

Tenure security and spatial planning law for rapid urbanisation control: perspectives from Botswana

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ABSTRACT

We live in an urban world. As the world continues to urbanise, both gains and challenges are felt. However, well planned and managed urbanisation fosters economic development. Due to this urbanisation, Botswana contends with land use challenges. These manifest through land corruption, conflicts and urban sprawl, amongst others, which put property rights in and around Gaborone under threat.

In Botswana, the land tenure is categorised as tribal, state and freehold land. Since its independence in 1966, the country had initiated evolutionary reforms to its tenure to improve access, protect property rights and achieve tenure security. This was achieved through the enactment of laws which established bodies such as Land Boards which governs delivery of tribal land and others dealing with state land. These laws have evolved to the extent that customary land is now surveyed and registered as deeds. On the other hand, Botswana enacted spatial planning laws which guide the spatial planning of the country. It has been argued that spatial planning law and tenure security can be intertwined to control effects of rapid urbanisation in the country.

Against this backdrop, the study determines how the land tenure security and the spatial planning law of Botswana could assist in controlling some of the impacts of urbanisation. The study concludes that rapid urbanisation has brought great challenges for the country, but tenure security and spatial planning law may just be able to control some aspects of it. The study recommends that a meaningful relationship between tenure and spatial planning regimes is desirable and possible.

Keywords: Urbanisation, land tenure, tenure security, spatial planning law, tenure reform, local government, Gaborone, Botswana

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LIST OF ABBREVIATIONS

ADP	Area Development Policy
ADR	Alternative Dispute Resolution
AfDB	African Development Bank
AHRLJ	African Human Rights Law Journal
AIDS	Acquired Immune Deficiency Syndrome
AJLP	African Journal on Land Policy and Geospatial Sciences
APA	Acquisition of Property Act Cap 32:10
B.S.A. Co.	British South Africa Company Limited
BJT	Botswana Journal of Technology
BLR	Botswana Law Reports
BNR	Botswana Notes and Records
CILSA	Comparative and International Law Journal of Southern Africa
CLG	Customary Land Grant
CoR	Certificate of Rights
CSO	Central Statistics Office
DCC	Development Control Code of 2013
DCEC	Directorate of Corruption and Economic Crime
DRA	Deeds Registry Act 33:02
DRAA	Deeds Registry (Amendment) Act 15 of 2017
DSA	Development Southern Africa
ETLR	Evolutionary Theory of Land Rights
FAO	Food and Agriculture Organisation of the United Nations
FPSG	Fixed Period State Grant

GDP	Gross Domestic Product
GLTN	Global Land Tool Network
HI	Habitat International
HIV	Human Immunodeficiency Virus
IDPR	International Development Planning Review
IJER	International Journal of Environmental Research and Public Health
IJSBE	International Journal of Sustainable Built Environment
IMF	International Monetary Fund
JAL	Journal of African Law
JEPM	Journal of Environmental Planning and Management
JLERI	Journal of Legal, Ethical and Regulatory Issues
JLRS	Journal of Land and Rural Studies
JPUL	The Journal of Legal Pluralism and Unofficial Law
LCA	Land Control Act Cap 32:11
LGA	Local Government Act 18 of 2012
LUP	Land Use Policy
NSP 2036	National Spatial Plan 2036
NSP of 1999	National Settlement Policy of 1999
PELJ/PER	Potchefstroom Electronic Law Journal
RNSP	Revised National Settlement Policy of 2004
SAGJ	South African Geographical Journal
SAHJ	South African Historical Journal
SAPL	Southern African Public Law
SHAA	Self Help Housing Agency
SLA	State Land Act Cap 32:01

SLT	Secure Land Title
Stell LR	Stellenbosch Law Review
TA	Townships Act Cap 40:02
TCA	Tati Concessions Land Act Cap 32:05
TCPA	Town and Country Planning Act 4 of 2013
TGLP	Tribal Grazing Land Policy of 1975
TLA	Tribal Land Act 1 of 2018
TR-LUP	Tenure Responsive-Land Use Planning
TRP	Town and Regional Planning
UBLJ	University of Botswana Law Journal
UDHR	Universal Declaration of Human Rights 1948
UDS	Urban Development Standards 1992
UN	United Nations
UN DESA	United Nations Department of Economic and Social Affairs
UN Habitat	United Nations Human Settlements Programme
VGGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security of 2022
WEF	World Economic Forum

Chapter 1 Introduction

1.1 Introduction

Urbanisation through complex dynamics tend to irreversibly change everything on its path- air, land, water, and ecology, including institutions, customs, and lifestyles...¹

The vivid assertion above conjures up the ultimate reality about urbanisation in our world. This study strives to corroborate it, especially about land in Botswana. Rapid urbanisation has transfigured the world.² Today, it is estimated that 55% of the world population (4.2 billion people) live in urban centres.³ It is further projected that by 2030, 60% of people will live in cities.⁴ Urbanisation is a multifaceted process.⁵ Some disciplines, such as geography and economics, define it in terms of population trends and dynamics, whilst others emphasise the need to include economic and social considerations.⁶ Urbanisation⁷ is however generally understood to be an increase in the proportion of the urban population relative to the non-urban population.⁸ In the Global South, rapid urbanisation is accompanied by complexities such as informality, pressure on natural resources, lack of adequate housing, and the intensification of urban poverty.⁹ It is argued that the misguided policy

¹ Onyebueke *et al* 2020 *Land Use Policy (LUP)* 1.

² Abd-Elmabod *et al* 2019 *Journal of Env Management* 2.

³ The World Bank 2020 <https://shorturl.at/gMQV3>. The terms 'urban centres', 'cities' and 'towns' are used interchangeably throughout the dissertation to mean one thing.

⁴ United Nations 2018 <https://shorturl.at/vHQRO>.

⁵ Myers "Urbanisation in the Global South" 27.

⁶ Dijkstra *et al* 2021 *Journal of Urban Economics* 4.

