

Tribal Land Administration in Botswana

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Abstract

Decentralising the administration of communally-owned land to a local system in Botswana was a sound objective and could be pursued elsewhere in the region. Yet, despite Botswana having grappled relatively successfully with many of the land challenges, evidence suggests that tribal land administration is not free of problems.

Introduction

Land reform in Botswana started with a commitment to enlarge the tribal lands and promote democratisation and decentralisation of decision making. Land reform was also aimed at increasing agricultural productivity, conserving range resources and improving social equity in rural areas.

In 1968, the Government enacted the Tribal Land Act, which transferred the chiefs' powers over tribal land to land boards, statutory bodies whose members were mostly nominated by the Minister responsible for land matters. Decentralisation enabled the modernisation of rural land tenure and democratised (and made more accountable) rural land administration. The transfer of substantial tracts of communally-occupied state land to the land boards in succeeding years can be seen as part of the same process.

The Tribal Land Act

The Tribal Land Act of 1968 transferred the chiefs' powers over tribal land to land boards, statutory bodies whose

members were mostly nominated by the Minister responsible for land matters. The Act vested '*All the rights and title to land in each tribal area ... in the land board ... in trust 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.*' The Act introduced the principle of leases under common law for commercial uses of tribal land, e.g. trading stores and other businesses, fenced commercial ranches, etc., and also for grants to persons who were not tribesmen of the area.

The purpose of the change was stated at the time to be to enable the modernisation of rural land tenure and to democratised (and make more accountable) rural land administration. The transfer of substantial tracts of communally-occupied state land to the land boards in succeeding years can be seen as part of the same process.

Tribal Land Administration

Prior to 1970 all tribal land in Botswana was administered by the chiefs in the traditional manner, following the norms and rules of customary law. At Independence in 1966, the new government adopted a policy of modernising and democratising local administration that involved reducing the powers of the chiefs by transferring their administrative duties to more democratic institutions. In pursuit of this policy, local government functions in the rural areas were transferred to

District Councils in 1967 under the Local Government (District Councils) Act of 1966. These councils were made up of both elected and nominated members, with elected members forming a small majority.

Customary law in Botswana

The great majority of land rights, whether held under individual or common property on tribal land, are held under customary law. Broadly speaking, under Tswana Customary Law, every tribesman is entitled to the grant of sufficient land for cultivation and housing to meet his household's subsistence needs and has the right of access for livestock to graze on the communal grazing land. The tribesman also has the right of access to natural surface waters (including sub-surface flow in sand rivers) for household and livestock watering purposes and to develop artificial ground water sources (e.g. wells or boreholes) or surface water sources (e.g. dams and hafirs – special dams used for fresh flood water collection where no well-defined drainage channels or sites for small dams exist) for his own use. These rights are heritable, but are not otherwise freely exchangeable or transferable and may not be sold except with the consent of the land authority.

In practice, tribesmen have virtually open access to grazing and natural surface water sources (almost all of which are either seasonal or ephemeral). Since the exercise of rights to residential or arable land or to develop artificial water sources may impinge upon the rights of others, tribesmen wishing to exercise these rights must apply to the land authority. Prior to the Tribal Land Act coming into force in 1970, the role of land authority was filled by the

Land tenure systems

By 1980, transfer of state land on a substantial scale and purchase of freehold land in congested areas had caused the proportion of tribal land to increase to 69%, while the proportion of freehold land had fallen back to 5.7% and state land to 25%. Today, tribal land comprises about 71% of the national land area, freehold just over 4% and state land the remainder. Thus, land policy in Botswana has been to increase the proportion of land owned by the tribes at the expense of both state ownership and private ownership of freeholds. The changes are illustrated by Table 1 below:

Table 1: Land tenure categories in Botswana

Year	Tribal land		State land		Freehold land	
	Area (km ²)	%	Area (km ²)	%	Area (km ²)	%
1966	278,535	48.8	270,761	47.5	21,356	3.7
1979	403,730	69.4	145,040	24.9	32,960	5.7
1998	411,349	70.9	144,588	24.9	24,572	4.2
2009	411,559	70.9	144,611	24.9	24,339	4.2

Tribal land may be occupied communally under customary law or under common law lease. Some tribal land is used and managed by the state as game reserves and forest reserves, with the consent of the land authority.

chief; since 1970 the exercise of these rights has been regulated by the tribal land boards.

