

1 Land rights issues

1.1 Introduction

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

- **rights to occupy** a home or homestead,
- **rights to use** land for crops, for grazing; to make permanent improvements; to have access for gathering fuel, poles, wild fruit, thatching grass, etc.; to hunt and exploit natural resources; and to use land for business or commercial purposes;
- **rights of way** for various purposes;
- **rights to transact**, give, mortgage, lease, rent and bequeath areas of exclusive use;
- **rights to exclude** others from the above-listed rights, and, linked to the above,
- **rights to enforcement** of legal and administrative provisions in order to protect the rights of the holder.

A fundamental goal of tenure reform is to enhance and/ or clarify people's land rights and thus provide tenure security. This may be necessary in order to avoid the suffering and social instability caused by arbitrary or unfair evictions, landlessness and the breakdown of local arrangements for managing common property resources. Tenure reform may be essential if rights holders are to be allowed to manage their land resources, invest in the land and use it sustainably.

As circumstances change, Government has found it necessary to change the terms and conditions on which land is held, used and transacted (e.g. the terms and contracts between the landlord and the grantee or lessee) and the arrangements for land administration.

Before colonisation, Botswana had customary procedures and rules governing land tenure. These have set the basic principles for the occupation and use of both tribal and state land in the modern nation state. An important feature of the customary land tenure system was the *Right of Avail* that was automatically shared by all people belonging to a particular tribe.¹ In land administration, 'citizen' has now replaced 'tribe' and the term 'tribal land' has become something of a misnomer. 'Customary land' would be a more satisfactory term to describe the land that is administered according to rules of customary land law and now vested in the land boards in trust for the benefit and advantage of citizens.

In the past, the allocation of land did not depend on the discretion of the Chief. He was by law required to provide residential, arable and grazing land for all his subjects. A tribesman was entitled to land without giving anything for it, but he had a duty to protect

¹ *Land tenure and management reforms in East and Southern Africa – the case of Botswana*; F.T.Kalabamu, Land Use Policy 17 (2000) 305-319.

and conserve it. Although the concept of individual ownership was unknown, the rights to residential land were exclusive and permanent. The holder could protect his rights by civil action against any person, even the Chief, except when land needed to be acquired in the public interest. In this case the chief would allocate an equivalent piece of land in compensation. The rights of the holder were permanent and inheritable. Customary law permitted tribesmen to transfer interests in residential land among themselves. Although the concept of land sales was unknown, there was no rule forbidding payment for improvements. The free transfer of unimproved land could be taken for granted. It was received free and was given free. It was not viewed as a commercial asset.²

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

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

These customary rules are, of course, unexceptional. They will be recognised across the vast savannah areas of Africa. In Botswana, they provide the basic framework of customary land law. They have secured the land rights of the great majority of the population for generations. Today, this framework has to accommodate new rules governing changes in land use and settlement and development resulting from the growth in the human and livestock population, the economy and the land market. Later sections of this report deal with the issues raised by emerging land markets and the need to reform tenure conditions, both in rural and urban areas.

The four topics in Section 1 focus on the land rights of those who are in danger of being left behind by the land market. The terms of reference for the Land Policy Review require the Consultant to address a number of land rights issues:

- Equitable rights of access to land and shelter for all citizens, especially the poor;
- The removal of gender discrimination in land allocation and access;
- Problems experienced by certain groups of citizens in securing land rights.

To this list has been added the topic of 'HIV/AIDS and land rights' because reports from neighbouring countries show that the pandemic can negatively affect the land rights of

² *Land Problems in Mogoditshane and Other Peri-Urban Villages*. Government Paper No. 1 of 1992. Gaborone: Republic of Botswana Government Printer.

widows and orphans and result in the grabbing of land and property by relatives, among others. Similar problems have been reported in Botswana.

Failure to tackle these land rights issues will allow the relatively few sores in the land tenure system to fester, affecting more and more of the whole; e.g. the landless poor moving into shacks in the towns; the continuing exclusion of women from the land market and the resulting adverse impact on the economic and social good of the country; the continuing hardship of the RADs and the enormous damage done to Botswana's image as a democratic, rights-respecting country and possibly the economy; and the abandonment of land and the loss of property by the rightful owners as a result of the HIV/AIDS pandemic.