⁷ In Africa, urbanisation has been attributed to a myriad of factors. Historically, it is argued to have been influenced by industrialisation from the West during colonisation of the continent. - See Fox 2017 *Journal of Demographic Economics* 16. According to the United Nations (hereafter UN) there are three dominant drivers of urbanisation: natural population increase, rural urban migration, and settlement reclassification. -See also Güneralp *et al* 2018 *Env Research Letters* 1. Cobbinah, Poku-Boansi and Asomani-Boateng argue that reclassification of rural settlements is determined by natural population increase or the demarcation of rural settlements. -See Cobbinah, Poku-Boansi and Asomani-Boateng 2016 *Urban Forum* 421. Notably, the boundaries that define rural and urban areas have shifted over time leading to rural areas being transformed to urban areas. -See Lichter, Brown and Parisi 2021 *Population, Space and Place* 2.

⁸ Fox and Goodfellow 2022 *Urban Studies* 1963. Farrell and Westlund note that one of the gravest oversights is conflating urbanisation with urban growth. It is therefore important to differentiate between the two processes. However, in most instances, these two processes happen at the same time. -See Farrell and Westlund 2018 *Asian Geographer* 86-87.

⁹ Gizelis, Pickering and Urdal 2021 *Political Geography* 3.

responses adopted by most African countries are worsening the situation.¹⁰ Such challenges affect mostly the poor population in society.¹¹ They affect societies and impinge on sustainable urban development.¹² Urbanisation is oftentimes connected to economic development.¹³ According to Bhagat,¹⁴ countries that are regarded as having middle-income status are 50% urbanised. This however has not been the case with most African countries, and their urbanisation has often been labelled as 'urbanisation of poverty'.¹⁵ The United Nations Department of Economic and Social Affairs' (hereafter UN DESA) *World Social Report 2020*, notes that to harness the economic benefits of urbanisation it needs to be well planned and managed.¹⁶

Botswana too is becoming an urban country.¹⁷ The United Nations (hereafter UN) projects that 84% of Botswana's population will be living in urban centres by 2050.¹⁸ This country's urban settlements are defined by a threshold population of 5000 residents.¹⁹ Urban settlement is expected to be accompanied by economic development.²⁰ As is the case elsewhere, the country's rapid urbanisation has been attributed to factors such as rural-urban migration, the natural increase in population and settlement reclassification.²¹ Gaborone specifically is deemed a fast-growing city in Africa.²² Its high rate of urbanisation can be attributed to migration for economic opportunities by local citizens.²³ Following the discovery of minerals in Botswana, mining towns however also surfaced.²⁴ These towns include

¹⁰ Baye, Wegayehu and Mulugeta 2020 *LUP* 1.

¹¹ Zhang 2016 *Habitat International (HI)* 251.

¹² According to Anarfi, Hill and Shiel "these challenges include, but are not limited to, urban sprawl, socio-economic inequalities, natural environment degradation, and climate change impacts". - See Anarfi, Hill and Shiel 2020 *Land* 1-2.

¹³ Onjala and K'Akumu 2016 *Dev Southern Africa (DSA)* 235.

¹⁴ Bhagat 2018 *Economic Political Weekly* 16.

¹⁵ Toku *et al* 2021 *SN Social Sciences* 3.

¹⁶ The UN DESA's *World Social Report 2020* 115.

¹⁷ Modie-Moroka *et al* 2020 *Global Social Welfare* 231.

¹⁸ Güneralp *et al* 2017 *Env Research Letters* 1.

¹⁹ Mpofu, Darkoh and Gwebu 2017 *GeoJournal* 1.

²⁰ Buhaug and Urdal 2013 *Global Env Change* 2.

²¹ The *Botswana Habitat III Report 2014* 4. See Awasthi 2021 *Cities* 1-2 on the pull and push factors of rural-urban migration.

²² Kampamba *et al* 2018 *Int Journal of Housing Markets Analysis* 363.

²³ Selolwane "From Infrastructural Development to Privatization" 284-285.

²⁴ Gwebu 2012 *Journal of Contemporary Afr Studies (JCAS)* 612.

Francistown,²⁵ Orapa, Selibe-Phikwe, Jwaneng and Sowa-Town.²⁶ In addition, some villages, such as Palapye and Tlokweng, have transformed over time into urban centres due to the level of employment and industrialisation.²⁷

As a result of rapid urbanisation, Botswana is experiencing land use challenges.²⁸ These include urban sprawl, land conflicts, a rise in informality, shortage of land and housing, as well as illegal land transactions.²⁹ Property rights are often described as a 'bundle of rights'³⁰ in which different individuals have competing interests.³¹ These competing interests manifest themselves in the form of land conflicts.³² The conflicts are caused by undefined boundaries and encroachments, urban sprawl,³³ illegal land transactions³⁴ and land use changes done outside planning regulations.³⁵

The conflicts are worsened by the dual nature of the legal system in Botswana.³⁶ These land conflicts happen through the manipulation of rights of customary land holders.³⁷ The expansion of cities and towns, such as Gaborone, Francistown and Lobatse, is leading to land use conflicts between individuals because of encroachment into original tribal land and displacement, for example.³⁸ Gaborone's

²⁵ Navaneetham and Dwivedi 2014 *BNR* 77.

²⁶ These towns also experience high rates to the extent that they attract people in search of employment opportunities. Drought and unproductivity in rural areas also accelerated migration to urban centres. -See Gwebu 2012 *JCAS* 615.

²⁷ Mosha 2014 *Afr Resources Dev Journal* 40.

²⁸ Gwebu 2014 *BNR* 90.

²⁹ These challenges are fully discussed in Chapter 2 below.

³⁰ Degens 2021 *Social Science Information* 212. According to Schlager and Ostrom these rights include the right to access, withdrawal, management, exclusion, alienation, due process, and compensation. However, these rights can be limited by different things such as lease agreements, servitudes, and the government through legislation. -See Schlager and Ostrom 1992 *Land Economics* 250-251.

³¹ Hou, Chan and Li 2018 *Journal of Housing and Built Env* 466-467.

³² Chitonge and Mfune 2015 *HI* 209.

³³ Rubiera-Morollón and Garrido-Yserte 2020 *Sustainability* 8.

³⁴ Kalabamu notes that these illegal land dealings are attributed to the cumbersome process of attaining title deeds which local citizens often do not afford. -See Kalabamu 2006 *Int Dev Planning Review (IDPR)* 211.

