

# Statutory recognition of customary land rights in Africa

An investigation into best practices  
for lawmaking and implementation



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for lawmaking and implementation

by  
**Rachael S. Knight**

for the  
Development Law Service  
FAO Legal Office

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## FOREWORD

Ensuring secure access to land is a key element of protecting the right to food of rural populations that depend on agriculture for their livelihoods. Weak governance and lack of respect for the rights of the poor contributes to tenure insecurity, which in turn can hamper human development, mire people in poverty and contribute to food insecurity. Weak governance institutions are also unable and often unwilling to tackle issues such as women's access to and control over land, which remains discriminatory throughout much of the world.

The issue of how best to increase the land tenure security of the poor and protect the land holdings of rural communities has been brought to the fore in Africa due to increasing land scarcity caused by population growth, environmental degradation, changing climate conditions, and violent conflict. This scarcity is being exacerbated by wealthy nations and private investors who are increasingly seeking to acquire large tracts of land in Africa for agro-industrial enterprises and forestry and mineral exploitation, among other uses. Some nations have received (informal) requests for up to half of their cultivatable land areas, and others are granting hundreds of thousands of hectares to private investors and other sovereign nations.

FAO has initiated a participatory process under the auspices of its Committee on World Food Security (CFS) for the development of *Voluntary Guidelines on the Responsible Governance of Tenure of Land and other Natural Resources*, which will provide guidance on governance with regard to, *inter alia*, administration of tenure, land reform, management of state land, resolving land disputes, attracting sustainable investments, improving gender equity and recognizing indigenous, customary and community rights (FAO, 2010).

Specifically in response to the increased investment interest in land around the world, FAO, IFAD, UNCTAD and the World Bank Group (The World Bank, 2010a) have proposed the following *Principles for agricultural investment that respect rights, livelihoods and resources*:

1. Existing rights to land and associated natural resources are recognized and respected.
2. Investments do not jeopardize food security but rather strengthen it.
3. Processes for accessing land and other resources and then making associated investments are transparent, monitored, and ensure

accountability by all stakeholders, within a proper business, legal, and regulatory environment.

4. All those materially affected are consulted, and agreements from consultations are recorded and enforced.
5. Investors ensure that projects respect the rule of law, reflect industry best practice, are viable economically, and result in durable shared value.
6. Investments generate desirable social and distributional impacts and do not increase vulnerability.
7. Environmental impacts due to a project are quantified and measures taken to encourage sustainable resource use while minimizing the risk/magnitude of negative impacts and mitigating them.

Generally, governments grant large land concessions with the intent of fuelling national commercial, agricultural or industrial growth and contributing to improvements in gross domestic product and local living conditions. However, there is a risk that such land concessions are dispossessing or hemming in rural communities and depriving them of access to resources vital to their food security, livelihoods and economic survival (World Bank, 2010a). Because most land in African nations is owned by the state, communities have little power to contest such grants. This powerlessness is often intensified by the fact that rural communities often operate under customary law and have no formal legal title to their lands or documentation of their claims.

Recognizing and protecting customary land rights is therefore a critical component of protecting and defending the land rights of the rural poor. This study is founded upon the notion that protecting and enforcing the land claims of rural Africans may be best done by passing laws that elevate existing customary land claims up into nations' formal legal frameworks and make customary land rights equal in weight and validity to documented land claims.

Through a close examination of the text and implementation of the land laws of Botswana, Mozambique and Tanzania, this publication investigates various over-arching issues related to statutory recognition of customary land rights, notably:

- How best to integrate statutory and customary legal systems so as to most effectively strengthen tenure security, foster national and

community prosperity, and take steps to extend all of the protections, rights and responsibilities inherent in the national legal system to rural communities;

- How to balance what happens on the ground, organically, against what the state views as "useful" or "valuable" and wants to preserve, enforce or encourage from above;
- How to write a land law that merges the practices of the people with the objectives of the state and arrives at solutions that will simultaneously: be used, adopted and successfully implemented on the ground; advance state interests; advance community interests; and advance individual interests;
- The factors that impact a law's long-term, effective and equitable implementation.

The UN Commission for the Legal Empowerment of the Poor (supported by FAO and others), the World Bank's Justice for the Poor program, and various other bilateral and international initiatives have, in the past few years, focused on understanding and leveraging customary legal systems as a way of ensuring access to justice and extending the rule of law to the poor. FAO has also been involved in supporting nations' efforts to draft and enact laws that integrate customary and statutory land holding frameworks. This publication is an extension of FAO's work in this regard; although it is based on African case studies, it is our intent that the lessons learned from this legislative study may further efforts to integrate and harmonize customary and statutory legal systems and promote greater land tenure security worldwide.

The target audience for this publication is not only legislators, lawmakers and policy analysts, but also international and national civil society groups. FAO hopes that both governmental and non-governmental actors may be able to use the findings and recommendations set out in this study to both craft good laws that protect the land claims of the rural poor as well as help to ensure that these laws are rigorously and equitably implemented.

Blaise Kuemlangan  
Officer-in-Charge  
Development Law Service

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## EXECUTIVE SUMMARY

In Africa, the issue of how best to increase the land tenure security of the poor and protect the land holdings of rural communities has been brought to the fore due to increasing land scarcity caused by population growth, environmental degradation, climate change, and violent conflict. This scarcity is being exacerbated by wealthy nations and private investors who are increasingly seeking to acquire large tracts of land in Africa for agro-industrial enterprises and forestry and mineral exploitation, among other uses. In many cases, governments grant such concessions with the intent of fuelling national commercial, agricultural or industrial growth and contributing to improvements in gross domestic product and local living conditions. However, many of these land concessions include lands upon which whole villages live; in many such cases, the concessions dispossess rural communities and deprive them of access to resources vital to their livelihoods and economic survival. Unfortunately, rural communities often have little power to contest such grants. This powerlessness is often intensified by the fact that rural communities often operate under customary law and have no formal legal title to their lands or documentation of their claims.

This study seeks to provide guidance on how best to recognize and protect the land rights of the rural poor. It is founded upon the notion that protecting and enforcing the land claims of rural Africans may be best done by passing laws that elevate existing customary land claims up into nations' formal legal frameworks and make customary land rights equal in weight and validity to documented land claims. The study takes as its starting point that rather than lawmakers inventing theoretical new legal frameworks or borrowing legal models from western nations, land tenure systems must be based in the lived realities of the people, as practiced daily on the ground. The goal is to create a stable investment environment in which communities can maintain their land claims and prosper and flourish alongside investment and national economic development.

This study examines the statutory recognition of customary land tenure in Botswana, Mozambique and Tanzania, which were chosen as case studies because of the diverse approaches to the issue they represent. Botswana's Tribal Land Act (1968) established a system of regional land boards and transferred the land administration and management powers of customary leaders to the boards, which originally included both customary leaders and

state officials among their members. It also codified the customary practices of the Tswana, and elevated their customary land rights and practices up into national legislation. Mozambique's *Lei de Terras* (1997) decrees that anyone living or working on land for ten years in good faith has an automatic *de jure* "right of use and benefit" over that land, and allows for community lands to be registered as a whole, thus formalizing communal customary rights. Communities may continue to administer and manage their lands according to custom, with the caveat that such practices should not contravene the national constitution. Tanzania's Village Land Act (1999) makes the village both the primary land-holding unit and the centre of local land administration, management, record-keeping, and land dispute resolution. It also makes customarily-held land rights equal to formally-granted land rights, and explicitly protects the land rights of vulnerable groups. In doing so, it creates a hybrid of customary and codified law – allowing the village to dictate how things are done but holding it to strictly-defined legal mandates.

Through a close examination of the text and implementation of the land laws of these three countries, this publication investigates various over-arching issues related to statutory recognition of customary land rights, notably:

- How best to integrate statutory and customary legal systems so as to most effectively strengthen tenure security, foster national and community prosperity, and take steps to extend all of the protections, rights and responsibilities inherent in the national legal system to rural communities;
- How to balance what happens on the ground, organically, against what the state views as "useful" or "valuable" and wants to preserve, enforce or encourage from above;
- How to write a land law that merges the practices of the people with the objectives of the state and arrives at solutions that will simultaneously: be used, adopted and successfully implemented on the ground; advance state interests; advance community interests; and advance individual interests;
- The factors that impact a law's long-term, effective and equitable implementation.

The analysis of the case studies in reveals that to successfully harmonize statutory and customary land rights, a law must do seven equally-important things well *within its text*:

1. Flexibly allow for the full range of customs within a nation to be expressed and practiced while implementing restrictions that impose basic human rights standards on customary practices, protect against intra-community discrimination, and ensure alignment with the national constitution.
2. Create local land administration and management structures that: come out of – and look much like – existing local and customary land management structures; are easily established; are low cost both to the state and for users; are highly accessible; and leverage local individuals' intimate knowledge of local conditions.
3. Establish administrative processes and dispute resolution mechanisms that are simple, clear, streamlined, local, and easy for rural communities to use to claim, prove and protect their land rights.
4. Establish appropriate checks and balances between customary/local leadership and state officials, create new, supervisory roles for land administrators, and ensure direct democracy and downward accountability to the people.
5. Include accessible, pragmatic and appropriate mechanisms to safeguard against intra-community discrimination against women, widows and minority groups.
6. Protect community land claims and create real tenure security while allowing for investment in rural areas, ensuring that all development will be sustainable, integrated, and beneficial for local communities.
7. Establish good governance in land administration by: creating appropriate mechanisms to ensure the law's enforcement; penalizing state officials who are contravening the law's mandates; and setting up dispute resolution mechanisms that allow for appeal of customary, community-level decisions up into the national justice system.

The study furthermore finds that for a law that harmonizes customary and statutory systems to be well and widely *implemented*, there must be political will to do so. It suggests that when land laws devolve power and control over land and natural resources management down to the community level and away from the central state - institutionalizing community-level land administration and management and decreasing central state control over land and resources, as in Mozambique and Tanzania - such laws are unlikely to have the political support of state officials, who may act to undermine the laws' successful implementation. Conversely, when land laws elevate power and control over customarily-held lands out of the domain of local leaders and into the hands of central officials - elevating customary law

upwards, clarifying it, formalizing it, making it legible to outsiders, as in Botswana - government officials will implement these laws with zeal and commitment. For the former approach to work in practice, therefore, it is of prime importance to devise ways of ensuring that there is political will to successfully implement such laws. This may be done by establishing new roles for the state and public officials on the one hand, while on the other hand creating safeguards to hinder efforts to subvert the law's intent.

Moreover, oversight mechanisms must be included to make sure that the systems are integrated in a way that promotes justice and provides for both upward and downward accountability for both state officials and customary leaders. Such integration must also ensure that should the rural need to protect or enforce their land claims, they can access and successfully navigate land administration systems. This is important because even if the formal legal system recognizes customary land claims, if the poor cannot access or successfully use the formal legal system, then they have little "real" or actual protection against land speculation by elites and investors.

As a result of such analysis, various "best practices" for statutory recognition of customary land rights have been distilled. The study recommends that laws that seek to recognize customary land rights should:

1. Make customary land rights equal in weight and stature to "formal", certified land rights.
2. Seek places of overlap between customary rules and formal law and start from there.
3. Establish genuine tenure security by placing land ownership in the people themselves, vest ultimate land rights to the land in communities, and create an enforceable fiduciary duty between local land management bodies and community members (the land holders).
4. Explicitly protect the land claims of women and other vulnerable groups and establish women's right to hold or own land.
5. Define "custom" very flexibly so as to be non-exclusionary and to allow for evolution, flexibility and adaptability over time.
6. Be explicit and clear regarding rights of rural communities vis-à-vis the state or external agents, or for the protection of vulnerable groups, leaving no room for interpretations that can weaken these protections.
7. Establish procedures for documenting and protecting community lands as a whole first to protect the meta-unit from encroachment,

then slowly - over time and according to landholders' volition - allow for documentation of family and individual lands.

8. Create local land administration and management structures that come out of – and look much like – existing local and customary management structures; are easily established; are highly accessible; and leverage local individuals' intimate knowledge of local conditions.
9. Establish land administration and management systems that are free or low-cost for the poor.
10. Integrate customary practices and direct democracy and promote good governance in land administration by establishing systems of checks and balances between rights holders, state land administrators, and local/customary leaders and establishing systems that ensure both downward accountability to community members and upward accountability to the state.
11. Locate customary land administration and management systems close to the land and communities they govern.
12. Include accessible, pragmatic and appropriate safeguards against intra-community discrimination.
13. Align legal proof of land claims with customary practice by formalizing landscape-based evidence and allowing oral testimony as proof of land rights.
14. Explicitly protect communal areas, customary rights of way and shared land use and access rights.
15. Provide for and encourage the creation of community bylaws and land and natural resource management plans.
16. Create new technical advisory and supervisory roles and responsibilities for state officials.
17. Establish a clear system of judicial appeal leading straight from the lowest level of local customary conflict resolution all the way to highest court of the nation.
18. Make legal representation for communities mandatory during negotiations concerning land-sharing agreements with investors, and ensure that all community-investor agreements are written down and considered to be formal contracts, enforceable or voidable according to national contract law.
19. Make customary land transactions legal and enforceable or voidable under contract law.
20. Extend compulsory acquisition laws to state expropriation of community common areas, even those that appear to be "unused."

The study concludes that while each nation should define for itself the most appropriate mechanism to recognize customary land rights within its formal legal system, the harmonizing or integration of customary land rights and formal law may best be done by recognizing custom as the effective, local, and locally-valid means that communities have established over time to administer and manage their lands and natural resources. It suggests that customary and statutory legal systems are not as divergent as may be thought, and identifies areas of overlap that may be useful starting points for creative integration of statutory and customary land law. It recommends that such integration may best be done not through not through strict codification at the national level, but through national laws carving out a space for custom within their legal framework, and then allowing each local community to determine and define for itself its rules and governance structures through fully-participatory processes. Community custom should then be written down *at the local level only* to ensure transparency and justice and to allow it to be held accountable to standards of sustainability, equity, and the protection of the rights of vulnerable groups.

Before they can be protected against outsiders, customary land rights must be recognized under national law. To allow customary land systems to flounder in the realm of illegality deprives the poor of state sanction for and protection of their basic rights. When the rural poor's customary land claims are not considered to be valid because they lack formal recognition, then only the rich and the legally savvy have tenure security. In consideration of various African nations' recent trend of granting of vast areas of land to foreign investors, the urgency of placing real ownership in the hands of the people living and making their livelihood upon lands held according to custom cannot be overstated. True tenure security will only come from elevating customary land rights up into formal law, and making customary land rights equal in weight to registered rights. Accountability systems and oversight mechanisms must then be put into place to ensure that the law is properly implemented, the land claims of rural communities are protected, and the legislative intent of the law is realized.

# I

## INTRODUCTION

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## **1.1 Overview and context**

Over the past two decades, a number of African governments have overhauled their governing land legislation and crafted new laws. The aim of such efforts has been to increase national development and prosperity by both strengthening the land claims of the poor and by attracting investment with the promise of greater tenure security. In many cases, the land laws previously in place were vestiges of colonial rule, perpetuating colonial systems of race-based land categorization. Such laws were neither adequate for addressing modern land-related transactions, particularly the growing land markets in urban and peri-urban areas throughout Africa, nor relevant to the complex and multiple ways that rural Africans use, share and transact land.

However, African lawmakers faced and continue to confront a complex situation, in which the injustices of colonialism and the difficulties of accessing and successfully navigating state land tenure systems have meant that customary land laws and land management practices have flourished alongside the formal ones. In some nations, over 90 percent of land transactions are still governed by customary legal paradigms, and the decisions and rules established under customary systems are recognized as legally valid and binding by their users. The result has been a wide gap between nations' formal legal systems and the rules that govern the lived realities of the majority of those nations' citizens. While the different systems do not operate in complete isolation from one another, a fissure exists between the constructs and laws of the modern nation state, and the legal paradigms and rules that dictate the myriad interactions of the rural poor. The end result is two or more legal systems functioning side by side, blending and mixing, and occasionally clashing at places of intersection. In some nations, the greater part of rural populations govern themselves and their land according to a legal system outside of and unregulated by the state while relevant national legislation remains largely unknown, ignored, or distorted.

Moreover, customary systems, much like common law systems, are in a constant state of evolution, adapting to the changing political, legislative, demographic and ecological circumstances and choosing innovations that work best to accomplish the desired ends. It may be argued that very little pure "tradition" remains; today's "customary law" is a mixture of various practices that have been inherited, observed, transmuted, learned and adopted. As well-stated by Cotula and Toulmin (2007 at 109): "Far from



being clearly delimited and mutually exclusive, the customary and the statutory are usually intertwined in complex mosaics of resource tenure systems."

Problems occur when one system does not recognize the other as valid. Centuries of outsiders who have refused to recognize the strength and validity of customary land rights has resulted in widespread tenure insecurity across Africa. Grappling with this, lawmakers have sought to integrate the two systems by elevating local, customary land rights up into the national legal system. Rather than passing laws built out of ideals and constructions of how society should be run, lawmakers have sent out anthropologists, sociologists, economists, and other researchers to investigate the rules by which the people govern themselves, and then worked to create a space within statutory law to reflect those practices, merging the two systems into one.<sup>1</sup> The impetus for such measures may have been to: adopt laws that derived from a genuinely African perspective; extend state influence out into the customary domain while harnessing the governance structures already in place; strengthen the land claims of the poor; find efficient, cost-effective models for rural land management in post-conflict and resource-scarce contexts; and foster national growth and economic development, among other reasons. Ghana and Botswana were the first nations to undertake this effort soon after Independence, and since then a number of countries including Namibia, Niger, Uganda, Burkina Faso, Mali, Lesotho, Malawi, Swaziland, Mozambique, Tanzania, South Africa and others have followed, adopting a wide range of mechanisms and strategies to varying degrees of success. Some of these nations have created or are in the process of creating new administrative bodies that are not customary in structure but have taken over the management of customary rights (Botswana, Niger, Namibia, Tanzania, Burkina Faso, Mali, Senegal, Uganda) while others have made customary leadership structures the community-level managers of decentralized state land administration (Mozambique and South Africa). Many nations have declared customary land rights to be equal in weight and validity to formal, state-issued land rights, and some have made local-level customary dispute resolution bodies the lowest rung of the national court system, their decisions appealable up to the highest court. (Alden Wily, 2003 at 46–47). Often, these laws are quite innovative, the result of highly creative and thoughtful lawmaking.

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<sup>1</sup> For the purposes of this publication, such efforts will be referred to interchangeably as both "harmonization" and "integration" of customary land rights and statutory law.

## **1.2 Why harmonize customary and statutory legal systems?**

While customary systems are far from perfect, and may in various instances perpetuate inequity and injustice at the local level,<sup>2</sup> efforts to integrate customary and statutory legal systems are critical for a number of reasons. First and foremost, laws and legal systems should have direct meaning, utility and applicability to people's daily lives. Rather than be theorized, crafted and imposed from above, legal systems should reflect the lived realities of a nation's people, encompass the rules that citizens are already adhering to in their daily interactions, and be based on the moral constructs that already order social relations. Recognizing local rules – customary or not – is thus important, as laws meant to increase land tenure security should reflect and legalize the realities of land use and property transactions practiced by the majority of the people in the country the poor, rather than the elite. If they do not, they will not be followed. When social practice and a nation's legal systems are not aligned, the legitimacy of the government – and rule of law – may be undermined and citizens' ties to the modern nation-state weakened; people may come to view laws and the formal legal system not as something that guides, supports and protects their daily transactions, but as a function of state power, through which an elite minority imposes its power upon the poor majority.

Second, statutory recognition of customary law is critical because customary governance systems are currently fulfilling a gap in state administration; in many countries, the customary leaders are the only "local authorities" that the poor have genuine access to. As such, many are already fulfilling the roles of community administrator, judge, land allocator and property registrar. While in some contexts these leaders are despotic, unjust or corrupt, in other contexts they do a fairly good job of resolving conflicts and maintaining peace and equanimity in their communities. For those leaders that govern in bad faith, better integration into the state administrative system can help to limit the injustices they perpetuate, and for those leaders that govern well, their efforts can help to streamline the two legal systems into a more coherent whole. Rather than marginalize customary governance structures on the grounds that they are outdated or oppressive, governments should identify and leverage the best parts of custom and integrate customary systems as partners in effective, decentralized local governance.

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<sup>2</sup> This will be explored fully in Chapter 2.

Third, statutory recognition of customary law is necessary because the continued existence of various legal systems co-existing side by side weakens the validity and power of both, as savvy individuals can exploit the differences and inconsistencies between the systems to achieve specific desired results that may be prohibited in one system or the other, or to avoid unwanted outcomes. The lack of relationship between state and customary dispute forums may foster uncertainty about the legal "bottom line". Delville writes about how the complex relationship between customary and statutory legal bodies ensures non-predictability as to the norms that are supposed to apply. As a result, "the splintering of the system of authority and the unregulated plurality of arbitration bodies" can lead to opportunistic behaviours, "forum shopping" and weak capacity of either body of law to resolve conflicts (Delville, 2007 at 39). Integrating and streamlining the systems can help to address such inconsistencies.

Fourth, population growth, increased international investment in rural areas, the development of new commodity markets (like biofuel), climate change, and other socio-economic factors are contributing to growing land scarcity throughout Africa. This scarcity has in turn led to increased individualization of land claims, greater competition for fewer resources, and a breakdown of the customary rules that have governed the equitable and sustainable use of common resources. These trends are impacting how individuals and families allocate, use and manage their land. Such behaviours are leading to: an increase in land-related conflicts (both large and small); growing informal land markets and accompanying improvised mechanisms for land transfer formalization; and a weakening of women's, pastoralists' and other vulnerable groups' rights to land. In sum - as land grows in value, land markets remain illicit and unregulated, and legal pluralism leaves the "rules of the game" undefined - the land rights of the most poor and vulnerable family and community members are becoming weaker. Woodhouse (2003 at 1715) describes how, "When competition for land intensifies, the inclusive flexibility offered by customary rights can quickly become an uncharted terrain on which the least powerful are vulnerable to exclusion as a result of the manipulation of ambiguity by the powerful". In such contexts, by paying increased attention and devoting state resources to train, supervise and monitor customary systems and leaders, states may have a role to play in ensuring against the perpetuation of intra-community injustice, discrimination, dispossession and disenfranchisement under custom.

Finally and most importantly, to allow customary systems to flounder in the realm of illegality deprives the poor of state sanction for and protection of their basic rights. When the poor's land claims are not considered to be valid because they lack formal recognition, then only the rich and the legally adroit, have tenure security. To refuse to recognize the customary land rights of the poor relegates them to a status as second-class citizens, discriminated against on the basis of class, and outside the bounds of constitutional protections.

