
A GENDER ANALYSIS OF AGRARIAN LAWS IN ZIMBABWE: A REPORT

For

WOMEN AND LAND IN ZIMBABWE
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ZIMBABWE

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A. BACKGROUND TO THE STUDY

Women and Land in Zimbabwe, a Non-Governmental Organisation whose objectives include the promotion of women's rights to land, has commissioned this study. The study seeks to provide a gender analysis of the current agrarian laws in Zimbabwe. A list of the specific laws to be analyzed is attached to this report as "Appendix A".

The study is being carried out at a critical time in Zimbabwe's history when the Government of Zimbabwe has embarked on a land reform and redistribution programme which seeks to redress past imbalances, specifically racial imbalances, in land ownership in Zimbabwe. It is important that this process does not exclude women. One of the ways of ensuring that women are not excluded from this process and from accessing and owning land and other agrarian resources in general is to ensure that there is a legal framework which is responsive to the needs of women.

Unfortunately the ensuing report, reveals that the current legal framework has several shortcomings as far as provision of women's rights to land and other agrarian resources is concerned. Suggestions for appropriate law reform are made to remedy these shortcomings.

Conceptual Framework and Delimitation

This report focuses on several key concepts, which need definition for the avoidance of doubt. There is also need to demarcate its limits.

One of the major concepts that require definition for the purpose of this report is the concept of gender. Gender in this report is used to denote the socially constructed roles ascribed to men and women in Zimbabwean society. However, in the context of this report, there is a presumption that these roles are discriminatory against women i.e the women are being subjected to gender-based discrimination. This presumption is based on the writer's knowledge of the historical and socio-cultural context in which men and women live in Zimbabwe. In this report the presumption of gender-based discrimination against women is specifically applied to the context of women's rights to land and other agrarian resources hence the gender analysts of the relevant laws is mainly a critique of the laws highlighting their discriminatory nature in so far as women's rights to land and other agrarian resources are concerned.

The other concept, which requires definition, is the concept of law. Law can be broadly defined to include both the law which is officially recognized by the state and that which, though not recognized, is nevertheless enforced and observed by various institutions and

communities such as families, churches and neighborhoods. This report will concentrate on officially recognized laws.

Officially recognized laws in Zimbabwe can be divided into three (3) categories namely statutory law, common law and customary law.

Statutory law refers to laws that are made by Parliament. Common law refers to the laws that were adopted in Zimbabwe at colonization. In Zimbabwe the common law is based on the Roman-Dutch common law system. Customary law refers to the laws that are based on the customs and practices of the indigenous people of Zimbabwe. These three categories are inter-connected. For example, a statute may provide that customary law is to apply in a certain situation such as allocation of land. However, the focus of this report is the statutory laws particularly those listed in “Appendix A”.

Although there are several regulations made under the various statutes, this report will not analyse these. This is because the substantive provisions of the legislation are contained in the Acts and not in the regulations. Regulations are just procedural guidelines.

The focus of this report is on laws that relate to women’s rights to land for agricultural purposes. It also looks at laws that deal with access to water for agricultural purposes and to natural resources on land.

Methodology

The report is based on a desk study, which was conducted by the consultant.

B. THE AGRARIAN FRAMEWORK IN ZIMBABWE

The current legal framework in Zimbabwe can be divided into four broad categories. The first category is legislation which deals with the acquisition of land rights. The second category is legislation which deals with acquisition of water rights. The focus of this report will be on water rights for purposes of irrigation. The third category is legislation that deals with access to and utilization of natural resources on land. These resources may be used to supplement income from agricultural activities. The fourth category focuses on legislation which deals with the courts with special reference to their role in administering legislation on land and water rights.

1. Acquisition of Land Rights

There are various Acts in Zimbabwe that deal with acquisition of land rights either exclusively or in conjunction with other issues. The rights that are addressed include the right to own land and also rights to lease land or occupy and use land.

1.1 The Constitution of Zimbabwe

The Constitution of Zimbabwe is the supreme law of the country. It contains a “Declaration of Rights” which sets out the fundamental rights of Zimbabweans. Section 16 of the Constitution protects private ownership of property by barring the state from compulsorily acquiring property except under specified conditions. A major exception to this right are the provisions of the Land Acquisition Act, Chapter 20:10 which permits the state to compulsorily acquire land in the interests of public safety or security. It also permits the state to compulsorily acquire agricultural land for purposes of resettlement.

The conclusion to be drawn from section 16 of the Constitution is that, except as provided for by the Land Acquisition Act, Zimbabweans are free to own land for agricultural purposes. However, the land must be acquired through their own efforts because the provision does not place an obligation on the state to assist those who want to acquire and own property but lack the means to do so.

Section 23 of the Constitution protects Zimbabweans against discrimination on the basis, race, tribe, and place of origin, political opinions, colour, creed or gender. This provision applies to discrimination in the laws and policies of the state. It covers

discrimination in relation to land rights. However, section 23 (3)(f) specifically provides that it shall not be discriminatory to accord rights or privileges relating to communal land to “tribespeople” to the exclusion of all other persons. Section 23(3)(a) permits discrimination in matters of “adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law”. Section 23(3)(b) permits discrimination “in the application of customary law in any case involving Africans”.