³⁵ Kuusaana and Bukari 2015 *Journal of Rural Studies* 54.

³⁶ Doss, Meinzen-Dick and Bomuhangi 2014 *Feminist Economics* 80.

³⁷ Fourie "Land Readjustment for Peri-urban Customary Tenure: the Example of Botswana" 80.

³⁸ Mpofu, Darkoh and Gwebu 2018 *GeoJournal* 728.

buildable area is almost entirely covered up with houses and other developments.³⁹ Therefore, the city is sprawling into the peripheral villages and is engulfing nearby villages such as Tlokweng, Mmopane and Mogoditshane.⁴⁰ Inevitably, these peripheral villages are going through peri-urbanisation which presents land use challenges.⁴¹ Peri-urbanisation means the transformation of rural lands near cities into urban use.⁴² In these peri-urban settlements there is competition for diverse land rights.⁴³ As a result, illegal land transactions occurred over the years.⁴⁴ Kalabamu⁴⁵ notes that Botswana has an ineffective land administration system unable to deal with the pressures of rapid urbanisation. The rise of illegal and informal land markets in Botswana is leading to the dispossession of customary land by elites.⁴⁶ In that regard, land officials and elites have often manipulated the records system for personal benefit.⁴⁷ They often buy and convert land in highly profitable states at the expense of the poor.⁴⁸ This results in tenure insecurity amongst customary land rights holders.⁴⁹

There are also conflicts between state institutions and individuals and/or tribal communities contesting ownership of land rights.⁵⁰ The land around Gaborone, Francistown and other urban centres is mainly tribal land.⁵¹ This type of land is susceptible to land grabs because it often lacks registered title.⁵² In Mogoditshane for example, there is an ongoing corrupt subdivision of tribal land which leaves

³⁹ Kent and Ikgopoleng 2011 *Cities* 484.

⁴⁰ Ritsema 2008 *Africa Dev* 88.

⁴¹ Mpofu, Darkoh and Gwebu 2018 *GeoJournal* 732.

⁴² Gweshengwe and Matai 2022 *The Int Journal of Community and Social Dev* 340.

⁴³ Kidido and Ajabu 2022 *Afr Geographical Review* 3.

⁴⁴ Kalabamu 2014 *HI* 477.

⁴⁵ Kalabamu 2021 *LUP* 2. See specifically *the Report of the Presidential Commissions of Inquiry into Land Problems in Mogoditshane and Other Peri-Urban Villages 1991* XI.

⁴⁶ Bhanjee and Zhang 2018 *Papers in Applied Geography* 3.

⁴⁷ Sjaastad and Cousins 2009 *LUP* 4.

⁴⁸ Kalabamu and Lyamuya 2021 *Town and Regional Planning (TRP)* 43.

⁴⁹ Ege defines tenure insecurity as the threat of eviction from land which one occupies. Three property rights are at higher risk of tenure insecurity, these include the right to possession of land, the rental rights over land and latent rights (the use of parental right as a successor in title of the said right). -See Ege 2017 *LUP* 57-58.

⁵⁰ Kalabamu 2019 *LUP* 338.

⁵¹ Shabane, Nkambwe and Chanda 2011 *Applied Geography* 678. In the context of this study, the terms 'customary' and 'tribal' land are used interchangeably to refer to one thing.

⁵² Kalabamu and Lyamuya 2021 *TRP* 40.

rightful owners of the land landless.⁵³ There is an overlap between the customary and formal land tenure systems which results in disputes and other challenges such as corruption.⁵⁴ In Francistown and Orapa, land concessions granted to mining companies are restricting urban growth.⁵⁵ As a result, conflicts between mining companies and communities ensued.⁵⁶ In this regard, the *Revised Botswana Land Policy* of 2019 states that:

Land conflicts manifests themselves in spiralling encroachment of land uses such as settlements into arable land, arable into grazing, and grazing into wildlife areas.⁵⁷

As suggested earlier, urbanisation further leads to a shortage of land in urban areas,⁵⁸ and consequently a shortage of housing.⁵⁹ The land prices in urban centres are also surging.⁶⁰ Consequently, most of the urban population has resorted to living in informal settlements.⁶¹ Urban centres encroach upon large tracts of nearby agricultural land, which threatens food security.⁶² The conversion of agricultural land to non-agricultural is a factor that aggravates tenure insecurity.⁶³

Against this backdrop, this study begs the question; how could land tenure⁶⁴ security⁶⁵ and the spatial planning law of Botswana assist in the control of some of the impacts of rapid urbanisation? Botswana has a peculiar three-tier land tenure system in which different rights are assigned to different individuals.⁶⁶ The formal

⁵³ Kalabamu and Lyamuya 2021 *TRP* 40.

⁵⁴ Turok 2016 *ADP* 36.

⁵⁵ Morapedi 2020 *South Afr Historical Journal (SAHJ)* 527.

⁵⁶ Mpofu, Darkoh and Gwebu 2018 *GeoJournal* 733.

⁵⁷ The *Revised Botswana Land Policy 2019* 25.

⁵⁸ Kalabamu 2014 *HI* 474.

⁵⁹ Muchadenyika 2015 *Journal of Southern Afr Studies* 1219.

⁶⁰ Adigeh and Abebe 2023 *Urban Science* 11.

⁶¹ Mosha 2013 *Urban Forum* 138.

⁶² Dadashpoor and Ahani 2019 *LUP* 218.

⁶³ Kalabamu 2014 *LUP* 479.

⁶⁴ According to Antonio and Griffith-Charles, land tenure is a construct that transcends social, political and economic life of every society. It refers to how property rights are assigned and held in different societies -see Antonio and Griffith-Charles 2019 *LUP* 125. See para 3.2.3 below.

⁶⁵ It should be noted that land tenure and land tenure security are interlinking concepts, therefore throughout the dissertation a discussion on land tenure security will be made in connection with the land tenure system. -See Chigbu *et al* 2019 *IJER* 4.