As such, integration of these systems must occur if the poor's land rights are to be protected. To this end, governments and legislators are creating new laws that elevate customary rights up into statutory law.<sup>3</sup> However, such endeavours are both extraordinarily *conceptually* difficult in their lawmaking and *practically* difficult in their implementation. These are not simple lawmaking exercises, for two main reasons. First, customary systems vary widely, evolve over time, and often are comprised of a mix of both just and unjust rules. A land law that seeks to recognize customary land rights must both allow a space for custom to be free to continue to successfully address the changing land-related needs of community members, and yet also include protections against those customary practices that perpetuate discrimination and inequity. Second, the blending of two very separate legal systems is a "major exercise in institutional reform" that "goes to the heart of governance" (McAuslan, 2003 at 1). Land laws that strive to efficiently integrate customary and statutory systems *by necessity* create new roles, new structures and new procedures for customary leaders and state officials alike. Such changes may not be well received, or the funding, technical capacity or other resources necessary to successful implementation may simply be lacking.

In thinking about how to best craft legal mechanisms to elevate customary land rights up into statute, various scholars have suggested different theoretical and strategic methods of approaching the question.<sup>4</sup> These

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<sup>3</sup> This has been happening in the context of increasing international attention being paid to the dichotomy between state and non-state justice systems. In the past few years alone, there has been an increasing focus on understanding and leveraging customary legal systems as a way of ensuring access to justice and extending the rule of law to the poor. Of note has been the creation of the UN Commission for the Legal Empowerment of the Poor and UNDP's follow-up, the World Bank's Justice for the Poor program, and myriad other bilateral and international initiatives.

<sup>4</sup> See e.g. Daniel Fitzpatrick's article, *Best Practice' Options for the Legal Recognition of Customary Tenure*, 2005, which suggests that there are three main structures that may be used by legislatures when

scholars' analyses are a very useful starting point. However, such overviews are not sufficient to identify the on-the-ground, practical, logistical details of how lawmakers should actually draft the laws and implementing regulations that integrate customary and statutory legal systems. What is needed is critical analysis of what works and does not work, based on (1) detailed legislative analysis of the strengths and weaknesses of how these laws are constructed, and (2) detailed study of how the laws function in practice. Such an analysis must ask: How usable are these strategies? How fully do they protect the land rights of the poor? What obstacles to effective implementation do they inadvertently create?

This publication endeavours to address such questions; its aim is to identify "best practices" that can inform lawmakers' efforts to harmonize customary land rights and statutory law. However, as desk study, the analysis is inherently limited and the effort has led to more questions than answers. As such, this publication does not profess to have the ultimate solutions; rather, it aims to elucidate the multiple factors and considerations that go into efforts to integrate customary and statutory land tenure law. It also implicitly lays out a critical research agenda, where the hypotheses it puts forward can really be tested or examined in the light of on-the-ground experience.

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conceptualizing the foundations of new land laws that locate control over land and natural resource rights within customary arrangements: (1) **the tenurial shell model**, a minimalist approach that should be used when tenure insecurity is caused by encroachment by outsiders or interaction with state officials; (2) **group incorporation**, in which the community takes steps to acquire legal personhood and establishes a leadership structure that can interact with outsiders on behalf of the community; and (3) the creation of **land boards**, state bodies that administer and manage community lands and which may be the best option when the source of tenure insecurity is internal community conflict. (Fitzpatrick, 2005) Similarly, Hubert Ouédraogo's 2002 article, *Legal Conditions for the Recognition of Local Land Rights and Local Land Tenure Practices*, suggests that there are three ways of formally recognizing customary land rights and customary land tenure systems: the legislative, the technical and the contractual. Ouédraogo characterizes the approaches in this way: (1) the **legislative** strategy involves public authorities "setting the rules regulating local land tenure in relation to the general objectives of economic development policy"; (2) the **technical** strategy "consists principally in the belief that the preliminary problem to be solved in making local rights secure is one of clarifying their nature, status and consistency" through the issuance of certificates of land rights and the establishment of institutional bodies to monitor these rights; and (3) the **contractual** strategy "define[s] the general rules governing land tenure relationships...[but does] not dictate the way in which an individual arranges every aspect of his relationship with others" (Ouédraogo, 2002 at 81–83).

### **1.3 What questions must be asked when harmonizing customary and statutory land rights?**

The central question that this study investigates is "How to best draft laws that harmonize and integrate customary and statutory land rights?" In attempting to answer this question, there are various issues, factors and questions that must be identified and addressed head on by lawmakers. The following section, while prescriptive and in many ways the analytic result of the foregoing legal analyses, sets out some of these factors, as they are best considered up front. They are as follows:

First, when thinking about how best to write a land law that appropriately elevates customary practices up into statute, there are two main factors from which all else must be derived:

- 1) What happens on the ground, organically. This includes both the realm of the "customary" (customary land management structures, communal usage and management of land and natural resources, intra-familial rules and roles, etc.) as well as the realm of the state and the market (interactions with and strategic use of the formal state system, emerging informal markets for land, etc.).
- 2) What the state views as "useful" or "valuable" and wants to preserve, enforce or encourage from above, and therefore make into law. This includes both the customary (lower-cost management, dispute resolution mechanisms that function on their own, cultural preservation, etc.) as well as the state and the market (state control over local governance, rural investment that promotes national development, etc.).

As will be explored in the following chapters, both of these scenarios – the organic situation as practiced on the ground and the interests of the central government – have the potential to produce unintended and harmful results and foster abuses if not managed well, balanced against the other, or undergirded by strong accountability mechanisms.

Second, there is another set of oftentimes conflicting underlying concerns that lawmakers must keep in mind and address when writing a land law. This may be summarized as: "How to write a land law that merges the practices of the people with the objectives of the state and arrives at solutions that will

simultaneously: be used, adopted and successfully implemented on the ground; advance state interests; advance community interests; and advance individual interests? Crafting a land law that successfully balances each of these needs while simultaneously and seamlessly elevating customary land tenure rights up into the formal legal system is an exceptionally difficult endeavour. To truly understand the myriad considerations that must go into writing a land law, it is necessary to unpack each of these considerations:

To ensure that laws and policies will be adopted and implemented on the ground, a land law must:

- Be easily merged into existing formal and customary systems, in that it is easy and inexpensive to implement, and can be managed by already-existing governance structures (customary and formal);
- Be flexible and adaptable to local situations and practices;
- Be in line with local socio-religious and cultural ideas of rights and responsibilities;
- Be acceptable to bureaucrats, customary leaders and communities alike; and
- Allow for slow change, at a pace that society can integrate and absorb.

To ensure that a land law will advance state and government (bureaucratic) interests (and therefore be allocated the resources, state energy, and political will necessary for successful implementation), it must:

- Allow for industry and development, creating opportunities for investors and entrepreneurs;
- Create tenure security to attract investors, promote internal stability and decrease land-related conflicts;
- Ensure that land is used most productively to increase the GDP and ensure food security;
- Not radically shift power and funding away from state officials, but rather modify their roles while maintaining some degree of control over land by central and regional officials;
- Allow for some degree of state monitoring and control of customary systems;
- Strengthen provincial and central government by registration and taxation, thus increasing government information and funding;

- Have the capacity to quickly resolve land-related conflicts so as to support national peace and security; and
- Be relatively inexpensive to implement.

To ensure that a land law will advance community interests, it must:

- Promote and foster social cohesion, cultural heritage and religious continuity;
- Allow for community control of land and natural resource use for livelihood support;
- Establish fully inclusive participatory processes to ensure that all community members are involved in community land governance and administration, especially members of minority or vulnerable groups;
- Create a space for the community to establish clear rules for community land and natural resource administration and governance, and mechanism to ensure enforcement of those rules;
- Support communities' sustainable management of their land and natural resources, allowing for flexibility and equity;
- Increase and promote intra-community and inter-community peace, through successful management of land-related conflicts;
- Increase and promote community prosperity and flourishing; and
- Create opportunities for communities to welcome investment and income-generating initiatives into their lands (as desired) in an equitable, fair and just manner, so as to allow for community development, local employment, and the construction of necessary infrastructure.

To ensure that a land law will advance individual interests and promote equal opportunity for all members of society, it must:

- Guarantee individual and family land tenure security;
- Ensure equal access to land and natural resource rights by all community members, by establishing and enforcing the land rights of women, the elderly, widows, children, pastoralists, indigenous peoples, and other marginalized populations;



- Increase potential for the realization of greater family prosperity, allowing land to be used in a way that the family believes will maximize its value;
- Protect against land grabbing, forced dispossession, or unconscionable contracts perpetrated by more powerful community members against more vulnerable members, or by one family member without the knowledge of the rest of the family;
- Provide increased freedom regarding options to rent, transfer or sell one's land claims according to family need;
- Allow families and individuals to sustainably access and use communal areas;
- Reduce land-related conflicts with neighbours;
- Increase the ability to expand and grow holdings if possible or necessary, including elasticity for shifting cultivation patterns; and
- Increase inter- and intra-family cohesion and sense of place and feeling of community.

To write a law that successfully addresses each of these considerations is an extraordinarily difficult task. The following legal analysis therefore includes an implicit contemplation of each law's balance of these various concerns. Specific attention is paid to the laws' "implementability" and balance of protection for and promotion of state, community, and individual interests.

Third, lawmakers must also tackle the challenge of "how to most effectively integrate customary and statutory law in a manner that leverages the best of each legal paradigm while minimizing the places of weaknesses and opportunities for injustice?" As such, a set of specific questions particular to harmonizing statutory and customary systems should also be considered. Such questions include the following, and it is these that drive the central conclusions of this publication:

1. When elevating custom up into state law, how does one maintain the best parts of custom without being overly vague or unduly prescriptive?
2. What kind of management structures and processes are best suited to proper implementation of integrated land administration systems?

3. What kind of local leadership and decision-making structures best allow for downward accountability to local people in the management of customary land claims?
4. What rules and systems may best protect the land rights of the most powerless members of a community? How best to address intra-community discrimination, and protect the land rights of women and other vulnerable groups in the face of discriminatory customary practices?
5. What is the most appropriate role for state officials when land rights are managed locally and according to custom? How best to leverage the technical and administrative powers, skills and capacities of the state?
6. How best to facilitate the merging and streamlining of customary and formal justice systems?
7. How best to address emerging markets in customary land rights within the context of customary land administration and management systems? How best to formalize land transactions so as to best ensure fairness and provide a measure of security?
8. How to address power imbalances during transactions and negotiations between communities and outside investors?
9. Should customary land rights be compulsorily registered?
10. What considerations should inform the *process* of drafting legislation that harmonizes customary and statutory law?

Finally, the publication strives to analyse the factors impact a law's long-term, effective implementation. In this context, the study investigates the factors that impact a government's political will to successfully implement land legislation. It examines the relative advantages and disadvantages of elevating customary rules up to the national level versus bringing state power and apparatus down to the local level.

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This publication is laid out in the following manner: Chapter 2 reviews the relevant socio-legal contexts within which efforts to integrate customary and formal legal systems are taking place. It examines the political, economic and cultural ramifications of increasing land scarcity and competition, and their manifestation in the power dynamics of rural communities. It then outlines the obstacles that impede the poor's access to and use of formal administrative and legal systems and increase their reliance upon customary governance systems.

Chapters 3, 4 and 5 present in-depth statutory analyses of the land laws of Botswana, Mozambique and Tanzania<sup>5</sup> respectively, looking carefully at the mechanics of how they have sought to integrate statutory and customary and tenure systems and investigating how these laws have worked in practice.<sup>6</sup> Attention is paid to the places of vision, creativity and ingenious invention, as well as to the laws' weaknesses, where opportunities for mismanagement, corruption, elite capture, discrimination, and inequity are inadequately addressed and have flourished in the laws' implementation.

Chapter 6 analyses the overall successes and challenges of these legislative endeavours, identifying the strengths and weaknesses of the laws as crafted.

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<sup>5</sup> In these analyses, it is important to keep in mind that the histories, terrain, climate, livelihoods practiced and population densities of these nations are different. Botswana is predominantly arid; the rural areas are largely inhabited by rural pastoralists with a hunter-gatherer minority, and an average population density of 3 people per square kilometre (United Nations World Prospects Report, 2004). Mozambique and Tanzania have more varied terrain, including semi-tropical, savannah and arid regions as well as coastal areas. Mozambique's average population density is roughly 25 people per square kilometre; Tanzania's is 41 (United Nations World Prospects Report, 2004). There are no purely pastoralist groups in Mozambique; Tanzania has a mixture of farmers, pastoralists and some hunter-gatherers. Botswana's population today is 65 percent urban, compared to 34.5 percent in Mozambique and 24.2 percent in Tanzania. Mozambique was colonized by the Portuguese, while Tanzania was administered first by Germany and then by Britain; Botswana was a British colony. Mozambique suffered decades of brutal warfare - first for independence, and then a civil war, while the transition to independence in Botswana and Tanzania was largely peaceful. Such factors have greatly influenced the frameworks of these nations' land laws and their implementation.

<sup>6</sup> The three case studies were chosen (after an extensive review of similar laws) for their variety: in the mechanisms adopted, in their length, and in the degree of specificity, detail, and prescription contained within. The primary methodology used was the author's own textual analysis, which was then under-girded by supporting articles, analysis and policy reports concerning the laws' content and practical implementation.

It identifies general trends and factors that have led to less successful outcomes in the laws' implementation.

The concluding Chapter 7 re-visits the questions identified in this introduction, deriving some suggested answers from the lessons learned through critical assessment of the case studies and makes recommendations for "best practices" of statutory recognition of customary law with the intention of fostering further debate and discussion among policy makers, legal draftsmen, and civil society.

## II

### LAND TENURE SECURITY IN THE CONTEXT OF LEGAL PLURALISM

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Before beginning an extensive analysis of the mechanisms and effects of Botswana, Mozambique and Tanzania's efforts to integrate customary and statutory land systems, some background information concerning the current socio-legal context within which and in response to which these laws evolved may be useful. The following sections briefly define and outline: land tenure security; legal pluralism and its effects; the impediments that restrict the poor's access to the formal legal system; historical and modern manifestations of customary land rights; and the socio-economic, cultural and legal ramifications of increasing land competition in Africa and their impact on customary land administration and management in the context of legal pluralism.

## **2.1 Land tenure security**

Land tenure is the way land is held or owned by individuals or groups. A number of individuals can hold different tenure claims and rights to the same land. These claims may be formal, informal, customary or religious, and can include leasehold, freehold, use rights and private ownership. The strength of one's land claims may hinge on national legal definitions of property rights, local social conventions and multiple other factors. Land tenure rights often include the freedom to: occupy, use, develop or enjoy one's land; bequeath land to heirs or sell land; lease or grant land or use rights over that land to others with reasonable guarantees of being able to recover the land; restrict others' access to that land; and use natural resources located on that land. Land tenure security is the degree of confidence that land users will not be arbitrarily deprived of the bundle of rights they have over particular lands. Tenure security is the reasonable guarantee of on-going duration of land rights, supported by the certainty that one's rights will be recognized by others and protected by legal and social remedies when challenged (FAO, 2002).

Property rights are a social and legal construction, and may be conceptualized differently in formal, customary or religious legal systems. The rights and obligations of individuals, families and communities in relation to land are embedded in the rules and norms sanctioned by local legal systems, which dictate how citizens and officials must behave in the pursuit and enforcement of land rights. Legal systems manage how land rights are administered and enforced and how the rules that make land tenure secure are applied. How and whether the relevant legal system acknowledges one's land rights is the basis for land tenure security.

## **2.2 Legal pluralism**

Bruce defines customary law as: "A body of norms generated and enforced by a traditional, sub-state polity and governing the actions of its members... [that] may or may not be recognized by national law. Customary rules are best not regarded as informal, because they enjoy social sanction by a polity. They come with administrative institutions and powerful advocates and have deep cultural resonance" (Bruce, 2007 at 13). Generally, in areas where state infrastructure and administration are absent or inaccessible, customary legal systems flourish to address communities' legal needs, enforce community rules, and mediate and resolve local conflicts as necessary, among other actions. In some nations, customary leaders adjudicate and resolve almost all rural land conflicts.

In nations where one or more customary justice systems exist alongside the formal state justice system, a situation of *legal pluralism* exists. In the context of legal pluralism, the concurrent existence of two or more parallel, separate legal systems using different rules and legal paradigms to decide land cases may undermine the rule of law, lead to inequity and injustice, and foster land tenure insecurity. Certain actors often prefer one forum over the other; urban investors may seek formal court orders or stamped government certificates as proof of their land rights, while the rural poor may feel their land rights are best protected by the local customary system. Individuals who have the wherewithal to do so may "forum shop", strategically using either the formal or customary system to seek outcomes advantageous to their interests. A resulting lack of continuity between outcomes may create uncertainty within both systems. There may be no clear legal bottom line. Such non-predictability may lead to opportunistic behaviours, lawlessness and weak capacity of each system to successfully resolve land conflicts and protect land rights.

## **2.3 Historical constructions of customary land rights**

A variety of scholars have written on the colonial constructions of land rights in Africa. It is now widely accepted that "customary land rights" as they are known today, were deeply impacted by colonial policy (Berry, 1993; Chanock, 1991; Mamdani, 1996; Moore 1986; White 1965). In the words of one scholar, "Colonization was essentially a quest for land, a mission whose fulfilment necessitated negation or marginalization of pre-existing property

[claims] and property relations and the creation of new, capitalist-oriented property regimes" (Gutto, 1995 at 20). There is ample evidence that in the time before colonial rule, Africans throughout the continent practiced a wide range of property-holding systems. Yet during the era of colonial expansion throughout Africa, the idea that Africans held strong, individual, family and clan-based property claims stood in the way of colonial conquest and development. To suit their purposes, colonial powers chose to highlight and strengthen those parts of custom that enabled the colonial agenda.<sup>7</sup> Colonizers argued that as Africans had no notion of "private property", then all land was *terra nullis*, and free for the taking. Such theories aptly functioned to grant colonial governments' moral and legal justification to forcibly expropriate Africans' land.

While the history and details vary according to colonial power and national context, colonial governments generally allocated the best, most fertile lands to European settlers and moved entire African communities onto more arid, marginal lands. In some nations, lands were zoned as "native lands", "reserve lands" or "tribal lands", within which private land ownership was prohibited and outside of which most indigenous Africans were forbidden to live and practice their livelihoods. Colonial administrators emphasized that under

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<sup>7</sup> Early accounts of "native" land tenure systems by anthropologists, missionaries and colonial administrators deeply impacted colonial understandings of customary tenure in Africa. Central tenets of these perceptions included: the idea that rights in land were vested in the tribe or lineage as a result of either conquest, rights of first clearance, or ancestral claims on the land; that land, being inalienable from the lineage, could not be bought or sold, but belonged to the community as a whole; that a tribe was a single political unit under the leadership of a chief and occupying a fairly distinct geographical territory; that the chief had the power to allocate and distribute land, regulate the use of the land and resolve disputes; and that the chief was either the "owner" of the land or "a trustee holding land for his tribe" (Chimhowu and Woodhouse, 2006 at 349; Ng'ong'ola, 1992). While these findings were indeed either wholly or partly true, the colonial governments chose to ignore other accounts of individual and family land holding patterns and to highlight those aspects that seemed to illustrate that African had no notion of private property or inalienable property rights. In addition, Africans *themselves* may have vigorously asserted the concept of communal land holding in defense of their own interests. The vast tracts of land kept vacant for village expansion, religious ceremony, or the grazing of animals suddenly *had* to be reconceived as definitively *belonging* to someone. Africans literally could not afford to admit that no one had rights over vacant land; to concede that a piece of land was not owned by anyone meant losing that land to settler farmers. This strategy may have served at once to: expand the power of African leaders' negotiations with colonial governments by articulating their claims within a paradigm that the colonizers had created to serve their own ends; maintain African possession of vast, seemingly empty tracts of land; and establish a false reality for the colonizers that allowed for a space of ideological privacy in which actual cultural traditions could be maintained (Chanock, 1991).



customary law, all land was held communally and that ownership and individual claims to land did not exist. Under the rubric of respecting "native custom", these administrators prohibited the sale of land and restricted individual ownership. The "traditional" law promoted by colonizers was a law founded upon collective ownership overseen by the chief, with the colonial government acting as trustee of land.

In an effort to strengthen colonial control over these areas, chiefs were oftentimes made into puppets of the colonial state and forced to enact colonial policies against their communities' best interests. When standing chiefs refused to cooperate, new chiefs were appointed by colonial governments, regardless of any authentic claim of representation by the people they were expected to govern. In some instances, colonial courts responsible for adjudicating "native law" distorted it by filtering its norms through European legal concepts. Thus, while this system had the appearance of maintaining traditional "African ways", in reality the chiefs' powers and the "customs" being enforced were subject to the definition and detailed control of the colonial administration. By closely overseeing chiefs' land transfers and allocations, district officials were able to dictate Africans' land use and land-holding patterns. Chanock (1991 at 69) writes: "There is a profound connection between the use of the chieftaincy as an institution of colonial government and the development of the customary law of land tenure...rights in land were [suddenly] seen as flowing downward. Whatever they were, they were derived from the political authority, rather than residing in the peasantry".

According to Cousins (2007 at 300), such mediation and filtration of the customary by the colonial administration transformed custom by overly emphasizing the group-based nature of land rights, redefining women's land rights as secondary and subordinate to the land rights of men, and eroding "mechanisms that constrained the power of traditional leaders and kept them responsive to rights holders, these being replaced by a requirement for 'upward accountability' to the state, creating opportunities for abuse of power and corruption".

By the end of colonial rule, more than a century of colonial control over land had impacted and warped "custom". The statesmen who came to power at independence therefore had a peculiar job: reconstructing "African" systems of land management and administration and enacting rural policies grounded

in "traditional African practices". Across the continent, African statesmen nationalized land, making it the property of the state to guard it "in trust" for citizens. In Tanzania, Julius Nyerere wrote, "To us in Africa, land was always recognized as belonging to the community... the African's right to land was simply the right to use it; he had no other right to it, nor did it occur to him to try to claim one" (cited in Chanock, 1991 at 80). In Zambia, Kenneth Kaunda asserted, "Land, obviously, must remain the property of the state today. This in no way departs from heritage. Land was never bought. It came to belong to individuals through usage and the passing of time. Even then the chiefs and elders had overall control although... this was done on behalf of all of the people" (cited in Chanock, 1991 at 80). Such assertions of "custom" served the new governments in much the same way they had served the colonial governments: they localized ultimate control over land at the centre, obfuscating the subtle and complex nuances of customary land administration and management as actually practiced on the ground.

## **2.4 Broad overview of customary land rights and practices**

The "custom" of today is not the "custom" of the past. It may bear some resemblance, but centuries of interaction with outside forces have changed it irrevocably. What may be considered to be "customary law" today is a blend of customary African laws and western/colonial laws, coloured by the forces of globalization, technology, capitalism and socialism, local, regional and international political economics, decades of development work, and multiple other factors. Yet debate concerning the "authenticity" of customary land law is to some degree irrelevant, in that custom changes (and should change, just as in common law systems, legal precepts are continually evolving). What matters, rather, is that complex systems of laws, rules and principles govern land relations and land use in communities throughout Africa, and that these local customary systems continue to function and thrive alongside the formal legal systems established by national governments. The "authenticity" of a customary system should thus be measured not by its "purity" in reference to past practices but by whether it has become socially embedded and has legitimacy in the eyes of those who operate within it.

