

Assessing the adequacy and effectiveness of the current legal and institutional framework for a devolved land administration system in Zimbabwe.

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Abstract- Zimbabwe has been implementing devolution as espoused in the constitution of the country (Constitution of Zimbabwe, Amendment (20) Act 2013; Section 264(1)). This has been expressed in unequivocal terms and progress has been noted in local governance devolution. The same cannot be said of devolution of land administration. Yet the same has been touted as a solution to some of the main challenges in land administration in Zimbabwe. This had put the systems meant to support the devolution of land administration under the spotlight. The paper sought to examine the adequacy of the legal and institutional framework for a devolved land administration system in Zimbabwe. The paper relied on secondary data with the National Constitution serving as the principal document. Analysis was anchored by lessons drawn from Kenya. Findings showed that the legal and institutional framework in Zimbabwe is sub-optimal as it does not effectively give authority to local governance structures. In the context of agricultural land, authority still resides at the top with the Minister wielding a great deal of power. If anything, the hitherto powerful traditional leadership has been left with little say in and allocation. The Zimbabwe Land Commission despite being brought about by the new Constitution lack independence to act with the Minister having great influence over the body. The study concludes that the legal and institutional framework in Zimbabwe is inadequate to support a devolved land administration system.

Index Terms- Constitution, devolution, governance, land administration

I. INTRODUCTION

Land administration serves as a suite of tools that operationalises the instruments of land policy. In the context of the current study, land administration is conceptualised as the process of defining, recording and disseminating ownership related information, land value as well as utilization as regulated by the implementation of land management policies (UNECE, 1996). This conceptualisation tried to summarize the relationship that exists between tools and policies exceptionally well (Van der Molen et al, 2008). Land administration is thus a central concept in land governance and one that has proven to be a critical success factor

in the same context. Expectedly, a lot of attention has been given to land administration with calls being made for devolution of land administration especially in developing countries (Subedi, 2016). The case for devolution of land administration is predicated on the understanding that the model recognises the importance of local knowledge and responsibility thereby allowing member controlled institutions space to participate in land administration. The model is thus highly pragmatic recognising the shortcomings of the central government with regards to resources and capacity to effectively administer land which is a political and budgetary reality. Subsequently, devolution has dominated the discourse around land administration at global, continental, regional and national levels (World Bank, 2008).

Trends in land administration attest to the utility of devolved land administration. Hitherto, land tenure systems on the African continent had for long been characterised by strong and centralised state control over both management and administration of land. This has proven sub-optimal with various problems being noted. Cotulla, Toulmin and Hesse (2004) note that a combination of inadequacy of legislative models as well as the state's incapability to fully sustain and manage the land reform and other relevant resources resulted in a proliferation of various informal decentralised systems. More recently however, there have been efforts to adopt land laws and policies that provide greater decentralisation in land administration amongst African countries. Boone et al. (2016) note that countries like Kenya, Sudan and Botswana have seriously pursued devolution policies in land administration. Kenya's 2010 Constitution through the 2012 Land Acts restructured institutions culminating in the devolution of these to 47 county governments (Land Commission Act, 2012). Regulatory and oversight authority were vested in the nonpartisan and independent National Land Commission. Similarly, in Sudan, the Rural Land Governance Project provided support to the South Sudan Land Commission while County Land Authorities were set up to administer land.

More specifically, Ethiopia has embraced devolved land administration with the devolution of land administration is taking place at state level where land administration is undertaken autonomously (Wily, 2003). Such cases are an indication that

progress has varied across context (FAO, 2002). However, Cotula et al. (2004) notes that implementation has been largely slow in most cases and it has been marred by ambiguities and inconsistencies between laws and policies on devolution more so in countries where different players have driven the devolution process. In Burkina Faso, despite legislation promulgated in 1998 providing a solid foundation for the establishment of new and better local governments with responsibilities of managing natural resources and land, the old village level institutions from the 1980s are still in place with agrarian legislation still validating them (Reorganisation Agraire et Fonciere, amended 1996) (FAO, 2002).

