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Customary Land Delivery Systems in Botswana

Fidelis Ifeanyi Emoh[1] & Faustin T. Kalabamu
Department of Architecture and Planning, University of Botswana, Gaborone, Botswana

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ABSTRACT: *Land is central to the development of any nation and, therefore, the way and manner through which it is procured and accessed for the welfare of the people becomes of paramount importance. While numerous countries in Sub-Saharan Africa have adopted freehold and other foreign land tenure systems, Botswana is one of the few countries that has retained its customary land delivery systems notwithstanding its far-reaching socio-economic and political transformations. The country has, however, introduced laws and institutions (such as the Tribal Land Act and the Land Boards) to modernize the customary land delivery system. The aim of this Chapter is to examine and assess the evolution of customary land tenure system in Botswana and the effectiveness the modern laws and institutions. The study examines the rules, procedures and processes for acquiring and transferring customary land rights in Botswana as well as the strengths and weaknesses of formal and informal land delivery mechanisms that have emerged as a result of the commoditisation of customary rights. The role of Land Boards and the Tribal Land Act in land accessibility will be closely examined and critically analysed. The study concludes with recommendations on how the customary land delivery system may be enhanced.*

KEYWORDS: Botswana; customary land delivery; commoditisation of customary land rights; land boards; tribal land act.

INTRODUCTION

To date, land remains the sole source of survival for most people in rural areas especially in the developing world and Sub-Saharan Africa in particular. To most rural communities in Sub-Saharan Africa, land is not just a place to live, grow crops and rear livestock but also a place or artefact that builds a complex web of social, cultural, and spiritual connections and identities between the current, past and future generations (ECA, 2011 and 2020). Ownership and/or access to land, therefore, immensely affects not only one's right to food, secure housing, water, health, work and an adequate standard of living but one's self-esteem, power and social standing in the community

[1] Corresponding author

as well. In the past access to land was guaranteed through the 'right of avail' or entitlement "that was uniformly applied to all and automatically shared by all people belonging to a particular community, tribe or clan" (Kalabamu, 2000:306). Of late, the right of avail appear to have been compromised due to many factors including colonial interferences, globalisation, modernisation, high population growth, socio-economic changes and political transformations.

This chapter seeks to share, analyse and assess Botswana's steadfast attempt to retain and deliver land under customary land tenure rules and practices. The chapter is organised in six parts including this introduction. The introduction is followed by a brief narrative on the country's geography and history as well as social, economic and political contexts. The third section focuses on pre-colonial and colonial customary land delivery processes while the fourth and fifth parts present and critically analyse, respectively, post-colonial and contemporary land delivery mechanisms. The last section contains lessons, conclusions and recommendations on the way forward.

Botswana: Geographical, Historical and Socio-Economic Contexts

Located in Southern Africa, Botswana is a large country (582,000 km^2) with a small population (about 2 million people in 2011). Despite its low population and low population density (3.4 persons per km^2), Botswana experiences land delivery challenges similar to those tenable in most Sub-Saharan countries. Several geographical, historical, political and socio-economic factors have impacted and continue to define and shape the delivery of customary land in Botswana.

Geographically speaking, Botswana's land mass may be divided into two broad parts: the sandveld or Kalahari Desert (72.2%) and the hardveld (28.8%). While the sandveld is characterized by sandy soils, lack of surface water resources and scanty rainfall throughout the year, the hardveld (which lies along the country's eastern border) is endowed with fertile soils, reliable rainfall, mineral resources (including diamonds, copper, nickel, coal and soda ash) and numerous rivers and streams. As a result of this contrast, the overwhelming proportion of the country's population, economic activities and settlements are concentrated in the hardveld. The hardveld has been occupied by agricultural-pastoralists for over 1500 years while the sandveld was originally occupied mainly by hunter-gatherer peoples of San and Khoi descent (Campbell, 1982). Consequently, the demand for land has traditionally been higher on the hardveld than on the sandveld.

