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'Torrens imperatives for SADC Fast-track Land Reform Programs'

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> *"Amid learned prophecies of failure he achieved success. Title by registration was substituted for title by deed. His instructions to all who desired to bring their property under the new law were so clear that any ordinary person with time at his disposal could dispense with legal assistance in complying with the forms; and the cost was almost nominal. Useless dust of ages was swept away. By the old law every change of ownership lengthened the chain of which each link had to be tested in every subsequent transaction. By the new law the last registration was complete in itself, and no retrospective searches or opinions - no new intricate deeds-were needed." George William Rusden on Sir Robert Richard Torrens, History of Australia Vol. II.*

Abstract:

The most successful economies are underpinned and characterized by very clear governance of acquisition, disposal, and transferability of land or, as it is properly called in law - real property. This article examines the evolving post-apartheid land governance practices under the Southern African Development Community's (SADC) fast-track land reform programs for their potential to enhance land's utility in framing economic development in concerned states. It shows a worrying potential diminution of land's utility as real property as a direct consequence of insufficient consideration in SADC fast-track land reform programs to ensure that, agricultural land contributes optimally to national treasury. The article recommends the integration into SADC fast-track land reform programs of the Torrens system for protecting land's utility as the foundation and cornerstone of powerful and successful economies. The benefits for SADC states would be endless. They include the nurturing of an in-built resilience of SADC economies to withstand the ruthless vagaries of World Trade Organization (WTO) sponsored trade liberalization practices in the increasingly deeply integrated world economy. Failure to adopt and implement the Torrens principles on the recognition and protection of land titles would be suicidal for the agrarian economies of the SADC because it would either lower significantly or, in some cases wipe out altogether land's potential to make a meaningful and consistent contribution to the national treasury. Consequently, land's potential to contribute optimally to the

nurturing and development of national economies of affected SADC states would be severely curtailed and, in some cases, hindered from generation to generation.

Key words: SADC, fast-track land reform, Torrens system, commercial utility of land, Torrens checklist, *fiat*, right to equal protection under the law

Introduction:

Nineteenth century Western disruptions of other evolving civilizations through adventures of colonization[1] and the imposition across the African continent of apartheid-rule failed to abolish completely, native notions and practice of culturally recognized property rights.[2] In their colonies, the British designated huge tracts of land 'for native use according to their customs'.[3] This was tacit acknowledgment of the fact that pre-colonial Africa had in some cases attained very advanced civilizations,[4] characterized also by very clear systems of land administration with recognizable principles and rules.[5]

The British Encyclopaedia describes Moshweshwe (1786 – 1870) as the founder and first paramount chief of the Sothos of Southern Africa. "One of the most successful Southern African leaders of the 19th century, Moshweshwe combined aggressive military counteraction and adroit diplomacy against colonial invasions. He created a large African state in the face of attacks by the Boers and the British raiders from the south-east coastal lowlands of Africa, and local African rivals."[6] Other relevant Southern African civilizations interrupted by the advent of colonial rule include the Herero and Nama of Namibia, the Zulu and Xhosa of South Africa, the Manyika, Matebele and Rozvi kingdoms of Zimbabwe.[7]

Colonial authorities' designation of some lands as communal, for use according to 'native customs' shows unequivocally that, pre-colonial native land governance principles and rules persisted throughout varying periods of colonial rule. If so, this

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[1] See also M. Gladwell, *Talking to Strangers: What we should know about people we don't know*, Allen Lane Publishers (2019) pp.7-13.

[2] See R. Home, 'The colonial legacy in land rights in Southern Africa', in Ben Chigara (ed.), *Southern African Development Community Land Issues: Towards a New Sustainable Land Relations Policy*, Routledge (2012) pp. 8-26.

[3] See also N.O. Madumere, *Customary Land Rights and Gender Justice in Eastern Nigeria and Ghana*, A thesis submitted for the Degree of Ph.D. at the University of East London (2018)

[4] See also N. D. Harkless, *Nubian Pharaohs and Meroitic Kings: The Kingdom of Kush*, AuthorHouse (2006); H.L.A. Hart, *The Concept of Law*, Oxford University Press (2nd ed. 1994) pp. 26 - 49.

[5] See also B. Chigara, 'The *Humwe principle*: A social-ordering grundnorm for Zimbabwe and Africa?', in R. Home (ed.), *Essays in African Land Law Vol.1* Pretoria University Law Press (2011) pp. 113 - 133.

[6] https://www.britannica.com/biography/Moshoeshoe (accessed 26 April 2023).

[7] A See also A. S. Mlambo and N. Parsons, *A History of Southern Africa*, Macmillan (2018).

opens wide the question of what post-colonial land governance principles should guide and inform the fast-track land reform programs that SADC states in their quest to undo the legacy of unjust apartheid-rule land rights that had emasculated blacks from their own lands without compensation and lumped them into tiny zones that had the least potential for agricultural production, while all the lands with the most potential for agricultural production, mining and tourism opportunities were reserved and distributed only among European settler communities?[8]

Section 8 of Zimbabwe's Communal Land Act provides that a person may, subject to that Act or the Regional Town and Country Planning Act [*Chapter 29:12*], occupy or use communal land with the consent of the Rural District Council established for the area concerned.[9] This article examines the evolving post-apartheid land governance practices under the SADC's fast-track land reform programs for their potential to enhance land's utility in framing economic development. It shows a potential diminution of land's utility as real property as a direct consequence of insufficient safeguards in these fast-track land reform programs to ensure that agricultural land optimally frames economic development of concerned states.