In Zimbabwe, devolution has been a topical issue and the 2013 constitution provides fully for a devolved model of government in Zimbabwe (Constitution of the Republic of Zimbabwe, 2013). The Lancaster House Constitution hitherto in place in Zimbabwe provided for a unitary sort of government with little recognition for provincial and local governments which only exercised power delegated to them by the central government. Yet, the current state of affairs with regards to land administration mimics that of the colonial era where there is little or no local authority participation in land administration. The land administration system remains centralized, rigid and highly bureaucratic. This lack of local stakeholder or community participation has culminated in insecurity of tenure, ambiguous property rights definition and failure to effectively employ land reform as a vehicle for fostering development.

Land administration in Zimbabwe has been far from optimum with various issues blighting land holders including lack of security of tenure. Jacobs and Chavunduka (2003) note that land administration in Zimbabwe has been characterised by lack of accountability, lack of transparency, fragmentation, inadequate administrative capacity and poor information quality. Consequently, challenges like corruption particularly in matters of land allocation have been observed in Zimbabwe (Matondi, 2013). Given that the Zimbabwean economy is agrarian-based, it is necessary that land administration is optimum. This is more so given the interaction between land administration and economic development as noted by Subedi (2016). Devolution of land administration has been shown to help optimise land administration (Wily, 2003; Food and Agriculture Organisation (FAO), 2016). The same has been touted as a solution. Despite the Zimbabwean government driving towards full implementation of the devolution policy as per constitution, land administration remains poor. The need to fully implement devolved land administration in Zimbabwe has been clearly demonstrated. However, there is little in extant literature regarding the adequacy and effectiveness of the legal and institutional framework for a devolved land administration system in Zimbabwe. It is against such a background that this paper seeks to thoroughly assess the adequacy and effectiveness of the legal and institutional framework for a devolved land administration system model in Zimbabwe.

II. STATEMENT OF THE PROBLEM

Land administration in Zimbabwe has been far from optimum with various issues blighting land holders including lack of security of

tenure. Jacobs and Chavunduka (2003) note that land administration in Zimbabwe has been characterised by lack of accountability, lack of transparency, fragmentation, inadequate administrative capacity and poor information quality. Given that the Zimbabwean economy is agrarian-based, it is necessary that land administration is optimum. This is more so given the interaction between land administration and economic development as noted by Subedi (2016). Devolution of land administration has been shown to help optimise land administration (Wily, 2003). The efforts made across the continent to decentralise land administration are evidence of this. Despite the Zimbabwean government driving towards full implementation of the devolution policy as per constitution, there hasn't been much progress in devolution of land administration with chaos subsisting in this regard. It is important that the necessary support systems are in place and legal and institutional frameworks are arguably the most important systems in this context. As such their adequacy is of paramount importance. Given the apparent dearth of evidence on the adequacy of the institutional and legal frameworks for the devolution of land administration in Zimbabwe, the current paper examines the adequacy of these frameworks.

III. REVIEW OF RELATED LITERATURE

A. *Devolution in theory*

Devolution is concept that has been around for some time and the same has proven to be a pervasive one. Devolution can be understood to be a form of decentralisation. Decentralisation may take the form of deconcentration or devolution. The current study is interested in devolution which is conceptualised as entailing giving local stakeholders more independent powers over public service delivery. White and Smoke (2005) state that devolved administrations often give more authority and importance to resources management and policy decisions than decentralised ones. Devolution can be expected to result in enhanced problem solving capacity, better infrastructure service provision, better chances for local development be it economic or social as well as the application of more appropriate initiatives. The materialisation of the benefits that devolution promises is conditional with factors like capacity of local stakeholder and availability of resources influencing the same. In understanding outcomes of implementation, it is prudent to consider the conditions under which devolution is applied.

