time, was responding (understandably) to an aspect of the land policy at the time which essentially made the land free to those who wished to use it.

"A provisional land use title document gave rights to a new 'investor' that were virtually freehold in all but name. And as it was not necessary to actually purchase the land, very large areas were requested and usually granted by a government driven by the new imperative of national development" (10).

The risk of a land grab were high, and in response to the first signs of exactly that, a number of different bodies, local and international, pressured the government for land policy reform. "The Government responded by abolishing several land related bodies ... and creating a new Commission with a clear multi-sectoral composition" (15). Through a process of "strategy and consensus building" (Tanner), a new and coherent land policy was formed, resulting in some remarkable conclusions, and giving Mozambique a land policy which may be more appropriate (at least for the Mozambicans) than any other scheme in place, anywhere today. Engineered with the objective of wide representation from all elements of life, including community bodies, non-

governmental organizations, academics and government, the Land Law of 1997 has several appealing features, which Tanner enumerates:

- State ownership of land
 - Guaranteed access to land for the population as well as for investors, while promoting social and economic justice in the countryside by recognizing the customary rights of access and management by rural people over their land
 - Guaranteed rights of access to and use of land by women⁹
 - Promotion of private investment – national and foreign – without prejudicing the resident population and ensuring that both they and the public treasury benefit
 - The active participation of national as partners in private enterprises
 - The definition and regulation of basic guidelines for the transfer of use rights over land, between citizens or national enterprises, as long as investments have been carried out on the land in question
 - The sustainable use of natural resources in a way that guarantees the quality of life for present and future generations
- (23)

The optimistically egalitarian nature of the 1997 Land Law is hopeful. Mozambique is a vast country with massive expanses of genuinely undeveloped land, and the administration's cadastral services are stretched thin. Although the law promises much, and is well-intentioned, the pressure from private enterprise for unequivocal individual title is constant. External pressures, especially from Western industrial nations, is intense and in a recent visit to Washington Chissano reasserted his nation's right to manage land in a locally appropriate fashion.

⁹ Mozambique and South Africa are similar in this respect – the participation of women in the armed struggle (“La Luta Armada” in Mozambique) has ensured their place at the table in the new societies that these two countries hope to create. The Marxist sources of their “bargain” is an interesting topic for possible future research.

Balancing the need for even-handed local egalitarianism, there is the need to attract foreign capital investment. Without clear and outright title, Western capital interests are reluctant to invest. This is not a problem of title so much as a problem of culture. The Land Law provides for the needs of capital investors by providing a form of leasehold. Tanner's description is useful:

The new Land Law does not provide a clear right of private property, but it does create very important and legally defensible private rights over land use. The use right conceded by the State to all land users is renewable and inheritable in the case of requests for new rights from the State, and is indefinite and inheritable in the case of existing rights acquired through customary occupation. Moreover, any investment made on the land *is* private property, and can be bought, sold or mortgaged.

The complications begin to emerge with the process of transmission of land use rights when investments are transferred to a third party. In urban areas this is not that important, as construction normally occupies most of the land in question and transmission of the right along with the buildings that are sold or mortgaged is automatic in a *de facto* sense⁶⁰. In rural areas this is not the case, and the investments that are transferred to third parties may occupy only a small part of the land area over which the previous owner has land use rights. Land in modern Mozambique *does of course have real value as a productive asset*, as evidenced by a very active under-the-counter land market, especially in urban areas. (38)

Whether a land grab can be avoided remains to be seen. The Land Law is a good faith effort to prevent it. A major risk factor in the initiation of a land grab is the extent of government corruption. In any government-sponsored land allocation scheme, there is a serious risk of abuse, especially in poverty-ridden nations where relatively small sums represent several years' earnings to government officials.

Despite the risks, Mozambique **is** a shining beacon in terms of its social policies, and especially the *intent* of the Land Law. The gap between rich and poor, have and have-not is almost always about land. Hopefully, Mozambicans will be served well by this landmark legislation.

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