

Land tenure dilemmas: next steps for Zimbabwe

An informal briefing note

Ian Scoones
Livelihoods after Land Reform Programme
Harare

June 2009

A new agrarian structure

The land reform since 2000 has created a fundamentally different agrarian structure with substantial, but as yet unrealised, potential for agricultural growth generated by land holdings of diverse sizes. The inefficient, inequitable and unjust dualistic system of the past has now gone and the potential for a flexible array of different farm sizes and production types now exists – from relatively large sized, highly capitalised operations to smallholder farms employing family labour. If effectively integrated, with linkages and synergies between farm and production types facilitated, the new agrarian economy can contribute to national development without the hindrances of the divisive colonial heritage which had hampered equitable development in Zimbabwe since 1980.

A key question today, as the post 2000 land reform is concluded, is what tenure system makes sense for this new configuration of land, livelihoods and production? Unfortunately, much of the debate on this starts from ideological assumptions about what is claimed to be the ideal tenure type, rather than the basic principles which should guide the choice of administrative and legal arrangement for ensuring tenure security. This briefing instead starts from defining key principles and moves towards a pragmatic assessment of options and trade-offs.

Seven key principles

What should be the key features of a new tenure regime? Here seven principles are outlined.

1. *Democratic accountability* to allow for state intervention to shift the configuration of tenure in line with national economic and development goals, in the face of dynamic change in technology or economic conditions and when market mechanisms are insufficient (for example, to facilitate a shift to a large-scale freehold system under conditions of full industrialisation and urbanisation in order to assure national food security)
2. *A flexible market* in land – including 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 4 and 5, below).

3. Facilitation of *credit and investment* through the provision of land 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.)
4. *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 (for example, the danger of mass sales and rapid speculative land accumulation by local or foreign elites/companies in times of economic hardship, and the reversal of redistributive gains).
5. 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 requirements for joint recognition of land holdings in leases, permits and titles, as well as administrative mechanisms to ensure equitable treatment of land issues).
6. *A low administrative burden* – both in terms of technical complexity and overall cost – of cadastral surveys, land registration and land administration more broadly.
7. *Revenues* through survey, title, lease and permit fees and setting *incentives* to discourage underutilisation through land taxation is an important condition for an effective land tenure regime.

There is broad agreement on the desirability of each of these seven principles, and a wider recognition from international experience of their importance (see World Bank, 2003; Migot-Adolla, 2004; Peters, 2007). However, there are more questions about their practicality and feasibility, and the pragmatic trade-offs between each given administrative and technical capacities in land administration.

In Zimbabwe existing legislation¹ allows for a wide range of potential tenure types, ranging from freehold title to regulated leases to permits to communal tenure under 'traditional' systems. All have their pros and cons. Any one or combination can offer a guarantee of secure property rights under particular conditions. There is thus no 'gold standard' or assumed 'evolution' towards an ideal, as is sometimes suggested (Richardson, 2005; UNDP 2008). Instead, the debate about the appropriate tenure regime must start from principles in context, and draw conclusions about the best way forward from an analysis of the trade-offs between options under the particular circumstances currently pertaining.

For example, policymakers must ask, given the available resources and capacity for land administration, can the appropriate level of tenure security be achieved through lower cost means? Or, given the dangers of rapid land appropriation, what minimal safeguards need to be deployed which do not undermine the capacity of credit and land markets to function? Or, what other legal or financial assurances and coordination mechanisms must be added to ensure that private credit markets function effectively? These are very real dilemmas and are encountered the world over, especially in relatively resource poor settings where capacity is underdeveloped. A debate that is constructed around the false promise of an ideal may actually act to undermine opportunities and stall agricultural growth.

Tenure trade-offs

How do different tenure arrangements perform against these key principles? Table 1 offers a preliminary assessment, based on both Zimbabwean and international experience.

Table 1: Trade-offs in tenure design principles

	<i>Freehold title</i>	<i>Regulated leasehold</i>	<i>Permit system</i>	<i>Communal/traditional tenure</i>
Democratic accountability to state	None	Yes	Yes	Limited
Flexible land markets	Yes	Yes	Yes	Informal only
Credit and collateral	Yes	Yes	Requires additional instruments for collateral guarantee	Requires alternative credit/micro-finance support mechanisms
Regulation against capture	No, although potentials for statutory restrictions on sales	Yes	Yes	Limited regulatory reach
Preferential women's access	None	Potential lease condition	Potential permit condition	None: traditional patriarchal biases
Administrative cost	Very high	High	Low	None
Revenues and incentives	Survey, land registration, title fees/Land tax	Lease fees/land tax	Permit fee/land tax	Limited potentials

Depending on the legal and administrative regime or the interpretation and practice of 'customary' or 'traditional' tenure, for example, there are of course large variations in the reality of different tenure types in practice. But despite such variation there are some common features. Freehold tenure for example is always administratively cumbersome, expensive to implement and reliant on market forces with limited opportunities (assuming the rule of law is adhered to) for state intervention to limit consolidation or shape market incentives. On the other hand, communal, customary or traditional systems have advantages of decentralised operation and low cost, but there are limits on the ability to assure security of tenure through legislative means and a limited regulatory reach of the state.