While access to natural water sources and communal land – and its grass, fuel wood and other natural resources – is effectively open, access to arable or residential land or to artificial water sources is not, but is controlled by the grantee, who has the right to exclude other people. Thus arable fields and residential compounds may be, and usually are, fenced. The Tribal Land Act did not change or amend customary land law in any way other than by transferring the role of land authority away from the chief to the land board, and by introducing certificates of customary grant as evidence of customary grants of individual rights for wells, borehole drilling, arable lands and individual plots. No fees are payable for the exercise of any

customary right under the Tribal Land Act. While all grants made after 1970 are validated by a certificate issued by the land board, no attempt has been made to register grants made by the chiefs prior to 1970. These were usually given verbally in the *kgotla* (chief's court) and are mostly undocumented in any form. Since these rights are heritable, and a large number of the original grantees are still alive anyway, many people who have legitimate title to land have no documentary evidence to prove it. On the other hand, this situation can also be used by people to claim rights in excess of what they were granted.

Land Boards

A demand arose in those areas where significant populations resided on state land (where they had the status of tenants-at-will, without clearly

defined rights), for such areas to become tribal land where land would be administered by a land board. There were initially eight land boards that covered the eight tribal territories that had been recognised by the Protectorate Government. In addition, transfers of former state land have extended a number of the pre-existing tribal territories.

The land board is required to consult the district council on matters of policy and the President has power to give directions of a general or specific nature to the land board, which it must obey.

The Minister appoints the Board Secretary while the rest of the board's staff were, for many years, appointed, promoted, disciplined and terminated by the Unified Local Government Service. Consequently, the boards themselves had no effective say in the composition and management of their own staff.

As is inevitable with such a radical change affecting the administration of so crucial a resource for the great majority of the country's inhabitants,

The membership of the land boards was initially made up of:

- two members of the District Council, elected by the council from amongst its own members to represent it on the board;
- the chief of the tribe whose land the board administered;
- up to 12 members appointed by the Minister acting on the advice of the District Commissioner (the number of members varies from one board to another); and
- two ex officio members to represent the Ministries of Agriculture and Commerce and Industry.

there were teething troubles, problems of acceptance by some sections of the population and severe shortages of funds, transport and competent, trained people to run the new institutions. However, in spite of the problems, the change was seen as a success overall, not only by the government but also by the bulk of the population.

In order to address some of these problems, four new tribal areas were established, in the Tati, Chobe, Kgalagadi and Ghanzi tribal areas, each with its own land board, where large tracts of state land, occupied by a distinctive community, were 'tribalised'. As a result of the problems it perceived in the operation of the Act, the government has over the years introduced a number of amendments to the Act, with significant changes being implemented in 1984 and 1993.

It was soon found that in the larger tribal territories the land boards could not handle the large number of applications received for customary rights for residential plots and ploughing fields, and initially the chiefs had to continue to perform this function. This was neither satisfactory nor popular, so subordinate land boards were established to perform this function from 1973 onwards. All the land boards, with the exception of those in Tlokweng, Tati and Chobe (which cover small areas with small populations), now have subordinate land boards to deal with customary allocations. By 2009 there were a total of 37 subordinate land boards in operation.

In 1984, further significant changes were made. The chief ceased to be a member of the land board, but instead had the right to nominate a member

to represent him. This was due to conflict of interest as the chief, who retains significant judicial functions, might find himself adjudicating a dispute over a decision by the land board where he had participated as a member. The method of selection of most members also changed, with prospective members standing for election at the main *kgotlas* in the area, at which their supporters formed lines to indicate their support for the candidates. Following these elections, a Land Board Selection Committee, chaired by the District Commissioner, made recommendations to the Minister as to who should be appointed.