⁶⁶ Mabikke 2016 *Journal of Land and Rural Studies (JLRS)* 154.

land tenure system comprises freehold, state land (formerly crown land) and tribal or customary land tenure.⁶⁷ State land vests in the Republic and is allocated to citizens in terms of Certificate of Rights (hereafter CoR) and Fixed Period State Grants (hereafter FPSG).⁶⁸ Freehold land is held privately and in most instances development covenants apply.⁶⁹ This type of land was historically designated for the white settler population.⁷⁰ Freehold land confers indefinite title to land therefore it is regarded as the most secure land tenure.⁷¹ It is asserted that freehold land created serious shortage of land, especially in cities like Gaborone.⁷² This is because in Gaborone, for example, freehold farms surround the urban area: hence, the city has restricted scope for expansion.⁷³

Additionally, Botswana has inherited most of its planning law from its colonial master, Britain.⁷⁴ Planning law generally refers to all legislation, tools and instruments aimed at the orderly and progressive development of towns, cities and countryside, passed by parliament.⁷⁵ These laws create institutions in both central and local government which form a country's planning system.⁷⁶ Spatial planning law informs the making and coordination of spatial plans.⁷⁷ Therefore, spatial plans play a key role in controlling urban sprawl, thus ensuring that urban development

⁶⁷ Kalabamu 2019 *LUP* 340.

⁶⁸ See para 3.4.2 below for the nature of the rights embodied in these titles.

⁶⁹ Bevan 2018 *Cambridge Law Journal* 72.

⁷⁰ Isaacs and Manatsha 2016 *BNR* 384.

⁷¹ Kalabamu 2019 *LUP* 340.

⁷² Sebege and Gwebu 2013 *Int Journal of Sustainable Built Env (IJSBE)* 197.

⁷³ Mpofu, Darkoh and Gwebu 2018 *GeoJournal* 728.

⁷⁴ Mosha "A Reappraisal of Spatial Planning in Botswana" 116.

⁷⁵ Molebatsi and Kalabamu 2016 *University of Botswana Law Journal (UBLJ)* 54. According to Van der Berg, planning law straddles both a public law and private law dimension. It is concerned with controlling property and land rights between different interested individuals. -See Van der Berg *Municipal Planning Law and Policy for Sustainable Cities in South Africa* 128.

⁷⁶ Acheampong *Spatial Planning in Ghana; Origins, Contemporary Reforms and Practices, and New Perspectives* 22.

⁷⁷ Joscelyne *The Nature, Scope and Purpose of Spatial Planning in South Africa: Towards a More Coherent Legal Framework under SPLUMA* 17.

is in line with the country's developmental objectives.⁷⁸ Matiyo⁷⁹ however argues that planning laws in most African countries have failed to foster sustainable urbanisation. This is because colonial planning law which Africa inherited was spatially biased, rigid and segregating.⁸⁰ Consequently, these laws birthed urban hierarchies, which led to stunted growth of other settlements, especially rural areas.⁸¹ At independence, African countries imported it as is, and did very little to suit the current circumstances.⁸² As a result, plans are not connected to development strategy, land provision is limited, and the powers of planning authorities are curtailed.⁸³ As such Baffoe and Roy⁸⁴ term it a 'failed enterprise' in the developing world. There is therefore a need to oust outdated laws and policies and replace them with flexible ones.⁸⁵

Spatial planning law in Botswana includes the *Town and Country Planning Act* 4 of 2013 (hereafter *TCPA*), which is the centrepiece of planning law in the country.⁸⁶ It makes provision for the orderly and progressive development of land in both urban and rural areas and aims to preserve and improve amenities thereof.⁸⁷ The *TCPA* mandates councils to be planning authorities.⁸⁸ Other spatial planning instruments include plans, standards and building control codes.⁸⁹ The *Revised Development*

⁷⁸ Karakadzai *et al* 2023 *LUP* 1-2. Furthermore, spatial planning law emanates from the concept of spatial planning. Healy defines spatial planning as a process of developing plans and policies that regulate space and development -see Healey "The Revival of Strategic Spatial Planning in Europe" 3-19. It is said to be "the soul of space optimization and development of a region or country". -See Liu and Zhou 2021 *LUP* 1.

⁷⁹ Matio *The Role of Law in Urban Planning in Kenya: Towards Norms of Good Urban Governance* 63.

⁸⁰ Nchanji and Nchanji 2020 *LUP* 1.

⁸¹ Myers "Urbanisation in the Global South" 32. See para 4.2 below of how this unfolded in the context of Botswana.

⁸² Cobbinah and Darkwah 2017 *Afr Geographical Review* 271.

⁸³ Spaliviero *et al* 2019 *Int Planning Studies* 237.

⁸⁴ Baffoe and Roy 2023 *Planning Perspectives* 173.

⁸⁵ Turok 2015 *JCAS* 354.

⁸⁶ Molebatsi and Kalabamu 2016 *UBLJ* 54.

⁸⁷ Long title of the *TCPA*.

⁸⁸ Section 5 of the *TCPA*.

⁸⁹ Van der Berg *Municipal Planning Law and Policy for Sustainable Cities in South Africa* 133.

Control Code of 2013 (hereafter *DCC* of 2013) provides for land use zoning in the country.⁹⁰

Since independence Botswana has adopted laws and policies to regulate land and improve tenure security, these have helped to protect property rights of land owners.⁹¹ These reforms have indirectly impacted on spatial planning in the country.⁹² The *Tribal Land Act* Cap 32:02 (hereafter *TLA* of 1968) established the Land Boards which were tasked with the responsibility to administer tribal land in Botswana.⁹³ This law was repealed by the *Tribal Land Act* 1 of 2018 (hereafter *TLA* of 2018) which provides for the continuation of Land Boards which administer tribal land on behalf of all citizens.⁹⁴ The *Land Control Act* Cap 32:01 (hereafter *LCA*) was passed to address the imbalance in the ownership of freehold agricultural land.⁹⁵ It provides that any person who is not a citizen of Botswana shall not acquire an interest in agricultural land unless the Minister has given consent for such a transaction.⁹⁶ The *Acquisition of Property Act* Cap 32:10 (hereafter *APA*) allows for compulsory acquisition of property by the state, including land.⁹⁷ This means that land can be expropriated from private hands for reasons such as defence, public safety, as well as town and country planning or land resettlement, amongst others.⁹⁸ This acquisition should be in line with the *Constitution of Botswana* 1966 (hereafter *Constitution*).⁹⁹

The above background raises the question whether there are any synergistic links between tenure security and spatial planning in Botswana.¹⁰⁰ Even though the relationship is not a definite one, ordinarily speaking tenure security and spatial

⁹⁰ The *DCC of 2013* 27.