Although customary legal systems are nuanced and location-, culture-, livelihood- and socio-ecologically-specific, the following section is an attempt to set out a basic sketch of some of the commonly-agreed upon elements of contemporary customary law.

Scholars generally agree that the land use and ownership patterns of African peasants are made up of a complex mesh of overlapping and temporal claims, some of which are held privately by families and lineages, others of which are held communally in furtherance of the health, prosperity and religious practices of the greater community. Other areas are left open for the use of future generations, the shifting patterns of agriculture necessitated by fluctuations in rainfall, crop rotation and soil fertility, as well as changing community needs. Land rights are primarily derived from membership in a given group or allegiance to a specific political authority, or by arrangements like sharecropping. Chiefs and sub-chiefs or head men have the responsibility to know their communities' lands and must give approval for new grants of land, although families can oftentimes sub-grant their lands to other individuals or families. Customary authorities adjudicate land and natural resource-related conflicts according to locally-agreed upon rules and concepts of justice.

It is critical to understand that "customary" does not mean "communal." Custom is the *system* under which land is held, and communal is the *way* in which *some* of that land is used. Alden Wily explains that: "Customary domains are territories over which the community possesses jurisdiction and often root title...[W]ithin the domain, a range of tenure arrangements typically apply. These include estates owned by individuals or families, and estates owned by special interest groups in the community [such as] ritual societies or women's groups." This is not to be confused with "properties which are owned by all members of that community in undivided shares, often the larger or remoter pastures, forests, woodlands, swampland and hilltops.... these are Common Properties, defined by virtue of membership to the group, and a group whose composition may change over time" (Alden Wily, 2005 at 6).

**Box 1- General framework of contemporary customary land law in Africa**

Cousins summarizes current pan-African ideas of custom, drawing on the work of various anthropologists, sociologists, and other African scholars, in particular the work of the late Okoth-Ogendo. He lays out various constructs that he suggests are generally true of customary land management as practiced today:

1. Land and resource rights are directly embedded in a range of social relationships and units, including households and kinship networks; the relevant social identities are often multiple, overlapping and therefore 'nested' or layered in character (e.g. individual rights within households, households within kinship networks, kinship networks within wider 'communities').
2. Rights are derived primarily from accepted membership of a social unit, and can be acquired via birth, affiliation or allegiance to a group and its political authority, or transactions of various kinds (including gifts, loans and purchases).
3. Land and resource rights include both strong individual and family rights to residential and arable land and access to a range of common property resources such as grazing, forests and water. They are thus both 'communal' and 'individual' in character.
4. Access to land (through defined rights) is distinct from control of land (through systems of authority and administration). Control is concerned with guaranteeing access and enforcing rights, regulating the use of common property resources, overseeing mechanisms for redistributing access and resolving disputes over claims to land. It is often located within a hierarchy of nested systems of authority, with many functions located at local or 'lower' levels.
5. Social, political and resource boundaries, while often relatively stable, are also flexible and negotiable to an important extent; this flows in part from the nested character of social identities, rights and authority structures.

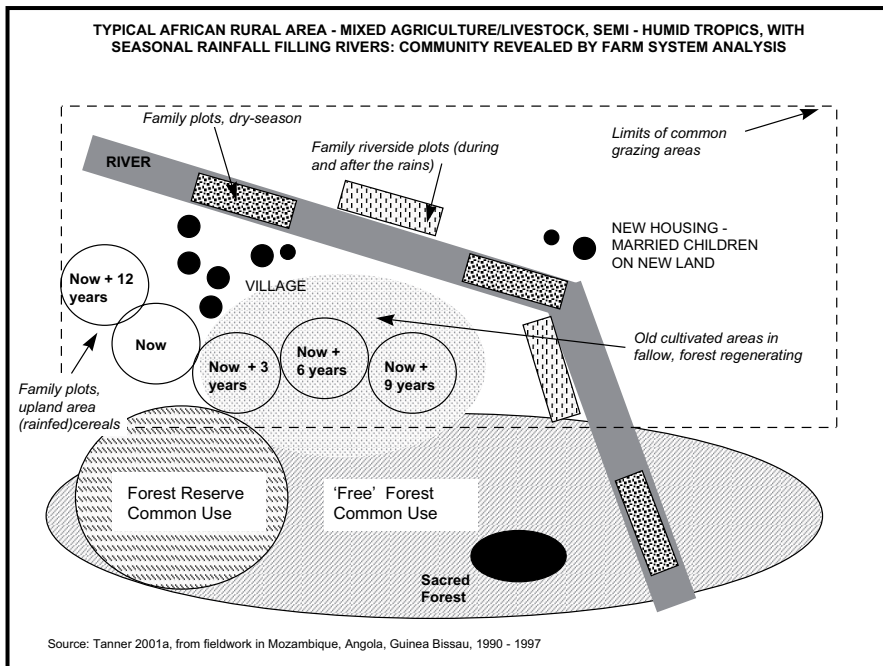
Scholars have found that customary land management and administration systems may also reflect:

*Power relations within a family or community:* Customary land rights are oftentimes "socially embedded;" the strength of one's land claims is negotiable and may be influenced by various cultural and societal factors. For example, the strength of one's land claims may more often hinge on intra-family dynamics, rather than on an individual's place in the community and kinship group. Research has revealed that land rights are negotiable, kinship relations can be manipulated, and, because customary rules can be ambiguous, an individual's rights to resources are highly impacted by that individuals' capacity to navigate various relationships and social forces (Quan, 2007 at 53, citing Berry, 1993; Chauveau *et al.*, 2006).

*Livelihood practiced:* The dominant livelihood practiced by a community greatly impacts the structure of the land tenure rights of that community. Pastoralists, sedentary small-scale farmers and hunter-gatherer groups, for example, will necessarily have different land claims, land use patterns, and rules governing land use. In certain circumstances and at particular times, one piece of land may be shared by groups practicing varied livelihoods, and thus its administration subject to overlapping customary paradigms. Cotula and Toulmin (2007a at 11) summarize that: "For a given piece of land, customary systems may cater for multiple resource uses (e.g. pastoralism, farming, fishing) and users (farmers, residents and non-resident herders, agro-pastoralists; women and men; migrants and autochthones; etc.), which may succeed one another over different seasons." Within a customary system, a range of secondary rights may also exist: rights of way, rights of access to use natural resources located on lands shared by more than one village or community, and seasonal access to common areas for pastoralists or hunter gatherers, whose customary rights include yearly passage through, visits to or use of lands and natural resources considered to be within the bounds of another, sedentary community.

*Ecological context:* Rainfall, temperature, soil fertility and climate may dictate small-scale farmers' use of risk aversion strategies such as shifting cultivation patterns, diversified plots, and leaving fields to lie fallow. Depending on the type of livelihood practiced and the kinds of crops regularly planted, families may rely on highly dynamic, shifting cultivation patterns (that vary according to season, rainfall, and other factors) as well as shared access to common

pool resources such as forests, pastures and water sources. Tanner (2005 at 13) explains that: "Each household requires access to and control over different types of land and resources over the course of a year. Some resources are communally used, such as forests, grazing land and water sources. Others may be regenerating and apparently unused as part of the lengthy rotation cycles commonly seen in this kind of system. [Erroneously] identifying and registering only the individual plots currently under cultivation – the plot labelled 'Now' for example - effectively leaves the vast majority of the local resource base unprotected as apparently 'free' land". See below an example diagram of "typical" African land use patterns in semi-humid tropical regions shown here in **Diagram 1**:



In some respects, these on-the-ground systems are not so radically different than the formal legal systems already in place and designed to manage the same basic human interactions. Both formal state laws and customary rules have been crafted to address the same basic land transactions, such as: allocation and formalization of secure land rights; land transfers and land sharing (long term or short term); land inheritance and distribution within a

family; use rights and rights of way; management of communal or "public" lands and natural resources; zoning and management of local lands (allocating areas for residence, public use, agriculture, industry, etc.); enforcement and protection of land rights; and adjudication of land-related disputes. Similarly, it is worth reflecting on the idea of the "customary" as both "traditional" or "ancestral" and also as "the ways things are done" or simply "community rules." Ouédraogo (2002) expresses this eloquently. He writes:

If the law is seen as no more than a set of norms established by the competent legal authorities, local land tenure practices will be accorded no legal validity and excluded from the judicial arena. But if, on the other hand, one sees law from an anthropological perspective as a social phenomenon for regulating individual and collective behaviour, one is obliged to acknowledge that the realm of justice does not necessarily begin with codified law. African societies have shown that they understand this by imposing models of behaviour on their members not on the basis of pre-established rules, but through a complex of social and cultural mechanisms.

Relatedly, it must be asked whether "custom" is truly just a moniker for "local," particularly given the absence of accessible, useable state systems at the community level. Ouédraogo (2002) describes how "to do justice to the dynamics of local land tenure, authors have gradually stopped referring to 'customary' land rights and have instead focused on 'local' land tenure practices." Every "customary" legal system is indeed local and unique to the community in which it operates; each community has its own particular set of rules and ways of making decisions, similar to its neighbours' but uniquely its own.

As such, it is arguable that the reality of a customary system can never be known by anyone not living and functioning fully within its precepts. Sally Falk Moore (1986 at 319) writes that "The domain of local autonomy is not large, but it is carefully insulated from external interference to whatever extent possible." Similarly, Whitehead and Tsikata (2003 at 94) assert that "a turn, or re-turn, to the customary raises acutely the question of what we know about how customary processes actually work."

## 2.5 The current socio-economic, political, and cultural context

As described above, a certain degree of flexibility and adaptability is inherent in any legal system; as socio-political realities change, the law, in turn, is modified to reflect those changes. Customary legal paradigms are no different: just as western legal systems' laws are constantly being created, amended and overturned, so too, are the rules of customary systems. The principles and "rules" of customary land tenure are often highly adaptive and in constant evolution, changing in response to cultural interactions, socio-economic change, political processes, and environmental and demographic shifts.<sup>8</sup>

Today, custom is changing rapidly as a result of various factors. Structural shifts in agrarian and tenure systems are transforming communities and leading to land scarcity. Climate change, environmental degradation and land speculation by investors are decreasing the amount of fertile, arable land available for allocation to community members. As a result, in many regions fertile land is no longer in abundance, particularly in peri-urban areas closer to main roads, markets, schools, hospitals and other infrastructure. Meanwhile, population growth is increasing demands on arable and productive land. In addition, across Africa, government grants of large land concessions to investors for agro-industrial enterprises, hunting and game reserves, forestry and mineral exploitation, ranches and tourism have served to hem in rural communities and deprive them of access to resources vital to their livelihoods and economic survival. Overcrowding and over-use of family and communal holdings has resulted, increasing degradation and fostering a breakdown in the rules that govern sustainable community use of common resources (Cousins, 2007, 1996; Odgaard, 2003; Taylor 2007).

These trends are impacting how individuals and families allocate, use and manage their land. As land becomes scarce, it grows in value, and as land values rise, land claims become more individualized. In this process, certain groups lose out as other groups gain. With less land to go around, "belonging" and social ties are redefined; outsiders may be pushed out, lose their land or face restrictions on their access to communal resources (Mathieu *et al.*, 2003). Within poor communities, vulnerable groups such as

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<sup>8</sup> McAuslan (2007 at 9), in summarizing the findings of various papers presented at a conference on tenure security in Africa, writes that the case studies presented "all drew attention to the strength and flexibility of customary tenure in adapting to a market economy whilst retaining some of the social concerns of local communities".



women, pastoralists, tenants and people living with HIV/AIDS are losing land to land-grabbing relatives, in distress sales to more powerful villagers, or in land disputes with neighbours (where surreptitious, gradual land-grabbing may be veiled as a "boundary conflict"), (Peters, 2004; Villareal, 2006). Meanwhile, individuals who already have wealth, knowledge, power, stronger kinship ties, and access to powerful decision-makers are more likely to triumph in struggles over scarce or valuable lands and natural resources. Some of these trends are briefly explored below:

**As land values rise, local elites are gaining land while the most marginalized community members lose.** The increasing value of land and the concomitant increase in land "sales" are exacerbating class differences within communities. Studies show that local elites often manipulate what leverage they have – financial and otherwise – to capture further control of available local land and natural resources (Peters, 2004). Citing relevant research revealing increasing evidence of land-related conflict and competition, Peters cautions that such conflict both is caused by and intensifies "deepening social differentiation;" including intergenerational conflicts, gender-based land disputes and resource struggles grounded in ethnic, cultural and religious differences. As such, she suggests that it is folly to assume that socially-embedded systems of land use guarantee full and equal access to all who need it. She emphasizes the point that "struggles within classes" are "as important as struggles between classes" (Peters, 2004 at 285, citing Sider, 1986 at 94). Peters (2004 at 301–302, citing Amanor 1999 at 20) writes that:

...the 'structures of inequality' being documented between generations, genders and communities have to be placed within 'wider processes of commoditisation of agriculture and social differentiation' A key socio-cultural dynamic of differentiation emerging from case studies turns on divisions within significant social units – family, lineage, village, 'tribe' or ethnically defined group. This can be seen as a process of *narrowing in the definition of belonging*. Social conflict over land takes the form of stricter definitions of those who have legitimate claims to resources, or, in other words, group boundaries are more exclusively defined.

Peters (2004 at 279) concludes that the end result of such conflict is an emerging class formation in rural areas. Cotula and Toulmin (2007) foresee that this class formation – and the resulting inequity – will only deepen in the coming decades, and caution that government policies intended to strengthen tenure security may actually end up contributing to an intensification of resource-grabbing. Such trends are leading to increased conflict, dispossession, landlessness, hunger and poverty. Most alarmingly, the land rights of the most poor and vulnerable family and community members are becoming less "embedded", and thus weaker, as described below.

**Women's land claims are getting weaker.** Under customary tenure, very broadly speaking, daughters do not inherit property from their fathers or uncles, but move onto their husbands' lands after marriage. Often a "bride price" is paid to a woman's family before marriage. This "bride price" can be quite high, and oftentimes leads to the tacit and sometimes explicit understanding that the man has "purchased" his wife and that she is his property. In addition, under patrilineal systems, women usually may not inherit their husband's land, as it is passed through the male bloodline from fathers to sons and is considered to belong to the husband's family or tribe. Meanwhile, under matrilineal systems, the land passes from uncles to nephews, also depriving women of their own rights to land. Thus, under customary law: women may not have personal claims to their own land, may lose their land when widowed, may be considered to be "property" of their husbands, and often have little to no decision-making power around questions of household agricultural production and sale.<sup>9</sup> However, there is

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<sup>9</sup> Within these basic parameters, there is some disagreement among scholars as to the relative strength of women's land rights. Many scholars argue vehemently that customary paradigms deeply disempower women, making them equivalent to "property" owned by their husbands. A second analysis is that the strength of women's land rights vary widely depending on each woman's own particular family situation. This view holds that since women's land claims are negotiated through kin (besides and in addition to a husband), women's land entitlements are therefore based on the fulfillment of a range of social obligations to family members, and thus the more well-connected and well-regarded a woman is, the stronger her claims to land (Whitehead and Tsikata, 2003 at 96–97). Whitehead and Tsikata cite Karanja as arguing that in spite of having no inheritance rights, under customary law "women held positions of structural significance, serving as the medium through which individual rights passed to their sons. They enjoyed security of tenure rooted in their structural role as lineage wives..." Whitehead and Tsikata cite a number of authors as concluding that the very strength of women's land claims is in their "embeddedness," and that this embeddedness provides a strong safety net. Other scholars argue a third position: that women's land rights under customary law are actually quite strong. Quan cites Yngstrom as finding that women can be considered to hold primary land use rights because of the recognition of the centrality of women's roles in production and

evidence that women who have been divorced, fled their marriages, or who never married are allocated land out of their parents' land (Giovarelli, 2006; Yngstrom, 2002).

While scholars vehemently disagree over the relative strength of women's land claims under customary systems, there is consensus among scholars, women's rights groups and feminist lawyers that as land becomes scarcer, existing customary safeguards of women's land rights erode. Fearing loss of land, customary leaders and families move from more flexible, negotiable systems of land holding (which take into consideration a woman's need to support herself and her children) to more rigid, discriminatory interpretations of gender-based land allocation. As land scarcity and value increase, customary law may be selectively preserving practices that subordinate women's land claims. Tripp argues that women's access to land has become significantly more precarious as customary protections for women's land rights have been disregarded and "forgotten," and Cotula and Toulmin (2007 at 108, citing Doka and Monimart, 2004) note that in some places men are reinterpreting and "rediscovering" customary rules that undermine women's land rights.

Fearing loss of land, customary leaders and families move from more flexible, negotiable systems of land holding (which take into consideration a woman's need to support herself and her children) to more rigid, guarded interpretations of land allocation for women. Remarking on this phenomenon, Adoko and Levine (2008) describe how, "Men and women who value the principle that land is family owned are told that their culture is discriminatory and backward...When a widow is thrown off her land by her in-laws, men and women are told that their culture is wrong, not that those who throw widows off their land are wrong." In sum, despite the strength and inherent negotiability of kinship-based land claims, as land becomes increasingly commoditised, the land claims of less powerful members of the

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social reproduction; women's land use rights are secured by husbands' social obligations to ensure that their wives are able to feed themselves and their children. Similarly, Yngstrom finds that land use rights are not allocated and safeguarded by the husband alone, but by the entire extended family network that the woman has married into (Quan, 2007 at 55, citing Yngstrom, 2002). These authors conclude that "women's claims to land are not justified solely through the recognition of their obligations in food production, but that local-level land-management fora make moral and material evaluations of inputs and behaviour between male and female household members over a very wide spectrum when adjudicating land claims"(Whitehead and Tsikata, 2003 at 77–78).

family become more tenuous (Giovarelli, 2006; Peters, 2004; Quan, 2007; Yngstrom, 2002). As a result, women are losing their bargaining powers both among their husbands' kin and within their own families as well (Whitehead and Tsikata, 2003 at 91; Peters, 2004; McAuslan, 2000; Adoko, 2000; Yngstrom, 2002).

Given the consensus that as land becomes scarcer, existing customary safeguards of women's rights to land erode, advocacy by development agencies and governments for a new statutory reliance upon customary laws for land administration at the local level is alarming to many African feminists as well as to other groups with weaker or more vulnerable land rights claims. African women's groups have vehemently argued for free markets in land, titling and registration and other tenets of more "modern" land rights systems that give women the right to inherit, purchase, and own land in their own name. They hold that a return to the customary will only serve to further disenfranchise women's capacity to claim and control their own land. However, there is a fierce disagreement within the feminist community around the issue of women's groups pressing for individual title and land ownership. Accordingly, the criticism is that while richer, more educated urban and peri-urban women may gain from laws allowing women to own land (and for land to be sold) the vast majority of poor, rural women will only lose out as land becomes commoditized. Moreover, there is evidence that titling and registration efforts actually exacerbate gender inequalities: when only the name of the male head of household is put on the certificate, women are effectively stripped of any formal, legal acknowledgement of their land claims.

### **Box 2 - Debate over women's land rights and custom in Uganda**

Across Africa, women's groups have struggled tirelessly for the right for women to own their own land. This fight is best exemplified by Uganda, where a woman's right to own her own land is not yet enshrined in statutory law, and where there has been an on-going national debate around women's land rights for more than fifteen years.

The comments of a focus group convened by the Uganda Land Alliance illustrate some prevalent conceptions regarding women's right to land.

Participants offered such comments as: "Women should not own land. Women do not own their children so how can they own land?"; "Women are weak in the head and may make wrong decisions in relation to land"; "Land is for the clan"; "Why should I give land to someone who is in transit?"; "If female children are given land by fathers, they will not respect their husbands and will leave them at the slightest excuse"; "Women will become prostitutes [if they own land]"; and "When a girl is given land she may become stubborn" (Tripp, 2004 at 42). Asiimwe (2001) notes that in Uganda: "Women's attempts to control, transact, and own property, especially land, are resisted and sanctioned by the community and the clan as misbehavior. In part, this is due to the society's intolerance for women who breach social norms. A woman who purchases land is seen as having "sinister" intentions, using the land to run away from her marital home or as a place to "entertain" other men. Gaining power through land ownership is deemed deviant, because only "improper" women are not satisfied with what their husbands or other male relatives can provide them."

However, such comments and the general debate is best put into the context that the idea of an individual "owning" land is inconsistent with customary paradigms in certain regions of Uganda. Under customary practices, *neither men nor women* can own land. All land is considered held by the entire family or clan, in a line from the ancestors to the future generations, and no one individual should have the right to claim this land as his or hers specifically. Adoko and Levine (2008), writing on behalf of the *Land and Equity Movement in Uganda (LEMU)*, argue a point well-worth repeating at length:

"The conventional starting point in the battle is often the 'fact' that traditionally, women are not allowed to own land. The aim is then to replace traditional systems of ownership ('customary tenure') with more 'modern' laws which give women rights... We believe that the strategy has failed because it is based on a wrong premise, that according to custom, women cannot own land. As a result, we have fought the wrong battle - against 'tradition', instead of fighting for the cultural rights that ... exist, but which are being violated....

Under customary tenure, land ownership is by families, not individuals. The head of the household would nominally be

referred to as the 'land owner', but it is a common mistake to interpret this as meaning that he has all rights in the land, and that his wife or others only ever enjoys 'access' rights if he gives his permission. Ownership is stewardship, or a trusteeship, and it comes with the responsibility to protect the land itself, and to protect the land rights of all those with a claim in that land – all family members, including future generations. If a man dies leaving a widow, she assumes the role of head of family. However, there would be extreme resistance to regard the land as the personal property of the widow – just as it was never the personal property of her husband....The specific rights that the widow and her late husband held are exactly the same."

**Widows and orphans are being dispossessed of their lands after the death of the male head of household.** There is growing evidence that the AIDS pandemic is deeply impacting land tenure arrangements. Under customary practice, a widow rarely inherits land upon her husband's death, as the land (and oftentimes the family's livestock, furniture, and all productive assets) is reclaimed by her husband's family, goes directly to her adult sons, or is held in trusteeship by the widow or by uncles and other male relatives until her sons are of age. In the past, widows have usually been allowed to continue to live on the land of their husband's family for the rest of their lives, or until they remarried. Yet as land scarcity increases and land values rise – and as HIV/AIDS leaves younger and younger orphans who cannot assert their inheritance rights – there is evidence that husbands' family members are increasingly exploiting stigmas surrounding HIV/AIDS to dispossess widows and orphans of their lands (Villareal 2006, Strickland 2004, FAO, 2006). Villareal (2006 at 8) reports that instances of relatives stripping widows and orphans of their land and property have sharply increased, and that as a result "such widows and their children are left without shelter, means of livelihood and support networks in the community."