1.2 Communal Land Act, Chapter 20:04

The Communal Land Act, Chapter 20:04 deals with the administration of communal land. Section 3 of the Act vests all communal land in the President (as representative of the state) who is empowered to permit it to be occupied and used in accordance with the Act.

The responsibility of granting rights to occupy and use communal land is given to Rural District Councils (RDCs) in terms of section 8 and 9 of the Act. Section 8 is the provision which deals with occupation and use of communal land for agricultural and residential purpose. According to section 8(1) a person can occupy and use such land with the consent of the RDC established for the area concerned. In granting its consent, the RDC must:

- consult and cooperate with the chief appointed to preside over the community concerned in terms of the Traditional Leaders Act, Chapter 29:17 (Section 8(2)(a1) of the Act.)
- where appropriate, have regard to customary law relating to the allocation, occupation and use of land in the area concerned (section 8(2)(a) of the Act).
- Grant consent only to persons who, according to the customary law of the community that has traditionally and continuously occupied and used the land in the area concerned are regarded as forming part of such community or who, according to such customary law, may be permitted to occupy and use such land (section 8(2)(b) of the Act).

1.3 Rural Land Act, Chapter 20:18

The Act provides for acquisition of and disposal of land by the state. The Act applies to all land except communal land and urban land. Section 5 of the Act authorises the appropriate Minister to acquire the land on behalf of the state. The acquired land becomes state land. Section 6 provides that the Minister may lease, sell or otherwise dispose of state land, subject to such conditions as he may determine. The provisions of the Rural Land Act have been used to acquire land for resettlement and to resettle people on the acquired land.

1.4 **Agricultural Land Settlement Act, Chapter 20:01**

This is another piece of legislation which authorises the appropriate Minister to resettle people on state land. The Act confines such settlement to settlement for agricultural purposes (section 7 of the Act). The land is leased to the beneficiaries with or without any option to purchase and subject to such conditions as may be fixed by the Minister (section 11 of the Act). The lessee is not permitted to cede, assign, hypothecate (mortgage) or otherwise alienate his/her lease or rights under the lease without the written consent of the Minister (section 13 of the Act). The lessee must possess capital and other resources necessary to make use of the land (section 10 of the Act). The provisions of the Agricultural Land Settlement Act are currently being used for the A2 Model resettlement programme.

1.4 **Rural District Councils Act, Chapter 29:13**

The Rural District Councils Act establishes Rural District Councils (RDCs) who are the authority responsible for administering the communal land. The Act sets out the powers and functions of RDCs in general.

1.6 Provincial Councils and Administration Act, Chapter 29

This Act provides for the appointment of provincial governors. It also provides for the setting up of provincial councils made up of:

- the provincial governor
- mayor or chairman and one councillor of any town or municipality situated wholly within the province
- the chairman and one councillor of each of the RDCs which lie wholly or partially within the province
- one chief appointed by each provincial assembly of chiefs whose areas lie wholly or partly within the province.
- Three (3) persons appointed by the President of which one shall be appointed for his/her skill and expertise in political affairs within the province, one to represent the women and one to represent the youth.

(section 14 of the Act)

The role of the provincial council includes, among other things, the promotion of development within the province (section 13 of the Act). Provincial councils have participated in the land reform programme.

1.7 Traditional Leaders Act, Chapter 29:17

This Act was passed in 1998 and it repealed the Chiefs and Headmen Act. It provides for the roles of village heads (kraal heads), headmen and chiefs. It also provides for the establishment of local governance bodies at village and ward levels known as village assemblies and ward assemblies.

The Act imposes duties on village heads, headmen and chiefs which include:-

- ensuring that communal land is allocated in accordance with the Communal Land Act
- ensuring conservation of natural resources
(see sections 5,9 and 12 of the Act)

However, section 26(1) of the Act emphasizes that the responsibility of allocating land in communal areas rests with the RDCs. It states:-

“No land shall be allocated in terms of (the) Act except with the approval of the appropriate Rural District Council, which shall be the administrative authority with overall control over the use and occupation of all communal land”

It follows that chiefs and other traditional leaders can only legally allocate land in communal areas if specifically authorised to do so by the appropriate rural district councils. Any allocation of land by these leaders without the authority of the rural district is illegal and the people who are allocated land in such circumstances can be evicted.

1.8 The Regional Town and Country Planning Act, Chapter 29:12

The major objective of this Act is to regulate the planning of land use. It requires approval of changes of use of land and subdivisions. However, it is not relevant to agricultural land of less than 100 hectares (section 22 of the Act.)

1.9 Land Survey Act, Chapter 20:12

This Act provides for the survey of land for the purpose of registration in the Deeds Registry in terms of the Deeds Registries Act, Chapter 20:05 or for the purpose of re-determining the boundaries (e.g where there has been subdivision) of land which is registered in the Deeds Registry. Generally it only applies to that agricultural land which is held under title i.e. freehold land.