⁹¹ See para 3.5 below.

⁹² See para 3.5 below.

⁹³ Section 3 of the repealed *TLA* Cap 32:02.

⁹⁴ Section 5 of the *TLA*. In some instances, the *TLA* is referred to as the *TLA* of 2018 to differentiate it from the *TLA* of 1968. The same applies to the *TCPA* of 2013 and the *TCPA* of 1977.

⁹⁵ *Kaundanika Investments (Pty) Ltd v Estate Late Bruwer* 2019 1 BLR 52 (CA).

⁹⁶ Section 3 of the *LCA* Cap 32:01.

⁹⁷ Lekgori, Paradza and Chirisa 2020 *Journal of Afr Real Estate Research* 2.

⁹⁸ Section 3(1) of the *APA*.

⁹⁹ Section 8(1)(a) and (b) of the *Constitution*.

¹⁰⁰ See Chapter 4 of the dissertation.

planning law seem to complement and feed on each other.¹⁰¹ Chigbu¹⁰² for example argues that the planning of settlements can help deliver benefits to rights holders such as tenure security. The two can arguably be coupled together for improved control over the impacts of rapid urbanisation in Botswana.¹⁰³ On the one hand, spatial planning law aims at attaining a 'socially desirable land use' and containing the effects of urban sprawl.¹⁰⁴ On the other hand, land tenure security offers a system that provides information on who owns the rights, whether they are customary or freehold.¹⁰⁵

1.2 Research question

How could the land tenure security and spatial planning law of Botswana assist in the control of some of the impacts of rapid urbanisation?

1.3 Research aim and objectives

The central objective of this study is to determine how the land tenure security and spatial planning law of Botswana could assist in controlling some of the impacts of rapid urbanisation in the country.

This objective is addressed via the following specific sub-objectives:

- a) To contextualise urbanisation in Botswana and its effects on land use, drawing on the trends in Gaborone;
- b) To explain and critically evaluate Botswana's land tenure system and state of tenure security with a view to investigate how it intersects with and controls rapid urbanisation;
- c) To explain and critically evaluate Botswana's spatial planning law system with a view to determine how it controls rapid urbanisation;

¹⁰¹ Chigbu *et al* 2017 *Journal of Env Planning and Management (JEPM)* 1623.

¹⁰² Chigbu "Tenure Responsive Land-Use Planning as a Tool for Improving Quality of Life" 17.

¹⁰³ See a detailed discussion at para 4.5 in Chapter 4 below.

¹⁰⁴ Van der Molen 2015 *Administration & Society* 177.

¹⁰⁵ Ali, Deininger and Duponchel 2017 *World Dev* 378.

- d) To question the linkages between the control and impact of urbanisation in Botswana, and the strength of the legal instruments emanating from the national land tenure and spatial planning law system; and
- e) To conclude the study with critical views on how the land tenure security and spatial planning law framework may be optimised to respond adequately to some of the impacts of rapid urbanisation.

1.4 Research methodology

The study followed the doctrinal legal research method. This involved a desktop-based critical assessment of applicable legislation, case law and other primary sources of law. This research further relies on secondary sources of law. Primary sources such as the *TCPA*, the *TLA* 1 of 2018, *LCA* and the *APA* have been considered. Other regulatory instruments such as development control codes and planning standards have been consulted. Additional sources such as international soft-law instruments, textbooks, articles, newspaper articles and internet sources have been utilised to support the analysis. The dissertation has also utilised data from development plans of Gaborone and Francistown, amongst others.

Reports of organisations such as the World Economic Forum (hereafter WEF), the Food and Agriculture Organisation of the United Nations (hereafter FAO) and UN Habitat have been consulted. The study also adopted an interdisciplinary approach of disciplines such as planning and urban studies amongst others. There was merit in doing so because the problem that the study had identified is not merely legal but social as well. Therefore, the solutions may not lie in law but in other disciplines identified. Even though the study did not take the shape of a case study, the trend of rapid urbanisation in Gaborone was studied closely. This is because the city has experienced higher rates of rapid urbanisation than any other urban centre in Botswana.¹⁰⁶ It has also a higher concentration of population living in the peripheral settlements.¹⁰⁷

¹⁰⁶ Sebegu and Gwebu 2013 *IJSBE* 197.

¹⁰⁷ Sebegu and Gwebu 2013 *IJSBE* 197.

1.5 Study outline

Chapter 2 provides context and a theoretical background to the study. It explores the land use challenges in Botswana that results from rapid urbanisation. The changes are examined in relation to the trends in Gaborone.

Chapter 3 provides definitions of the notions of land tenure, tenure security and insecurity. It discusses the architecture of the Botswana land tenure system with a focus on tribal, freehold, and state land tenure. The chapter further discusses land tenure law reforms aimed at improving land tenure security in Botswana.

Chapter 4 offers a critical analysis of the spatial planning laws in the country relative to the control of rapid urbanisation. It traces the history of spatial planning law in Botswana. It weaves through a discussion on features and role players involved in spatial planning. It also provides a discussion on how spatial planning and land tenure security intersects. It illustrates how through such a nexus challenges identified in Chapter 2 are addressed.

Chapter 5 concludes the dissertation by providing critical views on how the land tenure security and spatial planning law framework may be optimised to respond adequately to some of the impacts of rapid urbanisation.

Chapter 2 Rapid urbanisation and land use challenges in Botswana

2.1 Introduction

This chapter endeavours to address the first objective of the dissertation, being to contextualise urbanisation in Botswana and its effects on land use, drawing on the trends in Gaborone. At the outset, the chapter discusses the trends of rapid urbanisation in Botswana's major urban centres, being Gaborone, Francistown and other mining towns, and how their urbanisation trends evolved and manifested themselves over the years. The second part of the chapter focuses on prevalent current land use challenges as were alluded to in Chapter 1. It sets off by describing what a land use challenge is understood to mean. It proffers a summary of the discussion at the end.