The colonial administration (1885-1966) alienated most of the land covered by the sandveld in the western and northern parts of the country and converted into Crown land. It also expropriated some of the land covered by the hardveld allocated it to European settler farmers under freehold titles. The remainder was divided into tribal territories for use and occupation by indigenous communities under customary laws and tenure practices. According to Adams, Kalabamu and

White (2003), crown land, freehold land and tribal territories accounted, respectively, for 47.4%, 3.7% and 48.8% of the total land mass. Inevitably, the alienation of land compounded land shortages and landlessness among indigenous communities – especially those living along the eastern part of the country.

As expounded in the next section, urbanization has also seriously affected customary land delivery processes in Botswana. Although, until the 1970s, Botswana was a predominantly rural society, the country has since experienced two parallel forms of urbanization. First, the number of townships has more than doubled (from 3 towns in 1966 to 7 in 1991) following the establishment of four mining centres in areas where minerals were discovered. In addition, the discovery, exploitation and exportation of diamonds, cooper and nickel has enabled the country to move from being one of the poorest countries of the world to a middle income country. Second, and besides conventional urbanisation characterised by rural-urban migration, Botswana has experienced massive in-situ urbanisation. Unlike conventional urbanisation (which is dominated by rural-urban population movements), in-situ urbanisation does not entail population movements. Under in-situ urbanisation, rural settlements and their populations are transformed into urban or quasi-urban centres without much geographical relocation of the residents (Zhu, Qi, Shao and He, 2007; Kalabamu and Thebe, 2005; and Brookfield, Hadi and Mahmud, 1991). As a result of in-situ urbanisation, the number of villages or rural settlements that been granted 'urban' status[2] have increased from 2 in 1981 to 47 in 2011. All the villages that have attained urban status are located in areas where land is held under customary rules and tenure systems discussed below. All townships are located on state or government owned land.

As noted earlier, Botswana was a poor country until it discovered its mineral reserves. Since the 1970s, the country has experienced stable economic growth with the per capita Gross Domestic Product (GDP) rising from US$421 in 1966 to US$ 1966 in 1995. The country's per capita Gross Domestic Product (GDP) was estimated at US$7961 (P84901.5) in 2019 (Statistics Botswana, 2020:11). Besides increases in the number of townships and urbanisation of rural settlements, the economic boom has been accompanied by changes in employment structures, increased purchasing power and shifts from subsistence to a market economy and, more importantly for this study, commodification of land rights.

Pre-Colonial and Colonial Customary Land Delivery

Before the advent of colonialism, land in Botswana (like elsewhere in Sub-Saharan Africa) belonged to jural communities such as clans, tribes or chiefdoms. It was administered by chiefs, headmen and elders. According to Schapera (1943), Jeppe (1980) and Kalabamu (2000), every male child who became of age (just before marriage or soon thereafter) was entitled to two pieces

[2] In Botswana, any village which attains a minimum population of 5000 residents and where at least 75% of the labour force is engaged in non-agricultural activities is granted 'urban' status.

of land: one for his homestead and another for cultivation or growing of crops. He would usually be allocated the two pieces by his father from his own land holding. The allocation had to be witnessed by the headman and other male relatives in order to ascertain ownership and avoid encroachment upon neighbours' holdings. In circumstances where the father did not have adequate land to allocate to his son or sons, the headman would allocate them land from clan holdings. If the clan reserves were exhausted the chief would allocate additional land (from the tribal territory) to the clan for future re-allocations. No land was allocated to individuals for grazing their livestock. In addition, all tribesmen "were free to travel, hunt and collect or harvest natural resources anywhere within [the tribal] territory provided they did not cause damage to improvements (e.g. crops) on land" (Kalabamu, 2000:306).

Once allocated, built upon and/or ploughed, the land was said to remain the exclusive property of the family occupying it as long as the family continued to belong to the tribe. No person or family was allowed to sell, cede or transfer land to another family except through inheritance. If the land holder left the tribe or abandoned the land, it would remain unoccupied and undisturbed until it is reallocated by the headman or chief. The land holder could, however, allow a relative or friend to use the land temporarily - in which case the *de jure* holder could reclaim it back at any time.