**Families are more apt to terminate the land use rights of long-term tenants, some of whom have been using the land for generations.** Mathieu *et al.* describe how families who in the past granted long-term "loans" of land to "outsider" migrant families are increasingly reclaiming these lands abruptly, unilaterally, sometimes violently, and without notice. They often then use this land for their own needs or sell or rent it to richer

families or urban investors (Mathieu *et al.*, 2003 at 5). Mathieu (2006 at 4; Mathieu *et al.*, 2002) explains how: "Awareness of the scarcity of land and of the increasing precariousness of land tenure brought about ... [the practice of] indigenous landholders attempt[ing] to recuperate lands ceded to migrants 20 or 30 years earlier (often by the parents of the current land tenure decision-makers) by taking them back unilaterally." Interestingly, Mathieu *et al.* (2003 at 4–5) explain how the "owners" often use customary rationale for reclaiming the land and evicting the tenants:

Since [repossession] is not legitimate or defensible in traditional practice, withdrawals are often disguised in a form of words which refers to socially acceptable motives... [such as] failure on the tenant's part to respect custom or taboo, or a need for land on which to settle the children of the land owner."

**Land sales are increasing.** Increased land scarcity, rising land values, growing urbanization and a host of other factors are leading to growing informal land markets across Africa. Land is being acquired through a range of different kinds of financial transactions - from rental agreements<sup>10</sup> to sharecropping to outright sale and purchase. In many countries in Sub-Saharan Africa, land markets are illicit because national legal frameworks establish that all land is owned by the state on behalf of the people. People have leaseholds, and while they may own their houses or other improvements on the land, they do not own and therefore cannot sell the land itself. The situation is particularly acute in urban and peri-urban areas. Mathieu (2006 at 3) reports that: "These transactions are, however, ambiguous because in many cases they are hidden and made without relying on publicly acknowledged terms of sale and purchase. Moreover, these transactions are rarely accompanied by legal proof of purchase or ownership." There may be uncertainty concerning the content, terms and conditions of the exchange. Some land sellers take advantage of the covert, unofficial nature of the

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<sup>10</sup> Rural to urban migration and increased morbidity and mortality caused by HIV/AIDS may in some situations be serving to *increase* the supply of land in rural areas, as families may have insufficient labour to farm their lands themselves and instead choose to rent out land to individuals lacking the tribal or kinship ties necessary to be allocated land by the chief. Chimhowu and Woodhouse (2006 at 355) write that: "Renting land to 'outsiders' provides landholders with a means to retain control of this 'surplus' land against claims on it from other members of the local community." They hypothesize that "in the absence of formal land markets, and lacking the tribal or 'kinship' entitlement to customary land, vernacular markets offer an initial entry point through land rentals and in some cases land sales."

proceedings to engage in fraudulent practices such as making multiple sales of the same land. Alternatively, the purchaser may find that the seller has made the sale without the consent of other valid landholders in the family, who then challenge the transaction's validity.

Who is renting and buying this land? There are generally three categories of buyers/renters: 1) what Berry has called new rural "big men" – men who have income from a full time job or small business, and use their knowledge of bureaucratic processes to acquire lands upon which to begin agricultural ventures (Berry, 1993); 2) migrants lacking tribal connections who in the past would have been able to request land from customary leaders or prominent families but now must enter vernacular land markets to access land<sup>11</sup>; and 3) "those with rights to land through kinship but, where land is scarce, have to resort to land purchase or rental, often from a senior male relative with land to spare. Although buying or renting from a relative, they still pay the going market rate" (Chimhowu and Woodhouse, 2006 at 358). In addition, women are increasingly leveraging the land market to stake their own personal land rights outside of the usual kinship-based claims.<sup>12</sup>

Who is leasing and selling land? In some cases, the sellers are simply families in need of finances, or with a surplus of land. In addition, there is evidence of increased distress sales among families living with HIV/AIDS; as primary income earners fall sick and are unable to work, and as families urgently need money to pay for medicines and funeral expenses, families are forced to "sell" their land - often at rates far below "market value" – to survive (Villarreal, 2006 at 5 and 7). In other cases, the negotiations and sale of family lands are carried out in secret by one family member for his own

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<sup>11</sup> One illustration of the complex interaction of commercial land transactions and custom can be found in the rules surrounding renters' ability to make improvements to the land they are renting. In many customary systems, renters are oftentimes forbidden to undertake activities like tree planting or well-digging that, under customary paradigms, signify and are evidence of proprietary claims on land. These actions have the effect of conferring greater customary rights to the land in the eyes of the community, and as such, renters are explicitly forbidden to do so.

<sup>12</sup> Tripp recounts how in Uganda, women routinely purchase land as a way of circumventing customary land allocation systems. Interestingly, Tripp cites research by Troutt as finding that by the 1990's: 30 percent of female heads of households had bought land compared with 32 percent of male headed households; female-headed households were more likely than male-headed households to purchase their land holdings; and, in those areas that had the most active land markets, women's holdings most closely resembled those of men. Troutt (2004 at 60) concluded that stronger land markets improved land access for female-headed households.



personal gain, without the knowledge or permission of other family members with equal claim to the land being sold.

Interestingly, accompanying the emergence of a market for land rental and sale is the parallel development of improvised, *de facto* written documentation of these transactions. Mathieu *et al.* (2003) see these documents as a hybrid procedure at the interface between formal legal procedures and custom. Such written certificates of sales are essentially contract documents and receipts, creating "proof" of the exchange for posterity, should the transaction be challenged or questioned. The use of signed documents to legitimize land transactions are a kind of "informal formalization" (Benjaminsen and Lund, 2003) and are intended to reduce the ambiguity and uncertainty of extra-legal and non-customary land transactions. The papers may include the names and identity card information of the parties to the exchange, the amount paid, the duration of the agreement if a rental, the size and boundaries of the land transferred, and the rights and obligations of the parties, etc. The papers rarely mention the words "sell or buy" (Benjaminsen and Lund, 2003, at 124). In addition to the parties to the exchange signing the document, sometimes witnesses observe the transaction and sign as well.<sup>13</sup> However, these papers may not be sufficient to prevent the transaction being contested by stakeholders with prior claims to the land based on custom and kinship<sup>14</sup> (Mathieu, *et al.*, 2003). Chauveau and Colin (2007 at 76) summarize that "While these transactions seem to be more common and visible nowadays, they are still far from being considered publicly acceptable or legitimate. We can therefore talk of a market that is emerging but as yet unmentionable (at least in public), since its practices violate customary principles of land tenure and land legislation as understood at the local level."

**As land relations within communities shift, customary land administration and management practices change.** As explained above,

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<sup>13</sup> In other instances, local officials (who witness these transactions in the name of the government department they represent, but according to "unofficial rules") stamp the documents with an official seal (Lavigne Delville, 2003; Mathieu *et al.*, 2003; Toulmin *et al.*, 2002).

<sup>14</sup> In some instances, the "sales" *should* be challenged, having been undertaken by only one member of a diverse extended family - often the male head of the household. Acknowledging the increased frequency of commercial land transactions and the potential for unilateral and harmful decisions, new laws - such as Tanzania's Village Land Act - include provisions that nullify land sales if the sale has not been agreed to by both spouses, regardless of whether the purchaser/renter was acting in good faith (discussed further in Chapter 5).

there is evidence that customary systems are being re-interpreted to legitimize new practices, address emerging needs and respond to changing circumstances (Woodhouse, 2003 at 1712, citing Lund, 2000). Such transactions are cloaked in the customary processes that have always governed land allocations within rural communities. Scholars describe how, as land becomes a scarce and valuable market commodity, there is a social demand for more individualized, precise and formalized land ownership rights, yet this shift is "totally embedded in social relationships" and therefore "contradictory, complex and ambiguous." In the process, traditional meanings "retain their significance in the local social reality" (Mathieu *et al.*, 2003; Cousins, 2007; Daley, 2005).

For example, while in the past "gifts" and tokens of respect for customary authority were paid to chiefs in exchange for allocation of community land, in some regions such "gifts" are now growing to be more closely related to the market value of the land (Cotula and Cissé, 2007 at 89). Chimhowu and Woodhouse (2005 at 359) observe that even during "standard" customary land transactions, there is a shift towards market values, evident in the "increasing weight placed upon cash, relative to symbolic elements of exchange, and an increasing precision in the 'seller's' expectation of what they should receive." They describe how "the transition from the 'gifts' expected as tokens of acknowledgement of customary authority and of anticipated reciprocity, to payments more closely related to exchange values of the land, is not always easy to define" (Chimhowu and Woodhouse, 2005 at 401). Furthermore, in some countries, there are reports of chiefs redefining their customary stewardship of land as being actual "ownership" and then selling common lands for their own profit (Blocher, 2006; Ayine, 2008). Chimhowu and Woodhouse (2005 at 360) note: "The social embeddedness of vernacular land markets means that those with greatest influence over land under customary tenure (tribal chiefs and heads of patrilineages) will be best placed to gain from the commoditization of land through sales and rents." Mathieu (2006 at 3) writes that:

These new land tenure practices reflect a period of uncertainty, a time of "hesitation" as people find themselves between two systems and two periods: a time not long ago when customary principles were the point of reference; and an uncertain future, in which new rules and norms seem inevitable, including the commercialisation of land. The stability of long-standing customs seems to be weakening in many places, and yet

tradition is still very much alive and meaningful for the communities concerned, as a source of legitimacy and a binding element in social relationships."

## **2.6 Lack of access to justice and legal pluralism**

To a large degree, legal pluralism, extra-legal land dealings, and the kind of mixing of formal and customary practices described above exist because for various reasons, the formal legal system is inaccessible to the poor. As this publication argues, the solution is not to eliminate the customary, but to integrate and harmonize the two systems so that nations' formal legal frameworks mirror, legalize and oversee the customary, which should be allowed to continue to evolve and develop like any body of common law, so long as customary practices do not violate national laws or basic human rights. Such integration must ensure that the poor can actually access and successfully navigate any new land administration and management processes; if they do not, efforts to integrate and streamline the two systems may partially or wholly fail, as exemplified in the case studies below. In such instances, the poor will remain essentially confined to customary land administration and management systems that appear to be increasingly discriminatory towards the land claims of more vulnerable populations, while those with the wherewithal to do so will leverage the formal system to claim valuable lands and resources.

It is important to remember that people may very rationally choose to use customary mechanisms to govern and resolve their conflicts because in certain contexts customary bodies are more successful at their functions and better suited to the local context than state institutions. For example, customary tribunals may: hear a dispute more quickly than the formal court system; be conducted in the language that local people speak; give greater weight to relevant local evidence and culture; address conflicts holistically and arrive at compromises that allow both parties to a conflict to go on living amicably with one another (rather than ruling in favour of one party at the expense of the other); and are generally less expensive and more easily accessed by the rural poor than the formal system.

However, when the formal legal system does not recognize customary rules relating to land holdings and transfer, the poor have little protection against land speculation by elites, investors and state compulsory purchase

processes. While customary systems may provide a high measure of tenure security within a community, they are often insufficient to protect the poor's rights in the event of a violation by more powerful, external actors who may not only possess the wealth and knowledge to access the formal system, but also manipulate it to their advantage.

A succinct summary of the various obstacles to genuine access to and successful use of formal systems is therefore necessary to the foregoing legal analysis. Some barriers are inherent in the very structures of national governance and administration, while other barriers are embedded in social relations: in the gender dynamics within a family, in the class relations between individuals within a community, in the cultural differences between ethnic groups in a region and myriad other interpersonal power dynamics. As the case studies will show, successful implementation of land laws that endeavour to elevate customary rights into the formal system may be impeded by the following factors:

**Lack of knowledge of the national legal system.** The rural poor, often living in small, isolated villages remote from urban centres and government infrastructure, may have only a vague conception of the existence of legal rights other than the customary rules that govern social relations within their communities. They may not know of the existence of basic legal instruments like the national constitution and its guarantees of certain inalienable social and human rights for all people. The poor may learn a law has been passed, but never gain access to information about what rights and obligations the new law has created. Incorrect rumours of what a law dictates may circulate, creating misconceptions and breeding confusion. Even when the poor know that they have rights, they may have little idea how to take action to claim, defend and enforce these rights.

**Administrative offices and judicial systems are often inaccessible.** Legal and administrative systems are often designed and located in such a way that the poor can only access them with great difficulty and effort. Various factors may impede the poor's access to the formal legal system, including:

- **Cost.** Administrative and legal processes can be expensive and are often unaffordable for the rural poor. There may be separate costs associated with every step of administrative and judicial processes, including obtaining necessary documents, making photocopies and

filing applications. Even if such fees are set at minimal levels, the accumulation of multiple fees may amount to prohibitively high costs for the poor. Rights-holders also must bear the costs of travel to courts or government offices, the loss of income that may result from being absent from one's livelihood while pursuing the application in government offices, and, in the case of land titling, the high cost of surveyors' fees. Furthermore, the cost of hiring a lawyer, whose assistance may be critical to the success of a claim, may be too expensive to be possible.

- **Time.** The poor oftentimes simply cannot neglect their jobs or livelihoods for the amount of time necessary to follow an administrative process or pursue a legal case to its conclusion. The opportunity cost of time spent in court or in administrative offices filing appropriate papers and completing technical procedures may take the poor away from their work for too long.
- **Language and communication.** Necessary forms, administrative processes and legal proceedings may be written or conducted in a language that the poor cannot speak; when the poor do not speak the official language of a country and formal legal procedures only take place in this language, this effectively precludes the poor from using them. Furthermore, high rates of illiteracy among the rural poor decreases their ability to navigate administrative procedures, which are often based on written documentation and completion of relevant forms. The poor may be unable to fill out necessary forms and gather required documents.
- **Distance.** Where government offices are located in urban centers, time, resource and cost constraints may prevent the rural poor from accessing them; administrative offices and courts may be located in cities and towns far away from where the rural poor live, necessitating days of travel to reach them.

**Laws and regulations dictate complex processes that are difficult for the poor to navigate.** Laws that grant greater land rights to the poor may nonetheless be accompanied by regulations or administrative procedures that in practice restrict the poor's access to land and set the stage for bureaucratic mismanagement. In administrative situations, laws too often prescribe complex processes with multiple steps to be undertaken at various agencies, involving the approval and signature of different actors in separate locations. Each step adds an additional burden of time, resources and cost for the

poor. The time limits for every step of the process may be clearly set out in the law, but in reality take twice as long. Bureaucratic red tape can hold up each stage of the process, mandating seemingly senseless additions of extra papers, proof, and signatures. Standards and procedures may be inappropriate and excessively inflexible. Such overly multifaceted processes may not even be clear to the officials who perform them, and as a result progress haphazardly.

**Customary rights don't "fit" into formal legal procedures.** Formal state systems may have no "room" for the way that local communities do things. For example, the procedures for formally registering one's land claims may require furnishing proof and evidence that poor villagers cannot provide, or the proof that an applicant *can* provide might not be considered valid or acceptable evidence. As discussed below in the context of Tanzania, pastoralists are losing claim to their communal grazing land because, in the absence of buildings, fences, cleared fields or other markers of "ownership", they are not able to generate appropriate legal "proof" that the lands are theirs (Tenga and Nangoro, 2008 at 10).

**Weak institutions.** State systems that lack funding, capacity and other essential resources make it difficult to implement and enforce laws that protect the land rights of the poor. Poor management and record keeping, lack of necessary finances, overlapping jurisdictions, lack of coordination between government agencies, system confusion, understaffing, lack of capacity of existing personnel, lack of training, lack of access to necessary information (such as local maps), and lack of technical equipment can lead to inefficient and ineffective justice and administrative systems. The responsible institutions may be weak due to systemic failures, such as excessive centralization. As a result, even the most educated and empowered of the poor may be frustrated in their attempts to use formal systems to protect and enforce their land rights. As will be illustrated by the case studies, even good laws may be constrained by training and capacity issues.

**Corruption, rent seeking and elite capture.** Corruption, rent seeking practices and bad faith bureaucratic mismanagement may create enormous stumbling blocks for the poor as they try to claim and protect their land rights within formal legal systems. Laws and institutions may be manipulated by those in power to further secure their access to valuable land, resources and institutional supports. At its most extreme, judges may accept bribes to arrive at certain desired decisions, high level state officials may funnel state funding into their own pockets rather than into pro-poor development

projects, or wealthy investors may exert their power and financial influence to claim or be allocated fertile lands already under cultivation by poor farmers. Corruption and rent-seeking may also be petty, such as when underpaid low-level administrators demand small bribes at every step of an administrative process simply to guarantee that the processes move forward. Oftentimes the corruption is initiated or condoned by those at the very top level of power within a system or office.

Moreover, as will be illustrated in the case studies, even when the laws as written protect the interest of the poor, state officials may choose to frustrate the laws' implementation so as to ensure that they never achieve the intended redistribution of power and resources.

**Limited opportunity for review.** Limited supervision and oversight mechanisms, including judicial review of the decision of lower courts, local administrators and customary leaders, further weakens the poor's ability to ensure that their land rights are protected. In some nations, such appeals mechanisms simply do not exist, particularly for decisions made by customary leaders. When mechanisms for review do exist, they may not be accessible due to location, cost or technicality of the procedures. When there is little possibility for review or appeal of poorly completed procedures or corrupt practices by state actors, the poor may be left without recourse and feeling that they have suffered an injustice. Such outcomes may embitter the poor against state justice mechanism or drive them to seek extra-legal means of seeking justice.

Various nations are working to proactively address these issues by integrating customary and statutory legal systems. Botswana, Mozambique and Tanzania's legal frameworks each successfully address some of these obstacles and phenomena, and fail to adequately address others. For, as illustrated by the case studies, efforts to integrate statutory and customary legal systems must go beyond writing new laws – they must also take on a full restructuring of all administrative and judicial mechanisms and agencies charged with enacting and enforcing land laws. These nations' experiences are explored in the case studies below.

### III

## BOTSWANA'S TRIBAL LAND ACT

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### 3.1 Introduction

Botswana's Tribal Land Act, (ch. 32: 02) passed in 1968, was truly revolutionary for its time. When it was enacted, the Tribal Land Act was heralded as a mechanism for modernizing and ordering existing customary systems of land tenure in Botswana's tribal areas. It was the first land law in Africa to convert customarily-held land claims into formal, secure title, equal in weight to grants of land made by the state. It was the first land law in Africa to rule that land would be governed according to customary laws, and to base its policies on a commitment to providing for the land and natural resource needs of all "tribesmen".

In drafting the Tribal Land Act, legislators intended to preserve customary land tenure principles while creating a modern administrative system. As such, they did not explicitly change the complex rules and systems by which customary tenure was administered. Instead, they overhauled the power structures *behind* those systems by replacing chiefs and headmen with appointed and elected land boards. The land boards were intended to balance custom and modernity and lead the way for the creation of a new, independent state, founded upon principles of uniquely African law. In its creation of land boards, the Tribal Land Act created a mechanism to bring customary authorities, state officials, and elected representatives together to jointly take on the administration and management of land in Botswana. The land board model was and is, at root, a well-designed decentralized system of land administration that relies heavily on a back and forth with local customary leaders.

The primary innovations concerning statutory recognition of customary land rights established by Botswana's Tribal Land Act and accompanying legislation include:

- Customary, elected, and state-appointed leaders administer and manage land together under both customary and statutory tenure, thereby merging the two systems into one;
- Mechanisms to transform customary land claims into legal grants of customary land rights, as valid and enforceable as formally-granted titles;

- Holders of customary land rights have tenure security over their individually-held land, as well as the ability to transfer, sell, bequeath, or assign their land rights;
- All allocation of land is free of charge, as under custom.

The longevity of Botswana's Tribal Land Act offers multiple insights into how systems that integrate customary and state land administration practices evolve and are modified over time. As Botswana has changed, aspects of the land board system have also changed. For example, as a result of a series of amendments over the years, the land boards have been professionalized and modernized. Customary leaders were removed from the land boards and replaced by officials appointed by and accountable to the Minister of Lands. Other aspects of the land board system have remained relatively the same since their inception; for example, the land boards have found it necessary to continue to rely on ward chiefs or headmen (the lower-most level of the customary hierarchy) for their on-the ground knowledge of local terrain, existing customary claims, and community dynamics. So while chiefs have been phased out, headmen have remained an integral part of Botswana's land management system. However, glaring gaps in the law – particularly regarding the land rights of women and minority ethnic groups – have not yet been filled in, despite recent amendments.

Meanwhile, rural people are more hemmed in and impoverished than they were in the 1960's; in 1975, Botswana passed the Tribal Land Grazing Policy, which gave the land boards the authority to cede large tracts of what had formerly been communal grazing lands, held under customary tenure by rural pastoralists, to private cattle ranchers. The results of this policy have meant overcrowding and over-grazing of grazing lands, and the slow erosion of sustainable, customary management of communal resources in the rural areas. Moreover, the urbanization of Botswana society and the growth of land markets have meant that the definition of "custom" as set out the Tribal Land Act has had to be manipulated to continue to apply to the policy goals of the modern nation state and the increasing commoditization of land. As described by Nkwae (2008 at 1), "Even after 40 years of experimenting with the land boards, Botswana still describes its land administration system as a 'work in progress'. It continues to adjust and adapt its land administration based on traditional land rights and cultural values to meet the needs of a rapidly urbanizing economy and growing land market".

A careful analysis of how Botswana has shifted the content and procedures of its Tribal Land Act and addressed "custom" over the years yields rich, contradictory conclusions. In essence, the land board model is a potentially very good one. Yet decades of central government mandates about how the boards are to operate and what policies they must enact - and legislators' failure to amend the act to address its complete lack of protections for vulnerable groups - have arguably undermined the promise and intent of the land board model. In this way, Botswana's land board system sheds a clear light on the complex interplay of law and administration, of legislation and its on-going implementation by government actors.

### 3.1.1 History

Botswana became a British protectorate in 1885. Before that, it was populated by majority Tswana tribes governed by rigorous and well-defined political and legal systems. In the 1890's, the colonial administration ordered that the chiefs of the five principal Tswana tribes identify the boundaries of their tribal territories. When the chiefs had done so, the described boundaries were formally mapped and deemed "tribal lands." The colonial administration declared the remaining land to be "crown land," under the jurisdiction of the colonial administration. Any tribes living within "crown lands" lost formal claim to their lands – in particular the non-Tswana minority groups whose leaders were not consulted, most notably the Basarwa (or San) people. The colonial government then allocated crown land to settlers, who held their lands under freehold title. Those areas claimed by the tribes were left to govern themselves according to British principles of indirect rule; the chiefs retained semi-autonomous authority, under which they continued to allocate land within their boundaries, settle disputes, manage natural resources and establish tribal rules according to custom.