2.2 Trends and trajectory of urbanisation in Botswana

At the time of its independence in September 1966, Botswana was ranked as one of the poorest countries in the world.¹ Following the discovery of minerals in the 1970s, the country experienced an upshoot of economic growth.² The country's GDP was around 26% in 1971-72.³ The construction of infrastructure in Gaborone became the key magnetic pull, as many people came in for employment opportunities.⁴ According to Statistics Botswana, as of 2022 the population of Botswana was estimated to be 2 359 609⁵ as compared to 2 024 904 in 2011.⁶ This shows an increase of 15.9% in ten years.

As previously asserted, in Botswana, an urban area is defined in terms of population size.⁷ The threshold set for urban settlements is 5000 inhabitants with 75% of them

¹ Hillbom 2008 *The Journal of Modern Afr Studies* 191.

² Botlhale 2022 *Politikon* 6.

³ Botlhale 2017 *DSA* 94.

⁴ Selolwane "From Infrastructural Development to Privatization" 284-285.

⁵ Statistics Botswana *Population & Housing Census 2022* iii.

⁶ See para 1.1 above; Bainame and Letamo 2014 *BNR* 37.

⁷ Mpofu, Darkoh and Gwebu 2018 *GeoJournal* 725.

engaged in non-agricultural economic activities.⁸ The population of urban residents increased from 45.7% in 1991 to 54.2% in 2001 and 64.1% in 2011.⁹ In 2017, 1.6 million of Botswana's population was estimated to be living in urban centres.¹⁰ This trend indicates that the country is experiencing exponential rates of urbanisation. The following sections describe the urbanisation patterns in Botswana's major urban centres with a view to show how such rapid urbanisation impact on land use.

2.2.1 Gaborone

Gaborone, the capital city of Botswana was founded in 1966.¹¹ Prior to that, the colonial government administered the country from Mafikeng in South Africa.¹² This happened until 1965 when the capital was relocated to Botswana.¹³ Gaborone did not start off as a mining or agricultural place but as a centre of government business.¹⁴ The city was planned from scratch and building followed the British planning system.¹⁵ In 1981, 40% of the country's population had migrated to Gaborone in search of economic opportunities, whilst 50% of the country's population lived on the fringes of Gaborone.¹⁶ In 2022, its population stood at 246 325.¹⁷ The populations of its satellite villages, such as Mogoditshane,¹⁸ Tlokweng and Mmopane, also grew over the years due to urban sprawl and congestion in the

⁸ See para 1.1 above.

⁹ The *National Development Plan 11 (2017-2023)* 20.

¹⁰ UN Habitat 2018 *Assessing Progress towards Urban Prosperity* 3.

¹¹ Krüger 1994 *GeoJournal* 290. According to Mwale, Gaborone was chosen as a capital because it had already semi-infrastructure and was a meeting point between chiefs and the Resident Commissioner. Other suggestions included Lobatse and Francistown, but these could not pass because most of the land in Francistown was freehold and already owned by the Tati Company. -See Mwale *Culture, Heritage and the Politics of Identity in National and Tribal Spaces: the City and the Traditional Village in Botswana* 80.

¹² Makgala 2010 *Journal of Southern Afr Studies* 59.

¹³ Mgadla 2016 *BNR* 25.

¹⁴ Rabatsheko *What Decongestion?: a Livelihoods Approach to Urban Challenges Through Architecture; A Case of Old Naledi, Gaborone* 10.

¹⁵ Krüger 1994 *GeoJournal* 290.

¹⁶ Selolwane "From Infrastructural Development to Privatization" 283; Potts 2018 *Urban Studies* 1981.

¹⁷ Statistics Botswana *Population of Cities, Towns and Villages 2022* 3.

¹⁸ Mogoditshane village was announced as the biggest village in Botswana following the release of the 2022 preliminary results of the 2022 National Population Census. There has been calls for the village to be transformed into a township. -See Tlhankane *Mmegi* 2.

city.¹⁹ As these areas experience a surge, a new phenomenon of rapid urbanisation happens, which is termed peri-urbanisation.²⁰

Gaborone has the highest rural-urban migration in the country.²¹ The 1980s were characterised by rapid infrastructural development which started to fuel migration to the city.²² The pattern of economic development created an urban bias against rural areas.²³ It was estimated that by 1990 the city would grow to a population of 72 000.²⁴ However, this number was surpassed as the city's population already stood at 133 468 in the 1991 census.²⁵ Its in-migration was estimated at 17 463 persons in 2017.²⁶ Many migrate in search of economic opportunities.²⁷ This includes skilled and unskilled workers who take up informal work within the informal economy.²⁸ Additionally, the location of tertiary educational institutions contributes to the city's inward migration.²⁹

2.2.2 Francistown

Francistown is the second largest city in Botswana, after Gaborone.³⁰ It started off as a mining town following the discovery of gold deposits in 1897³¹ by the Tati Company,³² and developed into a commercial hub.³³ Most of its land is freehold and

¹⁹ Kalabamu 2014 *HI* 477-478.

²⁰ Nuhu 2019 *Urban Forum* 2.

²¹ Statistics Botswana *Population and Housing Census Analytical Report 2011* 188.

²² Gwebu 2012 *JCAS* 617.

²³ Wikan 2004 *Norwegian Journal of Geography* 6. Urban bias theory was conceived by Michael Lipton in 1977 when he argued that the under allocation of resources by the state on rural areas to support urban areas have created many challenges. This process is fuelled by the powerful urban class at the expense of rural areas. This is also manifested through state policies -see Zimbalist 2017 *Deve Policy Review* 247. See also Fox 2014 *World Dev* 199. Through urban biased interventions, the state offer subsidies, public goods and services which drive people to urban areas. -See Pierskalla 2016 *Studies in Comparative Int Dev* 290.

²⁴ Sebegu and Gwebu 2013 *IJSBE* 202.

²⁵ CSO *Population Report 1989-1991* 8.

²⁶ Statistics Botswana *Botswana Demographic Survey Report 2017* 34.

