Reflections on Botswana's 2015 Land Policy

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ABSTRACT

This is a study and an interrogation of the Botswana Land Policy approved by the National Assembly on 16 July 2015. This is a review from a legal perspective, appropriately so, because if the Policy prescriptions are faithfully implemented, most of the land tenure laws of the country will be due for revision or overhaul in the coming months. This process commenced with the publication in April 2017 of Bills to amend the Deeds Registry Act and to repeal and re-enact the Tribal Land Act. The objective of this study is to inform and persuade those responsible on areas or issues on which there is need to proceed with extreme caution. The study takes issue with some of the prescriptions in four out of the six substantive parts of the Policy, but it recommends that there is need to think again before formulation of laws that will replace Land Boards with Land Authorities or "de-professionalize" conveyancing in Botswana.

1. INTRODUCTION

After a gestation period of slightly over a decade, the Legislature finally adopted Botswana's Land Policy on 16 July 2015.[1] The Policy was formulated largely to be responsive to land administration and management challenges thrown up by changes to Botswana's economic, social and environmental landscape since independence. The emergent pressing challenges include those relating to access to land; security of tenure and protection of land rights; recognition of the vulnerability of certain groups; alienation of land rights; land administration processes, procedures and structures; and land values and the market.[2] The Policy is a comprehensive document, seeking to replace or embrace several other policies formulated in the past to address issues of land management and administration.[3] It spans 25 pages and 92

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1 Republic of Botswana, *Botswana Land Policy, Government Paper No. 4 of 2015*, Government Printer, Gaborone, (2015). Paragraph 8 of the Policy reports that "extensive nationwide consultations ... to reaffirm the validity of the proposed policy pronouncements" were conducted in 2004, 2006, 2010, 2011 and 2013. Stakeholder consultations in fact started with a draft of the policy produced as early 2003.

2 Paragraphs 2 to 6 in the introductory part of the Policy.

3 Paragraphs 17 – 32 of the Policy refer to at least seventeen (17) other "land-related policies" to be

paragraphs, arranged under eleven (XI) parts or chapters. The focus in this review is on policy prescriptions in the parts or chapters dealing with land tenure; access to land and protection of land rights; land values and market; institutional framework; and legal framework.[4] The review glosses over the Policy prescriptions in part VII, on "land management and administration" solutions to address land use conflicts brought about by population growth and increases in the national herd of livestock and wildlife. This is because the utility of some of solutions canvassed, such as better planning and zoning of land, land servicing, improved land allocation procedures and information management, appear to be self-evident. Some of these are also issues on which those with the technical expertise are better qualified to reflect. The paper is a reflection on the Policy from a legal perspective, intended to give indication of the extent to which the Policy addresses some of Botswana's well-known post- independence land tenure legal challenges,[5] and to counsel on legal reforms that should only be embarked upon with extreme caution.

2. LAND TENURE

Botswana, like several other former colonies and dependencies of the United Kingdom in Africa, has a mixed land tenure system, which emerged not long after the onset of colonial rule. Land is categorised as Tribal land, State land or Freehold land. Tribal land covers approximately 71 per cent of Botswana's land mass, estimated at approximately 578 000 square kilometres. At independence in 1966, it was approximately 49 per cent of the land mass. Tribal land was initially acknowledged and recognised by the colonial administration as belonging to various ethnic or tribal groups or communities, and as occupied and utilised under various customary or tribal customs and practices. In colonial Botswana it was also largely managed and administered by tribal structures and authorities. Tribal land is now occupied, utilised and administered primarily in terms of the Tribal Land Act, 1968.[6] State land, covering approximately 46 per cent of the land mass at independence, is now approximately 23 per cent, chunks of it having

replaced or embraced.

4 These are parts V to X of the Policy.

5 See, for example, C. Ng'ong'ola, "Land problems in some peri-urban villages in Botswana, and problems of conception, description and transformation of 'Tribal' land tenure," 36 [1992] *Journal of African Law*, *(J. A. L)*, pp. 140-167; "Land tenure reform in Botswana: post-colonial developments and future prospects", (1996) 11 *South African Public Law*, pp. 1-29; "Land rights for marginalised ethnic groups in Botswana, with special reference to Basarwa", 41 [1997] J. A. L, pp. 1-26; and S. Morolong and C. Ng'ong'ola, "Revisiting the notion of ownership of tribal land in Botswana", in C.M. Fombad, (ed.), *Essays on Law in Botswana* , Juta and company, Cape Town, (2007) pp. 142 – 175.

6 Act 54 of 1968, Cap. 32: 02, Laws of Botswana.

been converted into Tribal land. It is land which the colonial administration appropriated from Tribal land for its own uses, then regarded as Crown land. It is defined in the State Land Act as the residual land category of Botswana, under which may be classified all land that does not clearly fall within the categories of Tribal land and Freehold land.[7] Freehold land, comprising approximately 5 per cent of the land mass at independence, is now approximately 3 per cent, some of it having been converted into State land and Tribal land. In the words of the Land Policy, it is land "created for Settlers during the colonial era mainly for agricultural purposes." It is also land which individuals and companies can own in perpetuity. This makes it the most valuable and sought after type of land. Its occupation, use and disposal is predominantly regulated by the Deeds Registry Act[8] and Land Control Act.[9]

Paragraph 52 of the Land Policy indicates that this three-fold land classification system will be retained, as it has "served the country well save for a few shortcomings in administrative processes." To address these, changes in management systems and the legal framework will be put in place "to ensure efficient land administration". In respect of Tribal land, the Policy belatedly provides for prior planning and survey of all Tribal land before it is allocated.[10] This, and ascertainment (adjudication) of subsisting rights and interests in Tribal land, should have been attempted at the time land boards were conceived and empowered to take over from chiefs and other tribal leaders responsibilities for the administration of Tribal land. It is also proposed that a certificate of grant of customary land rights, issued by a land board after allocation of land rights under customary law, like a memorandum of agreement of a lease, which confirms allocation of land rights under the common law, should be registered under the Deeds Registry Act.[11] This will hopefully provide for better record keeping and for much improved security of tenure. It is further proposed that a Certificate of Rights, the title document issued upon allocation of State land in some urban localities, should also be registered under the Deeds Registry Act.

The standard right or title to be issued when State land is allocated, however, will remain a Fixed Period State Grant (FPSG). The grant confers ownership

7 Section 2 of the State Land Act, Law 29 of 1966, Cap. 32: 01 defines State land as "unalienated State land" and "reacquired State land" ownership of which is vested in the Republic Botswana. Unalienated State land is any land in Botswana other than Tribal land or land recognised as falling within the category of Freehold land.

8 First enacted as Proclamation 36 of 1960, now Cap. 33: 02, Laws of Botswana.

9 Act 23 of 1975, Cap. 32: 11, Laws of Botswana. Other notable Statutes relevant to Freehold land tenure include: Acquisition of Property Act, Cap 32:10; Immovable Property (Removal of Restrictions) Act, Cap. 32: 08; Sectional Titles Act, Cap. 33:04; and Transfer Duty Act, Cap. 53: 01.

10 Paragraph 53 (i).

11 Paragraph 53 (ii).

for a specified period, 99 years for residential purposes and 50 years for non-residential purposes. Ownership granted only for a specified period of time is an odd property law concept. Ownership should normally subsist for an indefinite period of time. It is also odd to require that at the end of the period the land, together with any improvements thereon, which must be effected within a short period of time, shall revert to the State without payment of compensation. This confounds constitutional protection of property in Botswana.[12] Addressing this concern, the Policy indicates that the terms and conditions for the grant "will include a provision for renewal at the end of the FPSG."[13] But what will be the legal position where renewal is not sought or, if sought, is not granted? By proposing to retain the FPSG, substantially as indicated in the terms and conditions of each grant, the Policy missed an opportunity to set this important and prevalent State land tenure concept on a sound legal footing.