The article recommends the integration into SADC fast-track land reform programs of the Torrens system for protection of land's utility as the foundation and cornerstone of the most successful economies. The benefits of that approach are endless. Failure to adopt and abide by the principles of the Torrens approach for the recognition and protection of land titles would be suicidal for the agrarian economies of the SADC as the potential of their land to making optimum fiscal contributions to their national treasury annually is lowered significantly or, in some cases wiped out altogether; minimizing and in some cases hindering land's potential to contribute optimally to the nurturing and development of national economies from generation to generation.

Land Reform[10]

[8] See also B. Chigara, 'Introductory Note to SADC Tribunal – *Mike Campbell (PVT) Ltd and Others v Republic of Zimbabwe'* , 48 ILM (2009).

[9] *Tinodya and Others v the State*, [2016] HH 215-18 CA 668/16 CRB 3503-7/16.

[10] See also M. Albertus, *Property without Rights: Origins and Consequences of the Property Gap*, Cambridge University Press (2020); C. Ng'ong'ola, 'The Post-Colonial Era in Relation to Land Expropriation Laws in Botswana, Malawi, Zambia and Zimbabwe', 41 *International and Comparative Law Quarterly* (1991): 117-36; J. Tsabora, 'Reflections on the Constitutional Regulation of Property and Land Rights under the 2013 Zimbabwean Constitution', 60 *African Law Journal* (2016): 213-29; S. Coldham, 'The Land Aquisition Act 1992 of Zimbabwe', 37 *Journal of African Law* (1993): 82-88; A. Van Horn, 'Redefining 'Property': The Constitutional Battle over Land Redistribution in Zimbabwe', 38 *Journal of African Law* (1994): 144-72.

The current international impasse over SADC land relations[11] may have served to freeze[12] and in some cases devalue land[13] particularly with potential foreign investors.[14] This has devastated affected SADC states.[15] The fiat that has characterized fast-track land reform programs may have contributed to uncertainty in the value of the new titles, their salability, transferability, acquisition and disposal, and their capacity for equitable dealing, all of which combine to diminish or enhance the utility of land for any country. Yet as Margherita Baldarelli observes, "The availability of land for agricultural development is the physical precondition for foreign investment in agriculture. In the case of mechanized agriculture, large tracks of arable land are needed to make the investment profitable due to economies of scale."[16]

Uncertainty in land titles can diminish foreign investment potential and undermine or, even wipeout equitable interest in land titles, reducing its value from 'real property' to insignificant chattel. In *Knox v. Despain*,[17] the Appellate Court of the Third District of Illinois observed that:

> In order that a title be merchantable, it must be good beyond a reasonable doubt, and this must appear from the abstract itself. It is not sufficient that the title may, in fact, be good, or that it may be made good. The abstract on its face must show that there is no reasonable doubt about it. It is not sufficient if the court has a favorable opinion of it, or thinks that it is probably good. It must be such a title as will not detract from the salability of the land, or depreciate its value on the market, or expose the vendee to possible litigation or to the danger of being defeated in an action concerning it. If there is a reasonable doubt as to the title, it will be resolved in favor of the vendee. If there is even a colour of outstanding title-which may prove substantial, a purchaser will not be required

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[11] See B. Chigara, 'Incommensurabilities in the SADC Land Issue', 25 *African Journal of International and Comparative Law* (2017): 295–325.

[12] See also R. M. Werden, 'Unfreezing Land Titles', *University of Illinois Law Forum* (1956): 76-107.

[13] See especially M. Albertus, *Property without Rights: Origins and Consequences of the Property Gap*, Cambridge University Press (2020).

[14] See S. Muradzikwa, 'Foreign Investment in SADC', *Development Policy Research Unit*, University of Cape Town, June 2002 Working Paper 02/67, available at: http://www.dpru.uct.ac.za/sites/default/files/image_tool/images/36/DPRU%20WP02-067.pdf (accessed 26 April 2023); C. Markowitz, 'FDI Trends in SADC: Implications for Value Chains, Industrialisation and Inclusive Growth', *South African Institute of International Affairs*, Occasional Paper 306, April 2020, available at: file:///Users/imac/Downloads/Occasional-Paper-306-markowitz-002.pdf (accessed 26 April 2023).

[15] C. Ng'ong'ola, 'The Post-Colonial Era in Relation to Land Expropriation Laws in Botswana, Malawi, Zambia and Zimbabwe',41 *International and Comparative Law Quarterly* (1992): 117-36.

[16] M. Baldarelli, 'Large-Scale Land Acquisitions and Legal Pluralism in Africa: The Case of Zambia and Ghana', Thesis submitted in fulfilment of the requirements of Ph.D. at University of Trento, Italy, p. 6.

[17] 156 Ill. App. 134, 139 (1910).