The changes introduced in 1993 were more radical. First of all, the concept of tribesmanship was abolished. In future, all citizens would be eligible to be allocated land in any tribal territory or area in Botswana. Prior to this date, the Minister's consent was required for any grant to a person who was not a tribesman of the area. This proposal was introduced following pressure from the political elite, who wanted access to tribal land in the peri-urban areas around Gaborone and Francistown, which were booming. Due to land pressure, the land authorities in these areas were becoming more selective about who they allocated land to. The land pressure was largely a consequence of the government's failure to service sufficient land in the urban areas and to enforce development covenants on the land they had serviced, leading to a housing shortage and excessively high rentals. This change has been rather unpopular, particularly amongst the former tribesmen of the peri-urban tribal areas, who saw their loss of right as not being compensated by the gain of rights of access in the more rural areas.

It was also, and remains, unpopular amongst some elements in the rural communities, who saw their land rights as being threatened by pressure from the urban elite wanting farms and smallholdings in the communal areas where they derive their livelihood.

Also in 1993, the method of selection of land board members was changed again. The positions for two members elected by the District Council and the member appointed by the chief were abolished. Prospective members are now subject to 'elections' in the *kgotla*, from a list of candidates approved by the Land Board Selection Committee, who subsequently make recommendations to the Minister as to who should be appointed. The Land Board Selection Committee comprises three officials, the chief and a member appointed by the Minister.

The 1993 amendment also established a Land Tribunal as a court of equity to hear appeals arising from decisions made by land boards, and abolished the Minister's role in dealing with appeals. A second Land Tribunal to serve the northern part of the country was established in 2005, based at Palapye. In 2006, the cabinet took an administrative decision that no further direct allocations of tribal land to non-citizens would be permitted. Non-citizens who want tribal land must now obtain it by sub-lease from citizens.

Some long-standing issues

Land boards are not entirely democratic or locally accountable institutions. The District Agricultural Wildlife and Commercial Administrative Officer is an ex officio member to represent agricultural interests, while the Game Warden (in some districts)

is an ex officio member to represent the wildlife/conservation interest, and the remaining members are appointed by the Minister of Lands and Housing to represent local interests following 'elections' in the *kgotlas* of each district as described above. The 'elections' are not held by secret ballot and only persons actually present at the *kgotla* may vote. Such persons are usually wealthier members of the community and large cattle owners. Most of the community is disenfranchised, as 'elections' are only held in a few 'main' *kgotlas*, while opportunities for voter trafficking and vote buying are legion. As a result, the election results may not represent the wishes of the community as a whole. In any case, the results are not binding on the Minister, who appoints from a slate of twenty. As a result, appointments to the land board are widely viewed as a form of political patronage.

One consequence of the current procedure is that the Board Secretary tends to influence the Land Board Selection Committee to approve candidates who wish to stand for election and subsequently to recommend to the Minister candidates for appointment who will not give him problems or oppose his wishes. This is tantamount to 'the mouse hiring the cat' and results in the board members being effectively accountable to the Board Secretary, and not vice versa. At the same time, the board members are not accountable to the community they are supposed to serve. This is a recipe for trouble, particularly where the Board Secretary is corrupt or incompetent.

In view of the centralising nature of expanding bureaucracies, and the general improvement in forms of communication in Botswana since 1970, it is perhaps inevitable that the

Ministry of Lands and Housing has taken advantage of the opportunity to involve itself more closely in the affairs of the land boards (and other land matters at district level). As a result, all land boards receive a steady stream of instructions from officials in Gaborone who lack local knowledge or even the limited local accountability of the land board.

At the same time, the land board's own staff is appointed by the Ministry of Local Government Lands and Housing and is subject to the Ministry's control. The land board is not permitted to give any instruction to the Board Secretary or any member of its staff. It may only pass resolutions and it is left to the Board Secretary to implement. As a result, the land board's ability to act independently is somewhat curtailed. However, it should not be construed from the above that the land boards are 'rubber stamps' for central government.

The only qualification required for appointment to the land board is a Junior Certificate. There is no requirement for candidates to have any training or experience in land matters, although many do. Members' pay is also poor: a member receives a daily sitting allowance of P162.75, or roughly P20.00 per hour, and a monthly responsibility allowance of P5787.40 (US\$713). This is roughly equivalent to the salary paid to a senior clerk in government.

