Chiefdoms and Rural Land Management

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Key words: Customary tenure, governance, land administration.

SUMMARY

Customary tenure has become accepted as a legitimate form of holding of rights in land in most African countries but the governance of this type of tenure is generally not fully explored. Africa south of the Sahara is faced with very high levels of poverty and land, despite its abundance is not used in the most efficient manner. Land if properly managed can unlock wealth to the communities but unfortunately this is not the case in sub-Saharan Africa. An average of 80% of land in Africa is under customary tenure and its governance has in the main continued to be rudimentary.

This paper discusses the need to interrogate the current governance of customary tenure systems and suggests that just as nothing is constant governments together with communities should devise governance structures that would truly engender development in a sustainable way. The continual insistence on practices that are archaic and which do not bring about meaningful development to the poor in the rural areas should be discouraged. Africa can borrow from best practices elsewhere and combine with their traditional set-ups to establish land administration systems that can work. Lessons from Botswana suggest that it is possible to achieve this in the African setting as well.

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1. INTRODUCTION

In this paper we ascribe the term chiefdom to mean traditional leadership as exists in most Sub-Saharan African rural communities. Tied to the issue of chiefdom is the issue of governance of rural land. Governance is about decision making and therefore when one discusses governance of customary tenure one would like to emphasise the concepts related to decision making in customary set-ups. As Molenaar (2006) has indicated in discussing governance we must bear in mind that this implies decision making at different levels i.e. local, regional, national and even international levels. Further, within the context of governance are important aspects of policy implementation. Bressers and Kuks (2003) mention the multi-level and multi-actor aspect of policy implementation and the multifaceted character of problems and objectives. Clearly governance issues are varied and involve a lot of stakeholders. In this paper governance can also be equated to rural land management in which we seek to find the best fit of administering customary tenure.

It has been recognised that there exists various forms of tenure in Africa and much has been said about the duality of tenure in Africa. Generally three types of tenure systems can be identified in Africa i.e. Freehold, Leasehold and Customary tenure. The first two fall under one category while customary tenure falls under the traditional tenure system which takes various forms in Africa. This paper focuses on the customary tenure system.

While it is generally agreed that customary tenure should be maintained in Africa it has not been clear, at least in the mind of the author, how customary tenure can best be managed in order for sustainable development to actually take place. Proponents of customary tenure e.g. Quan (1997) argue that *customary tenure* generally provides secure, inheritable rights of occupation and use to individuals and households. Quan , for instance, further argues that African customary tenure has proved flexible, dynamic and capable of development to accommodate agrarian change, resulting from population growth, farm intensification and market development. There has been talk that traditional rulers have always had the best interest of the people as custodians of the land. Generations upon generations of tribal communities have had to rely on the benevolence of the traditional rulers to manage the land on their behalf. However, most traditional setups do not really have institutional structures which will indeed improve the management of land in a more serious and sustainable way. With the migrational patterns and the continual urbanization of African population there is every danger that leaving the management of land in quasi-legal or non-legal traditional set-ups will lead to poor sustainable management of those lands. The ever encroaching urban development poses a serious threat to the way land is management in rural areas especially those that are close to cities. On the other hand can we trust the central government to provide for rural communities without usurping the productive capacities of the rural communities? As Middleton (1997) in his foreword to Land and Society in Contemporary Africa has observed that traditional and highly effective systems of

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social life based on forms of production and related forms of reproduction have been overthrown by the decisions on development made by central government. Indeed it is not easy to oversimplify the social and historical processes in the interest of quick economic development. However, it is still begs the question as to whether the current development situation is rural Africa should be left alone or be restored to its former "glory days" and perhaps be allowed to modernise at its own pace.

The question to ask therefore is how can land management best be practiced in the context of dualism that most African countries have inherited?

