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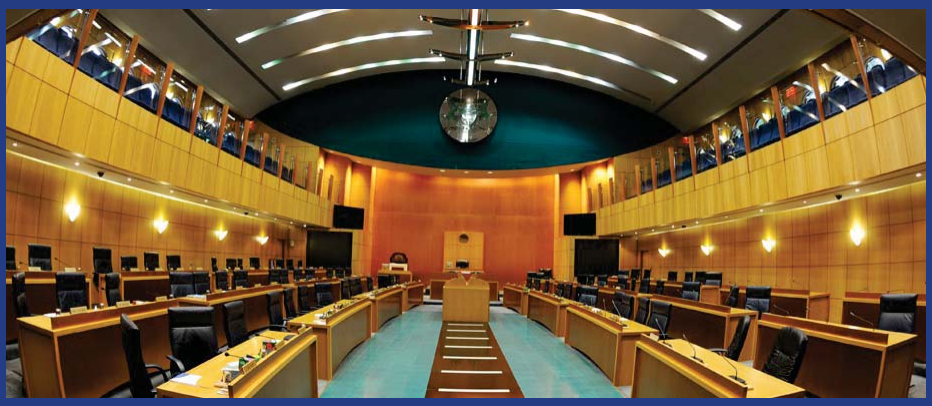

VALUATION OF TRIBAL AND UNREGISTERED LAND: KEY CONSIDERATIONS FOR BOTSWANA

TRIBAL LAND ACT, 2018 & TRIBAL LAND REGULATIONS, 2020 – COMMENTS BY BIV

LOCAL PROPERTY TAXATION TRAJECTORY AND THE CASE FOR MODIFIED AREA BASED VALUATION SYSTEM ON TRIBAL LAND IN BOTSWANA

BIV ANNUAL GENERAL MEETING – 2022

A COMMENTARY ON TRANSFER DUTY (AMENDMENT) ACT , 2023

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EDITOR'S NOTE

By: Donald Mengwe, Bsc (Hons) Estate management, Valuation Surveyor

After the advent of COVID 19, particularly during the relaxation and lifting of containment measures to fight the pandemic, valuers experienced unprecedented growth in business and demand for transaction - related valuation services, reinvigorated by introduction of Transfer Duty (Amendment) Act, 2019. This happened against the backdrop of slowing economic growth, supply chain disruptions and rising commodity prices induced by the pandemic. The economy and collaterally, the property market, took a massive battering during COVID -19 pandemic in spite of government's mitigation efforts. The pandemic swept away jobs and livelihoods on its path. The introduction of the Transfer Duty (Amendment) Act, 2019 was a double edged sword for the property valuers. Although, it contributed to the slowdown of the real estate market, it also increased the demand for transaction-related valuation services because it stipulated that transfers in respect of all land tenures required valuation reports.

The increase in duty had a further dampening effect on the real estate market as there was a notably decline in sales transaction volumes recorded at Deeds Registry, particularly for upper end and middle market segment residential properties , which experienced weaker demand. The commercial and industrial sectors recorded a downward trend, as wary investors stayed aloof due to the hefty duty increase for transfers to non-citizens, which contributed to unattractive potential returns. An oversupply of office space in CBD in the occupational market exerted downward pressure on rentals as well as general uncertainty over office space due to remote working. Industrials showed resilience during the pandemic because of demand, for additional space to withstand unexpected shocks as a result of supply –chain disruptions and e – commerce services. For the hospitality and retail sectors the COVID 19 pandemic was an obliterator.

Just as the valuation fraternity was expecting a promising economy recovery from the COVID 19 pandemic, in comes the war in Ukraine in February 2022, which contributed to high food and energy prices leading to increase in inflation. The central bank, Bank of Botswana, to reign in inflation responded by making adjustments to the Monetary Policy Rate (MPR). The pandemic and war in Ukraine has constrained the fiscal space for government as tax revenues have been reduced, under circumstances where there is a need for increase in expenditure on social safety nets, thus increasing public indebtedness. At the launch of 2023/24 Government Borrowing Strategy in 13th June 20223, Minister of Finance Peggy Serame indicated that the domestic economy is expected to grow by 4% on account of weak demand for rough diamonds. The Minister also expressed that the government through the borrowing strategy will navigate the ongoing global economic uncertainty, through the issuance of domestic government securities in the form of bonds and Treasury bills to raise 3 billion Pula and net external financing from multilateral and bilateral lenders, which is projected at 2 billion pula. The government forecast is that in the financial year 2023/24 the budget deficit will be 7.6 billion.

The Transfer Duty (Amendment) Act, 2023 effective 03rd May 2023 dealt a major blow to any hope for recovery for valuers, as it exempted considerable transactions from the requirement to pay duty and provide valuation reports.

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Valuers are going to have to adjust their business strategy and diversify their services in this constantly changing environment, to stay afloat and hope that things will take a turn for the better. The nature of the business of providing valuations is that it is vulnerable to downturns, and reductions in deal volumes means there is less demand for transaction-related valuation services. Monetary tightening by financial regulators and banks through their lending polices suggest that there may be opportunities in loan monitoring and financial reporting services.

Valuers have to adapt, stay informed of the latest technological advances, industry trends and best practices and differentiate themselves from other competing professionals such as brokers and accountants to remain relevant. Advocacy will have to take centre stage to protect the interests of valuers in these trying times.

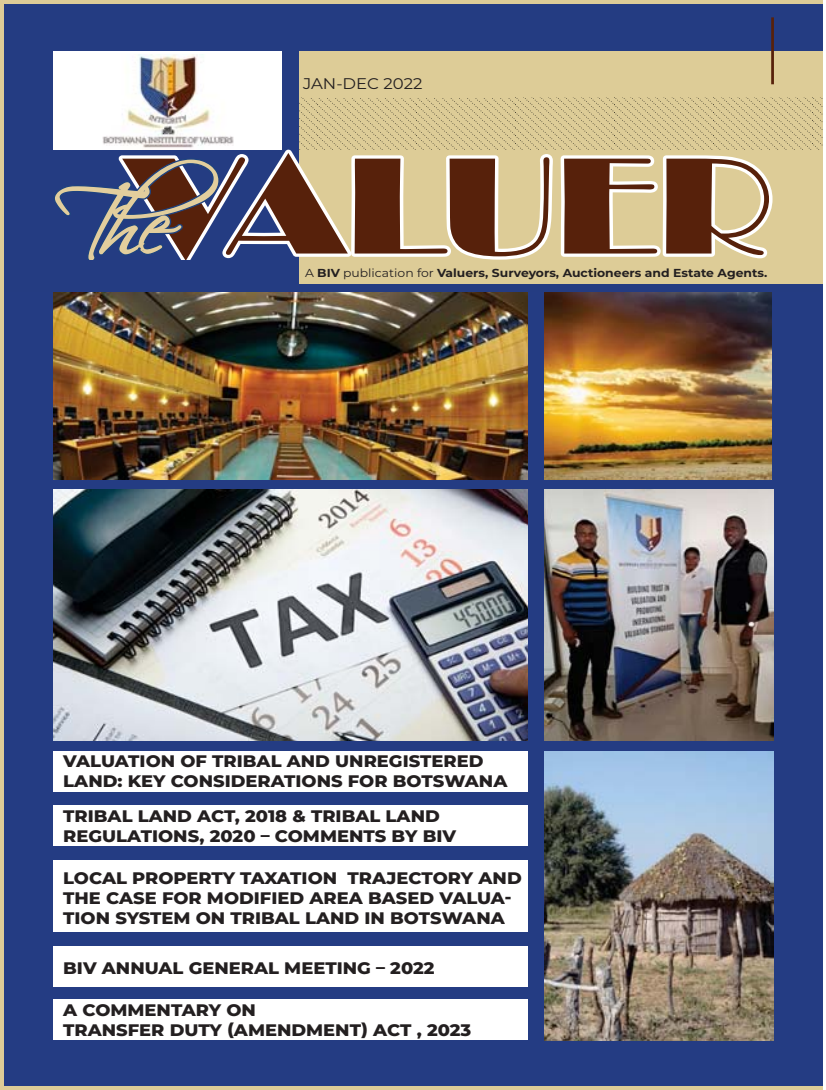

Table of **CONTENTS**

INTEGRITY est 2018
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VALUATION OF TRIBAL AND UNREGISTERED LAND: KEY CONSIDERATIONS FOR BOTSWANA

By: Ephraim Kabunda Munshifwa, PhD

1. Introduction

The debate on whether tribal or unregistered land can be assigned "market value" has grown louder in recent years (McDermott et al., 2018; Obeng-Odoom, 2018; McDermott et al., 2015; Kavanagh and Matz, 2019; Makathimo, 2019). These calls are obviously different from a few years ago when tribal and unregistered land were referred to as "dead capital" (de Soto, 2000); implying that unregistered land had no value. Tribal (or customary) land in this sense is land owned by tribal communities whose administration is often based on customary laws. "Unregistered" land is broadly defined as land rights that have not been registered or recorded in any formal sense; and often tribal or customary land constitute the bigger portion. The question then is: can unregistered land be valued?

For decades, universities have taught that there are only two principal interests or rights in land which valuers should be concerned with, these being freehold and leasehold (Lawrence et al., 1962; Shapiro et al., 2019). In such cases, property rights are defined as full, private and titled (registered), which then excluded unregistered land. Formalisation or registration of property rights has therefore been a key component of land reform programmes, especially across Africa, in order to support the operations of markets. The gist of the argument is that without fully functioning land markets, "market value" which is often taken as a proxy for market prices, cannot be established or assessed.

The reality though for most parts of Africa is that land rights are undocumented and often unrecognised by the State. This means that in the strictest neoclassical thinking, there are no rights to be valued in these areas; and yet literature shows that valuers are still assigning value to these rights. How so?

2. Redefining land rights

Studies over the years have revealed that land rights can take various forms beyond the narrow confines of freeholds and leaseholds. This has resulted in concepts such as "continuum of land rights" (Whittal, 2014; Lemmen et al., 2015; Mabikke, 2016) and "legal pluralism" (Tamanaha, 2008; Kelemen, 2018) from "dual systems". Framed within the new institutionalist perspective, a broader understanding of property rights is that they are "institutions" or "rules of the game" (North, 1991) and take formal or informal forms. Their main purpose is to enable or constrain human actions. Thus, land rights can now be redefined as the relationship amongst people on the use of land, making land rights also about social relations. Thus, land rights have to be examined within their own contexts – social, economic, political, environmental, culture, etc. In the African sense, this means that there are a variety of unregistered land rights which valuers should not ignore.

The implication of this redefinition of land rights on valuation practice is vast. It means that value on land can take multiple forms. Restrictions in the past were partly due to the definitions of value. In fact, valuers had long recognised that there can be multiple forms of value such as "use value", "investment value", "worth", etc.; and yet this application was restricted to freehold and leasehold interests. For instance, "use value" means that different uses will have different values on the same piece of land. Thus, land rights may have market value in terms of economic capital (monetary value). and non-market value in terms of natural and socio-cultural capital. The use of the concept of "value pluralism" (Kelemen et al., 2014), which implies several values existing in parallel that cannot be expressed in a single value, is now common.

"These complications mean that valuation of unregistered land, which also carries non monetary aspects, becomes further complicated."

3. Methodological challenges

UN Habitat defines valuation simply as "estimation of value of land rights" (UN Habitat et al., 2021). This often refers to the financial estimate of transfer price or market value of the land rights. With the redefinition of land rights, as discussed above, comes the methodological challenges of undertaking valuations which should differentiate these values. For instance, studies on non-monetary techniques for the valuation of ecosystem services point to approaches which capture the multidimensional nature of value such as symbolic, cultural, ecological and spiritual. Methods which include quantitative and qualitative research-type techniques such as surveys, interviews, participatory, etc., (Kelemen et al., 2014). Everyday valuation practice is more confined to monetary values and relies heavily on traditional approaches such as market, cost and income.

These complications mean that valuation of unregistered land, which also carries non monetary aspects, becomes further complicated. It also means that valuers should be able to put value on any rights, with or without a market. Valuers therefore need to be more innovative and find ways of adapting their methods to the valuation of unregistered land. For instance, the Royal Institution of Chartered Surveyors (RICS) report examined cases in Ghana, Peru and Indonesia (Obeng-Odoom and McDermott, 2018; Obeng-Odoom, 2018) where valuers have shown innovativeness and adaptability in the valuation of unregistered land using the same traditional approaches of cost, income capitalisation or market comparison.

"For instance, one of the challenges is that the market for tribal land is restricted to citizens."

