

Will the Dreaded 'Yellow Monster' Stop Roaring Again?: An Appraisal of Botswana's 2015 Land Policy

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Abstract

This paper assesses Botswana land policy of 2015 from a historical perspective. In July 2015 the Parliament of Botswana, after a lengthy debate, approved a new land policy for the country. It had first been brought to the parliament in 2013 by Botswana's then Minister of Lands and Housing, Lebonamang Mokalake. He had brought in the proposed policy with the provision of land quotas for the communities living in the peri-urban areas. The legislators rejected the proposed land quota model arguing that it was discriminatory. Thus, the 2015 policy has no provision for the land quotas. It tries to confront the serious challenges facing land administration and management in Botswana. However, a closer look at the policy shows that it overlooked the main challenges confronting land management and administration in the country. We suggest that the policy needs serious revision for it to be inclusive and to effectively address the real problems on the ground.

Introduction

Five decades have passed since most African countries gained their Independence from European colonial powers but not much has been achieved in terms of realising a good number of the ideals of Independence (Meredith 2005 and Coltart 2016). The liberation struggles that culminated in the attainment of Independence in Africa were mainly fought over land. Yet by 2016 the land question is still highly contested and an emotive subject in much of Africa. It is 'an example of historical injustices colliding with demands for contemporary fairness' (Gibson 2009:135). In Africa the failure to resolve the land question is exacerbated by the rigid neo-liberal economic framework, which has become globally dominant and aggressive since the 1990s (Moyo 2008). Neo-liberalists stress the primacy of markets and profits than social justice even when dealing with a structural problem like the land question. Addressing the land question 'requires thorough understanding of the complex social and political contradictions which have ensued from colonial and post-independence land policies' (Moyo 2008:1).

Researchers have extensively discussed the land question across Africa, especially after Zimbabwe's land crisis in February 2000 (see Tirivangani 2004 and Gibson 2009). However, Botswana remains scantily covered in the literature. This, if not critically examined, may lead to a wrong conclusion that the country has no contentious land issues (Manatsha 2011a). This paper concurs with former president of Botswana, Ketumile Masire's, admission in his memoirs that 'The subject of land is one of the most sensitive issues in Botswana, as it is in much of the developing world' (Masire 2006:183). Since the country's Independence in 1966 the government of Botswana has instituted legislative and policy reforms aimed at resolving land conflicts, improving access to land and its management. However, some of these reforms have wittingly and unwittingly aided the grabbing of land from the poor by the elites and the state (Malope and Batisani 2008). In an effort to curb this and improve land management and administration, the 2015 land policy provides, albeit with limitations, some remedies. It was debated and passed by parliament during its sitting from 6 July to 7 August 2015 (Republic of Botswana 2015). However, the matter had first been brought to parliament in 2013 by Botswana's then minister of Lands and Housing, Lebonamang Mokalake. This land policy was passed to address the teething problems in land management and administration.

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Since 2012 there have been intensified calls by communities in the peri-urban areas for the government to introduce land quotas when allocating plots in the tribal land. President Ian Khama publicly supported these calls when addressing *kgotla* meetings across the country (see *Botswana Daily News* 12 April 2015 and Kayawe 14 April 2015). However, land quotas contradict the amended Tribal Land Act (TLA) and Botswana's Constitution (Manatsha and Morapedi 2014). There have also been continued mass evictions of squatters from informal settlements by the government (Molebatsi 2004). The rising numbers of people on waiting lists for land allocation throughout the country and the rampant illegal selling of tribal land greatly worried the government (Manatsha and Morapedi 2014). It was in this context that the 2015 land policy was debated and passed. The policy correctly notes that land issues 'remain matters of grave importance and any change required is to be made with great care' (Republic of Botswana 2015:1). In 2016 Botswana celebrates 50 years of Independence from Britain. This coincides with the winding up of 'Vision 2016', which is a long term vision for Botswana. 'Vision 2016' outlines the challenges facing the country and also proposes solutions to them. It advocates for equitable resource distribution, amongst others (Republic of Botswana 1997).

The 2015 land policy avers that land tenure debate should involve many stakeholders. It is vital that governments should 'listen to and engage with different actors, and understand the diverse range of interests at stake, providing them with platform for discussion of policy option' (European Task Force on Land Tenure 2004:18). Botswana's land policy notes that there was 'extensive nationwide consultations... to reaffirm the validity of the proposed policy' (Republic of Botswana 2015:2). This paper assesses this policy from a historical perspective. It starts by discussing Botswana's land tenure and land administration since the pre-colonial period. It then proceeds with a brief explanation of the 2015 land policy. This is followed by a critical assessment of the provisions of this policy. The conclusion summarises the discussion.

