

# **Land tenure policy and practice in Botswana; Governance lessons for southern Africa**

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## **ABSTRACT**

Like other countries in the region, Botswana inherited a dual system of statutory and customary tenure at independence. Despite the contrasting characteristics of these two systems, it has developed a robust land administration, which has greatly contributed to good governance and economic progress. Its land tenure policy has been described as one of careful change, responding to particular needs with specific tenure innovations. Botswana continues to adapt its land administration, based on customary rights and values, to a rapidly urbanizing economy and expanding land market. Its approach is of interest because it is finding solutions to problems that continue to elude its neighbours.

## **1. INTRODUCTION**

### **1.1 Population, resources and economy**

Botswana is a semi-arid, sparsely populated country (ca. 1.7 million in 2001) of 581 000 square kilometres located in the interior of southern Africa. Britain declared a protectorate over the country in 1885 and pursued a policy of indirect rule that involved minimal interference in internal governance and customary law. It achieved independence in 1966 as a unitary state and parliamentary democracy, less affected by colonial rule than any other territory in the region, due no doubt to its unrecognised economic potential. Colonial dispossession and settlement by European farmers was not a major feature, although, where it occurred, local land scarcity and related grievances remain largely unresolved.

For several hundred years, livestock production has played a dominant cultural and economic role. Agricultural activities represented 40% of GDP in 1966, but only account for 3% today. Since the early 1970s, the growth of mining, particularly for diamonds, has stimulated infrastructure development and financed the expansion of government services. Tourism, based on wildlife is now the second most important primary source of foreign exchange.

In less than 40 years, Botswana has become a predominantly urban society. The proportion of people living in urban areas increased from 4%, in the decade preceding independence in 1966, to about 52% in 2002.<sup>2</sup> According to the census definition, urban settlements have increased from two before independence to about 24 in 1991. The capital, Gaborone, and its immediate hinterland are the focus of rural-to-urban migration. Diverse employment opportunities in the urban areas have improved people's living standards; so has the greatly improved access to water, power and social infrastructure. But, land scarcity and overcrowding in low-income settlements have increased and so have the problems of urban land administration, particularly on peri-urban customary land.

### **1.2 Land laws and tenure categories in Botswana**

Land laws in Botswana, fall into three categories. Modern customary law draws its inspiration from African culture. While its origins are indigenous, many modifications have taken place during the past one hundred years. The customary law of Botswana is described in two seminal works (Schapera 1938: 1943). Broadly speaking, the common law of Anglophone southern Africa constitutes the modern common law of Botswana. Since independence in 1966, there has been a considerable amount of statutory law applicable to land; the most

important laws are: the *Constitution of Botswana*, Cap 1; the *State Land Act*, Cap 32, 01; the *Tribal Land Act*, Cap. 32:02 and the *Town and Country Planning Act*, Cap. 32.09.

There are three categories of land tenure: tribal land<sup>3</sup>, state land (crown land before independence) and freehold land<sup>4</sup>. At independence, about 49% of the national land area was tribal land, less than 4% was freehold and the balance state land. Between independence in 1966 and 1972, a further 15,000 square kilometres of state land were alienated and sold as freehold both to Europeans and Batswana (White 1999). By 1980, the conversion of state land to tribal land and the purchase and conversion of freehold land in congested areas, had caused tribal land to increase to 69%, freehold land to fall to 5.7% and state land to fall to 25%. Today, tribal land comprises 71% of the land area; freehold about 4.2% and state land the remainder. Thus, the policy in Botswana has been to increase the area of tribal land at the expense of both state and freehold ownership. Table 1 below illustrates the changes.

**Table 1: Land Tenure Categories in Botswana, 1966-1998**

Year	Tribal land		State land		Freehold land	
	Area	%	Area	%	Area	%
1966	278,535	48.8	270,761	47.4	21,356	3.7
1979	403,730	69.4	145,040	24.9	32,960	5.7
1998	411,349	70.9	144,588	24.9	24,572	4.2

(White 1999)

State land, most importantly urban land, is administered according to the *State Land Act* by central government and local government councils. In urban areas, state land is allocated to citizens for residential purposes, as 99-year fixed-period state grants<sup>5</sup> (FPSGs) which are registered in the Deeds Registry. For business or industrial purposes grants are for 50 years. In low-income housing areas, land used to be allocated to eligible households in terms of a certificate of rights<sup>6</sup> (COR), but this form of tenure on state land has been discontinued in favour of the FPSG. State land is also occupied by the state as wildlife and forest reserves, research stations, roads, military purposes, large dams, etc.

Decentralised land boards administer tribal land in terms of the *Tribal Land Act*. Tribal land is either held by the land board itself or by eligible applicants as customary grants<sup>7</sup> or common law leases<sup>8</sup>. Although a land board has the statutory right to refuse to allocate land, an application by government will normally be accommodated.