Problems encountered

There are a number of governance problems that result from the issues described above. The most important is lack of accountability, particularly local political accountability. The administrative structure of the land board system is centralised, but it lacks

effective controls, checks or balances from the centre on the activities of land boards on the ground. At the local level, local institutions such as the District Council or the Tribal Administration have little or no power to influence the conduct by the land boards of their business. This position has been exacerbated by the abolition in 1993 of the two representatives of the District Council and the chief's representative.

Due to poor pay and the low level of qualification and experience required, some land boards have found difficulty in recruiting members of a high calibre who understand their role. Others, mostly those with lighter workloads in smaller districts, have succeeded in attracting sufficient candidates of high calibre who are willing to sacrifice income to give public service and thus raise the overall quality of board members to an adequate level.

The great majority of board members are dependent upon their income from the land board and all are aware of the Board Secretary's power over their membership. As a result, they are rarely willing to challenge a Board Secretary's actions and decisions, for fear that they may be removed from the board or not reappointed. This has led to a number of wrong decisions, dilutes accountability and encourages tolerance of incompetence and corruption.

Officials in the Ministry of Lands and Housing support this system, apparently because they think it gives them 'control' over the actions of land boards. The fallacy of this belief is well illustrated by the inability of that ministry to control events on tribal land in Mogoditshane, where widespread self-allocation and other illegal land activities are taking place.

The unfortunate fact is that Board Secretaries are virtual 'loose cannons' who are not effectively monitored or held to account either by the Ministry or by their boards. The transfer of the District Officer (Lands) from the District Commissioner's office to the land board has removed the only independent monitor within the government system.

Unfortunately, there has been a marked increase in corruption involving the administration and allocation of tribal land. Substantial tracts of communal land have been allocated as game farms and cattle ranches to both citizens and non-citizens in contravention of established procedure and, in some cases, of the Tribal Land Act itself. There have been numerous instances of the unlawful sale of tribal land, mostly in the peri-urban areas for residential, industrial or intensified agricultural use. False certificates to 'legitimise' these parcels have been corruptly obtained from land boards or sub-land boards. Land over which rights are known to already exist has been allocated to others, often in return for a bribe. In some areas, land board staff have 'allocated' themselves parcels of land, issued themselves false 'certificates' and then sold it on, often to non-citizens.

Despite an enormous investment in training, instances of sheer incompetence are also frequent. Double allocations, rejection of applications for insufficient reason and long delays in attending to applications and disputes are commonplace, and are frequently aired in public meetings and in the press.

Combined with the rising incidence of corruption, the frequency of

incompetence and long administrative delays has led to a clear decline in public confidence in the system, and a marked increase in the number of cases referred to the Land Tribunals and other courts. Both Land Tribunals are inundated with cases and are unable to dispose of cases at a rate approaching that at which they are filed, so both have large backlogs of cases. There are numerous cases initiated as long as five years ago, which are far from resolution.

Conclusion

The basic principle of a decentralised and locally accountable system of administration of communally-owned land is a sound one and should be pursued in Botswana and elsewhere. Yet, there are a number of serious problems concerning the administration of tribal land, mainly due to poor governance and largely the result of ill-advised changes to the Tribal Land Act and its regulations.

The basic problem is that the service providers themselves, to satisfy their own agenda rather than to meet the needs of service users, designed the system for administration of tribal land. This problem is not unique to land administration in Botswana, but needs to be addressed as a matter of urgency if national aspirations for economic growth and social justice are to be met.

Furthermore, local conflicts continue between those who would like to decentralise power and those who are determined to retain control and power over resources. The system appears as if it has been designed to be dysfunctional, with an inappropriate distribution of power and responsibility, risk and reward between the various

actors and stakeholders. In particular, board members need to be allocated more power over their staff and the powers of the Board Secretary over the appointment and retention of board members should be curtailed.

Botswana's experience of land boards is of interest to many countries in the region, yet additional work is still to be done to bring about more effective, democratic and participatory management of communal land rights and to devolve responsibility for land rights management to the rights holders. We need to learn from past mistakes and to reapply the founding principles upon which the system was designed. In particular, more emphasis on meeting the real needs of system

users is required if the land rights of the poor are to be protected and upheld and national goals for social and economic development achieved.

References

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