4. Drivers of debate on the valuation of tribal and unregistered land

Why the change in thinking? A number of drivers can be isolated as being important to influencing the valuation of unregistered land. This article discusses four of these, namely: Innovative registration of customary rights; emergence of informal/vernacular land markets; new theoretical understanding of formal and informal institutions; and acceptance by international bodies.

4.1. Innovative registration of customary rights

Studies show that a number of countries in Africa have traditional land grants based on customary law. Examples often given include: Botswana's Tribal Land Act which codified customary practices of Batswana and elevated their customary land rights (Kalabamu, 2000; Adams et al., 2003); Mozambique which allows for community lands to be registered as a whole – formalising communal customary rights (Balas et al., 2021); and, Tanzania's Village Land Act which makes customarily-held land rights equal to formally-granted land rights (Wily, 2003). In other cases, traditional authorities are now embarking on different innovative forms of documenting their rights – with or without state involvement. This then helps to codify rights on land in a particular area. Some of these are aided by international development agencies. For instance, traditional authorities in Zambia have received support from USAID, UN Habitat, GIZ to document customary rights in Central, Eastern and Western Provinces (Honig, 2022; Munshifwa, 2018). These documents, although not legal support, have helped in improving tenure security and emergence of land markets. The implication of these actions is that rights on land can be fairly deduced even in customary areas and value assigned to these rights.

4.2. Emergence of informal markets/vernacular markets

Market comparison approaches presupposes that a market exists to provide sales evidence. Recent studies again testify to the emergence of informal land markets across Africa. This means sales evidence on traditional land and peri-urban areas is obtainable(-Chimhowu and Woodhouse, 2006; Yunda and Sletto, 2017; Mabakeng, 2020). Thus, it is now undeniable that traditional land is being sold in most African countries – legally or illegally; registered or unregistered. Therefore sale prices can be established. In many cases, it is government/traditional authorities who prohibit these sales. Absence of sales data can thus be attributed to prohibition of transfers and not absence of sales. An additional point to note is that prohibition of trans-

fer of land increases risk for the financing institutions, hence their refusal to lend on such documents. For instance, a statement on marketability of the subject property in a Valuation Report is of keen interest to any financial institution. Marketability here is defined as the ability to quickly convert property into cash. While valuers were ignoring other interests, informal land markets have been growing and transactions taking place outside the formal systems

.

4.3. Theoretical understanding of formal and informal institutions

Many African valuers are schooled under the neoclassical thinking; thus, taught to ignore any interests outside freeholds or leaseholds. Although focus is often on Africa's unregistered land, it should be pointed out that even the United Kingdom has had unregistered land (not registered with Central Land Registry) for many years (Newman, 1966). These have relied mainly on title deeds prepared by Attorneys in cases of transactions. As noted earlier, the new institutional perspective is that land rights (and property markets) are institutions and work to enable or constrain human action regardless of whether such actions lead to efficient allocation of resources or welfare gain. They can thus be formal or informal. It is therefore no longer a misnomer to refer to "informal land rights" and "informal property markets". The implication is that valuers should be able to examine these rights and place a value on them; given sales evidence from the informal markets.

4.4. Acceptance by international bodies

It is an undeniable fact that Africa has always looked to Western countries for acceptance. This is so even in valuation practice. It is, for instance, clear that international bodies such as the Royal Institution of Chartered Surveyors (RICS) and International Valuation Standards Council (IVSC) set the standards for valuation practice globally. Thus, their voices on a subject such as the "valuation on unregistered land" (UN Habitat 2021; Obeng-Odoom and McDermott, 2021) adds credence to the debate. For instance, Obeng-Odoom and McDermott (2021) makes important observations on valuation of unregistered land, that: land title registration is not necessary to address the valuation challenges in the case study areas (Ghana, Indonesia and Peru); Participatory methods can be used for valuing unregistered land; there is need to develop capacity in social valuation methods; and, there is further need to customise the current IVSC definition of market value to reflect local understanding. These findings are applicable to most parts of Africa where evidence (Makathimo, 2019) shows that Valuers devise ways of adapting established valuation methods to value different types of land/tenure, whether registered or unregistered.

5. Lessons for valuation practice in Botswana

Botswana's tribal land administration system is often cited as a good example of governing customary land. So Botswana already has an elaborate tribal land tenure system which grants various forms of ownership on land. This also means that the country has a lot of experience in planning of "tribal" land through the Land Board system.

The Land Policy of 2015 provides two important points to support customary law land grant (the least rights on tribal land) and the functioning of the market. Firstly, it supports the registration of customary land grants which were not registrable before; and as such not accepted by financial institutions as a form of security. These will be registrable under the Deeds Registry Act, without the need to convert to common law land rights. This provision is reinforced in the new Tribal Land Act of 2018, which became effective on 22 April 2022. This further strengthens customary rights through the requirement in section 23 and 24 to have them registered with the Deeds Registry; this includes certificate, grants, leases or any rights allocated through the customary systems prior to the establishment of Land Boards. Secondly, tribal land will now be planned and surveyed before allocation to facilitate registration. Thus, despite the prohibition of transfer to foreigners (without Ministerial consent), this provision will strengthen tenure security and the operation of land markets in tribal areas and concomitantly provide evidence for valuers to enable them undertake valuation assignments.

This improvement in tribal land governance forms the basis for the valuation of tribal land. The argument in the literature has been that it is difficult to ascertain land rights in customary areas, however, this should not be the case for Botswana. It is not in dispute that valuation of tribal land comes with many challenges but this calls for professional bodies to be more innovative to overcome them. For instance, despite the operation

of land markets in these areas, sales data may be thin. Therefore, professional bodies such as the Real Estate Advisory Council (REAC), Real Estate Institute of Botswana (REIB) and Botswana Institute of Valuers (BIV) need to work on valuation standards to assist practitioners when undertaking assignments in these areas. These standards would then elaborate on the processes, methods and assumptions in undertaking valuations in tribal areas. Therefore Valuers need to understand how that restriction impacts on the prices for tribal land. In other words how are the prices for land reflecting this restriction?

Professional bodies also need to take interest in the curricula being offered in universities. Are universities still teaching a "flat earth"? Are university curricula open to alternative schools of thought, such as new institutionalist perspectives, which have redefined property rights and markets? Is there a gap between university curricula and valuation practice? Collaboration between universities and industry will help to close any gaps which may exist.

6. Conclusions

The key question for this article was: can tribal and unregistered land be valued? The answer is Yes; but not without challenges. The primary requirement for undertaking valuations is that land rights should be properly established and that a functional property market exists. This article argues that both conditions are present in most tribal areas of Africa, albeit at the informal or vernacular level. The onus is on valuers, not only to domesticate International Valuation Standards but also to understand the unique context of their environments and develop local standards (guidelines) to complement international ones.

There is also a need for Valuers to broaden their knowledge which would enable the examination of old problems from different perspectives. This requires close collaboration between academia and practitioners.

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TRIBAL LAND ACT, 2018 & TRIBAL LAND REGULATIONS, 2020 – COMMENTS BY BIV

The above statutory instruments are indeed major interventions in land tenure reforms in the Republic of Botswana, as well as the Revised Botswana Land Policy, Government paper No. 1 of 2019, following other interventions by the post – colonial state in response to changing political, economic, social and cultural circumstances. The goal obviously is to reconfigure social relations in respect of tribal land to facilitate sustainable social and economic development.

Our observation of the past government reforms of customary land tenure is that they have been on a gradual and cautionary manner to adapt to the capitalist or market oriented economic system whilst preserving its inherent nature of free access and usufruct rights. Prior to the enactment of the Tribal Land Act, 2018, the post-colonial state retained and recognized customary land tenure and also transformed customary land tenure practices by devolving authority to land boards, the introduction of documentation of land rights, introduction of exclusive lease rights to transform the rural economy by granting of tribal common law lease for residential, commercial and industrial uses to provide security of tenure and allow for transactions or commodification of tribal land interests for efficient and productive use and good environmental management. Other transformative instruments, *viz* Kgabo Commission and Tribal Land Act (Amendment) Act, 1993,were meant to deal with illegal tribal land dealings, land squatting, land speculation and informal land markets, particularly in peri urban areas due to increased competition for land, monetisation, urbanisation and land boards incapacity to deal decisively with land application and land use planning.

Overall, the reformation delivered customary land tenure system that retained its character of 'communal property" but at the same time, introducing market friendly innovations such as common law leases for access to financial services or to facilitate credit market linkages. Government took a deliberate position that tribal land cannot be owned in personal and private capacity and this was emphasised through the deletion of section 10 (2) and section 24(1) of the Tribal Land Act, 1968. You are obviously aware that this occurred against the backdrop of the *Kweneng Land Board V Kabo Matlho & Another (1992*) Court of Appeal case, where it was decided that tribal land can be owned in private capacity on the basis that customary law evolves with changing conditions of society. *Kweneng Land Board v Mpofu & Another (2015)* is an appeal against the decision of the High Court which observed the doctrine of *stare decisis*, in particular *Kabo Matlho* Case and the Court appeal relied on the Tribal Land (Amendment) Act, 1993 and the white paper No. 1 of 1992 titled " Land Problems in Mogoditshane and other peri –urban villages", that the sale of tribal land is an affront to the tenets of customary land law and that it is not culturally recognized.

Section 38 of the Tribal Land Amendment Act, 1993, motive is to allow commercial transfer or dealings of tribal land rights on condition that the land is put to productive use (i.e mixed with labour), pledged as collateral, is subject of foreclosure and inheritance and is not for speculative gain. This is deliberately done to avoid tribal land speculation or trading in the tribal land *per se*, to emphasize that tribal land at its core principle is communal or state property. In the Revised National Land Policy (2019), the " Sons of the Soil" concept is retained that customary land tenure will be retained and tribal land access will be improved through streamlining of land allocation process and will be allocated *gratis*, in terms of arable fields, residential plots and communal natural resources in the interests of equity, to sustain traditional livelihoods. Further, there is another strand to extend property markets through secure tenure and title in rural areas through mandatory registration of customary land grants and common land rights to create bankable interests to access financial markets and improve land use efficiency and investment. This is individualisation of property rights and creation of more rights in terms of Grant of customary land rights which is an entrenchment of market institutions in land administration. The policy also recognises different forms of land tenure to access communal natural resources such as water, firewood, wildlife, forage and to ensure efficient land use and investment, food production and promotion of tourism. It does not advocate for simplistic binary view of tenure as either *de facto* or *de jure*.

1) What are the land tenure reforms introduced by the Tribal Land Act , 2018?

Section 27 (1) provides that :

" subject to the provisions of this section, a land board may grant to any person land by way of lease

on terms and conditions as it may determine or which may be prescribed but may only grant land in ownership to the state"

Our understanding is that, this to all intents and purposes, is a reaffirmation that tribal land remains 'communal" or state property and private ownership of tribal land *per se* is not legally permitted. Part IV on Grant of Customary Land Rights provides for mandatory registration of customary land rights within six months. We cannot make any comments on the implication of this provisions on society, which are radical to say the least, but hope that an impact assessment has been carried in consideration of potential consequential issues such as family feuds, disenfranchisement of women and marginalized groups, Deeds Registry capacity to execute, safeguard the integrity of the tribal land records to ensure authenticity, legitimacy and state capacity to deal with adjudication and dispute resolution. We are of the view that rural communities generally show deferment to traditional authorities and practices and some remote communities may not be inclined or ready to be assimilated into the main stream socio –economic system, in this particular case registration or formalisation of their land rights which have social legitimacy. In these circumstances the state rather than using, coercive and policing powers, may be useful to devise measures of adaptation so that 'no one is left behind' in a way that respects their right of self-determination. It is also not clear how the provisions cater for the land rights of marginalized groups and other social groups whose economies are essentially land based and rely on communal natural resources for sustenance.

