

Demystifying Customary Tenure in Zambia

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Key words: customary tenure, security of tenure, leasehold tenure, individual ownership.

SUMMARY

Customary tenure has been associated with absence of individual ownership, inadequate security of tenure, weak institutions, causing environmental degradation, and discriminating against women. These perceptions are re-looked at in the light of personal experience and observations, and literature review in the context of Zambia.

Zambia uses a dual system of tenure consisting of statutory, leasehold, tenure on one hand and customary tenure on the other. This is a legacy from the colonial days. Some of the perceptions have roots in that era but have permeated even current official thinking. Since the liberation struggles purportedly were about fighting injustices inclusive of land issues, logically one would expect that the post-independence governments would have seriously re-looked and rethought the whole land tenure and land administration issue in country. Instead what we find is a perpetuation of leasehold tenure, a system that we are failing to sustain for all kinds of reasons. From all successive land laws and practices, the intention is clear – gradually replace customary tenure. One may hasten ask therefore that why eliminate a system that is legitimate, well understood, and widespread?

Given this background, the paper therefore reflects on the five identified perceptions used as justifications for perpetuating leasehold tenure pointing mainly local examples supported in some cases by outside studies. The conclusion is that these perceptions are in some cases just incorrect, or over generalised, whilst in others the problems are not inherent, specific, nor limited to customary tenure. The observations also suggest that security of tenure does not arise from title, recording, nor from boundary demarcation but from the perception supported by legitimate and capable institutions. If so, it is justifiable to advocate for a tenure system that is founded on the culture and norms of society and provides for universal entitlement to land.

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1. INTRODUCTION

This paper is largely based on personal experience and observations, and a deep reflection on customary tenure fuelled largely by the notion that a tenure system that is well understood, recognised, persistent, and pervasive cannot be so wrong as to deserve total replacement. Although customary tenure is recognised at law (Land Act No. 29, 1995), the general practice is to gradually convert all customary land to leasehold. The law makes provision for the conversion of customary land to leasehold but not vice versa (Machina, 2002). In addition, once land has been converted it ceases to be under the jurisdiction of customary tenure. Regardless of the ‘western’ view that customary tenure is inferior to statutory tenure, it has continued to this day and will continue for sometime given the rising interest once again. The revival of interest in customary tenure is evidenced by joint resource management ventures such as joint forest and wildlife management. Dekker (2003) also observes “the new interest and understanding of indigenous and traditional ways of land tenure, partly because of the importance of environmental protection to save yet unknown species from extinction”.

Zambia practices a dual system of tenure with leasehold on one hand and customary tenure on the other. A leasehold estate refers to an estate with a fixed term and certain duration. In Zambia, the maximum duration of a lease is 99 years and renewable. To borrow from Simpson (1976), customary tenure may be defined as “The rights to use or dispose of use rights over land which rest neither on the exercise of brute force, nor on evidence of rights guaranteed by government statute, but on the fact that they are recognised as legitimate by the community, the rules governing the acquisition and transmission of these rights being usually explicit and generally known though not normally recorded in writing”.

Some general myths concerning customary tenure are:

- There is no individual ownership of land
- Tenure is insecure
- Management structures or institutions are weak
- Hinders development in particular agriculture
- Causes environmental degradation
- Discriminates against women

The paper discusses the above perceptions (or myths) of customary tenure in the light of personal experiences and observations both as a child and an adult and some literature review. The paper then looks at the effects these perceptions have had on customary tenure in Zambia before discussing the way forward.

2. NO INDIVIDUAL OWNERSHIP

Land in customary areas is sometimes perceived to be owned by a tribe or by a tribal chief. These views have been refuted (Mvunga, 1980). The rights in land are essentially individual and are attributes of an individual. The individual owns the rights in the land under his/her occupation for as long as he/she wishes. Under customary tenure, individual rights are related to residential areas, cultivated fields, and to other areas where one has expended some labour individually such as digging a well. However, ownership is not the sole right subject to land. Other persons other than the landholder can enter somebody else's land to graze animals or to pick wild fruits. These are concurrent interests and should not be confused with communal rights.