Although, traditionally, women in Botswana were responsible for building houses, maintaining homesteads, growing crops and rearing small stocks, no land was ever allocated to women regardless of their social, economic or marital status. Women were treated as minors and could only access land through their fathers, husbands, sons or male relatives on the father's lineage. However, due to prolonged absence of men while in paid employment abroad (mainly in South Africa), chiefs and headmen started to allocate residential and farming land to unmarried mothers during the 1930s. According to Larsson (1999:74), by the1930s unmarried mothers had set up independent households, numerous women had become wage earners while many married women had become *de facto* household heads and, by extension, attained the social status traditionally reserved for men.

Although no pieces of land were ever allocated to individuals for private or exclusive use, Schapera (1994:209-211) notes that chiefs and headmen granted exclusive grazing zone around boreholes, wells and dams to individuals or groups of individuals (syndicates) that developed or constructed these man-made water resources within communal grazing areas. Consequently, people with large herds of cattle gained dual grazing rights – they were permitted to graze their livestock in both the communal grazing areas and the exclusive zones surrounding their respective borehole, well and dam.

Post-Colonial Customary Land Delivery Processes

As observed, inter alia, by Adams, Kalabamu & White (2003), Bruce (1981 and 1998) and Ng'ong'ola (1996), the government of Botswana has proceeded with caution and innovations in almost matters relating to land tenure reform. It has avoided wholesale replacement of customary tenure practices as well as land nationalisation policies that were with most independent governments in East and Southern Africa. Consequently, processes and procedures for the delivery of customary land remained undisturbed until 1969 when the Botswana Parliament or National Assembly passed the Tribal Land Act [Cap 32:02].. The Act sought to "improve agricultural production by removing constraints that inhibited the adoption of efficient methods of crop and especially animal husbandry" (Government of Botswana, 1970: 31). According to Mathuba (1989:2-3), the Act "was never meant to uproot the [customary land tenure] system … but to improve it by introducing a modernised land institution and by having a written law which can be easily referred to".

Tribal Land Act (1968)

The Act introduced four major innovations in terms of land delivery. First, Section 3 of the Act established and defined land boards in respect of every tribal territory. Sections 13 transferred powers previously enjoyed by chiefs, headmen and elders under customary law - in relation to land management and administration - to land board to be established under section of the Act. According to Mathuba (1989:2), land allocation powers were removed from chiefs and their assistants ostensibly because (i) traditional leaders were increasingly becoming egoistic and corrupt; and (ii) the government wanted customary land to be administered by experts or people with academic qualifications in land use planning, real estate managers, land economics and surveyors. However, to Ng'ong'ola (1997), the government sought to exercise greater political control over the administration of customary land.

Second, the Tribal Act - under Section 10(1) – legally vested in land boards all rights and title to land in each tribal territory. The land boards were to serve as trustees rather than 'owners'. They were to hold the title in trust for the benefit and advantage of the respective tribesmen and for the purpose of promoting the economic and social development of all the peoples of Botswana. Third, Section 16 of the Act required land boards to issue certificates to all customary land rights holders as well as establish register for keeping records of land allocations and transfers.

Fourth, Section 23 of the Act enabled land boards to lease land under common law for periods not exceeding one month and for longer periods with the consent of the responsible Minister. Under Section 24(1), land boards, with the permission of the Minister, were empowered to grant freehold land rights. Following the recommendations of the 1983 Presidential Commission, land boards have been empowered to grant the common law leases for periods of up to 99 years for residential uses, 50 years for commercial and industrial uses, and 50 years for all leases granted to non-citizens

without the consent of the Minister. Powers of the land boards to allocate freehold rights on tribal land were withdrawn following recommendations of the same commission. Until then, no land board had granted any freehold title (Government of Botswana, 1983: 2 and 5). Granting of freehold tittles and common law leases sought to give customary land holder "rights in land that can be used as an economic asset both saleable and bankable" (Government of Botswana, 1983: 2 and 5).

Fifth, Section 15 of the Tribal Land Act (1968), created six grounds on which land boards could cancel customary land rights, namely: -

a) The rights holder ceasing to be eligible
b) Failure to observe restrictions imposed by the act or any law relating to town or country planning or good husbandry
c) Need to ensure fair and just distribution of land
d) Use of land other than for the purpose for which the grant was made
e) Failure to cultivate land for 5 consecutive years without sufficient excuse
f) When land is required for public purpose.