Of course any tenure regime is only a legal/administrative procedure, and must function in a wider political-social-economic context. The lessons of the past decade show vividly

that tenure insecurity does not necessarily derive from the nature of the regime, but from the wider political setting, the capacity to administrate land and the ability to assure a rule of law. When these very basic governance conditions are not in place, then no tenure regime can assure security. Indeed, since 2000 it has been those with freehold tenure that have been the least secure, and those with communal tenure who have been the most secure (Justice for Agriculture; Zikhali; Tagarira 2007; Dore).

Ways forward

The Global Political Agreement of September 2008 guides the policies of the Inclusive Government of Zimbabwe, and commits to a reestablishment of transparent administrative procedures, the stamping out of corrupt practices and mechanisms for compensation, all in a secure legal framework. With this essential precondition in place, the discussion on land tenure options can take place more effectively – and in relation to a set of clear principles of the sort outlined in this paper.

The big question now, is what makes sense given the current situation, and given available administrative resources and capacity constraints? What tenure regime will help get agriculture moving and investment flowing, and support the new agrarian structure? With the appropriate regulatory conditions attached as part of revisions of legislation and with a land administration streamlined system developed (neither of which exist to date), the above table suggests that the leasehold and permit systems offer considerable promise for the Zimbabwe situation for the A2 and A1 areas respectively. This reflects international thinking on this issue, where low cost land registration and administration approaches based on leases and permits have been shown to be highly effective in relation to the range of principles identified above (World Bank, 2003). This does not mean that freehold tenure is not an option for the future, but it does not seem to offer the right combination of features for the present situation. It also does not preclude a reform of communal tenure, perhaps extending versions of the approach developed for the A1 areas to the communal lands over time. As the 1994 Land Tenure Commission argued so effectively, hybrid approaches that offer the best of customary, communal tenure arrangements, but with new forms of tenure security offered through legally binding arrangements may be of great importance in such areas (Rukuni 1994).

For now, though, the priority must be the new A1 and A2 areas. This represents a substantial area of land, and a considerable number of people/land units. Assuring tenure security in these areas must be the first priority, and this must be driven by a discussion based on clear principles, rather an ideological positioning, and an eye to rapid, effective implementation, rather than ‘gold standard’ ideals.

ⁱ From Moyo (2008): “In 2000 Constitution Amendment No. 16 effected provisions for compulsory acquisition; In 2001 the Rural Occupiers Act provided protection to certain occupiers of rural land from eviction, that provided for matters connected with or incidental thereto; In 2000 and then 2002 the Land Acquisition Act was amended; then in 2006 and 2007 Constitutional Amendment No. 17 and 18 respectively were introduced.... Land lawyers (e.g. Mhishi, 2007) affirm that new real rights in agricultural land are derived from Constitutional Amendment No 17 (of 2006), which recognises the right to agricultural landed property (section 16), subject to the right to compulsory acquisition on given terms (section 16A)..... In accordance with the Land Acquisition Act (of 1985), the sale of freehold agricultural land remains subject to the government exercising its “right of first refusal”..... The constitution also recognises the right of the state to own agricultural land (Section 16B) by providing the state the right to compulsorily acquire land (beyond the general

principle of 'eminent domain'), and for the right for agricultural land to be vested in and owned by the state, for its 'use and disposal', as it deems fit. This shapes the right of the state to issue leases and permits for the use of acquired agricultural land. Moreover, it requires that compensation for improvements on compulsorily acquired land be paid for by the state, using stipulated valuation processes, and it allows landowners to contest in court the value and nature of compensation awarded..... Agricultural leases, issued to A2 farmers through the National Land Board, are legally derived from the Agricultural Land Settlement Act [Chapter 20: 01]), which always provided 'real rights' to land through leases. These lease documents are considered legal long term contracts: ranging from 25 to 99 years, for conservancy and agricultural leaseholds respectively (Mhishi, 2007). These are backed by statutorily required surveys (Land Survey Act [20:12]) and are registerable according to the Deeds Registries Act [Chapter 20:15] (Moyo, 2008)