The latter rights involve the use of certain tracts of land that are not individually owned. One's entitlement to the use of this land is based on membership to the community within which the land is situated. Thus a member of the village is entitled to use a well, grazing fields, and to gather products of the wild forest, but no one member of the village can claim to have more rights than the other. Communal ownership is also not equivalent to open-access as enjoyment is restricted to village members. Some of the confusion regarding open-access in Zambia has been generated by overlapping communal and statutory rights over certain resources especially forests and wildlife. When government designated certain areas as forest reserves or game (wildlife) management areas in customary areas, the government took over control of these resources. However, due to several reasons government has not been able to adequately manage the resources leading to open-access and illegal exploitation.

3. INSECURITY OF TENURE

Security of tenure describes the level of trust or certainty individuals have in the continuous protection of their tenure against third parties (Dekker, 2003). Deville (2005) argues that land tenure security exists when rights "are not contested without reason or when, in case of unjustified challenges, legitimate rights are confirmed".

Customary tenure is generally perceived to be insecure. This insecurity means that one would not want to invest in durable improvements on land, such as housing, permanent agriculture, or infrastructure, because he/she is not certain of enjoying the benefits of the investment. The insecurity is also seen from the fact that customary rights are not recorded and thus cannot be used as collateral for credit. In general, security is seen largely in either legal or economic terms; protection against third parties or collateral for credit and easily transferable.

Writing on registration of customary rights in French-speaking West Africa, Deville (2005), observes that ambiguities even errors exist in the definition of land tenure security such as:

In local frameworks, work produces rights to land and resources (by clearing the land, etc.). Permanent investments such as tree planting, terracing, etc. leads to stronger, more individualised, rights. Tenure security is the result of investment – which might be forbidden to some stakeholders – investment is not the product of security.

Deville further notes that from the point of view of production what is important is “secure access to land use rights” rather than ownership, whereas from the standpoint of inheritance it is the “control over family property and its transmission, and control over the granting of land use rights.”

Two ideas are brought out by Deville; a different conception of security (investment leads to security), and different perspectives of security (from production and from inheritance). Extending the latter notion, it can be argued that if customary tenure has multiple functionalities (Payne, 2001; Dujon, 19977), then other perspectives of security of tenure are possible. Land is the basis of livelihood in customary areas. It is used for food production as well as social security in the absence of formal arrangements. It is something that should be secured for future generations. In addition, there are also several subtle uses of land resources, which all together contribute to the sustenance of livelihoods in customary areas. Therefore, when speaking of tenure security in customary areas, the multiple functionality of land should not be ignored.

Seen from multiple perspectives, it is easy to see why a person in an apparently insecure situation when looked at from only one perspective would go ahead and make investments on land. It could be possible that social than economic considerations are more important. It is not uncommon to hear of such comments as “this is our home, our ancestors are buried here” when people are threatened with eviction. Examples abound in Zambia where individuals have built durable houses and shops (Luapula and Northern provinces) and cleared forested areas for cultivation (Lusaka province) in customary areas without having formal title first.

In fact, studies do actually show that this tenure is actually adequate (Dekker, 2003; Mulolwa, 2002). Let us assume durability or permanence of the improvement as the indicator of security of tenure. In Luapula province, there is Kazembe village considered to be the largest in Zambia. Apart from the durable, well-aligned, houses, the village also has a shopping centre with a bus station and other facilities. This is part of the chieftdom of Senior Chief Mwata Kazembe and is entirely a customary area. In other parts of Luapula Province, along the Luapula River and Lake Mweru, again one can find other villages with shops and well-built houses in customary areas. In and around Kasama town in Northern Province the picture is the same.

