

**LAND AND PROPERTY RIGHTS IN MODERN CONSTITUTIONALISM:
EXPERIENCES FROM AFRICA AND
POSSIBLE LESSONS FOR SOUTH AFRICA***

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1. **THE OBJECT, SCOPE AND SUMMARY OF THE PAPER.**

The object of this comparative analysis is to ascertain the key elements in property and land rights reform in different African countries since these countries attained the status of formal political independence and to identify the problems and advantages arising from such experiences that may be of immediate relevance to the permanent Constitution-making process in the Republic of South Africa. As a preliminary issue, though of equal importance, the contribution will also attempt to dispel the misconception that the protection of property in the law need necessarily be through an entrenched property clause in the Constitution.

While adhering to essential legal, socio-economic and political aspects of the experiences discussed, the presentation adopts to the extent possible, a popular, non-legalistic, approach with a view of facilitating broader accessibility by the reader.

The countries whose experiences are covered are Kenya, Zimbabwe, Tanzania and Mozambique. The first reason for choosing these countries is that of convenience - they form the core of countries included in the study by the present author which was recently published in South Africa¹. The second reason for the choice is that these countries offer a variety of experiences arising from the different models they have followed since winning their independence from direct colonial rule. Kenya and Zimbabwe demonstrate two important traits: (i) tight constitutional and legal control of private property with very limited redistributive space and (ii) duality in the forms of major tenure regimes that depict on the one hand privatised land and on the other communal land with very weak secure rights for the indigenous peoples. Tanzania and Mozambique in the pre-reform era depicted a different type of duality: (i) weak private rights in property (including property in land) and (ii) strong state political hegemony over the control of landed property. It is my argument that the abuses and misuse of land and other property rights under these two main examples (the Kenya-Zimbabwe and the Tanzania-Mozambique models) have contributed to crises of legitimacy for both systems and has undermined social responsibility and sustainable economic development. They have also contributed to poor environmental management.

The contribution concludes by suggesting that South Africa has an opportunity to choose from four options: (i) a flexible property and land rights protection clause accompanied with strong independent public organs entrenched in the Constitution to oversee the allocation and use of land for economic development and social wellbeing (ii) a rigid and restrictive property clause, as it now has under Section 28 of the Interim Constitution, with the risk of speeding-up the development of a crisis of legitimacy (iii) excluding the property clause in the Constitution altogether or (iv) over concentration of ownership and control powers in the state and/or traditional authorities with only weak and marginal rights of security of tenure for individuals, families or communities. Option number three, above, is infinitely better than the option of a restrictive or rigid clause.

¹ SBO Gutto, Property and Land Reform: Constitutional and Jurisprudential Perspectives (1995, Butterworths, Durban).

2. THE PROTECTION OF PROPERTY AND LAND RIGHTS WITHIN AND OUTSIDE WRITTEN CONSTITUTIONS.

There is a popular myth or misconception that pervades public consciousness in most societies in transition nowadays. The myth or misconception is that in order to have an effective legal protection of property and land rights that guarantees either a market-oriented or a mixed economy or a socialist-oriented economy, the rights must be entrenched in a constitution. This myth or misconception has been exploded by many South African scholars, some who are participants in this Workshop. I shall refrain from repeating what they have recorded. My understanding of the matter is that security of property and land rights may be expressed either in a constitution or outside of it.² Either way, the real protection resides in the overall legitimacy the property and land rights and relations enjoys in society as a whole. When expressed or not expressed in a formal constitutional document, the legitimacy can be secured through broadly shared traditions, values and systems of law contained in common law, customary law and ordinary statutory laws. But the reverse is equally true: illegitimate property and land rights and relations regime, a recipe for social crisis and turmoil may be contained either in a constitution and/or in such traditions and values, common law, customary law and ordinary statutory laws.

There are many reasons why certain countries do not have or do not contemplate having constitutions which entrench property and land rights. Among these are situations where there exists: (a) a balance of opposed social and political forces, one demanding rigid provisions in the constitution and the other aspiring for softer provisions that would facilitate greater redistribution, when and if required, (b) the existence of historically entrenched traditions and systems of laws that already provide adequate protection of property and land rights and relations that are fairly legitimate.