1.10 Settled Estates Leasing Act, Chapter 20:19

This Act facilitates the lease of “settled estates”. “Settled estates” is defined as:

“all immovable property and all estates or interests which are the subject of settlement”.

“settlement” is defined as

“any deed, agreement, will or other instrument under or by virtue of which any immovable property or any estate or interest in any such immovable property stands limited to or in trust for any person by way of succession or for a life or lives or for a term of years determinable with the death of any person” (section 2 of the Act).

This includes immovable property, including agricultural land, which is being held in trust for some other person or persons. The Act provides that the High Court may authorise the trustee or trustees to lease the property if it (i.e the High Court) is satisfied that the lease will be beneficial to all interested parties.

1.11 Titles Registration and Derelict Land Act, Chapter 20:20

The Act has two major purposes. Firstly it allows individuals who have acquired the right to immovable property (including agricultural land) through prescription to obtain court orders from the High Court authorising the transfer of the property to them by the Registrar of Deeds. For a person to acquire the right to

property through prescription, he or she must have openly possessed the property as if he or she were the owner for an uninterrupted period of thirty (30) years. The period of occupation by the predecessors who are related to the person claiming the property can be included in calculating the 30 years period (see section 4 of the Prescription Act, Chapter 8:11).

Secondly, the Act authorises the state to obtain cancellation of title deeds for land which it has compulsorily acquired because it is derelict.

1.12 Urban Councils Act, Chapter 29:15

The Act provides for the establishment and management of urban councils. It does not have provisions which deal with agricultural land. However, urban councils can acquire land for their use and some of them, such as Harare, have allocated part of their land to residents for purposes of urban agriculture.

1.13 Administration of Estates (Amendment) Act, Act 6 of 1997

This Act amended the Administration of Estates Act, Chapter 6:01 in order to change the law relating to inheritance under customary law. Prior to the amendment, the customary heir to a man's property, was the eldest son (in most cases). With the amendment, there is no single heir but the property is shared between the widow

and the children. Where the immovable property (e.g house or farm) on which the widow lived was owned by the deceased and there is one widow, she is entitled to inherit that property.

2. WATER RIGHTS

2.1 The Water Act, Chapter 20:24

The Water Act vests all water in Zimbabwe in the President.¹ It specifically prohibits private ownership of water.² The Act sets out the parameters for the utilisation and management of water as a resource.

The Act distinguishes between use of water for “primary” purposes and other usage. “Primary” purposes includes domestic use and use for other domestic related needs such as making bricks for private use. It does not include use of water for irrigation purposes.

In terms of section 34(1) of the Act:

“No person shall abstract water for any purpose other than primary purpose except in terms of a permit”.

It follows that all farmers who require water for irrigation purposes must have a permit to use water.

¹ section 2 of the Act

The state can compulsorily acquire rights to use water and water works (i.e. dams and irrigation equipment) for the purpose of permitting more farmers to use it.³ This is a provision which is meant to ensure the equitable use of water given the historical context in which most water rights were held by large scale white commercial farmers.

The permit to use water for irrigation purposes is applied for. The application is made to the appropriate catchment council (section 34(2) of the Act) and, if refused, an appeal can be made to the Administrative Court (section 34(8)).

A permit is normally valid for twenty years but it may be renewed. When the land is sold the permit passes to the new owner.

Otherwise the permit must not be ceded, sold or alienated in any other way except with the consent of the catchment council. The catchment council, should first consult the secretary of the appropriate ministry before consenting to a cession sale or other alienation of a permit.

The administration of permits is done by subcatchment councils who are empowered to levy charges on permit holders (section 25 of the Act).

² section 3(1) of the Act
³ section 39(1)(c) of the Act

2.2 Zimbabwe National Water Authority Act, Chapter 20:25

This Act establishes the Zimbabwe National Water Authority (ZINWA) which is responsible for the formulation of national policies and standards on the planning, management and development of water resources.

ZINWA is also empowered to set up water works and supply water to any person or persons from such water works on such terms as may be agreed upon with the appropriate minister.⁴ The current policy is that ZINWA supplies water on the basis of the “user-pay” principle where ZINWA charges the user for use of the water.

3. ACCESS TO AND UTILISATION OF NATURAL RESOURCES ON LAND

3.1 Communal Land Forest Produce Act, Chapter 19:04

The Act regulates the exploitation of forest produce within communal land. Forest produce refers to all vegetation or parts of vegetation such as bark, seeds, fruits, gum and sap. The Act seeks to protect the produce by limiting rights to exploit it. The right to exploit the forest produce is vested in the Minister of Environment and Tourism but the inhabitants of communal areas are allowed to use the produce which is found in areas which are not restricted. However they must use the resources for personal

⁴ section 39(1)(b) of the Water Act

needs and not for commercial purposes (section 3 of the Act). The Minister may delegate his rights and functions under the Act to local authorities i.e RDCs (section 19 of the Act).

The Minister may grant permission to exploit forest produce and charge fees. The revenue from exploitation of forest produce that the Minister receives must be paid to the local authority within whose area the forest produce is situated.