Significantly, because of Botswana's semi-arid ecosystem, among other factors, its average population density is three people per square kilometre. The livelihood practices of the Tswana centre around pastoralism, with some degree of small-scale farming. Taylor (2007 at 6, citing Arntzen *et al.*, 2003, based on 2002 agricultural statistics) reports that in 2002, Botswana had one of the highest ratios of livestock to people in Africa, with 1.7 million people to more than 5.2 million cattle, goats, sheep and donkeys. The semi-arid conditions in Botswana and the requirements necessary for successful and healthy livestock grazing mean that even small communities need access to wide expanses of land to ensure access to seasonal natural resources and

sufficient water. To fulfil these needs, the majority of the tribal lands were originally used as communal grazing areas.

At Independence in 1966, the new government inherited a nation that was divided into three separate systems of land tenure: tribal land (48.8 percent); state land, formally crown land (47.4 percent); and land held under freehold title (3.7 percent). Since independence, Botswana's stated policy has been to increase the size of tribal lands, and so significant amounts of state land have been converted into tribal land; by 1998, 71 percent of Botswana's land was characterized as tribal land, 24.8 percent was state land, and land held under freehold title accounted for 4.2 percent of national territory (Adams *et al.*, 2003 at 1). The country's emphasis on providing land to all citizens has its roots in the customary land tenure systems of Botswana, which allocated land according to the principle of the "right of avail": the chief had an affirmative obligation to provide all members of a particular tribe with access to water and the residential, farming and grazing lands necessary to adequately provide for their welfare.

Botswana's new statesmen were serious about preserving Tswana custom; the Tribal Land Act was meant to significantly overhaul the colonially-instituted legal framework governing the country's land. To support these efforts and others, they created a "House of Chiefs" whose function was essentially serve as a fourth arm of government and additional check and balance on the executive and legislative branches of government; the House of Chiefs' role is to represent tribal interests on any pending legislation, regulation or policy of the central government.<sup>15</sup>

### 3.1.2 Overview of customary land management in Botswana

Before turning to a full explanation of Botswana's efforts to formalize customary laws and systems, it is necessary to explain exactly what those

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<sup>15</sup> The House of Chiefs is "entitled to discuss any matter within the executive or legislative authority of Botswana of which it considers it is desirable to take cognizance in the interests of the tribes and tribal organizations it represents and to make representations thereon to the president, or to send messages thereon to the National Assembly" (constitution, art. 88§5). The legislature may not proceed upon any bill or amendment that may affect the designation, recognition, removal of powers of chiefs, sub-chiefs or headmen; the organization, powers or administration of customary courts; customary law, or the ascertainment or recording of customary law; or tribal organization or tribal property unless a copy of the proposed legislation is referred to the House of Chiefs for review and comment" (art. 88§2).

customs were considered to be in 1968, when legislators enacted the Tribal Land Act. The basic customary rules of land and natural resource administration and management among the Tswana are grounded in the fundamental right of every individual to use, hold or access land sufficient for his or her survival and livelihood needs, according to membership in the social group. Of particular note is that for information about how customary land holding and management were practiced, legislators drafting the act relied not on *communities'* articulated experiences but on *Westerners'* anthropological fieldwork among the Tswana tribes<sup>16</sup>, particularly the research and findings of Isaac Schepera.

Generally, under Tswana customary law, when a new settlement area was established, the chief first chose the site of the *kgotla*, or tribal meeting place, and then laid out the sub-sections of the village (wards) in a semi-circle around the *kgotla*, with each ward administered by a ward headman. The land was laid out in concentric circles according to designated use: the areas closest to the *kgotla* was zoned as residential land, then, further away, arable land for cultivation, and beyond that, communal grazing land. The communal grazing land stretched from the edge of the arable lands all the way to the boundaries of another village or tribe (Ng'ong'ola, 1992).

Those land allocations granted by land boards to the Basarwa have generally been smaller than to other groups, on the grounds that they are not *able* to clear or cultivate larger pieces of land (Adams *et al.*, 2003, citing Mitchelsen, 1995).

The land administration of each ward was decentralized to the ward headmen, who would then allocate land for residential and arable purposes to families within the community according to each family's size, current need, and projected future needs. If the land originally allocated became inadequate, a family could approach the headman and requested an additional allocation, often out into the adjacent grazing lands (Machacha, 1982; Ng'ong'ola, 1992). Once allocated, these family land rights were generally exclusive and permanent. No compensation was required for an allocation of land, but there was an expectation that the family would protect, conserve and sustainably use the land they had been allocated

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<sup>16</sup> The emphasis on Tswana custom in the Land Act meant that the practices of other ethnic groups within Botswana were not provided for in the law, and as a result their claims to land and natural resources have become increasingly fragile over time.

(Adams *et al.*, 2003 at 3). Nkwae (2008 at 4) characterizes a family's customary rights to occupy and use land as secure, inheritable, perpetual, and transferable for a consideration amongst group members. Adams *et al.* describe how customary law allowed families the flexibility to transfer interests in residential and arable land among themselves; unimproved land could be transferred freely without the intervention of the chief, and while there were no land sales, there were no rules forbidding compensation for improvements made to the land being transferred. They write, "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" (Adams *et al.*, 2003 at 3). Meanwhile, families could allow others to cultivate crops on their lands, and could collect payments from the user for the benefits derived.

Communal grazing areas were considered common property for the benefit of all community members and was used equally, as-needed, by members of the tribe. All community members had the right to graze their animals there; there were no exclusive use rights or fences and all animals mingled freely across the area (Adams *et al.*, 2003 at 3). However, these lands were carefully administrated to ensure sustainability; Nkwae (2008 at 6) describes how the communal areas were generally divided into administrative districts supervised by overseers whose permission was needed in order to keep cattle or hunt in an area; he argues that the communal areas were essentially highly regulated common property – carefully overseen to ensure against over-grazing, unsustainable uses, and responsible natural resource management. All community members had the right to gather wood, soil and other materials for fuel and building construction from common areas. Rights to surface waters flowing naturally (springs, rivers, pans, etc.) were also held communally. Any family that sought to sink a well or build a dam had to request permission from the chief. However, once constructed, this family or individual then had exclusive, inheritable rights to this well or reservoir as well as exclusive grazing rights to the land in a specific radius around the well or reservoir (Adams *et al.*, 2003 at 3; Nkwae, 2008 at 6).

Access to other natural resources was highly regulated by the chief. For example, the killing of wildlife was determined by the chief, who could organize community hunts or limit the numbers of animals killed according to value, scarcity, and other principles (White, 2000 at 3). Similarly, the chief would carefully regulate when fields could be burned and when thatched grass, necessary for house construction, could be harvested (after the seeds

had matured). The chiefs' management of the area's natural resources was generally considered to be successful; internal rules and incentive structures functioned to insure against overgrazing and sustainable use of natural resources (Makepe, 2006 at 44).

Under customary law, land disputes were handled in the same hierarchical framework by which the land was allocated and managed; local land disputes would first be addressed by the family head, then the relevant ward head or headman; if no resolution was reached, the matter would be referred upward to the sub-chief and then the paramount chief of the tribe (Nkwae, 2008 at 4).

### **3.2. Tribal land boards**

#### **3.2.1 Composition of the tribal land boards**

Whereas before the act was passed, all tribal land was held and governed by chiefs, the Tribal Land Act created state administrative bodies called land boards, and mandated that, "All the rights and title to the land in each tribal area...shall vest in the land board...in trust for the benefit and advantage of the citizens of Botswana and for the purpose of promoting the economic and social development of all the people of Botswana" (art. 10(1)). Land boards are corporate bodies with the capacity to sue and be sued (art. 9). Originally, Botswana established 11 land boards to administer all land in the nation. However, when the land boards started operating in 1970, so many people made applications for grants of land and formal title that the boards were soon overwhelmed.

Moreover, it was soon obvious that most residents of the vast areas these land boards governed were unable to travel the far distances necessary to arrive at their offices, making them all but inaccessible. To remedy this, in 1973 Botswana passed the *Establishment of Subordinate Land Boards Order*, which created a system of more local, subordinate land boards and transferred to these boards the functions of sub-chiefs, heads of villages, and other customary land authorities. While in theory the subordinate land boards were created to preserve local knowledge and understanding of land use and make land administration systems more accessible, in practice, even subordinate land boards still administrate very large areas in rural Botswana and may be located over a hundred kilometres away from the local communities whose land they manage (Adams *et al.*, 2003 at 5).

The Tribal Land Act originally set out the composition of each land board to include, generally: the chief of the area administered by the board or his sub-chief as an *ex officio* member, an individual appointed by the chief/tribal authority, two members elected by the district council, and two members appointed by the minister responsible for lands, for a total of six members (art. 3§1). In their original configurations, one third of each land board's membership was affiliated with the chief and his authority, one third was locally elected, and one third was appointed by the Minister of Lands. In this way, the act built in a solid system of checks and balances on the abuse of power by any one faction – either by chiefs or by centrally appointed authorities. Land board members were both upwardly accountable to the central ministries, downwardly accountable to the local people, and horizontally accountable to the chiefs.

However, the composition of the boards has changed significantly since the act was first passed. Today, chiefs no longer have an established position on the board. In the 1990s, chiefs, sub-chiefs and their nominees were prohibited from standing for selection or election to land boards on the grounds that there was a potential conflict of interest on those occasions when appeals against land board decisions were to be taken to the customary courts, over which some of the chiefs presided (Clement Ng'ong'ola, 1992). As a result, today each land board consists of twelve members: five members elected by the people at the *kegotla*, two members who are representatives of the Ministry of Agriculture and the Ministry of Commerce and Industry, and five members appointed by the Minister of Lands (Adams *et al.*, 2003 at 4).<sup>17</sup> These changes effectively mean that today, on every land board, seven out of twelve of the main land boards (and six out of ten of the subordinate land boards) members are appointees or representatives of the various ministries and the Minister of Lands, accountable only to the central government.

Meanwhile, the elected members are no longer fully the product of direct democracy; their election is now conducted in the following way, as set out by the *Tribal Land Act Regulations* (1973, as amended, hereafter referred to as

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<sup>17</sup> The subordinate boards started with a membership consisting of one member elected by the district council, one elected by the main board, one ministerial appointee and one member elected by headmen and sub-chiefs of villages in its area of jurisdiction. Today, the composition of the subordinate land boards includes ten members: one representative of the Ministry of Agriculture, one representative of the Ministry of Commerce and Industry, four who are appointed by the Minister of Local Government, Lands and Housing, and four elected members.



"regulations"): individuals interested in being elected to the land board must submit applications, to be reviewed by a land board selection committee<sup>18</sup> which then chooses 15 of the applicants to be candidates for election at the *kgotla* (regulations, art. 2§2, 3). On the day of the election, residents of the tribal area assemble at the principle *kgotla* and elect the candidates.<sup>19</sup> From the list of candidates elected by the people, the *land board selection committee* then selects the most eligible members, according to their judgment, and from this list the *minister* makes appointments to the land board.<sup>20</sup>

Commenting on these changes to the appointment/election process, Ng'ong'ola (1992) writes: "The heavy ministerial influence over the composition of the boards ... [appears to confirm] the understated objective of strengthening the hand of the government in the control of tribal land..." White (2000 at 7) found that because the minister has final discretion over the "elected" members, "appointments to the land board are widely viewed as a form of political patronage." Moreover, the minister may require any member of a land board to vacate his or her office, on the grounds that s/he has missed too many meetings without cause, is unable to exercise the functions of his office, or "is otherwise unfit to discharge the functions of this office" (art. 6§3 (a–c)). White (2000 at 7) writes that "While these powers have never actually been exercised, their existence is a constraint to serious defiance of central government's wishes by a land board official."

In effect, therefore, while the land boards started out as a diverse, balanced body composed of customary authorities, elected community members and appointees of the central government, their composition over time has become dominated by appointees of the central government who are only

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<sup>18</sup> The land board selection committee is composed of: the district commissioner (who is the chairperson), the land board secretary of the tribal area concerned, the council secretary of the district council; the chief or sub-chief of the tribal area; and a member appointed by the minister (regulations, art. 2§11).

<sup>19</sup> Originally, people indicated their vote for a candidate by standing in a queue behind that candidate, an innovation designed to mirror customary practices. However, to ensure genuine freedom of choice and expand voting opportunities to community members who may have to work during the meeting time, the process was amended in 2006 to done by secret ballot box (regulations, art. 2§4).

<sup>20</sup> When narrowing the list and making final appointments, the regulations specify that the minister shall take the qualifications and experience of the candidates into consideration and "shall endeavour to ensure that, so far as possible, all relevant parts of the tribal area, including subordinate land board areas, are represented on the land board" (regulations, art. 2§7,8, 10).

upwardly accountable. It may also be noted that despite various modifications and amendments over the past 40 years, gender balance and ethnic diversity on the land boards are yet to be addressed in the text of the act.

### 3.2.2 Function of the tribal land boards

The Tribal Land Act transferred the chiefs' powers over land as a whole to the land boards and subordinate land boards.<sup>21</sup> As such, land boards are meant to function in the place of customary authorities. Specifically, Article 13§1 provides that:

All the powers previously vested in a chief and a subordinate land authority under customary law in relation to land, including: the granting of rights to use any land; the cancellation of the grant of any rights to use any land; the imposition of restrictions on the use of tribal land; authorizing any change of user of tribal land; or authorizing any transfer of tribal land, shall vest in and be performed by a land board acting in accordance with powers conferred on it by or under this act.

This list essentially enumerates the main land-related duties of a chief, translated into modern legal language. The main land boards' functions also include:

- Hearing appeals of decisions of subordinate land boards (art. 13 §2);
- Determining land use zones within the tribal area (pending the approval of the minister) (art. 17§1–3);
- Determining land management plans in consultation with the district council, village development committee and tribal authorities (art. 17§4);
- Maintaining land records;
- Ruling on applications for the creation and allocation of bore holes in their areas;

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<sup>21</sup> Ng'ong'ola (1992) argues that while the asserted rationale for this change was greater democratic control of land and an established series of checks and balances of chiefly power, this system was in reality designed to allow the new government the ability to assert greater control over tribal land administration.

- Implementing national land-related government programmes in tribal areas;
- Formulating and implementing policies to ensure the sustainable management of tribal land under its jurisdiction<sup>22</sup>;
- Allocating land to citizens of Botswana under common law;
- Processing applications for common law land grants made by non-citizens (for which the final decision lies with the Minister of Land and Housing); and
- Creating and enforcing regional policies<sup>23</sup> (Adams *et al.*, 2003 at 5).

The subordinate land boards are entrusted with granting the more common requests made, including hearing and ruling on applications to use land for: building or renovating residences, ploughing large tracts of land, grazing cattle or other stock, and other similar uses and needs (art. 4§1). Subordinate land boards also: make recommendations to the land board in respect to applications for boreholes in their areas; hear and adjudicate disputes concerning customary land grants or rights within their area of jurisdiction; and make recommendations to the tribal land boards regarding applications for common law grants of land" (art. 4§2–4). Again, such functions are essentially a formalized list of functions previously performed by customary authorities.

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<sup>22</sup> When a land board proposes to adopt a policy relating to its functions, it must outline the proposed policy and submit this outline in writing to the district council, who can accept it or reject it (regulations, art. 5§1, 2). In this way, the district council was supposed to serve as a check on the land board's policy-making powers. If the land board disagrees with the district council's decision, it can appeal the matter to the Minister of Lands, who has the final say on the matter (regulations, art. 5§3,4). Then, before any policy can be put into practice, people have to be consulted and their responses solicited; to effectuate this, land boards are to go around notifying people of intended policy changes. Local people's contributions have to be considered in the final implementation of these policies, and land boards must also consult with village development committees, tribal authorities and any other interested stakeholders when determining land use planning, zoning and management (art. 17). However, how these consultations are organized – where they are to be held, how notice of the meetings will be posted, etc. – is not outlined in the act or accompanying regulations. It is thus not clear how well publicized the proposed policy is in practice, or how public participation works in practice and whether the opinions of the public are taken into account.

<sup>23</sup> The types of policies that land boards have the mandate to establish include: creating land use and zoning plans, imposition of restrictions on land use, the planning and "zoning" of areas for exclusive use as grazing areas or commons including stipulation of the numbers of cattle that can graze in the areas around bore holes, and policies that promote sustainable use and management of natural resources in the area for which it has jurisdiction.

### 3.3 Land rights

It is important to note from the outset that the Tribal Land Act created three different types of land rights within tribal areas: customary, common law, and freehold. However, from 1968 until 2008, the land boards had not granted one freehold title; only customary and common law leasehold rights have been issued (Nkwae, 2008 at 10–11, 15).

- **Customary land rights:** customary land rights are exclusive use rights (but not ownership rights) over all family land acquired by custom within the tribal areas. Customary land rights may not be cancelled without just cause. Individuals, groups, or land boards may hold customary land rights. If they desire, holders of customary rights may seek an exclusive, inheritable customary land grant certificate.
- **Common law land rights:** two kinds of common law land rights may be issued for residential, commercial or industrial land uses: 1) a month-to-month lease for land not exceeding five acres; or 2) longer-term leases granted for 99 years for residential purposes, or for 50 years (with a possible extension of a second 50 years) for commercial, farming and industrial purposes. After the term of the lease expires, the land is subject to reversion to the local community. Common law land rights may be registered under the *Deeds Registry Act* (Cap. 33:02) and are mortgage-able and transferable. These rights were designed for foreigners, national investors, and others seeking to freely transact their lands (arts. 23–24).

#### 3.3.1 Formalizing and requesting customary land claims

Although it does not state this clearly in either the text of the Tribal Land Act or its regulations but is inferred, registration of customary land rights is not necessary or required; land allocated according to custom *before* the act was passed does not need to be formally registered for claims and rights to be legitimate and enforceable. This provision elegantly formalized all existing customary land claims the moment the act passed into law and eliminated

the need for rural community members to immediately undergo lengthy and complex registration procedures.<sup>24</sup>

Applications for customary land grant certificates that document pre-existing land claims and for *new* grants of customary land are to be made to and granted by the land boards (art. 13§1). As under custom, all grants of customary land rights are free. Grants of land under customary law may only be made to citizens of Botswana, unless the minister has personally granted an exemption (art. 20). Land boards may not make grants of customary land rights to individuals intending to use the land for trading, manufacturing or other business or commercial purposes, regardless of whether they are a citizen of Botswana (art. 20§2). For these purposes, an applicant must seek a grant of common law land rights (see below).

The mechanics and logistics of how customary land is allocated and formalized are set out in the regulations. The opinion and inclusion of local customary authorities – the ward headman – is mandatory at two discrete moments: before a hearing on the availability of the land applied for, and a literal "pointing out" of the boundaries of the land in front of relevant community members.

When applying for "a customary right to the use of land", an applicant must "produce his national identity card, and furnish *verbally* or in writing to the secretary of the land board" information regarding, among other things, his identity, family status, the nature of the right sought (i.e. for grazing, agricultural, residential or business purposes), the location, description and extent of the land affected, and information regarding and other land rights the applicant possesses (regulations, art. 6§1, *emphasis added*). Allowing for verbal provision of this information allows illiterate applicants equal opportunity to seek land grants and aligns with customary practice. The applicant bears the burden of identifying the land requested.

An applicant "*may* also produce to the secretary a letter from the head of the ward concerned or his local representative stating whether the granting of the right applied for will conflict with other people's land rights, or with present land use" (regulations, art. 6§2, *emphasis added*). However, if the

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<sup>24</sup> However, over time, it seems that the majority of rural families have in fact done so, as Botswana has modernized and as the consequences of not having a formal grant of customary land right have come to light.

applicant does not provide this letter, the board secretary *must* consult the ward head to ascertain that the land requested is free and available for allocation (regulations, art. 7§1, emphasis added).<sup>25</sup> As soon as the secretary has received an application, he or she must make this consultation, publish notice of the application publicly, and inform the applicant of the date on which the board will deliberate the application (regulations, art. 7§1). If, after a hearing, the land board is satisfied that the applicant is a citizen of Botswana, the land applied for is unclaimed and available and suitable for the use proposed by the applicant, it makes and records the grant of customary land rights (regulations, art. 8§1–2). In the regulations (First Schedule, Form 1, under regulations 11), applications for customary land grants allow that applicants may list "natural features" to demarcate the bounds of the land.

Before a certificate can be granted, the land board has an affirmative duty to ensure that the boundaries of the land applied for "are pointed out to the grantee...in the presence of the head of the ward or of two responsible heads of family, and such pointing out shall be recorded in the certificate of grant" (regulations, art. 10§4). This process nicely mirrors customary practices, and creates a further check on the precision of the allocation's boundaries. After the boundaries of the land have been agreed upon and demarcated, the board must accurately describe the boundaries of the land allocated in the certificate, referencing any permanent and ascertainable boundary points (by attaching a sketch). Then, the allocation is entered into the registry and a certificate issued.<sup>26</sup>

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<sup>25</sup> The National Land Policy Review, done in 2002 (described below) notes that "In the case of customary grants, the main counterbalance was supposed to be public consideration of the application and ascertaining the attitude of the ward head or his representative towards the grant being made. These precautions were not sufficient to minimise or prevent multiple, conflicting, disorderly and disputed allocations in densely settled areas. The regulations have now been revised to provide for a clearer indication by the ward head whether the allocation proposed would conflict with existing land rights or current land use. However, this assumes that the ward head has access to all the information required. In a rural area, that may be the case, but it is often not so in a rapidly expanding peri-urban area (Government of Botswana, January, 2003 version, p. 148).

<sup>26</sup> This seemingly simple and transparent process is often unfortunately complicated by the land board's lack of information about those customary land rights that were already in existence and immediately become formalized in 1970 when the Tribal Land Act came into force. Given this information gap, the land boards may not know what parcels of land in a given area are free and which are occupied. *Applicants* have an affirmative responsibility to identify the land they would like and bring this request to the land board, who then confirms the choice in the absence of serious objections from the ward headman. Nkwae (2008 at 12) reports that at the time of writing in 2008, the fact that the applicant is expected to identify

Once a customary land allocation has been granted, it cannot be cancelled without just cause and without first having ascertained the opinion of the relevant ward head (regulations, art. 15(1)(b)). The grounds upon which a grant of land may be cancelled include: non-eligibility of the grantee; failure to observe restrictions upon land use; contravention of laws relating to planning or good husbandry; use of the land for a purpose not authorized by customary law or in contravention of customary laws; or to ensure the "fair and just distribution of land among citizens of Botswana" (art. 15§1(a-d)). The grounds for termination were made more rigorous in the 1993 amendments; the provision that if, "without sufficient excuse, the land has not been cultivated, used or developed to the satisfaction of the land board....in accordance with the purpose for which the grant was made" was added to the suitable reasons for cancellation and repossession of a grant of customary land.