2. LAND MANAGEMENT AND CUSTOMARY TENURE

2.1 Land Management

Land Management can be said to consist of the following components: Land acquisition, land use planning, land allocation, land surveying, land registration and land use monitoring. These components can be found in varying forms of extent in any tenure regime. As illustrated in Figure 1 Land Information Management underpins the success of land management. It is expected that in customary tenure regimes not all of these components will be in place. However the extent to which land is sustainably managed and development occurs will depend to a greater extent on the maturity of some of these components. We would like to emphasize that "sustainable development" in whatever form ought to occur in rural Africa and we do not see how this can happen with the current traditional set-ups; however much there have been successful in the past!

Figure 1: Components of land management

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2.2 Customary tenure

The United Nations (1966) defined customary tenure as *"The rights to use or dispose of land which rest neither on the exercise of brute force, nor evidence of rights guaranteed by government statute, but on the fact that they are recognised by the community, the rules governing the acquisition and transmission of these rights being explicit and generally known though not normally recorded in writing"*.

All the three forms have some kind of governance structure that is required to manage these types of tenure. What are the common governance issues of customary tenure? Janneh (2006) highlighted the fact that customary systems govern the majority of land in Africa. He stated that however, the systems were under pressure from population growth and competing land uses, including urbanization. Historically in the sub-Sahara region at least (except for South Africa) one can see that major land chunks have been left to be under customary tenure (see Table 1.)

Table 1 Land alienated to non-Africans as a percentage of total area (after Adams & Turner, 2005)

Country	Land alienated to non-Africans as % of total area
SA	89%
Zimbabwe	49%
Swaziland	49%
Kenya	7%
Botswana	6%
Malawi	5%
Zambia	3%
Tanzania	0.9%
Uganda, Lesotho, Sudan	Less than 0.5%

Table 1 shows that most of the land in the countries cited (except for South Africa) is held under some form of customary tenure.

2.2.1 Customary governance issues

It is often said that customary tenure should be left to the local governance of the communities who have managed the land since time immemorial. While this high sounding philanthropic way of looking at "letting the people govern" sounds nice, it is the opinion of the author that it is fraught with danger if not properly managed. As seen in Figure 1 there are a number of components involved in Land Management which perhaps are not present in most customary governance structures. To what extent does this traditional tenure governance engender development? It is not uncommon to find land being given out by the chief without due consideration of the tribe. For instance in a study carried out in Zambia (Tembo & Mulolwa, 1999) it was found that communities were not too happy about the way some land had been given away by the chief. AWF(2005) state also that chiefs are the gateway to

obtaining leaseholds in their areas in Zambia but that there are several inefficiencies to the extent that if things are let as they are they would lead to disenfranchising the people who are supposed to benefit from the allocation of land done on their behalf by the chiefs. Another problem with current customary governance is that land development in these areas does not take place in a systematic manner because the tribe has held to land which could have been best utilized in a different and more sustainable way. The fact that people have continued to live happily in huts does not mean they cannot be provided with modern houses. The author wants to think that there is a general need to analyse the governance structures of customary tenure and propose ways in which this can be improved. One is not suggesting in any way, that the tenure governance must be that which is western oriented. However, one wants to posit the fact that the current governance of the tenure system is at best one that merely protects the tribes from the vagaries of urbanization and allows them to continue to co-exist with nature, "ever since immemorial", without really improving the lot of the people and at worst continues to lead the people we seek to protect into abject poverty.

2.3 What needs to be done?

Economic Commission for Africa Southern Africa recommends that Chiefs need to be given training in land management (2003). While it is a good idea to train chiefs in land management one thinks that the current customary structures themselves need to be enabled for land administration. This requires setting up land administration structures at local level. As Quan (1997) has observed "*there are clear advantages for the state in providing secure, heritable rights to national land through customary, or where appropriate, statutory local systems, within an overall regulatory framework.*" How these systems are set-up is always the vexing question. With the myriad of stakeholders on land there are conflicting ideas on what is the best model to manage and administer customary tenure. We shall look at select countries to review the way

3. CURRENT CUSTOMARY TENURE GOVERNANCE

De Soto (2000) states that property should not only be about assets, but rather that it should be about consensus between people on how the assets should be held, used and exchanged. Granted this fact, how do African traditional set-ups measure up to consensus in the way property is held, used and exchanged? Most commentators who discuss the efficacy of customary tenure focus primarily on the aspect of how customary tenure systems ensure that there is consensus on the land resource. Indeed most customary systems have a long tradition of sharing communal property or make sure that communal areas are kept or reserved for the common good of the community. However, one observation that one can casually make is that this has not made these communities develop- if anything the communities continue to wallow in abject poverty. The question that can be posed therefore is: is the status quo a worthwhile option?