Land Tenure and Land Administration in Botswana

Botswana was a British protectorate from 1885 to 1966 when the country attained its Independence. Before the institutionalisation of English property laws the *dikgosi* (chiefs) administered all the land on behalf of their *merafe* (tribes) in colonial Botswana (Schapera 1938 and Mathuba 1989). Contrary to what the British believed, the *dikgosi* were not the sole owners of the land but custodians (Selolwane 1980). The privatisation or commercialisation of land was imposed on Botswana by the British. Before colonisation, every 'tribesperson' was entitled to a piece of land, without paying for it. But 'there was no rule forbidding payments for improvements' on the land (Adams *et al* 2003). Tribal land is still not sold, but there are loopholes resulting in it being sold illegally. The key feature of customary land tenure was the 'right of avail' that was automatically shared by all members of the *morafe* (Kalabamu 2000).

In 1885 the British colonial administration introduced a new land tenure system in the form of freehold land, crown land and 'native' land (Schapera 1938 and Mathuba 1989). Freehold land was originally granted to the white settlers by the British colonial administration. A freehold title confers unlimited rights to the land (Republic of Botswana 1985). Crown land was ceded by the British colonial administration and was bestowed on the Queen of England. The State Land Act of 1966 converted crown land into state land (Republic of Botswana 1966). State land constitutes forest land, national parks and game reserves. It is also held by private individuals as leasehold, fixed period state grant or certificate of rights (Republic of Botswana 1985). Native land (now tribal land) was left in the custodian of the *dikgosi* until 1970 when the land boards were created (Republic of Botswana 1985 and Mathuba 1989). In 2013 tribal land constituted 71%, state land 26%, and freehold land 3% (Republic of Botswana 2015:2).

The TLA of 1968 (amended in 1993) is the most significant piece of legislation on the administration of tribal land that the Botswana Democratic Party (BDP)-led government (in power since 1966) passed. Section 13(1) of the TLA states that 'All the powers previously vested in a Chief and a subordinate

land authority under customary law in relation to land... shall vest in and be performed by a land board acting in accordance with powers conferred on it by or under this Act' (Republic of Botswana 1968). The land boards came into effect in 1970 and replaced the *dikgosi's* role in land allocation. Section 13 of the TLA outlines the functions of the land boards as (a) the granting of rights to use any land; (b) the cancellation of the grant of any rights to use any land; (c) the imposition of restrictions on the use of tribal land; (d) authorizing any change of user of tribal land; and or (e) authorizing any transfer of tribal land (Republic of Botswana 1968). The land boards' board positions are advertised and applied for. The committee that assesses the applications comprises of the district commissioner, the *kgosi*, the land board secretary and the district council secretary. After this committee has identified the qualifying candidates, their names are forwarded to the minister of Lands and Housing to appoint the board chairperson and his/her deputy (from these names) (Molebatsi 2011:151-52).

Previously, the board members were elected by the villagers through a secret ballot at the *kgotla*. Legally, the voters were expected to be the residents of a 'tribal territory' where the land board is located. The system was, however, marred by voter trafficking from outside the said tribal territories (Molebatsi 2011). The opponents also 'argued that [the] selection of board chairperson by the [elected] members compromised the chairperson[s], who had to show favour to those who elected them' (Molebatsi 2011:150-51). The current system, even though it might 'address the limitations of publicly elected land board members, it can also be argued that it has centralised appointment of land board membership' (Molebatsi 2011:151).

Section 10(1) of the TLA denounces tribal claim to land when it states that 'All the rights and title to land in each tribal area [is] for the benefit and advantage of the citizens of Botswana and for the purpose of promoting the economic and social development of all the peoples of Botswana'. In 1993 the term 'tribesmen' was replaced with 'citizens of Botswana' in the TLA for inclusiveness, neutrality and gender sensitiveness (Republic of Botswana 1994). Since then eligible Batswana can acquire land 'anywhere' in the country. Previously, they could only acquire land in their respective 'tribal territories'. The TLA was conceived to 'detrribalise' access to tribal land and to improve national unity. The BDP-led government feared that tribalism (political mobilisation of ethnicity) could engulf the nation as it had happened in other newly independent African countries (Makgala 2006). The TLA was also introduced following the personal differences between the 'progressive' new political elites and the powerful *dikgosi*. The TLA 'was part of our effort to remove the arbitrary power of the chiefs', notes Masire (2006:184). However, the *dikgosi* have always and strongly felt that the TLA disempowers them (Morapedi 2010). In many countries in Africa, the legal and institutional bodies governing/administering land are generally 'unrepresentative' (Moyo 2008:118). In Botswana the land boards are elitist and bureaucratic too (Molebatsi 2011).