Ng'ong'ola (1992) notes that in this respect, the procedural rules and regulations regarding cancellation of customary grants "appear to replicate customary law while masking a rather fundamental transformation of the customary procedures." He argues that land rights under the customary system were enduring and resilient: land was rarely taken away for misuse or non-use, and there was no presumption that unused land had been abandoned. Moreover, this provision grants too wide a scope of powers to the land boards, in that it is too vaguely worded, and dispossession may rest entirely on the subjective opinion of land board officials. How is the land board to determine that the land "has not been cultivated, used or developed to [its] satisfaction"? On what grounds and specific indicators? While the check with the ward head may help to ensure the continuance of customary protections for land claims, the amendment points to an alarming and significant widening of land board powers.

Another considerable deviation from custom is that under the Tribal Land Act, land is granted to individuals, not families, as was the case traditionally. Relatedly, the land rights to be registered make no provision for the rights of family members or secondary use rights. Although applications for customary land grants must include information on whether the applicant is

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the land him or herself, including indicating its particulars and preparing a sketch plan, has been found to "encourage unplanned land development, overcrowding of wards in the villages, [and] multiple or excessive land allocations."

married and how many children he or she has, there is no place on the form to record the names of the spouse and children, and no provisions that allow family members joint or derivative rights in the land (regulations, art. 6(b)). Writing as early as 1982, Machacha (1982, n.p.) observed that:

The registration of plots may result in other members of the family being left out....The man, as the head of the family, applies for land to be used by the family. If the plot is registered in the name of the head of the family, legally the plot belongs solely to him and, in the case of divorce, the other members of the family may have no claims on such land. This means that the registration has worked against their customary interests and rights."

To date, the act and regulations have not been amended to address this.

### 3.3.2 Grants of common law land rights within tribal areas

Common law land grants are issued for residential, commercial or industrial land uses (art. 23). Common law land rights were originally issued largely to foreigners and only outside of tribal areas. However, in the early 1980s this right was extended to citizens of Botswana within the tribal areas. Ng'ong'ola (1992) relates how "In 1983, it was recommended that even Tribesmen who would otherwise be entitled to a customary grant should not be denied a common law grant, especially where this may assist in the use of the interest as security for building or development loans." Adams *et al.* (2003 at 4) conclude that by providing for the granting of common law leases within tribal areas, the act was "an early concession to an emerging land market" and "sanctioned the privatization of the commons." Common law leases have also played another important role in the management of tribal land in Botswana; communities who seek to create community-based natural resource management schemes may be granted common law leases (explained further below).

The process of applying to the land board for both kinds of grant of common law land rights (both small scale and month-to-month as well as large scale and long-term) within tribal areas is complex, necessitating multiple steps, approvals and much documentation. An applicant must go to the land board and provide information concerning such matters as the



nature of the right sought, the location, description and extent of the land desired, and provide proof of citizenship (regulations, arts. 18(1) and 19(1)).

As with the process of customary land grants, the applicant bears the burden of identifying the land requested. The land board then *investigates the registry* to see if the land requested is held under customary rights and draws up a draft agreement of grant including the proposed terms and conditions of the lease, which it sends to the minister along with a diagram or sketch plan that clearly defines the boundaries of the land requested, submitted to it by the applicant (art. 24§4, regulations, 20§1–3). Every common law grant to a non-citizen must be checked by the minister (art. 24§2 and art. 31). There is no other process of "investigation" as to whether the land is already held under customary tenure.

Because customary land rights do not have to be registered under the law, this often has meant that this check of the registry regarding the requested land's availability fails to show that indeed the land is occupied; for those land grants made before 1970, there will often be no formal documentation of customary claims in the registry. It is therefore significant that there is no affirmative obligation for a land board to make a more thorough investigation with local authorities. It is unclear why there is no mandated check with the relevant ward head during this process. Moreover, while a public hearing is mandated before the granting of a customary land right, there is no public hearing requirement for a grant of common law land rights. This has in a number of instances led to the withdrawal of common law land allocations upon the discovery that they infringed upon customary land rights.

If the check of the registry finds that the land *is* indeed held under customary tenure, the holders' consent to the common law grant is mandatory. The land board must certify to the minister that the customary holders of the land have been informed of and agreed to the proposed common law grant application (art. 24, regulations 20§3–4). Yet the law does not define what counts as "consent", which leads to uncertainty about safeguards in the process for the customary rights holder. The act also fails to include protections to ensure that customary rights holders are fully aware of their right to give or withhold consent or that prevent against coerced consent. There are no oversight mechanisms in the text of the law to protect customary rights holders from losing their land to more powerful applicants for common law land grants.

If all involved parties consent to the application for a common law land grant, the land board then executes a formal contract to this effect which is entered into various registries (regulations, 20§5–7). The land must thereafter be properly demarcated and surveyed and the lease registered in the deeds registry (art. 24§4, regulation 21).

It is noteworthy that the act does not provide for the involvement of the community before the land board allocates common law grants within tribal areas to outside investors. A recent lawsuit has challenged the procedures governing grants of common law to foreigners on exactly such grounds. Adams and Palmer report that two Kgalagadi community trusts challenged a land board's decision to lease what they considered to be their communal grazing land to two foreign-owned companies. The communities argued that "in not consulting the district council or neighbouring communities and not advertising the land (to give citizens a chance to either apply or object) the land board has breached its duty of trust and is acting contrary to the principles of natural justice" (Adams and Palmer, 2007, at 6).<sup>27</sup>

### 3.3.3 Women's and minority land rights

Botswana's Constitution provides that "every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex" to the fundamental rights of "life, liberty, security of the person and the protection of the law; freedom of conscience, of expression and of assembly and association; and protection for the privacy of his home and other property..." (constitution, ch. II, art. 3). It also has a clause that explicitly provides against discrimination on the grounds of "race, tribe, place of origin, political opinions, colour or creed." (constitution, ch. II art. 15) However, there are no explicit provisions on women's right to own land or to protect the land claims of minorities in the constitution, the Tribal Land Act or its regulations.

The Tribal Land Act was amended in 1993 to substitute the phrase "citizen/citizens of Botswana" for what had formerly been "tribesmen," in Article 10§1. At the time, this amendment was "vehemently opposed by some chiefs and members of parliament" (Taylor, 2007 at 6, citing Mathuba, 2001) on the grounds that although the phrase "citizens of Botswana" was

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<sup>27</sup> See [www.mmegi.bw](http://www.mmegi.bw)

more ethnically and gender neutral, it "explicitly transferred the resource rights that were enjoyed at the level of tribal affiliation to the level of citizen....[and therefore] formally opened up the 'frontier' of unallocated communal land to any citizen, rather than restricting eligibility to those whose tribal affiliation was associated with that particular area" (Taylor, 2007 at 6). Tribes argued that the amendment limited their rights to sovereignty over their lands and created a new vulnerability to land speculation by outsiders (Taylor, 2007 at 7).

Generally, under customary law in Botswana, women gain access to land through their fathers, husbands, sons, or paternal uncles, and only sons inherit land from their fathers (Kalabamu, 2006). Perhaps in line with custom, the Tribal Land Act and accompanying regulations do not once discuss women's rights in landholding, inheritance or division upon dissolution of marriage. The act also has no provisions that serve to ensure equitable and fair inheritance or transfer of land within a family.

As explained above, when receiving an application for a grant of land, the board secretary must note the size of an applicant's family. However, there are no rules dictating how the size of the family should be taken into account; nor are there protections regarding putting the names of all of the family members on the certificate. Furthermore, Article 38 (amended in 1993) provides that land rights shall not be transferred without the consent of the land board except in the devolution of such land on inheritance (art. 38§1). This provision, meant to allow for freer inheritance of land within a family, effectively takes away any checks on discrimination against widows, orphans or other less powerful family members who might lose their land upon the death of the male head of household. Criticizing Botswana's "unwavering adherence to gender neutrality" Kalabamu (2006) argues that after decades of gender discrimination, such neutrality is in fact *tacit continuation of gender discrimination*. He writes that "the government has to date never initiated policies seeking to address women's housing needs or land requirements."<sup>28</sup>

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<sup>28</sup> However, other laws may provide some degree of necessary protections; the National Land Policy Review of 2002 reports that before recent amendments to the *Deeds Registry Act*, "husbands alone could deal with the registrar where spouses were married in community of property" but that new regulations mandate that "neither spouse alone can deal with the registrar where a marriage is in community of property. They have to act jointly" (Government of Botswana, January, 2003 at 74). However, when a marriage is not in community of property, this protection does not apply.

Furthermore, because Botswana's Tribal Land Act was designed around anthropological research on the dominant majority Tswana tribe, it essentially functioned to entrench Tswana traditions and rules as "the" customary law of the land. It therefore, by omission, implicitly discriminates against those ethnic and tribal groups that have different residential, land use, and livelihood patterns and practices from the Tswana. White concludes that "there is also an undoubtedly ethnocentric view of what land needs are. These are generally held to be limited to the *motse* (compound), *masimo* (field) and *moraka* (cattlepost) of the traditional Tswana system" (White, 2000 at 12–13). The customary land rights of non-Tswana tribes have to date not yet been recognized in any statute or law or acknowledged in practice. Their territorial rights to areas for hunting, gathering, foraging and the right to exclude others from their customary lands remain unprotected (Ng'ong'ola, 1999). As will be explained below, this has had very negative ramifications for the security of non-Tswana peoples' land tenure security in Botswana.

### **3.4 Natural resource management**

Customary land management in Botswana has various interrelated parts: land allocation, land conflict resolution, and natural resource management. Under custom, land allocation was only part of a chief or headman's land-related duties; *how* the land was to be used was a key piece of customary land governance. Under custom, as described above, the chief and headmen were responsible for managing sustainable use of common resources, and making rules for grazing, hunting, and gathering within common lands. Moreover, in Botswana, the state is the custodial owner of all natural resources, managing them on behalf of the citizens of the country. Under the Tribal Land Act, this responsibility was allocated to the land boards. The Tribal Land Act and accompanying regulations therefore transferred both the land allocation powers and the zoning, land management and planning components of customary authority to the land boards.

Yet neither the Tribal Land Act nor its implementing regulations outline rules for sustainable land and natural resource use and management, or articulate procedures for zoning, land use planning, and land management policies in the tribal areas. Although the act contains a requirement that boards consult with various village-level and customary bodies in their determination of zoning plans (sec. 17§4 allows that "after consultations with the district council, village development committees, tribal authorities and

any other interested institutions, the land board may determine management plans, and their revision from time to time, for the purpose of assisting or giving guidance on the use and development of each land use zone within a tribal area"), 40 years of implementation has shown that this lack of detail has in practice led to the land boards not seriously taking on the management functions of the customary leaders. This has contributed to the adoption of unsustainable policies and practices concerning common lands held according to custom.

About half of Botswana's land is occupied and used communally (Government of Botswana, January, 2003 at 18). For many years, state officials in Botswana worried about potential degradation due to the then-prevalent theory of the "tragedy of the commons". To address this, in 1975, Botswana introduced the Tribal Land Grazing Policy (TLGP) - to be administered by the land boards - which was intended to remedy the perceived overgrazing and degradation of communal areas (and was also likely intended to foster private investment and economic growth). The basic assumption behind the TGLP was that there were vast tracts of "unused land" that could be ceded to large herd owners to establish commercial ranches, thus taking pressure off of the overcrowded and over-grazed communal grazing lands. The stated aims of the policy were to counteract and reduce rangeland degradation while simultaneously fostering sustainable commercialization of Botswana's livestock industry (Taylor, 2007 at 7; Cullis and Watson, 2005 at 7-9). There was considerable opposition - including public protest - to the TLGP, yet the state proceeded with its implementation (Cullis and Watson, 2005 at 7-9).

Under the TGLP, the government re-zoned tribal land into four areas: commercial land (within which individuals and groups would be granted exclusive rights); communal land (allocated and managed according to customary principles); reserved areas (which were unallocated lands to be held as a safeguard for the poor's future land needs); and "wildlife management areas" (in which cattle were permitted to graze but which were primarily reserved for wildlife) (Watson and Cullis, 2005).

Large areas of the communal grazing areas, re-zoned as commercial land, were allocated to wealthy cattle ranchers under 50-year leases.<sup>29</sup> Despite

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<sup>29</sup> Rent for these commercial leases was to be paid to the land boards (Mathuba, 2003). Cullis and Watson (2004) describe how, despite the availability of loans under the TGLP to allow

Article 17§4's suggestion that the land boards make zoning decisions in consultation with various local authorities, the results of the TLGP indicate that such consultations have been a vastly inadequate check against infringement upon the customary land rights of pastoralists and hunter-gatherers already using the lands suddenly zoned as "commercial" (Taylor, 2007; Adams, *et al.*, 2003). The 1991 National Policy on Agricultural Development (NPAD) exacerbated the situation; it allowed owners of boreholes to fence the grazing lands around their borehole, areas that often extended to 3 600–6 400 hectares. This gave borehole owners exclusive 50-year rights to all water and natural resources over the large areas surrounding their wells.<sup>30</sup>

As will be explained further below, these policies have had hugely deleterious impacts on both the sustainable management of communal areas, and on the customary land rights of minority tribal groups like the Basarwa (San). Also, because these policies were national in scope and established by the central government, they have served to erode the land and natural resources management decision-making powers of the land boards as set out in the Tribal Land Act.

### **3.5 Dispute settlement and governance**

#### **3.5.1 Appeals of land board decisions and conflict resolution**

Individuals may appeal the decisions of the land boards regarding: the granting of customary rights to use any land; the cancellation of the grant of any rights to use land; the imposition of restrictions on the use of tribal land; a change of user of tribal land; and the transfer of tribal land (art. 14). In addition, an applicant who has been denied a common law land grant may also appeal the decision (art. 27).

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less-wealthy ranchers to acquire commercial land, the large down payments required to secure a commercial lease precluded their allotment to all but the most wealthy. Meanwhile, the government never designated the planned "safety-net" reserved areas, and the stipulation in the TGLP that no single person could be allocated more than one ranch was never implemented, resulting in single individuals holding multiple large ranches (Cullis and Watson, 2005 at 7–9 citing Peters, 1994).

<sup>30</sup> Taylor (2007 at 7) reports that under TGLP, over 2 million hectares, or approximately 4 percent of Botswana's land area of 58 million hectares, were allocated for ranching in the late 1970s and 1980s. By 2005, NPAD had sanctioned the enclosure of an additional 2 million hectares, taking a full 8 percent of Botswana's land area out of the common pool.

The Tribal Land Act's accompanying regulations provide that rights of appeal may be accessed by a wide range of stakeholders: regulations, Article 14 permits that "any aggrieved person" may appeal a land board decision. Appeals can be lodged verbally or in writing. However, because of the amount and depth of information that must be furnished (in writing), the regulations specify that prospective appellants must be helped if necessary.<sup>31</sup> Such rules were designed to ensure that anyone, regardless of literacy, may enforce their rights of appeal. However, neither the act nor its regulations establish rules or guidelines on the factors determining *how* an appeal is to be ruled upon, or what kinds of evidence – customary or not – may be presented.

In the occasion of a local land conflict, subordinate land boards are the bodies of first review; they hear and adjudicate disputes concerning customary land grants or rights within their area of jurisdiction (art. 4§3). Individuals may appeal all decisions of the subordinate land boards to the main land boards. In the original 1968 version of the act, appeals of the land boards' decisions were to be made to the minister. Yet such a process created the potential for a serious conflict of interest; more than half of the members of each land board are either appointed or approved by the minister. To remedy this, the 1993 amendments to the Tribal Land Acts included Article 40, which provided the minister the power to establish separate land tribunals for appeals of certain land board decisions.

In 1995 Botswana passed the *Tribal Land (Establishment of Land Tribunals) Order*. Article 40§3 of the Tribal Land Act allowed then that "any appeal [of a land board decision] which is said to lie to the minister... shall be referred to the land tribunal for the area concerned for settlement." There is a right of appeal from a decision of a land tribunal to the High Court (art. 11). As a result of these amendments and the Tribal Land (Establishment of Land Tribunals) Order, what was originally in 1968 a three-tier appeals structure grounded in administrative bodies (with a fair likelihood of conflicts of interest) is today a four-tier structure that moves from administrative jurisdiction to judicial jurisdiction as the matter is appealed.

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<sup>31</sup> At the subordinate level, the board clerk is responsible for helping appellants frame and enter their appeal (Subordinate Land Board regulations, art. 16§1). At the board level, "where an appellant requires assistance in formulating or lodging an appeal, he may seek such assistance from the district commissioner of the area concerned (regulations, art. 12§3).

While the order does not affirmatively create a space for customary evidence, it does set out that "In hearing and determining an appeal, a land tribunal ...shall not be bound by the rules of evidence or procedure applicable in civil or criminal proceedings, and may disregard any technical irregularity which does not, and is not likely to, result in a miscarriage of justice" (Tribal Land (Establishment of Land Tribunals) Order, art. 6§3). This provision allows for some degree of informality and integration of customary practice within the proceedings; permitting a departure from strict rules of evidence may create the space for customary evidence that may be of equal or greater weight in land-related disputes.

One issue of note is that the chiefs and headmen were barred from being members of the land boards in the 1990's on the grounds there was a potential conflict of interest on those occasions when appeals against land board decisions were to be taken to the customary courts, over which some of the chiefs presided (Ng'ong'ola, 1992). However, nowhere in the laws or regulations are customary courts established as a valid body to which a land board decision could be appealed. Moreover, the *Tribal Land (Establishment of Land Tribunals) Order* created an entirely new judicial institution to ensure against conflicts of interest. Yet customary authorities were not reinstated to the land boards after the order was passed.

### 3.5.2 Control, governance, accountability and supervision

Under custom, chiefs and headmen lived in close proximity to the people they governed and interacted with them daily, which strengthened their accountability to the people. However, as explained above, the land boards and subordinate land boards are both centrally appointed and physically located quite far from communities. On this count, the Tribal Land Act has strayed far from customary checks on abuses of power; there are no mechanisms to ensure downward accountability to local villagers in either the Tribal Land Act or its regulations.

The Department of Lands coordinates the land boards' activities, provides financial and logistical support, communicates policy guidance from the central government, and monitors and oversees their operation (White, 2000 at 11). While the land boards have multiple reporting obligations to the central government, they have no reporting requirements to the communities whose lands they are administering. This gives rise to concern, in light of the



fact that land boards are charged with natural resource management, zoning, and making common law allocations to commercial enterprises within tribal lands. Makepe (2006 at 49) writes that "The structure of the land boards was intended to integrate local participation in land planning and administration. However, the powers and controls established under the act ensured that the management system remained largely centralized because board members were ultimately answerable to the minister."

In regard to zoning, land use management and regional policy formation, land boards receive policy guidance from the district council and the President of Botswana, who "may give to any land board directions of a general or specific character" (art. 11§1, 2). White (2000) writes that in practice, the Department of Lands, acting under the president, "has largely usurped the policy guidance function of the district councils." Financially as well, the boards are rigorously accountable to the central government. As collectors of fees and rents, the land boards are subject to a yearly audit. To this end, they must provide the general auditor and minister with a full accounting of all expenditures and revenues collected (regulations, art. 32). The local communities are not part of this process.

One further aspect related to governance of the tribal areas that perhaps elucidates government views on customary land rights is in the different levels of compensation paid for land that the state has compulsorily acquired under Articles 32 and 33 of the Tribal Land Act. Article 33, as revised in 1993, holds that in this event of compulsory acquisition, the individuals who have had their land expropriated "may be granted the right to use other land, if available, and shall be entitled to adequate compensation from the state for ...the value of any standing crops taken over by the state; the value of any improvements effected to such land, including the value of any clearing or preparation of land for agricultural or other purposes; the costs of resettlement; and the loss of right of use of such land" (art. 32§2). In contrast, Botswana's *Acquisition of Property Act* (Cap. 32:10) Article 16§1 allows that for compulsory acquisition of land held under a common law lease - even if on tribal land - is compensated more highly, according to its market value and other salient factors. The 2002 Land Policy Review (Government of Botswana, January, 2003 at 16) group noted that:

The present policy, under which holders of property rights under customary law on tribal land are entitled to receive less compensation than holders of common law lease rights on

state land and tribal land is unjust. A unified and fair system of land acquisition and compensation should be established that is applicable to all land and all people with property interests in land. ...The scope of compensation offered and the rights of those to be compensated under the *Tribal Land Act* should be extended to achieve parity with the provisions of the *Acquisition of Property Act*.... There is no justification for the continuance of two separate systems of land acquisition and compensation – one for user rights in tribal land and one for all other sorts of rights in tribal land, in state land and in freehold land. The operation of the dual system penalizes the poor and benefits the well off.

### **3.6 Implementation challenges**

Since its passage in 1968, Botswana has had the time and occasion to work to adjust the Tribal Land Act. The longevity of Botswana's Tribal Land Law and its periodic reviews and amendments offer an incisive view of how legislation designed to integrate customary practice up into statute and set out land governance systems according to customary paradigms must be flexible and adaptable to keep pace with social changes. For forty-two years later, Botswana has changed a great deal. Various factors have dramatically altered Botswana's rural areas. For example, in 1966, agriculture generated 40 percent of Botswana's GDP, as compared with 3 percent today. Similarly, 4 percent of the population lived in urban areas in the 1960's, compared to a roughly 65 percent urban population today. Over time, the Tribal Grazing Land Policy (TGLP) has deeply impacted how rural land is used and managed, and by whom. A land market is flourishing across the country. Customary land use patterns, livelihood practices and social systems, therefore, both look different and apply to far fewer people today than they did when the Tribal Land Act was passed.

Briefly, key changes to the Tribal Land Act since 1970 have included:

- Rules allowing for fencing of arable lands (allowing for exclusion of other people's animals even after harvesting);
- Replacement of the word "tribesman" with the word "citizen" in the text of the act;

- The introduction of common law residential leases and leases for commercial grazing and farming ventures for citizens of Botswana within tribal lands;
- The relaxation of restrictions on land allocation to allow allocations of land through inheritance and specific kinds of transfer without board approval;
- Allowance for the exchange of premiums for transfers of developed land between buyer and seller;
- The creation of the land tribunals; and
- The inclusion of rigorous professionalization, oversight and accountability mechanisms for board members and staff, among other changes (Nkwae, 2008 at 10; Mathuba, 1999).

In the years since the Tribal Land Act was passed, Botswana has also had the time to hold several commissions of inquiry and policy reviews. A first Presidential Commission on Land Tenure was undertaken in 1983, a second review and analysis took place in 1992, when the government instituted a Presidential Commission of Enquiry to review the land board's processes, and a third review was undertaken from 2001–2002, which included the Second Presidential Commission on Local Government Structure as well as a National Land Policy Review<sup>32</sup> (LPR). The reviews have highlighted a wide range of difficulties that have hindered the land board's successful operation. Some of these obstacles include: inaccessibility of board offices; lack of technical expertise and capacity; record fragmentation and information asymmetry; lack of accountability/corruption; difficulties enforcing board decisions; and problems of gender, ethnicity and class discrimination. These implementation difficulties are explored below.

