Botswana's Tribal Land Act of 2018: Confounding Innovations with Congenital and other Defects

Clement Ng'ong'ola*

ABSTRACT

The paper interrogates Botswana's revamped Tribal Land Act, No. 1 of 2018, to tease out, applaud and celebrate its positive attributes, and to decry its shortcomings and weaknesses, which may be newly fangled or carried over from the old, repealed Tribal Land Act, No. 54 of 1968. The study shows that much of the new Act is a reproduction of the old Act. It has therefore come into existence with 'congenital defects.' Some of the welcome innovations in the new Act have also been introduced with profoundly troubling elements. On balance, therefore, there is not much to applaud or celebrate in Botswana's Tribal Land Act of 2018.

1 INTRODUCTION

Land in Botswana is generally classified as either Tribal land, State land or Freehold land.[1] Tribal land, comprising of approximately 71 per cent of a total land surface of about 578, 000 square kilometres, is the largest category, and consequently, the land resource on or from which a majority of the population derive or expect to derive sustenance. It is land which in other African land tenure systems is identified as customary or traditional land, previously occupied and utilised by indigenous communities under various customary laws and practices. On 27 September 1968, a few days before its second anniversary of independence, secured from the United Kingdom on 30 September 1966, Botswana passed a Tribal Land Act which sought to substantially transform tribal land tenure. Forty eight years after this law entered into force, and sixteen months after celebrating its 50th anniversary of independence, Botswana

* LLM (Exeter), PhD (London), formerly Professor of Law, University of Botswana

1 See Republic of Botswana, *Botswana Land Policy, Government paper No. 4 of 2015* (Government printer Gaborone, 2015) paras 1 and 9 on pages 1 and 2. State land is approximately 26 per cent of Botswana's total land surface, mostly comprising of forest reserves and national parks; and Freehold land is approximately 3 per cent of the land surface, and mostly agricultural land in selected parts of the country.

repealed and replaced the original Tribal Land Act.[2] The Tribal Land Act of 2018 is one of several pieces of legislation[3] to be passed after approval by the National Assembly of a new Land Policy in 2015.[4] This paper interrogates the 2018 Act with the simple purpose of noting and applauding innovations that have been introduced, and decrying weaknesses and shortcomings, which may be newly fangled or inherited from the old repealed law. Others might wish to consider whether or not there is a new millennial dawn for tribal land tenure in Botswana. The paper begins with a quick structural comparison of the old and new Acts, followed by an overview of the old Act and a part-by-part interrogation of the new Act.

2 The Tribal Land Bill, No 7 of 2017, was published in Government Gazette Extraordinary, Vol LV, No 21 of 3 April 2017. It was reportedly passed by Parliament between July and August 2017, but assented to by the President only on 19 February 2018. It was published in Government Gazette of 2 March 2018 as Act No 1 of 2018.

3 The Tribal land Bill, No 7 of 2017, was published, considered and passed by the National Assembly almost at the same time as the Deeds Registry (Amendment) Bill, No 6 of 2017 which, however, was assented to earlier as the Deeds Registry (Amendment) Act, No 15 of 2017. The third statute to be passed after approval of the Land Policy was the Transfer Duty (Amendment) Act, No 24 of 2019. The Transfer Duty (Amendment) Act and the Deeds Registry (Amendment) Act respectively entered into force in May and November 2020.

4 For a critique of the 2015 Land Policy see C Ng'ong'ola, 'Reflections on Botswana's 2015 Land Policy' (2017) 24 *University of Botswana Law Journal*, 113-139.

2. COMPARING MAIN PARTS AND PROVISIONS OF THE TWO ACTS

OLD TRIBAL LAND ACT (As Amended in 1993)	NEW TRIBAL LAND ACT (2018)
Part I, Ss 1 – 2, Introductory	Part I, Ss 1 – 2, Preliminary
Part II, Ss 3 – 11, Land Boards	Part II, Ss 3 – 17, Establishment and Functions of Land Boards
Part III, Ss 12 – 21, Grant of Customary Land Rights	Part III, Ss 18 – 21, Financial Provisions
Part IV, Ss 22 – 31, Grant of Land Rights under Common Law	Part IV, Ss 22 – 25, Grant of Customary Land Rights
Part V, Ss 32 - 35, Land Required for Public Purposes	Part V, Ss 26 – 28, Grant of Land Rights under Common Law
Part VI, S 36, Land Board Funds	Part VI, Ss 29 – 32, Land Required for Public Purposes
Part VII, Ss 37 – 40, General	Part VII, Ss 33 – 41, Land Board's Consent to Deal with Land
Schedules (First to Fifth)	Part VIII, Ss 42 – 56, General
	Schedules (1 – 5)

In the style of legislative drafting preferred in Botswana, part I of every statute covers preliminary or introductory matters. These are the 'short title' of the Act and a section on interpretation of key words and phrases. The last part of a statute covers 'general matters' such as the power to make regulations, repeal of other laws, and transitional provisions. The core of a statute is usually what is covered from part II to the part preceding the general matters part. Comparing the core parts of the two Acts, it is notable that there are several similarities. Part II in both Acts mainly deals with establishment and the primary function of land boards. Part III in the 2018 Act covers financial provisions. It expounds on what was covered in part VI of the old Act, on land board funds. Part IV of the 2018 Act, on customary land grants, is comparable to part III of the old law, on the same subject matter. Part V of the 2018 Act, on common law grants, is also on the same subject matter as part IV of the old Act. Part VI of the 2018 Act is comparable to part V of the old Act, both dealing with land required for public purposes. Except for the use of numerals as opposed to words in the titles, the

Schedules are also substantially similar. The only completely new part of the 2018 Act, with no equivalent in the old Act, is part VII, authorising land boards to consent to dealings with tribal land.

3. CORE FEATURES OF THE REPEALED TRIBAL LAND ACT

3.1 Land Boards as Established under the Repealed Act

In its original form the repealed Tribal Land Act sought to transform and modernise tribal land tenure, through replacement of chiefs and other functionaries responsible for land administration under customary law with land boards, which could be democratically composed and constituted, and by empowering land boards to grant rights in tribal land under forms of tenure and for uses and purposes which could not be readily accommodated under customary law.[5] Key provisions in part II of the Act described how land boards may be established and composed, their juridical status and basic mandate.

Provision was made in the original Act for only nine land boards, to be responsible for administration of tribal land in tribal areas corresponding with territories for which native or tribal reserves were created during the colonial era.[6] Eight of these were for the so-called principal Tswana – speaking tribes, and one was the Tati Reserve in the North East district. Three land boards were established in 1976 for Chobe, Kgalagadi and Ghanzi tribal areas,[7] bringing the total number to 12. This was the total number up to the repeal of the Act. This left other so called minority ethnic groups without land boards and tribal areas, and their tenurial practices not embraced under the Tribal Land Act.[8]

Land boards in the more expansive tribal areas were to be assisted by

5 See Sir Seretse Khama, National Assembly, Official Report, (Hansard 23), 2nd Session, 8-17 January 1968, 14 and contributions made at the second reading of the Tribal Land Bill, 1967, National Assembly, Official Report, (Hansard 25), 2nd Session, 3rd Meeting, 6-9 August 1968, 68-99.

6 Section 3 (1), as read with what then was the only Schedule in the Act. The Schedule had three columns: the first identifying the tribal territory; the second indicating the name of the relevant land board; and the third describing the composition of the land board. The Schedule was re-designated as First Schedule in 1970 and a Second Schedule, describing the territory for the Tati Land board added to the Act. The Third, Fourth and Fifth Schedules, respectively describing tribal territories for Chobe, Kgalagadi and Ghanzi land boards were added to the Act under the Tribal Land (Amendment Act, 21 of 1976.