Will the Dreaded 'Yellow Monster' Stop Roaring Again?

The Botswana government has been accused of heavy-handedness when dealing with the less politically connected who acquire land 'illegally' (Makgala 2006). It has repeatedly used the 'yellow monsters' (bulldozers) to demolish structures built on the land acquired illegally by the Batswana who, after waiting for years to be allocated land, ended up acquiring it informally in the black market (Molebatsi 2004). But the government has been reluctant to institute similar punishments when the culprits are the politically and economically powerful (Makgala 2006).

In the early 1990s the Botswana government instituted the Kgabo Commission to deal with the rampant 'Extralegal land subdivision and sale [of land]' in Mogoditshane (Molebatsi 2004:88). The commission blamed the failure by the government to allocate land on time as the root cause. About 800 plots were found to have been illegally allocated (Republic of Botswana 1991). The culprits felt that they were justified since the government had failed to deliver land on time (Molebatsi 2004). They openly told the commission that the leading Batswana, including senior politicians, were exploiting the situation and were

heavily involved in the illegal land dealings (Republic of Botswana 1991). In 2004 Lesetedi Commission of Inquiry was appointed by President Festus Mogae 'to look into the illegal land allocation in Gaborone. The commission's report implicated cabinet ministers, senior government officials and politically connected businesspeople. However, for a long time the government appeared reluctant to deal with the alleged culprits' (Makgala 2006:98). This lends credence to the view that in Botswana the rich easily get away with corruption as opposed to the downtrodden. This paper hopes that the new land policy will address the illegal land allocations across the country.

Botswana's 2015 Land Policy in Perspective

The policy notes that land has multiple values for Botswana and it is at the centre of people's identity (Republic of Botswana 2015). It acknowledges that these values have been rapidly changing since 1966. The policy claims to be a result of 'extensive consultation' (Republic of Botswana 2015:1) even though in Botswana the culture of genuine consultation is said to have long diminished (Makgala 2007). Botswana's then ministers of Lands and Housing, Nonofho Molefhi (2008-2011) and Lebonamang Mokalake (2011-2014), toured Botswana holding *kgotla* meetings 'consulting' Botswana about the proposed land policy. This paper contends that these *kgotla* meetings were primarily to inform Botswana and not genuinely engage them. Immediately after the land policy was passed by parliament (in July 2015) the government received complaints from the Botswana that it claims to have consulted (Mkhutshwa 9 December 2015). This prompted the minister of Lands and Housing to appear on the national television and Gabz FM, a local radio station, to re-explain what the intentions of the land policy are/were. Again, in December 2015 the minister admitted that the land policy was discriminatory in certain provisions. He reassured Botswana that the government will review the policy (Gabz FM 7 December 2015). During the *kgotla* meetings the issues discussed were the proposed land quota model, the demoralisingly long waiting lists, the illegal selling of tribal land, the protection of vulnerable groups (women, orphans, people living with disabilities and the remote area dwellers), and the poor service delivery by the land boards. In 2013, 2014 and 2015 parliamentarians argued that the land quota model was unconstitutional and thus rejected it (Manatsha and Morapedi 2014). This position narrowly focused on the interpretation of the law. In this way it, somehow, 'overlooked' social justice and equitable resource distribution.

In an effort to contextualise this land policy, its drafters provide a brief explanation of the previous policies and Acts related to land administration in Botswana. About 16 policies were passed between 1973 and 2004. Similarly, about 17 statutory instruments were passed between 1966 and 2003 (Republic of Botswana 2015:3-9). In 1985 the Presidential Commission on Land Tenure saw no need for radical changes in the land tenure systems (Republic of Botswana 1985). It recommended the replacement of the offending term 'tribesman' with 'Citizens of Botswana' in the amended TLA. The 2015 land policy also states that the land tenure system has 'served the country well save for few shortcomings in administrative processes' (Republic of Botswana 2015:10). It suggests, only if necessary, the changes in the legal framework. The land policy's overall goal 'is to protect and promote land rights of all land holders and promote sustainable human settlements' (Republic of Botswana 2015:9). It lists the factors that may compromise this objective such as 'market forces, gender [and] poverty' but vows to address them (Republic of Botswana 2015:9). The 2015 land policy's overall objectives are to:

- i. Protect and promote the land rights of all land holders;
- ii. Ensure that all eligible citizens have the opportunity to access and use the land;
- iii. Encourage citizens retention of rights to land;
- iv. Promote equity in access to land and natural resources;
- v. Improve land management system on customary, state land and freehold land to make it

- predictable, transparent, reliable, consistent and timeous;
- vi. Establish an up-to-date, efficient and accessible land information centre;
- vii. Promote compatible and best use of land, and other land resources (Republic of Botswana 2015:9).

