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# Property, Public or Common, in Post-Colonial Societies: Studying Zimbabwe's Communal Lands

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# Property, Public or Common, in Post-Colonial Societies: Studying Zimbabwe's Communal Lands

Zvikomborero Chadambuka

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### 1. Introduction

- 1 Before the colonial enterprise introduced western private property to many African countries, customary law systems of land tenure were in place. Colonial regulation did not fully stamp out these systems of land tenure, just as it did not fully stamp out other customary ways of life.
- 2 Zimbabwe was colonized by Britain in 1890. It was then known as Southern Rhodesia. Colonial authorities put in place an apartheid regime which sought to force native Africans into the settler wage economy as cheap labor.<sup>1</sup> The native population was relegated to the margins of social and political activity as they were deprived of the vote and had various restrictions placed on their liberty. In 1965, Britain sought to withdraw from the colonial enterprise. Colonial settlers refused to allow for majority rule and the establishment of full democracy—in 1965, they declared themselves independent of Britain and continued to run Rhodesia (the former Northern Rhodesia, now known as Zambia, had attained independence in 1964) under a settler minority rule system.<sup>2</sup> It was only upon full independence in 1980—after a protracted military struggle for

liberation—that a democratic system in which all persons had a meaningful vote was established.

- 3 From the colonial period through to independence in 1980 and up until around 2000, Zimbabwe's rural areas were divided into two areas. There was relatively fertile commercial farmland which was mainly owned as large farms by European descendants of colonial settlers. Commercial farmland was private property. Then there were communal areas to which colonial authorities had relegated native African communities.<sup>3</sup> Communal lands were in areas with high temperatures, low rainfall, poor soils and/or bad topography.<sup>4</sup> Landholdings in the overcrowded communal areas were tiny and were meant to be used for subsistence and small-scale farming.<sup>5</sup> Communal land was vested in the colonial state and hereditary traditional chiefs who administered the land and held it in trust for their communities, under the control of the colonial administration.<sup>6</sup>
- 4 Post-colonial Zimbabwe law replicated the colonial position by vesting communal land in the national president in his/her official capacity. Although different variants of customary allocation and governance of land have been employed post-independence, the formal titled owner of such land remains the president of the country. In 2000, the government of Zimbabwe embarked upon a program of land reform—the fast-track land resettlement program (FTLRP)—intended to correct the racially skewed distribution of fertile farmland. Having expropriated much of the erstwhile commercial farmland, the government resettled black farmers on that farmland. They gave the newly resettled farmers offer letters, which are understood as a prelude to occupation permits or 99-year leases.<sup>7</sup> Many resettled farmers still hold land on the basis only of the offer letters.<sup>8</sup> This is part of a variant of land tenure in which state land is held under the offer letter, permit or 99-year lease.
- 5 The state's ownership of communal land puts that land into public ownership. Such ownership is, in principle, by the general public, but in practice entails ownership rights exercised by political office-holders at the top of government.<sup>9</sup> It gives these rulers the right to exclude others from that property.<sup>10</sup> Rather than tying ownership rights to political office as public ownership does, common ownership ties ownership rights to group membership.<sup>11</sup> It provides

some kind of guarantee to each individual in the group that they “will not be excluded from the use or benefit of the land.”<sup>12</sup> In contemporary rural Zimbabwe, there is private property on commercial holdings that have not been compulsorily acquired. Compulsorily acquired farmland, that is, the resettlement areas, are public property. Communal land is both public property under the ownership of the state and common property under the purview of the particular customary group which holds rights over it. Many have also argued that, once allocated land in communal areas, allottees under customary systems have rights over their allocated portions that are much akin to private property, with a classical common property regime being confined to forestry and grazing lands in the communal area.<sup>13</sup>

- 6 This paper addresses the coexistence of different legal systems on communal land. The interaction between formal legal systems of land tenure and customary legal systems of land tenure creates questions as to the distribution of power over communal land between these legal systems and their respective governing institutions. Communal land's status as simultaneously public property under the president and common property under traditional chiefs in a customary law system has created political dysfunction by leaving the traditional authorities wholly beholden to whatever central government executive holds power. The dysfunction has only increased in the wake of a chaotic land resettlement program that increased uncertainty in both the legal classification of rural land and the authority of chiefs with respect to such land. Local democracy has also been rendered more subservient to political control from the center. The paper also discusses the efficiency, equity and sustainability challenges commonly attributed to customary land tenure schemes. It highlights that, in the context of Zimbabwe's communal lands and the abutting resettlement areas, it is the land's simultaneous status as public property and common property—and especially the status as public property—which creates an array of land tenure insecurities, inefficiencies and inequities. Customary tenure systems can deploy land allocation methods that increase use intensity in what are often locally sustainable and equitable ways. But these potential gains may go untapped because of broader tenure

insecurity due to the subservience of traditional authorities to central government authorities.

## **2. Property and land in Zimbabwe's constitutional framework**

- 7 The political system under colonialism substantially replicated the British system. It featured a largely ceremonial Governor, with most political power being held by a Prime Minister elected by parliament. The parliament was elected by the colonial settler minority, with the majority native population excluded from the electoral process.<sup>14</sup> The legal framework emanating from this legislature used land dispossession as a method of enrichment of the settler community and disempowerment of the native population.
- 8 In 1980, Zimbabwe attained independence under the negotiated Lancaster House Constitution which maintained a parliamentary system of government. Constitutional changes introduced in 1987 moved away from this system by introducing a powerful directly elected executive President. Political changes at the time—primarily the merger of the two parties which had fought for independence—also created one powerful political party, with minimal opposition. This concentration of power marked the emergence of an increasing tendency towards authoritarianism into the 1990s as opposition parties faced violence from government.<sup>15</sup> These political changes were accompanied by a number of changes in the land and property framework. Up until 1990, the ability of the Zimbabwe government to effect land reform had been constitutionally limited.<sup>16</sup> The first efforts towards land reform therefore emerged in the early 1990s. Those efforts were focused on reallocating land from descendants of colonial settlers to native Africans. Though there was no question that the issue of racially unjust land allocations needed to be resolved, the issue was not addressed as part of a broader reform of the land tenure scheme in the country. The opportunity to address the land issue as a broad matter of social and economic welfare was thus missed, and the land issue increasingly became a cudgel wielded by an authoritarian state to cling on to political power, particularly when a strong opposition party emerged in Zimbabwe in the late 1990s.