Further registration of customary land rights is important for security of title but security of tenure does not need documentary evidence to exist as it is reliant on social legitimacy. However, we do agree that to access financial services or establish credit market linkages, well defined or documented land rights to offer as collateral are a necessary requirement. The effect of section 23 under Part IV of the subject Act, is to transform a Grant of Customary Land Rights to something akin to a common law lease, which is individualization of land rights, save in this case, that it is perpetual user rights and the bundle of rights has been expanded to include among others, hypothecation and leasing to make it " market friendly". Our view is that this serves to cause contradictions or adds complexity to the conceptualisation of customary land tenure in Botswana. The delineation between a grant of customary land grant under customary land tenure and grant of land rights under common law lease was indicated by your savingram ref LG 2/1/4 II (6) dated 18th July 1994 on **"Implementation of the Tribal Land (Amendment) Act, 1993 "** on page 5 and 6
Section 33 of TLA, 1968 was amended with the following note ;

"... The issuance of a lease to a lessee does not change the land tenure system i.e it does not create freehold over customary land. Leasehold cannot exist on its own. It also exists under a land tenure system and in this case that system is customary land tenure system "

After the formation of an independent republican state with a neo-liberal constitution, government recognized customary land tenure in order not to cause socio economic disruptions to natives whose livelihoods were land based but also introduced innovative tenure reforms to customary land tenure to allow socio economic development along the post war global capitalist order. The market friendly innovations introduced include, *inter alia*, the common law lease which suggests that customary land can be held under a qualified right to occupy land for a fixed term which can only be ceded under the consent of the superior interest. The Grant of Customary Land Rights is, thus, an acknowledgement of a predominantly agrarian society where most livelihoods are essentially land based, dependent on subsistence, pastoral and arable farming. Our conviction is that there are still social groups in Botswana who still show deferment to traditional authorities and are yet to be integrated into the modern cash economy. The statutory intervention to recognize only a Deed of Customary Land Grant transforms this traditional tenure practice which has social legitimacy and was recognized under the TLA, 1968. In its character , there is non – personal ownership and it is applicable in common pastures (communal grazing areas) and shared natural resources which are critical to livelihoods of vulnerable people and remote area dwellers, though there are lingering issues of land degradation and conservation, which we believe can be addressed through community awareness campaigns and inclusive participation in decision making.

Based on the aforementioned, we suggest that commonage and grazing areas as stated under Part III of Grant of Customary Land Rights in TLA, 1968, be recognized so that there is legal clarity on the land rights of social groups which suit the social, cultural and economic needs of such communities,

even though there are not amenable to individual land titling and registration. We are of the view that it is important from an equity perspective and it provides a safety net for the rural poor. Government recognised the importance of communal land rights to rural livelihoods from a social justice and cohesion perspective in terms of sections 17 and 18 of the TLA, 1968. The earlier innovations that liberalised customary tenure in the form of Tribal Grazing Land Policy (1975), National Policy on Land Tenure (1985), Government paper No.1 of 1992 on Land Problems in Mogoditshane and Other Per-Urban Villages, Tribal Land Act, 1968 and Tribal Land (Amendment) Act, 1993, which espoused common law leases to commoditise tribal land interests, are adequate under the current social, economic, cultural and political circumstances and the Deed of Customary Grant is superficial and is introducing problems of conception as to the nature of customary tenure. The common law lease bears resemblance to the Deed of Fixed Period State Grant under the State Land Act, 1966, which emphasies that absolute ownership rests with the sovereign government.

2) Land Rights for Marginalised Groups

The 2019 Revised National Land Policy provides for the protection of existing land rights for marginalized groups identified as Remote Area Dwellers (RADS), Widows and Orphans. The measures envisioned for RADS is to incorporate them into mainstream society and influence them to change their traditional land tenure and use practices of forage or hunting and gathering which make them vulnerable to dispossession or landlessness. The idea is that they are organised into big communities and permanent settlements are established to facilitate conveyance of land titles to allocated plots. It is common knowledge that for some of the marginalized groups, their livelihoods are based on established national parks and game reserves and tribal areas, in particular the former 'crown lands'(e.g Kgalagadi Tribal territory) and their property rights are constitutionally recognised . The Basarwa in particular, their special needs should be recognised and therefore should be afforded positive discrimination to assimilate into the socio – economic mainstream, but should also be allowed to exploit the natural resources in what they regard as their traditional territories. It is not clear from the Act how the special dispensation is afforded to marginalised groups such as Basarwa, save to speculate that they might be afforded political representation as land board members or section 5 (5) might be useful provided the consultative process is truly participatory rather than mere tokenism. In line with the Universal Declaration of Human Rights, preservation of the cultural and spiritual rights of Basarwa, which is tied to their ancestral land, is important and the notion of property conceived as venerable individual right defined by exclusivity of use and enjoyment and alienation rights, needs to be reconceived as social rights in a way that allows adaptation, assimilation and integration in the modern socio – economic system.

3) Expropriation and Compensation

It is common knowledge that constitutional property clause section 8, protects land or property rights against forcible takings, subject to the limitations of public interest and order. The moral purpose of the constitutional property clause is to uphold human dignity. This then calls for the principles of equity and equivalence in determination of compensation. The general principle for ensuring equity and equivalence covers the 'balancing test" for evaluation whether expropriation strikes fair balance between the interests of claimants who have lost ownership or user rights of their interests and the public interests; ensuring that property rights owners are neither enriched or impoverished and consideration of both *de facto* and *de jure* rights in an equitable manner and supporting the poor and illiterate by paying reasonable costs of professional advice in negotiations.

Further international human rights standards and global agenda frameworks are useful in guiding a just and equitable compensation system. This includes Article 14 of the Universal Declaration of Human Rights (UDHR), which among others states that " all those evicted, irrespective of whether they hold title to their property, should be entitled to compensation". Articles 14 & 21 of the African Charter on Human and People's rights protect the right to property subject to the limitation of public interest and provides for dispossessed people to adequate compensation. The Food and Agriculture Organisation (FAO) of the United Nations, which focuses on rural land implores on all member states to ensure that valuation systems consider non- market values, such as social, cultural, religious and environmental values where applicable; recognise and respect all legitimate tenure rights holders and their rights irrespective of whether they are registered or not, and that legitimate tenure rights in particular, of vulnerable and marginalized groups, should be respected by acquiring minimal resources and promptly paying just compensation. Most international financial institutions such as the World Bank which provides

infrastructure financing, have their own compensation guidelines to protect people or mitigate social and economic disruptions due to national projects or land use changes. For example, based on the notion that government should improve the well-being of the affected, it recommends that depreciation should NOT be deducted from the replacement/reproduction value of the expropriated property. Further, valuations or rules for the assessment of compensation should not undermine the achievement of Sustainable Development Goals (SDGs).

3.1 What then is the 'balancing approach' in determination of compensation?

Our understanding is that, although compensation for expropriation is a normative issue, a proper conceptual understanding of the balancing approach can assist in developing a legal framework that does not create, opportunities for abuse of power; confusion and conflicting outcomes and provide a fertile ground for unjust compensation. You would no doubt agree that generally, compensation is paid to indemnify the individual from harmful government interference and distribute the burden of interference. If it is not paid, the individual bears the full cost of government interference of public interest works, which is not only in monetary terms but also an infringement of liberty and ability to participate in the political community (Please refer to the *'full belly analysis'* that suggests that people can only exercise their civil and political rights if their socio economic rights are also properly addressed and that the right to property supports other constitutional guaranteed fundamental rights such as liberties).

Therefore, the balancing approach applies the principle of proportionality to prevent unreasonable impact on tribal land rights. The principle of proportionality requires a fair balance to be struck between the interests of the community and the fundamental rights of the affected individuals, where the state interferes with tribal land rights. Compensation plays an 'equalisation' effect of relieving the individual from undue or excessive burden where there is disproportionate interference. By extension, there may be exceptional circumstances in applying the proportionality test, where lawful expropriation without compensation may be justified (e.g Parliament may decide that compensation is not paid for land taken, if the land has been acquired through conquest or compensation through the 'Market Value' standard for customary land rights allocated for free, is not appropriate as the state has 'appropriated land value' by prohibiting dealings in undeveloped land, and due to the fact that tribal land is not regarded as a commodity in terms of the tenets of customary land law). Market value is one of the many standards of quantifying loss and compensation is one of the factors to be taken into account in consideration, of the means of ensuring fair balance (e.g it is common for the marginalized groups to be allocated alternative land because their livelihoods are land based and compensation in cash may lead to impoverishment because they have not assimilated into the mainstream cash based economy.

In a nutshell, it is progressive not to give market value a central role in assessing compensation and the social and political history regarding, amongst others "the land question" has to be taken into account.

3.2) Section 8 of the Constitution : Protection of Private Property or Social Rights?

We are of the view that the constitutional property clause protects property of any nature or description or any right or interest over property of any description. It would be untenable to argue that unregistered legitimate land use rights such as commonage , communal grazing areas, even land rights of indigenous people to hunt and forage within a particular area is not property. Further, it is common knowledge that the concept of 'private ownership of land' is alien to customary land tenure. Under market libertarian (capitalist) system, which focuses on the primacy of the individual (individualism), property is interpreted as private property which supports other fundamental rights under the constitution such as liberty. The liberal notion of property is conceptualized as exclusive and promoting individual freedom. If this is applied to customary land tenure, what will be protected will be " private ownership" which then will serve as gross injustice to those that have lost legitimate land rights in connection with *meraka* and ways of life of indigenous people relying on forage. This means that cultural, spiritual and social values will not be taken into consideration (e.g graves as evidence of land rights).

If the constitutional property clause is interpreted as social rights , being entitlement to tribal land rights, then it protects land rights held under customary land tenure and land rights of indigenous communities. Under this perspective the constitutional property clause upholds human dignity and tribal land rights are recognized as basis of livelihoods, recognized by informal rules and customs rather just an asset from a commercial point of view.

3.3) Section 33 of Tribal Land Act, 1968 as amended : What are the issues?

The statutory rule for assessing compensation is based on the liberal conception of property thus compensation for ownership or private land rights over tribal land *viz* user rights, improvements and cost of relocation for involuntary resettlement. As the economic value of tribal land has been 'appropriated' by the state, as tribal land is not considered a commodity, the market value of land *per se* is not considered. However, this is appropriate in the contest of the 'balancing test' because the Grant of customary land rights is *gratis* in line with the tenets of customary law and allocating alternative land plays a balancing role, if available. Compensating at market value of the land will be contrary to the traditional institutions governing tribal land which do not recognize it as a commodity and will also lead to unjust enrichment, particularly in peri –urban areas, where informal and illegal markets are active. Customary land tenure derives out of a different value system which is typically socialistic and compensation for 'user' rights under the liberal conception of property will lead to an undervaluation.

The compensation model is not suitable for land rights in respect of common pastures or shared natural resources where the normal practice is to compensate for kraals, semi permanent structures, boreholes e.t.c. Common pastures and forage are the bedrock of livelihoods of rural communities, and these rights are not acknowledged as compensable as they are not documented and registered, they are non-personal property, yet displacement leads to disruption of social and economic lives and even impoverishment. (See Attorney General v Sesana & Others 2002 (1) BLR 452 (HC).
Application of section 33 on properties with trading potential such as hotels and filling station where it is difficult to isolate the business from the land and buildings, is highly contestable.

3.4) Section 32 of Tribal Land Act, 2018 and Regulation 19 of Tribal Land Regulations, 2020 : Contradictions, Confusion and Problems of Conception

Section 32, TLA, 2018, is an exact replica of sections 16 & 17 of the Acquisition of Property Act, 1955, which applies to property interests created in terms of the State Land Act, 1966 and freehold tenure and attempts to put compensation for expropriation of customary land rights on the same pedestal as that of land owned in private capacity. Section 16 of APA,1955, is based on the liberal conception of property, which conceptualizes it as exclusive private property which promotes individual freedom and other liberal values such as liberty and self - governance. Compensation for government redistributive actions requires full indemnification as attested by the judicial precedent *Attorney General vs Western Trust (Pty) Ltd (1981) BLR 1 (HC).* There is s strong proclivity to the individual and it has given pre-eminence over the protection of public funds.

Therefore , application of section 32 of TLA,2018, in relation to tribal land rights suggests that the prevailing dominant liberal market economic system or liberal conception of property, which protects 'exclusive ownership' is given prominence. This disregards the 'social dimension' of land rights, which holds that individualization of property rights is an affront to the democratic process, as it does not take account of the social origins of property and can only serve to frustrate government's redistributive actions in mediation between rights of the individual and government powers. This is in view of the observation that the relationship between the rights of the individual and the rights of the community has been in constant flux throughout history. Thus, property rights are a function of what others are willing to acknowledge and the limitations on property rights results from expectations and rights of others as formally sanctioned by law or informal rules.

Section 32 of TLA, 2018, disregards the social dimension of land rights which incorporate, among other cultural identities and social values.