In Central and Lusaka Provinces, there are farms in customary areas with some form of investment. The land that was initially forested has been cleared for cultivation and people are engaged in growing different crops such as maize, cotton, and tobacco. It should be noted that land clearing is an expensive exercise and one would not venture to invest labour and capital if one is not certain of continuing to enjoy the attendant benefits.

In some cases, people may express the desire to have formal title to land. It can be argued that this may be because of the education that people of have received regarding leasehold title and the support the Government gives it. This support is evident from the Land Act No. 29 of 1995. Although the Act in section 8(1) provides for conversion of land under customary

tenure to leasehold tenure, there is no provision for the vice versa. This is a clear indication that one tenure system is held in higher esteem than the other.

4. WEAK MANAGEMENT STRUCTURES

There are clear structures of governance in general in customary areas and the institution of chief is now formally recognised in the Zambian constitution (Mulolwa, 2002). Therefore, from both the legal and traditional perspective, the chiefs' institution is legitimate. In order of decreasing seniority, the hierarchy is paramount chief, senior chief, chief, and headman. Only 4 tribes out of 73 have a paramount chief. The rest only have a senior chief (Asperen and Mulolwa, 2006). The structures are well decentralised with the village usually headed by a headman. Appointment to the positions is through lineage and is done by a council of elders or indunas who also act as advisers to the paramount or senior chief. The above does show that administrative structures are present for both general governance and land administration.

Traditional rulers play various roles in governance. Although currently they are not allowed to participate in politics, every election year political parties line up to woo their support. In general, also their voices are becoming louder and stronger in articulating their own and their subjects' concerns due to increased awareness. Within their jurisdictions, traditional rulers act as arbiters over various issues including land disputes. If a dispute cannot be resolved by a headman, it could be referred to a more senior ruler. Traditional rulers can also allocate land to outsiders and control the exploitation of forests and other natural resources. How strong they enforce controls is dependent on the ruler but there is evidence for successful local forest protection and maintaining cleanliness in villages (Northern Province). This suggests these institutions can be vehicles for sustaining the environment as Dekker (2003) also indicates.

Historically, the subjects maintained the governance structures through payments in kind such as a portion of a hunter's kill or farmer's harvest. However, over the years the Government has taken over this responsibility through regular upkeep payments, provision of transport, and maintenance of palaces. This supportive arrangement though constitutional has in fact contributed to weakening the structures as it has created a dependence on the Government.

Apart from weak governance structures, customary institutions are also viewed not to be robust enough to react quickly to pressures such as growing population and urbanisation especially that they fail to increase food production. These are unfair criticisms. Lack of resources and robustness are not specific and limited to customary institutions. Even a formal institution can suffer from these inadequacies. In fact, it is being observed that chiefs have begun to increasingly assert their authority and to speak for their people. The new development plan of the City of Lusaka, for instance, has not been implemented because chiefs in the surrounding customary areas have refused to allow the extension of the City boundary due to increasing population. In Kasama (northern Zambia), the municipality there also wanted to acquire land for housing in a customary area. However, the responsible senior chief refused and instead opted to directly give the land to persons who wanted to build houses.

5. HINDRANCE TO (AGRICULTURAL) DEVELOPMENT

Some of the reasons advanced for the customary tenure for being a hindrance to especially agricultural development are insecurity of tenure and uncertain inheritance. As discussed above considerable security exists in customary tenure systems. Even though security exists, it is still doubted whether one can rely upon the consistent enforcement of these rules when particular pieces of land come to have widely different values as an area moves from subsistence to commercial agriculture or when serious land pressure exists. This is an issue of institutions and is addressed above.