- 9 Beginning with the constitutional limitations on land reform, land was always regulated differently from other property in post-colonial Zimbabwe. Whereas there were constitutional protections against deprivation and expropriation of property except for clearly spelt out public interests, agricultural land was placed outside these protections as land rights were understood to reflect “fundamental and dominant political considerations of the day.”<sup>17</sup> The constitutional and statutory scheme for agricultural land gave massive control and regulatory “powers to a “reformist” state to respond directly to and address the consequences of historical dispossession, conquest-based acquisition and inequitable distribution of rights in land”—even “state power in compulsory land acquisition [left] very few remedies and protection to private landowners.”<sup>18</sup> That distinction—between massive state power over agricultural land and limited state power over other property—became more explicit in the post-2000 constitutional amendments to the Lancaster House Constitution and made its way into the 2013 Constitution of Zimbabwe.<sup>19</sup>
- 10 The result of the range of regulatory schemes deployed over Zimbabwean agricultural land in the colonial and post-colonial eras has been a set of classifications of agricultural land into private property, public property and common property.<sup>20</sup> Privately owned rural land includes the remaining privately owned farmland.<sup>21</sup> State-owned land—public property—has become the dominant group since the land resettlement program began; this includes resettlement areas as well as state forests and game reserves.<sup>22</sup> Resettlement farmers generally hold land under leases and other types of statutory permits from the state.<sup>23</sup> Land held in common relates to communal land substantially governed under customary law,<sup>24</sup> but communal land is also public property as it is owned by the state. In fact, communal land features the state with formal title over the land, the traditional community with rights over the same land,<sup>25</sup> and individuals and households with stronger rights over part of that same land<sup>26</sup>—for some, this entails communal land being simultaneously public, common and private property.<sup>27</sup>

### 3. Rural land and political power

- 11 The divide between public property and common property runs parallel to the two separate systems by which land governance occurs in Zimbabwe's communal areas. There is a system under the general law and one under customary law. Under the general law framework is the executive administrative system in terms of which the president appoints resident ministers, formerly referred to as provincial governors, for each of the country's 10 provinces. The resident ministers are at the head of an administrative structure featuring provincial administrators and below them district administrators (DAs). There is a more general local governance system featuring a local democracy, usually typified by local rural district councils (RDCs), electoral bodies of ward councilors elected using a pluralist majoritarian system.
- 12 Traditional chiefs run the customary system. Chiefs perform administrative services and engage in conflict resolution using customary law. To carry out these functions, chiefs appoint Headmen below them and, below these, appoint Kraalheads.<sup>28</sup> The office of chief is, as may be expected, hereditary rather than elected. The shona constitute a substantial majority of the population of Zimbabwe. By far the most common system by which claimants ascend to the chiefhood among them is a variant of the agnatic seniority system in which brothers succeed to the chiefhood ahead of sons. Over generations, the system has become such that there are a number of family groups that stake a claim whenever there arises a vacancy on the throne. The family group whose turn is deemed to have come (and that is often a matter on which there is heated contestation) then selects one of their own (and there is further contestation in the process of selecting this individual too) as their claimant to become chief. The Ndebele, who are the largest of Zimbabwe's ethnic minorities, tend to follow agnatic primogeniture in which a chief's successor is to be selected from that chief's children. But in all cases, it is the president who ultimately appoints a chief from among the claimants.
- 13 The broadly understood position is that chiefs hold the chiefdom's land in trust for their community and have, historically, allocated land

to community members.<sup>29</sup> In order to facilitate administrative control of the rural population, the colonial process entailed not just an alienation of native land, but also a merging of sovereignty and property by vesting title to communal land in the colonial state.<sup>30</sup> Given the unrestricted power or capacity associated with sovereignty, the fusion of property and sovereignty was used to justify unlimited state power in administering the communal lands.<sup>31</sup> African rural communities were thus “granted rights of use and occupation which exposed them to the naked authority of the colonial state.”<sup>32</sup> By contrast, private property rights shielded colonial settlers from undue state intervention.<sup>33</sup> The process of merging sovereignty and property was facilitated by the claim that customary tenure was “communal and excluded individual rights.”<sup>34</sup> This claim discounted the fact that tenure systems change in response to social and economic changes and the reality of local customary tenures’ dynamism and flexibility, including ignoring the fact that customary tenure recognized individual use rights.<sup>35</sup>

14 After independence from colonial rule, formal title to communal land remained in the state. The post-colonial state thus retained the colonial merger of property and sovereignty that perpetuated state power over communal residents and furthered the undemocratic relationship between the state and the rural populace by undermining local political processes in communal areas.<sup>36</sup> This approach views land as a source of sovereignty rather than as a productive resource,<sup>37</sup> with land tenure systems being designed to give the state greater control over land.<sup>38</sup>

15 The central government’s formal power over communal land in Zimbabwe is extremely strong. Communal land residents’ rights of use and occupation remain subject to the naked authority of the state. The President can publish statutory instruments declaring that some land is no longer communal land, and can do this without consulting the chief or populace. The Minister of Lands can, after consulting the local RDC, set aside any communal land for the establishment of a township, business center, irrigation scheme or any other purpose.<sup>39</sup> The Minister publishes a notice in the gazette describing the area to be set aside and ordering all occupants of the area to leave that area permanently with all their property within a



set period.<sup>40</sup> Chiefs and the populace need not be consulted during this process. If one refuses to leave, they can face criminal sanctions.