## 2. MILESTONES IN BOTSWANA'S LAND TENURE POLICY

### 2.1 Stages in the reform of customary tenure

Land tenure reform refers to a planned change in the terms and conditions under which people use, occupy and have access to land. The fundamental goals of tenure reform are to bring about a more

#### Box 1 Land rights in Botswana

Depending on the land tenure category – tribal, state or freehold – land rights may include one or more of the following:

- **right of avail** - to be allocated land by virtue of one's membership of a tribe (now citizen);
- **rights to occupy** a home or homestead,
- **rights to use** land for crops, for grazing; to make permanent improvements; to be buried on one's ancestral land;
- **rights to have access** for gathering fuel, poles, wild fruit, thatching grass, etc.; to hunt and exploit natural resources; and to use land for business or commercial purposes;
- **rights of way** for various purposes, including servitudes for infrastructure;
- **rights to transact**, give, mortgage, lease, rent and bequeath areas of exclusive use;
- **rights to exclude** others from the above-listed rights, and, linked to the above,
- **rights to enforcement** of legal and administrative provisions in order to protect the rights of the holder.
- **rights to compensation** for compulsory acquisition by the land board or state.

Source: Based on Adams (2000)

equitable distribution of land and land resources, to secure people's control over land rights (Box 1) and to devolve power over land-rights management nearer to the ordinary landholder.

Botswana has long had customary rules and procedures governing land rights. An important feature of customary land tenure system was the 'right of avail' that was automatically shared by all people belonging to a particular tribe (Kalabamu 2000). This right did not depend on the discretion of the chief. He was required to provide residential, arable and grazing land for all his subjects. A tribesman was entitled to land without giving anything for it, but he had a duty to protect and conserve it. Although the concept of individual ownership was unknown, the rights to residential land were exclusive and permanent. The holder could protect his rights by civil action against any person, even the chief, except when land needed to be acquired in the public interest. In this case the chief would allocate an equivalent piece of land in compensation. Customary law permitted tribesmen to transfer interests in residential land among themselves. Although the concept of land sales was unknown, there was no rule forbidding payment for improvements. The free transfer of unimproved land could be taken for granted. It was received free and was given free. It was not viewed as a commercial asset (GRB 1992).

Allocation of arable land was to family heads. The size of the extended family was taken into account. The tenure of allocations was permanent, although allottees often requested new allocations when the original fields lost fertility. Rights to arable land differed from rights to residential land in that the holder enjoyed exclusive occupation only when the land was under cultivation. After harvest it reverted to communal use, if only for grazing purposes. A holder had the right to allow anyone in need to cultivate part of his allocation and to collect payment or part of the harvest in return for the land clearing and ploughing done by the holder.

An area that was neither residential nor arable was regarded as grazing land. All had the right to graze their animals there. There was no fencing and cattle roamed and mingled freely. However, each owner was entitled to a site for the purpose of drawing water, usually from a well. Once a well was sunk, the holder acquired exclusive rights to it.

These customary rules are, of course, unexceptional. They will be recognised across the vast savannah areas of Africa. In Botswana, they provide the basic framework of customary land law. They have secured the land rights of the great majority of the population for generations. Today, this framework has to accommodate new rules to cope with changes brought about by the growth in the human population, changes in land use practices and technology, economic growth and urbanisation.

A consistent thread running through Botswana's land-related policies and legislation is the aspiration to provide the land, shelter and production needs of all citizens. A related principle is that the land itself should not be bought and sold, only the unextinguished improvements thereon. This is evident in the *Tribal Land Act*, 1968 and subsequent amendments. The thread follows through the reports of the presidential commissions on land tenure (GRB 1983: 1992) and the related government white papers. The principles are rooted in customary law, but in an urbanising Botswana with a rapidly developing urban land market it is increasingly difficult to sustain them.

### **2.1.1 Changes to land tenure introduced at independence**

At independence, the *State Land Act*, 1966, turned crown land into state land and, among other things, conferred on the President the power to provide for its disposal. The *Tribal Land Act*, 1968 (as stated in the foreword to the Act) is 'to provide for the establishment of tribal

land boards; to vest tribal land in such boards; to define the powers and duties of such boards ....' It vested tribal land in land boards in trust for the benefit and advantage of citizens and for the purpose of promoting the economic and social development of all the peoples of Botswana. Section 13 (1) of the *Tribal Land Act*, 1968, provides that:

'All powers vested in the chief under customary law in relation to land including:

- the granting of rights to use any land;
- the cancellation of the grant of any right to use any land including a grant made prior to the coming into operation of this Act;
- hearing of appeals from, confirming or setting aside any decision of any subordinate land authority;
- the imposition of restriction on the use of tribal land

shall be vested in and performed by a land board acting in accordance with the provision of this Act.'

The *Tribal Land Act* did not change customary land law other than by transferring the authority over land from the chief to the land board, and by introducing certificates as evidence of customary grants of individual rights for wells, borehole drilling, arable lands and individual residential plots. The Act did, however, provide for the granting of common law leases with the consent of the Minister, which was a major innovation at the time. This early concession to the emerging land market sanctioned the fencing and privatisation of the commons.