In respect of freehold land, the Policy categorically states that "conversion of other land tenures to freehold tenure will not be allowed;" but, where necessary, freehold land will continue to be converted into Tribal land or State land. The amount of land in the freehold sector will thus continue to dwindle, making it prized property, to be acquired at a very high premium. To ensure proper regulation of land use, the Policy proposes that all areas in which freehold land is located will be declared planning areas, and a new regulatory mechanism incorporated in a new Land Act. Considering the amount of land remaining in this sector, a new regulatory mechanism might not be necessary. The Policy should indeed have considered whether control measures in the Land Control Act have served their purpose and it is now time to repeal that Act.

3. ACCESS TO LAND AND PROTECTION OF LAND RIGHTS

3.1 Access to Land

Access to land is covered in sub part (a) of part VI of the Policy, while protection of land rights is covered in sub parts (b) and (c), respectively titled as "land rights" and "affirmative actions." Land under the Policy may be accessed for both traditional and more modern types of land use. In Schapera's seminal work on Tswana land tenure, land was traditionally

12 See, for example, Section 8 of the Botswana Constitution, and C. Ng'ong'ola, "Property Guarantees in the Constitution and Implications for Land Tenure Policy in Botswana", in E. Quansah and W. Binchy (eds), *The Judicial Protection of human rights in Botswana*, Clarus Press, Dublin, (2009), Ch 16, pp. 301-340.

13 Paragraph 55 (ii).

required and allocated mainly for residential purposes, arable farming and for cattle grazing and watering.[14] In addition to these traditional land use categories, the Policy accommodates accessing land for commercial, industrial, civic and community use; commercial livestock and arable farming; game farming; wildlife management; communal natural resource use; tourism; and special purposes. The notable policy prescriptions to reflect on relate to residential land; arable farming; commercial agricultural land and communal grazing; and land for commercial, industrial and civic and community use.

3.1.1 Residential Land

The Policy acknowledges that shelter or housing is a basic need, and residential land is a pre-requisite to the provision of housing. It pronounces that Government is committed to ensuring that each family is housed. "Every Motswana", therefore, is "eligible for allocation of a residential plot at an area of their choice within the country."[15] For the majority, the allocation can only be made on Tribal land. Such allocations will continue to be free of charge. Land, however, is a finite resource, and not every Motswana, now or in the future, can be assured of one free allocation of a residential plot on Tribal land. The Policy therefore underscores that Government's commitment to ensure that every Motswana is housed will be deemed satisfied once a lawfully acquired residential plot is registered in a person's name.[16]

This is obviously problematic because it disfavours those who will acquire the first plot other than through a free allocation of Tribal land. This is also not a radical one person one free plot policy some would have wanted. Those that already have more than one free Tribal land plot will keep what they have; and, after the first free or subsidized allocation, a person can acquire as many plots as he/she can muster, "through the private market, inheritance or other legitimate channels ..."[17] It is also problematic to promise every Motswana a residential plot anywhere he or she might choose within the country. The demand for plots in some areas far outstrips supply. The demand is literally insatiable in peri-urban villages in the vicinity of cities like Gaborone and Francistown. The Policy does not properly guide allocating authorities on what to do in such situations. It vaguely states that they "will determine the appropriate method for allocation e.g. raffle, first come first

14 See I. Schapera, *Native Land Tenure in the Bechuanaland Protectorate, Lovedale, (1943) and A Handbook of Tswana Law and Custom*, Munster – Hamburg, (1994), Ch XI, pp. 195 – 213.
15 Paragraph 58 (i).
16 Paragraphs 58 (ii) and (iii).
17 Paragraph 58 (iv).

serve, waiting list depending on the circumstances …"[18] Further and better guidance should have been provided on whether methods of allocation such as raffle or prioritising persons indigenous to the area are consistent with the statutory duties and responsibilities of allocating authorities.

3.1.2 Arable Land

Land for arable agriculture, like residential land, is generally in short supply, and also to be found only in select localities. The Land Policy thus advocates "a limit of one agricultural holding allocation per eligible citizen."[19] However, depending on availability of land, and utilisation of the allocated holding, allocation authorities will have the discretion to allocate additional plots. Further, as with residential land, a person already allocated an agricultural holding shall be entitled to acquire additional plots through the private market, inheritance or other legitimate channels. The Policy also indicates that fertile ploughing fields (masimo) on Tribal land will be protected through zoning, such that once zoned, "change of land use will not be allowed."[20] This will hopefully arrest the proliferation of applications for conversion of farm land into residential land experienced in recent years in and around Gaborone. However, given the vagaries of arable farming in Botswana due to unfavourable climatic conditions, and the excessive insatiable demand for residential land near the city, it might not be prudent to inscribe in the relevant laws that once fertile farmland has been zoned, change of land use will not be entertained.

3.1.3 Commercial Agricultural Land and Communal Grazing

The policy envisages that some Tribal land and State land will continue to be available for commercial agricultural purposes, including livestock ranching. This will not be for free allocation. It will be for letting and hiring, and lease rentals "will continue to be levied at market rates."[21] The availability of land specifically for commercial livestock ranching is informed by the same modernization arguments that informed the Tribal Grazing Land Policy of 1975.[22] The argument was, and still is, that open access to communal grazing areas contributes significantly to denudation of those areas, and good range

18 Paragraph 58 (viii).
19 Paragraph 60 (i).
20 Paragraph 60 (v).
21 Paragraph 61(i).
22 *Republic of Botswana, National Policy on Tribal Grazing Land*, Government paper No. 2 of 1975, Government Printer, Gaborone, (1975).

husbandry and management could be fostered by allocation and fencing of exclusive or restricted access grazing areas and watering points. The Policy affirms that the allocation or leasing of exclusive ranches to individuals and/ or syndicates will continue. However, since the majority of Batswana still depend on communal land for grazing, "effective range management practices will be implemented to discourage the practice of dual grazing rights."[23] Acquisition of an exclusive farm or ranch, through whatever means, will exclude the holder from competing for or access to communal grazing land. This is likely to be difficult to implement if communal grazing areas remain open or readily accessible to all. Perhaps for this reason, the Policy indicates that "communal fencing of grazing areas will be continued subject to feasibility studies."[24] In the long run, therefore, open and readily accessible communal grazing areas will cease to exist, except in Tribal areas where fencing of the commons is regarded as not feasible.

3.1.4 Land for Commercial, Industrial, Civic and Community Use

The Policy advocates that access to land for commercial, industrial, civic or communal use, whether on Tribal or other category of land, should not be free or allocated on the basis of an application placed on a waiting list.[25] Plots for such purposes should be planned and surveyed before allocation; sold or leased at market price in a transparent manner; preferably through open, competitive public tender. In local commercial centres, however, preference should be given to citizens or citizen consortia.

3.2 Land Rights

Paragraphs 68 to 70 in part VI of the Policy cover issues related to security of tenure after access has been secured. Paragraph 68 requires registration under the Deeds Registry Act of all rights or titles in allocated land, including, as noted above, certificates for grants of customary land rights over Tribal land, and certificates of rights for State land allocated for low-cost housing schemes in some municipal areas.[26] The Policy recommends extending the scope of Botswana's Deeds Registration system to all rights and titles that may be issued over land. This, however, is a fairly complex

23 Paragraph 61 (v).
24 Paragraph 62 (i).
25 Paragraph 59.
26 Provisions already exist for registration under the Deeds Registry Act of other rights or titles issued in respect of Tribal land, State land or Freehold land. These are a Memorandum of Agreement of Lease (common law grant) in respect of Tribal land; a DFPSG in respect of State land; and deeds conferring ownership or other real rights, in respect of both State land and Freehold land.

and intricate system, not suitable for application to simple or inexpensive land transactions. Some of these intricacies will have to be addressed as time goes on. One intricacy addressed in this part of the Policy is the collection of duties, taxes and other dues at the point of registration. Paragraph 68 (iii) indicates that the law will be amended to exempt first time home owners from payment of value added tax (VAT) and transfer duty.