B. *Legal and institutional framework for a devolved land administration system: Lessons from Kenya*

In this section I rely heavily on the work of Boone et al. who have analysed land Law reform in Kenya extensively. As Dale and McLaughlin (1999) note, Land administration processes are normally influenced and governed by national culture while land administration-related institutional arrangements influenced by the systems which are centralisation and decentralisation. A lot of attention has been given to decentralisation and by extension devolution in recent times owing to its use in enhancing public services in emerging economies. The same requires land administration operations to be transferred to the local government levels. A devolved system of land administration lowers the need for coordination, creates opportunities for local populations and is

likely to promote enhanced administration and management (Food and Agriculture Organisation of the United Nations, FAO, 2017).

Legal and institutions framework relate to the set of services and laws that constitute a certain social aspect within a jurisdiction. In the current context, these laws and services make up land administration. The current section looks at the institutional and legal frameworks applicable to and administration. Such frameworks are very important to land administration as they are capable of ensuring that outcomes of any systems that are implemented are optimised notwithstanding the suitability of these systems to contexts. Kenya has led the way in making provisions for a devolved land administration system. The government in Kenya has attended to institutional and legal aspects of the new land administration system first and this underscores the importance of such aspects in the land administration matrix (The Land Commission Act, 2012). However, as indicated earlier in the section, having these frameworks in place is not enough as their utility will certainly be influenced by the conditions under which these frameworks are implemented. Boone et al. (2019) note that failure to operationalise the functional aspects of legal and institutional frameworks around land administration will render these ineffective in the pursuit of set objectives. This operationalisation can fail owing to various reasons including the actual abuse of these legal and institutional frameworks for purposes other than those for which they were put in place. Their utility with thus depend on the manner in which they are applied in practice.

The crafting and implementation of the new land policy in Kenya was a hard thought decision that was mainly informed by various challenges and recommendations by different commission established to probe certain related aspects. What is evident is that the Kenyan government was for quite some time under pressure to reform the land administration system (Rogers, 1973). Land disputes went for a long time without being resolved with some dating back as far as the colonial era (Boone, 2016). A new and revamped land policy was thus a necessity and the government had to act. Land administration in Kenya was hitherto a minefield, a matter that was capable of exploding and damaging the Kenyan society. Land was effectively weaponised by some unscrupulous leaders against their political opponents while at the same time using the same to buy loyalty and allegiance from certain members of the society.

Various commissions of inquiry made recommendations with the general idea put across being that the country needed to reform its land administration and management system. These include the Presidential Commission of Inquiry into the Land Law System of Kenya (Njonjo Commission), the Constitution of Kenya Review Commission (CKRC) as well as the Presidential Commission of Inquiry into Illegal and/or irregular Allocation of Public Land (Ndung'u Commission) (Di Matteo, 2015). Other stakeholder groups also put forward recommendations with regards to reforming the land laws in Kenya. A brief of the recommended new institutional framework by the Kenya Land Alliance and Institution of Surveyors of Kenya both of which are key stakeholders summarises the ideal underpinning principles of the same as follows:

- i. Coordination of all land delivery systems in the devolved government levels as well as devolved land administration and management;
- ii. Public –Private-Civil society partnerships to ensure that the implementation of the land policy is as inclusive as possible;
- iii. A robust monitoring and evaluation system to track progress made in the land policy implementation and offer timely feedback to both the public and all other stakeholder;
- iv. Guarantee of security of tenure for all land categories;
- v. Clear and unambiguous land rights for all categories;
- vi. A robust framework for the transfer and transmission of different land rights tailored to economic and cultural contexts;
- vii. Sustainable management and regulation of all land categories;
- viii. Accurate and highly accessible information systems for land administration; and
- ix. Availability of socially acceptable land dispute resolution mechanism that are cost- and time-effective

The already polarised Kenyan society was further sunk into chaos during the 2008 election in which many lost their lives while others were injured (Bunting, 2008). The subsequent political events saw the country enter into a government of national Unity which worked to produce a new constitution for Kenya. The 2010 Constitution in Kenya gave birth to 47 new counties which were empowered to control certain important aspects of land administration (Boone & Manji, 2016). These include control and management of public lands as well as crafting of databases for more effective management of land to combat ills like corruption and land dispossession, both rampant at the time. Suffice to say the Kenyan government has made efforts to optimise the devolved land administration system in place.