In the region, land boards are unique to Botswana, often imitated but less often understood. Nine land boards started operating in 1970.

They were constituted as corporate bodies with the capacity to sue and be sued and the power to do anything that would facilitate the proper discharge of their functions. Three more land boards were created in 1976 after the creation of new tribal territories from state land. Thus, there are now twelve land boards within the ten administrative districts.

The land boards got off to a slow start. Since they were new institutions, their members, even the traditional authorities, were unfamiliar with their functions. It took many years, and substantial efforts to train and guide the members, before they were familiar with their duties. One problem was that many of the people most knowledgeable on local land matters were illiterate; conversely, many of the better-educated people knew little about the land, being better acquainted with urban issues. Numerous adjustments have been made to the composition of the land boards before the current composition was arrived at (Box 2). It has proved extremely difficult to mould the land boards simultaneously to fit the diverse objectives of modernisation, democratisation, decentralisation and the pursuit of sometimes conflicting policies (e.g.

#### **Box 2 Land Board Membership**

Elections in the *Kgotla* started in 1984. Prior to that, two members were elected by the District Council from amongst its members, the Chief was an ex officio-member to represent the tribe, the District Agricultural officer was an ex-officio member to represent agricultural interests and the remaining members were appointed by the Minister of Local Government Lands and Housing, on the advice of the District Commissioner, to represent tribesmen and other local interests.

The composition now is 12 members for the main boards and 10 for the subordinate boards. Two members on each main and subordinate board are representatives of the Ministries of Agriculture and Commerce and Industry. Five members on the main boards and four on the subordinate boards are appointed by the Minister to hold office for three years, but subject to reappointment. The remaining five members on the main boards and four on the subordinate boards are appointed by the Minister for a four year renewable term after being selected by a Land Board Selection Committee from lists of candidates compiled in the area of jurisdiction of each subordinate board and selected or elected at the *Kgotla*. Chiefs, sub-chiefs and their nominees, those holding elected political office or holding public office are disqualified from standing for selection or election to land boards.

the privatisation of the commons at the same time as upholding the egalitarian principles of customary tenure).

As the volume and complexity of land board business increased, demands on the members have become heavier. Minimum educational standards are required of candidates. A minimum age limit of 26 years and an upper limit of 65 years have been imposed. Newly elected land board members receive a period of training in their duties. Land board membership makes heavy demands on members' time. There are not only the regular meetings, but also informal consultations and site visits, which can mean spending several nights away. It was found that active and capable people who might be eligible for land board membership were unwilling to serve unless they were compensated at a rate equivalent to the opportunity cost of their time. One of the most frequently heard complaints against the land boards is that they allocate land inequitably, that they favour those with influence and many cattle, and ignore the land claims of those who are politically inarticulate and have few animals. There is some evidence, however, that these biases are even greater in some of the central government offices which deal with land, and that the land boards and district councils, both locally representative bodies, have a clearer perception of the needs of the poor than do most civil servants and are more responsive to them.

Most of Botswana's districts are too large for a single land board to handle. Thirty-seven subordinate land boards have therefore been created to carry out many of the same functions as main land boards, at the local level (Box 3). In theory, this devolution of powers preserves one of the most important characteristics of the land allocating body - its local knowledge and understanding of the people's need for land and their traditional rights. In practice, in sparsely settled parts of the Kalahari, the subordinate land boards can still be very remote from local communities, in some cases as much as 250 km away.

Permission of the main land board is required for sinking a borehole or digging a well. In order to avoid crowding of boreholes, and therefore of settlements and cattle posts, a general rule of 8 kilometres between new boreholes or watering points is applied throughout the country. Borehole siting is a complex task, which has to reconcile the wishes of the applicant to drill in a certain place, the technical feasibility of finding potable water at a reasonable depth, the presence of sufficient unutilised land to allow the 8 km rule to be applied, and the absence of counter claims to that land. Some of the same complexities arise where leases for commercial ranches are applied for, and have to be inspected and demarcated.

Leases for ranches were first allocated on a significant scale under the Tribal Grazing Land Policy (GRB 1975).<sup>9</sup> The aims of the policy were to stop over-grazing and degradation of the veld; to promote greater

### **Box 3 Duties of Main Land Boards and Subordinate Land Boards**

**The Main Land Board** allocates land under customary and common law for residential, arable and other purposes. It also cancels grants made on any land including grants made by chiefs before the establishment of the land boards and hears appeals from Subordinate Land Boards. It imposes and enforces restrictions on the use of land, implements land-related government programmes like TGLP and the 1991 New Agricultural Policy fencing component. It is also charged with the sustainable management of tribal land under its jurisdiction. Applications by non-citizens are processed by the Main Land Board but the decision on them lies with the Minister of Land and Housing.