Deininger (2003) suggests that since customary tenure systems have evolved over a long period of time all that is required is to build on these traditions rather than replace them. In this argument he states that customary institutions in Africa administer virtually all of the land

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area, including peri-urban areas with high values. Such institutions he states not only have a stronger field presence than government institutions, but locals also trust them more. Although the statement is inherently true, it also conversely suggests that government institutions are seen to be alien to the communities. Cynics sometimes can argue that it is little wonder that Africa has not developed that much because Africans have left customary institutions to manage land without providing the requisite skills to do so. The view of the author is that these traditional structures have not sufficiently developed over the years and therefore have been unable to deliver sustainable development in their present form. Prof Ali Mazrui (1986) in the triple heritage alludes to the fact that most African countries never developed because of the apparent abundance of natural resources. If we needed food we easily would go into the bush and hunt for an animal. If we wanted shelter, we never bothered to build strong houses- infact we could live in the open without a big problem. Now this triple heritage has been our undoing. So, with respect to the customary tenure I am very wary when we extol its virtues without looking at the big picture and seeing whether or not we have managed to strengthen the customary tenure institutions to carry us forward.

Governments in Africa have recognized customary tenure in which there is legal recognition of community rights and a key element of these reforms is the extensive use of existing local institutions (Deinenger, 2003). Deinenger observes that recognition is but a first step. There is also need to build capacity in the local institutions. This is where the question of whether to divest or invest in the chiefdom comes in. Bruce (1997) talks of *reinstitutionalisation* as a concept in land reform that emphasises change in the institutions that administer the tenure system. In this concept the communal dimension is left intact and the role of the national bureaucracy is minimised. There are examples e.g. Pescay (2002) which highlight the use of village committees at the communal level in Benin to discharge the land management function. Juma and Christensen (2001) discuss the promise that starter and landholder title give to the concept of recognition of informal holding of land in Namibia.

In Botswana the tried and tested Land Board concept has worked well in the administration of Tribal Land. However Land Boards have on occasions been accused of excluding the chiefs in the process of land allocation.