²⁷ Nair and Masukusuku 2012 *Afr Population Studies* 243.

²⁸ Nair and Masukusuku 2012 *Afr Population Studies* 243.

²⁹ Kampamba, Kachepa and Seketeme 2021 *Int Journal of Housing Markets and Analysis* 56.

³⁰ Samboma 2021 *Journal of Public Affairs* 2.

³¹ De Wit 2018 *Mineralogy and Petrology* 59.

³² According to Morapedi, land that is occupied by the Tati Company have a convoluted history in that the land was claimed by Chief Lubengula and later sold on a fraudulent deal to the company. -See Morapedi 2014 *SAHJ* 551.

³³ Morapedi 2014 *SAHJ* 550-551.

is owned by the Tati Company.³⁴ It is estimated that in total the company owns 45 000 square hectares of land.³⁵ The city's growth has been constrained because the land belongs to Tati Company and constitutes freehold land.³⁶ The British colonial administration gave free and undisturbed possession of land to the successors in title through the *Tati Concessions Land Proclamation* of 1911.³⁷ This proclamation became the *Tati Concessions Act* Cap 32:05 (hereafter *TCA*) which is still in force today.³⁸ Despite the ugly colonial plunder in which that land was taken, the government has to date not done anything to repeal the Act and expropriate the land..³⁹ Francistown is surrounded by peri-urban villages such as Tati Siding.⁴⁰ Its location makes it a strategic economic link between Zimbabwe and Zambia.⁴¹

Over the years the population of Francistown grew at a constant rate. It experienced an economic boom in the 1980s, which caused migration to surge and the city to expand. Around 1991, the construction industry was the biggest employer with a total of 4 658 employees.. An additional 2000 people were employed in the government sector. The total population was estimated at around 98 961 in 2011, including an excess population of 90 000 in the city peripheries.⁴² In 2022, the population stood at 103 417.⁴³

2.2.3 Mining towns

As indicated in the preceding chapter, mineral discovery in Botswana led to the establishment of mining towns.⁴⁴ These towns included Orapa, Selibe-Phikwe, Jwaneng and Sowa-Town.⁴⁵ The development of these towns was accompanied by

³⁴ Manatsha 2020 *Journal of Asian and Afr Studies* 114.

³⁵ Mokwena *Botswana Guardian* 5.

³⁶ Manatsha 2020 *JLRS* 191.

³⁷ Ng'ong'ola 1996 *Southern Afr Public Law (SAPL)* 4.

³⁸ Section 2 of the *Tati Concessions Act* Cap 32:01.

³⁹ Mokwena *Botswana Guardian* 5.

⁴⁰ Chiguvu and Kgathi-Thite 2022 *JLERI* 2.

⁴¹ Moyo 2020 *Social Sciences* 5.

⁴² UN Habitat 2018 *Assessing Progress towards Urban Prosperity* 7.

⁴³ Statistics Botswana *Population & Housing Census 2022* 6.

⁴⁴ See para 1.1 above.

⁴⁵ Musokotwane *The Socio-Economic Impact of Mining: a Comparative Study of Botswana and Zambia* 66.

schools, health facilities and private businesses.⁴⁶ As a result, employment opportunities sprung up and acted as a pull factor for most of the rural population.⁴⁷ Even though the mining towns grew, the land concessions granted to mining companies restricted this growth.⁴⁸ Conversely, Selibe-Phikwe has experienced negative urbanisation patterns since the closure of the BCL mine.⁴⁹ Due to its closure, the town has lost around 5000 jobs and that gap has been too much to fill, leaving it to be a ghost town.⁵⁰

It is possible to summarise the urbanisation trends in Botswana by stating that the country has experienced high rates of urbanisation in the last 50 years.⁵¹ These trends are attributed to economic development of the country that fuelled migration to urban centres.⁵² As a result, there has been high rural-urban migration to urban centres.⁵³ It is said to be predominant in Gaborone.⁵⁴ The rural-urban migration results in the burgeoning of satellite settlements around cities.⁵⁵ Other towns, such as Selibe Phikwe, have experienced negative urbanisation.⁵⁶ This is mainly due to the collapse of mining activities. With the above in mind, the study focuses on some of the land use challenges in the areas in and around Gaborone. It will be demonstrated during this research how rapid urbanisation seems to affect land use, leading up to the question whether the land tenure security and spatial planning law of Botswana is adequate to control it.

⁴⁶ Jefferis 2009 *Transnational Corporations* 74.

⁴⁷ Good and Taylor 2008 *Democratization* 760.

⁴⁸ Steyn and Atamelang 2014 *Int Journal for Housing Science* 45.

⁴⁹ Statistics Botswana *Population & Housing Census Analytical Report 2011* 172.

⁵⁰ Dikuelo 2021 <https://tinyurl.com/432b22ca>.

⁵¹ Molebatsi "Understanding the Coexistence of the Tribal Land Act" 138.

⁵² Mosha 2015 *Commonwealth Journal of Local Governance* 139.

⁵³ Kalabamu and Lyamuya 2017 *Current Urban Studies* 507.

⁵⁴ Gwebu 2014 *BNR* 88.

⁵⁵ Mosha 2015 *Commonwealth Journal of Local Governance* 52.

⁵⁶ Unknown 2016 <https://shorturl.at/mnrzR>.

2.3 Current land use challenges in Botswana

2.3.1 Introductory remarks

Land is a place where, *inter alia*, economic activities take place.⁵⁷ All life hinges on it, as it is a source of social and political life.⁵⁸ In Botswana, land has both social and spiritual connectedness.⁵⁹ Because land holds so much significance in people's daily lives, it is susceptible to challenges and conflicts.⁶⁰ There is no concise definition of land use challenges.⁶¹ Land use however refers to all the arrangements and how people exploit land resources.⁶² Svensson *et al*⁶³ note that land use has an environmental, economic, and public footprint.⁶⁴ In the context of Botswana, land use challenges include competition for land, dispossession of the land from the poor and tenure insecurity.⁶⁵ The exponential rate of urban sprawl has brought about spatial changes affecting the land delivery process.⁶⁶ These land use challenges are interrelated, for example urban sprawl leads to land conflicts in the rural-urban fringe.⁶⁷ On another front, corruption around issues of land leads to shortage of land, thereby pushing the poor towards informality.⁶⁸ The next section describes each of these land use challenges in turn.