Land in Botswana is normally allocated for residential or other purposes subject to a development covenant and restrictions on further alienation or transfer before completion of the developments. Among other objectives, this is intended to curb land speculation and quick loss of land rights by indigent grantees. Whether in respect of Tribal land or State land, restrictions on further alienation of undeveloped land have proved exceedingly difficult to enforce. Legal and other devices are invoked to circumvent the law and policy.[27] Paragraph 69 of the Policy seeks to tighten the regulatory framework on this issue. It provides that land allocated at subsidised prices or under special dispensation or economic empowerment schemes should not be alienated within a period of 15 years. If land allocated at subsidised prices is alienated within 15 years, the balance between the subsidized price and the market price would become payable, and the transferor will not be eligible for any subsequent allocation. In the case of land allocated under special dispensation or economic empowerment schemes, assessment and approval of land authorities will be required for any alienation within 15 years, and the transferor will not be eligible for allocation of land in the same category after the alienation. It is further provided that in any event a person will not be allowed to alienate the last residential plot directly acquired from a land authority. Land boards, too eager to apply this policy prescription in land scarce peri-urban areas, were in 2016 restrained by the High Court, holding, *inter alia*, that the policy was not reflected in Section 38 of the Tribal Land Act, the provision specifying grounds upon which Land Boards may refuse to consent to a transfer or dealing with a right or interest in Tribal Land.[28] The Court in effect implored Land Boards to enforce or apply the law, not policy yet to be incorporated into the law.[29]

27 One such device, approved of by the Courts, is the granting of an option, exercisable upon completion of the required developments. See *Tswaing v Van Schalkwyk*, [1979-1980] BLR 1449; *Bhamjee v Maposa* (No. 2) [1988] BLR 268; *Isaacs v Motlapelem* 2000 (1) BLR 200; and *Bagidi v. Oketsang and Another* 2003 (1) BLR 571.

28 *Molatlhegi and Dichabe v Tlokweng Land Board and Others*, High Court of Botswana, Unreported Case No. MAHGB – 000566 – 16, Lobatse, 29 November 2016.

29 Section 33 in Part VII of the Tribal Land Bill No. 7 of 2017, revising and reenacting section 38 still omitted to incorporate this policy restriction among the grounds which may be invoked for refusal to sanction a transfer or dealing with Tribal land. The revised and reenacted Tribal Land Act had not yet been published and was not available at the time of writing, having been passed by the National Assembly around July/ August 2017.

Paragraph 69 (v) proposes further controls on alienation of land even where compliance with a development covenant or the terms and conditions of a grant is not an issue. It states that "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." This will most likely entail replicating measures in the Land Control Act[30] to transfers of residential and non-residential land in urban areas between or among non-citizens. The Land Control Act declares that specified transactions or dealings with agricultural land in the freehold sector between or among non-citizens are controlled transactions. They must be approved by the Minister, and preceded by advertisements intended to give interested citizens the right to pre-empt the transaction. The mischief that gave rise to the Land Control Act was clear. Almost a decade after independence, fertile agricultural land in the freehold sector was still largely owned or controlled by settlers, many of whom being of Afrikaner extraction, from Apartheid South Africa. The Act was Botswana's inimitable but conservative attempt to reclaim and indigenize settler freehold agricultural land. The decline in the amount of freehold land, from approximately 5 per cent in 1966 to approximately 3 per cent in 2015, is partial evidence that the Land Control Act may have served its purpose. But whether there is a problem of non-citizen ownership or control of residential or non-residential land outside the Freehold or Tribal land sectors to merit invocation of such regulatory measures has never been established.[31]

3.3 Affirmative Actions

In sub part (c) of part VI of the Policy, it is acknowledged that there are special categories of persons in the society whose rights of access to land should be acknowledged, realised and protected, if need be through "affirmative actions" or special procedures. These include widows and orphans, the youth, vulnerable groups such as Remote Area Communities (RACs), persons with disabilities and the needy; and special investors, foreign or domestic. Varying policy prescriptions are suggested for each of these categories of persons. Some of these are decidedly vague and nondescript.

For widows and orphans, suggested affirmative actions include stepping up campaigns to educate them about their legally protected rights and offering them legal support in the vindication of those rights; identifying

30 No. 23 of 1975, Cap 32: 11, Laws of Botswana.

31 A survey of ownership of residential land in Gaborone, which would have provided empirical justification for the control measures proposed in paragraph 69 (v), was quietly abandoned after coverage of only a few Extensions.

and addressing customary and common law practices in the administration of estates that disadvantage widows and orphans; and, since only one spouse can apply for a plot, inscribing in law that the surviving spouse must as of right inherit allocated land.[32] For the youth, it is suggested that a quota of land available on public tender should, where appropriate, be reserved for them.[33] It is further suggested that special measures will be put in place and applied to expedite allocation to youth (groups), to facilitate access to special funding. For people with disabilities and the needy, it is suggested that based on recommendations from social workers, allocation of residential land should be expedited and preferential treatment applied in the consideration of applications from such groups.

For RACs, who, it is claimed, are often dispossessed of their land rights by people from other areas, it is stated that Government will, where appropriate, establish growth points for establishment of formal settlements. Transfer of land rights allocated to RACs in such settlements will not be allowed except under special circumstances. Some of the RACs are the San, Basarwa or Bushmen, who claim aboriginal right or title to live as "hunters and gatherers" in some areas now falling within national parks, game reserves and wildlife management areas on State land.[34] The establishment of formal settlement areas for RACs, albeit with the consent of affected communities, will not address historical land claims of some of the Basarwa communities.

For special investors, it is stated that suitable areas for various types of investment, be it commercial, industrial, tourism, agriculture, recreational or other types of investment will be identified and land reserved to relevant ministries for allocation to investors.[35] It will also be the responsibility of user ministries to monitor developments and give regular updates on the status of the investment. The Policy underscores that although Government is desirous of attracting foreign direct investment, this will not be at the exclusion of domestic investment. It would appear that "citizens first" will be the guiding philosophy in land allocation matters.

The affirmative actions and special dispensations in this part of the Policy do not include anything for Batlokwa, a tribe with a small tribal territory, hemmed-in by some freehold farms and by Gaborone, the capital city, which was partly developed on their lands.[36] The demand for

32 Paragraph 72.

33 Paragraph 75

34 See C. Ng'ong'ola, "Land Rights for Marginalised Ethnic Groups in Botswana, With Special Reference to Basarwa," 41, [1997] J. A. L. pp.1 – 26; and "Sneaking Aboriginal Title into Botswana's Legal System Through a Side Door: Review of *Sesana and Others v Attorney General," University of Botswana Law Journal,* 6, 12 (2007), pp. 107 – 130.