> to take it and thus encounter the hazard of litigation with an adverse claimant over whom the court has no jurisdiction. [18]

Steadfast certainty in the merchantability of land titles on the other hand, enhances land's role in national economic development. Writing on the USA land governance system over a century ago, Eugene Massie observed that certainty in land's economic value was critical to economic gains and that, that certainty of private legal title was almost *sacred and to be preserved*:

> … while the law merchant has been developed to meet the expanding needs of commerce, and while other departments of municipal law have grown, or sprung into being, in answer to the demands of an increasingly complex civilization, there has been comparatively little change in the law of realty. Certainly the evolution here has not kept pace with the revolution in many of the conditions of life, social and commercial. Perhaps this may be accounted for in part by the great abundance of land, by reason of which it has heretofore been something of a 'drug on the market' in America. And perhaps it may be further accounted for by the circumstance that there was early adopted -in the new world the system of recording muniments of title; Which was found to be so superior to what our ancestors had been accustomed to in England that a sense of its excellence has been unduly impressed upon the public mind, until at length many have been lulled into the belief that no better system could possibly be devised. *This record system has thus come to be regarded as the American system, and has been invested with all the sanctity inhering in that term. It occupies a position endeared by long use and colored by national pride, and is regarded by some as a fundamental national institution, against which no unholy hand must be raised, and in derogation of which it is akin to treason to lift a voice*.[19]

Perhaps as they hurry and scurry to undo the unsustainable racialized colonial, apartheid-rule, land relations legacies on their territories, SADC states should also worry about what it is they are correcting and what may need preserving and why? The aim is certainly not to undermine land governance. On the contrary, the substantive and equitable interests in land should multiply as a consequence of fast-track land reforms and not diminish otherwise the changes will create their own blighted legacies of diminution of land's utilities observed as having:

> … enhanced qualities of utility and indestructibility which justify its distinction from other more perishable forms of property …[Moreover,] the extent to which it is legally, socially and politically protected raise immediately the most

[18] 156 Ill. App. 134, 139 (1910) See also *Firebaugh v. Wittenberg*, 309 Ill. 536, 141 N.E. 379 (1923).

[19] E. C. Massie, 'Commercial Land Titles', 3 *Virginia Law Review* (1915-1916): 115 -139 at p. 115 (my emphasis).

fundamental problems of political philosophy and social life – the relationship between the individual and his social environment, between the citizen and the state and - in modern society – between the personal and the commercial" [20]

The Torrens system of Land Registration and emergent SADC fast-track land reform titles[21]

The idea of registered legal land titles is traceable to the Torrens Act of 27 January 1858, South Australia.[22] The idea gained rapid acceptance not just in Australia and across the English-speaking world, including in Tasmania, New Zealand, the Fiji Islands, the Dominion of Canada, and in a modified form in England. The principles of the system were applied in statutes of eleven American states, including, California, Colorado, Illinois, Massachusetts, Minnesota, Mississippi, North Carolina, New York, Ohio, Oregon and Washington.[23] The principles were admitted in Porto Rico, Hawaii and the Philippine Islands.[24] Just like the Universal Declaration of Human Rights, these principles have a near universal application. But what has made it so successful?

The Torrens system is named after Sir Robert Richard Torrens, born at Cork, Ireland, in 1814, and educated at Trinity College, Dublin and the first Premier of South Australia. In an essay published in 1882,[25] Torrens himself submitted seven empirical benefits of his system of land registration since its adoption as follows:

1. It has substituted security for insecurity.
2. It has reduced the cost of conveyancing from pounds to shillings, and the time occupied from months to days.
3. It has substituted clearness and brevity for obscurity and verbiage.
4. It has so simplified ordinary dealings, that any person who has mastered the three Rs can transact his own conveyancing.
5. It affords protection against the largest class of frauds.
6. It has restored to their natural value many estates held under good holding titles, but depreciated on account of some blot or technical defect, and has barred the recurrence of any such defect.

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[20] K. Gray and S. F. Gray, *Elements of Land Law*, Oxford University Press (2008) p. 6.

[21] See especially Mabo and Others v Queensland (No. 2) (*1992) 175 CLR 13 June 1992*
also D. Miller, *Principles of Social Justice*, Harvard University Press, Massachusetts (1999); M. Dixon, *Modern Land Law*, Routledge (11th ed. 2018).

[22] E. C. Massie, 'Commercial Land Titles', 3 *Virginia Law Review* (1915-1916): 115-139 at p. 115.

[23] Ibid.

[24] Ibid. 116.

[25] 'An Essay on the Transfer of Land by Registration' Ibid. p. 117.

7. It has largely diminished the number of chancery suits by removing the conditions that afford grounds for them.[26]

I shall call these the Torrens checklist for efficient land governance. Perhaps in their rush to undo the legacy of unsustainable colonial, apartheid-rule racialized land relations on their territories, SADC states should consider the Torrens checklist of land governance because no country that has followed them has not benefited its economy immensely from doing so while those that rejected it or, abstained from applying it may have considerably undermined their potential economic development. While it may not be the aim of SADC fast-track land reform programs to weaken or even ruin their own chances of economic development, that will be their only gain if they seek to re-invent the wheel by shunning tried and tested methods of getting it right.

Commenting on the process of transforming to the Torrens system, Eugiene Massie writes that, "No proposition has ever been fought with more bitterness and none has ever triumphed more completely over all enemies. No country or state that has ever adopted it has abandoned it."[27]

Characterizing SADC Fast-track Land Reform Programs[28]

Zimbabwe's fast-track land reform program is arguably the most entrenched to date in the sub-regional organization. Traceable to the Constitution of Zimbabwe Amendment (No. 17) Act of 2005,[29] it seeks to counter colonial constitutional land laws that had alienated native lands without compensation. The Land Apportionment Act 1930 had reserved 51 per cent of the country's agricultural land for the 50,000 whites while reserving only 30 per cent for the 1.1 million native Africans. The Land Husbandry Act 1951 had enforced private ownership of land. The Land Tenure Act 1969 had reinforced land classification into African and European areas.