The policy also aims to approach land management holistically, taking into account sustainable development. Specifically, it says it will:

- i. Guide all land operations for sustainable human settlements, land utilization and socio-economic development;
- ii. Promote access, equity, efficiency, land rights security and transparency in land management and administration; and
- iii. Be responsive to emerging opportunities and dynamics of planning and development in the country.

The policy recognises the role that equitable access to land and its usage can play in addressing the socio-economic needs of all citizens. It guards this critical resource when it states that 'Once secured, land rights need to be protected' (Republic of Botswana 2015:11). It also recognises the link between the right to shelter and access to residential land. Shelter is an uncontested human right. The policy reaffirms that '(i) Every Motswana will be eligible for allocation of residential plot at an area of their choice' (Republic of Botswana 2015:11). This is consistent with the TLA Section 10(1), the Constitution's Sections 14(1) and 15(3), and Botswana's 'Vision 2016'.

Tribal/Customary Land

This section discusses what the land policy proposes to introduce under tribal land, and the challenges associated with such reforms. The following are examined: secure land rights, access to residential land, the one spouse, one plot policy, access to arable land, communal land and the tragedy of the commons, and communal grazing lands and dual grazing rights.

Secure land rights

Under tribal land, the policy notes that customary land grants cannot be used to secure loans/funds in banks since they are not registered (Republic of Botswana 2015). Having only user rights limits one's economic opportunities. Tribal land rights can be cancelled by the state anytime. 'Adequate' compensation is made only for the developments on the land. To ensure that customary land certificate holders have security, the policy indicates that '(i) Tribal land will be planned and surveyed before allocation to facilitate registration; and (ii) The certificate of customary grant will be registrable under the Deeds Registry Act, without the need to convert to common law land right' (Republic of Botswana 2015:10). These will limit the repossession of land from the poor under the pretext of public interests. It will also transform many livelihoods as registered land could be used as collateral in financial institutions.

De Soto (2000) argues that secure land tenure is one of the major ways of overcoming poverty since secure land can be used as collateral in banks. Land without security of tenure is dead capital (De Soto 2000). This paper argues that in Botswana secure land tenure would also address the illegal 'selling' of tribal land. The policy states that to facilitate land registration, the Ministry of Lands and Housing (MLH) will establish a land information centre. 'The land information systems will be integrated to provide inter-operability as per e-government programmes' (Republic of Botswana 2015:21). This sounds progressive. The government must fast-track the conversion of tribal land grants into secure land rights for

the benefit of all. But given the government's notoriety for having good policies but disturbing inefficiency in terms of implementation (Magang 2015), it remains to be seen when this initiative will take off.

Access to residential land

The policy underscores that access to residential land is directly linked to the right to shelter, hence the right of every citizen to be allocated land is reaffirmed (Republic of Botswana 2015). It outlaws multiple ownership of land in the same category (e.g. residential or arable land acquired directly from a land authority). Legally, those who benefited before July 2015 cannot be required to surrender other portions of land they acquired under the same category. Many Batswana acquired multiple residential plots in one land board's jurisdiction. It happened due to poor record-keeping, corruption and the demand for land in the black market, especially in the peri-urban areas (Republic of Botswana 2001). The policy says that additional plots will be acquired 'through the private market, inheritance or other legitimate channels' (Republic of Botswana 2015:12). In the peri-urban areas the waiting lists for land allocation are frightening. In April 2015 the waiting list for Mogoditshane Sub Land Board stood at 143,000 and some of the applications were submitted in 1993 (*Botswana Daily News* 23 April 2015). In March 2016 the minister of Lands and Housing informed parliament that across the country, there were '1,062,158 applicants on the waiting list as maintained and published by various Land Boards and the Department of Lands' (Piet 15 March 2016). This forces Batswana to acquire land through the formal and informal market. The policy encourages Batswana to voluntarily return their land to the land boards should they fail to develop it within five years. Those who do so will be given priority when there are ready to develop when or if the land is available (Republic of Botswana 2015:17). It is hoped that this will address speculation and illegal selling of land.