The other hindrance is that customary tenure systems create uncertainty as to who will ultimately inherit a farm because of not recognising freedom of testation (right to dispose of one's land by will). Firstly, this is a gross generalisation of observations. Bruce and Dornier (1981), in fact do note that amongst the Lozi some categories of land are held absolutely and are inheritable. It has also been pointed out that land under ones cultivation or occupation is held individually and is inheritable. Who it is actually passed over to is a question of patrilineal or matrilineal traditions. These traditions have their origins and specific contexts. Therefore, to say prima facie that a system where only children inherit their parent's property is better than one where nephews/nieces are the heirs of their uncle's/aunt's property is not to be objective. Similarly, on the face of it, it cannot be said that the use of a lawyer and a will (testation) to handover property is better than entrusting the same in a matrikin or patrikin. What should be questioned is whether the culture and logic behind the latter practice has changed. However, current practices point otherwise. Property grabbing has continued in both urban and rural areas regardless of the wills.

Secondly, the widespread ignoring of testation is an indication of clash of cultures, arising from adopting foreign concepts or instruments that conflict with tradition. This is not saying such acts as property grabbing should be condoned, but rather that unbridled adoption of foreign concepts into the Zambian law system should be checked. Unless a legitimate, long-standing, and well-understood tradition or practice is completely out of tune with the general public feelings and norms, it is unwise and expensive to abandon it for a completely new one. Where it is necessary for a practice to be discontinued forthwith, rather than just tell people to stop such a tradition, the people should be sensitised and couched to change.

6. CAUSE OF ENVIRONMENTAL DEGRADATION

This is also a case of over generalisation. Those systems that degrade are exceptions rather than a general rule. The notion that "... freedom in a commons brings ruin all ..." (Hardin, 1968) has been rebutted by several authors. In common-property unlike open-access regimes, members of a recognised group or community have a legal right to benefit and exclude others from using the common resource.

Dekker (2003) observes that:

There is currently sufficient evidence that indigenous people are very well able to manage resources in a sustainable way. These people are generally well aware of the threats to their

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environment learned during hundreds of years of living in that environment. Although there are some exceptions, they seldom will overgraze common land because they simply know that they should respect this most valuable source to keep their main asset (livestock) in good shape.

One study in northern Zambia reported that there was no evidence of any measurable soil loss from chitemene fields when it was practised by cutting of tree branches instead of cutting the entire tree. The study further noted that semi- and permanent- cultivation in fact evidenced more soil loss than the branch cutting chitemene system.

Indigenous cultivation systems involve leaving tracts of land fallow for sometime after loss of soil fertility and opening new fields. However, this can only happen in areas that still have abundant virgin land. Where this is not possible, a farmer will be forced to use the land more intensively. Without appropriate resources including knowledge, this intensive use can lead to land degradation. If this occurred, can it directly be attributed to customary tenure? Can it not occur in leasehold or freehold tenure? Does statutory tenure come with a complete book of do's and don'ts? If so, is it possible to separate indigenous from learned knowledge, so that the 'non-degradation' can be directly linked to the learned knowledge?

The point being made here is that certain results cannot directly be attributable to the customary tenure system even in its broadest sense. Tenure simply defines the institutions for accessing, using, and disposing of specified land rights. Issues concerning resources such as knowledge, credit, technology, and infrastructure (e.g. roads) are beyond the scope of any land tenure system. Where land titling projects have been implemented as vehicles for increased agricultural production without taking into account these issues, at best the results have been really mixed.

7. DISCRIMINATES AGAINST WOMEN

Again, this problem is not restricted to the customary tenure systems alone. It is widespread. On the Zambian Land Act No. 29 of 1995, Machina (2002) observes that:

... in theory, the Lands Act does not discriminate against women. Women in Zambia can apply for any land in any part of the country, just like their male counterparts. The law however, ignores the long historical reality of an unequal society in which women have not had access, ownership, or control over land. It assumes that there is gender equality in land. Hence, the law has no gender sensitive framework under which this imbalance can be checked and corrected.

A study on women's rights in eastern and southern Africa (Ikdahl et al, 2005) also notes (emphasis own) thus:

Statistics from Kenya showing that only 5-7 % of the registered rights-holders are women demonstrate how **formal and informal customary laws** related to land transactions in family, marriage and inheritance matters often have a spill-over effect on registration of land rights that is detrimental to women.