35 Paragraph 74.

36 See F. Kalabamu, "Divergent paths: Customary land tenure changes in greater Gaborone, Botswana,"

residential land in Tlokweng is insatiable. Batlokwa have demanded that a quota of the available land should be reserved for them. This would entail accommodating a derogation from the law and policy applied from 1993 that land boards must hold and administer tribal land for the benefit of not just tribesmen of the area but for all citizens. The case for Batlokwa has not been dismissed as unarguable, but Government appears to be unwilling to explicitly accommodate the suggested derogation in law and policy.[37]

4. LAND VALUES AND MARKET

Paragraph 83 in part VIII proposes at least three subtle but significant policy shifts on the subject of land values and market. It provides that after the first free allocation, intended to guarantee every Motswana a right to shelter, allocations of Tribal land for residential purposes should be at some cost to the grantee; that taxes and other dues should be collected on transfer of rights in Tribal land; and that the assessment of compensation for expropriated Tribal land should be based on the market value of the land. These were some of the contentious issues lurking beneath the headlines in some of the landmark cases on unauthorised dealings or transfer of Tribal land to come before the Courts.[38]

Tribal land, for residential or other purposes, was generally freely allocated to members of the community under customary law. After their creation, land boards were also mandated to make free grants of rights to land under customary law in terms of Part III of the Tribal land Act. But the allocation of a common law grant in terms of Part V of the Act involved some financial expenditure on the part of the grantee. The land had to be demarcated and surveyed, and possibly fenced, and a lease registered in the Deeds Registry. There was also a development covenant to comply with. Registration costs, however, were kept to a minimum through procedures that did not require intercession by legal professionals, and through Government deliberately forgoing the collection of transfer taxes and other dues. When land boards or the State decided to expropriate the land, the conundrum was

Habitat International, 44 (2014), pp. 474-481, especially at pp. 478-480.

37 S. M. Isaacs and B. G. Manatsha, "Will the dreaded 'yellow monster' stop roaring again?: An appraisal of Botswana's 2015 Land Policy," *Botswana Notes and Records*, 48 (2016), pp. 383-395, at pp. 383-384 report that the version of the Land Policy taken to Parliament in 2015 included and accommodated the request from Batlokwa, and President Khama publicy supported the principle at Kgotla meetings in 2016. But Parliament ultimately decided to exclude the quota dispensation from the final policy document.

38 See for example, *Kweneng Land Board v Matlho*, [1992] BLR 292 (CA); *Kweneng Land Board v Mpofu and Another*, 2005 (1) BLR 3 (CA); *Mswela v Mswela*, 2011 (2) BLR 511 (CA); *JIA v Motila*, 2011 (2) BLR 515 (CA); and *Marokane and others v Kereng*, Civ Appeal No, CACGB – 120 – 12 (CA), 2016, not yet reported.

whether compensation should be assessed on the basis of market value for a property that was freely acquired and which, some would contend, was not a commodity for sale.

Paragraph 83(iii) now states that residential plots "will be allocated under subsidized cost recovery principle", except for affirmative action allocations, which shall be free. It is contended that "customary entitlement to land has been oblivious to the value of land as capital and an investment resource." It is also noted that policy requirements that all land must be surveyed, planned, zoned and serviced before allocation entail a cost on the part of Government, some of which, not all, must be recovered, hence the subsidized cost recovery principle. Investment land, however, will continue to be allocated at market prices. From the earlier discussion of access to land, also available at market prices will be land allocated for commercial, industrial, civic and community use; for commercial agricultural purposes, including livestock ranching; for game farming; tourism; and for other special purposes.

Paragraph 83(i) states that property rates will be payable on all land tenures, with exceptions as may be prescribed; and Paragraph 83 (ii) tersely reads: "Property transaction taxes to be charged on all land tenures." Rates are an unpopular urban or municipal property tax, often associated with, but not necessarily legally related to, provision of certain services in urban or municipal areas. All the major villages in Botswana are now urbanized, and residents require and demand the same types of services as are provided in formally gazetted townships and municipalities. The Deeds Registry Act facilitates the collection of rates and other unpopular taxes. It provides that no deed of grant or transfer "shall be registered unless accompanied by a receipt or certificate of a competent public revenue officer that the taxes, duties, fees, [rentals] payable to the Government or any local authority on the property have been paid."[39]

Coincidentally, therefore, registration of customary land grants under the Deeds Registry Act, will not only provide security of tenure and other related benefits of deeds registration, but also compel parties to land transactions to be efficient payers of taxes and other dues.

The main property tax payable upon transfer of property is transfer duty, and the Registrar of Deeds is the public revenue officer responsible for its collection.[40] It is a tax payable at specified rates; calculated in reference

39 Section 87 (1).

40 Section 10 (1) of the Transfer Duty Act, Cap. 53: 01, Laws of Botswana. Section 10 (2) enjoins the Registrar not to register any "any sale, transfer or other alienation of any property or right thereto" unless duty which is payable has been paid to him. It also states that "no such purported sale, transfer or other alienation shall be of any force or effect, nor shall any court take cognizance of … [it]…

to the purchase price, or value of the property, whichever is higher; by the transferee or person in whose name the property is to be registered in the Deeds Registry. Section 2(1), the designating provision in the Transfer Duty Act, in part states that transfer duty "shall be payable and paid upon the purchase price or value of any immovable, whether freehold or held from Government upon quitrent or other leasehold tenure, sold or otherwise alienated or transferred." One interpretation of this provision, suggested to a previous Registrar of Deeds, is that if transfer or alienation of immovable property is involved in the granting of Tribal land under a memorandum of agreement of lease, or in a subsequent cession of the lease, both of which are registered, then transfer duty should be paid.[41] But the Registrar of Deeds was apparently counselled to forgo the collection of duties on Tribal land transactions because it could never have been the legislator's intent to apply the Transfer Duty Proclamation to Tribal land transactions when it was first enacted in 1896.[42] However, not much was lost to the fiscus through this arguably erroneous advice. The Act, even at the time of the advice, provided numerous derogations and exemptions to the requirement for payment.[43] For citizens, duty was payable at the rate of 5 per cent of the purchase price or value of the property, but they were at the same time exempted from payment of duty on the first P20 000. This was increased in 2003 to the first P200 000.[44] Duty would not have been payable on most transfers of undeveloped residential land in tribal areas.

Paragraph 83(vi), lastly, states that "adequate compensation will be paid for land and developments acquired". Among other requirements, the property clause in the Botswana Constitution, calls for "prompt payment of adequate compensation" for any property or right or interest in property that is compulsorily acquired.[45] Section 16 of the Acquisition of Property Act, elaborating on compulsory acquisition of freehold property, indicates that adequate compensation must be assessed in reference to the price which a willing buyer would pay a willing seller in an arms-length transaction. The Court of Appeal in Botswana has acknowledged that customary land tenure is not frozen in time. If, at some point, it was not permissible to subdivide

unless the same has been duly registered by the Registrar of Deeds."

41 This was the conclusion I came to in an opinion for the Registrar of Deeds dated 11 November 1992.

42 It was first enacted as HCP of 10/ 6/ 1896.

43 See for example, Sections 18 -24 in Part IV of the Transfer Duty Act on exemptions from, and Remission and reduction of Transfer Duty.

44 Section 20(t) of the Transfer Duty Act, as amended by the Transfer duty (Amendment) Act no. 6 of 2003

45 Section 8 (1) (b) (i) of the Constitution.

and sale Tribal land,[46] such transactions are now common place.[47] This is acknowledged even in Section 38 (1) of the Tribal Act, which in part reads:

> "The rights conferred upon any person in respect of any grant or lease of any tribal land, whether made under or in accordance with Part III of IV, or made prior to the coming into operation of this Act, shall not be transferred, **whether by sale or otherwise**, to any person without the consent of the land board concerned; …" (my emphasis).[48]

This section, while clearly prohibiting transfer of Tribal land rights without the consent of the land board, does not prohibit sale. It in fact acknowledges that a person may be validly conferred with such rights through a sale.

In Paragraph 83(vi), therefore, the Policy could be suggesting that there should be no differentiation in the computation of adequate compensation for expropriated freehold land and Tribal land rights. Section 8 of the Constitution, in any event, protects "property of any description" and "interest in or right over property of any description."