1.2 Land rights of the poor

1.2.1 Background

Although the percentage of the population living below the poverty datum line has decreased in the last 10 years, it is possible that the actual number has remained constant. HIV/AIDS is expected to throw an increasing number into poverty. The aged, the unemployed (youth, single mothers), and women heads of household are the most vulnerable as a result of 'income poverty' (i.e. lack of access to employment and land, and exposure to drought-related disaster).

For the poor, it is easier to acquire land rights in rural areas, but even here, their relative position has deteriorated in the last 25 years. In urban areas, land rights are least secure.

In Botswana both public and private efforts have been made to allocate land and housing and to alleviate drought-related hunger. However, in recent years these have not adequately addressed issues of access to land and shelter. Despite the relative overall decline in poverty, the number of poor people who do not have adequate access to land and natural resources has probably continued to increase.

A number of government initiatives to reduce costs (and enhance incomes) have been tried. Self-help housing has been the main thrust. The able bodied are to be assisted by schemes, which have completed a successful pilot phase and are to be replicated, designed both to alleviate poverty and to provide housing. The 'not able' will be assisted through District Council programmes for destitutes.

1.2.2 Related land policy issues

In rural areas Tribal Grazing Land Policy (TGLP) and the Fencing Component have been a major determinant of tenure insecurity. The TGLP fenced 2.6 million hectares. The Fencing Component of the 1991 Agricultural Policy provides for larger areas to be privatised. The benefits of these policies in terms of productivity remain unclear, while the costs in terms of landlessness and poverty are very high. Many people deprived of access to communal grazing rights and veld products end up in townships such as Ghanzi. The land privatisation policies have created great potential for a steep growth in inequality and have made it more difficult for the descendants of the poor to escape from poverty.

In rural areas the government aims to assist poorer households to build better quality housing by granting loans to people allocated plots by land boards. Self Help Housing Agency (SHAA) offices are being established in all District and Sub-District Headquarters as a start. The programme has been running for less than a year. Eligibility for SHHA plots depends on a minimum income of P4400 to P36 000 a year, although the application of the rules seems to vary between districts. Demand in the rural areas has rapidly outpaced the amount of money allocated for the scheme.

In urban areas, low-income groups are no longer eligible for SHAA allocations or able to build to the prescribed standards. In Ghanzi Township, for example, there are some 1600 poor on the waiting list for surveyed plots and more than 2000 squatters too poor to apply. The poor have previously acquired Certificates of Rights (the urban equivalent of a Customary Land Grant) on state land in urban areas, but this form of tenure has been discontinued.

1.2.3 Policy principles and choices

The *Draft Botswana Poverty Reduction Strategy* (April 2002) calls for the review of land policy to ensure that the access of poor people to adequate land is assured and protected, and that land is used productively. Among others things, Government could:

- Strengthen the capacity of land boards in land allocation and management.
- Strengthen the planning and implementation capacity of District Councils to ensure that poor people have access to land.
- Relieve the severe urban land shortage by:
 - amending policies and existing legislation for the free transferability of customary land rights in certain areas;
 - set aside suitably-located demarcated and surveyed land for low-cost housing under SHHA.
- Design and implement a local government low-cost housing scheme for the very poor that is neither subject to distress sales or speculation because Council retains the land and structures.
- Re-introduce the COR on state land in urban areas.
- Ensure that the Fencing Component of the 1991 National Policy on Agricultural Development does not run ahead of the capacity of District Councils and RADP to accommodate evictees.
- Ensure that evictees and others displaced by implementation of the Fencing Component of the 1991 National Policy on Agricultural Development receive prompt, adequate and just compensation.

1.3 Land rights for women

1.3.1 Background

Women should own land and exercise control over its products because:

- Women's access to land will improve both their own and their households' income, improve household food security and child nutrition.
- Securing stronger land rights for women increases productivity because women will invest more in their land.

- Recognizing that women should have equal rights in land is necessary for justice.
- Recognizing that women should have equal rights in land will enhance economic efficiency;
- Equal land rights can empower women to fight for equality, dignity and other economic rights.

Traditionally, every male head of a household was entitled to three pieces of land, one each for his homestead, cultivation and grazing. When a man died, his male children inherited his land. Women, regardless of their marital status or age, could never acquire land or landed property on their own. They had to reside with their parents, husbands or sons. Until the *Married Persons Property Act 1971*, husbands were the sole administrators of property held by either party before and after marriage. In 1993, the *Tribal Land Act* was amended to allow all adult citizens rights to use and occupy tribal land anywhere in the country. In 1996, the *Deeds Registry Act* was amended. This enabled women to acquire land for their sole use and deal with immovable property bequeathed or donated to them even when they were married in community of property.