**Subordinate Land Boards** allocate land for customary uses, impose restrictions on use and recommend cancellation of customary land rights to the Main Land Board. They receive, investigate and make recommendations to the Main Land Board in respect of common law and borehole applications. They also settle land disputes. Subordinate Land Boards can't allocate any grazing land, any commercial or industrial land and cannot authorize a change of land use.

equality of incomes in the rural areas; and to allow growth and commercialisation of the livestock industry on a sustained basis.<sup>10</sup> Exclusive rights to specific areas of grazing land were given to individuals and groups for commercial ranches with boreholes and fencing. Leases were granted and rents paid to the land boards. Tenure conditions in unfenced communal grazing areas remained unchanged. This controversial privatisation policy has been expanded under the National Policy on Agricultural Development (GRB 1991a). Because rights to hunt and gather are not recognised under customary or statutory law, the indigenous San people continue to be displaced by fenced ranches and relocated in settlements. The *Tribal Land Act* entrenched a fairly uniform system of Tswana land tenure. It did not accommodate other forms deviating from the Tswana patterns of land holding and use. The San are not the only minority marginalized in this way.

The integrity of the land administration system on tribal land has also been tested in the crowded peri-urban areas. The increasing demand for land and the rapid urbanisation that is taking place require a high level of technical and administrative competence on the part of the land boards. The failure to provide for the recording of all existing customary land rights has continued to severely undermine the land allocation process. Many of the problems now being experienced in the peri-urban areas have, at their root, the lack of information on the extent and nature of prior allocations (Ng'ong'ola 1999). In the urban areas, the land boards have difficulty in identifying the genuinely needy from among the many applicants and of finding land to allocate to them. Time and resources are wasted, illegal activities go unchecked and the land needs of the poor are not met.

In the view of the Presidential Commission on Land Tenure (GRB 1983) the financial, technical, staff, transport and other resources required to permit this institution to carry out its responsibilities were badly underestimated. This remains as true today as it was twenty years ago. The Second Presidential Commission on Local Government Structure in Botswana (GRB 2001) recorded serious public disquiet about the operations of the land boards, but nonetheless recommended that they should remain in place.

### **2.1.2 The first comprehensive review of land tenure policy in 1983**

*The Presidential Commission on Land Tenure* (GRB 1983) conducted the first major review of Botswana's land policy 15 years after independence and found no reason for sweeping changes. It described the land tenure policy that had been pursued by government 'as one of careful change, responding to particular needs with specific tenure innovations' (p. 3). The recommendations that were accepted by government included the following:

- (a) Commercial and industrial leases on tribal land should be modified to allow for duration of 50 years; automatic right of inheritance should be granted; land board consent should no longer be required for a sale of a common law lease to a citizen; the consent of the land board to transfer or sale should not be unreasonably withheld.
- (b) Common law leases for residential plots, for the purpose of mortgaging residential buildings, should remain as 99 years; the lessee should be allowed to apply for reversion to customary allocation at any time, subject to it not being mortgaged.
- (c) FPSGs and CORs were deemed to be the most suitable form of land tenure on state land in urban areas. The Commission called for legal changes to allow lending against a COR offered as security for a loan. Various amendments to the *Deeds Registry Act* were proposed to prevent land fronting.<sup>11</sup>

### **2.1.3 The 1992 White Paper and *Tribal Land (Amendment) Act, 1993***

The next important milestone was the *Review of the Tribal Land Act, Land Policies and Related Issues* (Mathuba 1989). A Presidential Commission (GRB 1991b) and White Paper on

the *Land Problems in Mogoditshane and other Peri-Urban Villages* (GRB 1992) followed shortly. The Commission was appointed in July 1991 to inquire into the illegal transaction occupation and use of tribal land adjoining Gaborone and Francistown and to make recommendations to resolve them.<sup>12</sup> The government's response was contained in the White Paper published in March 1992, which has policy implications that go beyond the resolution of land problems in peri-urban areas. It examined the status of the customary land tenure system, provided a synopsis of the customary law prior to the enactment of the *Tribal Land Act, 1968*, and explained the pending changes to the law which materialized in the *Tribal Land (Amendment) Act 1993*.

The government white paper addressed the contentious issue of compensation for compulsory acquisition of land because the failure of the land boards to pay adequate compensation to rights holders of arable land was a root cause of some of the land management problems in peri-urban areas. The government paper recalled and reaffirmed the views of the first President of the Republic of Botswana, Sir Seretse Khama, that there was no longer any justification for compensation for the acquisition of tribal land for public purposes to be lower than compensation for other types of land, that such differentiation could not be reconciled with the terms of the Constitution and that the law would be altered so that tribal land would be covered by the terms of the *Acquisition of Property Act* so as 'to enable landowners to receive compensation commensurate with the value of the land as dictated by market forces' (pp12-13).