Most of the above grounds, as Mathuba (1989) observes, contradicted Botswana customary land tenure principles and practices. Traditionally, customary land rights were perpetual and had no time limits.

Land Boards

As noted above, the duties of the land boards are to (i) hold customary land in trust of the tribesmen; (ii) administer and manage customary land within their jurisdiction; (iii) allocate and cancel land rights; and (iv) to issue and keep records of certificates of customary land rights and transfers. The Act established 12 main land boards and 38 subordinate land boards in the whole country. In terms of Section 9 of Tribal Land Act (1968), all land boards are corporate bodies with perpetual succession and common seals. They are capable of suing and being sued in their own names. While land boards are corporate bodies mandated to allocate and cancel land rights for all purposes under both customary and common law leases, subordinate land boards function under land boards and may only make customary land grants for residential and arable farming.

According to the First Schedule to the Tribal Land Act (1968), land boards were initially composed of traditional leaders, elected representatives and political appointees as follows:

(i) The Chief / Tribal Leader ex-officio or his deputy
(ii) One member appointed by the Chief
(iii) Two elected members
(iv) Four - Six members appointed by the Minister

Section 5 of the Tribal Land Act (1968) allowed each land board to co-opt, with the approval of the Minister, not more than two persons with suitable expert knowledge or experience to assist the land board in discharging its duties. Co-opted members had no voting powers. The Tribal Land Act does not specify roles to be played by the tribal administration, headmen, land overseers and local communities although land boards work closely and depend on these institutions and agencies in their day-to-day duties.

Land delivery by land boards

In accordance with Section 13 of the Tribal Land Act (1968) as amended, powers of land boards with regard to customary land delivery include:

a) Granting of rights to use any land
b) Cancelling of the grant of any rights to use any land
c) Imposing of restrictions on the use of land
d) Authorising of change of use of tribal/customary land
e) Authorising of any transfer of tribal/customary land

Initially (during the 1970s and 1980s), land boards granted land rights in two ways: by ratifying the traditional transfers of land rights from fathers to sons and by direct allocations to men and women whose parents did not have adequate land to allocate to them. Unlike chiefs and headmen, land boards allocated land to "individuals rather than towards or people belonging to the same clan" (Kalabamu and Thebe, 2005:16). Unlike in the past, individuals in need of acquiring land had to formally apply to respective land boards by completing an Application Form indicating, inter alia, their full names and postal addresses; marital status and number of children; nature of land being sought (e.g. residential, agriculture or commercial); and current land holdings.

On receipt of the application form, the land board would invite the applicant to a meeting where the application would be considered. If successful, the applicant would be invited to a site meeting allocation meeting. The applicant was required to bring with him or her, identification documents, a witness and four corner posts. A land board member, accompanied by one or two administrative officers and the land overseer or headman, did the allocation by measuring and recording the length of each side of the plot. The land board staff completed the allocation format indicating those present at allocation and plot measurements. Then the applicant was required to immediately, or within six weeks, demarcate the plot using the four posts. Later, the land board would issue a Certificate of Customary Land Grant (CCLG) signed by the chairman or land board secretary. However, according to Mathuba (1989: 71), land boards neither issued certificate with each and every land allocation nor kept proper records of land allocations at all times.

Until 2020, CCLG were not registrable by the Registrar of Deeds because they carried sketches instead of diagrams approved by the Director of Surveys and Mapping. Consequently, CCLG titles could not be tendered to secure credit finance from banks and similar institutions. All customary land grants are, however, convertible into common law leases at the grantee's initiative, costs and production of a diagram or plan approved by the Director of Surveys and Mapping. Upon expiry of the common law period, land reverts to customary land rights.