- 16 The president's formal ownership of vast swathes of rural land has undermined democratic politics in rural areas. This is especially so as presidential ownership of communal land is allied to a non-democratic traditional governance framework that is rooted in the appointment of traditional leaders through a conflictual process that almost always involves multiple claimants among and within family groups, with one of these claimants ultimately receiving presidential approval. A loyal cadre can therefore be chosen, and this cadre stays loyal for fear that their family groups' future claims to the chiefhood could otherwise be compromised.
- 17 Political manipulation of traditional leaders and the populace by political incumbents began at the very commencement of the modern state—at the very commencement of the colonial period. Native reserves, the precursors to communal areas, were established at colonialism's onset in the 1890s.<sup>41</sup> At that time, "traditional" structures were reorganized by colonial authorities.<sup>42</sup> They structured traditional authorities as a subordinate political system within the reserves and filled that system with leaders who were in concert with, or at least malleable to, the particular needs of the local colonial administration.<sup>43</sup>
- 18 There is growing evidence that access to agricultural land in Zimbabwe, in both resettlement areas and communal areas, has become a matter of political allegiance. Traditional leaders are increasingly subject to pressures from central government and from the ruling party.<sup>44</sup> Direct threats are issued by government and ruling party leaders against traditional leaders.<sup>45</sup> State salaries and benefits given to traditional leaders increase central government's leverage over them.<sup>46</sup> Opposition parties have been blocked from holding rallies unless they obtain letters from traditional leaders, which letters traditional leaders have allegedly been unwilling to provide or afraid to provide.<sup>47</sup> Reports have shown that traditional leaders, even though they are expressly prohibited by law from playing any role in elections, have been active in corralling the rural vote in favor of the ruling party.<sup>48</sup>

- 19 It is therefore no surprise that the Zimbabwe literature has long expressed the concern that the state uses the land tenure system to increase its influence, often through “increasing central state influence and control over customary tenures.”<sup>49</sup> More recently, this process has also occurred through the manner in which the expropriation and redistribution of land was carried out under the FTLRP.<sup>50</sup>
- 20 Initially, the state was not very active in exercising its extensive statutory powers in communal areas.<sup>51</sup> This was due to a fear of antagonizing the peasantry in the immediate post-colonial period, a time when the peasant resistance that had propelled them to power was still fresh in the minds of the new rulers.<sup>52</sup> The ruling party also received enthusiastic support from these areas in the immediate post-colonial period.<sup>53</sup>
- 21 The resettlement program seems to have provided a channel by which to insidiously increase central government influence and exercises of power in the communal areas. The colonial dualism in land tenure is replicated by the recent FTLRP.<sup>54</sup> Under this program, recipients of larger landholdings—meant to be engaged in commercial agriculture—are termed A2 recipients and hold the land under 99-year leases, or offer letters while waiting for the 99-year leases.<sup>55</sup> Those who received smaller plots, which have additional rights to some common grazing areas and are largely presumed to be for subsistence farming, are termed A1 recipients.<sup>56</sup> A1 lands cannot be sold, but are generally understood to be inheritable.<sup>57</sup> Traditional leaders have been empowered under the land policy and local government law to exercise administrative oversight in matters of natural resource and land use management and other low-level legal processes in A1 areas,<sup>58</sup> although that authority does not extend to land acquisition and allocation issues.<sup>59</sup> Traditional authorities have no power over A2 farms.<sup>60</sup> By contrast to the A1 situation, A2 lands’ 99 year-leases are meant serve as collateral for financing and, eventually, to allow for “transfer through a land market.”<sup>61</sup>
- 22 A1 recipients hold the land under permits from the DA’s office or under offer letters pending receipt of such permits.<sup>62</sup> This has similarities to the use and occupation rights of dwellers of communal

lands. The 2013 Constitution explicitly acknowledges state power to grant rights outside those ordinarily associated with property schemes under the common law, such as uniquely circumscribed rights of use and occupation.<sup>63</sup> But if they are to be successful, such fragmented use rights systems depend on legislative creation of security of tenure.<sup>64</sup> The absence of a legislative framework providing security of tenure creates serious tenurial insecurity in resettlement areas in Zimbabwe, much as in the communal lands.<sup>65</sup> At independence, post-colonial governors had the option of extending to the general public the stronger protections from undue state intervention with agricultural land that the colonial government had given to colonial settlers—with limitations to cater for the correction of historical imbalances. Yet, in carrying out the land resettlement program, the post-colonial regime preferred to extend more widely the insecurity of tenure that Africans in communal areas experienced.

- 23     Resettlement areas have introduced a politicized dynamic to rural Zimbabwe. Land administration and the issuance of tenure documents in resettled areas was coordinated by District Land Committees which were dominated by members of the ruling party and were directly subservient to the ruling party and the central government.<sup>66</sup> Thus, tenure was held only at the pleasure of ruling government forces. The violent process by which the resettlement program was carried out embedded violence into the rural world, creating a demand for subservience and aggressive shows of loyalty to the ruling party and the central government for those who were, or wanted to be, chief. The strengthened central government control over vast swathes of the rural countryside—the resettlement areas—also portended increasingly assertive state control over rural land in general. Thus, the relationship between central government and local chiefs was restructured firmly in favor of central government.
- 24     The increase in state power over traditional leadership was especially aggravated by the ambiguity of chiefs' control in resettlement areas. Traditional chiefs claimed historical control over resettlement lands. The government, in carrying out the resettlement program, avoided framing it as the return of lands to the chiefs.<sup>67</sup> To have a chance of central government authorities acceding in some way to such claims,

loyalty to those authorities was required. Even in precolonial times, the boundaries between chiefdoms were often disputed.<sup>68</sup> They were also frequently modified before and during the colonial era.<sup>69</sup> Retaking of former commercial farmlands reignited precolonial conflicts over land between some neighboring chiefs.<sup>70</sup> Given government's determinative power over the conflict and ultimate control of the land, this can only have generated greater subservience to government interests. Traditional governance over the deeply politicized resettlement areas likely influenced traditional leaders in ways that impacted how they governed their communal areas. Further, as chiefs have sought to assert their influence over these resettlement lands, they have come up against a government which has itself become more activist in land matters.