Act 17, 2005 authorizes the Zimbabwe government to nationalize private commercial farmland held predominantly by white farmers for redistribution among the dispossessed, landless indigenous majority black population. Its procedures are critical to either ensuring or relegating the utility of land in the development and

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[26] Ibid.

[27] Ibid. p. 118.

[28] *The Commercial Farmers Union* v. *Comrade Border Gezi and others*, Case No. HC3544/2000; C*ommercial Farmers Union* v. *Minister of Lands, Agriculture and Resettlement* v. *Others* SC/132/2000; *Etheredge* v. *Minister of State for National Security Responsible for Lands, Land Reform and Resettlement*, HH 16–2009, HC 3295/08 Decision of 4 February 2009. See also B. Chigara, 'Incommensurabilities in the SADC Land Issue', 25 *African Journal of International and Comparative Law* (2017): 295–325; B. Chigara, 'Introductory Note to SADC Tribunal – *Mike Campbell (PVT) Ltd and Others v Republic of Zimbabwe'*, 48 ILM (2009); Human Rights Watch 2002 Report: 'Land Reform in the Twenty Years after Independence', available at: https://www.hrw.org/reports/2002/zimbabwe/ZimLand0302-02.htm (accessed 26 April 2023).

[29] 16th September 2005 (General Notice 373D of 2005)

management of the Zimbabwean economy. Get them wrong and the economy is compromised from within and not by any foreign economic sanction campaigns. Get the procedures right and even with the burden of foreign economic sanctions, the economy has a better chance of resilience. Eugene Massie writes that: "At the end of 1879, the value of property brought under the Torrens Act was nearly twelve million sterling in South Australia alone. Long before that time Mr. Torrens had grafted his reform upon the neighboring colonies. To some he went while the lawyers were arraying their forces against the dreaded innovation which was everywhere proposed, everywhere opposed, but everywhere triumphant."[30]

Section 16B, sub-section 16.1 of Act 17, 2005 regulates the compulsory acquisition of land without compensation. The designated minister may issue a letter of new ownership without any of the usual contract law voluntary requirements of willing seller – willing buyer, offer and acceptance, consideration and intention to create legally binding obligations. In essence this power is a nullification power identical to that contained in colonial pieces of land legislations that de-robbed natives of their dignity in land ownership. It nationalizes land previously designated under colonial apartheid laws as private land that benefited from legal title, transferability and salability.

A significant difference is that the consequent land titles during apartheid-rule had resulted in enhancement of the legal utilities of the land, including the creation of equitable interests capable of salability and other dealings in land that added to both the value of land titles, and the economic viability of the national economy. It is contestable whether the land titles consequent upon SADC fast-track land reform programs have retained or enhanced the same benefits. If so, then implementation of these SADC fast-track land reform programs may be problematic in that they may not fully support economic requirements for nurturing and best management practice of their own economies in this ruthlessly competitive global market.

By presentation of an 'offer letter' issued by the designated minister of government, an occupier of nationalized farmland must vacate and let the offeree enjoy the rights of possession of the designated property. Questions must arise but the criteria for allocation of governmental offer letters against nationalized commercial farmland to individuals for their private use for up to 99 years. Who qualifies, under what criteria, and what justifies those criteria? While these are questions for another essay, and not for discussion here, their significance should not be underestimated because they address the same issues that SADC fast-track land reform programs seek to correct, namely unequal relations to land or, unequal access to land, or prejudiced land relations.

It is a crime under Zimbabwean law to sell-off land obtained through the fast-track land reform procedures. Such land remains state property enjoyed by the occupier on leasehold for up to 99 years. This approach freezes for at least the duration of A2 leaseholds under ministerial offer letters, the potential of nationalized

[30] E. C. Massie, 'Commercial Land Titles' *Virginia Law Review* (1915-1916): 115-139 at p. 118.

commercial farmlands to contribute any revenue to the state treasury purses through for instance the usual collection of stamp duty taxes upon transfer of title. This seems to be a luxury that the Zimbabwean authorities are confident that they can afford, even though the Torrens system of transfer of land titles has proven to be an efficient means of safely and efficiently transacting in land without much expense for the parties but much benefit for state treasury purses.

There is also the question of fraud through the presentation of fake offer letters. These have contributed to distortions and unneeded uncertainty in Zimbabwe's fast-track land reform. This risk sits at the heart of Act 17, 2005 procedures and undermines certainty and security of land titles advocated and guaranteed under the Torrens system of land registration. Legal certainty, which establishes integrity and reliability in the most finite resource for any nation – land is critical for incentivizing direct foreign investments. Foreign investors are always wary not to invest in host states where legal security of investments is not guaranteed.[31]All foreign investors will inevitably interact with the host state's land policies whether as leases of office space or small holdings or other commercial properties.

Therefore, SADC states cannot afford the luxury of *Torrens land policy averse* land relations policies as the latter is what Bilateral Investment Treaty (BIT) seeking sending-states require in host-states for corporations registered on their territories. Besides Western sanctions that may be visited upon them for their justifiably necessary fast-track land reform programs, SADC states undermine themselves when they fail to ensure minimal requirements for success in their revolutionary procedures. Their pursuit of de-racialization of land use should be careful not to alienate in the process, very much needed bilateral foreign investments.