### 3.6.1 Lack of technical expertise and professional capacity

The land boards are charged with a broad spectrum of tasks, including policy formation, zoning determinations, and sophisticated natural resource management. Because of the complexity and range of these tasks, the land

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<sup>32</sup> During the National Land Policy Review, a wide spectrum of stakeholders debated the implementation and impacts of the land policy and "concluded that Botswana's overall land policy and institutional framework are fundamentally sound and that, despite the profound changes witnessed by Botswana in the last two decades, the 1983 strategy of careful change, responding to particular needs with specific tenure innovations, remains valid" (Adams *et al.*, 2003).

board system necessitates the involvement of a range of qualified professionals such as land surveyors, land economists, physical planners, computer technicians, and lawyers who are conversant with customary and statutory land laws (Nkwae, 2008 at 14). However, this technical capacity has often been lacking among board staff. Writing in 1982, Machacha (1982), who was at that time working in the Lands Division of Botswana's Ministry of Local Government and Lands, explained that Botswana's land policies "have demanded technical expertise and sophisticated management, which land boards lacked drastically at the time of implementation." The Land Policy Review (Government of Botswana, January, 2003 at 134) summarized:

The land boards got off to a slow start in 1970. Since they were new institutions, their members, even the traditional authorities, were unfamiliar with their functions. It took many years, and substantial efforts to train and guide the members, before they were familiar with their duties. One problem was that many of the people most knowledgeable on local land matters were illiterate; conversely, many of the better-educated people knew little about the land, being better acquainted with urban issues.

The 1993 amendments to the Tribal Land Act directly addressed these capacity and staffing issues. Article 11 was expanded to include 28 new sections that comprehensively define the professional rules and composition by which land board officials must abide. These amendments essentially function to "professionalize" the boards; candidates are now required to meet minimum education requirements, and there are now rigorous training and supervision protocols, age limits, and strict consequences for improper action.<sup>33</sup>

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<sup>33</sup> Among many other mandates, the 28 new sections prescribe: The creation of a director of the land board service, who is a public officer and whose functions include the recruitment, transfer and promotion of land board officers, the administration of a land board service training policy, and overseeing the discipline, training and welfare of land board officers (art. 11D§2); A probationary period of two years after being appointed, after which the offer will either be confirmed, the officer dismissed, or informed of his or her mistakes and given an opportunity to correct them (art. 11H§1–5); Penalties for misbehavior, corruption, and the provision of false information, including disciplinary proceedings, salary withholding (art. 11R§1–5), fines or imprisonment (art. 11T, 11U); and the creation of a land board service commission who can investigate the work of land boards, including inspecting land board offices, examining documents, books or other records belonging to a land board, obtaining

However, even taking into consideration the changes to Article 11, fifteen years later the LPR's inquiry found that

Despite the technical and financial support provided by government there are many complaints about the inadequacies and inefficiencies of land boards. In the view of the 1983 Presidential Commission on Land Tenure "the financial, technical, staff, transport and other resources required to permit this institution to carry out its responsibilities were badly underestimated". This remains as true today as it was twenty years ago. The Report of the Second Presidential Commission on Local Government Structure in Botswana, in 2001, recorded serious public disquiet about the operations of the land boards but nonetheless recommended that they should remain in place (Government of Botswana, January, 2003 at 136).

Such capacity and resource constraints are exacerbated by the unwillingness of qualified professionals to serve on the land boards. Adams *et al.* (2003 at 136) report that land board membership makes heavy demands on members' time, including regular meetings and hearings, informal consultations, and site visits, which in many instances mean travelling long distances and spending several nights away from home. They write that "that active and capable people who might be eligible for land board membership [are] unwilling to serve unless they [are] compensated at a rate equivalent to the opportunity cost of their time." As a result, board members are now paid additionally for each specific task; the LPR (Government of Botswana, January, 2003 at 136) found that "members are paid a 'responsibility allowance', a 'sitting allowance' for each day spent on land board business, a subsistence allowance for each night spent away from home on land board business, and a daily meal allowance" Such allowances add up, and increase costs; if the allowances are borne by applicants, they effectively turn a system of free land administration into one that is quite costly.

Interestingly, at stakeholder workshops held in 2002 related to the LPR, the public indicated that they understood the systems and procedures of the land boards well, including the procedures for dispute resolution, and praised the

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required information from any land board officer, and otherwise undertaking any action that is incidental or conducive to the exercise of the commission's functions (art. 11Z).

land boards for their decentralized and democratic nature, as well as their accessibility. However, the public criticized land board staff's service, and called for both "improving staff capabilities in public relations" and "the development of a 'code of conduct'" for the land boards (Government of Botswana, January, 2003 at 139).

### 3.6.2 Record fragmentation, information asymmetries

Land boards have experienced difficulties with record keeping from the beginning of their operations. Strangely, because the act allowed each land board to establish its own operating procedures (ch. 7§1), each board was therefore left to devise its own record keeping strategies; a system that undoubtedly has led to increased confusion.

Various registry-related problems have hindered the validity of land allocations. First, while the land boards were charged with recognizing pre-existing allocations, they were confronted with the difficulty of having no way to differentiate between valid and false claims of pre-existing rights. In 1982, Machacha (1982) reported that "Anybody could lay claim on any piece of land on the pretext that it belonged to their parents and therefore to them under traditional inheritance laws, or that they were allocated the land by a deceased chief." Moreover, under the act, the impetus was on each family/individual to proactively begin the application process if they wished their land claims to be officially recognized. Besides creating a situation in which the boards were immediately overwhelmed with applications, this policy ensured that the land boards had no knowledge of the rights of those families or individuals who did *not* take action to formally register their land claims, leading the boards to sometimes assume the land was "open" for allocation, and, as described above, to allocate lands to applicants that are already held under custom by other families. The act failed and fails to help ensure against injustices that stem from these distances and disconnects.

Relatedly, as described above, when the land boards allocate common law grants to investors within the tribal areas, they must secure the consent of individuals with customary claims to those lands. However, the law does not clarify what counts as "consent". The act fails to set out: safety mechanisms to ensure that the consent is not coerced; guarantees that the individual will be properly compensated for the loss of the land and any improvements upon it; and procedures to make certain that the individuals or family living

on that land are aware that they have the right to deny the request. Furthermore, the act does not provide for a space or opportunity for the community as a whole to weigh in; when the common law grant requested is quite large or concerns land that the community relies upon for its livelihood or for the collection and use of necessary natural resources, this lack of opportunity for consultation or consent by the community amounts to injustice.

Such information asymmetry has created the need for on-going and continual participation in the process by the wards heads, which has allowed for a continued role for customary leaders in land allocation procedures. Nkwae (2008 at 14) describes how even recently, "Because of inadequate land records on land allocations the land board still relies on the knowledge of the ward heads for information about local land occupation." The LPR (Government of Botswana, January, 2003 at 138) also reported that although the precautionary check with the ward head was initially "not sufficient to minimize or prevent multiple, conflicting, disorderly and disputed allocations in densely settled areas" the regulations were subsequently revised "to provide for a clearer indication by the ward head whether the allocation proposed would conflict with existing land rights or current land use."

Second, The inter-ministerial Committee on Land Board Operations (Botswana 1977) found that "No land board can with assurance declare what land has or has not been allocated ... This weakness continues because there does not exist an adequate register to systematically record allocations [and] relate them to a particular piece of land and to a national map" (cited in Machacha, 1982). As a result, at times boards have been unable to keep track of what land they have already allocated. This may be due to the boards' methods of record-keeping, which have been poorly organized and therefore almost impossible to access. In 1982, Machacha (1982) reported:

Although there are records in land board offices, these records do not in any way help land boards because they cannot be referred to easily. The main problem is that of record fragmentation, so that when one traces the history of a single plot, one may have to go through more than ten sets of records. The tendency is for officers to be reluctant to refer to such records and, as a result, some cases which have been dealt with are replicated over time. Most people have come to realize this handicap and take advantage of it. For example, if a

person appealed and lost a case, he [can] wait for three to five years and resubmit the appeal, well knowing that the land board will not be in a position to know of its former decision.

In addition, Machacha (1982) described how, "sometimes land boards reject the suggestion that they ever allocated [a] plot until a certificate issued by them is produced." Machacha (1982) explained: "As a result, people can themselves extend or change plots without the land boards finding out." He reported that these instances caused people to doubt that the land boards even knew of their own allocations, leaving the system ripe for abuse.

Such problems related to lack of information and proper record keeping have not abated with time; almost 20 years later, Botswana's Presidential Commission on Local Government Structure (2001) summarized the lack of inventory of customary land rights similarly: "Land boards do not have easily accessible information showing what piece of land has been allocated to whom and for what purpose. They do not know how much of their land has been allocated and how much is still available for allocation. Of the allocated land, they do not know how much of their land is being utilized and how much is idling."<sup>34</sup> Similarly, the 2002 LPR (Government of Botswana, January, 2003 at 44) found that "On tribal land there are also numerous residential plots in almost every settlement as well as borehole allocations that have not been developed. Due to poor record keeping, the location of almost all of these plots is unclear to the land board. With time, the identity and whereabouts of the holder also becomes lost. All the urban villages have sprawled much further than necessary due to the large number of undeveloped plots..."

The 2002 National Land Policy Review (Government of Botswana, January, 2003 at 136), concluding that "one problem that has continued to severely undermine the system has been the failure to provide for the recording of all existing customary land rights" recommended various changes to improve access to information regarding land allocations, including: 1) increased gathering of on-the-ground local land information (including topography, size and location, building structures, names and number of occupiers,

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<sup>34</sup> One result of these difficulties is a lack of data. Adams *et al.* (2003) reported that in 2003, there was very little data to be found regarding the amount of land being used for customary purposes, the size of customary allocations, or the amount of land being used for communal grazing.



tenure arrangements); 2) increased use of the [already-existing] computerized Tribal Land Information Management System; 3) increased information-sharing both between land boards and between land boards and urban authorities to address prospecting and hoarding of land; 4) the creation and maintenance of digital maps; and 5) a requirement for more information to be collected and collated about the extent of the land parcel and the agreed sale price or lease rental" (Government of Botswana, January, 2003 at 54).

### 3.6.3 Difficulty enforcing board decisions

By shifting customary land management out of village and community structures and locating land boards far away from the communities they govern, the act cut off the local, personal ties and easy accessibility that could have made the boards downwardly accountable to the people whose land they were governing and undoubtedly has helped to undermine the social legitimacy that boards need to ensure that their decisions are respected and their mandates are followed. Writing in 2008, Nkwae asserts that "the land board system suffers from lack of legitimacy and authority which the chiefs and other tribal authorities enjoyed by virtue of their political positions". As a result, the boards have at times struggled to ensure that their decisions are followed, leading to a general sense of lawlessness and a weakening of the rule of law.

The lack of provisions for enforcement mechanisms in the Tribal Land Act does not make this easier. The Tribal Land Act did not originally provide for any enforcement mechanisms. As a result, people could simply choose not to heed a land board's decision. Previously, the only way for boards to enforce their own decisions was to take defaulters to court and petition for a court-ordered eviction - an expensive, time-consuming process. In 1992, Ng'ong'ola observed that "As experience has also now revealed, the authority of the boards in the discharge of this particular function is severely undermined by the absence of enforcement rules and regulations, especially since the boards did not inherit the political role and clout of their tribal predecessors. The boards lack the wherewithal to ensure that their decisions are respected."

*The Tribal Land (Amendment) Act, 1993* and the *1995 Tribal Land (Establishment of Land Tribunals) Order* remedied this. The tribunals replaced

the minister as the fora for appeals of land board decisions.<sup>35</sup> The order also gave boards the option of referring their cases to the tribunals, who do have enforcement provisions. Now, any land board needing or wanting to enforce one of its decisions may on its own refer a matter to the appropriate land tribunal, which will rule on the issue. (art. 40§5) However, due to lack of capacity, the boards have little ability to monitor whether their decisions are being complied with. As a result, unless the rights of others have been infringed upon and those individuals alert the land boards or file a legal action, the land boards may not know whether their decisions and mandates have been implemented or ignored. Writing in 2006, Makepe (at 50) relates that while the legitimacy, authority and institutional capacity of the land boards has increased over time, "the land boards' limited capacity for the sort of on the ground monitoring needed to enforce decisions and prevent unapproved uses of land poses perhaps the most important challenge."

#### 3.6.4 Lack of land boards' accountability

In 1991, the government established a Presidential Commission of Enquiry to investigate the land boards, which in its view were failing to supervise land dealings and transfers. Corruption and extra-legal dealings in land had become prevalent in peri-urban areas. The commission's report exposed failures in the integrity and competence of the land boards, which led to the resignations of the vice president and the Minister of Agriculture. Its report confirmed that there was a serious problem of "lawlessness" in some of the affected areas, manifested by "a complete disregard of the law and the role of land boards in the execution of land dealings" (cited in Ng'ong'ola, 1992). Such lawlessness included people claiming land that belonged to others and selling it to unsuspecting land seekers, and as well as people making unsubstantiated claims that virgin, abandoned, unused or unoccupied land was once tilled or occupied by their forebears, and thus should be granted to them (Ng'ong'ola, 1992).

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<sup>35</sup> The LPR (Government of Botswana, January, 2003 at 27 and 173) found that creation of the tribunals was a welcome development and suggests that a stronger land tribunal system should be developed for appeals of land board decisions on a range of land-related matters. It argues for this both in efficiency grounds, but also on the grounds of administrative justice; principles of "openness, fairness and impartiality will be met by open hearings before an impartial body which gives reasoned and published decisions rather than no hearings or closed hearings before officials acting on behalf of a minister."

Discussing the situation of accountability, the 2002 Land Policy Review found that "The system is not coping with the pressures of rapid urbanisation on state land in urban areas and has all but broken down on tribal land in peri-urban areas, where there is mounting illegality" (Government of Botswana, January, 2003 at 23). It concluded that, "A choice needs to be made between: either bringing the land boards into a clear and direct line of authority and control under the [Ministry of Lands], or decentralizing decision making and making them more accountable to citizens in the areas they serve" (Government of Botswana, 2002, at xvii). This is increasingly important in the context of Botswana's growing land market; Nkwae (2008 at 15) writes that as land values rise, "The integrity of the land board members is often called into question."

### 3.6.5 Gender equity and women's access to land

Studies have found that as a result of the lack of explicit provisions in the Tribal Land Act that protect and enforce women's land rights (described above), the land boards often minimize or overlook women's land rights. According to Kalabamu's research, "Many land boards do not allocate land to married women without the written consent of their spouses," while "the same rules are not applied when allocating land to married men" (Kalabamu, 2005). Adams *et al.* (2003 at 10) report that unmarried and divorced women with children lack access to productive land, and that land boards at times refuse to allocate land to married women in their own right, on the grounds that under customary law, husbands have "marital power" over all household assets. Furthermore, the 2002 LPR cites a 1998 Botswana Department of Women's Affairs (WAD) report as finding that:

Many land boards conceded that in practice, they did not allocate residential and business plots to married women without the written consents of their spouse, but the land boards did not demand the same from husbands. According to these land boards, traditionally a woman could not request a plot independently from her husband, and to allocate her one would be seen as divorcing the couple; some land boards justified the practice by saying that there was a shortage of land so that each couple should be allocated only one plot (Government of Botswana, January, 2003 at 43).

The LPR concludes that while various laws have been passed to try to remedy gender inequities in land rights, "the constitution exempts customary law from provisions as to discrimination so that customary tenure rules still quite lawfully discriminate against women" (Government of Botswana, 2002 at 61). In response, it suggests that in order to strengthen land rights for women, the government should support policies that: "Educate women about their rights to hold land so that they can assert those rights and make informed choices; remove all *de jure* and official barriers to women's ability to acquire land; address both direct and indirect discrimination in the use or occupation of land and in all decision-making forums; [and] recognize and address differential treatment of women to ensure equal outcomes in land tenure" (Government of Botswana, 2002 at vii).

The LPR also recommends that "action needs to be taken to enlighten land board members and staff on the rights of women and the land boards' duties in addressing them." To this end

Clear guidelines should be drawn up to assist land boards to understand and deal equitably with married women's land rights under the Tribal Land Act, and also to clarify the rights of all women, married or unmarried, to be allocated land in their own capacity. The land boards should be guided as to the precise nature of women's land rights whether they are single, cohabitating or married whether in or out of community of property (Government of Botswana, 2003 at 44 and 150).

Kalambu (2005) argues that Botswana must pass laws and policies that explicitly provide women with rights to hold land and property in their own right, as "gender-neutral policies, however persistently pursued, do not result in women's empowerment." Rather, "there should be positive discrimination in favour of women especially those who are vulnerable and/or disadvantaged by existing cultural norms, practices and poverty. For example, the LPR (Government of Botswana, January, 2003 at 150) recommends a review of marital property law, the reform of inheritance laws, the reform of bank's discriminatory lending practices and advises that "the statute should lay down an express requirement that spouses should act together on all occasions in transactions involving the immovable property of the joint estate."

### 3.6.6 Access to land by non-Tswana tribes

As described above, Botswana's Tribal Land Act has no provisions that extend formalization of customary rights to other, non-Tswana ethnic groups. This has meant that the Tribal Land Act is inherently discriminatory against non-Tswana tribes, most particularly against hunter-gatherer groups like the Basarwa (San) people. For example, because specific rights of hunting and gathering are not recognized under either Botswana's statutory law or in the dominant customary law of the Tswana, the Basarwa's customary rights to hunt and gather over large tracts of land have never been legally recognized.

This has meant that vast territories that the Basarwa have historically depended on for their livelihood and survival have been granted to private ranchers, who have fenced these areas and impeded the Basarwa's access. As a result of the TGLP, "Large numbers of [remote area dwellers] have been dispossessed of their land within living memory, mainly by alienation of land for cattle ranching" (Government of Botswana, January, 2003 at 80). In many instances, these groups can no longer move across the lands upon which the natural resources they depend upon for their livelihood and survival are located - lands that they have used for generations and to which they arguably have customary rights (Adams *et al.*, 2003). Although these land claims are protected under the Tribal Land Act, it has never been invoked to protect them.

The Land Policy Review found that:

The Tribal Grazing Land Policy brought to the surface the insecurity of tenure faced by minority ethnic groups ...[in that it] assumed that there were extensive areas of tribal land that could be zoned and fenced for commercial ranching, but it emerged that the veld was used and occupied by ... Basarwa. In some cases, land boards ... drew up appendices to the lease to be given to prospective ranchers, spelling out in detail the rights of [Basarwa] ranch residents to continue to hunt, gather, graze livestock, cultivate fields and even send their children to school. However, the Attorney General ruled these appendices illegal. Ranch lessees were given exclusive rights to the land (Government of Botswana, January, 2003 at 78).

The LPR relates how the Attorney General's "decision emanated from two legal opinions: the first being the notorious *Re common law leases* which stated that 'the true nomad Masarwa (sic) can have no rights of any kind except rights to hunting'; and the second [legal opinion] that only land rights granted in terms of certificates of customary grant were protected from enclosure by commercial leases" (Government of Botswana, January, 2003 at 79).<sup>36</sup> Various commentators have pointed out that the Attorney General's ruling was unconstitutional, in that Section 8(1) of the Constitution of Botswana protects and guarantees "property of any kind" and "rights or interests in or over property of any kind" and that "the customary land rights of the Basarwa are rights in or over property and should not have been extinguished without due process, as required by the constitution" (Government of Botswana, January, 2003 at 79). The land boards, meanwhile, have granted smaller land allocations (than those given to other groups) to those Basarwa who formally apply for them on the grounds that they are not *able* to clear or cultivate larger pieces of land (Adams *et al.*, 2003, citing Mitchelsen, 1995 and Gulbrandsen, 1994).

Moreover, the establishment of national game reserves has entailed the relocation of San from their lands. In the 2006 case of *Sesana, Setlhobogwa and Others v. Attorney General*, to ensure that the Basarwa were successfully removed from their lands located within a reserve, the government decided to terminate the provision of vital human services such as water, food rations and healthcare in the area. It also withdrew the "special game licenses" that had exempted the San from the legal prohibition to hunt in the reserve, and prevented the San from entering the reserve without a permit. Compensation for the loss of their homes and resources was never qualified or provided, despite explicit provisions for compensation in the event of compulsory land acquisition in the Tribal Land Act (ch. 33). Fortunately, the High Court of Botswana ruled in 2006 that such policies were illegal and that the community should be allowed to return (Adams and Palmer, 2007 at 5).

Taken together, a clear pattern of institutionalized racism emerges. This is underlined by the fact that the Government of Botswana has taken few steps

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<sup>36</sup> This second ruling is quite ominous; it appears to hold that customary rights *must* be registered to be respected; despite longstanding customary claims, if the land holders have not followed the administrative procedures to acquire a Grant of Customary Land Certificate, then their land claims are void. As such, it appears that over time, the Tribal Land Act's implicit allowance that unregistered customary land claims are as enforceable as registered claims has been eroded.

to remedy the inequities entrenched in the law, or to adopt less discriminatory policies and practices. Other than changing the word "tribesmen" to "citizens of Botswana" in the text of the act, it has not amended the act to include protections for secondary land rights such as rights of way that could strengthen the land rights of hunter-gatherers. Nor has it sought to widen the definition of "customary" land rights to include provisions that could apply to the practices of non-Tswana tribes.

The LPR suggested a variety of actions to redress these inequities, including the provision of immediate "redress for already-dispossessed communities" as well as that "future amendments to the Tribal Land Act should provide formal recognition of the customary land rights of minority ethnic groups." It called for immediate legislative action to both protect the San from evictions related to common law leases for cattle ranchers as well as to clarify the land rights of San "squatters" on lands that they used to have customary rights to but are now private cattle ranches (Government of Botswana, January, 2003 at 12 and 81).

The Land Policy Review also advised that the government should create policies that give minority groups greater control over land management arrangements, recognize minority rights to "pursue a different life style and maintain a distinct culture from that of the majority" and promote the economic and social empowerment of all citizens. It recommended that in those areas where the San and other non-Tswana tribes formed a majority, subordinate land boards should be created that consider the customary practices of the groups living in the region, and that local community structures should be established to regulate the use of the land and manage natural resources, including water (Government of Botswana, 2002 at vii–viii and January, 2003 at 12 and 81).

Interestingly, during the Land Policy Review's meetings with various stakeholders, it was noted that "the issue of the land rights of marginalized groups was the most sensitive and difficult which the LPR had to address. Some strong opposition has been voiced to the proposals [extending stronger land rights to minority groups]" (Government of Botswana, January, 2003 at 81).

### 3.6.7 An emerging land market

Botswana has slowly been moving towards a privatized land market. State officials have both implicitly and explicitly supported this transition. Today land sales – or the exchange of premiums between buyer and seller – are allowed. To allow for a land market within Botswana, where under the Land Act all land is legally held by the land boards in trust for the people, lawmakers, judges and other officials have had to go to great lengths to (re)define "custom" as allowing for private ownership and customary land claims as akin to freehold title.