## 4. Customary tenure: Efficiency, equity and sustainability

- 25 Tenure defines “the rights and duties of people to each other with respect to the land” and connotes “a bundle of rights to use land and its products, by a clearly defined individual or group of individuals, possibly to the exclusion of others.”<sup>71</sup> Security of tenure connotes the certainty of continued use of the land and of protection of that usage from interference by others—this requires that the occupier's rights be clear and enforceable.<sup>72</sup>
- 26 Customary land tenure stands accused of undermining land tenure security and so creating inefficiency. The argument is that “communal control discourages long-term investment in land improvements [as] individual farmers, not having secure private rights to the land, may not be able to claim fully the returns on their investment.”<sup>73</sup> The lack of investment makes the land less productive than it would otherwise be (and further that it could potentially promote land degradation “to the extent that investments are required for conservation purposes”).<sup>74</sup> This argument constitutes the productive inefficiency claim.
- 27 Yet customary tenure can be very secure. The general understanding of customary land tenure in Zimbabwe “is that rights to land are an incident of political and social status. By virtue of membership in the

[group], every [member is] entitled to claim some land, from the ... chief, or from such political unit as exists in the absence of chiefly authority.”<sup>75</sup> While there is some variation across specific customary systems on the extent of community leaders' control over land relative to individual control,<sup>76</sup> farmers under communal systems typically have secure use and inheritance rights.<sup>77</sup> A chief has no power to banish a person from the chieftom. Land rarely gets taken away under customary law. Traditional leaders generally only take away land when the land has become abandoned or unused—they will do so to give it to another person who does not have land.<sup>78</sup> This is likely to facilitate efficient and sustainable use of land.

28 Customary tenure also provides a degree of flexibility in the range of rights that can be given, depending on the specific resources in issue. “Rights for individuals and families vary from discrete temporary issues such as gathering natural resources in communal forests, grazing on communal pastures, cultivating a specific field for one to several seasons, to permanent control over a piece of land or other resource for cultivation and to pass it on to their heirs.”<sup>79</sup> Families have comprehensive control over the residential plots and arable land allocated to them—some have resultantly referred to this element as a *de facto* private property regime or as “traditional free-hold.”<sup>80</sup> This more nuanced understanding contradicts the idea that communal tenure always entails group rights that override those of the individual.<sup>81</sup> And it is no modern innovation either—“it is ... beyond doubt that the control of arable land was individual in the precolonial land tenure system, with significant group control being exercised only” in respect of common property resources.<sup>82</sup>

29 Official versions of customary tenure emanating from both the colonial and the post-colonial state which present customary tenure “as communal and thus excluding individual rights of any kind,” and “as static and inimical to development” are therefore incorrect.<sup>83</sup> Customary tenure, in fact, features possibilities of tenure security which are, or can be, properly calibrated to the specific resources in issue. These flexibilities allow for more intensive, but sustainable, use of land. For example, cattle can routinely graze on others' land outside the cropping season.<sup>84</sup> The rush to private property and land titling can generate inefficiency by destroying these possibilities. It can also work an inequity by eliminating without compensation

rights, such as grazing rights, that may be an important source of livelihood for vulnerable groups.<sup>85</sup> Customary law's provision of "rights of access to land by all lineage members, even when working or resident elsewhere, has ... been shown to provide an important element of security, particularly in old age," and has been "an important factor in explaining the low incidence of landlessness in many heavily populated rural areas of sub-Saharan Africa."<sup>86</sup> This is an important factor given the weakness of pension systems in many sub-Saharan African countries. Losing the security of "these rights could prove disastrous for many."<sup>87</sup>

- 30 As clear from the ultimately insecure tenure of descendants of colonial settler farmers in Zimbabwe and from Elinor Ostrom's research, private property does not always provide tenure security and sustainable resource management.<sup>88</sup> Political and institutional context are determinative.<sup>89</sup> Tenure security arises from different sources of authority which must emerge together; "these are political, social, cultural" and "formal legal allocations of rights."<sup>90</sup> This is why traditional systems of communal land tenure based on culturally-accepted rules can offer tenure security, at least when the authority overseeing such tenure regimes is legitimate, trusted, transparent and accountable.<sup>91</sup>
- 31 Private property alone works no efficiency magic. Arguments for private property's relative productive efficiency in Zimbabwe's agricultural history conveniently overlook the century-long "history of state interventions to construct agricultural land and factor markets in support of the development of 'commercial farming,' and ... the systematic state repression of farming in customary tenure" areas.<sup>92</sup> Heavy support for commercial farming included provision of "regular subsidies, water development, research, access to markets for inputs and outputs, technology, foreign currency and capital."<sup>93</sup> Rather than resort to a call for private property, dealing with other issues that have always afflicted communal lands—the discriminatory treatment, the overcrowding, the poor soils, the bad topography—are more urgent concerns. It is no small wonder that empirical studies have shown little relationship between land rights and productivity and researchers have struggled to find clear evidence for "the view that the security which ensues from [land] registration increases investments."<sup>94</sup> Empirical studies have also

noted increased production and surpluses from communal areas since independence.<sup>95</sup> Further that there have been cases in Africa, including in Kenya, Uganda and Zimbabwe, where formal titling has increased tenure insecurity.<sup>96</sup> Claims of resource degradation due to common ownership in the context of communal tenure are largely incorrect. Much of the resource degradation in this context arose from the overcrowded nature of the reserves and the poor-quality soil therein, matters predetermined by colonial policy choices.

32 Under customary law, land has a role as “an integral part of the social system [with its] legitimate use ... determined by birth, affinity, common residence, and social status or some combination of these.”<sup>97</sup> This emphasis on status creates some challenges. For example, “customary land tenure relations are interwoven into societal structures and institutions, (mainly family structures, with their marriage and inheritance practices) such that an individual's rights to land are derived from their relations with other persons in the household and ‘community.’”<sup>98</sup> This system generates serious equity deficits, particularly by grossly undermining women's land rights.<sup>99</sup> Nondiscrimination is a nonnegotiable—strictly-enforced laws nondiscrimination laws should apply to customary tenure.