Zimbabwe's Land Acquisition Act (1992) empowered the President and other authorities inter alia to acquire land and other immovable property compulsorily in certain circumstances for resettlement purposes and provided for the establishment of the Derelict Land Board to assist with the declaration and acquisition of derelict land. The procedural frustrations arising from legal challenges by farm owners in resistance of the program to utilize derelict lands for resettlement purposes led *inter alia* to the adoption of the Constitution of Zimbabwe Amendment (No. 17) Act of 2005[32] which cured most of the procedural hurdles that had stalled the country's resettlement program. Schedule 7 of Act 17, 2005 lists properties compulsorily listed for nationalization. The statute. Authorizes the Minister for Lands and Agriculture to

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[31] See also B. Chigara, 'European/Southern African Development Community (SADC) States bilateral investment agreements (BITs) for the promotion and protection of foreign investments v. post-apartheid SADC economic and social reconstruction policy' 10 *Journal of International Trade Law and Policy* (2011): 213 – 42; B. Chigara, 'Social justice: the link between trade liberalization and Sub-Saharan Africa's potential to achieve the United Nations Millennium Development Goals by 2015', *Netherlands Quarterly of Human Rights* (2008): 9-42; 'Trade Liberalization: Saviour or Scourge of SADC Economies?' 10 *University of Miami International and Comparative Law* Review (2010): 7 - 21.

[32] 16th September 2005 (General Notice 373D of 2005).

issue 'offer letters' to new owners of compulsorily acquired property under the Act for a period of up to 99 years.

However, not all farm owners of properties gazetted for compulsory acquisition under these legislative provisions actually vacated either because of the arrival of a new tenant with a 99-year lease or, otherwise. In fact, some commercial farm owners affected by these legislative Acts of Parliament may not even be aware of their post-land acquisition legislative Acts relations with "their property". Some have discovered their post- legislative relations with "their properties" only when they tried to sell to an interested buyer that, they could not sell "state land."

Consequently, a new conveyancing due-diligence requirement is that the buyer must ensure that the vendor's title is not encumbered by a present interest of the Minister of Lands and Agriculture, i.e. it has not been compulsorily repossessed by government by application of the relevant statutes. Perhaps SADC fast-track land reform programs could and should be more open to anyone whose relationship with "their own land" will be, shall be, or has been affected by any new changes. Perhaps they should assume that they have a duty of care to notify anyone whose interest in land previously held will be affected and how so, because of the compulsory acquisition of land pieces of legislation.

The UK Supreme Court observed a similar duty in *Council of Civil Service Unions (CCSU) v Minister for the Civil Service*[33] where the Court reasoned that requirements of legitimate expectation[34] applied where a decision of a public authority negatively impacted an individual by depriving him/her of some benefit or advantage which in the past s/he had been permitted to enjoy and which s/he could legitimately expect to be permitted to continue to enjoy either until at the very least s/he was given notice of its withdrawal.[35]

The shock of discovering that land titles that had all along been held as private personal property had transformed into national assets is for anyone involved when they have secured a buyer and have planned to move on, such an extreme experience that could easily be dispensed with if concerned states merely assumed and discharged the *duty to notify affected property holders within a reasonable time*, of such changes. For instance, they could send a mere simple standard letter of the change of circumstance and the simple consequences of that change. This suggestion is supported by considerations of common humanity.[36]

Moreover, beneficiaries of the fast-track land reform can lose land gifted to them by government "offer letters" for a variety of reasons. The case of *Kasukuwere v*

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[33] [1984] 3 All ER 935.

[34] Ibid. p. 936.

[35] Ibid.

[36] See also *The Corfu Channel Case (UK V Albania)*, ICJ Reports 1949 p. 41; A. L. Kirby and P. L. Harris, 'The case of common humanity: Towards a deeper understanding of children's social ideas', 50 *Journal of Moral Education* (2021): 401-418.

Mujaya, Macharaga and State of Zimbabwe[37] probably illustrates the salient challenges regarding certainty of legal title to land since the launch of the fast-track land reform program and, regarding transferability of title to land - both of which are critical to enhancing the utility of land to nurturing strong and more trade liberalization resilient economies.

Saviour Kasukuwere was the Local Government minister in Robert Mugabe's last government. He also held senior national positions in the ruling party under Robert Mugabe. During that time, he had acquired Cornucopia Farm in the renowned fertile Mazowe belt in Mashonaland Central by way of an "offer letter" from the responsible minister of government. That offer letter and nothing more had enabled him to unseat the previous landlords.

Following the split of the ruling party and the demise of the Mugabe regime in the 'coup that was not a coup' – November 2017,[38] Kasukuwere fled into self-imposed exile. The new government listed Cornucopia farm for repossession. Perrance Shiri, the new Minister for Lands, Agriculture and Rural Resettlement is reported to have withdrawn the previous 'offer letter' to Kasukuwere, paving the way for the repossession of Cornucopia Farm. The Reserve Bank of Zimbabwe (RBZ) also declined the citrus producer an export licence.

In May 2020 War Veterans are reported to have invaded and occupied Cornucopia farm and harvested the citrus fruit for sale.[39] The obvious problem is that of certainty and security of land title. Only this certainty distinguishes and differentiates land as 'real property' from chattels that can be gifted at leisure. Moreover, diminution of the utility of land's potential to raise revenue for treasury through ascertainable commercial procedures for exchange of legal titles may be an own goal in SADC states' efforts to establish strong, competitive and trade liberalization resilient economies in the fiercely uncompromising globalized world economy. SADC states should be wary not to reduce their chances of economic survival under the WTO by failing to merchandise their land with prudence. They should do everything within their wits to preserve their economies and progress their potential, and not take brazen or, reckless risks that in some cases wipeout any gains they had previously established.