The main point that I am putting forward here is that the primary focus of any property and land rights reform ought to be the creation of a legitimate system that broadly caters for the needs and aspirations of the society and to accompany this with appropriate legal expression, whether this be in the Constitution and other laws or in laws other than the Constitution. Property in law is an expression of social power relations. How that power is distributed so as to meet the fundamental goals of development, social justice and social solidarity ought to be the main objectives of reforms.

² Gutto, above, note 1, at 31-34;

3. THE AFRICAN EXPERIENCES

3.1 Kenya

The studies which inform my understanding of the Kenyan experience have been those I have personally undertaken,³ as well as the existing sources authored by other scholars and researchers.⁴ Kenya was a European-settler colony in which property and land was divided on the basis of race, with the settlers expropriating the Africans and declaring the most productive parts of the country as "White-Highlands". Despite the historical brave armed struggle waged by the indigenous peoples to dislodge this unjust order - through what is popularly known as the "Mau-Mau" - the independence Constitutions of 1963 and 1964 entrenched the then existing property and land ownership system in some of the most elaborate provisions ever drafted in legal history. With few insignificant changes adopted in the late 1960's, these provisions still exist today.⁵

For the purposes of the present discussions, what was, and remains, significant is that these constitutional provisions were reinforced by ordinary legislations and subsequent administrative policies, court or judicial decisions. Collectively, what emerged and remains as the distinctive features of the Kenyan property and land rights regime, and the reforms around the system, were and are:-

- (a) restrictive and rigid constitutional protection of the existing property and land, which allowed little room for redistributive reform;
- (b) concentration of the best lands in the hands of a few individuals, big corporations and the state;
- (c) parcelling out of small and unviable pieces of land to some of the landless masses and squatters, which later led to increasing social marginalisation, propertylessness and landlessness;
- (d) insecure land rights in areas where colonial "communalisation" was not affected

³ Gutto, above, note 1 at 36-40; Gutto, "Land and Property Rights: The Decolonisation Process and Democracy in Africa - Lessons From Zimbabwe and Kenya", in M Venter and M Anderson, Land, Property Rights and the New Constitution (1994, Community Law Centre, UWC) Chap. 2; Gutto, 'Law, Rangelands, the Peasantry and Social Classes in Kenya' (1981) vol.20, Rev. of African Political Economy, 41-56.

⁴ For example, chapters 6 and 7 by various authors in JW Bruce and SE Migot-Adhoha (eds) Searching for Land Tenure Security in Africa (1994, The World Bank, Washington D.C.); HWO Okoth-Ogendo, Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya (1996, ACTS Press, Nairobi); C Leo, land and Class in Kenya (1989, Nehanda Publishers, Harare); F MacKenzie, "A Piece of Land Never Shrinks: Reconceptualising Land Tenure in a Smallholding District, Kenya", in TJ Bassett and DE Crummey (eds) Land in African Agrarian Systems (1993, University of Wisconsin Press, Madison) 194-221.

⁵ Section 75, Constitution of Kenya, 1969.

by "privatisation" - later to be invaded by corrupt and parasitic politicians and so-called "investors".

With the social pressures for greater democratisation in the country in the increase and the speculative pressures brought about by the so-called liberalisation of the economy giving greater access to foreign speculative capital, the ruling autocracy is using land scarcity to foment ethnic hostilities and violence in order to weaken democratic forces and, at the same time, the same autocrats are busy enriching themselves through bribes generously offered by internal and foreign speculators interested in land. Thirty two years since independence, squatters and right-less labour tenants continue to exist, and their numbers are expanding.

Thus, both the rigidity of the constitutional provisions on property and land as well as the weak protection of rights of people occupying the so-called "communal" land are problematic and contribute to social instability. Besides, they constitute a hinderance to democratic political and socio-economic development.