3.2 Natural Resources Act, Chapter 20:13

This Act provides for the conservation of natural resources which include soil, water, minerals, animals, birds, fish, trees, grasses, springs, vleis, sponges, reed beds, marshes, swamps and public streams. The Act will soon be repealed and substituted by a more comprehensive and up to date Act whose Bill (the Environment Management Bill) is currently before Parliament.

3.3 Mines and Minerals Act, Chapter 21:05

The Act vests all mineral in Zimbabwe in the President. Therefore owning a piece of land or having access to one does not entitle one to the right to exploit minerals on the land.

The Act provides for the issuing of prospecting licences and mining leases by the Minister of Mines. Prospectors may not prospect within 450 m of a homestead or on cultivated land without the

authority of the owner or, in the case of communal land, lawful occupier of the land (section 31 of the Act).

All payments due to the owners of land in relation to exploitation of minerals are to be made to the District Development Fund (DDF) in the case of communal land (section 188(7) of the Act).

3.4 Parks and Wildlife Act, Chapter 20:14

The Act provides for the preservation of wildlife (i.e animals and birds), fish and plants of Zimbabwe. It regulates the exploitation of these resources. The responsible Minister may delegate his functions to local authorities as has happened with the Communal Areas Management Programme for Indigenous Resources (CAMPFIRE).

4. COURTS AND THE ADMINISTRATION OF LEGISLATION ON LAND AND WATER RIGHTS

4.1 Administrative Court Act, Chapter 7:01

The Act establishes the Administrative Court. The court deals with matters relating to land acquisition in terms of the Land Acquisition Act. It also deals with planning issues in terms of the Regional Town and Country Planning Act. It also deals with issues relating to water rights under the Water Act.

4.2 High Court Act, Chapter 7:06

This is the legislation which sets out the general powers of the High Court. The High Court deals with issues relating to derelict land under the Titles Registration and Derelict Lands Act. It also deals with issues relating to lease of settled estates under the Settled Estates Act. It also can deal with any dispute involving ownership of or access to land regardless of the nature of the legal issues involved e.g. sale, lease, inheritance, property sharing upon divorce.

4.3 Magistrates Court Act, Chapter 7:10

The Act establishes the Magistrates Court. The Magistrates Court does not normally have jurisdiction over disputes relating to ownership of land because its maximum jurisdiction is for claims whose value does not exceed \$200 000.00.⁵ However, it can decide matters relating to the lease of land where the value of the right of occupation does not exceed \$200 000.00. Section 16 of the Communal Land Act specifically gives the magistrates court the power to try someone for contravening the Act. If found guilty, the person can be fined or imprisoned or both fined and imprisoned. In addition to such fine and/or imprisonment, the court can order that

⁵ See Statutory Instrument 31 of 2002

the person, together with those living with him or her, be ejected from communal land.

5. OTHER LEGISLATION

There are three more pieces of legislation on agrarian issues which will be reviewed and do not seem to fit into any of the above categories. These are:

- Agricultural and Rural Development Authority Act, Chapter 18:01
- Alienated Land (Information) Act, Chapter 20:02
- Land Occupation Conditions Act, Chapter 20:11

5.1 Agricultural and Rural Development Authority Act

This Act establishes the Agricultural and Rural Development Authority (ARDA). One of the functions of ARDA is to “plan, coordinate, implement, promote and assist agricultural development in Zimbabwe” (section 18(2)(a) of the Act). It is empowered to implement specific schemes for settlement and/or agricultural development. These schemes can be set up in any state land including communal land which is defined as state land for the purposes of the Act (see section 18(1) of the Act). The schemes can be set up for the purpose of conducting all or any of the following operations:

- irrigation of land and provision of water for irrigation
- farming of land including ranching and forestry
- settlement of farmers on land
- preparation for processing or marketing or the processing or marketing of agricultural produce or any other commodity
- research into agriculture and agricultural development
(see the First Schedule to the Act)

ARDA is also mandated to construct dams and other irrigation related works and to provide tuition and training in any field which falls within its mandate.

5.2 Alienated Land (Information) Act

The Act empowers the state to obtain information from private land owners on the nature and extent of occupation and use of the land. The information required may pertain to issues such as the development (i.e buildings, fences, irrigation works etc) on the land and the agricultural activities such as cultivating plantations and livestock breeding being carried out on the land.

The Act provides for the appointment of officers who may inspect alienated land “at all reasonable times” (see section 4 of the Act). Section 5 of the Act makes it an offence to fail or neglect to respond to a question by an officer or to supply information requested. It is

also an offence to knowingly make a statement which is materially false.

5.3 Land Occupation Conditions Act

This is a piece of legislation dealing with how settlers who have been granted land by the state are to prove that they have effectively occupied land which was granted to them. The Act only applies to land of more than 170 hectares (see section 11 of the Act as read with section 3).

C. GENDER ANALYSIS OF THE AGRARIAN LEGAL FRAMEWORK

The analysis is divided into two broad issues. The first issue to be addressed is women's access to land and other agrarian resources. The second issue to be addressed is security of tenure for women. The two are inter-related.