The above indicates that gender insensitivity is not a preserve of customary tenure alone. Even statutory tenure suffers from it. One thing should be pointed out though. Single women

(widowed, unmarried, or divorced) always do own land for their sustenance under customary tenure. When a woman marries, it is generally believed that her rights to land are overtaken by the husband under both patrilocal and matrilineal systems. What is forgotten though is that under subsistence farming systems, labour largely comes from the family. Therefore, instead of splitting that labour between a woman's and her husband's fields, the labour is focussed on one field. Since the husband will often do the harder work of clearing the field such as lopping trees under chitemene systems, whether the field belongs to the wife, husband, or the family, it would appear as if it belonged to the husband.

There are even cases where women, whose husbands are not in farming, own land for food production, where a woman would get a portion of or the entire husband's field after divorce or husband's death, or where husband and wife have separate fields. In the latter case, often the husband's field is used to produce for sale, and the wife's for household consumption. How widespread these practices are needs further investigation but they cast doubts on the correctness of the general perception. It should also be noted that in Zambia there are a varying complexity of customary tenure practices and rights and that it would not be appropriate sometimes to generalise too much.

8. EFFECTS OF THE MYTHS

The perceptions that customary tenure does not provide for individual ownership, lacks security, has weak management structures, and discriminates against women have in part led to the perpetuation of the dual tenure system in Zambia. Although it constitutes over eighty five percent of the total land area in Zambia and contributes two thirds of marketed crops and over eighty percent of national livestock, land under customary tenure continues to receive only minimal support from government both legally and economically (Mulolwa, 2002). It can be said in general that the effects of this continued neglect of customary tenure by successive governments have been:

- Lack of structural, financial and legal support
- Perceived generally as inadequate and inefficient in this era especially
- Abandonment of well understood practices and structures
- Adoption of incompatible unsustainable foreign systems

Although customary tenure is recognised at law (Land Act No. 29 of 1995, section 7(1)), there has been no practical effort from government to strengthen the capacity of customary institutions for administering land. No land in a customary area can be alienated without prior consent of the chief in whose area the land is situated. Money that is raised from taxing leaseholds in a customary area goes to the central treasury and therefore does not directly benefit the chieftdom. No one can expect these institutions to effectively administer land without the requisite resources. When inadequacies are noticed in traditional land administration, these are used to justify and confirm the supremacy of leasehold tenure.

The colonial legacy of looking at indigenous people as being incapable of managing themselves and ring-fencing them into native reserves lingers on. Now customary tenure is

denigrated as being too inadequate and inefficient for this era not through colonial misconceptions but through 'elitist modernism'. It is more modern to be a leaseholder than a customary landholder. Henceforth, there are two classes of landholders, one for the elites the other for the 'natives', those who should be thought for. Truly, government's thinking is also in this line as evidenced by the cosmetic changes made to the land laws since independence and failure to seriously re-look at and rethink post independence land tenure. The Land Act, for instance, provides for conversion of customary tenure to leasehold but not vice versa. It can be inferred that the intention is to ultimately have all land in Zambia under leasehold tenure.

The question begging answers then is why abandon a system that is not only pervasive but is also legitimate, well-understood (by locals), and has a number of good aspects. This is not to say leasehold does not have its good aspects. The main issue is that this tenure has its roots in pre-independence racial segregation, which was one of the main issues for the 'independence struggle'. At independence, very few indigenous Zambians, if any, had statutory title to land. The majority still relied on customary tenure, and it is only fitting that the future of any national land tenure system should have relied heavily on the former. The fact the customary tenure is pervasive, legitimate, and well understood, against a background of a tenure system that was designed for a minority and was fought against, is surely sufficient justification for its (customary tenure) continuation.