The policy states that in places where eligible applicants exceed the available plots, the land authority 'will determine the appropriate method for allocation e.g. raffle, first come first served, waiting list' (Republic of Botswana 2015:12). The use of a raffle caused upheaval in Tlokweng in 2012/13 after the Tlokweng Land Board had decided to use it to determine the allocation of 285 plots at Maratanang ward. The land board had received over 20,000 applications. Some 17 Batlokwa challenged this decision in court arguing that it disadvantaged them as they were initially promised plots by the Tlokweng Land Board on the basis of being the 'locals' (*Botswana Daily News* 7 March 2013 and Manatsha and Morapedi 2014). The case was finally settled out-of-court in November 2014. The High Court made an agreement of the two parties a court order, which stated that the Tlokweng Land Board will allocate plots to each of the 17 applicants provided they qualify in terms of the TLA (Mokwape 5 November 2014).

On 25 November 2014 thousands of Batswana, desperate to be allocated residential land, thronged the Oodi Sub-Land Board in the Kgatleng district after the MLH had announced that people should apply for plots there. Thousands camped overnight causing a near stampede in the morning of 26 November 2014 prompting the Botswana police to be called to control the crowd (Manatsha 30 November 2014). The waiting lists, if managed well, are a better option. The TLA (section 9(2)), however, empowers the land board 'to do anything and enter into any transaction which in its opinion is calculated to facilitate the proper discharge of any function conferred or imposed upon it under this Act or any other law, or which is incidental or conducive thereto' (Republic of Botswana 1994). Despite this, the paper cautions that any method deemed 'appropriate' by any land board in allocating land should be subjected to rigour and scrutiny to avoid litigations and social unrest as happened in Tlokweng and Odi.

The one spouse, one plot policy

The land policy makes the controversial pronouncement that 'Since only one spouse can apply for a plot, the surviving spouse must as of right inherit their land allocations' (Republic of Botswana 2015:18). This

violates individual's right to own land as stipulated in the TLA. The Constitution also grants citizens the right 'to reside anywhere in the country' (The Constitution of Botswana Section 14(1)). It is discriminatory for the land policy to deny Batswana the right to acquire 'free' land on the basis of marriage. This also fails to acknowledge that Botswana has a high rate of divorce cases. In 1994 there were only 394 divorce cases registered with the High Court in Lobatse. In 2011 and 2012 the figure stood at 2,089 (*Echo* 11 September 2015).

This hypothetical example proves the irrationality of the one spouse, one plot policy. Imagine Kabelo and Chedza getting married in August 2015. In June 2016 they divorced. They only had one plot, which Kabelo acquired in October 2015 and the couple built a house in it. The policy barred Chedza from acquiring a plot. During their divorce the court granted the house to their two children. The court also granted Chedza the custody of the children. She remains in the house. Kabelo becomes homeless. Legally, Kabelo and Chedza have no house yet the land policy obligatorily and explicitly states that 'Every Motswana will be eligible for allocation of residential plot' (Republic of Botswana 2015:11). Therefore, it is inconsistent that matrimony makes this unachievable. The policy also commits to promote 'equity in access to land' (Republic of Botswana 2015:9). Another hypothetical scenario would be when Tabona's wife, Neo, wants a plot in Maun. The policy prevents her because Tabona has a plot in Nswazwi. Yet the policy states that 'One is deemed to be allocated a plot if they have a lawfully acquired plot registered in their names' (Republic of Botswana 2015:11). The policy does not specify the type of marriage (in Botswana there is marriage in community of property, marriage out of community of property, traditional marriage and even polygamy).

Access to arable land

The policy stresses the vitality of arable farming as a 'source of food, income and employment for many Batswana' (Republic of Botswana 2015:13). It recognises the shortage of arable land and proposes that mechanisms will be devised to ensure that arable land is 'used efficiently and effectively' (Republic of Botswana 2015:13). In 1985 the Commission on Land Tenure stated that 'many people in rural areas have no other means of earning a living except from the land' (Republic of Botswana 1985:14). To 'efficiently and effectively' utilise arable land, the land policy proposes to limit ownership to one agricultural holding per eligible citizen. Subsequent plots will be allocated on certain conditions. Like with residential plots, 'additional plots may be acquired through private market, inheritance' or other legal means (Republic of Botswana 2015:13).