7 Ibid

8 See C Ng'ong'ola, 'Land rights for marginalized ethnic groups in Botswana, with special reference to Basarwa' 41 (1997) *Journal of African Law* 1-26

subordinate land boards, which could be established by the Minister by an order published in the Government Gazette.[9] Subordinate land boards, therefore, could be established and re-configured as and when the Minister deemed it expedient, without any need to amend the Act. The Minister in due course sought and obtained similar powers to change the composition of main land boards through Orders published in the Gazette.[10] And this was repeatedly done over the years. By the time the original Tribal Land Act was repealed and replaced, it had reportedly been affected and revised by not less 29 Acts, Statutory Instruments and General Notices.[11]

The Schedule in the original Act specified a standard composition and size for land boards for the eight Tswana-speaking tribes, and a slightly different composition and size for the Tati land board. The membership included the chief or tribal authority, or his representative, as an *ex officio* member; one member appointed by the chief or tribal authority; two members elected in a specified manner by an electoral college at the relevant district council; and two members appointed by the Minister. When the Minister began to vary the composition of land boards through Orders published in the Gazette, Government experimented with sizing of land board membership in reference to the size of the tribal area; election of some land board members; and exclusion of chiefs and tribal leaders from active land board membership, and requiring them to be more involved in land board election processes at the *Kgotla*.[12] By the time the Tribal Land Act was repealed, however, chiefs and other tribal leaders had long been restored to active land board membership, as *ex officio* members,[13] and land board elections

9 Section 19 in part III of the Act. It was initially the President's responsibility to establish subordinate land boards. Some, but not all, of the President's powers under the Act were later cascaded down to ministerial level. It will, however, be noted below that this did not include initiating transfer to the State of tribal land required for public purposes. This remained the responsibility of the President under the various amendments of the Act.

10 Tribal Land (Amendment) Act, 24 of 1980.

11 The side note alongside the long title of the Act published after the 2011 revision of the laws of Botswana lists the following amending Acts and other instruments: Act 48, 1969; Act 62 , 1970; Act 70, 1970; Act 42, 1971; Act 13, 1975; Act 21, 1976; Act 4, 1979; Act 24, 1980; SI 102, 1981; Act 26, 1982; Act 33, 1983; Act 3, 1984; Act 24, 1984; SI 91, 1984; SI 103, 1984; Act 16, 1985; Act 5, 1986; SI 35, 1986; Act 15 of 1987; Act 14 of 1993; Act 10 of 1994; 216, 1994; 392, 1997, SI 92, 1999; Act 1, 2003; Act 24, 2004; Act 18, 2007; SI 30, 2008; and SI 19, 2011. Most of the statutory instruments (SIs) affected the composition of land boards.

12 See for example Tribal Land (Amendment of Schedule) Order, S.I. 102 of 1981; Tribal Land (Amendment) Regulations SI 90, 1984; Tribal Land (Amendment of Schedule) Order SI 91, 1984; Tribal Land (Amendment of Schedule) (No 2) Order, SI 103, 1984; and Tribal Land (Amendment of Schedule) Order, SI 35, 1986.

13 See Tribal Land (Amendment of Schedule) Order, S.I. 102 of 1981 and Tribal Land (Amendment of Schedule) Order SI 91, 1984.

abandoned.[14] The Minister had reasserted his prerogative to pack land boards with appointees. The notion of democratising tribal land administration through election of some land board members was no longer policy.

A constant feature of land boards, not at all affected by repeated amendments of the original Act, was their establishment as bodies corporate, each capable of suing and being sued in its own name, and empowered to do anything and enter into any transaction which could facilitate the proper discharge of any of its functions.[15] On the ground, however, land boards could hardly operate as typical, autonomous Botswana statutory corporations, accountable to Government through periodic publication and presentation of reports and accounts. First, as suggested above, the Minister was firmly in control of the establishment of both main and subordinate land boards. A preponderant number of land board members, including the chairperson and land board secretary,[16] the *de facto* chief executive of the of the board, were ministerial appointees. Second, land boards were entirely funded by government, and the Minister had statutory powers to direct how land board funds could be expended.[17] The Minister could even direct that funds deemed surplus to the requirements a land board should be appropriated to the revenues of the District Council.[18] Government further maintained a firm grip on land board policy formulation. The President could further 'give to any land board directions of a general or specific character', and the land board was duty-bound to give effect to any such directions.[19]

Section 10 (1), describing the primary function of land boards, discloses an additional and more convincing explanation for government's close superintendence of these statutory corporations. Section 10 (1) read:

> 'All the rights and title to land in each tribal area listed in the first column of the First Schedule shall vest in the land board set out in relation to it in the second column of the Schedule in trust for the benefit and advantage of the citizens of Botswana and for the purpose of promoting the economic

14 Tribal Land (Amendment of Schedule) Order SI 19, 2011, and Tribal Land (Amendment) Regulations SI 18, 2011.
15 Tribal Land Act 1968, s 9
16 S 8
17 S 36
18 S 36 (3)
19 S 11.

and social development of all the peoples of Botswana.'

The original Act indicated that the primary function of each land board was to hold and administer the land 'for the benefit and advantage of the tribesmen of that area and for the purpose of promoting the economic and social development of all the peoples of Botswana.' This was a positive, nation-building reform, which, nevertheless, overlooked the likelihood of overwhelming demand for land in some but not other tribal areas. It is not much consolation to tribesmen in high demand tribal areas, who cannot access land where they come from, to be informed that they can apply for it elsewhere. Also overlooked in the process of revising section 10(1) was the contention, now confirmed by the courts,[20] that the provision transferred more than administrative powers from chiefs to land boards. Land boards were accorded common law rights of ownership, which chiefs and other tribal leaders never had.[21]

The original Act also provided that nothing in section 10 'shall have the effect of vesting in a land board any land or right to water held by any person in his personal and private capacity.'[22] The 1993 amendment deleted this provision from the law.[23] Through this, the legislature signalled its displeasure with decisions rendered by the courts in *Kweneng Land Board v Matlho and Another*.[24] The Court of Appeal, upholding a decision of the High Court, held that land in Mogoditshane, in the Bakwena tribal territory, acquired under customary law before land boards were established, could be purchased or sold without the involvement of the responsible land board. It was an example of land or water rights held in a private and personal capacity, title to which did not vest in a land board in terms of the deleted sub-section. The decision was regarded as promoting anarchy and lawlessness in Mogoditshane and other peri-urban villages where unauthorised land dealings were rampant. The deletion of

20 See, for example, Lord Weir JA in *Kweneng Land Board v Bosele Syndicate and Others* [2001] BLR 208, 210 – 211 (CA)

21 According to I Schapera *Native Land Tenure in the Bechuanaland Protectorate (*Lovedale 1943) 40, chiefs and tribal leaders were no more than mere administrators, custodians or trustees of the land.

22 This was initially in sub-section (4) which was re-numbered as sub-section (2) after several revisions of the Act.

23 Section 7 (b) of Tribal Land (Amendment) Act, No 14 0f 1993.

24 [1992] BLR] 292 (CA). For an early review of the case, before it was officially reported, see C. Ng'ong'ola, 'Ownership of Tribal Land in Botswana: Review of *Kweneng Land Board v Kabelo Matlho and Pheto Motlhabane*, Civ Appeal 10/ 91', 37, 2 (1993) *JAL* 193-198.

sub-section (2) underscored the power and ability of land boards to supervise all dealings with land in a tribal area.

This was reinforced by the addition of new provisions, notably sections 38 and 39, in part VII of the Act. Section 38 (1) emphatically provided that rights in tribal land, whether granted in terms of part III or IV of the Act, and whether acquired prior to the coming into operation of the original Act, 'shall not be transferred, whether by sale or otherwise', without the consent of the land board concerned. While unmistakably quashing the jurisdictional aspect of the decision in Kweneng *Land Board v Matlho and Another*, the Legislature, perhaps unwittingly, appeared to agree with the finding by courts that customary law in the Bakwena tribal territory had sufficiently evolved to permit selling and purchasing of tribal land rights. To facilitate permissible sales, transfers and other dealings with tribal land, section 38 (1) included a proviso dispensing with consent of the land board for the following: (i) where the land to be transferred had been developed to the satisfaction of the land board; (ii) sale in execution to a citizen of Botswana; (iii) hypothecation in favour of a citizen of Botswana; or (iv) devolution of the land by way of inheritance.[25] Section 38 (2) prohibited the Registrar of Deeds from registering any conveyance of rights in tribal land without a certificate from the relevant land board, or without being satisfied that the requirements of sub-section (1) had been complied with.

Section 39 prescribed what in 1993 were fairly stiff sanctions for, among other offences, occupying tribal land without a grant, lease or certificate from the relevant land board; changing user of the land without prior approval of the relevant board; and transfer of land otherwise than under or in accordance with provisions of the Act. The penalties were a fine of P10 000 and imprisonment for one year for individuals, and a fine of P20 000 for corporate bodies.