3.1 How is it done in Botswana?

In Botswana the customary tenure system in itself was seen not to be an encumbrance to development in a commission on Land Tenure of 1983(GoB, 1983). It was observed that the system actually provided security of tenure both in terms of easy access to land as well as inheritability. The customary tenure system is governed by The Tribal Land Act of 1968. The Act was introduced to improve the customary tenure by introducing a modernised land institution and by having written law which can easily be referred to. The Government of Botswana states that the Act was introduced to improve agricultural production by removing constraints that inhibited the adoption of efficient methods of crop and especially animal husbandry.
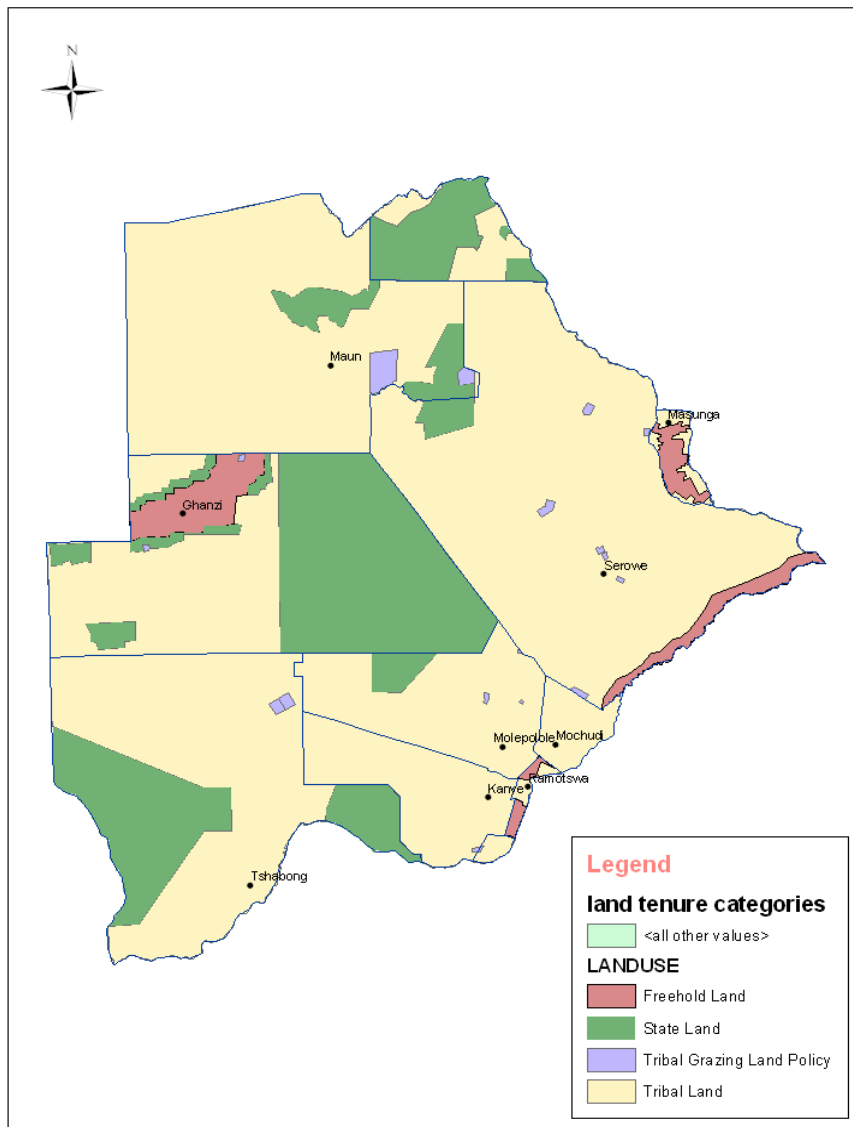
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Figure 2: Land Tenure categories (After DSM)

The Act governs access, use and disposal of 71% of land in Botswana. It provided for the establishment of Land Boards whose functions involve the grant of customary land rights. Part III of the Act states that the powers vested in a Chief under customary law in relation to land including:-

   a) The granting of rights of use of any land
   b) The cancellation of any grant of any rights to use any land
   c) Hearing of appeals from, confirming or setting aside any decision of any subordinate land authority;
   d) The imposition of restriction on the use of tribal land

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e) Shall be vested in and performed by a land board. In essence the Tribal land Act transferred powers previously vested in the chiefs to the land boards. The Land Boards are body corporates composed of elected members of the community. The current composition of the Land Boards is as follows:-
1) 5 members selected and appointed by the Minister from a list of 20 candidates elected by people living within the jurisdiction of the respective land board and submitted to the Minister
2) 5 members appointed by the Minister;
3) 1 member representing the Ministry of Agriculture
4) 1 member representing the Ministry of Commerce and Industry

(Government of Botswana, 1994)

In Botswana one can say that there was complete divesting of the powers of land allocation and administration from the chief. The creation of the Land Boards through the Tribal Land Act (1970) essentially excluded the chief from participating in the administration of land in customary areas of Botswana.

3.1.1   How does one become a Land Board member?

Public advertisements are placed in the public media calling on potential candidates who must be between 26 and 65 years old and should have a minimum qualification of junior Certificate. A further requirement is that the candidate must reside within the tribal area in which they seek to be elected. One of the "controversial" requirements is that of the fact that the candidates must not be actively involved in politics.

After the applications there is of course the usual screening done and the finalists then stand for elections at the Kgotla. The elections are conducted by the Land Board Selection Committee which is made up of a District Commissioner, Land Board Secretary, Council, the Kgosi and a member of the public appointed by the Minister.