Demand for peri-urban land and illegal land markets

Rapid urbanisation fuelled by job opportunities and revenues from mineral sales experienced during the 1970s and 1980s resulted in high demand for urban land and housing which spilled into peri-urban settlements such as Mogoditshane. According to a report prepared by the Kweneng District Administration (1982), the demand for peri-urban customary land was high partly because it was easier, cheaper, quicker and more certain to acquire than state land in townships. By the late 1980s, land boards in peri-urban areas had been overwhelmed by applications for customary land rights. This led to self-allocation or unauthorised occupation of customary land and the emergence of illegal land market. A report of the Presidential Commission of Inquiry appointed to look into land problems in peri-urban areas revealed almost a 1000 households had occupied land illegally; some residents had subdivided their agricultural fields into residential plots for sale; some land sellers had issued fictitious certificates of customary land grants; and that cabinet ministers and high-ranking government officials were among the offenders (Government of Botswana, 1992). The Commission's findings led to major policy changes including amendment of the Tribal Land Act (1968) and establishment of a Land Tribunal.

Contemporary Customary Land Delivery Processes

Contemporary customary land delivery processes, procedures and practices have largely been shaped by the 1993 amendments to the Tribal Land Act; the Revised Botswana Land Policy of 2019; and challenges encountered in land boards' day-to-day operations.

Tribal Land (Amendment) Act 1993

As noted earlier amendments to the Tribal Land Act (1968) were partly inspired by the findings of the Presidential Commission of Inquiry into Land Problems in Mogoditshane and other Peri-Urban Villages. The amendments were also inspired by controversies arising from Sub-section 10(2) which stated that, "Nothing in this section [10] shall have the effect of vesting in a land board any land or right to water held by any person in his personal and private capacity". Sub-section 10(2) contradicted Sub-section 10(1) which vested all the right and title to customary land in respective land boards. The contradictions led to various interpretations and litigations as observed by Presidential Commission of Inquiry ((Government of Botswana, 1992), Ng'ong'ola (1993) and Kalabamu (2000). To Kalabamu and Morolong (2004), Sub-section 10(2) was probably included to protect private property and water rights of the elite that owned large herds of cattle. The use of

the term 'tribesmen' was also considered offensive because it did not promote 'nationalist' attitude and was not gender neutral.

In light of the foregoing, the amendments sought, among other things, to remove contradictions and ambiguities in the Tribal Land Act, strengthen the efficiency and effectiveness of customary land management and administration and promote nationalist perspectives. The amendments replaced 'tribesman' with 'citizen' to allow land allocation to women as well as men and do away with the requirement for ministerial consent for non-tribesmen to hold land within another tribal jurisdiction. Section 10(2) was repealed and section 10(1) revised to provide that land in each tribal area belongs and is accessible to all citizens of Botswana. The Amendment also did away with the requirement for the consent of the Minister for common law rights (i.e., leases) to be granted to citizens. It also provided for the transfer of customary and common-law rights without the consent of the land board, provided the land had been developed for the purpose for which it was originally granted (Adams et al., 2003).

The Tribal Land (Amendment) Act of 1993 replaced Section 39 with new provisions "imposing hefty penalties for unauthorised land dealings and other transgressions…" (Ng'ong'ola, 1997: 18). The new Section 39 made it an offence to either acquire or occupy any piece of tribal land without a lease or certificate issued by the respective land board; or transfer land rights without prior approval of the concerned land board

Reconfigured Land Boards

Although the Tribal Land Act (1968) had transferred powers and duties to allocate customary land from chiefs and headmen to land boards, land boards relied heavily on traditional leaders to identify vacant land for allocation to applicants. Overtime, headmen in peri-urban areas "assumed powers unto themselves and started to allocate residential and commercial plots on arable land for which they got some 'thank you fees' (Kalabamu and Morolong, 2004). In addition, there was a blurred distinction between traditional leadership and land boards because chiefs were part of land boards. Following the 1993 amendments to the Tribal Land Act, chiefs / traditional leaders were removed from the composition of land boards. By 1994, each land board had 12 members as follows:

(i) 5 members appointed by the minister from a list of 20 candidates elected by people living within the jurisdiction of the respective land board and submitted to him/her;
(ii) 5 members appointed by the Minister;
(iii) 1 member representing the Ministry of Agriculture;
(iv) 1 member representing the Ministry of Commerce and Industry (Government of Botswana, 1994).