3.2 Customary Law Grants under the Repealed Act

Amplifying the core mandate of land boards described in section 10(1), sections 12 and 13 in part III of the Act described the land administration functions taken over by land boards as including granting of rights to use land under customary

25 See Republic of Botswana, *Report of the review of the Tribal Land Act, land policies and related issues* Ministry of local government and lands (Gaborone 1989), which suggested that the proviso to section 38 (1) was intended to facilitate dealings with and transfers of tribal land between and among citizens of Botswana.

law, (customary land grants); cancellation of such grants; dispute resolution; and regulating land use. The latter was expanded to include authorising transfers and change of user under the 1993 amendments. Sections 17 and 18 also mandated land boards to plan and set aside land that could be used for grazing, arable and horticultural purposes, and as commonages for the community.

Section 20 suggested customary land grants were primarily for citizens, (tribesmen before the 1993 amendment), and for uses known under customary law. Non-citizens were expected to seek and obtain common law grants, so too citizens who required land for uses not accommodated under customary law.[26] The main customary law usages envisaged were residential use, arable farming and grazing and water rights. The Act and Regulations underscored that customary grants shall be confirmed by the issue of a 'certificate of grant of customary rights.'[27] No land was to be occupied without such a certificate, and the secretary of each land board was required to retain and keep in a register a duplicate of each certificate issued.

A customary land grant could be made and a certificate issued subject to such conditions as the Minister chose to impose. Non-compliance with specified conditions could justify cancellation of the grant. Additional grounds for cancellation of a grant enumerated in the Act[28] included the holder of the grant ceasing to be eligible for it; cancellation necessary for ensuring fair and just distribution of the land; use of land for a purpose not authorized under customary law or in contravention of customary law; cancellation where land was required for a public purpose; and, without a sufficient excuse, failure to cultivate, use or develop the land to the satisfaction of the land board within the specified period, or cultivation, use or development of the land for a purpose other than that for which it was granted.[29] It was otherwise underscored in section 15 of the Act that 'no cancellation for any other reason shall be of any force or effect.' This made customary land grants very secure indeed, potentially more secure than common law grants to be made in terms of part IV of the Act.

As for dispute resolution, section 13 (1) (c) specifically conferred upon land boards 'powers vested in a chief under customary law' relating to

26 Tribal Land Act, 1968, Ss 20 and 21 and Tribal Land Regulations SI 7 1970, Reg 8 (1).
27 S 16 and Reg 11
28 S 15
29 Tribal Land (Amendment) Act, 14 of 1993, s 10 (2), replacing s 15 (e) of the original Act.

'hearing of any appeals from ... any decision of any subordinate land authority.' As subordinate land authorities under customary law had been replaced by subordinate land boards, strictly, therefore, the dispute resolution mandate of land boards was to entertain appeals against decisions taken by subordinate land boards in the discharge of their land allocation functions. Land boards were not mandated to resolve all manner of land disputes under customary law. In the light of this, section 14 stipulated that a person aggrieved by any decision of a land board taken in the execution of its functions may appeal to the Minister within a period of six months. Appeals against the Minister could be taken to the courts.

The 1993 amendment to the Act sought to improve the system by providing for the establishment of a land tribunal or tribunals, to which appeals against ministerial decisions could be taken.[30] It was, strangely, the Minister responsible for land matters who was empowered to establish land tribunals by an order published in the Gazette. Pending the establishment of a tribunal for a particular area, section 20 of the Tribal Land (Amendment) Act, 1993 provided for reference of appeals to the District Commissioner of the area. The Minister responsible for land matters was at the time also responsible for supervision of District Commissioners. When eventually established, the same Minister was also responsible for funding and supervision of land tribunals. This was a palpably defective legal and administrative arrangement, not cured by the enactment in 2014 of a separate Act on land tribunals. The Minister responsible for land matters is still responsible for funding of land tribunals, and accountable to Parliament for their operations.[31] A more appealing arrangement would have been to establish land tribunals as specialised courts, funded and supervised like other courts under Botswana's judicial system.

30 In addition to sections 38 and 39 described above, section 19 of the Tribal Land (Amendment) Act provided for the addition of a new section 40, on establishment of land tribunals, to part VII of the original Act.

31 Section 5 of the Land Tribunal Act, No. 4 of 2014, for example, invests the Minister with the power to appoint the Chief Land Tribunal President and Land Tribunal Presidents who will preside in the Tribunals. The formal qualifications for appointment as a Land Tribunal President or Chief Land Tribunal President are similar to those required for appointment as a Judge of the High court of Botswana. The Act also notably adds to the jurisdiction of land tribunals appeals against decisions of Planning Authority under the Town and Country Planning Act, No. 4 of 2013.

3.3 Common Law Grants under the Repealed Act

Ten provisions in part IV of the original Act elaborated on the power of land boards to make grants of tribal land taking effect under the 'common law.'[32] Of these, the most notable were sections 23, 24 and 25.

Section 23 empowered land boards to grant land not exceeding five acres in extent, under leases terminable by either party upon giving of one month notice in writing, for transient agricultural, horticultural and other activities, to be undertaken mainly by persons who were not citizens of Botswana.[33]

Section 24 was the lead provision on the making of common law grants. It identified ownership and leasehold rights as the common law rights under which tribal land could granted. Only the State could be granted ownership of tribal land. Every other person was to be content with a grant of leasehold rights. Section 24 authorized granting of long-term leases for land required for residential, agricultural, commercial and other activities. Citizens of Botswana were entitled 99-year leases for residential land, but non-citizens were only entitled to 50-year leases. The duration of leases for non-residential, commercial and other activities, for both citizens and non-citizens, could be for up to 50 years.[34] A land board was not permitted to make a common law grant to a non-citizen without the written consent of the minister.

Survey and demarcation of the land within three months, and registration of the lease at the Deeds Registry within six months, were essential preconditions for section 24 common law grants. The registration procedure attempted to make it unnecessary to engage notaries, (or other legal practitioners), who must otherwise be involved in the conveyance 'other real rights in immovable property' that are registered under the Deeds Registry Act.[35] The regulations

32 Section 2 of the Act, the interpretation section, did not attempt to define "common law". In Botswana, when used in contradistinction to law other than that made by Parliament, the phrase is regarded as referring principles of Roman Dutch common law. See C M Fombad and E K Quansah *The Botswana Legal System* (LexisNexis, Butterworths, Durban, 2006) para 3.2.2 and 4.2.2.

33 Tribal Land Act 1968, s 29.

34 Para 11 of the 2015 Land Policy.

35 According to section 17 of the Deeds Registry Act, Cap 33:02, ownership of land must generally be conveyed from one person to another by means of a deed of transfer, prepared by a conveyancer, and attested by the Registrar of Deeds. Other real rights in immovable property must generally be conveyed under a deed of cession, prepared and attested by a notary public. Section 26 (4) in the original Act, later replaced by section 38 (3) in 1993, provided that 'for the avoidance doubt' section 17 of the Deeds Registry Act shall have effect in the transfer of land rights in a common law grant as it has effect in the transfer of other real rights in land.

required that at the appropriate time the grantee must obtain from the Director of Surveys and Mapping an official, approved diagram for the land and two signed copies of the memorandum of agreement of lease earlier deposited with the Director, and send them by registered post to the Deeds Registry, together with the required fee.[36] In practice, however, it was always advisable for a person to be handheld throughout the entire process, from application to registration of a grant, by an experienced legal practitioner, not necessarily one admitted to practice as a conveyancer or as a notary public.

Section 25 was a remarkable provision. It purported to authorise inclusion in tribal land leases of the odious term and condition that upon termination of a lease, even by effluxion of time, the land and improvements shall revert to the land board 'without payment of compensation whatsoever.' It provided that in the absence of a written agreement to the contrary, no person shall have a claim against a land board or the State for compensation for improvements to land which reverts to a land board; and a right of retention founded upon any claim for compensation for improvements effected on land reverting to the land board. At common law, at the end of a lease, a tenant must be compensated for useful and necessary improvements to the property that may not be removed because they have acceded to the land. Section 25 attempted to alter the common law. This was uncouth, and probably inconsistent with section 8 of the Botswana Constitution which, among other requirements, calls for 'prompt payment of adequate compensation' whenever property is 'compulsorily acquired' or rights in property of any kind are 'compulsorily taken over' by the State.