After the elections the names are passed on to the minister for the final appointment as Land Board members but sometimes there have been cases where those that won elections are

Given the steps indicated above the role of the chiefs is greatly diminished by the establishment of the Land Boards. As Kalabamu and Morolong (2004) have observed the composition of land boards does not include the chiefs, their deputies or their appointees. The role of the chiefs and headmen in land administration was ".. *reduced to that of completion of certificates of no objection, indicating that the land required has not been allocated to anyone else*" (Government of Botswana, 1983). In 2001 the Government instituted a commission of inquiry on the local government structure and representations were made regarding the effectiveness of land Boards: These included among others:
1) Insensitiveness to the wishes, the needs and the requirements of the people, including inordinate delays in the allocation of land
2) Inadequate consultation with communities and other local level institutions- council, Tribal administration and Village development committees

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3) Lack of transparency and consistency in their operations. Unfair practices with respect to compensation for land acquired from owners for reallocation
4) Immaturity of Land Board members. For instance the lack of experience in customary matters of the Land Board members.
5) Corrupt and non-transparent procedures in the election of Land Board members.
6) Despite these complaints the commission recommended that Land Boards should continue to be corporate bodies and the Ministry of Lands should continue to provide policy guidelines to the Land Boards. Further to align the Land Boards closer to the communities a new Local government structure was proposed were the Land Board, the council and the Kgosi (chief) had linkages. (See Figure 3)
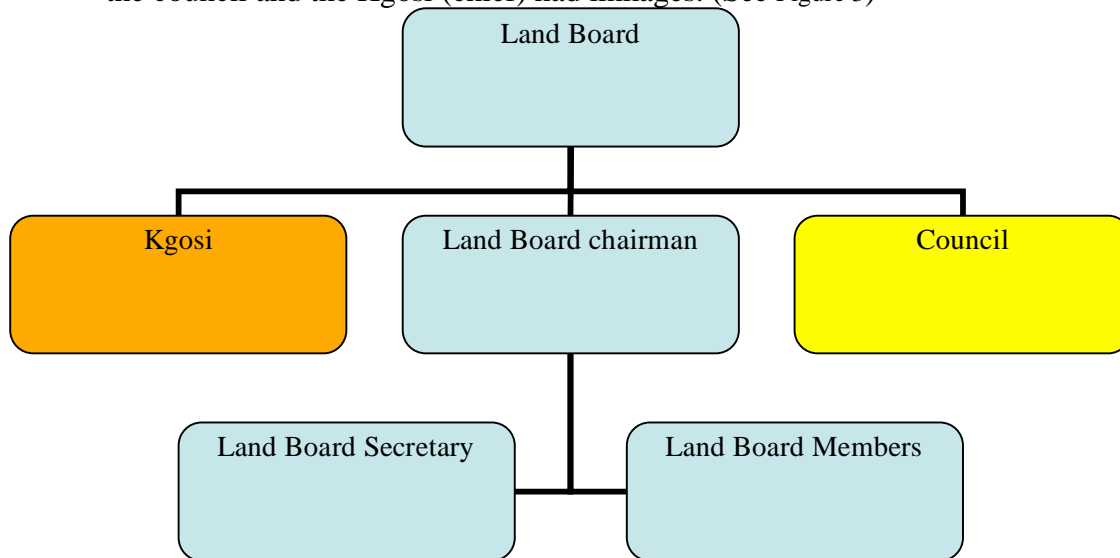

Figure 3: Land Board Structure with links to the Dikgosi and the Council

The Botswana example illustrates the continual work required to "improve" the management of land administration in customary areas. Other studies e.g. that of Alcock & Hornby (2004) in KwaZulu Natal suggest that the introduction of bureaucratic reform should not be done in a such a way as to assume that the subjects for whom the reforms are being done have no history of the way they administered land. They say that what is apparent is that the new reforms in South Africa do not acknowledge the existence of community systems and practices. They further state .."*…Indeed they say little about practical land administration and focus instead on committee procedures for the establishment and functioning of a new structure. LEAP suggests that the process needs to be understood as one of reaching agreements on the institutional arrangements for managing land, which is then captured in a constitution document, rather than simply a process of constructing a document to give effect to legal instruction. But to derive agreements that have real effect (particularly in the context of poor state support), it is necessary to begin from people's knowledge through use of their own land administration systems, practices and structures.*"