33 Another argument against customary land systems relates to the fact that customary land tenure is associated with the idea of land as inalienable. Ideas include that “land belonged to the living and to the unborn as well as to the dead [and further that] no member of a group could sell or transfer land to an outsider as land was considered a natural endowment in the same category as rain, sunlight and the air we breathe.”<sup>100</sup> Some assert that the idea of land's inalienability under customary law is an exaggeration as land was, or can be, alienable under customary law.<sup>101</sup> Nonetheless, customary law does suggest some limits on alienation. Migot-Adholla et al assert that “the distinguishing feature of different tenure regimes” revolves around “restrictions on the individual holder's ability to transfer land”—whether this is only allowed among family members, or within the lineage/community, or whether transfer to outsiders is also allowed, and whether such transfer would require approval from other lineage/community members.<sup>102</sup> Traditional leaders allocate usufructuary rights to a farmer.<sup>103</sup> The farmer, in

turn, can only alienate occupation rights to the land to members of the lineage.<sup>104</sup> In practice, these occupation rights to communal land are generally transferred only through inheritance,<sup>105</sup> although there is no formal inheritance of communal land.<sup>106</sup> These limitations on alienation restrict the development of market transactions in the land and so allegedly inhibit the movement of land from less productive users to more productive users.<sup>107</sup> This is the allocative inefficiency claim.

- 34 No doubt customary tenure systems have their challenges, not least of which is a loss of productive potential due to the fact that communal land cannot generally be used as collateral.<sup>108</sup> A communal tenure system may also be outperformed by private property in facilitating increases in an individual's scale of operations. Legislation establishing communal areas never addressed the possibilities of allowing for increases in scale under customary tenure. Because communal areas overwhelmingly—and as a deliberate policy choice—consisted of small, deprived plots of land, governance's focus when it came to size tended to be only on ensuring that plots do not become too small; thus legislation placed limits on subdivision. One suggestion is that customary tenure be updated by making provision and means for accumulation of land, at least “up to a designated ceiling.”<sup>109</sup> Possibilities for land transactions under communal tenure, discussed below, do show that communal tenure can facilitate accumulation and differentiation.<sup>110</sup>
- 35 The allocative inefficiency argument would suggest that private property, by enabling market transactions, does a better job than customary tenure in ensuring that land ends up in the ownership of the most productive persons. But private property is notoriously allocatively inefficient as the market's willingness-to-pay measure is a very imperfect measure of capacity to utilize resources productively.<sup>111</sup> Willingness to pay relates to ability to pay, with the result that the market system leads to serious inequality.<sup>112</sup> It is thus no surprise that, post-resettlement, there are longstanding fears over the introduction of a private property scheme over rural land due to concerns over “(re)concentration of land control through land sales.”<sup>113</sup> Private property therefore raises efficiency concerns and produces serious inequities. It is legitimate that these issues find



voice in a system that acknowledges non-market interests in the land and so does not always subject land to the market *in toto*.

- 36 Under the classical conception of customary tenure, which has also been termed the colonial model,<sup>114</sup> land is inalienable—it has only use-value and no exchange value such that there is no market in land.<sup>115</sup> But some argue that non-alienability is not actually a feature of customary law.<sup>116</sup> Indeed, those making the non-alienability point tend to state the limitation firmly with respect to alienation to outsiders.<sup>117</sup> That is, that transfer rights under customary systems “tend to be limited to lineage and community members or the community itself;” it is transfer to outsiders that is not permitted.<sup>118</sup>
- 37 Under Zimbabwe legislation, sales of communal land are banned and there is no formal inheritance of communal land.<sup>119</sup> Ways have been found to enable transactions over land in communal areas. Formal “transactions relating to land take the form of a negotiated entry into the collectivity of the village or community which brings with it property entitlements and obligations held by other members of that collectivity.”<sup>120</sup> Institutions that allocate land often charge settlers, who are sometimes even non-members of the community, a fee for the allocation.<sup>121</sup>
- 38 Communal areas feature informal land markets, including sales and rentals.<sup>122</sup> Original users can effectively sell land by demanding “compensation for the work of clearing and preparing farmland; but as land becomes more scarce, value for the land itself is added to the compensation fee.”<sup>123</sup> Payments can also be framed as being made for farm infrastructure developments.<sup>124</sup> Custom’s flexibility in recognizing individual use rights has allowed for transactions such as borrowing or leasing of land among residents, and such transactions also facilitate accumulation.<sup>125</sup> In a move likely to be intensified by the land resettlement program’s tendency to create absentee allottees on neighboring resettlement areas, successful farmers in the communal areas rent “land occupied by households who underutilize all or part of their land as a result of capital and/or labor shortages.”<sup>126</sup> In these cases, payment can be “by way of cash, food and ploughing services.”<sup>127</sup>

- 39 Customary law's layers of flexibility thus enable instances of autonomous intensification and even privatization of rights as circumstances change.<sup>128</sup> It has been noted "that, except in very isolated cases, communal control over land under indigenous tenure systems today occurs mainly in areas characterized by relative land abundance and low intensification ...."<sup>129</sup> Communal systems have always been quite flexible and responsive to changing circumstances, with the historical record showing that customary systems adapted "to new farming technology or methods of exchange long before the colonial period ... Evidence from different locations in Africa confirms instances of autonomous intensification and privatization of rights in land since the beginning of the century."<sup>130</sup> Much of the rise in land purchases in Zimbabwe's communal areas is associated with growing population pressures, urban expansion and expanded agricultural commercialisation.<sup>131</sup>
- 40 Some argue that customary tenure ought to head towards a process of individuation and that government should dispense with restrictions on the transfer of land.<sup>132</sup> Customary tenure restrictions on alienation stand accused of preventing "the transition from common to private ownership in agricultural land (or at least delay[ing] the transition, as long as they remain effective), where growing markets require a change from subsistence to market production."<sup>133</sup> Restrictions on the transferability of customary land generally arise from cultural beliefs. They also arise—and usually certainly so at the central government level—from the concern that a land market will create an "excessive concentration of land amongst the rich and the dispossession of the poor."<sup>134</sup> Farm size ceilings are, again, suggested to deal with this problem.<sup>135</sup>
- 41 Ought we, then, just abandon customary systems and move to private property? Matters are not that simple. Customary tenure's alienation limitations play a role in curbing some problematic elements of a full market system. Allowing the individual element of customary tenure to blossom ought to occur within the confines of measured change in customary systems. Given private property's allocative inefficiencies and customary law's conceivable flexibilities enabling sustainable intensive uses of land, any efficiency losses from a measured approach may be insubstantial. Given private property's equity concerns and customary tenure systems' ability to ensure equitable

access to land and elements of social security, the equity gains from a nuanced approach to changes in alienation powers within customary tenure are potentially massive.