Under the same Act, section 22 provides
" The provisions of this Part shall apply in relation to granting, variation, determination of customary forms of tenure"

Section 27 provides ;
" subject to the provisions of this section, a land board may grant to any person land by way of lease on terms and conditions as it may determine or which may be prescribed but may only grant land in ownership to the state"

The above provisions confirm conservatism to retain customary land tenure rather than evolution towards privatisation of tribal land. However, at the same time, there are contradictory provisions for mandatory individualization of Grant of Customary Land Rights to create bankable interests rather than consolidation of the earlier market friendly innovation of common law lease (Refer to *Kweneng Land Board vs Mpofu & Another 2005 (1) BLR 3 (CA)* on nature of customary land rights). The TLA, 2018 is however silent in terms of the compensation approach for communal land rights in terms of shared natural resources such as commonage, communal grazing areas, which are unregistered and are critical for the sustenance of basic livelihoods. This is probably because the compensation issue does not particularly lend itself to proper analysis on the basis of neo – liberal perspective on account of the non-exclusivity nature of the tribal land rights. Ironically, the 2019 Revised Botswana Land Policy explicitly acknowledges the importance of communal grazing land rights and communal natural resources use rights to livelihoods. It is further doubtful that assessing compensation on the basis of market value of an executive house in a remote area, where real estate markets are inactive or non – existent, can lead to financial outcome which is more than the reproduction cost of the building improvements. If it does lead to an outcome where market value is greater than or equal the reproduction cost, then the assessment approach will defeat the principle of equivalence and equity.

It is well and truly obvious that prescriptive market solutions will not alway public outcry of unjust compensation.

Regulation 19 of the Tribal Land Regulation, 2020 surprisingly, when we expected it to expound on section 33 of TLA, 2018 resuscitates section 33 of TLA,1968, as amended and adds sentimental values and solatium in regulation 19(2), which means the compensation model is on ' SUBJECTIVE' rather OBJECTIVE basis. This is surprising, considering that section 32 (3) of TLA,2018 and the APA, 1955 in particular section 16(1)(e)(i) which influenced the said section 32 states that in determination of the amount of compensation, the land boards/board of assessment shall not have regards to the fact that " the acquisition is compulsory". The statutory rules for assessing compensation under the subsidiary legislation are diametrically opposite to that of the Act and adding more detail that causes further confusion.

3.5) Solatium and Sentimental Values

The provision that 'No allowance shall be made on account of the acquisition being compulsory' is to avoid the consolation amount. If solatium is added, it is normal to provide a certain percentage as a statutory rule, to the agreed amount of compensation so that it is not left to the discretion of the acquiring authority. Where solatium is added , it is common in other jurisdictions to extend it as 'home loss payment' because of the sanctity of the home. In this case, the home is more protected than business properties which normally fare well in terms of compensation for expropriation.

3.6) What is the solution? An inclusive balancing normative ' human rights' based approach

Based on the aforegoing, it is apparent that there is tension between the liberalisation of customary land tenure and conservatism in retention of customary land tenure . This also suggests that it is not pragmatic to have a single land tenure system that caters for all social groups. In adoption of the liberal conception of property for loss of tribal land rights held by indigenous people, which are the basis of their economy and communal land rights in terms of shared natural resources and grazing areas critical for livelihoods, expropriation will attract little, if any, compensation mainly because the rights are undocumented.

What is required is a normative approach, that is human rights centred to ensure that the assessment of just compensation or valuation approaches are adapted to the prevailing local circumstances and are acceptable to the community. In this way, every case will be weighed on its own particulars or merits. It is common knowledge that land tenure evolves, reflecting the changing social, political, cultural and economic circumstances of society or the statutory rules for assessing compensation need to change in tandem with land tenure reforms. Tribal Land constitutes over 70% of the surface land area of Botswana and sustains the livelihoods of a considerable number of the population living in rural areas, particularly the vulnerable and indigenous groups. The human rights based approach should be flexible, be based on the proportionality principle balancing the public interest and protection of fundamental rights guaranteed in the Constitution, and should avoid detailed statutory rules for assessing compensation as all possible scenarios on the ground cannot be envisioned.

We suggest a statutory rule for determination of compensation that can accommodate both leftist and rightist perspectives along the following lines :

" Any person who is required to vacate land under the provisions of subsection (1) may be granted the right to use other land, if available, and shall be entitled to just and equitable compensation from the state, reflecting an equitable balance between the public interest and the interests of those affected, having regard to relevant factors including ;

(i) Loss of right to use such land
(ii) the state subsidy and investment in the acquisition and capital improvement of the property
(iii) The history of the acquisition and use of the property
(iv) The value of any improvements of such land including the value of any clearing and preparation of land for agricultural and other purposes

Provided that the land board shall not have regard to –

(i) The fact that the acquisition is compulsory
(ii) The degree of urgency which has led to the acquisition
(iii) Any disinclination of any person interested to part with the property to be acquired
(iv) Any damage sustained by any person interested which, if caused by a private person, would not be a good cause of action.
(v) Any increase in the value of the property to be acquired which is likely to accrue from the use to which it will be put when acquired, or
(vi) Any outlay on additions or improvements to the property to be acquired, which has been incurred after the date of service of notice to vacate the land unless such additions or improvements were in the opinion of the necessary."

There is no need to expound on this statutory rule in the tribal land regulations. Furthermore, in any case, regulations can be formulated based on experiences on the ground and lessons learnt which cause contestations and public outcry.

4) Property market and land use efficiency vs Equity : A balancing Act

As mentioned earlier, the above legal instruments represent a significant milestone in land tenure reforms from liberalisation perspective. The main intervention of mandatory registration of grant of customary land rights seeks to provide for security of title to mitigate fraud and access to credit and there are restrictions of transfer to non – citizens, save for exemptions granted by the Minister. Another innovation of note which is market friendly is to permit transfers of grant of customary land rights in terms of hypothecation, foreclosure and leasing. We have made an observation that it is doubtful that this package of bundle of rights in the form of Deed Of Customary Land Grant, by its nature, is in line with the tenets of customary land rights which characterise it as communal property. Being perpetual, its registration may have transformed it to a private interest, something resembling a freehold interest as registration tends to privatise land rights. Our view is that this, to all intents and purposes, is promotion of privatisation of customary land rights to allow for transfer and market transactions. This represents a drastic approach to land tenure reforms rather than a cautious gradual and incremental approach that government has been well known for over the years, to minimise unintended and undesirable social consequences. Customary tenure systems from an equity perspective allow vulnerable members of the community to access land rights and also protect the interests of people who depended on natural resources for their basic livelihoods. The mandatory registration of customary land rights is more likely to lead to social exclusion for vulnerable groups such as widows, down raiding of the poor by the rich and influential elites who have the skills, knowledge and financial resources to navigate the formal system. Moreover, it is not automatic that customary land registration will lead to mobilisation of resources to improve the housing conditions and land use efficiency. The majority of households or larger segment of society do not qualify for mortgage finance because they cannot service large loans due to high unemployment and dependency on the informal sector. Micro finance lending offers a better opportunity for them to make housing improvements incrementally. Thus, mandatory registration of customary land rights is unlikely to increase access to formal credit for poor households as their levels of income is inadequate to make repayments. Formal titles could actually lead to dispossession of vulnerable groups, which could defeat the principle of equity in land allocation or administration. These problems are likely to even emerge, causing impoverishment to rural communities where land markets

are unlikely to develop, mainly due to the fact that livelihoods are dependent on subsistence farming .In these communities, deferment to traditional authorities and social cohesion based on common background and social history is preferable.

Peri urban areas present certain complexities because customary land tenure systems are under pressure from urbanisation, population growth and increased competitive pressure in informal land markets. In these circumstances, it is ideal for the state to provide incentives for formalisatiion, as informal land markets and illegal land transactions due to competition for land rights in previously low value arable fields and residential plots, can lead to dispossession. To deal with the competing interests of local communities and market forces, formalisation of title must be accompanied with capacity building of land boards and to enable locals to enter contractual arrangements with outsiders in order to mitigate against the illiterate, poor or marginalized people losing their property rights. The common lease has served well over the years as an instrument for commodification or privatisation of tribal land rights allowing rights holders to capture some of the land value.

The rationing system of tribal land allocation by land boards, which is based on first come first served basis, is inefficient and consequentially has led to an informal land market, abuse by authorities, land speculation and squatting. Although it is intended to allocate tribal land on a need basis, the reality is that land boards lack adequate capacity to keep proper land records, the waiting list is stagnant and its integrity basis on equity basis is questionable. The challenge is to develop a legal framework that ensures a well-functioning property market to address both allocative and land use efficiency and equity, mainly because of the existence of active informal land markets. Allowing a land market to develop side by side a system where land is in public ownership and allocated on rationing command system without giving market mechanism pre – eminence, will be counterproductive as it will lead to market distortion and uncertainty in land dealings. As tribal land for residential purposes is allocated on need basis rather than considering the capacity to develop, allowing easier transfer of tribal land rights of undeveloped parcels of land is likely to render many people landless because of the temptation to gain financially from rising land values and also it will result, in land use inefficiency because of land speculation. If the public control of tribal land allocative mechanism is maintained, it is better not to focus on acceleration of formalisation of titles but rather, to develop a legal framework that facilitates the well-functioning of property, housing and mortgage markets and also address supply side bottlenecks such as inappropriate policies and legal codes that lead to over regulation such as inappropriate building codes; poorly targeted subsidies, uncompetitive banking industry that leads to resources being channeled to unproductive resources, high cost of building materials, poor regulation of land practitioners, crowding out of the private sector in land servicing etc. Designing incentives and institutions that facilitate the well-functioning of the property market is complex and requires high technical skills, and if not done properly, can create negative market outcomes (market failures) such as sky rocketing property values and bubbles , which can lead to the poor being priced out of the markets and exclusion of the majority who are poor. Inappropriate regulation may create an underclass which is denied access to any form of affordable housing, thus not improving the equity of housing and property markets. The poor need to be protected from the vagaries of the markets to avoid the housing and property market being monopolised by the few rich to the extent that the market now becomes cancerous and precipitates political instability.

4.1) What then should be done?

Obviously, the panacea is not a market approach and through liberalisation of customary tenure by wholesale titling or land registration. Comprehensive titling can foster the powerful and influential members of the community to acquire more land, leading to inequities by down raiding the poor and vulnerable. In well-functioning property markets, where demand stimulates supply or land availability is responsive to market signals, there may not be issues of equity and negative market outcomes of land speculation and high property values when mortgage finance is available. However, considering the incapacity of land boards to deal with land administrations issues, it is advisable to devise an incremental approach to land tenure reforms that accommodate all land tenure types, serving different social groups to improve land use efficiency and equity

We therefore recommend a cautious approach to land tenure reforms and development of risk management or monitoring framework to mitigate the potential negative market and social outcomes of mandatory registration as stipulated under section 23 of the Tribal Land Act , 2018. This is moreso, if it

not possible, to revert to the previous incremental approach to land registration which allowed conversion to common law lease that allowed land rights holders to register on their own volition. Generally, the wider implication of land tenure policy changes are difficult to predict and if not managed properly could lead to social disruptions or at worst social unrest. Imported systems of land tenure are not a panacea and reforms have to respond to prevailing social, cultural, economic and political circumstances and make adjustments as more information becomes available and lessons are learnt. The focus should be rather on strengthening land boards administrative capacity to develop market institutions and well-functioning property markets and systems of property rights that work in the interest of all social groups. Titles and rights, once granted, are not easy to withdraw and land once sold is not easy to reclaim. The previous approach of government to land tenure reforms of flexible, gradual, learning and cautious process, when dealing with customary land tenure systems and making adjustments at an acceptable pace and learning from experiences, is advisable as land tenure reforms can lead to unexpected outcomes.

5) We trust our submission is in order. Please do not hesitate to contact us for further clarification.

Thank You

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By order of the Council
Botswana Institute of Valuers

LETTER TO : MINISTRY OF LANDS AND WATER AFFAIRS | DATE : 01 JUNE 2022

LOCAL PROPERTY TAXATION TRAJECTORY AND THE CASE FOR MODIFIED AREA BASED VALUATION SYSTEM ON TRIBAL LAND IN BOTSWANA

By: Donald Mengwe, Bsc (Hons) Estate management, Valuation Surveyor

"No government can exist without taxation. This money must necessarily be levied on the people; and the grand art consists of levying so as not to oppress".
Frederick the Great.

Introduction

Over the colonial and post-colonial period local property taxation has evolved in Botswana, from hut tax in 1899, rates levying in townships in the 1960s and the extension of rates to tribal territories through the Local Government Act, 2012 (LGA,2012). Local property taxation, despite its potential to finance municipal services, has contributed an insignificant amount to fiscal revenues in the post-colonial period. This may be largely attributed to great reliance on the buoyant diamond revenues and poor property tax administration. The expansion of the tax base to include tribal land is an important policy intervention that will improve local accountability and mitigate the impact of commodity price shocks on national tax revenues. Introducing local property taxation in tribal territories has to be amenable to recognised institutions governing tribal land rights. Land in tribal territories is held under customary land tenure system, and over a period of time government has interfered with the system to adapt it to changing socio – economic, political and cultural conditions. The notion of private ownership of tribal land is contestable even though there are widespread monetary transactions on customary land, particularly in peri – urban areas. The disposition of land boards is that tribal land is not commodity and therefore cannot be held in private capacity and section 27 of the Tribal Land Act, 2019 (TLA,2019) reinforces this view by providing that

" – a land board may grant any person land by way of lease on terms and conditions as it may determine or which may be prescribed but may only grant land in ownership to the State."