This was reinforced two years later as the country passed three new land laws (National land Commission Act, 2012). Through the National Land Commission Act, 2012, the hitherto powerful government Ministry of Lands was stripped of some of its powers which were then given to the related National Land Commission provided for by the aforementioned law as per new constitution. The constitutional provisions for the Commission envisaged the same to be an independent commission which would oversee land administration matter through a network of subsidiary and equally independent bodies cascading down to county level.

Clearly, the National Land Policy in Kenya currently recognises the important of decentralising land administration as well as the important role that the National Land Commission can play in this regard. However, having the NLC in place alone was not enough as the same needed to be empowered to create and build its land reform implementation capacity by availing funding, human resources, and management information systems as well as the transformation of the environment. While Kenya has led the way in formulating the ideal legal and institutional frameworks to support a devolved land administration system, bureaucratic complexity, opacity in management, high transaction costs and substantial disuse have remained challenges (Boone et al., 2016a).

Even with the new land law and relevant institutions in place, land has remained highly contested in Kenya. These contestations have manifested at all levels including at National level where the executive branch and the Ministry of Lands strongly fought against the National Land Commission (Mulevu, 2017). Various tactics were employed in this regard including withholding of funding, obstructionism as well as withholding of important information (Boone et al., 2019). All these are potent tactics in paralysed a body like the NLC. Land is a very important resource globally and these contestations can be expected as control of land transposes to power in the patronage systems that have corroded democratic institutions in Africa. The integration of certain staffers from the Ministry of Lands to the NLC served to perpetuate the old challenges as the same underlying causes were simply passed on the new body. This was a clear failure to recognise the human factor in whatever challenge hindered the functional of the Ministry and the old land administration system. Efforts to address would have gone a long in enhancing the chances of success of the new body and system.

Between the years 2012 and 2015 constitutional provisions were violated and the transfer of authority and power to the NLC was delayed (Boone et al., 2014). These challenges spilled into the courts with the NLC approaching the highest court in Kenya (Supreme Court) where an advisory opinion was sought on various outstanding matters relating the new land administration systems as well as the transition (The National Land Commission, 2012). Ironically, the court only confirmed the contested powers of the Ministry of Lands mostly through inherent “ambiguities and loopholes” as well as contradiction in the new land laws (Rickard, 2020). This is a typical example of situations where laws are abused for the benefit of certain parties. The ensuing Land Law Amendment Act of 2016 not only gave the Ministry its powers back but rather threatened the devolution of land administration in Kenya.

IV. METHODOLOGY

The paper relies on secondary data in undertaking an analysis of the legal framework that underpins the devolution of land administration in Zimbabwe. The legal framework was analysed with special reference to the case of Kenya where an in-depth research on devolution of land administration has been undertaken over time by Boon et al. (2016). The authors’ submissions are rich and based on intensive field work that was undertaken in the aftermath of the land law reform in Kenya. Available secondary data was relied on and this was drawn from various publicly available sources with the Constitution being the principal document in this regard.

V. DEVOLUTION AS APPLIED IN LAND ADMINISTRATION IN ZIMBABWE

In this section we critically analyse the legal institutional framework for a devolved land administration in Zimbabwe. In a move away from this approach, the Zimbabwean government identified devolution as a key pillar in pursuit of its development goals. Devolution sees citizens being involved in setting the national development agenda including at community level. Devolution is enshrined in Section 264 of the Constitution of

Zimbabwe as well as other subsidiary pieces of legislation including the Urban Councils Act (Chapter 29:15) (Constitution of Zimbabwe, 2013). However, the subsequent implementation process has been marred by accusations and disagreements mostly regarding the readiness and willingness of the ruling party to see the process through as well as the willingness to relinquish authority to certain institutions as per constitutional provisions.