The amended law made possible the further extension of the market in tribal land. A crucial amendment, vehemently opposed by some chiefs and members of Parliament (Mathuba 2001), replaced 'tribesman' with 'citizen' so as 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. This latter change was made because it was felt to be improper for land to be held and allocated for the benefit of a restricted group. 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 the land was originally granted.

The extension of the eligibility criteria and the migration to towns and cities in eastern Botswana resulted in a major increase in the number of applications to land boards for residential plots. The increase came about as a result of genuine need, pre-emptive reservations to forestall land scarcity (e.g. by parents for their children), as well as wish by some to profit from the increasing value of land. The scramble for residential allocations on tribal land has had many adverse consequences. Responding to the long list of applications ties up the financial and human resources of the land boards. Meanwhile, large numbers of allocated plots remain undeveloped and unused and are administratively difficult for the land boards to repossess. As a consequence, new land for residential allocation extends the perimeters of villages into arable and grazing land. The costs of servicing plots with infrastructure also increase.

#### **2.1.4 Developments in the administration of urban state land**

The State Land Allocation Policy (MLGL 1990) aims to provide for the right of avail in urban areas. The policy currently in force states that all citizens, regardless of where they live, will be eligible for two residential, commercial and industrial plots in the urban areas of Botswana provided a first plot has been developed.

Land servicing (i.e. provision of roads, drains, water and power supplies) is a precondition for land allocation on urban state land for residential, commercial and industrial purposes. Plots are not allocated free but at a price determined by the income category for which the plots are intended. However, government prices fall below market value, hence the very long waiting lists and the associated problems of land fronting.

The Self Help Housing Agency (SHHA) allocates plots for low-income earners. The Department of Lands is responsible for overseeing the administration of urban state land and for coordinating the development and allocation of non-SHHA serviced land. The Department of Surveys and Mapping is responsible for overseeing the survey of all layouts and plots for which titles are allocated and registered by the Deeds Registry. The private sector, which has so far played only a modest role, is involved in land servicing in high-income residential estates on freehold land and on a limited scale through government contracts on blocks of state land. At the other end of the income scale, NGOs have been active in low-income shelter provision.

The Accelerated Land Servicing Programme, which was instituted by the government in 1992, aimed to meet the unsatisfied demand for urban housing and respond to the customary 'right' of avail of citizens for land in urban areas. Upon an application for a plot being lodged with the Department of Lands or a SHHA office, the details were entered into a computer based system. Priority was given to those with no plot or house in any of the urban areas. When plots become available, a committee approved the allocations. Allocated plots were to not be transferred unless they had been developed for the purpose for which they were allocated and a 10-year period had elapsed since the date of allocation. In a case where a plot had to change hands before the prescribed date, it had to be developed first and the transferee had to pay to government the difference between the sale price of the plot and the initial cost-recovery price paid by the allottee.

A review of the Accelerated Land Servicing Programme (MLH 2001) found that, of the middle and upper income plots in Gaborone, 13% had to be repossessed as compared with 55% of the SHHA plots. A similar pattern emerged in the other centres. The number of residential plots that remain undeveloped and unpaid for between 1992 and 2001 was substantial. It would appear that people who were allocated plots were not able to develop them, despite the fact that plots were offered at subsidized prices. Allottees hung on to them hoping that one day they would be able to develop them. As a result, the infrastructure provided deteriorated and was vandalized. Some 22 000 plots were delivered under the programme between 1992 and 2002, but no new major land-servicing project is planned.

The National Policy on Housing (GRB 2000) portends a fundamental change to land policy in urban areas. It states that government's role in the provision of land for housing has had to change from that of financier and direct producer of plots, to that of facilitator. The allocation of subsidised plots to urban households, whatever their level of income, has to come to an end. The government paper states that in future scarce budgetary resources will be channelled to low income housing as an instrument of economic empowerment and poverty alleviation.

### **3. BOTSWANA'S NATIONAL LAND POLICY REVIEW 2002**

Some ten years after the last government paper on land tenure policy and the amendments to the *Tribal Land Act*, consultants were appointed by government to conduct a comprehensive review of land policy and prepare the groundwork for a government paper on the subject. Stakeholders from all over the country energetically debated the conclusions of two draft reports on land policy by the consultants (NRS 2002a: 2002b) in the last quarter of 2002. The



review covered the length and breadth of both land administration and land management.<sup>13</sup> This section of the paper briefly touches on the former.

The review concluded that Botswana's overall land policy and institutional framework are fundamentally sound and that, despite the profound changes witnessed by Botswana in the last two decades, the 1983 strategy of careful change, responding to particular needs with specific tenure innovations remains valid. Nonetheless, some important adjustments to the policy are called for.