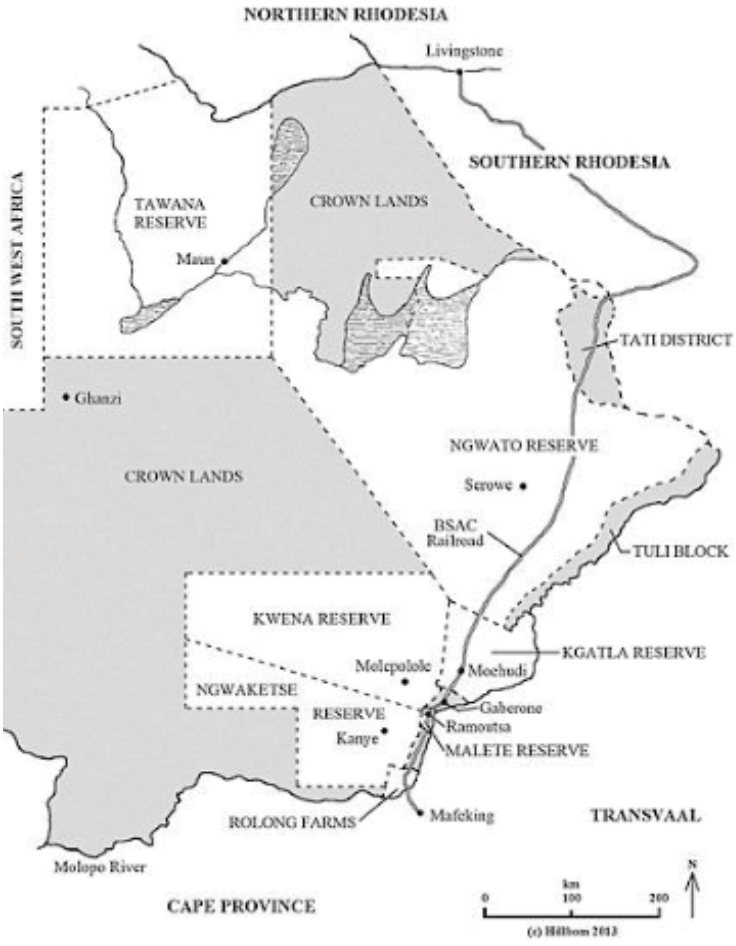
That customary tenure is evolving is not in doubt, and this is evidenced by amongst others, direct property taxes imposed on customary land transfers in tribal territories. Considering the scale of public investment in infrastructure in our rural settlements, it is reasonable for communities to capture part of the increment in private or improvement values to raise revenue for public services. Property market activity paves the way for use of market values to be used as a basis for assessment of properties for local taxation purposes. However, in rural communities where real estate markets are non- existent, and emerging but opaque and non- transparent, it is unviable to use market driven approaches for annual recurrent land and property tax. In such situations, other options or standards of value should be considered for tax assessment.

This article presents a trajectory of local taxation in Botswana and makes the case for a modified area based valuation system to be adopted in tribal territories and further offers insights into developing such system.

Trajectory of local property taxation in Botswana

Colonial era

Local property taxation in present day Botswana was introduced after demarcation of the tribal reserves of Kgatla, Kwena, Ngwaketse and Ngwato in 1899, by the colonial administration and was formally called Hut Tax(see map 1).



Map 1 : Crown land and native reserves in Bechuanaland Protectorate

Consultation on the introduction of the annual recurrent hut tax began in 1886, almost a year after the imposition of British rule, mainly because the British had learned from history of public tax revolts in the colonies of the British Empire , such as the American revolution which popularized the political slogan " No taxation without representation". The colonial administration implemented the hut tax system in 1899, considering the weak colonial regime which had not consolidated itself, prevailing drought and rinderpest pandemic. Typical of any fiscal regime, the hut tax played a pivotal role in state formation, raising revenue for public administration and mobilising a steady flow of cheap migrant workers to farms, mines and industries in South Africa (Ndlovu 2016). In this respect, the hut tax revenue was mostly spent on the police force and in the 1920s the colonial administration through Chiefs as intermediaries coerced able bodied adult males in tax arrears to sign contracts with local labor recruiters. In terms of the hut tax proclamation, a hut tax assessment basis on natives would be on per hut basis, simply meaning an adult male's taxable value will be directly proportionate to the number of huts occupied. In theory, one man could only occupy one hut at a time and thus pay a flat rate regardless of the area or size of the hut. However,

As the economy was not monetarised, but predominantly agrarian during the colonial era, with most people dependent on subsistence farming and hunting for livelihoods, the tax payment was in kind, though the tax system demanded cash in pound sterling .

on the ground, this varied according to the number of wives an individual adult male had, the principle being the ability to pay or support household was related to polygamous status. Customarily, a wife in a polygamous marriage is afforded her own hut and parcel of arable land for crop production. The hut tax, when introduced, was pegged at 10 shillings per adult male per annum and over the years varied between 10 to 25 shillings (Makgala 2004, Ndlovu 2016). Tax collection was attributable to Chiefs at a fee of 10% and in case of collection inefficiency, this was reduced to 5% as an incentive instrument. Makgala (2004) reveals an impressive collection by Dikgosi in sterling pounds in 1899 as follows : 98 from Ngwaketse; 379 from Kwena ; 292 from Kgatla and 3,093 from Ngwato as the tribe controlled a relatively large geographical area. As the economy was not monetarised, but predominantly agrarian during the colonial era, with most people dependent on subsistence farming and hunting for livelihoods, the tax payment was in kind, though the tax system demanded cash in pound sterling . Over the years the hut tax system evolved to improve the tax base, with several statutory instruments, *inter alia*, extending the tax base to every native occupant of a hut tax and conversion to poll tax (Ndlovu 2016). Table 1 shows that over six financial years from 1912-13 hut tax contributed between 55 % and 60 % of domestic recurrent revenues.

Table 1 : Government finance and taxation : 1912 - 1916

Year	1912-13	1913-14	1914-15	1915-16	1916-17	1917-18	1918-19
Hut Tax	35,742	36,887	31,843	39,854	36,451	38,572	40,750
Customs	13,828	14,522	11,298	15,065	16,489	15,043	19,382
Posts	5,742	5,483	6,951	6,891	6,598	7,112	7,554
Licenses	3,915	3,873	3,776	3,487	4,916	4,839	5,132
Sale of government property	510	510	415	315	265	427	882

Source : Ndlovu: 2016 , pg 7

Local property tax in post independence era

It will be inadequate to discuss local property taxation without juxtapositioning it with national tax revenue. After independence, before the discovery of diamonds, approximately half of the national budget was dependent on British aid and the economy was dominated by the cattle industry, and around half of the population was dependent on remittances from South Africa (Barclay 2009). It is ubiquitous that at independence, the post-colonial government inherited an impoverished state, without infrastructure, low literacy rate and 7 km tarred road. The new leadership, considering the precarious socio-economic conditions, not only adopted neo-liberal economic policies, but embarked on tax reforms as tax was the main source of revenue for funding development projects. Until the discovery of diamonds in the late 1960s, the major tax reforms focused on income tax, in order to simplify the tax system and make it more equitable and reduce the dependence on foreign aid and customs duties (Ndlovu 2016). Revenues from exploitation of diamond reserves brought more economic prosperity due to increases in mineral revenue, but government continued to institute income tax reforms to prevent the Dutch disease or resource curse though at trepid level (Ndlovu 2016). Figure 1 shows the contribution to government revenue of different sources.

The new leadership, considering the precarious socio-economic conditions, not only adopted neo-liberal economic policies, but embarked on tax reforms as tax was the main source of revenue for funding development projects.

Figure 1 : Sources of Revenue 1967-1986

source: Barclay 2009,pg 18.

The 2008 global financial crisis brought into sharp focus the volatility of diamond revenues to economic shocks, compelling government to introduce reforms to value added tax (VAT) , and improve administration at Botswana Unified Revenue Services (BURS) and implement computerisation to improve revenue performance.

The Township Act of 1955 empowered urban councils to levy property rates, as a way to generate own source revenues, in order to improve service delivery. However, meaningful implementation of the said legislation only took off after independence, following the development of mining towns and resultant public investment in physical infrastructure to defray costs. A differential rating system was applied around the 1970s based on different categories of land use and a high rate was applied to unimproved sites to curb land speculation. Market value was adopted as an assessment basis in terms of the Township (rating and valuation) regulations of 1966 to distribute the tax burden. This involved a complex valuation process to determine site and improvements values and tax liability being assessed based on the aggregate of the said values. The Township regulations provide that tax base be the capital improved value of a rateable property and also stipulate that rateable property be all land and improvements within tax jurisdiction bar exemptions. In 1981, due to administrative constraints, government outsourced the valuation function of all rating authorities to Fleetwood- Bird Wilson & Co (Pty) Ltd. To build administrative and technical capacity, an experienced rating surveyor was deployed to the then Department of Lands and Surveys (DSL). This deployment was based on development assistance from the United Kingdom (UK), for oversight and quality control of the rating valuation process and, to train personnel with view to build capacity for government to undertake valuations in house. DSL eventually took over the rating valuation function in 1988 as it was considered to be in the public interest for government to have adequate administrative capacity to advise on local property tax matters on economic grounds. Over the years, the Directorate of Lands (DoL) made concerted efforts to improve local property tax administration by recommending automated valuation and assessment process and centralised rating valuation agency, before the portfolio or mandate was handed over to the Ministry of Local Government on account of the fact that legal authority to prepare valuation rolls vested on Councils. Thereafter the major property tax reform proposal was technical assistance report by the International Monetary Report (IMF) in 2014. The IMF report titled " Steps Towards Improving Collections from Property Rates", amongst its recommendations for improved property tax administration include : review of enabling legal framework; establishment of centralised valuation department within the Ministry of Lands and Housing; collection - led strategy rather than valuation - pushed strategy; assessment basis or valuation standard to be area based with adjustments to

"A differential rating system was applied around the 1970s based on different categories of land use and a high rate was applied to unimproved sites to curb land speculation.

reflect location, use and availability of services and expansion of tax base to include commercial farms. Currently, local property tax administration is dismally poor with outdated valuation rolls and low collection efficiency, presenting monumental challenges for the Ministry of Local Government and Rural Development (MLGRD) to address head on.

Revenue from property rates since independence made an insignificant contribution to the fiscus, income and sales taxes remained the important source of government revenue. Almost all recurrent and development expenditures of rating authorities are funded by Revenue Support Grants (RSG) and income from rates has been modest over the years since independence. Table 2 shows a serious vertical fiscal imbalance for all urban council due to limited own source revenues for the financial years 2019 -2021.

In 2012, the LGA, 2012 merged District Councils Act, 1965 and Township Act, 1955 , in an attempt to rationalise central and local relations by, among other things, providing mechanism for municipalities to mobilise own source revenues such that they are less dependent on central-local revenue transfers. In this respect,t local property taxation was extended to rural areas in line with the mantra 'finance should follow function'.

Table 2 : Revenue sources of Urban Councils (Botswana)

Revenue Source	Francistown		Gaborone		Jwaneng		Lobatse		Selibe Phikwe		Sowa	
	In Pula Millions(to nearest 100 thousand)											
	2019/0	2020/1	2019/0	2020/1	2019/0	2020/1	2019/0	2020/1	2019/0	20201	2019/0	2020/1
Property rates	11.8	7.8	70.0	37.9	6.8	0.8	2.9	0.7	6.5	1.3	0.7	0.7
Revenue Support Grant	178.5	193.3	262.6	285.1	82.5	89.7	110,0	119.4	121.4	132.0	41.3	44.8
Other Income	9.5	22.3	20.9	47.8	4.0	2.5	5.9	6.9	6.1	5.4	1.5	1.4
Total	**200**	**224**	**353.6**	**370.9**	**93.3**	**93.1**	**118,8**	**127.0**	**134.1**	**138.7**	**43.5**	**46.7**

Source : MLGRD, author's calculations

Local Government System in Botswana

Botswana is a unitary state with a two-tier system of government, comprising of central government headed by the President and local government led by Mayor in urban councils and Council Chairperson in rural districts. There is no constitutional provision for local government to underline the unitary system of political organisation. Local authorities in Botswana exist at the pleasure of the central government as they are statutory bodies and could be dissolved by Parliament, without reference to the Constitution. The main legislative enactments, that established District and Urban Councils are the Local Government (District Councils) Act, 1965 and The Township Act, 1955 respectively. The LGA, 2012 consolidated the aforementioned statutes to strengthen decentralization and local governance. A decentralisation policy has been developed and according to Madala et al (2016), this was intended to create a system that defines and aligns the role and responsibilities of central government, local government and non-state actors to drive a decentralised, inclusive and responsive service delivery and sustainable local development. Some commentators though, observe that decentralisation 'has always exhibited elements of centralisation, with the local government lacking autonomy and independence and operating as an extension and implementing arm of central government' (Mooketsane et al 2017).