Considering the value of arable land (*masimo*) the government should stop repossessing it. Those who are unable to utilise their *masimo* should be encouraged to lease them. The government has been repossessing the unused *masimo* since 2010 (Manatsha 2011b). The land policy further reemphasises the importance of scaling up integrated farming. It also notes that *masimo* found 'on fertile land will be protected through zoning. Once zoned, change of land use will not be allowed' (Republic of Botswana 2015:13). The TLA (section 17(1)) empowers the land board to 'determine and define land use zones within the tribal area, and may from time to time make amendments thereto'. Is the policy firmly pronouncing that once *masimo* have been zoned, the land boards cannot turn around and demand the same in the future for other developments? Many Batswana have lost their *masimo* due to village expansions (Manatsha 2011b). Attaining food security should be at the core of the agricultural sector.

Communal land and the 'tragedy of the commons'

Scholars have dismissed the assumption that communal areas are inherently poorly managed (Feeny *et al* 1996). Yet the land policy still states that the 'non-exclusivity of rights' results in the mismanagement of communal land in Botswana (Republic of Botswana 2015:14). This needs proper contextualisation.

There are rules and norms that have well governed the use of communal land for generations (Feeney *et al* 1996). Admittedly, the individualisation and commercialisation of communal land undermined these tried and tested practices. Some scholars uncritically argue that talking about African traditional methods of conservation prior to European colonisation is a ‘romanticised myth’ (Hinze 2003:19-21). Garrett Hardin popularised this Eurocentric myth in the *Tragedy of the Commons* (Hardin 1968). He contends that communal ownership results in resource overexploitation and depletion, and blames this on selfishness and weak norms and rules by the users (Hardin 1968). But a myriad of studies have shown that communal ownership has done better than other regimes (Feeney *et al* 1996).

Hardin’s thesis gained prominence in the 1970s and 1980s. It significantly informed policy intervention in rangeland management in many developing countries. In Botswana, presidents Seretse Khama and Ketumile Masire strongly believed in Hardin’s thesis (Parsons *et al* 1995 and Masire 2006). They fully endorsed the Tribal Grazing Land Policy (TGLP) in 1975 and the National Policy on Agricultural Development (NPAD) in 1990 respectively (Malope and Batisane 2008). Both policies were designed to improve rangeland management. Ironically, they led to the overgrazing and degradation of communal lands (Fidzani 1998). It is unconvincing for the land policy to propose that the fencing of communal grazing areas will address the degradation (Republic of Botswana 2015). Instead, it could cause serious social problems as happened with the TGLP and the NPAD studied by Happy Fidzani (1998).

It is also ill-advised for the land policy to assume that a syndicate system will achieve equitable resource allocation (Republic of Botswana 2015). A syndicate policy ‘has a tendency of concentrating [resources] in the hands of the few well to-do’ (Manatsha 2010:93). The poor, weak and those with little resources benefit less- if they do at all. The land policy must protect everyone. The land policy’s announcement that ‘Preference will be given to syndicates in areas where grazing resources are limited’ (Republic of Botswana 2015:14) is vague. What about non-syndicate members? The land policy overlooks the fact that ‘traditional right of a tribesman to... a piece of land to plough, and to use the communal grazing lands ensures that every person may acquire the means to exist’ (Republic of Botswana 1985:3).

Communal grazing lands and dual grazing rights

The land policy promises to ‘discourage the practice of dual grazing rights’ (Republic of Botswana 2015:14). This is progressive although it is unclear how it will be achieved. The policy states that the ‘Acquisition of an exclusive farm or ranch, through whatever means, will exclude the holder of the farm or ranch from competing for access to communal grazing land elsewhere in the country’ (Republic of Botswana 2015:14). This is hard to enforce from a legal, political, institutional and social perspective. Most cattle barons are the politically powerful and economically strong elite. In many instances, it has been hard for the land boards to deal with them fairly in cases whereby they contravene the law (Makgala 2006 and Manatsha 2010). When the TGLP and the NPAD were implemented, the objective was to control overgrazing in communal lands by giving cattle barons ‘exclusive rights’ (Fidzani 1998). But these cattle barons continue to freely graze in communal lands. How will the policy address this?

The land policy concludes that communal grazing lands are overgrazed because of the ‘non-exclusivity of rights’ (Republic of Botswana 2015:14). Ironically, commercial farmers with ‘exclusive rights’ still want to enjoy the ‘non-exclusive rights’. Apart from greed, this also reveals that ‘[m]any Batswana stand today with one foot in the traditional sector and the other in the developing cash economy. New needs exist but old needs [shall] persist’ (Republic of Botswana 1985:3). The government admits that the contribution of commercial ranches to the beef sector is ‘very marginal’ (Republic of Botswana 1985:3). Why is the policy emphasizing the continuation of ‘exclusive grazing rights’? What is the value of this?