### **3.1 The right of avail**

The customary rules governing applications need to be updated to overcome the related market failures on tribal land. The Land Policy Review (LPR) recommended that: (a) the entitlement of citizens to apply for any number of residential plots should be limited; (b) application fees should be restored to 1968 values, to act as a demand regulator and (c) the regulations relating to the repossession of undeveloped land should be amended. The LPR proposed that citizens should be limited to a single lifetime grant of tribal land for residential purposes in the area of their choice. If the plot were serviced, the recipient should pay the costs involved. For additional plots on tribal land, they should rely on the land market. With regard to the allocation of urban state land, it was recognised that the waiting list system had outlived its usefulness and that middle and upper income groups should obtain land through the market. However, government should continue to acquire, service and distribute land to meet the housing needs of the poor.

### **3.2 Compensation for land acquisition**

The LPR recommended the establishment of a unified and fair system of land acquisition and compensation applicable to all land and all people with property interests in land. The scope of compensation offered and the rights of those to be compensated under the *Tribal Land Act* should be extended to achieve parity with the provisions of the *Acquisition of Property Act* and to comply with the requirements of the Constitution. This proposal was anticipated ten years ago in the government white paper on problems in peri-urban areas (GRB 1992) but not followed up. The type of compensation offered should be flexible and should correspond to the needs of those to be compensated.

### **3.3 Proposals relating to the content of rights in urban areas on state land**

In urban areas on state land, a more flexible approach to tenure rights was recommended for low-income earners on state land than the 99-year FPSG, the sole option currently available. Applicants for both COR upgrading and new allocations should be offered the option of short-period leases (or FPSGs) of 10 to 30 years. The aim of the renewable short-period lease would be to give tenure security at an affordable price, but not for such a long period that upper income groups would be tempted to buy into the land. It was also recommended that government should clarify and make explicit its policy on the renewal of FPSGs by amending the *State Land Act*. Provided that the holder had met certain conditions, all FPSGs should be renewable on similar terms upon payment of a fee to cover transaction costs and a premium proportional to the market value of the land. Where the plot concerned is the principal place of residence of the holder, no premium should be payable.

### **3.4 Proposals relating to the content of rights in rural areas on tribal land**

In rural areas on tribal land the LPR proposed a number of tenure-related measures that would improve land management and development prospects and protect the land rights of the poor. Proposals were made that would increase the flexibility of the land use categories provided for under the *Tribal Land Act* to empower holders of customary grants and common law leases to

use the land for any purpose compliant with planning regulations or local byelaws and to sublet residential and arable land and enter into share cropping and share farming agreements in a manner which would protect the interests of the parties involved.

With regard to grazing leases, the LPR recommended that, in order to address the problem of dual grazing rights,<sup>14</sup> the *Tribal Land Act* should be amended to require any person who wished to move livestock from a fenced farm to a communal area first to obtain the permission of the body responsible for that communal area's management. It also proposed that leases for all ranches should require the lessee to relinquish all rights to use the communal grazing land belonging to the lessor (i.e. the land board).

Many grazing leases are not managed commercially but as weekend cattle posts by town dwellers. In order to promote commercial management of leasehold ranches on tribal and state land, the LPR recommended that: rents should be levied at a commercial level; all ranches on tribal land should be allocated through a transparent tender procedure; where a rancher declined, or is unable, to pay a commercial rent for a leasehold farm, the holder should be required to surrender the lease to the land board for the board to dispose of as it sees fit; lessees of TGLP ranches should be permitted to manage their farms profitably, to use their land in a commercial manner and free to select the most appropriate manner of use for it.

The LPR endorsed the recommendation made by the Revised Rural Development Policy (GRB 2002) that local community-based institutions should be involved in the allocation and management of land and natural resources. Community based property rights should be recognised and more adequately provided for in the *Tribal Land Act*.

The Land Policy Review proposed a number of steps to address tenure related problems identified in the leasing of land to the tourism industry. For example, all leases of public land should be public documents open to scrutiny by any person. Land boards should educate the public in their rights and responsibilities. Both land boards and communities should change their attitude towards concessionaires and joint venture partners and work with them to build a valuable common enterprise for everyone's benefit. Land boards should invest more resources of manpower, money and time in monitoring the activities of communities, concessionaires and joint venture partners and support them in meeting their obligations in terms of their lease and joint venture agreements.

### **3.5 Facilitating the operation of the land market**

The LPR concluded that the continuing rapid growth in transactions required more efficient operation of the land market. Recommendations were made for improvements in efficiency that can be obtained by (i) reducing the transactions costs to consumers (e.g. by simplifying procedures and reducing delays by improving the efficiency of the Deeds Registry and the land boards); (ii) ensuring that buyers and sellers have better access to information (e.g. data in the Deeds Registry and details of vacant and available plots on tribal land); and (iii) by reducing risks and uncertainties (e.g. by making clear what constitutes a legal transaction and what does not). The extension of the benefits of the land market to more citizens involves improving access to mortgage finance by first-time borrowers and making it easier to rent property.