It is expected therefore that rather than supplant existing knowledge of land management at local level there ought to be recognition and incorporation of the customary system. Indeed, it has been argued that in any case, customary systems rule most of Africa although these are normally not recognized legally. In their study of legal dualism and land policy in Eastern and

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Southern Africa, Adams and Turner (2005) highlight the gradual acceptance of the dual tenure systems that prevails in most African countries. They highlight the fact that it is no longer an option to wipe out this dualism. Rather the focus and the challenge now are on how to integrate the two tenure systems. This recognition can be seen in most countries e.g. Zambia where there is a provision to convert from customary tenure to leasehold when certain conditions are met. Adams and Turner further state that the new approaches to tenure dualism require the building of bridges between tenure regimes and legal systems.

4. CONCLUSIONS AND RECOMMENDATIONS

As stated by Ordnance Survey (2002) the reason to formalise Land Tenure and its administration must be among other things the alleviation of poverty and stimulation of investment. Those organisations that deal in land cannot deal in land without proper linkages. Who for instance should plan the proper use of land in customary areas? Can we live this to the chiefs? Ng'ombe et.al (2006) have stated that Customary tenure is a recipe for poverty in Africa but it should not be so if the tenure system can be properly formalised and proper linkages are created to foster development. There is need therefore to develop models that would work not only in sustainable development but also in ensuring economic development. For example the Bavarian government in Germany has developed its rural development model such that there is an interaction between the professionals and the village communities (see figure 4)
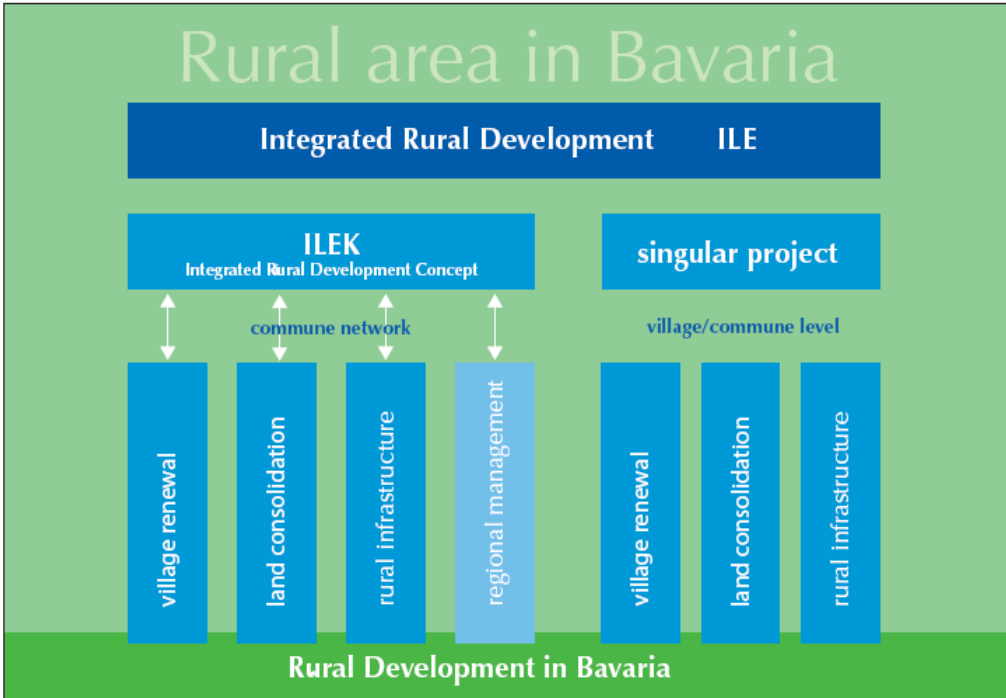

Figure 4: Rural development in Bavaria (after Bavaria Ministry of Agriculture and Forestry)

What is important to understand in this context is that rural development constitutes more than tenure. It involves an integration of development concepts that might not be grasped by those who we want to be given responsibility of managing the land.