- 42 There are also pragmatic political and legitimacy concerns that speak to whether actual security of tenure is achieved and are also key to nation-building in societies made up of different groups brought together by a shared colonial experience. These concerns counsel a measured approach to individuation of customary systems. That approach must include very substantial participation for affected groups. Ethnicity's centrality in national politics in African countries –conceivably facilitated, in part, by colonial and post-colonial reinterpretations of tribal authority and 'indigenous' tenure" that have led to "the freezing of ethnic boundaries" at the same time as "the emergence of the nation-state in Africa"—makes it "inconceivable that a national land market would evolve merely as a result of the introduction of a privatized tenure system. Evidence from other studies of Kenya indicates that although there is a weak market in land nationally, it is more severely restricted in the former African reserves, where it operates mainly among members of the same ethnic group. In contrast, a significant level of transactions in land occurs in the former white settled areas and in urban peripheries, where individuals are not bound by strong kinship identity. The consequence is that titles to agricultural land are perceived to have a greater commercial value within the urban periphery and former scheduled areas, than in the former African reserves, largely because of difficulties in enforcing contracts. For although some banks have accepted titled land as collateral and auctioned it off in cases of default, in some cases purchasers were not able to take occupation of the land for fear of reprisals."<sup>136</sup>

## 5. Regulatory plurality and land tenure

- 43 A direct danger to tenure security from communal lands' status as public property lies from direct exercises of presidential power. Communal farmers can, and have, been removed from their homes without compensation.<sup>137</sup> "Government entities have mined diamonds in communal lands with scant regard for the people who

live there. There have been repeated disputes over the quarrying of black granite in communal lands. And in March [2021], over 12 000 hectares were excised from communal land in Chiredzi to grow lucerne for a dairy company, an action which threatened to displace over 12 500 villagers.”<sup>138</sup> Also damning are recent claims—at least in resettled areas—that evictions have been carried out as punishment for voting patterns in affected areas that did not favor the ruling party.<sup>139</sup>

44 A pluralist legal framework can strengthen local populations or the central government through the forum-shopping processes that “are characteristic of most plural legal orders.”<sup>140</sup> Thus one view could be that customary systems can be mobilized against excessive state power. Further, “[w]hile state law often is the legal expression of state domination and dominant economic interests, it can also be mobilized by villagers or ethnic groups against oppression, while local customary or religious laws may be mobilized by the state to legitimate exploitation and oppression.”<sup>141</sup> Zimbabwe’s multiplicity of land tenure systems alone is not, of itself, problematic.<sup>142</sup> A multi-form land tenure system may be ideal for “a complex land system with multiple users wanting different things out of holding land.”<sup>143</sup> Problems arise when the systems are overly centralizing, and when they interact in inconsistent and ambiguous ways.<sup>144</sup> In the case of Zimbabwe’s communal lands and associated resettlement schemes, legal pluralism gives room to maneuver for the central authority, but much less so for the citizenry. Here is a case where “overlapping legal regulations” increase the insecurity of local people, rather than provide them with “a wider and richer legal ‘cookbook.’”<sup>145</sup> Communal lands’ combination of presidential public ownership with customary allocation leads to loss of maneuverability for the citizenry and creates tenure insecurity through the insecurity of traditional authorities’ power due to central government power over chiefs. For example, even though chiefs cannot banish a person from their area and do not generally take land, chiefs have played a role in harassing people for political reasons.<sup>146</sup>

45 Central government ownership of land and control over customary authorities gut local governance and disempower RDCs, the democratic possibility. They essentially amount to traditional authorities, which are particularly subservient to central government,

carrying out many administrative functions that elected local government would otherwise carry out. In that way, national political authorities retain control in a manner that undermines local democracy and so undermines the possibilities for democratic capacity-building and a true establishment of democratic principles.

## Conclusion

- 46 Customary tenure systems can be channeled to provide efficiency in an equitable and sustainable manner. In Zimbabwe's communal lands and associated resettlement schemes, it is the interposition of overwhelming state power which creates tenure inefficiencies and inequities.

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## NOTES

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18 TSABORA, *supra* note 17 at 216 and 224.

19 Section 16 regulated the right to property under the Lancaster House Constitution. It was eventually supplemented by a section 16A creating greater government control for agricultural land, which was later supplemented by an even more government-empowering section 16B. The 2013 Constitution establishes section 71 for general private property and section 72 for agricultural land. Note that the definition of agricultural land in section 72 of the 2013 Constitution makes clear that the provision does not extend to communal land. As noted below, communal land is already under the formal authority of the state.

20 M. O'FLAHERTY, "Communal Tenure in Zimbabwe: Divergent Models of Collective Land Holding in Communal Areas," *Africa* 68 (4), 539, (1998).

21 O'FLAHERTY, *supra* note 20 at 539.

22 O'FLAHERTY, *supra* note 20 at 539.

23 TATSVAREI *et al.*, *supra* note 3 at 1876; MOYO, *supra* note 6.

24 O'FLAHERTY, *supra* note 20 at 539.

25 RUKUNI, *supra* note 7, describing traditional common property scheme on communal land to be a form of traditional usufruct granted by the state.

26 MUROMBEDZI, *supra* note 1 at 3.

27 MUROMBEDZI, *supra* note 1 at 4.

28 The use of the English term "Headman" is statutory. It may be noted that in at least one shona group, the Gudyanga, the equivalent position is one historically occupied by women—see O'FLAHERTY, *supra* note 20 at 552-553 (endnote 4).

29 CHEATER, *supra* note 1 at 189-191; MUROMBEDZI, *supra* note 1 at 7. There is some debate on this matter. Some assert that, just before the colonial era, people essentially allocated land in an area to themselves (so long as they were understood to be part of the relevant community), this being a function of easy availability of land at the time as land was not in great demand in a precolonial economy with poorly defined chiefly territories, little population pressure and many alternatives to agriculture; pre-colonial economic diversity was destroyed by colonial settlers as part of their measures to force Africans into the settler wage economy. MUROMBEDZI, *supra* note 1 at 5 and 8; CHEATER, *supra* note 1 at 189. It is further argued that it was the colonial state that, in the last decade of colonialism from the late 1960s to 1980, (re?)crowned chiefs as allocators of land in the communal areas; MUROMBEDZI, *supra* note 1 at 5; O'FLAHERTY, *supra* note 20 at 540.