The land policy unequivocally states that ownership of a farm/ranch, acquired ‘through whatever means’, will automatically exclude one from grazing in communal land (Republic of Botswana 2015:14).

This sounds good from a social justice perspective and is clearly in line with 'Vision 2016' which calls for 'sustainable utilization of our natural resources' (Republic of Botswana 1997:6). But this exclusionary clause may also be interpreted as unconstitutional, especially by those who acquired their farms through the market. They may argue that the TLA still grants them rights, as citizens, to freely access the communal lands too.

Commercial Agricultural Land

This section discusses the interventions that the land policy proposes on the management of commercial agricultural land. The land policy provides for the repossession of the idle/disused and mismanaged commercial agricultural land (Republic of Botswana 2015). The on-going Land Administration Procedures Capacity and Systems will give the government the status of all the land across the country. At the moment, comprehensive information is lacking (Lute 21 March 2016). The policy notes that since Independence 'freehold land has fallen into the hands of citizens' (Republic of Botswana 2015). It also states that 'Statutory provisions [will] be made in the proposed Land Act to administer freehold land' (Republic of Botswana 2015:11). However, the land policy does not indicate the amount of idle land owned by absentee landlords. It also does not specify how it will address absentee landlordism, especially the land acquired during the colonial period by white settlers and colonial syndicates.

In 2003 the Member of Parliament for Gaborone West, Robert Molefhabangwe, tabled a motion in the parliament demanding the repossession of idle land owned by absentee landlords in the North East District (NED). He also questioned the legality of the freehold titles held by the Tati Company (Manatsha 2011a:74). The ruling BDP, which has been in power since 1966 and has been viewed as largely accommodating to the British colonial interests (Edge 1996), used its majority to defeat Molefhabangwe's motion and similar others. Yet the party admits that the nationalities and whereabouts of some of the absentee landlords are unknown (Manatsha 2011a). If there was political will on the part of the ruling party's government it could use the Acquisition of Property Act and the Constitution to acquire the land held by absentee landlords.

Commercial, Industrial, Civic and Community Land

The land policy rejects the allocation of 'commercial, industrial and civic and community plots on the basis of waiting list as this hampers economic usage of land' (Republic of Botswana 2015:12). It contends that allocating this land using waiting list has 'resulted in wide spread speculation on land'. To address this, the policy pronounces that 'Access to land for investment will be through open competitive public tender' (Republic of Botswana 2015:12). This paper suggests that this land can also be leased to facilitate the implementation of the government-initiated youth sponsored projects across all sectors and not necessarily agriculture. The policy states that the land under this category will be planned and surveyed prior to allocation.

The policy underscores citizen empowerment, and states that local commercial centres will be created and preference 'will be given to citizen consortia' (Republic of Botswana 2015:12). Competitive tendering appears progressive, yet it runs the risk of alienating those who may not possess the technical expertise to develop tender documents which also come with costs. Based on the feasibility of business proposals, the paper suggests that commercial and industrial land can still be allocated without subjecting it to the strenuous tender process.

Alienation of Land Rights

The TLA and the policy on allocation of state land forbid the 'alienation of undeveloped plots without the consent of Land Authority' (Republic of Botswana 2015:16). The land policy aims to discourage the sell-

ing of undeveloped plots and speculation. Thus, it proposes the following:

- i. Where the government has allocated land at subsidized prices, those who want to alienate their land rights within a period of 15 years will be required to pay the difference between the subsidized price and full market price of the plot at the time of allocation; and they will not be eligible for any subsequent allocations;
- ii. Land allocated under special dispensation and economic empowerment schemes will not be alienated within a period of 15 years. In the event the alienation has to be effected within 15 years, an assessment by the Land Authority will be done before approval;
- iii. Once allocated land in a particular use category, one may not be eligible for allocation of land in the same category after alienating the plot;
- iv. A person will not be allowed to alienate their last residential plot acquired directly from the Land Authority;
- v. The alienation of any land will give preference to citizens and any alienation to non-citizens will be subject to advertisement of notice of intention to alienate;
- vi. An individual who voluntarily returns their plot to the Land Authority will be given priority in future when plots are available and they apply in the same locality, provided they surrender them before it is due for repossession (Republic of Botswana 2015:17).