1.3.2 Related land policy issues

Although the existing legal and policy reforms are progressive, compared with those of other countries, they do not empower women fully when dealing with land and property.

Prior to the amendments to the *Deeds Registry Act*, husbands alone could deal with the Registrar where spouses were married in community of property. Following the amendment of the Act, neither spouse alone could deal with the Registrar where a marriage was in community of property. They had to act jointly. However, the benefits of these amendments to women are illusory while women's status in terms of 'marital powers', under the *Married Persons Property Act*, remains inferior. This law provides for women either to marry in community-of-property or out-of-community-of-property. If married in community of property, all property is pooled and shared upon divorce. If married out of community of property, pre-nuptial property of the spouses remains individual property, but property acquired or accumulated after marriage is treated according to the marriage agreement. If there is no such ante-nuptial contract, then it is 'in community of profit and loss' and treated as a common pool to be divided upon divorce. Occasionally, there is a postnuptial contract which can vary this arrangement. Few women enter marriage with knowledge of these options or their significance.

Adult citizens of either sex are eligible to receive FPSGs (and, formerly, CORs) and customary land grants and common law leases on tribal land. However, despite this equality, men and women are not treated equally when applying for land. It is still assumed that married women should depend on their husbands for access to land. Male domination of decision-making in Botswana's patriarchal society is a major factor in blocking women's access to land. Information that would empower them to make informed choices does not get through to them as they are not seen as potential users of such information.

1.3.3 Policy principles and choices

Overall national policy aims to promote gender equality and the empowerment of women. In *NDP 9*, the Government has committed itself to raising women's representation in

Parliament and Councils to 30% for each by the end of 2008/9. In addition the *Revised National Policy for Rural Development* calls for specific programmes to be put in place to address the special needs of women since they constitute the majority of the rural population. Likewise, the land policy should aim to encompass principles of justice, equity and gender equality.

Among others things, Government could:

- Educate and raise women's awareness of their rights so that they are conscious of existing opportunities and can make informed choices.
- Remove all official barriers (including land application and registration forms and practices) that make it difficult for women to acquire land.
- Remove discrimination, either direct or indirect, in determining the occupation or use of land; attendance at, or participation in, decision-making forums regarding the occupation or use of land; or membership of any structure involved in the administration and management of land rights.
- Recognise that differential treatment of women and men, and of different groups of women may be necessary to ensure equal outcomes in land reform.

1.4 Land rights of minority groups

1.4.1 Background

The Basarwa people, previously known as Bushmen, have since 1976 been included with other minorities under the official heading of Remote Area Dwellers (RADs). Their traditional economy has been eroded for many decades by the loss of land and access to important natural resources. There is no precise information on the size of the RAD population in Botswana. Estimates vary from 3% to 6% with significant numbers in most districts and the largest concentration in the West - Ghanzi and Kgalagadi districts.

During the colonial period, the west was declared Crown Land. There was no official recognition of the RADs' existence nor of their tradition of hunting and gathering. Within the tribal areas, their land rights were ignored in favour of the livestock owners (and others) who wished to move into and utilise the areas occupied by RADs. In 1973, the government introduced a special development programme, now known as the RADP, to meet the RADs' development needs.

The problems now faced by RADs extend far beyond lost land rights. A programme of land restitution, however favourable it might be, cannot resolve them. RADs live in more extreme poverty than any other group. The issues extend into education and training, health and nutrition, housing, social welfare and employment - all beyond the remit of land policy. However, access to land and other natural resources and security of tenure would seem to be the fundamental issues to be addressed.

1.4.2 Related land policy issues

The problem can be formulated as a number of questions.

Over the last 25 years, what has been the impact on RADs of the operational strategies of the TGLP, the land boards, the Department of Wildlife and National Parks and of the RADP upon access to and tenure of land and water resources? What action has been taken to extend land access and rights to RADs displaced in the past or recently by cattle post and ranch development?

What has been the effect of the RADP settlement and water development strategies in terms of land tenure? In what manner and to what extent have RADs been involved in decision-making as regards relocation, establishment of settlements, and rights of access to land and water? What is the nature of rights over land and other resources in RAD settlements? To what extent is land use within settlements managed to protect the tenure security of settlers? What influence do RADs themselves have over land use and access to water and other resources in the settlements? In what manner has title or other mechanisms of security been awarded by land boards?