5. INSTITUTIONAL FRAMEWORK

Paragraphs 84 to 90 in Part IX describe institutions that will be responsible for physical planning; land surveying and mapping, deeds registration, land administration; adjudication of disputes; and coordination and consultation in the implementation of the Policy. It is not necessary to comment or reflect on what is said in the paragraphs on physical planning, land survey and mapping, and coordination and consultations in the implementation of the Policy. But much more than what is below can be said about the paragraphs dealing with deeds registration, land administration and adjudication of land disputes.

5.1 Deeds Registration

From the onset, the legal profession was excited and alarmed by the policy direction indicated in paragraph 87, which reads:

46 This was alleged by expert witnesses and assessors in *Kweneng Land Board v Matlho*, [1992] BLR 292 but the evidence was ignored by the High Court and by the majority judgments in the Court of Appeal.

47 *Marokane and Others v Kereng*, Civ Appeal No, CACGB – 120 – 12 (CA), 2016, not yet reported.

48 Section 38 is one three provisions added to part VII of the Tribal Land Act through the Tribal Land (Amendment act) Act, No. 14 of 1993, most likely to reverse the effect of the Court of Appeal holding in *Kweneng Land Board v Matlho*, (above), that Tribal land rights could be disposed of without the involvement of land board that are tasked with administration of the land..

> "Conveyancing of Alienation of land rights at the Deeds Registry has been the legal monopoly of conveyancers. This monopoly has resulted in exorbitant fees being charged for the service. In order to reduce costs of land registration, maintain the standard of registration as well as increase efficiency further:
>
> i Standard forms will be created for simple registrable transactions where owners, in addition to conveyancers, will be allowed to prepare and lodge such documents with the Registrar of Deeds;
>
> ii Legislative amendment and electronic infrastructure innovations will be made where possible to provide for electronic conveyancing; and
>
> iii Some of the Registry of Deeds Functions will be decentralized to Land Authorities."

Stakeholders are in agreement about the need for electronic conveyancing and electronic filing and record keeping at the Deeds Registry. To realise this, however, the required legislative amendments would have to include Section 19 of the Electronic Communications and Transactions, 2014[49], which excludes from the ambit of Part III of the Act, dealing with the legality of electronic transactions, "…(c) any contract for the sale or disposition of immovable property …; and (d) the transfer or conveyance of any immovable property …" There is no hint in the Land Policy of awareness of this impediment to e-conveyancing brought about by an earlier piece of legislation.

Whether it is sound to decentralize some Deeds Registry functions to Land Authorities cannot be determined without details on the constitution, composition, spatial location and other functions, duties and responsibilities of Land Authorities.

There is almost unanimity in legal circles that the first part of the recommendation in paragraph 87 is not sound. Several arguments can be made marshalled against the proposal to "de-professionalize" and permit what can be termed "self-conveyancing" under Botswana's Deeds Registration System.

The first is that the motivating argument is palpably wrong, and confounds other Government policies on the management of the economy. Conveyancers in Botswana do not charge exorbitant fees. Fees for conveyancing and notarial practice work related to deeds registration were set and fixed in 2004, under regulations which declare it actionable professional misconduct for a conveyancer or a notary to charge higher or lower than what

49 Act No. 14 of 2014.

is prescribed.[50] Thus, conveyancers and notaries cannot compete with each other through the fees they demand. This confounds Government policies on competition and control of income, employment, prices and profits.[51] If fees and charges set in 2004, which have not been adjusted upwards, are now considered as exorbitant, the appropriate corrective measure should be to reset them, not to permit self-conveyancing.

The second argument is that paragraph 87 projects a narrow view of conveyancing in Botswana, as involving mainly preparation and lodgment of deeds of transfer at the Deeds Registry. It is indeed currently a monopoly of conveyancers to prepare deeds of transfer for lodgment at the Deeds Registry, which must be executed by the owner and attested by the Registrar of Deeds.[52] Conveyancers can also stand in for the owner at the execution of deeds in the Deeds Registry.[53] Conveyancers similarly have a monopoly over the preparation of mortgage bonds and certificates of title, and in representing the owner at the execution of mortgage bonds in the Deeds Registry.[54]

Conveyancing in a wider, holistic sense involves preparation of other deeds and documents, for execution or mere filing, in the Deeds Registry. Other legal practitioners such as notaries are involved in this. Section 17, the key provision in the Deeds Registry Act on conveyancing in a wider sense, distinguishes between ownership and other real rights in land. It requires that ownership of immovable property should normally be conveyed from one person to another by means of a deed of transfer, prepared by a conveyancer, and attested by the Registrar. Other real rights in immovable property, should normally be conveyed by means of a deed of cession, prepared by a notary public, executed by the cedent and cessionary, and attested by the notary, who also submits the same to the Deeds Registry for registration. Apart from preparation of deeds cession, notaries are also involved in the preparation for registration of notarial bonds, antenuptial contracts, deeds of donation, trust deeds and other deeds having reference to persons and property.[55] The Policy appears to be oblivious to the role of a notary in the preparation of deeds alienating land rights. Yet, since the Tribal land Act prohibits the granting of rights of ownership over Tribal land to

50 Deeds Registry (Conveyancers and Notaries public) (Fees and Charges) Regulations, published in October 2004 as S. I. 80, 2004.

51 See Republic of Botswana, *National Competition Policy for Botswana*, Government Printer, Gaborone, (2005); and *Revised National Policy on Incomes, Employment, Prices and Profits*, Government Printer, Gaborone, (1990).

52 Section 17.

53 Section 20.

54 Section 16 and Regulation 26, and Section 48(1)

55 See Sections 5(l), 59(1). 62, 72, 74, and 82-83 of the Deeds Registry Act.

anyone other than the State,[56] and a long lease, conferring a real right other than ownership, is the preferred common law grant of Tribal land, a notary public, not a conveyancer, is the legal professional likely to be engaged in Deeds Registry transactions involving Tribal land.

Both conveyancers and notaries are thoroughly trained in the mechanics of deeds registration. In Botswana, conveyancers and notaries must first be admitted to practice as attorneys. The base qualification for this purpose is a Bachelor of Laws (LLB) degree from a recognized university.[57] An attorney who is fit and proper and is in good standing qualifies for admission as either a conveyancer or notary, or both, upon satisfying the High Court that he/she has passed "such examinations as may be prescribed" in the "practices, functions and duties" of the relevant strand of the profession.[58] At the University of Botswana the LLB degree programme currently includes Property Law, Land Law, Conveyancing and Notarial Practice as core or compulsory courses. Attorneys trained at the University of Botswana are therefore eligible to be admitted to practice as conveyancers or as notaries. They are deemed to have passed such examinations as may be prescribed in the practices, functions and duties of conveyancers or notaries.[59] They have the basic skills and competencies to practice as such. If, therefore, the monopoly of conveyancers in deeds registration must be corroded, as suggested by paragraph 87(i), a case could be made for allowing attorneys trained at the University of Botswana to practice as such. But completely de-professionalizing conveyancing, so that an owner, with no training in law or deeds registration, could prepare and lodge a deed of transfer, is mind boggling.

It is also retrogressive. It takes the practice of deeds registration back in time to where it was at the Colony of the Cape of Good Hope before professionalization.[60] Deeds and other instruments effecting sale or hypothecation of immovable property were initially prepared and attested by officials in the Colonial Secretary's office, before whom the parties appeared. Professionalization began with Ordinance 39 of 1828, which provided for a Registrar of Deeds, to be responsible for preparation, attestation

56 Section 24 of the Tribal Land Act.

57 Sections 4 and 8 of the Legal Practitioners Act, Cap. 61:01, Laws of Botswana.

58 Section 9.

59 See Legal Practitioners (Exemption from Notary Public or Conveyancing Examinations) Rules. S. I. 72, 1996, made in terms of Section 54 of the Legal Practitioners Act, and *Re Itumeleng, Petitioner*, [2007] 3 BLR 567.