In the peri-urban areas many young people have sold their only residential plots with the hope to reapply or inherit from their parents (*Mmegi* 8 March 2013). The policy's announcement above (iii) will discourage this practice. However, the TLA does not mention one-man-one plot anywhere. The pronouncement (vi) above restricts those eligible to reapply for land in the 'same locality' after alienating their land rights. This undermines citizens' 'right to reside in any part of Botswana' as stipulated in the Constitution (section 14(1)). This hypothetical example proves the irrationality of the 'same locality' principle. At 20-years-old, the unemployed but university-educated Tapiwa applied for a residential plot in Masunga (NED). She failed to develop it owing to the circumstances beyond her control. She then returned it to the Tati Land Board as per the policy's advice. After 15 years, Tapiwa is a fully-fledged lawyer based in Gaborone. Her urgent need is to have a plot/house in Gaborone or its vicinity. But the policy strictly states that she must go back to Masunga and reapply there. This violates her constitutional right as argued above. The repossession of the undeveloped plots pronounced in (vi) above must seriously take into account extenuating circumstances such as unrelenting poverty and rife unemployment, especially amongst the youth.

Cancellation of Land Rights

The president and the land boards have the legal powers to repossess tribal and state land 'for public purposes' and 'adequate compensation is paid' (Republic of Botswana 2015:17). Nonetheless, in most instances, 'public purposes' are highly contested by the dispossessed. Consultations with the affected must be genuine and transparent. The repossession of *masimo* has left many landless. This is done for infra-structural development and villages' expansion. The affected are unable to benefit from the government sponsored schemes (Manatsha 2011a).

When cancelling land rights, the main concern is also 'adequate compensation'. The government only compensates for the developments made on the land not for the land itself. Most Batswana lack 'the wherewithal to substantially develop their land especially arable land' (Manatsha 2011a), hence they get very low compensation. In November 2010 President Ian Khama stated that his 'Government has revised compensation rates for acquisition of tribal land, which should encourage more plot holders to release their land' (Republic of Botswana 2010b). The TLA (section 33(3)) states that anyone dissatisfied with the compensation can approach the courts of law (Republic of Botswana 1994). The poor and weak lack the

knowledge and resources to take the court route. The cancellation of land rights must be fair.

Affirmative Action and Land Allocation

The 2015 land policy recognises that certain groups in the society are vulnerable, and for fairness and natural justice, it provides for special treatment for them in land allocation. According to the policy the vulnerable are 'remote area communities, widows, orphans, youth and the vulnerable groups (people with disabilities and the needy)' (Republic of Botswana 2015:18). It also notes that in some instances, orphans and widows are denied access to the estate of their deceased parents or spouses. The denial of such rights is unconstitutional but 'the reality on the ground is different' (Republic of Botswana 2015:18).

Botswana is largely patriarchal. For instance, in October 2012 'the High Court of Botswana declared the Ngwaketse rule of customary law, which provides that only the last-born son may inherit his parents' dwelling house, as unconstitutional' (Jonas 2013:239). The land policy encourages all relevant stakeholders to intensify their campaigns and educate 'women and orphans about their legally protected [land] rights' (Republic of Botswana 2015:18). This will address discriminatory customary laws it is believed.

First Time Home Owners, Value Added Tax and Transfer Duty

The land policy provides for the exemption of 'first time owners from VAT [Value added Tax] and transfer duty' (Republic of Botswana 2015:16). The Bill on the exemption of first time owners from VAT was endorsed by parliament in 2014 although it has not yet been implemented. It is the brainchild of the Botswana Congress Party leader, Dumelang Saleshando, who was parliamentarian for Gaborone Central. The Botswana Unified Revenue Service Commissioner General, Keneilwe Morris, told the parliamentary committee on statutory bodies that implementing it was a logistically nightmare. He asked rhetorically, 'How do you determine the first time home owner?' (Nkani, 12 October 2015). Morris explained that it was difficult to establish that an individual had bought material from a VAT registered party.

These uncertainties have delayed the implementation of this Bill. Yet the land policy pronounces that the exemption will be implemented. By the end of 2016 this was yet to happen and many have been disadvantaged. Parliament endorsed both the land policy and this Bill.

Conclusion

Not surprisingly, the land policy recognises that land is a highly contested resource. It stresses that equity and social justice are key to land management, but it contradicts itself on this. Commendably, the policy identifies some vulnerable groups and shows how it will protect their interests. The policy is a milestone development in the administration of land in Botswana. It has opened up more contentious debates. In general, the policy overlooked the real problems as argued above. Based on this assessment, the paper recommends that the minister of Lands and Housing should take this policy back to the National Assembly for revisions and amendment.

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