Preamble

Most of the legislation on land and water rights in Zimbabwe is silent on the rights of women. The legislation on access and control over natural resources is also silent. It appears that there is an assumption that the gender neutral legislation will be applied equally to men and women. This assumption is erroneous because gender neutral legislation can be discriminatory when applied to the reality of women's lives. This is highlighted by some of the findings on the analysis of the legislation.

Women's Access to Land and other Agrarian Resources

The current legal framework on women's access to land and other agrarian resources has several inequities. These range from outright discrimination to provisions that result in discrimination when applied to the reality of women's lives.

With regard to freehold land, there is no direct discrimination against women. Women are free to purchase and own free hold land. However, the reality of women's lives is that most of them do not have the resources to purchase land for agricultural purposes. The Rukuni Commission (1994) found that only 2.3% of large scale commercial farms were owned by women.⁶

In the resettlement areas, women are free to apply for land under Model A1 or Model A2. For Model A1, the interested women must apply through traditional leadership if they live in communal areas or through councillors if they live in other areas. Patriarchal tendencies have hindered women from applying for land in their own right with most of them preferring to let their husbands apply. The disadvantage of this approach is that the permit is issued in the name of the husband. In such a situation, the women can only live on the land and carry on agricultural activities with their husband's permission or approval.

Women are also free to apply for resettlement under Model A2. However, the requirements for one to qualify to be allocated land under this model are restrictive for women. One has to have resources (human and material) for the utilisation of the land. Most women lack these resources and are therefore disqualified from Model A2.

In communal areas, the emphasis on customary law and tradition results in discrimination against women. This happens when the authorities that allocate land allocate it to men on the grounds that they are the customary heads of households. The women do not have direct access to the land. They access it through men.

The role of traditional leadership i.e village heads, headmen and chiefs needs to be critically examined. Some traditional leaders have been known to oppose women's rights in general, particularly those that challenge patriarchy such as the Legal Age of Majority Act (which is now section 15 of the General Law Amendment Act, Chapter 8:07). Given such attitudes it is difficult to envisage such leaders being sympathetic to women who wish to be allocated communal land (or resettlement land under Model A1) in their own right.

Access to water rights for the purpose of irrigation can be difficult for women because the current legal framework is based on the "user-pay" principle. There is no provision for the state to assist those farmers

⁶ See p295 of Volume 2, Technical Reports

(including women farmers) who cannot afford the levies charged by the catchment councils and/or by ZINWA.

Anne Hellum (2001) argues that a human rights approach should be used to ensure women's water rights. She identifies four critical issues which need to be addressed with the current legal (and policy) framework if women's water rights are to be enhanced.

Firstly, she points out that the distinction between use of water for primary purposes and use of water for commercial purposes is problematic for women. Women tend to use water more for primary purposes than for commercial purposes. If government efforts are focused on use of water for commercial purposes (including irrigation) women's basic need for water may be sidelined. There is need to address both.

Secondly, women in small scale commercial farming areas and communal areas tend to use water for irrigating (by hand) small gardens in which they grow vegetables for both consumption and sale. Hellum notes that if this activity is regarded as commercial use and subjected to the user pay principle, these women may be deprived of a source of livelihood and food security for themselves and their families.

Thirdly, Hellum notes the poor representation of women on the current water management structures (sub-catchment councils, catchment councils and ZINWA Board) and recommends that there be affirmative action to ensure women's equal participation in water management.

Finally, Hellum concludes that any reform will have to include means to strengthen women's social, economic and educational resources, including knowledge of the Water Act, in order to be successful.

With the exception of wildlife under the CAMPFIRE programme, the state controls all the natural resources on land. This limits the ability of farmers (including women farmers) to diversify into other income generating activities which involve utilisation of these resources. This is particularly important for small scale farmers including communal farmers who have limited capital and whose agricultural activities can be threatened by adverse weather conditions and/or diseases and pests. The income from utilisation of the natural resources on the land would allow them to increase capitalization and also provide them with an alternative source of income in the event of a poor agricultural season.

Security of Tenure for Women

The legal framework on access to land by women does not guarantee them security of tenure. In most cases women have to access land through male heads of households such as husbands, fathers or brothers. This dependence on males makes their use of the land dependant on their continuation of their relationship with these men. For married women, it permits their husbands to exploit their labour. Thus, we have situations where men who work and live in urban areas have control of agricultural produce produced by their wives and children who live in the rural areas.

In some cases the men abuse the income derived from the sale of this produce. This becomes a source of grievance for the wives and there are reported incidences where the aggrieved wives have committed suicide.

For single women who never married (most of them have children), the failure to allocate them land in their own right in communal areas means that they are at the mercy of their fathers or brothers if they want to engage in agricultural activities for their livelihood. Given the pressure on land in most communal areas, the fathers or brothers may not be willing to assist them. This lack of land for agricultural activities may force them to migrate to urban areas where their chances of getting formal employment are very slim. Most of them end up engaging in informal income generation activities such as petty trading which may not give them enough income to live on in the comparatively more expensive urban environment. Inability to earn sufficient income from informal income generation activities or failure to find opportunities to engage in such activities may force some of these women to engage in prostitution. The negative consequences of engaging in prostitution, including the risk of contracting HIV/AIDS are obvious.