3.2 Zimbabwe

Like Kenya, my experience and understanding of the Zimbabwean reality is based on personal studies⁶ as well as on the work of others⁷. Zimbabwe is next door and, in addition to its geographical location, its historical past is intimately linked to that of South Africa - during the colonisation process, during the hey-day of colonial rule, during the era of the struggle for national liberation and the resistance against that historical reality, and even after it achieved independence, and presently since South Africa achieved national democratic change. I reiterate the obvious to make a point. The point is that given its proximity and historical and socio-cultural closeness with South Africa, one would expect that the processes of change in Zimbabwe would be matters of common knowledge in South Africa. The reality, however, appears to be quite different. The dominant conventional wisdom in South Africa seems to be that in the area of constitutionalism and its relationship to property and land rights reform, Zimbabwe is too radical and too reformist. The reality as far as I know it is quite the opposite. The Zimbabwean political system is living with a constitutional property and land clause that is almost as rigid in its protection of the existing order and as restrictive of any reforms as that of Kenya.⁸ The difference with the provision in Section 28 of the Interim

⁶ Gutto, Human and Peoples' Rights for the Oppressed (1993, Lund University Press, Lund) Chap. 8 (pp. 214-239); Gutto, note 1 above, at 40-46.

⁷ For example, HV Moyana, The Political Economy of Land in Zimbabwe (1984, Mambo Press, Gweru); S Moyo, The land Question in Zimbabwe (1995, SAPES, Harare); S Coldham "The Land Acquisition Act, 1992 of Zimbabwe", (1993) Journal of African Law, 82-88; T Roger, "The Communal Areas of Zimbabwe", in Basset and Crummey (eds), above, note 4, at 354-385.

⁸ The Constitution of Zimbabwe, 1979, entered into force in 1980, Sections 11 and 16.

Constitution of South Africa is that it explicitly allows for derelict land, under-utilised land, and land used for subversive purposes to be expropriated with limited, if any, compensation. Thus, the real ideology dominating the property and land relations in Zimbabwe is that of the brand of market economy which goes under the slogan of "willing seller - willing buyer" in a context where the historically advantaged and privileged Whites are the potential sellers - and to a large extent also potential buyers. Why then does the Zimbabwean experience send out conflicting signals? The answer appears to be based on the fact that the rigid and restrictive constitutional and other legal dispensations lack legitimacy and is a source of social instability. In order to appear to be addressing this problem, the ruling political formations are forced to engage in high rhetorics and scare-tactics, especially during election campaigns; on the one hand they promise the people radical reforms and on the other hand cause nightmares to the big property owners and landowners. These desperate political manoeuvres are sometimes expressed in legal dispensations, for example in the locally well-publicised Land Acquisition Act of 1992⁹, and its predecessor¹⁰.

The controversy surrounding the Land Acquisition Act is that it empowers the government to designate certain agricultural land for future legal acquisition or expropriation by the government for purposes of resettlement (redistribution) under the appropriate laws, which provide for compensation. The outcry by the affected farmers is not over the constitutional clause but rather on the potential effect the designation may have on the land prices. In other words, it is not over security of tenure of legal protection but rather on the economics of land values. There is a case seeking to establish whether or not the designation amounts to 'deprivation'¹¹ which has been taken on appeal to the Supreme Court and a decision is still pending. The dispute is quite similar in material terms to that of the recent South African case where big landowners and privileged residents attempted, unsuccessfully, to block the establishment of a "less formal township" because it potentially had negative impact on the property prices in the area.¹² The significance of these cases is that they go to demonstrate the negative impact on property and land prices that are likely to escalate in conditions where the property and land regimes do not adequately address the plight of those who have been historically marginalised or excluded. They point to the need for less rigid or less restrictive entrenched property and land rights clauses in constitutions. They do not point in the opposite direction, as many observers and commentators tend to believe.

Zimbabwe, like Kenya, also has the problem of duality in landownership and, to a large

⁹ Land Acquisition Act, No. 3 of 1992

¹⁰ Land Acquisition Act, No. 21 of 1985, as amended in 1988.