3.4 Tribal Land Required for Public Purposes under the Repealed Act

The original Tribal Land Act was not only about transformation of institutions responsible for administration of tribal land tenure, but also about enacting, as section 8 (1) (b) of the Botswana Constitution required, a law providing for compulsory acquisition of rights in tribal land.[37] Sections 32 to 35 in Part V of the original Act provided such a law. Sections 32 and 35 dealt with the procedure to be followed when tribal land was required for a public purpose.

36 Reg 21 (3) of Tribal Land Regulations, SI 7, 1970

37 The Acquisition of Property Act, Cap 32:10, the then existing law on compulsory acquisition, excluded tribal land from its scope.

Sections 33 and 34 dealt with compensation payable for loss of rights to use the land.

Section 32, in a manner consistent with the law on compulsory acquisition of freehold land, identified the President as the functionary responsible for initiating the process. If the President determined that some tribal land was required for a public purpose, section 32 (1) provided that the Minister shall serve a notice on the relevant land board and District Council, and request the land board to grant the land. The land board was expected to do as requested within a period of three months. If it refused or neglected to do so, or if it sought to impose unacceptable terms and conditions, section 32 (2) provided that the Minister could refer the matter to a Commission of Inquiry, comprising of a chairperson, nominated by the Minister; one member nominated by the land board; and a third member jointly nominated by the Chairperson and the member nominated by the land board.[38] The mandate of the Commission was to interrogate whether the land was indeed required for public purposes; whether the requirements of the state were reasonable in other respects, and to consider objections or misgivings of the land board or District Council in the matter. If the Inquiry found in favour of the acquisition, and the land board was still not keen to facilitate the transfer, section 32 (3) authorised the Minister to execute the grant.

Provision for reference of the matter to a Commission of Inquiry was a clear improvement over the comparable process for compulsory acquisition of freehold land described in the Acquisition of Property Act. Under this Act, Government could take over the land two months after service of a notice of intention to acquire the property.[39] The affected party could, of course, challenge the notice in the courts, but Higher Courts in Botswana were in the past not very keen to interrogate government motives and actions in such matters.[40]

On compensation payable for loss of customary law land rights, section 33 (1) directed the land board to grant the affected party rights 'to use land elsewhere of equivalent value' in terms of Part III of the Act. It also required

38 Section 35 of the original Tribal Land Act

39 Acquisition of Property Act, Cap. 32:10, s 7

40 See *Tati Company Ltd v the High Commissioner* 19559 HCTLR 74 (CA); *President of the Republic of Botswana and others v Bruwer and another* 1998 BLR 86 (CA); and C. Ng'ong'ola, 'Challenging the legality of a notice of expropriation in Botswana' 115, IV (1998) The *South African Law Journal*, 616-627.

the State to provide compensation for: (a) value of standing crops on the land taken over by the State; and (b) the value of any improvements effected on the land, including the value of any clearing or preparation of the land for agricultural or other purposes. Where there were subsisting rights on the land not governed under customary laws, section 34 provided that compensation should be assessed in reference to the Acquisition of Property Act. This Act provided for payment of adequate compensation, and for the adequacy of the compensation to be assessed in reference to the market value of the rights or property affected. Potentially, therefore, much more was payable by way of compensation under section 34 than under section 33(1). The other challenge with section 33 was whether compensation for the items specified could ever be adequate as required by section 8 of the Constitution. Also not clear was what was to be done if the land board was unable to find and grant land of equivalent value in the tribal territory? Over time, this was a real possibility in some tribal areas.

Section 32, on the procedure to be followed in the acquisition process, was not revisited under the 1993 amendments to the original Tribal Land Act.[41] Section 33, on compensation, was however replaced by one indicating that a person with subsisting customary rights over the land shall be required to vacate the land and, thereafter, 'may be granted the right to use other land, if available, and shall be entitled to adequate compensation from the State for the following, if applicable, ...' The compensable items listed in the revised sub-section (2) included the value of standing crops; the value of improvements effected on the land, including clearing or preparation of the land for agricultural purposes; costs of resettlement; and the loss of right of user of such land. Land boards were thus not obliged to replace lost customary rights, more so where land of equivalent value was not available in the tribal area. But they were obliged, in keeping with Section 8 of the Constitution, to offer adequate compensation for specified losses. The 1993 amendment, however, still left room for the argument that compensation for the four listed types of losses would still not amount to the 'adequate compensation' required by the Constitution or as specified for freehold land under the Acquisition of Property Act.

41 Tribal Land (Amendment) Act, 14 of 1993, s 18

4. INTERROGATION OF THE TRIBAL LAND ACT OF 2018

4.1 Establishment and Primary Functions of Land Boards

Part II of the 2018 Act has six more provisions than the comparable part of the repealed Act. The additional provisions elaborate on powers and duties of land boards, composition, appointment and removal of members, and conduct of meetings. Some of these issues were in the First Schedule, accompanying Regulations and other parts of the old Act. It is standard drafting practice in Botswana to cover all such issues under one part of a law establishing a statutory corporation. This also serves to signal that land boards under the new dispensation will be expected to function and operate like other statutory corporations in Botswana.[42]

The additional provisions notwithstanding, no system overhaul is proposed in Part II of the 2018 Act. Section 3 provides for the 12 land boards established under the repealed law to continue to administer tribal land in the 12 tribal areas identified and described in the Act. It also provides that each land board shall retain its status and capabilities as a body corporate. Section 4 further provides that 'all rights and title to land' in each tribal area 'shall continue to vest' in the relevant land board, 'in trust for the benefit and advantage of citizens of Botswana and for the purpose of promoting the economic and social development of all the peoples of Botswana.' These provisions are clearly not in consonance with the recommendation of 2015 Land Policy to replace land boards with land authorities.[43] The Legislature now appears to be suggesting that time is not yet ripe for implementation of this recommendation.

After the indication in section 4 that all rights and title to land in tribal areas shall continue to vest in land boards, section 5 describes in more detail other powers and functions of land boards. They include making and cancellation of grants of rights to use any land; imposition of restrictions on rights to use any tribal land; and authorising any change of use and transfer of tribal land.[44] Each

42 Para. 2 of the Memorandum Introducing Tribal Land Bill No. 7 of 2017, published in Government Gazette Extraordinary, vol. LV, No. 21, 3 April 2017.

43 Republic of Botswana, *Botswana Land Policy ... 2015* para 88 (i).

44 Section 5 (1) (a) – (e) of the 2018 Tribal Land Act reads like a reproduction of section 13 (1) in part III of the old Act which was specifically about grants, cancellation, change of use and transfer of customary rights in tribal land.

land board is additionally mandated to 'manage and administer all land' under its jurisdiction; to ensure equitable distribution of land to citizens of Botswana, in a manner that ensures sustainable development and the protection of natural resources; and to advise Government, whenever appropriate, on matters relating to policies affecting the mandate of the board.[45]

The description of the primary function followed by other specific functions of land boards in sections 4 and 5 is to be applauded. It is an improvement over the arrangement in the repealed Act which, as noted above, covered the primary function in part II and the specific functions in parts III and IV.

Section 6 in the 2018 Act is however disconcerting. It states that the Minister may give land boards directions of a general or specific nature regarding the exercise of their powers and performance of their functions, which directions shall not be inconsistent with the Act or with contractual or other legal obligations, and land boards shall give effect to such directions. This is a re-enactment and broadening of Section 11(2), under the repealed Act, which gave the President similar powers in the context of policy formulation by land boards. The powers of the President under the 2018 Act have been cascaded down to ministerial level, and directions can now be given in respect of the exercise or discharge of any of the powers and functions of land boards. This, again, is out of consonance with the objective of enhancing the capacity of land boards to operate more efficiently as bodies corporate.