Divorced women are another category of women whose ability to access land is severely curtailed because women depend on their marriages to access land. When the marriage is terminated by divorce, they find themselves without access to land. The traditional approach, which is practised in the communal areas and in villagised resettlement areas, is to

send divorced women to their natal homes where their fathers or brothers are expected to support them materially including giving them land for agricultural activities. As with single women who never married, the fathers or brothers are usually very reluctant to offer them land because of the general scarcity of land for agricultural activities. A study by WLSA (Zimbabwe) revealed that these “returnee” daughters (in some cases they return with their children) are often in competition for resources with their brothers and their (the brothers’) wives and children.⁷ Inability to secure land in communal land and villagised resettlement areas may result in their resorting to the same measures as single women who never married as discussed previously in this report.

Widows are in the same precarious condition as single women (never married or divorced) when it comes to their security of tenure. However, their position is slightly better particularly if they have children. In some communal areas and villagised resettlement areas, widows are permitted to remain on the land which they occupied prior to the death of their husbands and to continue their agricultural activities. However, in some cases widows are evicted from the land. This is particularly true of childless widows or those young widows who refuse to be married by a relative of the deceased husband (“kugarwa nhaka”). Sometimes accusations of witchcraft, where the widow is accused of causing the

⁷ Ncube W, et al “Paradigms of Exclusion: Women’s Access to Resources in Zimbabwe” WLSA Zimbabwe, Harare, 1994

death of her husband through witchcraft, are used as an excuse to evict the widow.

Under the Model A2 resettlement programme where there is a lease to buy arrangement, the widow would be able to inherit the land directly from her husband under either the Administration of Estates (Amendment) Act (6 of 1997) or the Deceased Estates Succession Act, Chapter 6:02 depending on the type of marriage that she had with her husband (customary or civil) and provided there are title deeds to the land.

Currently there are very few Model A2 resettlement areas where title deeds have been granted. Most of the land is still being held under lease and it is not clear whether the widows can inherit the leases.

Overall, the agrarian legal framework in Zimbabwe makes it difficult for women to access land and control it in their own right. It also makes it difficult for the women to have security of tenure. Women also have limited access to water for irrigation purposes.

Given this scenario, what is the way forward? The following discussion makes recommendations in this regard.

D. RECOMMENDATIONS/WAY FORWARD

The recommendations address the question of what is to be done to ensure women's access to land and water and to guarantee their security of tenure. The recommendations will deal with each type of land tenure system separately and then draw a general conclusion. The first part seeks to justify the need to reform the status quo.

Justification for Reform

Zimbabwean society is a society where women play a critical role in the development process. Women play a central role in the agricultural sector particularly in communal land and the small scale commercial farming sector.

The state has realised the key role that women play in the development of the nation and has sought to address the legal inequities that hinder them from exercising their full rights as citizens. Some of the legislation that was aimed to redressing legal inequities includes the Legal Age of Majority Act of 1982, (now section 15 of the General Law Amendment Act), the Matrimonial Causes Act of 1985 (Chapter 5:13), the inclusion of "gender" as one of the grounds upon which discrimination is prohibited through Constitutional Amendment No. 14 of 1996 and the Administration of Estates (Amendment) Act of 1997 which reformed inequitable customary inheritance laws.

The state has also shown its commitment to human rights in general and to women's rights in particular by ratifying several international human rights instruments such as the United Nations Universal Declaration of Human Rights of 1948 (UDHR), the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966, the African Charter on Human and People's Rights (the African Charter) of 1981 and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) of 1979 which came into force in 1981.

However, despite the above national law reform and the commitment to women's rights shown by the ratification of the above mentioned international human rights instruments, there are still some shortcomings in the current agrarian legal framework and the following recommendations are intended to redress the shortcomings.

Freehold Land

For freehold land the legal framework is clear in that women can purchase and own land in their own right. However it is recommended that there be a special fund which is set up by the state to assist women who intend to purchase land for agricultural purposes in order to redress the current imbalance between men and women in ownership of land. The fund should also assist those women who intend to participate in the Model A2 resettlement programme but lack the capital resources to utilise the land.

Model A2 Resettlement Land

Leases should be issued in the names of both parties in the case of married people. In the event of death of one spouse, the surviving spouse should automatically take over the lease. Title deeds should also be in the names of both spouses when they are granted.

Model A1 Resettlement Land

This land should not be treated like customary land because it is state land. Clear, non-discriminatory guidelines must be set out in the Rural Land Act or other legislation indicating the rights of women to be allocated land in their own names. Permits for married people should be in the names of both spouses. The surviving spouse should automatically take over the deceased spouse's share of the permit i.e become the sole permit holder in the event of death of one spouse. Children should only inherit the permit after the death of both parents. The relevant state officials (resettlement officers) should assist the children to reach an agreement as to who should take over the land (and compensate the others) if the land cannot be subdivided into viable portions. Where the children are not yet adults, the resettlement officer or other official should assist the adult relatives of the children (paternal and maternal) to decide on who should have temporary use of the land until the children are ready to take over. If there is failure to agree in any of the negotiations, the dispute should be referred to the courts.