### **3.6 Problems experienced by groups of citizens in securing land rights**

The LPR, while advocating government's recognition of the importance of the land market in the land allocation process, conceded that certain groups of citizens were sidelined in the market allocation process, because they did not have the financial muscle or because they

were disadvantaged in some other way by reason of the law as it now stands. Under this heading were included the poor, women, marginalized minority groups, and those affected by HIV/AIDS. It was necessary for government to intervene in the land market on their behalf.

The Land Policy Review observed that land and shelter were aspects of poverty that have been neglected in the past. It recommended that land and housing for the poor should become a focus of national policies for the reduction and alleviation of poverty. To further strengthen women's land rights, the LPR recommended the abolition of the 'marital power' in legislation, the review of marital property law, the reform of inheritance laws, and the necessary actions to encourage the reform of the lending practices of financial institutions and increasing the representation of women in land authorities.

With regard to minorities such as the San and other groups, it was recommended that in those localities where they formed a majority, local community structures could be established to regulate the use of the land and manage natural resources, including water. New water development in settlements could be put under their control, as was proposed in the early San settlements in the 1970s, so that they could operate a borehole and control access by owners of large herds (Wily 1981). As a matter of priority, the LPR recommended a high-level policy decision to afford the San community protection from eviction as a result of the allocation of common law leases under the fencing component of the National Policy on Agricultural Development (GRB 1991).

The LPR recognised the need for a more systematic study of the impact of HIV/AIDS on the land rights of affected households in Botswana. It proposed actions to protect the property rights of women and orphans. This proposal was based on emerging evidence from Botswana of problems in this regard and the experiences of other countries in the region that are affected by the pandemic (SARPN 2002).

#### **4. DRAWING GOVERNANCE LESSONS FROM BOTSWANA**

Botswana's land institutions are often held up as a model of democratic development. As periodic land policy reviews and commissions have revealed, there have been both successes and failures, but after investigation and discussion problems have generally been acknowledged and rectified.<sup>15</sup> In no other country in the region has land been so judiciously administered as an essential component of good governance. Some would argue that Botswana has little to offer in the way of lessons to the region because it is unrepresentative. Its population is modest in size and ethnically relatively homogeneous. By comparison with neighbouring countries, it is relatively wealthy and has no impairing legacy of colonial domination and European settlement. These points have some validity. But it should be noted that Botswana set out to democratise its land administration shortly after its independence in 1968, when it was still one of the poorest countries in Africa. The costs of Botswana's land administration are modest. In current 2002/03 prices the combined recurrent expenditure of all the institutions in the land sector grew from P51 million in 1989/90 to P165 million in 2002/03.<sup>16</sup> This represents 0.8% to 1.2% of total annual government expenditure over the period.

Whilst diverse in objective, and uneven in delivery, efforts to reform land tenure in the region exhibit a remarkably common set of concerns (Wily 2000). Systems of land administration cannot be exported wholesale to neighbouring countries, but experiences with different types of tenure, land institutions and the harmonisation of statutory and customary law might usefully be drawn upon. The manner in which customary, unregistered rights are increasingly regarded in Botswana's land policy and law is a case in point.

#### **4.1 The nature of the policy making process**

Because of its sensitivity and complexity, land tenure reform is a time-consuming process. The necessary institutional development is likely to take decades (Adams *et al* 1999). Progress is dependent on appropriate constitutional and legal frameworks and requires thorough public consultation and careful preparation. For the last quarter of a century in Botswana, iterative policymaking in the different sectors, including land, has followed a sequence of steps extending up to two years: (i) a commission of inquiry (or an expert review) involving calls for written submissions, public meetings in different parts of the country involving a wide range of stakeholders; (ii) the preparation of a draft report, oral presentations and discussions at a national workshop covered by the media; (iii) the drafting of a draft paper which is debated in Parliament; (iv) the publication of a government white paper setting out the policy change which has been adopted, the recommendations which have been accepted, amended and deferred (or rejected) complete with the justification for government having done so; (v) finally, where relevant, the drafting of new laws or amending of existing legislation.

This public process of policy development and change is in stark contrast to that played out elsewhere in southern Africa over the last decade. Excepting South Africa, Mozambique and Malawi, it is difficult to detect a linear relationship (or any kind of systematic relationship) between the analysis of the problem or opportunity and the assessment of the evidence, the formulation of recommendations and the announcement of the policy change. In Zimbabwe, Zambia, Namibia, Lesotho and Swaziland land policymaking is seen as a prerogative of Cabinet. Even then, there has rarely been evidence of the kind of policy consistency that might be expected from collective decision-making, because policymaking is the prerogative of the President and/ or the Prime Minister and reflects some short-term political expediency.