One of the main issues relates to control or authority over land and other natural resources. Meanwhile as Jacobs and Chavhunduka (2003) note land administration in Zimbabwe remains sub-optimal in its functionality. Zimbabwe is thus in need of a new land administration system in order to effectively harness agricultural sector development. This is highly necessary as the land reform programme in Zimbabwe reconfigured land ownership and use in the country. There 145 000 smallholder farmer that occupy 4.1 million hectares and 23 000 medium-scale farmers on 3.5 million hectares (http://www.pbs.org/newshour/bb/africa/land/gp_zimbabwe.html). This is as opposed to 45000 large scale farmers that dominated prior to the land redistribution exercise. It is therefore difficult with the current approach to know who has land and where as there are various illegal allocations as well as unclear boundary demarcations.

Disputes over land still persist together with arbitrary repossession which have sometimes been described as being politically motivated. For instance, there have been cases in the local courts relating to disputes over ownership of land in Zimbabwe. The case of Esidakeni farm in Matabeleland is a good example of land dispute and one where the Minister expropriated the farm with ease (Constitution of Zimbabwe, 2013). Similarly, former Youth Minister Saviour Kasukuwere losing their farms allocated under the land reform programme after the state reposed the same (<https://allafrica.com/stories/202001230652.html>). These challenges have been attributed to the current land administration approaches.

The 1990 Land Policy in Zimbabwe had been rendered irrelevant by the various changes in the Zimbabwean land administration context as events like the land reform and wide urbanisation had overtaken the same. A report by the Zimbabwe National Land Commission proved and shed light to massive changes brought about by the land reform programme and how crucial it is to resolve them through the national land policy which should be youth- and gender-sensitive and futuristic in orientation.

VI. ADEQUACY AND EFFECTIVENESS OF THE LEGAL AND INSTITUTIONAL FRAMEWORK: A CRITICAL ANALYSIS

The 2013 Constitution in Zimbabwe through section 296 facilitated the establishment of the Zimbabwe Land Commission which is meant to state land acquisition; state land disposal; to settle every individual as well as alienation land for Agricultural purposes, control and monitor the subdivision of land and the lease of land meant for other purposes apart from Agricultural use;

reallocation of land in order to avoid the biased allocation of many plots of land to one individual and assess the land size of the same; to amend Agricultural Land Settlement Act [Chapter 20:01] and the Rural Land Act [Chapter 20:18], to modify the Land Acquisition Act [Chapter 20:10], and to deal and resolve other matters arising due to the previously mentioned case (Constitution of Zimbabwe, 2013). However, members of the Land Commission are appointed by the President with their removal from office being subject to Section 237 of the constitution which governs the same in case of all Chapter 12 institutions in Zimbabwe.

Just like is observed in the case of Kenya, the Ministry of Lands in Zimbabwe has remained powerful with the land Commission largely limited to inquiries regarding parceling out of state land illegally or irregularly more so in Urban areas where home seekers have often been duped by 'land barons' of their hard earned cash only to be evicted. Most of the constitutional provision and guidelines in the 2013 Constitution pertaining to the activities of the Land Commission subordinate the Commission to the Ministry of lands from which approval should be sought prior to undertaking certain activities. For instance, Section 297 (2) state that "The Zimbabwe Land Commission, with the approval of the Minister responsible for land, may make regulations for any of the purposes set out in subsection" (Constitution of Zimbabwe, 2013). On the other hand, Section 297 (3) states that "The Zimbabwe Land Commission must exercise its functions in accordance with any general written policy directives which the Minister responsible for land may give it". This is speaking to the little room that the Zimbabwe Land Commission may have to manoeuvre within the land administration system in Zimbabwe. Just for perspective, in Kenya the National Land Commission was so empowered that it even dragged the Ministry of Lands to court after the latter interfered and attempted to impede its activities in the country (Boone et al., 2016).