60 A Bechuanaland Protectorate Proclamation of 4 July 1893 provided that the law of the Colony of the Cape of Good Hope relative to the registration of deeds and instruments in Deeds Registry Offices therein, "shall, *mutatis mutandis,* be in force within the Bechuanaland Protectorate." The history of conveyancing in Botswana is through this instrument linked to Deeds Registration at the Colony of the Cape of Good Hope in South Africa.

and registration of instruments for transfer and hypothecation of land.[61] Ordinance 44 of 1844 enhanced the process by requiring that deeds should be prepared by advocates or other persons authorized to do so by the Governor. Ordinance No. 12 of 1859 then introduced examinations for persons other than advocates seeking to be permitted to prepare deeds for registration, to be administered by three examiners appointed by the Supreme Court. The Registrar's role was to examine and approve of deeds and other instruments before attestation, execution and registration. The Deeds Registry Act, No. 19 of 1891, additionally made the Registrar of Deeds one of the three examiners of the competence of persons seeking to be permitted to prepare deeds and other instruments for registration at the Deeds Registry. This Act also attempted to codify in 23 sections the entire law and practice of deeds registration at the Cape; and this was the law and practice that was imported into the Bechuanaland Protectorate in 1893.[62]

There were obviously sound reasons propelling incremental professionalization of deeds registration practice at the Cape Colony. This is one of the elements that contributed to security of land tenure at the Cape, and to the importation in the Bechuanaland Protectorate of a system that was regarded as an effective and reliable deeds registration system. Deeds registration is essentially document registration. There is no guarantee that the title reflected in the registered document is valid. This is one of the hallmarks of land or title registration.[63] The State or system guarantees the validity of the title reflected in the registers. However, the complex rules and procedures embedded in Botswana's deeds registration system, including use and involvement of only qualified legal professionals, *de facto*, guarantee the validity of a title in a registered deed. Everyone appreciates that land transfers and transactions are generally effective upon registration of a deed or document in the Registry. It would be foolhardy to deal with land without registration of a deed or document in the Registry. Deeds Registration in Botswana and Southern Africa does not positively guarantee title to land, but it confers what is termed "negative validity" of title.[64] It is claimed that it is not necessary in Botswana and Southern Africa to replace such reliable systems of deeds registration with land or title registration systems. De-professionalization of the system will degrade the reliability of the system,

61 For these historical developments at the Colony of the Cape of Good Hope see H. S. Nel, *Jones Conveyancing in South Africa*, 4th Ed., Juta & Co., Cape Town, (1991), Ch. 1, pp. 3-4.

62 See Note 57 above.

63 See R. S. Simpson, *Land Law and Registration*, Cambridge University Press, (1976), Ch. 2, pp 12-24.

64 G. Pienaar, "A comparison between some aspects of South African deeds registration and the German registration system," *Comparative and International Law Journal of Southern Africa*, *(CILSA)*, Vol. XIX, No. 2 (1986), pp. 236-251.

and probably make it necessary to switch to proper land or title registration. For this, much more will be required than merely surveying of all land parcels. Laws will have to be passed for proper adjudication of existing land rights and recording of those rights in land registers, and for transformation of the deeds registration system into a land or title registration system.

It would appear from paragraph 87(i) that "self-conveyancing" is envisaged mainly in respect of "simple registrable transactions", but it is not clear from the Policy what these could be. The first contact with deeds registration for many is upon acquisition of a property. Depending on the land tenure category, this may require preparation of a deed of grant, deed of transfer or a notarial deed cession of a lease. If the transaction is financed by a loan, registration of a grant, transfer or cession, will be linked to registration of a mortgage bond. This immediately complicates what would otherwise have been a simple registrable transaction, capable of being reflected in a standard form. The finance provider/ mortgagee will invariably seek to control the terms and conditions of the bond, and the purchaser/ mortgagor requires independent or dispassionate professional advice. Even if there is no complication of a mortgage bond, the sheer amount of money involved in land transactions suggests that it would always be prudent to interpose a legal professional between a seller and a buyer. The buyer (or party into whose name the property is to be registered), is responsible for the price as well as for conveyancing costs, property taxes and other dues that are payable. The involvement of a legal professional in the transfer provides necessary quality assurance, or the right of recourse under legal practice rules if the work is not properly done. It is not inconceivable that the owner or holder of the property, eager to secure the price, could be slipshod in the preparation of transfer documents. Self- conveyancing, therefore, is to be deprecated even in what non-professionals may regard as simple registrable land transactions.

5.2 Land Administration

For a Policy whose principal objective is to propose land management and administration solutions to land tenure challenges being experienced in Botswana,[65] what is said in paragraph 88, on Land Administration, is proverbially the heart of the matter. It is in part stated that "Land Authorities will be established at local level to be responsible for all land tenure systems …"[66] It also stated that allocation of State land SHHA plots will be transferred to the Land Authorities, Urban Local Authorities, currently responsible for

65 See note 2 above, referring to paras 2-6 of the Policy.
66 Paragraph 88(i).

such allocations will be responsible for receiving and vetting applications and making recommendations to Land Authorities.[67] It is not stated in paragraph 88 what the role of Land Authorities will be as regards Freehold land, but they are likely to be responsible for enforcement of planning regulations if planning areas will be declared over all freehold land.[68] As regards Tribal land, it is envisaged that Land Authorities will assume all the powers and functions of land boards in tribal land administration.

The latter, on its own, would justify an assessment of paragraph 88 as proposing yet another seismic transformation of Tribal land tenure in Botswana. The first such transformation was the replacement of chiefs and tribal leaders with land boards as administrators and managers of Tribal land under the original Tribal Land Act of 1968. Establishment of Land Authorities also belies the implicit suggestion in paragraphs 52 and 53 that the Policy does not propose a substantial re-ordering of land tenure in Botswana. In Africa, and probably elsewhere, land administration is core, not only to management of land *per se*, but probably to governance of entire communities and societies.[69] Transformation of land administration, *ipso facto*, amounts to significant transformation of tenure arrangements.

If so, paragraph 88 is disappointing for its brevity and lack of detail. It is not indicated in paragraph 88 and, as far as I can detect, in any other paragraph of the Policy, what sort of entities these Land Authorities will be. It is not specified how they will be constituted or composed, and how different they will be from land boards. Even the "local level" at which they will be constituted is not indicated. Some of those who contributed to formulation of this aspect of the Policy have suggested that the intention was to create Land Authorities at district level, to act as one-stop centres for all land-related services such as land allocation, deeds registration, land surveying and development planning and controls. If the intention was to localize Land Authorities at the level of "Administrative Districts", which are also referred to in surveyed parcels of land, and incorporated in the description of land in deeds, some of these districts would be too large and the service centres far removed from the localities they would be serving.[70]

67 Paragraphs 88 (iii) and (iv).

68 Paragraph 56 (ii).

69 See Y. P. Ghai and J. P. W. P. McAuslan, *Public Law and Political Change in Kenya*, Nairobi, (1970), p.25 for the appreciation in British colonial land policy that "he who controls the land is in a good position to influence government". I have argued elsewhere that this was the understated reason for reforms of Tribal tenure introduced under the original Tribal Land Act of 1968. See C. Ng'ong'ola, "Land problems in some peri-urban villages in Botswana, and problems of conception, description and transformation of 'Tribal' land tenure", 36 [1992] J. A. L, p. 149.