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Williamson (2005), talks about the evolving and complex rights and restrictions that modern society demands in order to deliver sustainable development objectives. He states that the concept of the cadastre must evolve from the initial focus of land markets to include social and environment issues. The developed model then is given figure 5 which shows that for sustainable development to occur we need to have among other things a land information infrastructure and a land policy framework which fit into the land management issues that we raised earlier.
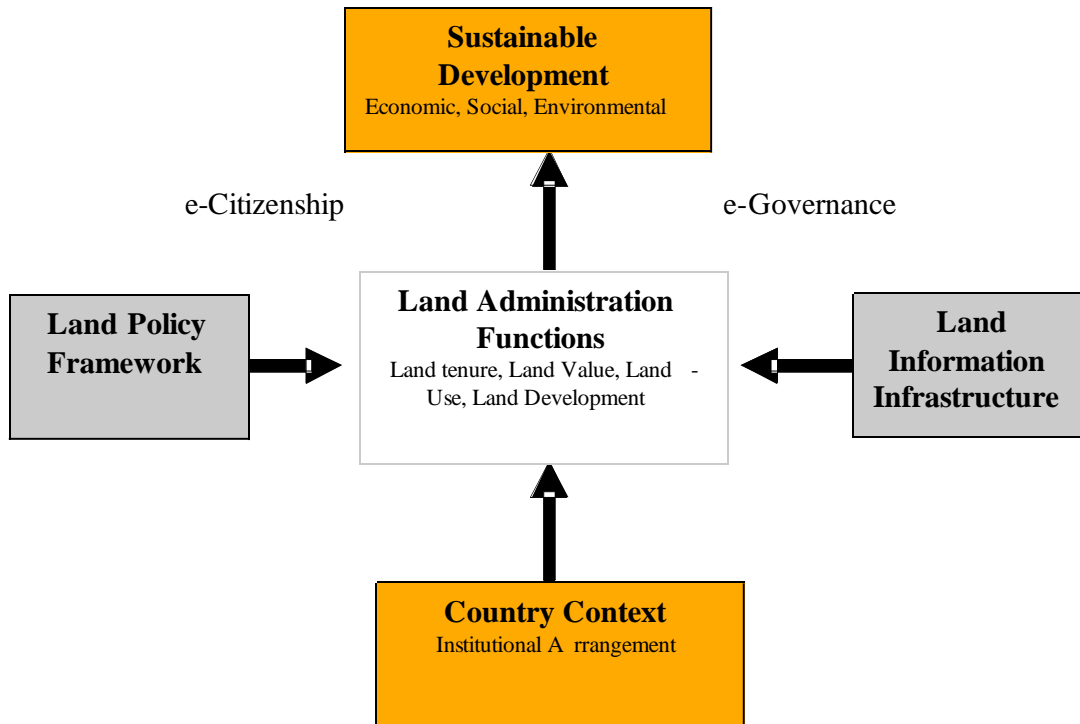

Figure 5: Land Administration Arrangements (After Williamson, 2005)

What we can understand from these arrangements is that we need to be able to internalise our situations and determine the best fit institutional arrangements that can answer the myriad of challenges associated with sustainable development. I do not think that traditional governance in its current form can deliver development as we would want it to.

The situation in Botswana suggests that with the right institutional arrangement a combination of customary tenure with a proper regulatory framework can deliver communities from poverty. Models provided by Williamson and the Bavarian example also show how sustainable development can be achieved in this ever increasingly complex world. Whether we divest in the chiefdom or enhance their role will depend to a greater extent on the nature of the communities for whom the land reform process is being done. Supplanting rules from the town to the village will also not do, as it will be a recipe for conflict. On the other hand we cannot, I believe, continue to support semi-feudal systems in an information age.

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