The composition of land boards, previously described in the third column of the First Schedule in the repealed Act,[46] is now in section 7. All 12 land boards will have a standard composition of 11 members, comprising of eight members 'appointed in accordance with the prescribed procedure', who shall hold office for three years and be eligible for re-appointment, and three *ex officio* members. The *ex officio* members shall be a *kgos*i or *moemela kgosi*; one member representing the Ministry responsible for trade; and one member representing the Ministry responsible for agriculture. The appointing authority, as with most other statutory corporations in Botswana, shall be the Minister. The Minister shall also appoint a chairperson for each board from among the

45 Tribal Land Act 2018, s 5 (2) (a) – (d).

46 Schedule 1 in the 2018 Act has two columns only, describing the tribal territory (First Column), and the respective land board (Second Column).

members; and the members shall elect a deputy chairperson from among their number. The chairperson and the deputy shall hold office for a period of three years. It is apparent from section 7 that no person may become a member of a land board other than through appointment by the Minister. Election of some land board members is not envisaged. Governing bodies of all statutory corporations in Botswana are always packed with ministerial appointees. It is also apparent from section 7 that chiefs or their representatives, (tribal leaders) will be the ever-present members of land boards. They will always have an important role to play in tribal land administration.

On a related matter, section 53 in part VIII of the Act, on general matters, provides for the establishment and composition of subordinate land boards. It is notable that a subordinate land board for any area within a tribal area may, 'with the approval of the Minister', be established by the land board. The Minister, however, shall appoint the members. Each subordinate land board shall have a total of nine members, comprising of six members appointed to hold office for a prescribed period, and three *ex officio* members, described in the same manner as the *ex officio* members for land boards. Each subordinate land board shall also have a chairperson and deputy chairperson, to hold office for a period of three years, and appointed and elected in the same manner as the chairperson and deputy chairperson for the land board. Section 53 (6) empowers the Minister, by Order published in the Gazette, to 'vary the membership of any subordinate land board or the period of office of any members thereof.' This, again, is disconcerting and out of consonance with attempts to remould land boards to function as autonomous statutory corporations.

Also notable in part II of the 2018 Act is section 8, laying down grounds upon which a person may be disqualified from appointment or serving as a member of a land board or a subordinate land board.[47] The grounds are familiar, and apply to most public offices and governing boards of many statutory corporations in Botswana. They include insolvency or bankruptcy; insanity; being sentenced for any offence, whether in Botswana or elsewhere, to imprisonment without the option of a fine; holding office in a political party, and being a councillor in a local authority or a member of the National Assembly;

47 Section 53(8) stipulates that sections 8, 9, 11, 15 and 16 shall apply with such modifications as may be necessary to subordinate land board members.

or holding any public office.[48] It is also notable that a land board member 'may be suspended' from office by the Minister if criminal proceedings are instituted against him or her, at the end of which the sentence to be imposed is imprisonment without the option of a fine.[49] On the other hand, a member 'shall be removed' from office if convicted of an offence under the Act, or under any other Act, for which the sentence upon conviction will be imprisonment for six or more months without the option of a fine.[50] Section 8 does not mention qualifications or criteria repeatedly underscored in rules and regulations promulgated under the repealed Act, such as nationality, age, minimum academic qualifications, and residency in a tribal area.[51] Some of these may still be relevant qualifications or disqualifiers.

The last provision in part II to take special note of is section 17, on the role and functions of a land board secretary.[52] Under this provision each land board shall have a land board secretary, who shall be 'the head of the administration,' and responsible for the 'day-to-day administration' of the land board. This will obviously entail organising meetings of the land board and ensuring that records of such meetings are kept. Section 17 also lists the following notable responsibilities for a land board secretary: providing advice on and interpretation of government policies on land related issues, to ensure that well-guided decisions are taken by the board; implementation of lawful decisions taken by the board; entering into business transactions that facilitate the discharge of the mandate of the board; determination and definition of land use zones for the area of jurisdiction; supervision, monitoring and coordination of activities of officers, to ensure accountability and transparency in the management and delivery of land board services; maintenance of law, order and security in the land board; and litigation of cases on behalf of the land

48 Section 8(1)
49 Section 8 (2)
50 Section 8 (3)
51 See for, example, Regulation 2 (2) of Tribal Land Regulations, as amended by S.I. 18 of 2011.
52 It is not necessary in this paper to take special note of sections 9 to 16 of the Act, dealing with: vacation of office; filling of vacancies; temporary absence of members from office; meetings of land board; quorum and procedure at meetings; committees of a land board; disclosure of interest; and observing confidentiality. There is hardly anything unique or peculiar to land boards in these provisions. The details are as they appear in other statues establishing statutory bodies, such as the University of |Botswana Act, No. 15 of 2008; Companies and Intellectual Property Authority Act, No. 14 of 2011; Botswana Trade Commission Act, No. 20 of 2013; Botswana National Sport Commission Act, No. 30 of 2014; or Botswana Energy Regulatory Authority Act, No. 13 of 2016, to name a few

board at the Land Tribunal. These duties and responsibilities suggest that a land board secretary will be the equivalent a chief executive officer for a corporate body in the business world, accountable not only to his or her board but also to the Minister and the public at large for the performance of the land board. The secretary will either personally require, or have at his or her disposal, secretarial, corporate governance, land management and legal skills. The Act is silent, but it must be presumed, that land board secretaries will be appointed by the Minister responsible for land matters, from public servants employed in that ministry, who will then be seconded to the land boards.

Statutes establishing many statutory corporations in Botswana also contain the type of financial provisions included in part III of the 2018 Act. Section 18 requires every land board to establish a fund into which may be paid moneys due to the land board. It describes funds of a land board as consisting of monies appropriated by the National Assembly; grants and donations that the land board may receive; fees that the board may charge for its services; and such income as it may receive from investments. Section 19 describes the financial year of a land board as the period of 12 months beginning on 1 April each year and ending on 31 March of the subsequent year. Section 20 requires a land board to keep and maintain proper books and records of account, and to have them audited at the end of each financial year. Section 21 requires a land board to submit to the Minister a comprehensive report on its operations together with the auditor's report on its accounts within six months of the end of the financial year, which shall be laid before the National Assembly within thirty days of receipt.

The description of the funds of a land board as comprising of much more than monies appropriated to it by the National Assembly may have unintended repercussions under the law relating to expropriation of property. Section 8 (6) of the Botswana Constitution states that nothing contained in or done under any law shall be held to be inconsistent with or in contravention of section 8(1) of the Constitution to the extent that the law in question makes provision for the taking of possession or compulsory acquisition, in the public interest, of the right or property of 'a body corporate established by law for public purposes in which no moneys have been invested other than moneys provided by Parliament.' Thus, under the repealed Act, land required for public

purposes could be taken over by Government without need to comply with the constitutional requirement for prompt payment of adequate compensation to the land board. If land board funds include moneys other than those appropriated by Parliament, Government would arguably be required to compensate land boards for loss of rights to tribal land required for public purposes. This may be an unintended consequence of the strengthening of the ability of land boards to operate as true statutory corporations in Botswana.

4.2 Grant of Customary Land Rights

The number of provisions covering grant of customary land rights has been reduced from ten in part III of the repealed Act to 4r in part IV of the 2018 Act. Section 22, the introductory provision, reminiscent of section 12 in part III of the old Act, announces that granting, variation and determination of customary forms of land tenure are the core issues in part IV. This is misleading. No provision in part IV deals with variation or determination of customary land rights. Cancellation of customary land rights is covered in section 43, located in part VIII of the Act. Variation is only hinted at in section 5, in part II of the Act. Part IV of the 2018 Act mainly seeks to implement recommendations in the 2015 Land Policy relating to investigation, surveying and registration of customary land rights at the Deeds Registry.[53] It is only to this extent that the part deals with granting of customary land rights.

Section 23, providing for registration of all customary rights in tribal land under a 'deed of customary land grant' issued and signed by the Registrar of Deeds, is the stand out provision in part IV, if not in the entire Act. It effects a fundamental transformation of tribal land tenure in Botswana, as profound as the vesting of all rights and title to land in tribal areas in land boards in terms of section 10 (1) of the repealed law. Section 23 (1) declares a deed of grant of customary land rights issued by the Registrar of Deeds as the only acceptable evidence of entitlement to customary land rights. No person claiming such rights should occupy the land without such a deed. This includes persons

53 Paras 52 and 68 of the 2015 Land Policy. Investigation, mapping and surveying of all rights in tribal land is officially regarded as 'systematic adjudication of tribal land in Botswana.' It reportedly commenced under a project called LAPCAS (Land Administration, Procedures, Capacity and Systems) in May 2010.

claiming to have acquired the rights from a land board under the repealed Act,[54] or from chiefs and other tribal leaders before the repealed Act was enacted.[55] Every such claimant must seek and obtain a deed of customary land grant within six months of the commencement of the 2018 Act. This may not be realistic, since every claim must be investigated and verified, and the land demarcated and surveyed prior to registration and issue of a deed. Delays in the entry into force of the 2018 Act may be due to the imperative of ensuring these necessary preliminary activities are accomplished, and ensuring that land boards are properly equipped in terms of human and technical resources.