70 Administrative Districts are provided for in the Administrative Districts Act, Cap. 03:02, Laws of Botswana, and defined in the Declaration of Administrative Districts Order, S.I. 8, 2006. The

To garner wider consensus over the proposed substantial reform of Tribal land tenure, paragraph 88 should been flagged and presented for transparent debate during stakeholder consultations over the Policy. Had this been done, it would have been appreciated that Batswana are not ready for more radical reforms of Tribal Land tenure. The concept or institution of Land Authorities would not have featured prominently in the 2015 Land Policy. It is telling that the Tribal Land Bill of 2017, repealing and re-enacting the Tribal Land Act in the light of some of the other proposals in the Land Policy, provides for "the continuation of land boards," as institutions in which "all rights and title to land in each tribal area … shall continue to vest … in trust 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."[71] The Bill merely elaborates and expounds on the composition of land boards and their powers, duties and functions. This, however, was a sufficient re-writing of the law to compel one chamber of the Legislature, *Ntlo ya Dikgosi*, (House of Chiefs), to request postponement of final consideration of the Bill until further consultations have been conducted.

5.3 Adjudication of Land Disputes

One of the major innovations when the Tribal Land Act was amended in 1993 to deal with the problem of unauthorised land dealings in peri urban settings was to provide for a Land Tribunal as the forum to which appeals against decisions taken by land boards could lie.[72] The Land Tribunal replaced the Minister as the functionary to whom appeals could be taken. Paragraph 89 of the Land Policy, misleadingly subtitled as about "Land Adjudication,"[73] states that "more power\ wider jurisdiction will be given to the Land Tribunal to include appeals on state land allocation, land use planning, compensation matters, [and] sectional titles disputes." This paragraph should have been

gazetted boundaries of some of the districts incorporate entire Tribal Territories, Portions of State Land and some freehold farms. It should also be noted that there are 12 Tribal Territories for 12 Main Land boards provided for in the Tribal Land Act, and 13 Administrative Districts in the Administrative Districts Order. Main urban areas like Gaborone, Francistown and Selebi-Phikwe have Administrative Districts not coterminous with nearby or surrounding Tribal Territories.

71 Long title and Section 4 of the Tribal Land Bill, No. 7 of 2017, published on 3 April 2017. The Bill was reportedly presented for the second reading and ultimately passed by Parliament in July\ August 2017, but had not been assented to by the President and neither had the Act been published in the Government gazette by the end of the year 2017.

72 A Land Tribunal was provided for in section 40, one of three provisions added to the Tribal Land Act by the Tribal Land (Amendment) Act, No 33 of 1993. The Tribunal started operating in 1997.

73 Under the law relating to land registration, land adjudication is specifically about ascertaining existing rights and interests in or over defined parcels of land, which will be recorded or reflected in land registers.

edited and updated prior to the approval of the Policy in August 2015. By then Parliament had already passed an Act establishing a Tribunal with more power\ wider jurisdiction.[74]

A detail review and discussion of the Land Tribunal Act, 2014 is beyond the scope of this work. It will suffice to note only some of the following elements. First, Section 3 (1) of the Act states that the Tribunal shall "have such jurisdiction and powers as shall be conferred on it by this Act or any other written law." The jurisdiction conferred on it under the Act is to: (a) hear and determine a land dispute properly before it; and (b) hear appeals and review a decision of a public body concerning land. A public body means a land board established under the Tribal Land Act and a planning authority established under the Town and Country Planning Act. It appears from this that although the jurisdiction of the Tribunal presently appears to be limited to review of decisions of Land Boards and Planning Authorities, it could be widened to include resolution of any land dispute. The Tribunal is potentially a subordinate land court, which might one day evolve into a land division of the High Court.

Section 3 (2) of the Act also notably provides that the Tribunal may consist of one or more divisions as the Minister may consider necessary, each headed by a Land Tribunal President. Section 4 states that the Tribunal shall comprise of the following: (a) a Chief Land Tribunal President and Land Tribunal Presidents appointed in terms of the Public Service Act; and (b) such other members appointed on contract, also in terms of the Public Service Act, but holding qualifications in land management, real estate management, physical planning or related fields. A person shall not be qualified to be appointed as a Land Tribunal President unless he or she is qualified to practice as an advocate or as an attorney, and has been so qualified to practice for a period of not less than ten years. This is also the practice requirement for appointment as a judge of the High Court of Botswana. But the appointing authority for the Chief Land Tribunal president and Land Tribunal Presidents is the Minister responsible for land matters, not the Judicial Service Commission. The Minister is also the authority to whom the Land Tribunal is administratively accountable. It is incongruous and anachronistic for a land dispute adjudication body, set up as a potential land court, to be under the authority and supervision of a Minister, who will also be responsible for land boards and planning entities, whose decisions will be taken to the Tribunal on appeal.

74 Parliament passed a Land Tribunal Act, No. 4 of 2014 on 4 December 2013. It was assented to by the President on 23 January 2014. It reportedly entered into force on 1 April 2014.

6. LEGAL FRAMEWORK

Paragraph 91 provides for consolidation of all land- related Acts, and for review of the Deeds Registry Act to accommodate registration of customary land grants and recognition of electronic records. The first limb of the recommendation in this paragraph is not readily attainable, but the second limb is.

Consolidation is literally the process of combining several pieces of legislation into one. Only statutes in pari materia can be readily consolidated. It is challenging and daunting to consolidate legislation dealing with different aspects of land tenure, more so where, as in Botswana, the land tenure system is multi-layered. By opting for retention of this system, as indicated in paragraph 52, the Policy was compounding possible consolidation of land statues. Paragraph 91 further compounds the task by calling for consolidation of "land – related Acts". Paragraphs 33 to 49 in Part III of the Policy list not less than 17 such land-related statutory instruments, some of which may be consolidated, but a good number must be remain as specific statutes for what they currently deal with.[75] It should also be noted that the establishment of a Land Authority at a local level, to be responsible for land allocation and servicing across all the tenures, is indicated in paragraph 91 as the principal motivation for consolidation of land-related statutes. As suggested above, Land Authorities are not likely to be established in Botswana at this point in time. Consolidation at this point in time therefore lacks one of the motivating arguments.

As for the doable limb of the recommendation in paragraph 91, at the same time that it was presented with a Bill to repeal and re-enact the Tribal Land Act, Parliament considered and passed a Bill amending the Deeds Registry Act to provide for registration of customary land grants, but not at all dealing with the issue of electronic records.[76] For the purposes of this

75 The "Land Related Statutory instruments are: State Land Act, Tribal Land Act, Tribal Territories Act, Immovable Property (Removal of restrictions) Act, Town and Country Planning Act, Acquisition of Property Act and Land Control Act, (included in compiled in Chapter 32 of the Laws of Botswana); Land Survey Act, Deeds Registry Act, Sectional Titles Act and Fencing Act, (compiled in Chapter 33 of the Laws of Botswana); Water Act and Borehole Act, (compiled in Chapter 34 of the Laws of Botswana); Transfer Duty Act, Chapter 53: 01; Administrative Districts Act and Botswana Boundaries Act,(in Chapter 03 of the Laws of Botswana); and real Estate Professionals Act, Chapter 61: 07. Other statutes not on this list, but referred to in Conveyancing and Notarial Practice include the Legal Practitioners Act; Administration of Estates Act; Prescriptions Act; Married Persons Property Act; Abolition of Marital Power Act; Law of Inheritance Act; Succession (Rights of Surviving and Inheritance Family Provisions) and Removal of Reservations of Trading Rights (Tati Company Limited) Act; Mines and Minerals Act; and Mineral Tights in tribal Territories Act.