According to Mathuba (1989) the regular changes in the composition of land board members were required in order to depoliticise land management and administration as well as improve the 'quality' of membership. In pursuant of these goals, land boards are currently dominated by members literally appointed by the Minister who also appoints land board secretaries. Under Section 7 of the Tribal Act of 2018(whose date of commencement is still on notice), future land boards will consist of non-elected members as follows: Eight (8) members appointed by the Minister; and three (3) ex-officio members being (a) the chief or his representative; (b) a person representing the ministry of trade; and (c) a person representing the ministry of agriculture.

Land Tribunal

To further depoliticise and enhance the quality of customary land delivery institutions, the 1993 Amendments to the Tribal Land Act made provision for the establishment of a Land Tribunal. Before the 1993 amendments, land boards heard and determined appeals made by or against subordinate land board decisions while the Minister presided over appeals brought by land board or against land board decisions. The Minister was deemed to be the final arbiter in all matters related to land. According to Mathuba (1989) and Kalabamu (2000), these arrangements were considered inappropriate for the following reasons. First, both the Minister and Land Boards were, as it were, directly conflicted in all matters related to land. So, they could not be objective in their own cases. Second, both the Minister and land boards did not have judicial powers – legal disputes were said to be the domain of judicial bodies such as courts. Third, land boards had neither legal authority nor political clout to enforce their decisions (Ngo'ng'ola, 1992:156). Consequently, land board decisions were seldom respected because of this so much so that they were seen as toothless dogs. Fourth, the process of referring appeals to the Minister proved to be lengthy – taking up to 5 years to resolve.

The first Land Tribunal was a mobile court established in 1995 and based in Gaborone. As of January 2021, the Land Tribunal had 4 divisions based in Gaborone, Palapye, Francistown and Maun. Each land tribunal is mandated to receive and determine appeals brought to it by land boards as well as appeals against decisions of any land board. Decisions made by any tribunal are the same and as enforceable as those made a Magistrate Court. Any party aggrieved by the decision of a tribunal has leave to appeal to the High Court. A separate Act, Land Tribunal Act (2014), was passed by Parliament in January 2014. The Act extended the mandate of Land Tribunals and enabled them to hear and determine appeals against town planning decisions made by the Minister or any Planning Authority including District, Rural, Municipal and City Councils. This chapter shall, however, confine itself to customary land delivery matters and exclude town planning issues. The first Land Tribunal was presided by a qualified lawyer who was assisted by at least two ordinary citizens conversant in local culture, traditions and values. At present, the Land Tribunal is composed of the Chief Land Tribunal President and several Land Tribunal Presidents. The Chief Land Tribunal President is the head of the Land Tribunal while Land Tribunal Presidents

are in charge of the divisions. In terms of Section 4(2) of Land Tribunal Act (2014), all land tribunal presidents must be qualified lawyers with not less than 10 years' experience. The presidents are assisted by people holding qualifications in land management, real estate management, physical planning or any other land related field. According to Section 5 of the Land Tribunal Act, any of the Presidents can preside over proceedings in Gaborone, Palapye, Francistown or Maun depending on workload or need. In accordance with Section 7 of the Act, all Land Tribunals have jurisdiction to (a) hear and determine any land dispute; (b) hear appeals and review decisions concerning land made by any land board or planning authority; and (c) entertain any written application from any land board or planning authority wishing to enforce any of its decisions. The sitting of any Land Tribunal must comprise of the 'President' and at least two members of the tribunal. Only the 'President' of the land tribunal decides on matters involving questions of law while the other members decide on matters involving questions of fact. Proceedings of the Land Tribunal are open to the public (unless the Tribunal decides otherwise), highly flexible and not bound by the rules of evidence or procedures applicable in a common court. In addition, the Land Tribunal is allowed to regulate its own procedures and disregard any technical irregularity which does not or is unlikely to result in the miscarriage of justice.

Other institutions

Besides land boards and land tribunals, there are over 10 national and regional institutions involved in the delivery of customary land rights in Botswana (Kalabamu, 2000). National level institutions include the Department of Lands; the Department of Town & Country Planning; the Department of Surveys and Mapping; the Department of Water Affairs and Sanitation Services; the Registrar of Deeds; Botswana Power Corporation; and Water Utilities Corporation. Regional or local level institutions include District Councils and Village Development Committees. These institutions assist land boards with the planning, demarcation (surveying), valuation, servicing, registration and administration of land rights.