Local authorities in Botswana predate independence in 1966 and actually tribal administration morphed into local government in the early years of state building during the restructuring of political entities and socio – economic systems in the colonial era. In the 1950s local authorities were called tribal councils, the largest being Ngwato Tribal Council. Tribal Chiefs played limited government role by allocating land, raising revenue, administering justice and providing social services.

Although Councils are the main political and administrative structures of local governance, local governance in Botswana rests on four pillars of Councils, District administration, Land Boards and Tribal Administration. District Administration operates as a representative of central government in the districts and performs functions allocated by central government. Land Boards hold tribal land in trust of the community and allocate it for different uses to citizens. Chiefs are the custodians of culture of their ethnic groups and administer or enforce customary law. The above mentioned institutions play an important role in local

" Local authorities in Botswana exist at the pleasure of the central government as they are statutory bodies and could be dissolved by Parliament, without reference to the Constitution."

economic development through District /Urban Council Committees. The Committees are responsible for preparation of district development plans and Councils are responsible for implementation. The revenue assignment to Councils and their powers and functions derive from the LGA, 2012. Councils' own sources of revenue included rates, service levies and user charges and these are supplemented by inter- governmental transfers. Council members are elected for a five year term by direct universal suffrage in accordance with the electoral code. Generally, local authorities have limited capacity, mainly insufficient qualified and skilled personnel.

Evolution of Customary Land Tenure and Administration In Botswana

In the pre-colonial era, the system of property rights was customary land tenure. Amongst the main elements of the customary land tenure was the 'right to avail' meaning every community member was entitled or had a birth right to be allocated residential, arable and grazing land. Each family was granted exclusive use rights to residential and arable land but grazing land was used on a communal basis. The rights in customary land could not be traded for commercial gain but reverted to the tribe when surplus to requirements. Security of tenure was based on kinship and being a member of a tribal society. The Chief was the custodian of the land, holding it in trust for the benefit of the tribe and administered the land under customary law.

During the colonial era, the customary land tenure remained intact in areas declared as native reserves. In other areas carved out of tribal land, the colonial regime declared them crown lands and freehold land to serve their socio-political and economic interests. The concept of private property, which is an important institution in a liberal market economy, was introduced on portions excised out of tribal land.

After independence, attained in 1966, the three tier land tenure system was maintained but the nomenclature changed, with native reserves converting to tribal land and crown land became state land. Parliament passed the TLA, 1968, which established decentralised land boards and transferred powers and authority over customary land administration from Chiefs to these statutory bodies. Further, the subject TLA,1968, also made provision for granting of certificates of customary land grants and common law leases within tribal territories. Under customary land tenure, the owner has a right to perpetual use, which can be transferred and inherited but absolute ownership rests with sovereign government. The tribal land rights can be alienated, provided the land board's consent has been secured upon satisfaction of development covenant. Customary land grants are only available to citizens and may be converted to common law leases. Common law leases can be granted to citizens and non-citizens. Allocation to non-citizens requires the consent of the Minister responsible for tribal land. Tribal land can be allocated for different uses in line with the land use or structural plan of a tribal territory.

The post-colonial land tenure has evolved in gradual and cautious manner to avoid social and economic disruptions The Tribal Land Grazing Policy (TGLP) of 1975 introduced exclusive leaseholds of 50 years to improve agricultural production and address land degradation. TGLP also addressed the concerns of smaller farmers by reserving communal grazing areas to be utilized along customary practice. The National Policy on Land Tenure (1985) constituted a major milestone in the review of Botswana's land tenure. In respect of tribal land, the policy, in order to improve rural development, made provisions for granting of common law leases for residential use for 99 years and for industrial and commercial use for a duration of 50 years. The policy also stated that common law leases should provide for automatic right of inheritance, subletting, hypothecation, reversion to customary grant subject to reasonable consent of the land board. It was also stipulated that land boards consent should no longer be required for cession of common law lease to a citizen. The Report on the Review of Tribal Land Act, Land Policies and Related Issues (1989), and Government Paper No. 1 of 1992 on Land Problems in Mogoditshane and Other Peri- Urban Villages, dealt mainly with illegal tribal land sales or informal tribal land markets in major urban villages. Population growth and rural to urban migration put pressure on the tribal land administration system, as well as relocation of low income earners priced out of property market as a result of sky rocketing property values in townships. The inability of land boards to efficiently allocate land and execute effective land use planning resulted in land squatting or informal settlements and implosion of tribal land sales. Individuals who held tribal land rights acquired before establishment of land boards sought to benefit from the influx of migrants seeking plots for housing development by selling their small agricultural holdings on the township fringes, on the strength of section 10 (2) of the TLA, 1968. The decision of the Court of Appeal in the case of *Kweneng Land Board* V Kabo Matlho was watershed moment as it firmly established that tribal land can be held in personal and private capacity and therefore a commodity, because customary law evolves with changing conditions of society. Government, fearing that this could lead to chaos and dispossession of the poor at considerable scale, responded by promulgation of the Tribal Land (Amendment) Act, 1993 (TLAA,1993), which deleted section 10(2) and imposed restrictions on sale of tribal land. Some commentators argue that the cancellation had minimal impact, as by the insertion of section 38(1) , government acknowledged the changes to cultural, economic and social values to tribal land (Ng'ong'ola C 2017, Mengwe D 2017). Section 38(1) provided that land board's consent is not required ;

i) Where the land to be transferred had not been developed to the satisfaction of the land board
ii) Sale in execution to a citizen of Botswana
iii) Hypothecation in favour of citizen of Botswana
iv) Devolution of land by way of inheritance.

The Revised National Land Policy, 2019, indicated that the three tier land tenure system will be retained as it has served the country well over the years. It also states that tribal land will be planned and surveyed before allocation and compulsory registration of all tribal land rights to improve tenure security. In terms of alienation of tribal land, the revised policy proposes that transfers to non-citizens will be regulated by ensuring the right of first refusal is given to citizens. It also provided for imposition property rates and transaction taxes

on tribal land.

Parliament enacted the Tribal Land Act, 2018 (TLA,2018), which came into effect on 20th April 2022, and this can be likened to a new dawn on Botswana land tenure trajectory. The TLA,2018 provides for mandatory registration of all customary land grants and compels all tribal land holders to register their tribal land rights within a period of six months from the date of commencement of the Act. It further insists that common law lease be re-registered as a customary grant and stringent regulations similar to the Land Control Act, 1975 which control transactions of freehold agricultural land, for transfer of tribal land to non- citizens. The Minister also retains powers to direct tribal land policy and composition of land boards. On compensation for expropriation, the legislative piece introduced the concept of market value in determining adequate compensation. Although arguably transformative, some commentators have posited that it has major congenital and serious defects that make it regressive (Ng'ong'ola 2019).

Land administration is essentially about management of land tenure rules and involves, for example processes for determining land rights, valuation and taxation of land, land use regulations and land dispute resolutions. Considering its fundamental importance to sustainable development, Botswana has made changes to land administration since independence. In the 1970s, land boards were established and were given authority to allocate and administer tribal land and issue certificates of customary land grants, on the basis of the TLA, 1968. Over the years attempts were made to improve the performance of land boards by capacitating them through training. The TLA, 1968, was amended in 1993 to address the emerging challenges of illegal sale of tribal land and informal tribal land markets due to rapid urbanisation and land boards' inefficient land delivery systems. Government introduced the Land Administration Procedures Capacity and Systems (LAPCAS) program in 2009, to make the land administration more transparent and efficient because of high incidence of poor service delivery by land boards. Among the major issues and problems identified were : poor record keeping, inadequate registers, lack of common register of tribal land and the fact that tribal plots do not have unique numbers of identifiers, all of which contributed to inequitable distribution of land. Although the LAPCAS project was rolled out nationally after initial piloting, it faced considerable challenges such as lack of buy-in by the public, insufficient ownership by stakeholders and inadequate capacity in terms of skills and high turnover of staff trained at considerable expense by government (Seleka et al 2016).

Property market in Tribal territories in Botswana

Rapid urbanisation, population growth and monetisation have contributed to socio – economic transformation and emergence of tribal land sales in tribal territories. Tribal land transactions are more pervasive in peri-urban villages and major villages with considerable industrial base such as Palapye. Government's initial reaction to the development of tribal land market or tribal land sales was more restrictive on the premise that the sales are contrary to customary norms. This obviously drove the transactions underground, leading to an informal property market characterised by opaqueness and non-transparency. Over time, the pervasiveness of informal and illegal tribal land sales in peri – urban villages caused by poor land delivery and administration by land boards, as well as being a natural outcome of a liberal market economy adopted by Government, led to market friendly tenure and administration reforms. The land tenure and administration

entailed granting of leaseholds on tribal land that allowed hypothecation, sale in execution and unfettered exchange of improved sites between citizens. This, to all intents and purposes, entrenched commodification of tribal land. Government has facilitated credit market linkages with the property sector, through provision of housing finance to civil servants for residential development and business finance for development of enterprises, in rural communities. Registration of common law lease at the Deeds Registry to improve security of tenure, also facilitated the creation of bankable interests and extension of property markets in rural communities and improvement in land use efficiency. On this pedestal, some commercial banks have been able to penetrate property market in tribal territories, particularly in peri urban villages where there is competition for land for housing and economic activities.

Generally, the real estate market in Botswana is thin, and in tribal territories it is characterised by lack of publicly available information to track market trends due to poor record keeping by land boards and their disposition not to facilitate development of primary property market. Public information on tribal land interests transactions recorded at Deeds Registry is incomplete as it indicates exchange prices without full details of the physical description of the property and particulars of sale. This contributes to valuation uncertainty amidst a poorly regulated Valuers' profession. The real estate market in peri – urban villages, which are part of the agglomeration economies of towns and cities, mainly developed because of considerable demand for tribal land from low and middle income migrants priced out of the not well functioning housing market in Gaborone. Some of the peri urban villages such as Mogoditshane and Tlokweng have undergone population implosion as shown in Table 3 below.

Table 3 : Population growth in selected peri – urban villages

Village	Population Census, 2011	Population Census, 2022	% Increase
Mogoditshane	58 079	88 006	52%
Tlokweng	36 364	55 508	53%
Oodi	5 687	10 257	80%
Gabane	15 237	20 010	31%

Source : Statistics Botswana (2023) and Author's Calculations

As a result, there is considerable property developments for housing and economic activities to service this burgeoning population financed by the banking and financial sectors, as a response to macro-economic growth. The major impediment to property market efficiency is free allocation of tribal land on rationing basis in the interest of equitable distribution. This contributes to market distortion, creating an uncertain investment climate and negative market outcomes caused by supply side bottle necks. Delays by land boards to service tribal land timely, crowding out of private sector in tribal land delivery and servicing, restrictive planning regimes not responsive to market signals have contributed to sky rocketing tribal land values and sub standard housing. The average value of tribal plot measuring 900 square metres in Mogoditshane is P300 000.00, and according to Statistics Botswana Multi Topic Survey Q4 2022, the monthly average earning of citizens in formal employment is P6 578 and overall unemployment rate is 25.45%. Using the 30% rule meaning that one should not spend more than 30% of gross income on rental or mortgage payment, reveals that property values in peri –urban areas are high relative to income. The situation is precarious, considering that tribal land purchase is likely to be financed through personal loans from commercial banks and micro finance at high interest rates.

The Transfer Duty (Amendment) Act, 2019 (TDAA, 2019) can be considered as a herald of government's yielding to tribal land markets. In terms of the TDAA,2019, the tax base has been broadened to cover tribal land and market value is the basis of tax assessment. The TLA, 2018 by introducing the concept of market value for payment of adequate compensation for expropriated tribal land interests is also an acknowledgement of trading of tribal land interests.
Generally, the real property market in tribal territories is non – transparent, immature and inefficient due to market distortions and poor land administration by land boards. Real property markets are non-existent in predominantly rural communities where livelihoods are land based or dependent on subsistence pastoral and arable farming and, there is strong attachment to customary arrangements to access land. In these communities, there is no considerable trading of tribal land interests for investment or housing, as those who require tribal land, their demands can easily be met through the government land rationing mechanism.

" This contributes to valuation uncertainty amidst a poorly regulated Valuers' profession."