Fiat in land acquisition begets fiat in its transfer. The colonialists applied extreme fiat ridden dynamics to take away land from powerless colonized natives. For almost 100 years, Rhodesians appeared to have put their unjust initial acquisitions of

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[37] *Kasukuwere v Mujaya, Macharaga and State of Zimbabwe*, HH 652-19, HC11252/18 HARARE, 25 July & 21 August 2019, available at: https://media.zimlii.org/files/judgments/zwhhc/2019/562/2019-zwhhc-562.pdf (accessed 26 April 2023).

[38] See also B. Chigara, 'Operation Restore Legacy renders Southern African Development Community (SADC) constitutionalism suspect in the coup d'état that was not a coup', 20 *Oregon Review of International Law* (2018) 173 - 217.

[39] See Zimbabwe News, "War Vets invade Kasukuwere's Mazowe farm, now harvesting oranges" 16 May 2020, available at: https://www.newzimbabwe.com/war-vets-invade-kasukuweres-mazowe-farm-now-harvesting-oranges/ **(accessed 26 April 2023).**

native land behind them and, decorated their ill-gotten gains with *legal deeds* and *legal titles* and other formalities pertaining to just property rights. All that was unmasked by the extreme fiat of majority rule governments' fast-track land reforms that followed, matching the pattern of the earlier colonial style fiat in land acquisition.

According to Nozick, justice in holdings manifests two concerns, namely the original acquisition of holdings and the transfer of holdings. Only a person that acquires a holding in accordance with the principle of *justice-in-acquisition* is entitled to that holding. The initial acquisition is just if it is an appropriation of unheld things in accordance with '. . . the process, or processes by which unheld things may come to be held, the things that may come to be held by these processes, the extent of what comes to be held by a particular process, and so on'.[40]

SADC states need to undo the legacies of the colonial apartheid-rule unjust racialized land relations on their territories, otherwise the objective of their hard-won struggles for political independence and majority rule would be betrayed. These struggles were fought principally to recover their land and restore dignity in land ownership. Nonetheless, in doing so, SADC states must be wary what they wish for: either an end to *fiat in land relations* on their territories with the promise of more secure and certain entitlements to land coupled with economic prosperity and peace or, the prolongation of fiat in land relations on their territories that is accompanied by the chaos and anguish that follows on from that. The latter appears to be an unambiguously flashing self-destruct button for their own economies. If they take that approach, then any chance they might have held of surviving the ruthless trade liberalization agenda of the WTO will be wasted. My view is that concerned SADC states will get it right, eventually because like any other IQ Test, you gain invaluable experience from attempting/dealing with it and applying lessons learnt on the reflective cycle.[41]

The SADC land issues appear to be an IQ Test dealt by the hand of history to each of those communities. This is because the SADC community is a product of historical experiences of conquest, colonialism and apartheid-rule; and bloodshed in civil conflicts for political liberation from settler rule. The dynamics of each of those historical experiences parked each community where it finds itself today. How each community unpacks the social, political and economic baggage of each of these historical periods in their own evolution is akin to an IQ Test, but one that they cannot afford to fail, in spite of distractions from mischievous onlookers, some with vested interests.

To overcome this IQ Test, affected SADC states need resolutely and fervently to pursue de-racialization of land use on their territories under the full constraint to ensure that land's utility remains the cornerstone in framing their economic

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[40] R. Nozick, 'An Entitlement Theory' in M. Clayton and A. Williams (eds), *Social Justice*, Blackwell (2006), 85–109 at p. 86.

[41] Testing traces of the Gibbs reflective theory in AU international relations, see B. A. Chigara, 'The Quasi-Supranational AU and the International Criminal Court', in Olufemi Amao et al., (eds.), *The Emergent African Union Law*, Oxford University Press (2021).

development. Only if they so proceed do they stand a chance of prevailing admirably over history's mischief of dealing them the migraine-card of racialized land-use practice for one of their many vital IQ Tests. Adherence to the principles of the Torrens check-list for land governance would be a prudent way to ensure that, their fast-track land reform programs succeed.

Moreover, the fast-track land reform has unearthed a hitherto sleeping problem associated with the colonial problem of forced labour in the British colonies of Southern Africa. Nyasaland (Malawi) men were trafficked to neighbouring Southern Rhodesia (Zimbabwe) to raise money to pay for colonial hut, dog, cattle, and land taxes imposed on natives to force them into seeking jobs on setter European enterprises – mostly mines and commercial farms.[42] This forced migration resulted in whole families settling around mines and on farms, often undocumented for generations, well into the twenty-first century. Coupled with pass law that restricted movement of natives in British colonies, this suited their masters as it limited their trafficked victims' chances of existence to staying on with them, performing work that Zimbabweans would not accept or, be forced to take.

With fast-track land reform and implementation of the BEE norm, many of these immigrant mining and farming communities have found themselves homeless and with nowhere else to go. The saddest thing is, their criminalization for remaining on the only place they can live on or, call home. This is because it is an offence to continue to occupy commercial farmland without authorization of the state once it has been nationalized under the fast-track land reform program.