Formal and informal land delivery systems

As observed by Kalabamu and Morolong (2004), the delivery of customary land may be divided into formal and informal land delivery systems. Formal land deliveries include inheritance and allocation by the land boards while informal land deliveries include all illegal and/or unauthorised land sales, transfers and acquisitions including squatting and self-allocations.

Section 38 of the Tribal Land Act (amended) recognises the acquisition of land through inheritance. A person who inherits land is required to regularize his/her devolution with the land board. The inheritance must be confirmed, under oath, by the customary court and witnessed by all family members and interested parties, before it is regularised by the land board. Akin to inheritance, is a process (popularly known as in-filling) whereby a person identifies a 'vacant' space within the older parts of a settlement and applies for it. Often, the so-called vacant spaces

are areas which were used for keeping cattle (kraals), traditional ceremonies or passages in the past. In-filling seeks to increase building densities and use land more effectively.

The majority of rural settlements (as noted earlier) have attained urban status and declared planning areas under the Town and Country Planning Act of 1977 and 2013. To ensure orderly and progressive developments, the Act requires land boards to allocate land rights (in all villages declared 'planning areas') according to land use plans approved by the Minister or other relevant authorities. The requirement has, however, constrained expeditious and timely allocation of land rights especially in peri-urban settlements as well as rapidly growing villages such as Palapye. To uphold justice, fair and equitable allocation of land for residential, commercial, religious and other uses, most land boards have adopted some form of 'waiting lists' which enable them to allocate land on first-come-first served basis.

Land boards' failure to allocate land on demand, has resulted in the growth of informal land deliveries. According to a study by Kalabamu and Morolong (2004), most of the informal land deliveries are disguised as inheritance, gifts or houses sales.

Land delivery challenges

Formal delivery of customary land is currently seized with several challenges. First, the country faces apparent land shortages due to its ecological, natural and historical factors as earlier observed. Land shortages are most acute in settlements (e.g. Tlokweng, Ramotswa, Oodi, Chobe Enclave and Lesoma) which are engulfed by national parks or freehold farms. Second, despite the country's low population figures, demand for land (especially in urbanised and peri-urban villages) is increasingly becoming almost insurmountable. The demand is fuelled by many factors including free availability and the culture of entitlement (Kalabamu and Morolong, 2004; and Kalabamu, 2012). Since 1993 amendment of the Tribal Land Act, any citizen can apply and be allocated free residential and agricultural land rights in any part of the country – a provision which has tended to not only fuel land demand but promote land grabbing by the elite as well (Molebatsi, 2019).

Third, agricultural land holders are unwilling to release land re-designated for housing, commerce, industry, military and other uses. Holders' unwillingness to release emanates from the amount of money paid as compensation for land to be repossessed land for public causes or resettlement purposes. As Molebatsi (2004) observed, land rights holders complained that compensation offered by the land board for repossessing fields is inadequate when compared to informally subdividing the holdings and selling the plots. While the government has tended to pay handsomely for freehold land acquired by the state, the compensation offered by land boards for repossessed tribal land has been inadequate (GOB, 1992a; Kalabamu, 2000). Land boards have however argued that since tribal land is 'free', it is impossible to quantify, in monetary terms, loss of rights to use a particular piece of land beyond the unexhausted improvements on it (e.g.,

standing crops, boreholes, fences, buildings, ploughing). Thus, to land boards, compensation does not need to reflect the market value of tribal land, even in peri-urban areas. It is, however, reassuring that Section 70(i) of the Revised Botswana Land Policy of 2019 has made provision for the payment of adequate compensation for repossessed tribal land. The adequate compensation rates envisaged under the Tribal Land Act of 2018 shall be based on market value. This according to Manatsha (2019) is a welcome development to many Batswana who decry the low compensation offered by the government when acquiring tribal land for public use.

Fourth, land boards have to date failed to generate, develop and maintain proper land records. Except for the planned areas, land boards have been unable to determine who owns what and where in older parts of various settlements and areas reserved for ploughing largely because chiefs and headmen did not keep written records. As a result, land boards are unable to identifying vacant / unclaimed land for allocation to eligible households and public uses. In light of this widespread challenge, the Government decided to launch a systematic land titling and registration project (popularly known as LAPCAS) in 2009. The project seeks to identify, demarcate, adjudicate, issue certificates / titles and register all customary land rights in all tribal territories (Khama and Sekela, 2016). The project will enable land boards to identify unclaimed land for allocation.