¹¹ Davies and Others v. The Minister of Lands, Agriculture and Water Development, High Court of Zimbabwe, HH 185-194, HC 6289/93.

¹² Diepsloot Residents' and land Owners Association v. Admin., Transvaal, 1994 3 SA 366 (A).

extent, economy. This is an inheritance from the colonial era. It has, parallel to the dominant privatised sector, communal land regulated by the Communal Lands Act¹³ and a host of other statutes dealing with governmental administrative structures and powers. Besides maintaining a system of weak tenure rights protection and abandoning the rural masses to the dictates of unaccountable chiefs, most of them of colonial creation, the communal lands also manifest greater exclusion of women from the ownership and control of land and its major products.¹⁴ Since the political process is unable to effectively tackle redistributive problems caused by the rigid and restrictive constitutional property clause, it has been rendered powerless in addressing the issue of tenure insecurity and gender inequality in the communal areas.

Overall, propertylessness, landlessness, homelessness and marginalisation of the majority exist side by side with often (but not always) wasteful ownership of large tracks of land by a small minority. Land has acquired a speculative value thus setting the stage for corruption both in the public and private sector. South Africa may not choose to follow the Zimbabwean model not because the Zimbabwean model allows too much room for state interference but rather because it has a constitutional dispensation that encourages desperate action on the part of the government. This is not the best way to legitimise and secure property and land rights in the interest of national stability and overall economic and social development of society.

3.3 Tanzania and Mozambique

Tanzania and Mozambique are included in this presentation for two reasons: (i) they form part of the comparative study in the recent book already cited¹⁵ and, more importantly (ii) they demonstrate contrasting experiences from those of Kenya and Zimbabwe, although these experiences are considered to be equally less ideal for the historical and social context of South Africa. The Tanzanian and Mozambican experiences demonstrate problems that are likely to arise where weak individual and community tenure rights pre-dominate alongside strong formal state ownership and control of property and land. Strong state control over ownership and user rights over land and other dominating forms of property in the economy may seem ideal for purposes of access but this is dependent on the existence of particular political leadership and prevailing global power relations. Where the leadership and the conditions change in favour of less egalitarian ideals and goals, very weak or non-existence of individual and community tenure rights facilitates greater and speedier extinction of existing rights in favour of new forces of private primitive accumulation.

Recently, in fact in July this year, a journalist published two investigative stories in **The**

¹³ Communal Lands Act, No. 20 of 1982.

¹⁴ Gutto, note 1 above at 43.

¹⁵ Gutto, note 1 above, at 46-51.

Sunday Independent¹⁶: one of the articles bore the title and sub-title "*Into Africa with unlikely allies Mandela and Viljoen: It is a 'Marshall Plan' for Africa, says General Viljoen, as thousands of white farmers prepare to move to other African countries - with Mandela's Blessing*"; the other story carried the title and sub-title "*Drought-weary farmer keen to pack his wagon and join the next Great Trek to greener pastures: After years of battling the relentless drought in South Africa, Fritz Potgieter has decided to sell up and move to Mozambique*".

I am a strong advocate of regional economic cooperation and development in Africa and also believe that some strategic free flow of human expertise, goods and services is essential to the process. I also consider it inappropriate to question the patriotism of the farmers who feel that they can better serve their interests, and hopefully those of humanity, by relocating to other African countries. The point of referring to these stories is that, if the facts are correct, the map accompanying the second story shows that the countries of destination for the fleeing farmers include Mozambique, Malawi, Angola, Zambia, Tanzania, Uganda, Zaire, Cameroon and Ivory Coast. These are countries with mostly weak land tenure rights which the Governments find easy to expropriate and then alienate, with or without the collaboration of traditional authorities. Tanzania and Mozambique are among them.