In the Zimbabwe Constitutional Court decision of *Benias Yoramu and 45 Others*,[43] the applicants were charged by the state with the crime of contravening section 3 (2) (a) as read with Section 3 (3) of the Gazetted Lands (Consequential Provisions) Act, [*Chapter 20:28*] (the Gazetted Lands Act). By continuing to occupy gazetted land, the Applicants "had continued to use and occupy the farm without lawful authority". The Magistrates Court at Harare had placed them on remand. Thereafter, the applicants filed an application for various issues to be referred to the Supreme Court.[44]

The Applicants had been employed by Archie Black - a white commercial farmer, who owned a property known as *Mgutu of Great B Farm*, Mazowe. On 8 September 2000 the government of Zimbabwe listed *Mgutu of Great B Farm* among properties gazette for nationalization. The farm was subsequently acquired by the State pursuant to the promulgation of the Constitution of Zimbabwe Amendment Act (No 17).

It was then divided into thirty three plots and allocated to various beneficiaries under the land reform programme. Following the acquisition of the farm by the

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[42] E. Frankema and M. van Waijenburg, 'Metropolitan Blueprints of Colonial Taxation? Lessons from Fiscal Capacity Building in British and French Africa, c. 1880-1940' 55 *The Journal of African History* (2014): 371-400.

[43] Judgment No. CCZ 2/2016 1 (Const. Application No. CCZ 245/12).

[44] Ibid. para. 4.

Government, Archie Black left the farm. However, the applicants had remained on the farm and continued to use the farm compound, house and storage sheds situate on land allocated to one of the beneficiaries. The applicants had not been formally engaged to provide services by any of the resettled farmers who had been allocated land on the farm.[45]

If they had had a rural homestead in Zimbabwe to retire to, most of these Applicants would have taken that route. If they knew where their forebearers had arisen from in Malawi, many of them probably would have retired back to Malawi. This case exposes a concealed colonial abuse of natives – forced labour, resulting in criminalization of descendants of victims of trafficked labourers themselves trapped in the perpetual cycle of forced labour and and later servitude long after achievement of majority rule in affected states.[46] The Applicants had applied to the Supreme Court for reprieve under Section 24 (2) of the former Constitution, making clear that: "[T]hey had either migrated to Zimbabwe a long time ago or had been born and bred on the farm and had worked for Mr Archie Black for many years. As part of their conditions of employment, Mr Black had provided them with accommodation, clean and safe drinking water, electricity, sanitary facilities and food rations,"[47] but not one might add, commensurate remuneration as was the culture, to ensure generational supply of cheap labour for settler European enterprises.

The question before the Zimbabwe Constitutional Court was whether the prosecution of the applicants in the Magistrates Court under Section 3 (2) (a) as read with Section 3 (3) of the Gazetted Lands Act constituted a violation of the applicants' rights to equal protection under the law? In its General Comment No.15 on the application of the right to equal protection under the law, the UN Human Rights Committee stated that the rights in the Covenant applied to all individuals within Member State Party territories - Article 2 (1). "In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her *nationality or statelessness*."[48]

Taken together with the view of the European Court of Human Rights in the *Siliadin v France*[49] case that, the state has a duty to legislate to ensure access to a legal remedy for victims of forced labour or servitude, it is arguable that since the 46 Applicants in the *Benias Yoramu* case had pleaded a status akin to statelessness, the Zimbabwe authorities probably have a duty to ensure the humane treatment of aliens stranded on their territory – a situation arising from the circumstantial convergence of two factors namely, (i) colonial human trafficking for labour supply on European

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[45] Ibid. para. 3.

[46] See the jurisprudence of the ECHR on forced labour and servitude in *Siliadin v France*, Application No. 73316/01 (26 October 2005).

[47] Supra n. 41 para. 5.

[48] *UN Human Rights Committee CCPR General Comment No. 15: The Position of Aliens Under the Covenant,11 April 1986, available at: https://www.refworld.org/publisher,HRC,GENERAL,,45139acfc,0.html* para. 1. (my emphasis).

[49] Supra. Note 46 at paras. 58 and 5.

settler enterprises in farming and mining and, (ii) implementation of Zimbabwe's fast track land reform program for the justifiable purpose of undoing the colonial legacy of racialized land relations.[50]

Therefore, in that circumstance to target the Applicants with criminal procedures seems to be wholly unconscionable. The Court probably missed a fundamental in this case, namely, to direct the state to an omission in its legal provisions which failed to require the consequential discrimination of aliens from enjoyment of the right to equal protection under the law. Instead, the court appears to have turned against the Applicants for being *trafficked, homeless, stateless aliens* that had continued to occupy the only land they called 'home' in Zimbabwe after its nationalization into state land under the provisions of the Constitution of Zimbabwe Amendment Act (No 17) without the state providing any other option. Either the Court paid a blind eye to the social, political and economic history of Zimbabwe or, it was willfully negligent.

Support for this view is clear in the UN Human Rights Committee jurisprudence. General Comment No. 15 provides in paragraph 2 that:

> Thus, the general rule is that each one of the rights of the Covenant must be guaranteed *without discrimination between citizens and aliens*. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. *This guarantee applies to aliens and citizens alike*. Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens (art. 25), while article 13 applies only to aliens.[51]

The legal team for the Applicants presented *hardship and continuity of employment arguments*, in an effort to persuade the court to issue a reprieve from criminalization of their clients. However, as the Constitutional Court found,[52] this was a stretch too far.

SADC fast-track land reform should be sympathetic to victims of colonial human trafficking in the sub-region, and their descendants. They are victims of multiple factors, including family and cultural dissociation; servitude in the *Siliadin v France* sense and the human misfortune of statelessness. To make them criminals by convicting them for having nowhere else on this earth to put their feet and call home violates the SADC's foremost *grundnorm* of *Ubuntu, Unhu*, *Humanism* - more recently popularized by the late Nelson Mandela. Where do the Applicants go after serving their sentences for having been found 'guilty of occupying nationalized commercial farmland without authorization' – the only place they have ever lived or known as 'home' in Zimbabwe?