It is also notable that failure or refusal to register customary land rights as required under section 23 are not listed in section 49 as offences that can be committed under the Act, which are punishable by a fine of P20 000 and imprisonment for two years in the case of individuals. Section 23 (8) instead provides that if any person fails to apply for registration of his or her rights within the period of six months, or, if after a diligent search by the land board, the person to apply cannot be found, the land board itself shall complete and sign required documents in the name of the absent person or the one failing, refusing or neglecting to do so, and submit them to the Deeds Registry with an accompanying affidavit. Full and complete registration of customary rights in tribal land will thus hopefully be accomplished without criminal sanctions.

The procedure for registration described in sub-sections (5), (6) and (7) of section 23 is that the holder of a customary grant or a lease shall submit to the relevant land board an application in a format approved by the Registrar of Deeds, accompanied by the certificate of grant or lease to be registered and other supporting documents or evidence. Upon receipt of the application and supporting documents or evidence, the land board shall assess whether the applicant is entitled to be so registered, and if so satisfied, submit the certificate of grant or lease and supporting documents to the Registrar of Deeds. The Registrar shall then sign and issue a deed of customary land grant. A new section 17A in the Deeds Registry Act provides for a similarly simple procedure for transferring land rights reflected in a deed of customary land grant.[56] The

54 Section 23 (3).
55 Section 23 (4).
56 Section 7 of the Deeds Registry (Amendment) Act, 2017 provided for the insertion of the new section 17A in the Deeds Registry Act.

holder of the land shall apply on a prescribed form to the relevant land board, submitting the deed and such other supporting documents as shall be prescribed; the land board shall consider and approve of the application, and then forward the application together with the relevant supporting documents to the Deeds Registry.

In this way, first registration of customary land rights and subsequent transfers will hopefully be accomplished without the services of conveyancers and notaries public who, as noted earlier, must otherwise be engaged for preparation of deeds and other documents by which 'ownership' and 'other real rights' in immovable property must be conveyed from one person to another.[57] The 2015 Land Policy also recommended reducing 'the legal monopoly of conveyancers in the alienation of land rights at the Deeds Registry'; creation of standard forms for simple registrable transactions, so that owners as well as conveyancers may be able to prepare and lodge required documents at the Deeds Registry; and introduction of infrastructure innovations to make electronic conveyancing possible.[58]

It has been contended elsewhere that Botswana, like South Africa, has a highly reliable deeds registration system, which need not be upgraded into a land registration system.[59] This is partly because of the involvement of trained legal professionals in the preparation and lodgement of deeds and other documents. Conveyancers and notaries provide necessary quality assurance in deeds registration. Legal practice rules also provide for possibilities of legal and financial recourse for substandard work. Side stepping legal professionals in the registration of customary land grants may thus affect the quality of deeds registration in Botswana and the reliability of a deed of customary land grant as a land title document.

Additional responsibilities will also be imposed on the Registrar of Deeds and his or her staff, at a time of conversion to electronic conveyancing. The procedure suggests that the Deeds Registry will largely rely on land boards

57 See n35 and n36 above.

58 Para 87 of the 2015 Land Policy.

59 See 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) 236-251; and C Ng'ong'ola, 'Aspects of land tenure and deeds registration in Botswana' Proceedings of the International conference on Land tenure in the Developing World, with a focus on South Africa University of Cape Town, Department of Geomatics, 1998 477- 493.

to lodge and file correct documents. The failure of land boards to keep and maintain proper records of grants made under the repealed law, which partly informed the recommendation in 2015 Land Policy, not acted upon in the 2018 Act, to replace land boards with land authorities,[60] does not inspire confidence that land boards will be up to the challenge. Land boards are reportedly being re-tooled and equipped for electronic registration of customary land rights. The exercise will obviously be at a considerable cost to the *fiscus*, which has already been responsible for the survey and demarcation of all customary land parcels through the LAPCAS project. The question is whether going forward it will still be prudent and financially sustainable to make land boards responsible for registration of transfers of customary land rights.

Section 23 (9) introduces another controversial aspect. It provides that a person in occupation of tribal land under a common law lease 'shall' also apply 'for the re-registration of the common law lease as a customary land grant within six months of the commencement of this Act.'[61] It has been noted above that customary land grants under the repealed Act were primarily for citizens of Botswana, and common law grants were for non-citizens and for land uses that customary law would not readily accommodate. But citizens were not precluded from seeking common law grants for land uses not readily accommodated under customary law. Sections 24 and 25 in part IV of the 2018 Act replicate the repealed law in these respects, but section 25 curiously adds the proviso that 'any grant to a citizen of Botswana shall be deemed to have been made under the provisions of this part unless the land board has purported to make the grant under ... part V and the common law has expressly or by necessary implication been made applicable to such grant.' This confirms that the preferred grant for citizens is a customary land grant. But should citizens be compelled, as the imperative language in section 23 (9) suggests, to re-register common law leases under a deed of customary lad grant within six months of the commencement of the Act?

The tenure conditions that a deed of customary land grant will embody will become clear when prototypes of the deed are published, perhaps with new Tribal Land Regulations. The assumption from the title of the deed is that it

60 Para 88 of the 2015 Land Policy.
61 Section 23 (9)

will embody rights in the nature of customary law land rights. For as long as a person remained a member of the community, he or she was entitled to perpetual occupation and use of the land, for no charge, and the rights could be transmitted through inheritance. Land rights were arguably more secure under customary law than under a common law grant. The latter, as a lease, offered possession and use for a specified period, and often in consideration of payment of a rental. Tribal land leases granted under the repealed law were also transmissible through inheritance, but they could be determined by notice given by either party or by effluxion of time. As noted earlier, at the end of the lease, section 25 of the repealed Act authorised the land board to take over the land and all improvements thereon, without payment of compensation. On the basis of this alone, the holder of a common law lease would be well-advised to take advantage of section 23 (9).

Other considerations will however come into play in the decision-making process. Some may have sought and obtained common law grants because creditors and financiers would not lend against the security of a customary land grant. In such cases, especially where a mortgage bond was passed over the property, re-registration of a common law lease as a customary grant would have to be sanctioned by the mortgagee. The language in sub-section (9), therefore, should not have been imperative. Further, market perceptions about the nature of the security offered by a registered deed of customary land grant may not be properly gauged within six months of the entry into force of the Act. This timeline, therefore, should not have been applied to conversion of common law leases into customary grants.

4.3 Grant of Common Law Land Rights

An issue elaborately traversed in nine provisions in part IV of the repealed law is now covered in three provisions, sections 26 to 28, in part V of the 2018 Act. This might be indicative of the relative importance of customary land grants under the new legal dispensation. With registration of customary grants at the Deeds Registry, there should be little appetite for common law grants among citizens of Botswana.

Section 26, like section 22 in part IV, is introductory. It introduces

provisions in part V as concerned with 'granting and variation of common law forms of tenure.' This is misleading because no provision in this part covers variation of common law grants. Section 27 covers granting of common law forms of tenure, and section 28 covers conversion of customary grants into common law grants, not variation of common law grants.

Section 27 recalls from section 24 of the repealed law the instruction that only the State may be granted ownership of tribal land, and any other person may only be granted a lease. This will be on such terms and conditions as the land board may determine or as may otherwise be prescribed. As under section 24 of the repealed law, a grant under section 27 must be in the form of a written agreement, signed on behalf of the land board by the chairperson or secretary, duly authorised thereto by a resolution of the board. Part V of the 2018 Act has no provisions on survey and demarcation of the land; registration of the lease at the Deeds Registry; change of land user; and non-payment of compensation for improvements upon determination of the lease. Details on these issues will presumably be in regulations that must be prepared in time for the entry into force of the Act.