In the early 1990's, the case of *Kweneng Land Board v. Kabelo Matlho and Others* challenged the land board's powers under Article 10, which dictates that "All the rights and title to land in each tribal area ...shall vest in the land board." In this case, the land board was trying to evict Kabelo Matlho as an "illegal" occupier, and in response, Matlho joined as a third party a man named Pheto Motlhabane, who he claimed had transferred the land to him. It was clear that the land had been in Motlhabane's family for generations, and had acquired it under customary law before the land boards were created. However, the land board argued in its application for the eviction order that pursuant to Article 10, it had the right of "ownership" over the particular piece of land and must therefore moderate who was occupying it.

The Attorney General of Botswana submitted an *amicus curiae*, arguing that under Article 10 (1) the tribe is the "residual owner" of tribal land which for the time being is vested in the land board, and that Article 10(2) allowed that land and water rights held by a person in his personal or private capacity remained "vested in, or owned for the time being, by the private person" (cited in Ng'ong'ola, 1992). The Attorney General also called in seminal anthropologists with expertise in Botswana's customary practices to testify that customary law did recognize "private ownership" of wells and water rights, although not of grazing land and that it also recognized possibilities of transfer, by donation or inheritance, of residential and arable land. Ng'ong'ola explains that the Attorney General concluded that "customary ownership is the equivalent of unregistered freehold title subject to the usual planning and land use restriction." Thus, according to the Attorney-General's submission, the third party who had inherited the land from his forefathers was its owner, and he was at liberty to dispose of it to Matlho.



The court accepted the Attorney General's argument and ruled in favour of *Matlho*. An appeal of the case upheld the decision. The appeals judge, writing for the majority, ruled that "whatever the customary law might have been in the past ...the law had apparently developed to permit of private ownership by tribesmen of tribal lands. ...." (cited in Ng'ong'ola, 1993). Ng'ong'ola makes the point that both the Attorney General's argument and the decisions passed down from the courts were political moves, motivated by government officials' desire to move Botswana more quickly towards a private land market.

Interestingly, it appears to have already been moving in that direction in the tribal areas; the 1992 Presidential Commission of Enquiry review culminated in a white paper ("White Paper on Land Problems in Mogoditshane and other Peri-Urban Villages (Republic of Botswana, 1991 and 1992)), which "recognized that to all intents and purposes, what persons who were granted rights in tribal land were getting was a lease and not some traditional customary right" (Government of Botswana, January, 2003 at 34). The review concluded that, "by whatever name called and in disregard of conceptual niceties, a market for developed land was now operative in tribal land in which individual landowners were buying and selling rights to land" (Government of Botswana, January, 2003 at 34).

To underline the *Matlho* decision and begin to formalize the growing land market, the 1993 amendments to the Tribal Land Act allowed for certain land transfers without board approval, including transactions of developed land, devolution of land upon inheritance, and sale of land to a Botswana citizen (art. 38§2). Adams *et al.* (2003 at 7) summarize these changes as making possible "the further extension of the market in tribal land."

Indeed, the *Matlho* decision and subsequent 1993 amendment successfully opened the door for a flourishing land market. The National Land Policy Review found that in comparison with other countries in the region, "facilitation of the land market is relatively advanced in Botswana. Customary tenure has been relatively successfully integrated with a modern and democratic system of land administration." Between 1992 and 2001, the number of annual market transactions of state and freehold land had increased by 56 percent (Government of Botswana, 2002 at 10 and 13).

The review concluded, however, that this opening up of land markets and the "high demand for land in and around urban areas in Botswana has led to

a rise in illegal and extralegal transactions in adjacent tribal land. Many of these transactions fall between customary and statutory law, conforming to neither" (Government of Botswana, 2002 at 10). Unfortunately, by amending the Tribal Land Act to provide for land sales yet failing to include or create protectionary mechanisms to ensure against bad faith transactions, Botswana's Tribal Land Act and related court decisions have now created an unregulated land market that may have various negative consequences, such as distress sales and unjust transactions between individuals with power and information asymmetries.

In response to this problem, the Land Policy Review recommended policy changes to reduce illegal transactions and protect the right of disenfranchised populations such as women and individuals living with HIV/AIDS, who are becoming further disenfranchised as the land market emerges. To meet the rising demands created by a flourishing land market, the review also recommended various changes to the Deeds Registry, such as computerization, standard forms for both land sales and leases, simpler local document registration systems, and "clearer and more rigorously applied land board procedures for registering and recording transfers of customary grants and leases" (Government of Botswana, January, 2003 at 14).

### 3.6.8 Elite capture and inadequate land and natural resource management

The Tribal Grazing Lands Policy (TGLP) and the National Policy on Agricultural Development (NPAD) have individualized much of what was formerly communal land and allowed elites to claim and fence off extensive areas that were once shared by local communities. As a result, a small number of wealthy families today control vast areas of Botswana's arable and grazing land. Such policies have drastically reduced the grazing land available to small-scale and subsistence herders within tribal areas and led to the growth of a landless rural underclass (Adams *et al.*, 2003).

Even by 1982, Machacha (1982) was concluding that, "While the initial intent of the policy was to benefit all, recently the policy has been labelled as one for the rich. This is because poorer people are being forced out of their traditional areas to make room for richer commercial ranchers." Furthermore, White reports that while in theory all citizens of Botswana have equal access to land in line with the customary edict that all individuals

are entitled to land *according to their needs*, in practice the land boards have instead been allocating land *according to perceived ability to use it* (as in the example of the Basarwa, above.) Wealthy individuals who can demonstrate the capital and resources to make full productive use of large areas of land are allocated large areas of land, while the poor (including widows, disabled individuals, and the landless, among others) who lack the tools, resource and assets to use the land fully are "effectively denied land" (White, 2000 at 12). He writes that "One of the most frequent complaints against the land boards is that they allocate land inequitably, that they favour those with influence and many cattle, and ignore the land claims of those who are politically inarticulate and have few animals" (Adams *et al.*, 2003 at 5).

The main losers have indeed been poorer households in the rural areas. Moreover, contrary to policymakers' goals, the TGLP has furthered the degradation of the communal grazing areas.<sup>37</sup> This is because ranch owners, as citizens of Botswana, retained their rights to use the communal areas for grazing of their animals. They thus had *dual* grazing rights, using the communal areas during the wet season and their exclusive ranches during the dry season and in times of drought. Others "grazed out" their commercial ranches and then moved their cattle to the communal areas. Meanwhile, according to Taylor (2007 at 7) the "unused" land allocated for the commercial ranching scheme was exactly that land that the *communities* has used as a safety net in dry seasons and drought; now, with the poorer community members' cattle forbidden to enter this land, the remaining communal grazing areas were degraded and over-grazed to new and critical levels. Taylor (2007 at 4–5) summarizes: "Diminishing access to land in Africa...is a fundamental constraint to effective environmental management and poverty reduction." In its silence regarding how the land boards should

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<sup>37</sup> Adams *et al.* hold that the theories of rangeland ecology preservation that under-girded the TGLP were proven incorrect; rather, the customary cattle post system is "economically and biologically more efficient, under Botswana conditions, than fenced ranches" (White, 2000 at 11). Similarly, noting that neither a cost/benefit analysis nor an Environmental Impact Assessment have ever been undertaken regarding these policies, the LPR conclude that "scientific advances over the past 20 years suggest that concerns over degradation are overstated. There are biological and economic feed-back mechanisms which protect the land from irreversible damage. High stocking rates have been demonstrated to be sustainable in Botswana. As a result, the communal areas are highly productive and support large numbers of people for whom there are no alternative livelihood opportunities in the present state of development of the economy" (Government of Botswana, January, 2003 at 19).

manage land and natural resources within their jurisdiction, the Tribal Land Act offers no protection against such unsustainable practices.

Taylor argues that Botswana's policies have resulted in the erosion of the strength of traditional natural resource management systems and are exacerbating rural poverty. He writes (2007 at 7–8): "The progressive fragmentation of previously common rangelands into private parcels by a growing number of agrarian capitalists, elites, state agents and multinational investors is therefore likely to have profound impacts on the ability of households to get out of, or keep out of, poverty. Similarly, Cullis and Watson (2005) conclude from their analysis of the commercialization of the common grazing areas that Botswana's land boards, rather than preserving customary systems and safeguarding every individual's customary right to have land adequate for their needs, have actually exacerbated inequities, disproportionately benefiting the elite at the expense and impoverishment of the poor and disenfranchised members of society.

Describing how Botswana's land boards have been used as a model for joining customary and statutory land management systems, Woodhouse argues that there should be concern that "Botswana's land boards have presided over widening inequity of access to grazing and privatization of rangeland" and "it is worth noting another respect in which Botswana's land boards fall short as a model for governance of natural resources. This is the failure to promote meaningful dialogue between resource users and government officials to explore what constitutes "sustainable" land and water use, resulting in conservative land use regulations that stifle local initiative" (Woodhouse, 2003 at 1715).

Part of this is due to what the LPR terms a "management vacuum"; although the Tribal Land Act expressly grants land boards the power to administer and manage communal lands, the boards have only taken on customary leaders' role as land *allocators*; they have left aside chiefs' arguably more important role as land and natural resource managers. Furthermore, while large areas of Botswana continue to be used communally, "the powers of management over these areas have been taken away from the communities which occupy them and vested in remote institutions (which do not exercise them)" (Government of Botswana, January, 2003 at 19). The LPR found that "the consequence of this management vacuum is that local communities now have no say in or control over the allocation of land within their area or the

use of the natural resources derived from that land. Legal power over the allocation of land and the use of natural resources now resides with a number of official institutions, all of which are distant from the community level and none of which are more than remotely accountable at the local level" (Government of Botswana, January, 2003 at 108–109). It concluded that the "National Land Policy should encourage the further democratization of the allocation and management of land and natural resource," and recommended that the Tribal Land Act should be amended to explicitly recognize and protect community-based property rights (Government of Botswana, January, 2003 at 109).

On the grounds that, "it is imperative that the communal area should be better managed, which requires that communal rights are made more secure," the LPR suggests: 1) legal recognition of the existence and validity of community-based property rights; 2) greater involvement by communities in decision-making processes that have a direct bearing on their livelihoods; and 3) the strengthening of local institutions and the organic evolution of customary land law in accordance with changing land availability and local needs, so as to place resource management in the hands of resource users" (Government of Botswana, January, 2003 at 109).

The Community Based Natural Resource Management (CBNRM) model may create a path back toward the sustainable communal land use practices of Botswana's past. CBNRM initiatives have been pursued by communities at the local level for the past 15 years and come the closest to any kind of legally-established customary land management activity in Botswana. CBNRM is a conservation and development natural resources management *strategy* wherein the state devolves or decentralizes management of natural resources within a specific area to the community level. The approach works to empower communities to sustainably manage and use local natural resources for long-term social, economic and ecological benefits (Botswana draft CBNRM Policy, 2004 at 1). What is transferred is not ownership, but management and use rights. Generally, to be allocated these rights, a community must establish itself as a legal body - often a trust - and register itself formally with the land boards. The boundaries of the community are then formally delimited, and the community must adopt bylaws, form a management committee, and complete other processes that organize its financial and legal management procedures. The community then has the right to exclude non-community-members from using the natural resources contained within its boundaries, and may enter into legal contracts without

outside investors to better exploit or profit from the natural resources within its bounds. The profits from these partnerships are then distributed to community members.

In one example of the positive implications of CBNRM in Botswana for promoting and strengthening customary land management systems, Taylor (2007 at 12) reports how, during discussions among the target communities of how best to manage their resources under a pilot CBNRM scheme, "Many of the middle-aged to elderly generation expressed strong sentiments for reinstating the community-based systems of regulation that they were familiar with when younger." The communities in the project were looking backwards to custom to determine how to most sustainably and profitably manage "their" resources. In this way, CBNRM initiatives may allow a return to a time when communities felt more empowered to carefully use local resources. It is arguable that such a return to customary practices in communal grazing areas will help to counteract the degradation of the past few decades.

In Botswana, communities establishing CBNRM associations or trusts in Botswana can apply to the land boards for fifteen-year common law leases. When a community has been granted a lease, it then has the exclusive right to use the resources that are specified in the lease. Subject to the conditions of the lease, the community can then charge access fees or sublease/transfer some of these rights to third parties without the permission of the land board (who is the "owner") (Final Report of the Review of Community-Based Natural Resource Management in Botswana, September 2003).

CBNRM's model of allowing communities to apply for common law leases over vast tracts of land also offers a defence against the further encroachment of commercial cattle ranches into communal range lands. Taylor (2007 at iii) writes that "for states unwilling to devolve authority over land even further and accord full recognition to customary rights...CBNRM [is] one route to promote sufficient recognition of collective rights. Taylor (2007 at 4–5) suggests that:

In the absence of legal systems that acknowledge direct community ownership of land, the granting of management rights may be sufficient recognition of the legitimacy of community control to protect such lands from allocation to

outside interests. If CBNRM approaches are able to become widely established in the semi-arid production areas of Africa, it may play a significant role in protecting the poor from large-scale privatization of previously common-pool resources.

However, it should be noted that the land boards are not obligated to lease Tribal Lands to communities seeking to start CBNRM schemes. Rather, the communities must *compete* with other potential users also bidding for common law leases over the same area. At times, the land boards have denied community applications for leases (White, 2000). Taylor (2007 at 2) reports that 14 years after Botswana's launch of its first CBNRM projects in 1993, "the legitimacy of allowing local communities to control, and derive commercial benefits from, natural resources in their vicinity has been widely questioned by policy makers in Botswana" while privatization of cattle ranches continues to receive wide government support.

The LPR (Government of Botswana, 2003 at 109), suggesting that community-based property rights should be recognized as a type of private property rights, also called for the government to "consider the application of democratic, community based management principles to all land-use activities in communal areas." Through a comprehensive and well-resourced CBNRM policy and implementation plan, Botswana may have the opportunity to align its natural resource management strategy with its expressed land tenure policy; rooting both in custom but allowing space for local development and investment.

### **3.7 Analysis**

Botswana's system of land boards has been touted as a model of land administration in Africa that gracefully combines modern governance with customary practices. Indeed, Botswana's Tribal Land Act does some things very well. Its original configuration of the land boards elegantly balances power between communities, the central state, and local customary authorities. The amendments made to professionalize land board staff may serve as a good example of legislation that improves local or regional land governance and administration. The land boards administer land both under customary and statutory tenure, and thus have over time managed to shift the boundaries between the two in a fairly organic way, allowing for greater harmonization. Similarly, the Tribal Land Act has also created the space for a relatively seamless transition from customary tenure to a fairly-well

functioning private land market while maintaining an important role for ward heads in the process.

In analysing the Tribal Land Act's implementation difficulties, it is important to take into consideration Ng'ong'ola's (1999) reminder that:

A land board system must be capable of accommodating the natural evolution of land tenure without perhaps seeking to engineer, accelerate, or, indeed, obstruct the process. From these various experiences it must also be appreciated that the introduction of a land board system must be seen as a process, not an event. It must be seen as continuing process of land tenure reform that will require periodic adjustments and reorientation.

It may be said that the Tribal Land Act, as originally written, was indeed a legal instrument "capable of accommodating the natural evolution of land tenure without perhaps seeking to engineer, accelerate, or, indeed, obstruct" it.

However, an examination of the Tribal Land Act's implementation and subsequent "periodic adjustments and reorientation[s]" leads to the conclusion that despite a relatively good law that indeed could have worked excellently - with various amendments over time to 1) provide for increased protections for vulnerable groups, 2) allow for the slow emergence of a formal land market, and 3) align with improved surveying, mapping and cadastral technologies - the law has more or less fallen victim to political manipulation. Over the years, rather than methodically and carefully amend the Tribal Land Act to ensure increased fairness, equity, prosperity and sustainable, integrated development in the tribal areas, government officials and politicians have interpreted the law to allow for greater state control, and to facilitate the enrichment of the elite. Many of the implementation difficulties could have been remedied by amendments that were not made (despite various opportunities to do so) or could have been avoided by less deleterious policy decisions. In the final analysis, one may conclude that the Tribal Land Act itself - and the land board system - is quite a good law/system as originally conceived and that rather, it is the "process" that has been to its detriment.



As it was intended by the legislators, the Tribal Land Act was not supposed to significantly change the way that land was administered and allocated in the tribal areas. It merely substituted land boards for chiefs and headmen (giving chiefs a position on the land board to ensure that the boards were administering land according to custom), and shifted the basic functions of the customary authorities to the land boards. The boards have jurisdiction to allocate land, manage the use of natural resources, administer communal grazing areas, rule on the sinking of wells or boreholes, review local land conflicts, and generally govern and create policies for land and natural resources in their region, as per customary land and natural resource management practices. As under custom, the land boards are mandated to consult with local ward heads before allocating lands. Under the law, all existing customary land claims were automatically formalized, and these rights are secure and enforceable, given freely, and transferable, assignable, and permanent.

However, over the past 40 years, through implementation and amendment, the Tribal Land Act has introduced changes that significantly depart from the basic tenets of custom, arguably not to good ends. Putting aside issues of technical expertise, capacity, record fragmentation and difficulties enforcing land board decisions, the most problematic aspects of the Tribal Land Act and its implementation over time are related to the following issues.

First, the de-democratization of and the removal of customary authorities from the land boards, which has eliminated any sense of the board's downward accountability to the people whose lands they manage. The land boards' original configuration - one third of members were affiliated with the chief and his authority, one third were locally elected by the people, and one third were appointed by the Minister of Lands - built a solid system of checks and balances on the abuse of power by any one faction. As designed, this was as optimal a solution to legal pluralism and downward accountability in formal land administration structures as is possible. Yet by removing the customary authorities from the land boards and amending the local elections for board membership (by giving the minister final selection of the various candidates that have been elected), close to 100 percent of all board membership is now controlled by central government. Moreover, by shifting customary land management out of village and community structures and locating land boards oftentimes far away from the communities they govern, the act cut off both the local, personal ties and easy accessibility that could

have made the boards downwardly accountable to the people whose land they are governing

Second, the land boards' failure to fully take on the "management" side of customary land administration, has contributed to the unsustainable and inequitable management of the land and natural resources under their domain. While the land boards are charged with zoning and management of their land within their jurisdiction, land management policies have more often been driven by central government (who have had the promotion of private investment as a central motive) than by local need for sustainable and responsible use of natural resources. Under the TGLP and NPAD policies, the land boards have overseen the allocation of vast tracts of communal grazing land to private cattle ranchers. As under custom and the Tribal Land Act, these common properties belonged to the peoples living and making their livelihood upon them, yet the customary owners have not been compensated. Meanwhile, these communal grazing lands - protected for centuries by customary rules that ensured sustainable use and guarded against overgrazing - have since become degraded by overcrowding and over-use.

Third, Botswana's Tribal Land Act fully fails to include protections for women's rights to land. The longevity of the act and the date of its original adoption is no excuse; the act has been amended as recently as 1993 and could have been amended since. Applications for customary land grants may be put in the name of the male head of household only, and the law does not include provisions that allow family members joint or derivative rights in the land. Lawmakers could have included a few simple oversight mechanisms to ensure that the land rights of vulnerable family members or groups were protected under the act, yet have not done so, and this continues to be reflected in the land board officials' gender-insensitive behaviour when processing women's land claims.

Fourth, the Land Act's failure to explicitly protect the land and natural resource rights of non-Tswana tribes has allowed the space for government actors to discriminate against minority groups; even as late as 2006 the state was forcibly removing the San from their lands, sometimes on the grounds that other "customary" rights applied in the area (Adams and Palmer, 2007 at 5; Fitzpatrick, 2005 at 464). However, in at least one instance (*Sesana, Setllobogwa and Others v. Attorney General*), despite the act's lack of adequate

protectionary provisions for the land rights of vulnerable groups, the strong rule of law and independence of the courts in Botswana have meant that the act can be used by an activist judiciary to protect the customary land rights of all groups. In this way, Botswana is a good example of how national case law can augment and address the gaps in legislation.

Fifth, customary land rights have been weakened by both changes to the law and its judicial interpretation. Case law and various government decisions have held that unregistered customary land claims are not to be protected; notably, even when a land board took steps to try to protect the land rights of the people in its area, Botswana's Attorney General overruled these efforts and ruled that ranch lessees had exclusive rights to their land and could bar the entry of the land's previous residents and users. In addition, the 1993 amendments' inclusion of more rigorous provisions for cancellation of land grants, on the vague grounds that "the land has not been cultivated, used or developed to the satisfaction of the land board" may serve to weaken customary land rights in that dispossession may rest entirely on the subjective opinion of land board officials.

Interestingly, the LPR concluded that, 35 years after its passage, the Tribal Land Act no longer was a particularly "customary" one. It finds that as a result of changing the words "tribesmen" to "citizen" in the 1993 amendments, "the tribal basis for land allocation by land boards was done away with...[and as a result] the customary law basis for the exercise of powers by the land boards was undermined." In this process, "the system changed from tribe-based local land allocation system to a citizen-based national land allocation system" (Government of Botswana, January, 2003 at 24). In light of this, the LPR therefore recommends something particularly fascinating: the further codification of custom. It explains:

One of the first principles of an efficient and equitable system of land management is that the basic rules for acquiring, holding and disposing of land be transparent, known about and objective in their legal phraseology and operation. Customary law, as the law governing the *substance of land allocation*, needs to be reformed by a statutory code (i.e. a handbook on [customary] procedures) which spells out for all citizens the substantive ground rules applicable to allocation and management, in the same way as statutory rules dealing with the *procedures* applicable to all applications for tribal land

have replaced local customary rules on the matter (Government of Botswana, January, 2003 at 24, emphasis added).

However, despite the various excellent suggestions made by the Land Policy Review, it appears that in the seven years since the LPR's final report, little has been done to implement its recommendations. One of the authors of the report recently explained that "Sadly, there has not been much action on this front. We have long been awaiting a Botswana Government Paper, i.e. the government's response to the Land Policy Review. ...The LPR view is that the Tribal Land Act is now well overdue for revision and possible incorporation in a unified law." Indeed, the LPR suggests that, going forward, it is now time to do away with the various divisions between the kinds of lands and the laws that govern them in Botswana, and to draft and adopt a unified law that addresses all lands.<sup>38</sup>

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<sup>38</sup> It advises that "The ... preferable solution would be to recast all [relevant] existing land laws ... into one new land act divided into chapters dealing with tribal land, state land and land ownership by non-citizens. A further chapter would deal with the land tribunal system. Common sets of definitions and of general and miscellaneous powers applicable to all land matters would also be part of the new act. Common rules applicable to common matters could be provided for in the law. The whole would be a coherent, comprehensive and integrated statute dealing with land contained in one document" (Government of Botswana, January, 2003 at 173–174).