Options for determining taxable value

The imposition of rates in tribal territories must be based on a reasonable valuation system for distribution of the tax burden. In deciding on the appropriate valuation approach, it is important to consider the local circumstances, in particular property tax administration capacity, land tenure system and the extent of the development and maturity of real estate markets (UN Habitat 2011). The most considerable challenges in implementing property taxes in Africa relate to institutional complexity

and capacity constraints, incomplete or highly contested land titling and ownership records as well as problems of conceptualising and measuring value especially in rural areas where property markets are non – existent (Zebong et al 2017). There are essentially five assessment basis for local land and property tax system *viz* Capital market value, annual rental value, valuation bands, cadastral or formula value and area based value (UN Habitat 2011). Plimmer et al (2010) suggest that the major tax bases can be split into different groups of market or *ad valorem* based, area – based and modified area based. Zebong et al (2017) enunciate market value based systems, surface area – based approaches, simplified hybrid methods which hinge on area based approach by adding locational and qualitative factors such as zones, construction and points based system.

Generally, market based assessments are preferred because they can reflect changes in local economies and the distribution of property related wealth. Furthermore, value based approaches are relatively, better in encompassing vertical and horizontal equity, allow for tax buoyancy, reflect the quality of infrastructure services and are a good proxy for ability to pay (Monkam 2011). However, market based approaches require good quality property market data, good deed/title registration system, expertise in property valuation and intensive use of man power resources (McCluskey et al 2002). In the absence of active property markets, there is a fertile ground for collusion between valuers and rate payers.

Area based approaches are easier to administer, eliminating the need for excessive demand for extensive detailed market data and expertise. Furthermore, they are practicable, transparent, simplistic and socially acceptable by the tax payer. They are also cost effective when revaluations are conducted. The main drawback of the area base system is that it is regressive, in that, a greater burden can be placed on low income than high income taxpayers and as well as the fact that it is inconsistent with ability to pay principle. It is also characterised by lack of tax buoyancy, in that revenue will only change if the tax authority takes explicit action by recalibrating the area based system by adjusting coefficients or rating factors. This is in contrast to *ad valorem* based system where increases in revenue occur automatically as market values increase.

Modified Area based approach applied to a tribal village where real estate markets are developing.

In Botswana, the real estate market in tribal territories, though still developing in peri urban areas, is thin, non –transparent and not well functioning. In remote rural areas it is virtually non–existent. The land administration infrastructure necessary for development of real estate markets in tribal territories is not well developed, even though the tribal land records or registration system has improved considerably over the years to provide the necessary data for identification of properties. Through LAPCAS project, many tribal plots were given unique identifiers, however in many tribal areas street maps are either unavailable or outdated. Although customary land tenure reforms have been made to facilitate gradual development of real estate markets in rural areas, the deed registration system does not give full details surrounding the transaction to improve property market efficiency. Further, considering that private ownership of tribal land is still highly contested and the disposition of land boards is that tribal land is not an economic commodity, despite innovative market friendly customary land tenure reforms, it is arguably deviant to adopt market based valuation systems. This is because in some sections of society this will be inconsistent with the traditional concept of customary land that it has no market value due to inalienability.

Broadening the tax base to include tribal land and adopting market based assessment approach will be far-fetched, as there are serious capacity constraints in implementing *ad valorem* property tax system in urban councils, which have decades of experience imposing local property tax. The land tenure system in urban councils is state land and freehold and central government is responsible for land administration system, whereas land boards and district councils have been delegated authority to deal with tribal land administration. The state land administration system is relatively superior than tribal land stewardship by land boards. Qualified valuers within urban councils are deficient and the real estate market is thin even in cities such as Gaborone, as there are few transactions to support a fully-fledged market based property tax system across all rating jurisdictions (Grote et al 2014).

When deciding on the appropriate valuation system, it is advisable that the central plank be on simplicity, transparency and explainability to the tax payer (Kelly R,1994 as cited by McCluskey et al 2002). Thus a simplified valuation system is suited for tribal territories, where real estate markets are either developing or non-existent, because it is far easier to assess relative values than actual objective market value. Perception of fairness by tax payers is critical to the valuation process, therefore absolute value is less significant than relative value, meaning that the ratepayer is more interested in knowing whether or not his assessment is equivalent to another ratepayer owning a similar property. Simplified valuation approaches are transparent, defensible, easier to comprehend and gain legitimacy or credibility than complex market based methods, because they are essentially based on property physical characteristics. Market based approaches are highly likely to be contested in tribal territories or peri –urban areas, compromising certainty or predictability, where there is serious paucity of comparable evidence and in communities where there is free access to land or land abundance. One of the major challenges at sub national government level, impeding the provision of public service in Botswana, is lack of skilled personnel. Therefore,

"Therefore, simplified valuation methods make it possible to deconcentrate valuation responsibility from central government thus strengthening local governance.

simplified valuation methods make it possible to deconcentrate valuation responsibility from central government thus strengthening local governance. Where simplified valuation methods are employed, local government functionaries could use para-valuers to collect data, with central government valuers playing a supportive role by providing rating valuation guidelines and basic values of benchmark properties for use as references for conversion to rateable values.

The modified area based tax is administratively feasible because of its simplicity and cost effectiveness and can be applied in tribal territories because real estate markets are not developed. In applying this approach, the property tax can be imposed on land only and where there is considerable industrial base, it could be applied to both land and improvements. This is practicable as the TLA, 2018 makes provision for mandatory registration of customary land grants and tax liability should fall on entity or individual allocated a parcel of tribal land. The development and applicability of the modified area based valuation system is demonstrated below using the urban spatial structure of Mogoditshane village.

Mogoditshane is divided into five zones as shown in Figure 2. Figure 3 shows property developments and road networks within an area of zone C. Each zone is assigned a basic land value for different land use classes, which though there are not market values there is element of market forces in the derivation of the basic value. Through the observation of listed prices of properties in different regions of the village, the valuer should determine basic values using experience and knowledge of the nascent market. The notion that the location is important determinant of value is thus brought into play to inject some modicum of fairness or equity in the valuation process. Properties in the same zone of the same category are thus assigned the same basic value and adjustment are made to reflect what are considered the most important value determinants in all zones which is, whether the property lies in a ward where there is a lay out plan (planned area) or in typically old wards without a layout plan (unplanned area). Table 4, Table 5 and table 6 show the basic values determined for each zone and the coefficients for location and infrastructure which can be used to calculate the value of each individual parcel of tribal plot in each zone. The tables allow for a simplified valuation process that can be carried en masse in a systematic or structured way based on the area of the land.

Figure 2 : Mogoditshane village divided into five zones.

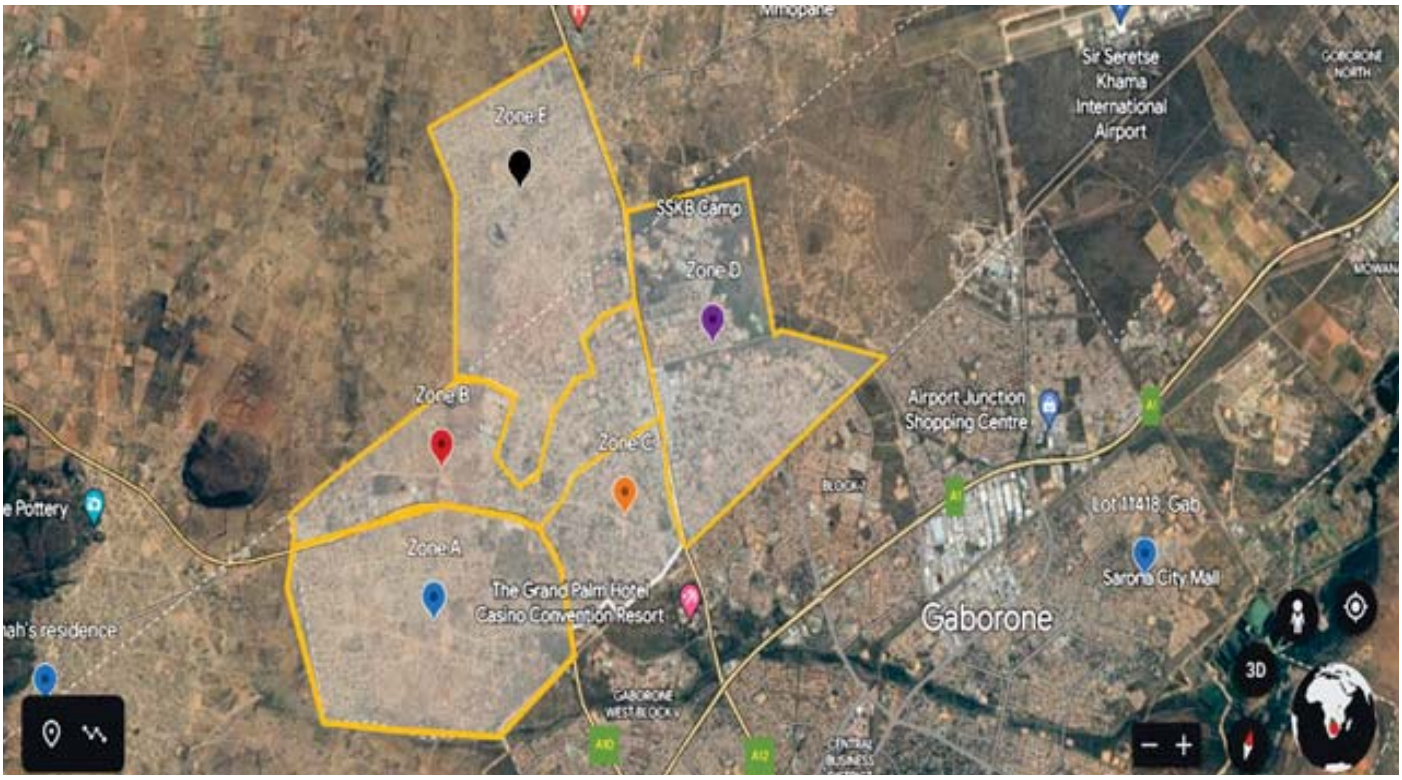


Figure 3 : Part of Zone detailing different land uses.

Table 4 : Basic Land Value (BWP/Sqm)

Mogoditshane					
Zones(defined by law)	**Class/land use**				
	Residential (Single Family)	**Residential (Multi-family)**	**Commercial**	**Industrial**	**Community services**
A	170	300	600	350	270
B	150	300	620	450	270
C	200	320	650	500	270
D	215	320	620	450	270
E	230	350	550	400	270

Table 5 :Coefficient for Location (CI)

Mogoditshane					
Locality with Zones	**Zones**				
	A	B	C	D	E
I (old wards without layout plans)	1.00	1.00	1.0	1.00	1.00
II (wards with layout plans)	1.10	1.10	1.0	1.20	1.30

Table 6 : Coefficient for Infrastructure (Ci) = 1 + i + ii + iii + iv

Infrastructure elements	Elemental Value			
	available	**Not available**	**connected**	**Not Connected**
i. Water Supply	0.15	-0.20	0.05	-0.02
ii. Electricity	0.10	-0.15	0.03	-0.02
iii. Sewerline	0.05	0.00	0.00	0.00
Roads				
iv. Road access	**Arterial Road**	**Collector Road**	**Street/Minor Road (Unplanned)**	**Street/Minor Road (Planned)**
	0.20	0.10	0.05	-0.05

The basic value per square meter for improvements is based on the building quality and construction type as per the assigned construction code. It is derived from reproduction cost determined from enquiries from public and private developers, builders and construction cost consultants. Table 7 shows the unit basic value for different types of buildings and their assigned construction codes. Table 8 shows the adjustment factors or coefficient of individual physical characteristics important for determining building's value.

Table 7: Basic Value of Buildings (BWP/Sqm)

Construction Code	Type of Construction	Basic Value (Unit reproduction cost)
ICF	Industrial, Reinforced concrete frame, concrete brick/block infills, topped by colomet cladding and insulated ceilings	9 000
IPF	Industrial, Portal frame with concrete brick/block infill walling and IBR cladding	8 000
ICB	Industrial, Concrete block/brick walls. Monopitched IBR/Corrugated iron sheeting roof	5 000
CCF	Commercial, Reinforced concrete frame with concrete block/brick walls	17 000
CCB	Single storey concrete block/brick walls, IBR and corrugated iron sheeting roofing.	10 000
RHC	Executive/high cost, concrete block/brick walls	6 500
RMC	Medium cost, concrete block/brick walls	4 500
RLW	Low cost, concrete block/brick walls	3 500

Table 8: Coefficient for Individual Characteristics (Cc) = 1 + A+ B+C+D+E+ F

Condition/Improvement	Adjustment	
	Does not exist /poor	**Exist/good**
A. State of repair and condition	-0.10 – 0.50	0.00
B. Air conditioning	0.00	0.10
C. Floor Tiles	0.00	0.05
D. Balcony/Verandah	0.00	0.05
E. Garage	0.00	0.10
F. Staff/ Maid's Quarters	0.00	0.10

Valuation example

Figure 4 : Single storey medium cost house in Zone C

Newly built single storey house with following construction details; concrete block wall, plastered and painted in and out, porcelain tiles floor finish. The external floor area of the house, in terms International Property Measurements Standards (IPMS) 3A Residential) is 80.41 square metres and the area of the verandah is 10.46 square metres.