A Presidential Commission set-up to investigate land policy and land tenure structure in Tanzania identified, among others, that the absence of legal security of tenure within the villagisation policies adopted in the 1970's in Tanzania has exacerbated land problems¹⁷. Some of the recommendations for reform suggested by the Commission include modernisation of tradition as opposed to imposing modernisation on tradition from above, democratisation of land tenure control and administration, and providing security and safety of land rights¹⁸. The Commission tried to strike a balance between the two extreme positions of absolute privatisation of rights in land entrenched constitutionally, which speculators prefer, and the weak rights protection, as presently exists. This appears to be a sensible approach.

4. WHAT LESSONS FOR SOUTH AFRICA?

It has not been the object of this contribution to prescribe for South Africa what it must do but rather to offer experiences from which it may choose what it considers appropriate to emulate or what it considers to be inappropriate to its own reality. What appears to be emerging clearly from the experiences analysed and discussed here is

¹⁶ B Wilkinson, in The Sunday Independent, July 9, 1995.

¹⁷ The Ministry of Lands, Housing and Urban Development, Government of the United Republic of Tanzania, Report of the Presidential Commission of Inquiry into Land Matters. (The Shivji Report), Vol. 1 "Land Policy and Land Tenure Structure". (1994, Scandinavian Institute of African Studies, Uppsala), 124

¹⁸ The Shivji Report, above, at p.131.

that the South African reality, in the context of the Interim Constitution is close to the Kenyan and Zimbabwean models. For this reason, there is a case to be made for departure from this rigid and restrictive constitutional dispensation on land and property rights. There is also need to adopt a system, whether in the Constitution or outside of it, which allows and facilitates strengthening of rights of communities that have hitherto had weak recognition of rights in positive law. The price for not modifying the land and property clause as exists in the Interim Constitution is the likely rendering of property and land rights illegitimate and thereby making land a primary source for future social instability, with serious implications to economic stability and growth. The law, whether it be a constitution alone or a constitution and ordinary laws, should facilitate reforms that meet the demands for redistribution, security of tenure rights and legitimation of property as a whole.

South Africa also needs to avoid following in the footsteps of Tanzania and Mozambique. Weak legal land tenure rights for the masses, on community and individual basis, accompanied by strong state hegemony exposes the people to the shifting dictates of traditional and governmental wishes and whims. This does not mean that traditional structures, norms and authorities should be discarded. As the Tanzanian reform recommendations suggest, the strategic objective should be democratisation from below of these institutions within a context of secure tenure rights for the people.

Since public involvement remains important in ensuring balanced use of land in the interest of environmental protection, management and use, the role of government and independent public bodies to oversee the ownership, control and use of land needs to be assured in any constitutional and/or other legal dispensation.

The above reasons, based on the concrete experiences examined, lead me to reconfirm the suggestion as to the options open to South Africa made in the last paragraph at the bottom of the first page of this paper. These are:

- (i) A flexible property and land rights protection clause accompanied with strong independent public organs entrenched in the Constitution to oversee the allocation and use of land for economic development and social wellbeing or
- (ii) A rigid and restrictive property clause, as it now has under Section 28 of the Interim Constitution, with the risk of speeding-up the development of a crisis of legitimacy
- (iii) Excluding the property clause in the Constitution altogether or
- (iv) Over-concentration of ownership and control powers in the state and/or traditional authorities with only weak and marginal rights of security for individuals, families or communities.

Of the four likely options, it may be wise and foresighted to go along with either option number one or option number three, with preference being given to the latter. I find what I have presented here not to be a significant departure from what I individually submitted to the ANC Constitutional Commission of the Gauteng Province early this year, following some collective workshopping¹⁹. It also does not contradict the submissions that the

¹⁹ "Property Clause or no Property Clause?" (pp.12-13) in ANC Gauteng

Centre for Applied Legal Studies had previously made to the Constitutional Assembly which called for omission of the Property Clause. I was part of that submission. The difference this time is that the justification for suggesting these two options is based on more detailed motivation arising from my understanding of the experiences in countries with which I have either lived in and carried out research or have visited and studied.

Thank you for affording me this unique opportunity to participate in this historic event in the life of South Africa, and humanity in general.