In the event of divorce, the land should be divided equally between the spouses with the spouse who gets the homestead compensating the other, or, if it cannot be viably subdivided, the court should decide on who should get it in terms of provisions of the Matrimonial Causes Act which requires the court to take into account the direct and indirect contributions of each spouse to the acquisition of the assets and to order cash adjustments where necessary.

Communal Land

The Rukuni Commission recommended that communal land should not be regarded as state land and that traditional leadership should be given more authority in relation to the land.

It is recommended that communal land should remain state land but the state should allow local communities more autonomy over the land and other resources found on the land. This is to enable the state to set uniform standards for the allocation of land particularly allocation of land to women. There should be no community that is allowed to refuse to allocate land to women in their own right on the basis of tradition or custom.

Giving traditional leaders more powers to allocate land is seen as a confirmation of the de facto position where village heads, headmen and chiefs are allocating land despite the fact that the legal power to allocate land is vested in Rural District Councils. The Rukuni Commission also

pointed out that women are seeking help in resolving disputes on land from kraalheads.⁸ The conclusion from these observations is that Rural District Councils are not effective in their role in allocating land. This has created a void which traditional leaders have occupied because in the past they used to allocate land. However, as mentioned earlier, their patriarchal attitudes are problematic for women.

It is recommended that the Communal Land Act be amended to make it clear that women are entitled to be allocated land in their own right. The amendment of section 23 to make customary law subject to challenge on the basis of discrimination against women would also assist in this regard.

It is further recommended that there be a process of dialogue with communal land dwellers on the appropriate institutions for allocating land and resolving land disputes. The institutions that are set up should be gender sensitive. Their decisions must be appealable and reviewable by the High Court.

The current land legislation is too fragmented and vague in some aspects. There is need for a comprehensive Land Act which deals with the following:-

⁸ Volume One: Main Report at p.27

1. Clearly defines all land in Zimbabwe in terms of tenurial systems
i.e. freehold land, resettlement land, communal land etc.
2. Sets out the criteria for qualification to acquire land under the
various tenurial systems. The criteria must not discriminate against
women either directly or indirectly.
3. Defines the authorities responsible for allocation and/or
administration of the land under the various tenurial systems. Each
authority must have equal representation between men and
women.
4. Provides clear guidelines on how those authorities responsible for
allocating land are to do so. The guidelines must emphasize equity
and non-discrimination.
5. Clearly defines the rights and obligations of the occupiers, lessees
or owners of the land in relation to:
 - (a) sale of the land
 - (b) lease of the land
 - (c) mortgaging of land or using it as security for a debt in some
other way.

- (d) Where they are the spouses of the land owner, lessee or occupier, their rights upon divorce or death of the land owner, lessee or occupier.
- (e) Where they are the dependants (other than spouses) and/or children of the land owner, lessee or occupier, their rights upon the death of the land owner, lessee or occupier.

The above list is not exhaustive. Any other pertinent issues suggested by stakeholders can be added to the list.

SUMMARY OF FINDINGS AND RECOMMENDATIONS

The findings on the gender analysis of the agrarian legal framework in Zimbabwe can be summarised as follows:-

1. Most of the legislation on land and water rights in Zimbabwe is silent on the rights of women. The legislation on access and control over natural resources is also silent. It appears that there is an assumption that the gender neutral legislation will be applied equally to men and women. This assumption is erroneous because gender neutral legislation can be discriminatory when applied to the reality of women's lives. This is highlighted by some of the findings on the analysis of the legislation.

2. The Constitution of Zimbabwe can reinforce discrimination against women in access to and control of land. Section 23 of the Constitution permits discrimination in the application of customary law and in matter of “adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law” (section 23(3)(a) of the Constitution). This provision allows discrimination in land tenure systems based on customary law if it is shown that the discriminatory practices are part of the customary law in question.
3. The Communal Land Act, Chapter 20:04 also allows discriminatory customary law in the allocation of communal land. Section 8 of the Act provides that, in allocation land in communal areas, Rural District Councils must “consult and co-operate” with chiefs. They must also have regard to customary law and only allocate land to these people who are customarily permitted to occupy and use land. In most cases, land in communal areas is allocated to men or heads of household. This results in women being deprived of land in the event of divorce or death of their husbands or where they never marry.
4. Land in resettlement areas is being allocated under two models namely, A1 and A2. In both situations, the enabling legislation (the Rural Land Act, Chapter 20:18 and the Agriculture Land Settlement Act, Chapter 20:01) is silent on the right of women to be allocated land in their own names (either as single women or jointly with their husbands). The legislation is also silent on what it to happen to the allocated land in the event of the death of

- a spouse husband or divorcee. Model A2 is only available to people with the requisite resources and most women lack these resources.
5. Water rights for irrigation are premised on a permit system which does not specifically provide for ensuring equity for women. There is also a cost of recovery policy which disadvantages women because of their general poverty.
 6. In most cases legislative or other there are no mechanisms which allow for the participation in the control of natural resources by the residents of the areas in which these resources are found. Where such mechanisms are available e.g the CAMPFIRE programme, there is no legal framework that ensures equality between men and women in benefitting from the resources.