Table 9 : Valuation Example : Value based on property attributes

Zone and Land use	Land Area	Basic Value	Location factor		Coefficient of Infrastructure (Ci)		Land Taxable Value
Zone C / Residential	900 sqm	P200/sqm	Planned	1.00	Water	(0.15 + 0.05)	
					Electricity	(0.10 + 0.03)	
					Sewerline	(0.05 + 0.00)	
					Collector Road	(0.10)	
					Total Ci	**1.45**	**P261 000**

Zone and Building quality	Building Area	Basic Value	Coefficient of characteristics	Individual	Building Taxable Value
Zone C /RMC	80 sqm	P4 500/sqm	State of repair and condition	0.00	
			Air conditioning	0.10	
			Floor tiles	0.05	
			Verandah	0.05	
			Garage	0.00	
			Maid;' Quarter	0.10	
			Total Cc	**1.30**	**P468 000.00**

The taxable value of the property is the sum of P261 000 and P468 000.00 which is P 729 000.00

Conclusion

Local property taxes have been imposed in Botswana during the colonial and post colonial era to finance public services. However, despite the potential of local property taxes to raise revenue for sub national government, it has been saddled with poor administration leading to low revenue yield and inequity. Dependence by central government on the easily collectable primary commodity export earnings, particularly in the diamonds sector for five decades, has contributed to a lackadaisical attitude towards domestic direct taxation. Direct taxation has political costs and demands accountability. Half-hearted tax reforms have been implemented in the past, but the reality that " diamonds are not forever" but exhaustible natural resources has helped, in terms of renewed focus on strategies to attain optimal revenue potential and generate more revenue from the non-mining sector. Tax base broadening to extend annual property rates to districts and property tax reforms, to improve revenue performance is sensible considering improvements in tribal land administrations and market friendly land tenure reforms over the years. The challenge in extending local property taxes to peri –urban villages and rural settlements is the weak administrative capacity of Councils, immature valuation profession, lack of property market data and incomplete tribal land registration system, which makes it difficult to establish a credible and fair property tax regime.

The proposal presented in this article is for a modified area based valuation system to be used in tribal territories, where real estate markets are still developing. In this approach, it has been proven that assessment equity can be incorporated by adjustment factors such as infrastructure services, building quality and condition. The method can be further simplified by removing the building component so that the tax base becomes unimproved site value. The modified area based approach is simple, cost effective and quicker as it allows for en mass systematic valuations.

Decentralisation and rapid urbanisation require stable and predictable revenue services to improve local governance and accountability. This requires strengthening the local property tax regime by amongst other things, innovative valuation approaches that reflect prevailing social, economic, political, technological and cultural circumstances. Simplified valuation system can address administrative deficit at local authorities and can be used as a springboard for local government functionaries to build bureaucratic capacity in the long run for an establishment of an efficient, predictable and buoyant local property tax regime.

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BIV **ANNUAL GENERAL MEETING – 2022**

The 3rd Annual General Meeting (AGM) of Botswana Institute of Botswana (BIV) was held on 17th September 2022 at Hotel LaBama, Block 6, Gaborone. It was a hybrid meeting where some members attended in person and others joined the meeting through an online Google Meet platform. The President reported the main activities of the outgoing Council for the preceeding year as follows;

- A strategic plan was developed and shared with membership through BIV websitie.

- BIV submitted a position paper on the Tribal Land Act, 2018 and Tribal Land (Regulations) 2020.

- A Joint Working Group was established between BIV and Real Estate Institute Of Botswana (REIB) to review Scale of Professional Fees set by Real Estate Advisory Council (REAC). REAC made a request to REIB to make proposals on review of fee scale.

- Minimal progress has been made over the year in terms of lobbying for review of the Real Estate Professionals Act, 2002 to be aligned with Constitution of the Republic, so that it does not violate freedom of members to associate with any Society of their choice. BIV will engage with the Ministry of Lands and Water Affairs when the opportunity arise.

On the financial front,the Treasurer highlighted that BIV relies mainly on membership subscriptions for sustenance but payment is low compared to the membership base. Members were urged to pay their subscriptions to enable the BIV to facilitate, in their professional development.

The incoming Council appointed by members comprise of;

President:
Mr K. Mpatane
Vice President:
Mr T. Ndlebe
General Secretary:
Mr D. Mengwe
Deputy General Secretary:
Mr E. Richard
Treasurer:
Mr G. Moalosi

ADDITIONAL MEMBERS
Mr M. Motlhanke
Mr C. Matobolo
Mr B. Thibelakae
Ms M. Keolopile

The membership directed the incoming Council to prioritise the following in the ensuing year;

i) Arrange for three CPD sessions.
ii) Facilitate at least two activities for fund raising.

Quality of Valuation Reports

The AGM was followed by a round table discussion on the ' Quality of Property Valuation Reports in Botswana.' by all members physically present before the event was brought to a halt. Members shared their experiences and knowledges, thus learning from each other in order to find reasonable solutions or improvements to gaps identified in valuation reporting. Generally all agreed that the quality of valuation reports was a major issue of critical concern to all stakeholders and industry. The following weakness in valuation reporting were revealed ;

- Lack of understanding and attention to clients instructions
- Lack of transparency in terms contents of valuation reports
- Lack of analytical detail and comparables
- No clear indications of valuation approaches and methodologies used in the assignments.

"All members agreed that International Valuation Standards should be domesticated or adopted and all valuation reports should be compliant thereto."

All members agreed that International Valuation Standards (IVS) should be domesticated or adopted and all valuation reports should be compliant thereto. Valuers should also adopt the best ethical practices and standards and compy with relevant laws. Further, all members agreed that in undertaking statutory valuations the relevant legislation should take precedence over IVS.

On the subject of what interventions should be made, as most clients are clearly not demanding higher valuation service levels, it was suggested that members should continually improve their skills and competencies through CPDs; adhere to ethical standards and ; that BIV should facilitate and support research on local practice standards and clients' perception of quality of valuation reports.

A COMMENTARY ON TRANSFER DUTY (AMENDMENT) ACT , 2023

By: Donald Mengwe, Bsc (Hons) Estate management, Valuation Surveyor

Government has backtracked on its nationalistic or discriminatory pose in Transfer Duty (Amendment) Act, 2019, which imposed draconian tax rates on non-citizens. Under the Transfer Duty (Amendment) Act,2019 that tax rate was set at 30% of the purchase price, but the new Transfer Duty (Amendment) Act, 2023 effective 03rd May 2023 has reduced the rate of transfer duty to non – citizen as follows ;

i) 10 % of the purchase price or market value of the property up to P 2 000 000.00
ii) 15% of the purchase price or market value of the property in excess over P2 000 000.00

It was obviously a shot on the foot, to increase the tax levy on foreigners whilst also courting for foreign direct investment in flows. This tax charge on property transfer seemed diametrically inconsistent with the generous corporate tax reliefs for foreign companies and other incentives that allow investors to repatriate dividends and profits from Botswana freely. It is therefore apparent that that the main reason for this intervention in the property market was not so much to raise additional revenue but to restrict foreign ownership of property in Botswana. The property sector and business community were caught by surprise as in liberal market economy, land is a factor of production, so raising the tax rate is bound to increase the production costs. Higher production will obviously affect the competitiveness of Botswana to attract FDI that is necessary for economic growth and poverty alleviation.

The property market was also negatively affected by the hefty increase in duty rate and requirement for tax clearances for all transfers including tribal land. Property values took a nosedive and there was a dip in sales transaction volumes recorded at Deeds registry most noticeably for properties priced in excess of P2 million pula. In the residential sector, the upper end, was more negatively affected by the hike in tax rate, as the foreigners who have business ventures in Botswana, and have traditionally been the predominant players remained aloof. The commercial and industrial sectors also took a hit as is dominated by listed property companies and companies with foreign share ownership, and this resulted in an increase in illiquidity. Considerable activity was only in the lettings market where in prime retail and industrial properties performed well from a rental perspective, because of a strong tenant base and escalations built in lease contracts.

Overall, the increase in duty contributed to delays and increase in the time period required to complete transfer of ownership, as BURS vetted almost all transfers even those unlikely to raise revenue such as, for properties situated in tribal territories where real estate markets are non-existent. There were also considerable increase transaction costs as cost recovery prices by the land authorities are factored in and a decline in property capital values because of a reduction of potential pool of demand because of restrictions on foreigners.

Generally the property market showed signs of slow down after the rise in duty rate. Add to situation the onset of inflation due to high commodity prices, which put pressure on wages leading to cost of living crisis, and a hike in interest rates, the property market became more jittery.

The other commendable provisions in the Transfer Duty Act, 2023, which are effective from 3 May 2023 are

"The property market was also negatively affected by the hefty increase in duty rate and requirement for tax clearances for all transfers including tribal land."

i) New tribal or state land alloca-

tions are exempt.

ii) Local council valuations or valuations by independent competent persons appointed Commissioner of BURS will be accepted for the purposes of ascertaining the fair value of immovable property situated on tribal land.
iii) The transfer duty exemption threshold for citizens has ben increased from 1 million to 1.5 million.
iv) A waiver from the payment of Transfer Duty where VAT is payable on transaction.
v) The following are specified transactions exempted from the requirement to provide valuation reports and lodging of declarations with the Commissioner General:

a) Heirs for inheritance purposes
b) Transfers to citizen first time home owners
c) Transfers to former spouses following divorce.
d) Transfers between spouses still in marriage
e) Transfers into trust by intended spouses or parents of intended spouses for support of marriage
f) Transfers from trustee to beneficiary
g) Transfers to parent of deceased child who had died intestate (without a will) and did not have a spouse or child, and
h) Correction s of mistakes regarding registration of transfers.

The above transactions can be lodged directly at Deeds Registry or Land Boards for purposes of transfers

It is also applaudable that the margin of error has been set at + - 33%, considering the immaturity and inefficiency of Botswana property market. Section 15(2) and as amended provides that

‘ where the fair market value determined by the Commissioner General is in excess by one third of the declared value or the value stipulated in the valuation report, whichever is greater, the determined fair market value shall be taken as the basis for duty computation’

and Section 15 (3) as amended provides that

‘where the fair market value determined by the Commissioner General is less by one third of the declared value or the value stipulated in the report, whichever is greater, the declared value or value stipulated in the report shall be taken as the basis for duty computation.

By introducing market value as a basis of assessment, in broadening the tax base to include tribal land, through the amendment to Transfer Duty Act, it was inevitable that this was going to bring to the fore, problems of conceptualisation of the tribal land rights. Section 27 of the Tribal Land Act, 2018 provides that

‘ a land board may grant any person by way of lease on terms and conditions as it may determine or which may be prescribed but may only grant land in ownership to the State.”

It is apparent that the purpose of the provision is to underscore that tribal land cannot be held in personal and private capacity. From a neo classical perspective, this is theoretical and serve no practical purpose, as land and property markets deal with real property rights or interests rather than the land *per se*. The real property rights accompany the tribal land as they are transferred. In terms of this neo liberal thinking to determine market value where property markets are active, valuations have to be based on sales data. However, for those who hold the view that customary land has no intrinsic value, as it is inalienable, there should be clear distinction between the solum (soil) and things that grow on it or are attached to it. The soil like motherhood is priceless and invaluable. In this respect, private ownership is alien, and one can only own the improvements, meaning market value can be limited to replacement cost of buildings or improvements.

Section 2(4) b as amended provides that the rate of transfer duty

‘ in the case of customary grant, be calculated on the aggregate rental payable or on the value of immovable property leased, whichever is greater.’’

It would have been sensible for government to avoid prescribing the detail on approaches for computation of value for transfer duty purposes and left that to the ingenuity of valuers or contracting party. As it is the customary grant is treated as tradeable commodity and this is inconsistent with section 27 of the Tribal Land Act, 2018.

In conclusion, the Transfer Duty (Amendment) Act, 2023 is a welcome development considering government stance of courting foreign direct investment, however it also introduces problems of conceptualisation with regard to nature of the tribal land interest and appropriate valuation approaches for assessment of the tax.

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