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31 TSHUMA, *supra* note 30 at 79.

32 TSHUMA, *supra* note 30 at 79.

33 TSHUMA, *supra* note 30 at 79.

34 TSHUMA, *supra* note 30 at 77.

35 TSHUMA, *supra* note 30 at 77; MUROMBEDZI, *supra* note 1 at 5.

36 TSHUMA, *supra* note 30 at 77; O'FLAHERTY, *supra* note 20 at 540.

37 TATSVAREI *et al.*, *supra* note 3 at 1876.

38 TATSVAREI *et al.*, *supra* note 3 at 1876, asserting that this feature is typical of African land tenure systems.

39 VERITAS, "Communal Land and the Rights of Those who Live in It," *Constitution Watch* 3/2021, at 3, (2021); TSHUMA, *supra* note 30 at 87.

40 VERITAS, *supra* note 39 at 3.

41 O'FLAHERTY, *supra* note 20 at 542.

42 O'FLAHERTY, *supra* note 20 at 542.

43 O'FLAHERTY, *supra* note 20 at 542.

44 CHIMHOWU & WOODHOUSE, *supra* note 7 at 30.

45 F. MATIASHE, "Zimbabwe: How Zanu PF Uses Traditional Chiefs to Buy Votes in Rural Areas," *The Africa Report*, (2022).

46 CHIMHOWU & WOODHOUSE, *supra* note 7 at 30-31.

47 CHIMHOWU & WOODHOUSE, *supra* note 7 at 30-31.

48 CHIMHOWU & WOODHOUSE, *supra* note 7 at 30-31.

49 MOYO, *supra* note 6 at 31.

50 MOYO, *supra* note 6 at 31.

51 TSHUMA, *supra* note 30 at 88.

52 TSHUMA, *supra* note 30 at 89.

53 TSHUMA, *supra* note 30 at 89.

54 CHIMHOWU & WOODHOUSE, *supra* note 7 at 28-29; TATSVAREI *et al.*, *supra* note 3 at 1881.

55 RUKUNI, *supra* note 7; CHIMHOWU & WOODHOUSE, *supra* note 7 at 14 and 28-29.

56 RUKUNI, *supra* note 7; CHIMHOWU & WOODHOUSE, *supra* note 7 at 14 and 28-29; TATSVAREI *et al.*, *supra* note 3 at 1881.

57 CHIMHOWU & WOODHOUSE, *supra* note 7 at 14 and at 28-29. "It was noted by Moyo (2016) that the A1 lease agreement is not explicit on the inheritance issues considering the challenges experienced within the SSCF. The lease insists on one farm per household and does not allow for group ownership or subdivision of farms by siblings. A key source of tension also relates to the deaths of parent landholders and how succession is handled in such a scenario." TATSVAREI *et al.*, *supra* note 3 at 1881.

58 MOYO, *supra* note 6 at 34; TATSVAREI *et al.*, *supra* note 3 at 1881.

59 MOYO, *supra* note 6 at 34.

60 MOYO, *supra* note 6 at 34, noting that, because A2 farms are interspersed with A1 farms, traditional leaders often attempt to exercise authority over A2 farmers, leading to conflict between the parties.

61 CHIMHOWU & WOODHOUSE, *supra* note 7 at 14; TATSVAREI *et al.*, *supra* note 3 at 1881.

62 CHIMHOWU & WOODHOUSE, *supra* note 7 at 14 and 28-29; TATSVAREI *et al.*, *supra* note 3 at 1881; RUKUNI, *supra* note 7, further noting that an earlier resettlement program in the early 1990s also led to recipients holding land under permits and they continue to do so.

63 TSABORA, *supra* note 17 at 225-226.

64 TSABORA, *supra* note 17 at 226.

65 RUKUNI, *supra* note 7; TATSVAREI *et al.*, *supra* note 3 at 1881, both noting that, even with A2 farmlands, many have not received the 99-year leases and hold land under the insecure tenure of offer letters.

66 MOYO, *supra* note 6 at 33.

67 O'FLAHERTY, *supra* note 20 at 537.

68 CHEATER, *supra* note 1 at 203 (fn 3).

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75 T. CURTIN, *The Economic History of Land Tenure in Zimbabwe*, at 12, (2008). On line: <<https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=561411b2fbe6f16afbd99e264533f5eb5eadf342>>, consulted on 18/06/2023.

76 MOYO, *supra* note 6 at 7.

77 MIGOT-ADHOLLA *et al.*, *supra* note 73 at 157.

78 CHEATER, *supra* note 1 at 191; TSHUMA, *supra* note 30 at 89, stating that "arable land and homestead plots are only transferable to other households after they have been abandoned for a couple of years."

79 MOYO, *supra* note 6 at 7.

80 TSHUMA, *supra* note 30 at 89.

81 MUROMBEDZI, *supra* note 1 at 7.

82 MUROMBEDZI, *supra* note 1 at 5-6.

83 TSHUMA, *supra* note 30 at 92.

84 MIGOT-ADHOLLA *et al.*, *supra* note 73 at 170.

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87 MIGOT-ADHOLLA *et al.*, *supra* note 73 at 171.

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92 MOYO, *supra* note 6 at 1.

93 TATSVAREI *et al.*, *supra* note 3 at 1877.

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- 95 TSHUMA, *supra* note 30 at 88.
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- 97 MIGOT-ADHOLLA *et al.*, *supra* note 73 at 156.
- 98 MOYO, *supra* note 6 at 7.
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- 100 CHEATER, *supra* note 1 at 190.
- 101 CHIMHOWU & Woodhouse, *supra* note 7 at 15 and 26.
- 102 MIGOT-ADHOLLA *et al.*, *supra* note 73 at 159.
- 103 TATSVAREI *et al.*, *supra* note 3 at 1879.
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- 105 TATSVAREI *et al.*, *supra* note 3 at 1880.
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- 109 TSHUMA, *supra* note 30 at 92.
- 110 TSHUMA, *supra* note 30 at 77.
- 111 E. POSNER and E. WEYL, "Property is Only Another Name for Monopoly," 9 *Journal of Legal Analysis* 51, 51-52, (2017).
- 112 POSNER & WEYL, *supra* note 111 at 51-51; O. BAR-GILL, "Willingness to Pay: A Welfarist Reassessment," 38 *Yale Journal on Regulation* 503, 511-512, (2021).
- 113 MOYO, *supra* note 6 at 22.
- 114 MUROMBEDZI, *supra* note 1 at 6.
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- 116 CHIMHOWU & WOODHOUSE, *supra* note 7 at 15 and 26.
- 117 MUROMBEDZI, *supra* note 1 at 7.
- 118 MOYO, *supra* note 6 at 7.
- 119 O'FLAHERTY, *supra* note 20 at 540.
- 120 TSHUMA, *supra* note 30 at 89.