As for conversion of customary grants into common law grants, section 28 requires a written application to be sent to the relevant land board, which shall consider whether or not to approve of the application. Where the application is not approved, an appeal shall lie to the Land Tribunal. Registration and issue of deeds of customary land grants in terms of part IV of the Act should in theory make it less likely that many would want to invoke section 28. As contended above, however, it is the market that will determine the worth and value of a deed of customary land grant as a bankable security. One therefore cannot decry the provision for bureaucratic decisions to be contested in a formal dispute settlement setting under section 28.

4.4 Tribal Land Required for Public Purposes

As under the repealed law, only four substantive provisions part VI of the 2018 Act deal with this topic. Two aspects of the repealed Act are reproduced in section 32- 35 of the 2018 Act, and two new elements have been added to the law. The reproduced elements are the procedure to be followed when tribal land

is identified as required for a public purpose, and what should be provided by way of compensation for loss of customary rights to use the land. The new Act has retained reference of the matter to a Commission of Inquiry where a land board is not inclined to grant the State the land identified as required for a public purpose.[62] It has also retained the requirement that a person with subsisting customary rights required to vacate the land 'may be granted' rights to use other land if available, and 'shall be awarded adequate compensation' by the State for specified losses.[63]

There new elements introduced are the indication in section 31 that the process may also be initiated by a land board, if it determines that it is in the public interest to repossess land 'for the purpose of ensuring the fair and just distribution of land among citizens of Botswana, or for any other purpose that does not require acquisition of the land by the State.' Also new is the enumeration in section 32 (3) to (6) of principles for determining adequate compensation for loss of rights, interests and other amenities in or over the land acquired. This would appear to be the Legislature's response to long-standing criticism, acknowledged in the 2015 Land Policy, that the amount of compensation offered for tribal land required for public purposes does not match that offered for other land categories, and amounts of compensation actually offered might arguably fall short of the constitutional requirement for prompt payment of adequate compensation.[64]

Section 32 (3) of the Act, echoing section 16 (1) of the Acquisition of Property Act, states that the assessment of adequate compensation shall have regard shall to the following: (a) the fact that the party has been granted the right to use other land, if available; (b) the market value of the property at the date of service of the notice to vacate the land; (c) an increase in the value of any other property likely to accrue from the use to which the property acquired will be put; (d) damage, if any, sustained from severance of land from any other land of the party claiming compensation; (e) damage, if any, sustained by any person

62 Sections 29 and 30.

63 Section 31 (2).

64 See: Paragraph 83 (vi) of the 2015 Land Policy; Republic of Botswana, *Report of the Presidential Commission of Inquiry into Land Problems in Mogoditshane and other Peri-urban Villages* (Government Printer Gaborone 1991) paras 2.190 – 2.199; and C Ng'ong'ola, 'Compulsory Acquisition of Private Land in Botswana: the Bonnington Farm case' (1989) XXII *Comparative and International Law Journal of Southern Africa* 298-319.

interested, by reason of the acquisition injuriously affecting any other property of such a person; and (f) reasonable expenses, if any, incidental to change of residence or place of business by the affected party. But there should be no regard to the following in the computation of compensation: (i) the fact that the acquisition is compulsory; (ii) the degree of urgency which has led to the acquisition; (iii) any disinclination on the part of the affected person to part with the property; (iv) any damage which, if caused by a private person would not be a good cause of action; (v) any increase in the value of the property, likely to accrue from the use to which the property will be put after acquisition; or (vi) outlays, improvements or additions effected after service of the notice to vacate which, in the opinion of the State, are not necessary.

Section 32 (4), reproducing section 16 (2) of the Acquisition of Property Act, further states that improvements increasing the market value of the property within a year of the service of notice to vacate the property should also be disregarded, unless it is proved that they were made *bona fide* and not in contemplation of the land being required for public purposes.

Section 32 (5), reproducing section 17 of the Acquisition of Property Act, provides that a land board, not the State, which is generally responsible for payment of compensation under section 32, may award compensation for loss of rentals where the State takes over property and enters into possession before payment of compensation or agreed consideration for the property.

Section 32 (6), finally, provides for reference of disputes arising in this process to the Land Tribunal. These may be disputes pertaining to the right or interest of the affected party in the land; the amount or adequacy of the compensation to be paid; and the legality of the taking of possession or acquisition of property, interest or right. This is consistent section 8 (1) (b) (ii) of the Constitution which calls for reference of expropriation disputes to the High Court, either directly or on appeal from a decision of any other authority. Section 11 of the Acquisition of Property Act, from which section 32 (6) is modelled, provides for reference of such disputes to a 'Board of Assessment' comprising a person nominated by the Chief Justice, who shall chair the Board; a member appointed by the President; and a member nominated by the affected party.

The concept of market value, mentioned several times in section 32 as

the core ingredient in the assessment of adequate compensation, is not defined in the 2018 Act or in the Acquisition of Property Act from which it has been imported. At common law it is reckoned to embrace 'the amount which the property would have realised if sold on the date of the notice in an open market by a willing seller to a willing buyer.'[65] If this understanding is read into section 32 of the 2018 Act, as it must, the conundrum will be that some rights in tribal land, initially freely allocated, will be taken over by the State, for a public purpose, at a considerable cost to the *fiscus*. This might however be mitigated by the fact in tribal areas, where selling and buying of land is frowned upon, the price that a willing buyer would pay a willing seller might be low.

4.5 Control of Transfers and Dealings with Tribal Land

The nine provisions in Part VII of the 2018 Act empowering land boards to regulate transfers and dealings with tribal land appear to combine and adapt the law and procedures in section 38 of the repealed Act and sections 3 to 10 of the Land Control Act.[66] This Act sought to regulate transfers and other dealings with agricultural land in the freehold sector, perceived at the time to be predominantly owned by settlers of European descent or their corporate entities. It prescribed ministerial consent for transfers or dealings in favour of a non-citizen, and required the proposed transaction to be advertised in such a way an interested citizen of Botswana could replace the non-citizen party.

Section 33(1) of the 2018 Act substantially reproduces the requirement in section 38 (1) of the repealed Act that land boards must consent to every transfer or dealing with rights in tribal land, but it incorporates into the requirement elements of the description of a 'controlled transaction' from section 3 of the Land Control Act. It specifies that the following transactions shall not be entered into without the consent of a land board: (a) transfer, mortgage, charge, bond or lease capable of running for a period of five or more years, partition or other disposal or dealing with any tribal land; (b) division of any such land into two or more parcels to be held under separate titles; or (c) the issue, sale, transfer,

65 See, for example, *Pietermaritzburg Corporation v SA breweries* 1911 AD 501, 515-516; *Durban Corporation v Lewis* 1942 NPD 26, 48-49; *Estate Marks v Pretoria City Council* 2 SA 227.

66 No. 23 of 1975, cap. 32:11, Laws of Botswana

mortgage, or any other disposal or dealing with any share in a private company owning any land.[67] Consent, however, is not required for the following: (i) a sale in execution to a citizen of Botswana; (ii) a hypothecation by a citizen of Botswana; or (iii) for devolution of the land upon inheritance. This is a replication of the proviso to section 38 (1), without the superfluous proviso (i), indicating that consent of the land board need not be obtained in respect of a dealing with 'land which has been developed to the satisfaction of the land board concerned.'

Section 33 (2) reproduces the instruction in section 38 (2) of the repealed Act that the Registrar of Deeds shall not register any conveyance of tribal land without ensuring that requirements of the preceding sub-section have been complied with. Section 33 (3) does not repeat the clarification in section 38 (3) of the repealed Act that rights in common law leases of tribal land shall be conveyed from one person to another as stipulated in section 17 of the Deeds Registry Act. Section 33 (3) instead provides criteria for determining the citizenship of a company for the purposes of Act. It stipulates that 'citizen' shall not include a company incorporated or registered under the Companies Act of Botswana, 'unless all classes of shares in such company are beneficially owned by individuals who are citizens of Botswana'. The Land Control Act only requires that 'the majority of all classes of shares in such company [be] beneficially owned by individuals who are citizens of Botswana.'[68] The Transfer Duty Act also only required that 'a majority of every class of equity shares' must be held by citizens of Botswana.[69] If the citizenship of a company was similarly determined under the repealed Act, the change proposed in section 33 (1) would have the effect of rendering many joint venture enterprises previously eligible for allocation of tribal land now ineligible. If indeed tribal land was being surreptitiously acquired by non-citizens, the tightening of the definition in section 33(3) may have accentuated the problem.