#### **4.2 The role of traditional authorities**

Land tenure reform in Botswana has been both flexible and gradualist with regard to the role of traditional authorities. Because widespread departures from existing systems are rarely immediately feasible, successive governments in Botswana have moved in a measured way to reduce the powers of undemocratic traditional authorities (see Box 2). In contrast, successive ANC governments in South Africa have vacillated over the role of the chiefs in land administration in the communal areas. The Communal Land Rights Bill, intended to secure the tenure of people living under traditional leaders, is now not expected to reach Parliament in 2003, after five years in the making. Zimbabwe, Namibia and Zambia have a similar record of 'blowing hot and cold' over the role of traditional leaders. The current Lesotho government is in the process of drafting legislation to abolish customary land tenure on the advice of the Land Policy Review Commission (GKL 1999), despite the fact that the chiefs hold effective sway over land allocation over much of the country.

#### **4.3 The devolution of powers over land rights management and decision making**

Botswana's experience with the land boards has been of interest to countries in the region, but as the National Land Policy Review has shown, more work has still to be done to bring about the effective, democratic and participatory management of communal land rights and devolve responsibility for land rights management closer to the rights holders. Several countries claim to aspire to imitate Botswana's land boards, most recently South Africa. The intention to provide for land boards in the communal areas first appeared in an earlier draft of the so-called Land Rights Bill in 1999 under the Mandela Government. The local land board (at magisterial district level) was intended, as in Botswana, to be an integral part of a system of land rights management, a nested system that simulated customary systems. Under the latest

version of the legislation (GRSA 2002), the Communal Land Rights Bill, no such system is envisaged because land rights are to be transferred in full private ownership to so-called communities. The land boards (on which traditional authorities are to be represented) appear suspended in space, with an advisory role only and with only one land board per province.

#### **4.4 Customary land relations and the status of women and the poor**

Reform of customary land relations must pay special attention to the legal status and economic activities of women and the poor, who are often disproportionately dependent on the commons. Despite the complexities, reforms to sustain their access to the commons are essential (Adams *et al* 2000). The National Land Policy Review once again drew the Botswana government's attention to the concerns raised by White (1993) on the privatisation of the commons by sectional interests in the cattle industry and the likely negative impact on the production of a range of livestock and veld products and the livelihoods of the poor. It remains to be seen whether the advice will be heeded. Although legal reforms still need to be undertaken, the record of Botswana in securing women's land rights is more creditable. Although the matter has yet to be confirmed, there is evidence that the negative impact of the HIV/AIDS pandemic on women's land and property rights is less severe in Botswana than elsewhere in southern Africa.

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<sup>2</sup> For census purposes, an urban area is defined as a settlement with a minimum population of 5000 inhabitants and whose at least 75% of its labour force are employed in non-agricultural activities.

<sup>3</sup> Tribal land is a misnomer, as it no longer held by tribes but by statutory land boards. More appropriately it should be called customary land as it is administered in terms of customary law.

<sup>4</sup> Strictly speaking freehold is not term used in Roman Dutch law. The correct term is land in private ownership.

<sup>5</sup> This form of tenure is granted on urban state land. An FPSG is long-term building leasehold except that the usual ground rent is converted to a premium payable on the grant of the interest. Transfers, sales or assignments can take place once the initial development covenant is satisfied.

<sup>6</sup> As the name suggests, it was a certificate spelling out the rights and obligations of the holder. These included transferability with the consent of the Town Council, inheritability and use in return for an obligation to pay for the services provided by the Town Council.

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<sup>7</sup> Grantees receive a certificate of customary land rights. While the certificate was introduced to make people feel more secure, most people are not worried about their security of tenure and many allottees fail to collect their certificates from the offices of the land board.

<sup>8</sup> Common law leases are renewable, registrable under the *Deeds Registry Act* and are mortgageable.

<sup>9</sup> Leasehold tenure was first introduced under the *Tribal Land Act* to cover small businesses and residential land granted to non-citizens.

<sup>10</sup> The policy had a negative impact on all counts and led to the emergence of iniquitous ‘dual grazing rights’ in which ranch owners keep their cattle on the communal lands, only to withdraw them to their farms when grazing is exhausted.

<sup>11</sup> Fronting exists because of the differential prices at which land is made available to different classes and groups of individuals and because of a ban on selling undeveloped land. For example, it takes place when a person who is allocated a plot at a subsidised price arranges to sell it (at a higher price) to someone that might not be eligible to apply for the land direct.

<sup>12</sup> Illegal transactions included the unauthorised subdivision and/ or sale of arable land for residential and other purposes and the transaction of land allocated for residential purposes before it had been developed for that purpose.

<sup>13</sup> Land administration refers to the process of allocating land and determining, recording and disseminating information about the tenure, value and use of land when implementing land management policies. Land management is concerned with the management of land as a resource, both from an environmental and an economic perspective.

<sup>14</sup> See endnote 10.

<sup>15</sup> Notable exceptions are issues relating to the land rights of the San and other minorities and the related problem of privatisation of the commons for ranching.

<sup>16</sup> This includes, Land boards, the Land Tribunal, the Department of Surveys and Mapping, the Department of Lands, the Department of Town and Regional Planning and the Attorney General’s Chambers Lands Division & Deeds Registry.