Fifth, as observed by Manatsha (2020) and Kalabamu and Lyamuya (2020), there are widespread concerns that non-citizens are grabbing land in Botswana. Although the Tribal Land Act of 1968 (as amended), empowers land board to grant land rights to non-citizens under common law leases of up to 50 years, it appears non-citizens are increasingly acquiring large tracts of customary and non-customary land through purchase and other quasi-legal channels.

New policies and legislations

The Botswana Parliament recently passed the Deeds Registry (Amendment) Act (2017), the Tribal Land Act (2018), and the Revised Botswana Land Policy (2019). These three instruments seek, in part, to address customary land delivery challenges noted above. The Revised Botswana Land Policy (2019), like any other land policy, defines guidelines and strategies to be adopted in order to resolve land administration and management challenges facing the country. New strategies related to customary land delivery as expounded under the revised Botswana Land Policy (2019) include the following:

a) All Citizens of Botswana aged 18 years and above are eligible to apply for available/un-allocated tribal land in any tribal territory or area in Botswana;
b) Each citizen will be eligible for allocation of two residential plots (one in a tribal area and another on state land) and one agricultural plot;
c) Tribal (customary) land will be planned and surveyed before allocation to facilitate registration

d) The Certificate of Customary Land Grant will be registrable under the Deeds Registry Act, without the need to convert to Common law land rights.
e) Alienation of land to non-citizen will be subject to advertisement of notice of intention to alienate;
f) Adequate compensation will be paid for tribal land required for public purpose.
g) Allocation of land will be computerised to ensure speedy delivery.

Amendments to the Deeds Registry Act aim at facilitating registration of customary land grants and transfer of deed of customary land rights while the Tribal Land Act of 2018 incorporates and provides legal force to strategies and guidelines underlined in the revised Botswana Land Policy. At the time of writing this chapter, the Tribal Land Act (2018) had not come into operation.

CONCLUSION AND WAY FORWARD

The delivery of customary land in Botswana has generally been characterised by continuity, innovation and change. Despite the introduction of statutes or modern laws to govern customary land tenure practices and the replacement of chiefs, headmen and elders with land boards and tribunals, the process and indigenous land rights have largely been upheld. Additional modernising elements in the delivery of customary land rights include issuance of certificates, common law leases and now registration of customary land rights. The outstanding element retained from traditional law is the 'right of avail' whereby each citizen is eligible and assured of being allocated free residential and agricultural plots as well as free access to communal grazing pastures. Formal or written application for land rights, failure to allocate land according to clan or tribal affiliation, planning, demarcation and registration of land rights are complete departures from traditional norms. The government has been steadfast in introducing progressive changes and innovations wherever challenges arose.

The above positive observations notwithstanding, it is probably no longer appropriate to believe and argue that undeveloped land has no monetary value. Since the emergence of commodisation in the land delivery system, tribal land has attained latent (intrinsic) value which needs to be tapped by land boards as well as allottees of customary land. There is therefore the need to amend the relevant laws on tribal (customary) land to allow for the sale and subsequent transactions on customary land rights. The sale of customary land rights will improve the revenue base of land boards, local and central governments. Again, since the land available cannot go round all interested allottees thus creating the dreaded 'Awaiting List' by the Land Boards, priority should be given to the bona-fide members of the rural villages especially in the allocation of customary land being used in livestock production and animal husbandry. This will empower them since they can subsequently sell to the rich moneybags who have hitherto unfettered access to the Land Board

officials. Payment of compensation for compulsory acquired customary land should be based on the market value of the land as is the case for freehold land in Botswana.

Finally, the current trend whereby the Minister responsible for land matters is granted powers to appoint the Chairman and Secretary of all land boards and members of all the land boards appears undemocratic. A return to initial practices with regard to the election of the Land Board members as prescribed under the 1993 Tribal Land Act (Amended) is therefore recommended.

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