The FAO report on the stakeholder meeting held in Bulawayo focusing on the gender-sensitive land policy framework under development highlighted various issues that stand as challenges to the functionality of the current land policy and its subsidiary frameworks (FAO, 2020). One of these relates to the misalignment of the local land policy framework with best practices in land administration internationally. This is an important aspect particularly in the current analysis where the case of Kenya was considered. Kenya is viewed as having made efforts to devolve land administration and can therefore be relied on when evaluating institutional frameworks in this regard.

Contestations have also subsisted in Zimbabwe owing mainly to concurrent role of chiefs, the Zimbabwe Land Commission and other state officials including ministers of state which have been largely repugnant with the constitutional imperatives (FAO, 2020). Further, the constitutional provisions for land administration devolution do not recognise Provincial and District Redistribution Land Committees nor does it provide for the formation of these to aid the Zimbabwe Land Commission. Ironically, these Committees have remained in place are more powerful in practice particular in the allocation of agricultural land. Failure to recognise these in the Constitution (Section 297) is itself a challenge and runs contrary to the fundamental principles

of devolution (Constitution of Zimbabwe, 2013). Chiefs through the Chiefs' Council have also lamented the stripping of powers to allocate land and serve as custodians of the same by the new land administration systems describing the same as "the death of chieftaincy" in Zimbabwe (FAO, 2020). Suffice to say there are a lot of grey areas in the constitution especially around the Zimbabwe Land Commission and its actual powers with regards to land allocation. The role of the Zimbabwe Land Commission and the inherent powers can be summed up being limited to making recommendations or implementing certain Ministerial and Government directives including undertaking land audits.

In Zimbabwe, a land audit was undertaken by a commission headed by Justice Uchena. Despite the audit being complete, the report was released much late albeit detailing some important ills and challenges in the current land administration and management particularly in urban areas (Uchena Commission Report, 2019). One key takeaway from the same however is that the land audit mainly focused on illegal sale of government land in urban centres with little being done with regards to agricultural land. In the case of land audits, issues around funding have sometimes proven to hamstring such operations. Funding and the forms of resource allocation are critical in the independent functioning of Chapter 12 bodies in Zimbabwe as they are in other countries (Constitution of Zimbabwe, 2013). A FAO stakeholders meeting report indicated that land administration in Zimbabwe suffered from a serious land of information systems to support data integrity and security (FAO, 2020). It is no surprise then that in attempts to curtail the functionality of these bodies, withholding funding has been the favourite tactic by the powers that be. The same is noted in Kenya where funding and information were withheld from the National Land Commission by both the Ministry of Lands and the Executive branch of government (Boone et al., 2019).

VII. CONCLUSIONS AND RECOMMENDATIONS

The discussion in the paper clearly shows that the endeavor to have in place a devolved land administration system may be difficult to materialise based on the current legal and institutional framework. The legal provisions for such a system fall short of facilitating the full implementation of devolution in the context of land administration. Authority still resides at the top of the chain with little of it having been passed down to local structures. This is more so in the most important aspects relating to allocation of agricultural land. Land allocation is still firmly under the Ministry of Land and Rural Resettlement with the Ministry retaining a lot of power (Constitution of Zimbabwe, 2013). The executive branch in Zimbabwe remains highly powerful with power contorted at the top with regards to land administration. While the national Constitution provides for the establishment of Zimbabwe Land Commission, the same is not adequately empowered to take authority and power in land matters down to the local governance structures (National Land Commission Act, 2017). The National Land Committee in Kenya on the contrary has been empowered to come up with subsidiary structures down to county level thereby putting in a position to effectively implement decentralisation of land administration in the country (National Land Commission, 2016). It is necessary that the power and role of the Zimbabwe Land Commission is revisited so as to ensure that the Commission

is empowered enough to effectively devolve the system of land administration down to local governance levels. This may include formation of local land committee which incorporate cultural and traditional players like chiefs to avoid conflict and ensure a unified approach to land administration. The constitutional provisions that subordinate the Land Commission to the Minister needs to be amended as these curtail the power and independence of the Commission especially given that the Minister is an appointee of the sitting president.

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