The recommendations that flow from the problems highlighted above can be summarised as follows:

1. There is need to amend section 23 in order to outlaw ALL discrimination against women including discrimination in the application of customary law.
2. There is need to amend the Communal Land Act in order to remove provisions that permit the application of discriminatory customary law in the allocation of customary law.

3. The Rural Land Act and the Agricultural Land Settlement Act must be amended to provide clear and non-discriminatory criteria for the allocation of resettlement land. They must also be clear provisions on what should happen to the land in the event of death of a spouse (or both spouses) or divorce.
4. There must be a comprehensive Land Act which defines all land in Zimbabwe, sets out the criteria for its allocation, defines the authorities responsible for its allocation and administration and clearly spells out the rights of the owners and/or occupiers.

CONCLUSION

The Rukuni Commission concluded as follows on security of tenure:

“There is no tenure system which is secure in its own right, but rather any tenure system is only as secure as the degree of common resolve in a society to secure and guarantee stated rights for individual. This requires strong consensus in society, competent governance, legitimate and effective institutions.”⁹

It is important that the institutional framework (Administrative and Judicial) for implementing the reformed agrarian legal framework should be such that women can access it and get effective assistance. This is particularly true of the court

⁹ Ibid at p. 14

system as some of the disputes that arise will be ultimately resolved in the courts.

The fragmented nature of legislation on land is also a cause for concern. There is need to come up with a comprehensive Land Act which defines all land in Zimbabwe and sets out the parameters for its acquisition, use, control and administration. The Rukuni Commission made a similar recommendation.

APPENDIX “A” – TABLE OF STATUTES AND DOCUMENTS REVIEWED

1. Administration of Estates (Amendment) Act, 6 of 1997.
2. Land Acquisition Act, Chapter 20:10
3. Rural Land Act, Chapter 20:18
4. Agricultural Land Settlement Act, Chapter 20:01
5. Communal Land Act, Chapter 20:04
6. Rural District Councils Act, Chapter 29:13
7. Traditional Leaders Act, Chapter 29:17
8. Water Act, Chapter 20:24
9. Administrative Court Act, Chapter 7:01
10. Agricultural and Rural Development Authority Act, Chapter 18:01
11. Alienated Land (Information) Act, Chapter 20:02.
12. Communal Land Forest Produce Act, Chapter 19:04
13. Lands Occupation Conditions Act, Chapter 20:11
14. Land Survey Act, Chapter 20:12
15. Magistrates Court Act, Chapter 7:10
16. Mines and Minerals Act, Chapter 21:05

17. Natural Resources Act, Chapter 20:13
18. Parks and Wildlife Act, Chapter 20:14
19. Provincial Councils and Administration Act, Chapter 29:11
20. Regional Town and Country Planning Act, Chapter 29:12
21. Settled Estates Leasing Act, Chapter 20:19
22. Supreme Court Act, Chapter 7:13
23. Titles Registration and Derelict Lands Act, Chapter 20:20
24. Urban Councils Act, Chapter 29:15
25. Zimbabwe National Water Authority Act, Chapter 20:24
26. Constitution of Zimbabwe.
27. Report of the Commission of Inquiry into appropriate agricultural and land tenure systems under the chairmanships of Professor Mandivamba Rukuni, October 1994.
 - (a) Volume One: Main Report
 - (b) Volume Two: Technical Reports.

APPENDIX “B”: SOME PROVISIONS IN INTERNATIONAL HUMAN RIGHTS INSTRUMENTS THAT ARE RELEVANT TO AGRARIAN ISSUES

1. Article 22 of the United Nations Universal Declaration of Human Rights (UNDHR) provides that every citizen is entitled to the realisation of “economic, social and cultural rights that are indispensable for his dignity and the free development of his personality which are “in accordance with the organisation and resources of each state.” These rights (and all other rights stated in the UDHR) must be accorded without discrimination on the basis of race, sex etc (Article 2).

2. Article 3 of the International Covenant on Economic, Social and Cultural Rights states:-

“The state parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”

Article 11(2) provides that state parties must take measures to counter hunger including specific programmes to “improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge ..” and “developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources.”

3. Article 13(3) of the African Charter on Human and People’s Rights states:

“Every individual shall have the right to access public property and service in strict equality for all persons before the law.”

Article 18(3) provides:-

“The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions”.

Article 22(1) states:

“All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in equal enjoyment of the common heritage of mankind.”

4. Article 3 of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) states:-

“States parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures including legislation, to ensure the full developing and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights an fundamental freedom on a basis of equality with men.”

Article 5 provides:-

“States parties shall take all appropriate measures:-

- (a) to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the stereotyped roles for men and women;

Article 14 states:

“State parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-metized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present convention to women in rural areas.”

Article 14.2(g) enjoins states to take all appropriate measures to ensure rural women the right:

“To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes.”

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