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[50] See also B. Chigara, 'Introductory Note to SADC Tribunal – *Mike Campbell (PVT) Ltd and Others v Republic of Zimbabwe',* 48 ILM (2009).

[51] Supra. Note 48. (my emphasis)

[52] Supra. note. 43 para 20.

Fast-track land reform programs should provide resettlement opportunities for all victims of colonial human trafficking simultaneously as they nationalize the only place known as 'home' under heaven to these victims of colonial human trafficking. To omit to do so would probably qualify for ungodly, callous and inhumane treatment. This would be one of the salient unintended consequences of fast-track land reform programs in the sub-region. The morality of states is best measured by each nation treats *aliens* and others that qualify for the category of 'the most vulnerable' on their territories. Zimbabwe's Constitutional Court may have created a huge mess with its decision that: "In the circumstances, the referral of this matter to this Court was not proper as the application raised no constitutional issue."[53]

Conclusions:

SADC fast-track land reform programs appear to have a clear aim, namely, to undo the colonial, apartheid rule legacies on their territories of racialized land relations established by apartheid-rule pieces of legislation that confiscated native land without compensation and reserved as private white commercial farmland lands with the most potential for agricultural production, while confining native populations to pockets of lands reserved for native inhabitance, lands with the least potential for agricultural production. This intention is clear also in the sub-regional SADC constitutional Black Economic Empowerment (BEE) norm, which prioritizes in all economic activity, the undoing of colonial, apartheid-rule legacies. This norm appears to be consistent with General Comment No. 18 of the UN Human Rights Committee which supervises state compliance with their obligations under the International Covenant on Civil and Political Rights (1966).[54] General comment No. 18 provides in paragraph 10 a situation befitting SADC racialized land relations as follows:

> The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in-order to diminish or eliminate conditions that cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as-long as such action is

[53] Ibid.
[54] UKTS 6 (1977), Cmnd. 67702

needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.[55]

Moreover, the UN Human Rights Committee insisted in paragraph 8 of its General Comment No. 18 on non-discrimination that: "The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance".[56]

Nonetheless, Western States, including among others the EU, the USA, Canada and Australia hope that history will credit them with hastening the end of apartheid-rule in the SADC by *inter alia* boycotting racism in sport in the 1970s and 1980s. Unfortunately, such a hope would be illusory and hopeless under the light of their fierce, clear, and uncompromising *patria potestas* determination to punish in the post-apartheid black majority-rule era, any attempt to reverse the policy of racialized land relations.[57] It renders black populations in SADC states hungry and angry non-participant mere spectators in their own predominantly agrarian economies[58] unless their governments implement the SADC constitutional Broad-Based Black Economic Empowerment norm[59] (BEE) by instituting radical fast-track land reform policies.

Thus, Western states' unflinching and uncompromising stand in support of the maintenance of colonial apartheid-rule legacy of racialized land relations in post apartheid majority rule SADC states is clear in their sanctions regime against Zimbabwe for implementing from the year 2000 onwards a fast-track land-use reform program - twenty years after securing political independence that marked the end of political but not economic apartheid in 1980.[60] This also appears to be a salutary warning to South Africa's BEE initiatives of what might follow should they implement the already warned Zimbabwe style fast-track de-racialization of land relations program.[61]

Regarding the emergent SADC fast-track land reform programs, no matter how justified and necessary they may be, it is the case that unless they integrate into their modus operandi, the Torrens approach, they may not succeed not on account of foreign economic embargoes in the questionable name of 'respect for democracy and property rights',[62] but because of their own failure to realize the utility of land as real

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[55] See UN Human Right Committee, available at: https://www.refworld.org/docid/453883fa8.html (accessed 26 April 2023).

[56] Ibid.

[57] See B. Chigara, 'Incommensurabilities in the SADC Land Issue', 25 *African Journal of International and Comparative Law* (2017): 295–325.

[58] See also B. Chigara, 'Latecomers to the ILO and the Authorship and Ownership of the International Labour Code' , 29 *Human Rights Quarterly* (2007): 706-26.

[59] Broad-Based Black Economic Empowerment Act 53 of 2003 as amended by Act 46 of 2013 2013. Available at: https://www.bbbeecommission.co.za/wp-content/uploads/2016/09/Consolidated-B-BBEE-Act-2013.pdf

[60] See D. Martin and P. Johnson, *The Struggle for Zimbabwe*, Zimbabwe Publishing House (1981).

[61] Infra note 32.

[62] Including: USA - S494 (107th): Zimbabwe Democracy and Economic Recovery Act, (USA) 21 December 2001, available at: http://www.govtrack.us/congress/bills/107/s494/text (accessed 26 April

property, and of its potential to contribute to the treasury's annual fiscal budget in the nurturing and development of stronger national economies.

> "Sir, I am a true labourer: I earn that I eat, get that I wear; owe no man hate, envy no man's happiness; glad of other men's good, content with my harm: and the greatest of my pride is, to see my ewes graze and my lambs suck." William Shakespeare - As you Like It, Act III Scene II

2023); Canada - Special Economic Measures (Zimbabwe) Regulations, P.C. 2008–1588, See also: http://www.international.gc.ca/sanctions/zimbabwe.aspx?view=d(accessed 26 April 2023).