76 The Deeds Registry (Amendment) Bill, No. 6 of 2017 was reportedly presented for the first reading in April 2017, and for the second reading, and passed, in July\ August 2017. The Act was reportedly assented to by the President at the end of 2017, after the draft of this paper had been finalised. It was not therefore possible to reflect on the provisions of the Bill\ Act as passed by parliament.

discussion, the notable elements of the Bill include redefinition of certain key concepts in Section 2; expansion of the powers of the Registrar of Deeds in Section 5; and elaboration of the mechanics of deeds registration and the role of conveyancers, in Sections 16 and 17. Other notable elements of the Bill, likely to endear it to the public, but outside the scope of this work, include improvements to Section 18, on transfers by persons married in community of property; and amendments to Sections 43 and 44, to facilitate transfer by way of endorsement to a spouse in the event of death or divorce.

Conveyancing is essentially about the transfer of real rights in immovable property from one person to another. As noted earlier, Section 17 of the Deeds Registry Act distinguishes between "ownership" and "other real rights" in immovable property. Ownership must be conveyed by means of a deed of transfer; and other real rights by means of a notarial deed of cession. The Bill redefines the key concept of "immovable property" as including "a deed of customary land grant issued under the Tribal Land Act". This is not elegant. The deed is not immovable property, but the right or interest in the property reflected in the deed. The Bill is conspicuously silent on whether the right reflected in a customary grant is ownership or some other real right. But an "owner" is redefined as "the person registered as the owner or holder thereof and includes a land board established under the Tribal Land Act. …" This suggests that a land board may be considered an owner of Tribal land, but any other person, including one reflected in a customary grant, is a mere holder of the right.

To accommodate registration of customary grants, the Bill reformulates duties and functions of the Registrar of Deeds in Section 5(c) to include "registration of customary land grants, grants or leases of land lawfully issued by the Government or grants issued by any other competent authority …" It also introduces a new section 17A on the mechanics of conveying the right in a deed of customary grant. It does not state that the right shall be conveyed by means of a deed of transfer or a deed of cession. It instead provides that the holder shall apply to a land board for transfer of his or her rights using a form prescribed by the Registrar. If the land board approves the application, it, (the land board), shall forward the application together with such supporting documents as may be necessary to the Registrar. Section 17A, therefore, adds one more alternative to standard methods of conveyancing through a deed of grant, transfer or cession. This is transfer through an application on a prescribed form.

Section 17A also shifts the responsibility for ensuring registration of a transfer from the holder of the customary grant to the land board. This

is curious and probably needlessly paternalistic. If land boards are notorious for their poor record keeping, and it is partly for this reason that provision has been made for registration of customary land grants in the Deeds Registry, what assurance is there that this additional responsibility will be discharged efficiently? This is also at variance with the procedure for registration of common law grants, under which it squarely is the responsibility of the grantee to ensure registration of a memorandum of agreement of lease in the Deeds Registry.[77]

In keeping with the Policy recommendations in Paragraph 87, the Deeds Registry (Amendment) Bill proposes to minimise the role of conveyancers in the registration of customary grants at the Deeds Registry. It provides for the addition of new subsections (3) and (4) to section 16 of the Deeds Registry Act. Subsection (3) confirms that it is not necessary to engage conveyancers for the purpose of registration of instruments relating to choice of matrimonial property regime under the Married Persons Property Act, or the initial registration of a customary grant or its subsequent transfer to another party. Subsection (4), however, emphatically states that "… sectional titles in relation to customary land grants shall not be attested, executed or registered by the Registrar unless they have been prepared by a conveyancer." This is an acknowledgement that self –conveyancing is neither suitable nor desirable for complex matters such as sectional title transactions. Registration and transfer of a customary grant, on the other hand, could be regarded as an example of a simple registrable transaction mentioned paragraph 87, and amenable to self–conveyancing. However, as contended above, a simple registrable transaction ceases to be one, or amenable to self-conveyancing, if the transfer is financed in a manner requiring linked registration of a mortgage bond. A conveyancer must be engaged for purposes of preparation and execution of a mortgage bond. There is no proposal to change this either in the Policy or Deeds Registry (Amendment) Bill, 2017.

7. CONCLUDING OBSERVATIONS

The 2015 land Policy was crafted over a sufficiently long period of time for its sponsors to carefully study Botswana's myriad land tenure problems and concerns, devise appropriate solutions, and adequately engage and consult relevant stakeholders on what needs to be done. The Policy finally approved in 2015 is comprehensive, suggesting that the diagnosis of the land tenure

77 See Section 24(5) of the Tribal Land Act, and Regulations 19, 20 and 21 of the Tribal Land Regulations.

challenges and concerns in Botswana was equally thorough. This study, however, suggests that policy prescriptions in four out of the six substantive parts of the Policy are or could be legally problematic. Some were not properly conceived. Contrary viewpoints which should have influenced policy direction were on some of the issues simply brushed aside. The study has not reflected and does not comment on the land management and administration policy prescriptions in part VII. It reflects on but does not criticise the policy prescriptions on land values and the market in Part VIII. They are implicitly approved. It is highly or mildly critical of some of the policy prescriptions on land tenure, access to land and protection of land rights, institutional framework and legal framework in parts V, VI, IX and X.

On land tenure, this review does not disagree with retention of Botswana's three-tier land tenure system. It merely points out that this will make the quest for a consolidated land law difficult and practically challenging. The review also welcomes planning and survey of land before allocation. For Tribal land, this should have been attempted at the time land boards were created, before or by 1970. As it is, land boards started operating without full knowledge and information about the land which they were supposed to be responsible for. The registration of customary land grants in the Deeds Registry is also not objectionable in principle. But encoding rights reflected in a customary grant in the language preferred by the Deeds Registry Act is problematic. The Deeds Registry Act prefers to encode property rights as "ownership" and "other real rights", and prescribes different methods of conveying these rights. The proposed amendment to the Deeds Registry Act, to enable registration of customary grants, inelegantly side-steps these technical difficulties. It does not classify a customary right reflected in a grant as ownership or some other real right, and it confusingly provides for the transfer of the right by means of "a deed of customary grant."

This review is more critical of the retention of the FPSG as the title under which State land is granted. If the overriding policy in Botswana is State ownership of natural resources, including land, the Policy should have boldly recommended conversion of FPSGs, as they fall due, into long leases, so that State land tenure will eventual resemble Tribal land tenure. Conversion of FPSGs into long leases would also resolve the constitutional conundrum over the reversion clause in FPSGs. At the end of a lease, a lessor must in law pay compensation for necessary and useful improvements effected on the land. It is legally unacceptable for a lessor to assume ownership of such improvements without payment of "any compensation whatsoever". The issue of payment of compensation for improvements effected to the land

at the end of the period of a grant is not adequately addressed by merely including a provision for renewal in the terms and conditions of FPSG.

On access to land and protection of land rights, while commending as noble the attempt assure each and every Motswana of housing or shelter, through the promise of allocation of one free residential plot, this review notes that the application of the policy as stated will discriminate against those who would have acquired the first residential plot through other legitimate channels. The constitutionality of the Policy in this respect is likely to be tested. This review is also critical of some of the affirmative actions and special dispensations for vulnerable communities. It is noted that the Policy side-steps accommodation of claims to aboriginal title by some of the RACs, and the need for a special dispensation for indigenous persons in Tribal areas with finite land resources.

The study is hyper critical of the policy prescriptions relating establishment of Land Authorities as new entities to administer land at local level across all land tenure systems and on corrosion of the monopoly of conveyancers in preparation and lodgement of deeds of transfer at the Deeds Registry. It is contented that the prescriptions on these issues were not properly conceived, and should be revisited. This should not wait for the mid-term review and comprehensive evaluation of the Policy to be undertaken respectively after five and ten years of the approval of the Policy.[78]

78 Paragraph 92 in part XI, on implementation, monitoring and evaluation of the Policy.