Section 34 resembles section 5 of the Land Control Act. It requires that a proposed transaction in favour of a non-citizen must be publicized in

67 Similar transactions or dealings with agricultural land in the freehold land sector are described in the Land Control Act as 'controlled transactions' if the transferee or party acquiring the right or interest is not a citizen of Botswana.

68 Land Control Act 1975, s 2 (4)

69 Transfer Duty Act, Cap 53:01, s 2 (6)

prescribed media for a period of 'not less 30 days prior to' the date of the proposed transaction. The period under Land Control Act is 'not less than 90 days prior to' the date of the transaction.[70] Section 34 (2) indicates that it shall not be necessary to publicize, and by implication, to seek the consent of the land board, where land is acquired by a non-citizen through inheritance, or in execution of a court order resulting from divorce proceedings.[71] The details of the proposed transaction that must be publicised under section 34 are substantially as indicated in section 5 of the Land Control Act.[72] Section 35, echoing section 6 (1) of the Land Control Act, provides that an application for consent under section 33 (1) must be accompanied by evidence of the publication of notices as required under section 34. The time worn stipulation in section 6 (2) of the Land Control Act that the minister's decision in these matters shall be final and conclusive and shall not be questioned in any court is not repeated in section 35.[73]

Section 36 indicates what the land board must take into consideration when deciding whether or not to permit transfer or a transaction in favour of a non-citizen. The factors are substantially similar to what is indicated in section 7 of the Land Control,[74] with the added detail that a land board must act on the principle that consent generally ought to be refused where the transferee has sufficient land for the purpose he or she proposes to use the land, and where it would be in the public interest to do so.

Sections 37 to 41 spell out the consequences of non-compliance with the law and procedure laid out, again, in a manner similar to what was provided in comparable provisions of the Land Control Act. Section 37, in a manner comparable to section 3 (2) of the Land Control Act, provides that an agreement

70 Compare section 34 (1) of the Tribal Land Act 2018 with section 5 (1) of the Land Control Act 1975.

71 Transfer of land to a non-citizen through inheritance was also not regarded as a controlled transaction in terms of section 3(3) of the Land Control Act. But there was no equivalent in the Act of the exemption of transfers arising from divorce proceedings.

72 These are the description of the land; full names of the parties; details of the proposed transaction; consideration; and the reference to the right of a citizen of Botswana to preempt the transaction.

73 Section 6 (2) is inconsistent not only with modern constitutional and administrative law notions, but also with section 48 (2) of the 2018 Act which states that 'any person aggrieved by any decision of a land board made under this Act may appeal to the Land Tribunal within a period of 30 days' from the date upon which he or she became aware of the decision.

74 Comparing section 36 of the 2018 Act with section 7 of the Land Control Act, it is notable that both require that consideration must be given to the likely development and utilization of the land ; to objections, if any, lodged against the proposed transfer; and to the wish of any citizen of Botswana to pre-empt the transaction.

to be a party to a regulated transfer of tribal land 'shall become void for all purposes' at the expiration of three months if an application for consent is not made within that time. If an application was made, and the consent was refused, the transaction shall be void at the expiration of 30 days after the refusal. Although the transaction shall be 'void for all purposes', section 38, in a manner similar to section 4 of the Land Control Act, provides that any money or valuable consideration paid under the transaction before it is rendered void shall be recoverable as a debt. Section 39 (1), reproducing section 8 (1) of the land Control Act, instructs the Registrar of Deeds and the person responsible for keeping the register for shares in a company, not to register any instrument or document effecting a regulated transaction unless satisfied that the requirements of the Act have been complied with and there is documentary evidence of the price at which the transaction was concluded. Section 39 (2) declares that a contravention of section 39 (1) is an offence punishable by a fine not exceeding P5000 or imprisonment for a term not exceeding one year, or both.[75] Section 40 provides that any person who knowingly provides false information in these processes commits an offence punishable by a fine not exceeding P50 000 or imprisonment for a term not exceeding five years, or both.[76] Section 41 rounds off the criminal sanctions by stipulating that it shall be an offence punishable by a fine not exceeding P200 000 or imprisonment for a term not exceeding two years, or both, for any person to pay or receive any money or to enter into or remain in possession of land in furtherance of a transaction or agreement avoided in terms of section 37 of the Act.[77]

Allocation and transfer of tribal land to non-citizens were somewhat simply regulated under the repealed Act. As noted above, customary land grants were primarily for citizens of Botswana, and non-citizens were expected to seek only common law grants. A common law grant, secondly, could not be made to a non-citizen without the consent of the Minister. It was also implicit from section 38 (1) that a land board had to authorise every transfer or dealing with a common law grant involving a non-citizen, except for devolution through

75 The comparable penalty in section 8 of the Land Control Act was a fine not exceeding P5, 000 or imprisonment for a term not exceeding six months, or both.

76 The comparable sanction in section 9 of the Land Control Act was a fine not exceeding P10 000, or imprisonment for a term not exceeding one year, or both.

77 The comparable penalty in section 10 of the Land Control Act was a fine not exceeding P20 000, or imprisonment for a term not exceeding two years, or both.

inheritance. As a matter of policy, perhaps not law, a land board could not authorise a transfer or dealing involving a non-citizen without the Minister's consent. It was not suggested in the 2015 Land Policy, or in earlier reviews of the work of land boards, that controls put in place under sections 24 and 38 of the repealed Act were not working. There was also no indication that non-citizens were acquiring significant amounts of tribal land. Incorporation in the 2018 Act of controls devised for indigenisation freehold agricultural land was, therefore, probably unnecessary. The 2015 Land Policy must have had in mind residential land in urban areas, not tribal land, when it recommended replication of controls in the Land Control Act to other land categories. And it did this without evidence or statistics indicating that the mischief which gave rise to the Land Control Act also affected other categories of land in Botswana. Sections 34 to 41 of the 2018 Act will in consequence needlessly complicate the work land boards when the priority should be successful registration of customary land rights at the Deeds Registry.

5. CONCLUDING OBSERVATIONS

At first glance, Botswana's Tribal Land Act of 2018 appears to be an elongated upgrade of the original Tribal Land Act of 1968, as amended in 1993. Its principal objective is to provide for the continuation of land boards established under the old, repealed Act, as if they were established under the new Act. It is elongated because of new or additional provisions reinforcing the status of the twelve land boards as corporate bodies of the same stature as other statutory corporations in Botswana; new provisions on registration of customary land grants at the Deeds Registry; new provisions on assessment of compensation for loss of rights to use tribal land expropriated for public purposes; and new provisions regulating transfer of rights in tribal land to non-citizens, in the manner of controlled transactions under the Land Control Act. These, at first glance, also appear to be exciting developments and additions to the law. A closer analysis, however, reveals that there are problematic elements in each of the new or additional provisions, likely to confound the implementation of the Act.

It is contended in this paper, for example, that Minister's grip on

establishment and composition of main and subordinate land boards has not been sufficiently loosened for these institutions to operate as autonomous statutory corporations. The Minister has also retained his powers to direct land policy formulation. The registration of customary land grants at the Deeds Registry will primarily be the responsibility of the land boards. These are institutions that were notorious for poor record keeping and registration of documents under the old law. They must now be conversant with heavily regulated deeds registration practices that should now be electronic. And the parties are not expected to engage legal professionals who, as part of their University training, study conveyancing and notarial practice. It has also been contended in this paper that payment of market based adequate compensation for expropriated rights in tribal land ensures that the Tribal Land Act is consistent with protection of property in the Botswana Constitution. But Government will now find itself paying a market price for land that was originally allocated without charge or at a heavily subsidized cost. It is finally the contention of this paper that inclusion in the 2018 Tribal Land Act of provisions regulating transfer of tribal land to non-citizens, first devised for freehold agricultural land, was probably unnecessary. The law in the new part VII of the Act is addressing a problem which would only have come into existence through catastrophic failure by land boards to apply the law and controls incorporated in sections 24 and 38 of the repealed Act. New controls in the Act are likely to add to the new, onerous duties and responsibilities of land boards, which will be poorly executed. And the narrowing of parameters for the determination of the citizenship of a company has rendered more companies, previously eligible for allocation of tribal land, to the pool of non-citizens not eligible for such allocations. It has paradoxically accentuated the very problem that part IV was designed to address.