What are the constraints and limitations imposed on traditional rights, particularly hunting and gathering, in the areas whence the settlers came and had long-term occupation and use? What is the relationship of RADs to the WMAs and protected areas in terms of traditional rights of ownership and use and planned and actual access rights? What is the future role of RADs in the management of land and natural resources? What priority in managing hunting quotas will be given to RADs?

How important is the land issue and what is the way forward?

1.4.3 Policy principles and choices

First and foremost, the land policy should aim to give RADs more control over their own land management arrangements, as other citizens already have.

Appropriate actions following from this principle might include:

- Upholding the rights of minorities to pursue a different life style and maintain a distinct culture from that of the majority,
- Promoting economic and social empowerment of all citizens, addressing the plight of the rural poor, etc.
- Promoting sustainable use of land and the conservation of natural resources and
- Diversification of both the rural and the national economy.

Within the land sector:

- In those areas where RADs form a majority of the local population, new sub-land boards or related structures could be established to regulate the use of the land. Membership of these could be made up of mainly of local residents (i.e. RADs).

- New water development in RAD settlements should be put under the control of the RAD residents themselves. District Council control of these water sources has been a prime cause of invasion of RAD settlements by cattle belonging to non-RADs.

1.5 HIV/AIDS and Land Rights

1.5.1 Background

HIV/AIDS is unique because it deprives families and communities of their young and most productive people. The pandemic is deepening poverty, worsening gender inequalities, eroding the ability of government to maintain essential services, reducing labour productivity and supply, and putting a brake on economic growth.

Elsewhere in the region, where land is scarce, HIV/AIDS-affected households try to cope by renting-out or sharecropping their fields and/or shifting production to their home gardens. In a pastoral setting, e.g. in Lesotho, *mafisa* increases in importance. Many local cultures do not guarantee a wife's rights to inherit her husband's property. Widows are often dispossessed by their in-laws and rendered homeless. Increasing numbers of widows and orphans are arriving in the urban slums. In some districts of Kenya, large areas of fertile land lie unused as a result.

In Botswana, median HIV prevalence among pregnant women in urban areas already stood at 38.5% in 1997. In 2001, it had risen to 44.9%. Among 25–29-year-old women attending antenatal care in urban areas, 55.6% were living with HIV/AIDS. Overall, 39% of adults are infected with HIV. There has been the hope that the epidemic may have reached its 'natural limit' but this appears not to be the case, as yet.

1.5.2 Related land policy issues

The impact of HIV/AIDS on land rights in Botswana has not yet been the subject of a systematic field study. It is estimated, however, that the economy will be one third smaller by 2021 than without HIV/AIDS, while government expenditure will have to increase by 20%.

Dispossession of surviving members of families, principally women and orphans may not be as serious a problem in Botswana as it is elsewhere in the region. Land boards are said to be willing to transfer land to the surviving dependants and issue the appropriate documents.

A number of cases have been reported of relatives trying to dispossess orphans of their inheritance of residential property. Increasing numbers of affected households with loans are expected to default.

With the loss of able-bodied members, HIV/AIDS-affected households will not be able to continue to plough and survive in rural areas and may move to urban and peri-urban areas in search of land and shelter. Current policy makes sub-leasing of portions of land difficult.

There is expected to be a growing area of idle and abandoned land and a falling demand for fields for ploughing. On the other hand, the demand for residential land and shelter for the poor in urban areas or villages will increase.

At the same time HIV/AIDS will strain the capacity of Botswana's land administration and management institutions at all levels.

1.5.3 Policy principles and choices

The land policy should address the plight of the poor and the landless, especially those who have been thrown into deeper poverty by HIV/AIDS.

Appropriate actions following from this principle might include:

- The impact of HIV/AIDS on land rights, land use and occupation in urban and rural areas should be the subject of a special investigation commissioned by the Department of Lands.
- Strengthening property rights for women to reduce the negative impact of surviving dependants in both rural and urban areas.
- Prompt allocation of land and shelter for the very poor, especially in urban and peri-urban areas.
- Ensuring that affected households can draw on their capital assets in a time of need by renting /leasing or transferring potentially productive land, which would otherwise lie idle.
- Better land information and more efficient operation of land boards should reduce the impact of the pandemic on land administration services.