- 121 MUROMBEDZI, *supra* note 1 at 8 and 9; CHEATER, *supra* note 1 at 192; CHIMHOWU & WOODHOUSE, *supra* note 7 at 23-24; TSHUMA, *supra* note 30 at 89.
- 122 MOYO, *supra* note 6 at 7, and at 21 noting that insecure tenure concerns in resettlement schemes have not stopped informal land markets through renting, subletting or sharing.
- 123 MUROMBEDZI, *supra* note 1 at 8; CHEATER, *supra* note 1 at 192.
- 124 TSHUMA, *supra* note 30 at 89.
- 125 TSHUMA, *supra* note 30 at 89 and 92.
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- 127 TSHUMA, *supra* note 30 at 90.
- 128 MIGOT-ADHOLLA *et al.*, *supra* note 73 at 157.
- 129 MIGOT-ADHOLLA *et al.*, *supra* note 73 at 156-157.
- 130 MIGOT-ADHOLLA *et al.*, *supra* note 73 at 157.
- 131 MOYO, *supra* note 6 at 7.
- 132 MIGOT-ADHOLLA *et al.*, *supra* note 73 at 171.
- 133 HALLER, *supra* note 9 at 181.
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- 135 MIGOT-ADHOLLA *et al.*, *supra* note 73 at 171.
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- 139 W. MUKORI, "Zanu PF is Evicting Resettled Blacks, Operation Mavhotera Papi Mark 2023 in All but Name," February 13, 2024. On line: <<https://bulawayo24.com/index-id-opinion-sc-columnist-byo-240158.html>>, consulted on 30/02/2024.
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- 141 VON BENDA-BECKMANN & VON BENDA-BECKMANN, *supra* note 140 at 28.
- 142 SCOONES, *supra* note 88.
- 143 SCOONES, *supra* note 88.

144 TATSVAREI *et al.*, *supra* note 3 at 1883, suggesting that “the country needs to consolidate these land tenure regimes in the agricultural sector, reduce them and provide a legal and administrative system that allows for efficient utilization of land through acceptance in market systems.”

145 VON BENDA-BECKMANN & VON BENDA-BECKMANN, *supra* note 140 at 7.

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## ABSTRACTS

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### Français

Cet article traite de la coexistence de plusieurs régimes juridiques concernant les terres communales au Zimbabwe. L'interaction entre les systèmes formels et les systèmes coutumiers de droits fonciers suscite des interrogations quant à la répartition des pouvoirs sur les terres communales entre ces systèmes et les institutions qui les gouvernent. Le statut des terres communales en tant que propriété publique sous la responsabilité du chef de l'État et propriété commune sous la supervision des chefs traditionnels, en vertu du droit coutumier, a engendré un dysfonctionnement politique, rendant les autorités traditionnelles complètement dépendantes du gouvernement central en place. Ce dysfonctionnement s'est encore intensifié après un programme de réinstallation foncière désorganisé, qui a accentué les incertitudes concernant la classification juridique des terres rurales ainsi que l'autorité des chefs sur ces terres. La démocratie locale s'est aussi retrouvée davantage soumise au contrôle politique central. Cet article examine également les défis liés à l'efficacité, l'équité et la durabilité que l'on associe souvent aux régimes de tenure foncière coutumière. Il met en avant que, dans le cadre des terres communales du Zimbabwe et des zones de réinstallation voisines, c'est le statut simultané de ces terres en tant que propriété publique et propriété commune – en particulier leur statut de propriété publique – qui crée des insécurités, des inefficacités et des inégalités en matière de droits fonciers. Les systèmes de droits fonciers coutumiers peuvent recourir à des méthodes d'allocation des terres qui augmentent l'intensité d'utilisation de manière souvent localement durable et équitable. Cependant, ces avantages potentiels risquent de ne pas être exploités en raison de l'insécurité plus générale liée à la subordination des autorités traditionnelles aux autorités du gouvernement central.

### English

This paper addresses the coexistence of different legal systems on communal land in Zimbabwe. The interaction between formal legal systems

of land tenure and customary legal systems of land tenure creates questions as to the distribution of power over communal land between these legal systems and their respective governing institutions. Communal land's status as simultaneously public property under the national president and common property under traditional chiefs in a customary law system has created political dysfunction by leaving the traditional authorities wholly beholden to whatever central government executive holds power. The dysfunction has only increased in the wake of a chaotic land resettlement program that increased uncertainty in both the legal classification of rural land and the authority of chiefs with respect to such land. Local democracy has also been rendered more subservient to political control from the center. The paper also discusses the efficiency, equity and sustainability challenges commonly attributed to customary land tenure schemes. It highlights that, in the context of Zimbabwe's communal lands and the abutting resettlement areas, it is the land's simultaneous status as public property and common property—and especially the status as public property—which creates an array of land tenure insecurities, inefficiencies and inequities. Customary tenure systems can deploy land allocation methods that increase use intensity in what are often locally sustainable and equitable ways. But these potential gains may go untapped because of broader tenure insecurity due to the subservience of traditional authorities to central government authorities.

## INDEX

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### Mots-clés

propriété publique, propriété commune, propriété privée, Zimbabwe, terrain communal, réinstallation, terre agricole, coloniale, postcolonial, tenure coutumière, chef traditionnel

### Keywords

public property, common property, private property, Zimbabwe; communal land, resettlement, agricultural land, colonial, post-colonial, customary tenure, traditional chief

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