The continuation with the dual system of tenure with a strong intent on replacing customary with leasehold tenure has had a number of problems. It has raised insecurity of tenure in customary areas and has contributed to conflicts over land, as it is difficult where land is not developed to know whether the land is under leasehold or customary tenure. Leasehold tenure is proving to be unsustainable. There is not adequate financial assistance to the supporting government institutions. The institutions are highly centralised and thus not easily accessible. The process of acquiring land is long, fraught with delays, and is very costly for most Zambians (Mulolwa, 2002). It fails to cater for the disadvantaged in society as it relies heavily on the market in allocating resources. The Land Act, section 4(1), notes that the President cannot alienate land to any person without first receiving money for the alienation and the renting (ground rent) of the land. Above all very few Zambians are aware of the intricacies of the process of acquiring land.

9. DISCUSSION AND WAY FORWARD

It is clear that perceptions of customary tenure are in some cases just wrong and in some other cases over generalised or not inherent to customary tenure alone. Lack of individual ownership and security are just incorrect views of aspects of customary tenure. Individual rights can exist concurrently with other rights and an individual can have at the same time rights to communal resources. Adequate tenure security is also evident in investments in permanent land improvements. Hindrance of agricultural development because of uncertain inheritance and cause for environmental degradation are over generalisations of observations. There are cases of certain and clear lines of inheritance. Further, the fact that one system of inheritance uses lawyers whilst the other uses traditional administrators does not make one

system more certain or better than the other. As with inheritance, there are cases where customary tenure has been found to be sufficiently protective of land resources.

As regards weak management structures/institutions and discrimination against women, it can be said that these views do not result specifically from and are not limited to customary tenure. The failure of customary tenure structures to react to internal and external pressures can be attributable to lack of resources such as money and expertise. This can affect both customary tenure and leasehold tenure institutions. It is pointed to above that leasehold tenure is becoming unsustainable due to a number of problems. These problems have come to the fore because the supporting institutions are failing to meet the needs of a growing population and foreign investments. Similarly, the study from eastern and southern Africa on women rights indicates, discrimination can have roots from both customs and formal law.

There is also a contradiction in actions on the part of successive governments. Whilst they quietly support leasehold tenure to ultimately be the only system of tenure in Zambia, they have continued to construct infrastructure such as clinics, schools, and boreholes in customary areas. To a large extent, this has only worked to legitimise and to raise the level of tenure security of the communities in which such infrastructure has been built.

The above discourse suggests that when people acquire land from an institution (formal or informal) perceived to be legitimate and capable of protecting them from adverse possession, they can invest in improving their land regardless of whether they have title or not. By extension therefore, it can be said that security of tenure is established neither by recording of rights, demarcation of land, nor award of title, but more by perception backed by legitimate and capable institutions. The three instruments certainly help in making tenure more explicit but are not prerequisites for tenure security.

Customary tenure per se is not a hindrance to agricultural development nor is it a cause of environmental degradation. Further, the problems of weak institutions and discrimination against women are not inherent in, specific, or limited to, customary tenure. These shortcomings therefore should not be used as justification for promoting foreign tenure systems at the expense of indigenous ones that are both pervasive and generally well understood. These systems support a wide range of functions. What should be advocated is to work on the weaknesses of customary tenure systems (improvement approach) in order to generate a system that is rooted in the cultures and norms of the people, reflects who they are and their aspirations, and provides entitlement to land for all inclusive of women and the minority.

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GLOSSARY OF TERMS

Matrilineal: When descent is counted along the mother's line (grandmother-mother-daughter-granddaughter). Even though descent is counted from mother to daughter, matrilineal inheritance is normally transferred from man to man: not from father to son, but from a man to his sister's son (nephew).

Patrilineal: When descent (and inheritance) follow the father's line (grandfather to father to son to grandson).

Patrilocal: When husband and wife, after marriage, move to the husband's kin's home to live.

Matrilocal: When a man and woman, after they marry, move to the woman's home to live.

BIOGRAPHICAL NOTES

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