2.3.2 Illegal land dealings and corruption

According to the Transparency International Perceptions Index 2022, Botswana is ranked number 35 out of 180 countries for corruption.⁶⁹ However, corruption is still

⁵⁷ Olapade and Aluko 2022 *Urban Forum* 2.

⁵⁸ Bekele *et al* 2022 *LUP* 1.

⁵⁹ The *Revised Botswana Land Policy* 2019 3.

⁶⁰ Dietz and Engels 2020 *Geoforum* 209.

⁶¹ Nedd *et al* note that there has been conflation of the concepts of 'land use' and 'land use cover', but the two concepts are not similar and embody different elements, for example 'land cover' refers to the biotic and abiotic configuration of the earth such as vegetation and soil whilst 'land use' is a social concept which to how people use land and all the economic life that encircles it. -See Nedd *et al* 2021 *Land* 6-7.

⁶² Nedd *et al* 2021 *Land* 6-7.

⁶³ Svensson *et al* 2020 *Sustainability* 1.

⁶⁴ Svensson *et al* 2020 *Sustainability* 14.

⁶⁵ Toulmin 2009 *LUP* 11.

⁶⁶ Kleemann *et al* 2017 *Landscape and Urban Planning* 281.

⁶⁷ Amponsah *et al* 2022 *LUP* 2.

⁶⁸ Arjjumend and Seid 2018 *Journal of Global Resources* 5.

⁶⁹ Transparency International *Corruption Perceptions Index* 2022 3.

rampant especially in the land sector.⁷⁰ It is argued that land corruption is mainly prevalent in urban areas and adjustment peri-urban areas.⁷¹ Urban land is the most lucrative and is highly sought after as a political asset.⁷² The said land is mostly used for investment and commercialisation purposes by elites, companies and government.⁷³ This is mainly due to the rising migration and demand for housing in urban areas such as Gaborone.⁷⁴ Land corruption in Botswana is institutionalised.⁷⁵ Land corruption manifests itself through bribes, fraud, favours and abuse of power by land officials when executing their roles.⁷⁶

In land administration in Botswana, corruption is rampant.⁷⁷ The Land Boards arguably are at the core of land corruption in the country.⁷⁸ For instance, in Mogoditshane, it was reported that officials arrogate land to themselves to the detriment of the entire public.⁷⁹ The corruption has been aggravated by poor land registers which are open to abuse by land officials.⁸⁰ This results in lack of information which leads to manipulation as transparency is eroded.⁸¹ Lack of land registers results in long waiting lists for land allocations.⁸² This also perpetuates land corruption on the part of land officials.⁸³ Additionally, it is asserted that people are involved in illegal land sales because of fear that the Land Board is repossessing their land without adequate compensation.⁸⁴

⁷⁰ Jones 2017 *Asian Education and Dev Studies* 220.

⁷¹ Maripe "Land Administration, Politics and Governance in Botswana" 188-189.

⁷² Chiweshe "Urban Land Governance and Corruption in Africa" 231.

⁷³ Nuhu and Mpambije 2017 *Open Journal of Social Sciences* 283.

⁷⁴ Maripe "Land Administration, Politics and Governance in Botswana" 188.

⁷⁵ Kalabamu 2006 *IDPR* 222.

⁷⁶ Chiweshe 2017 *Africa Insight* 114.

⁷⁷ Mokwape *The Monitor* 3.

⁷⁸ Kome 2023 <https://dailynews.gov.bw/news-detail/71872>.

⁷⁹ Seitshiro *Sunday Standard* 1, 5.

⁸⁰ Moreri, Fairbairn and James 2018 *LUP* 407.

⁸¹ Ameyaw and De Vries 2020 *Land* 17.

⁸² Kapamba *et al* "Land Governance in Botswana".

⁸³ Isaacs and Manatsha 2016 *BNR* 388.

⁸⁴ Akrofi and Whittal "Customary Land Rights in the Context of Urbanisation" 127-148.

Land corruption has also been attributed to weak institutions that fail to respond to land administration challenges adequately.⁸⁵ Mushinge *et al*⁸⁶ assert that this corruption occurs during land surveying, land use planning, land allocation and land development. Institutions mandated to deal with corruption, such as the Directorate of Corruption and Economic Crime (hereafter DCEC) and ministerial anti-corruption units, have failed to root out land corruption happening within land administration in the country.⁸⁷ This is due to serious delays in investigations and lack of administrative capacity.⁸⁸

In 1991, a Presidential Commission of Inquiry, (hereafter Presidential Commission), exposed serious land theft in Mogoditshane, a village in the periphery of Gaborone. It was discovered that over 841 pieces of land were acquired illegally.⁸⁹ Today the village still experiences high land corruption cases because of its proximity to the city.⁹⁰ Land Boards in Botswana lack a proper records system.⁹¹ A better records system would potentially make land allocation more efficient and faster.⁹² Self-allocation of land continues to be a challenge in Mogoditshane.⁹³ Due to the slowness of the Land Board to effect subdivisions and land use changes, the people proceed to subdivide and sell without the consent of the Land Board.⁹⁴ They also issue fake land titles and certificates.⁹⁵ These fake certificates are used to facilitate land transactions to third parties which complicates corruption further.⁹⁶

Land corruption creates many complex land conflicts.⁹⁷ These include multiple sales of the same piece of land, leading to contestations over ownership.⁹⁸ Sales arising

⁸⁵ Fosu 2021 *Afr Journal on Land Policy and Geospatial Sciences (AJLP)* 115.

⁸⁶ Mushinge *et al* 2020 *AJLP* 75-78.

⁸⁷ Mphendu and Holtzhausen 2016 *Administratio Publica* 238.

⁸⁸ Jones 2017 *Asian Education and Dev Studies* 220-221.

⁸⁹ Good 1994 *The Journal of Modern Afr Studies* 502.

⁹⁰ Mokwape *The Monitor* 3.

⁹¹ Onoma 2009 *Africa Dev* 105.

⁹² Onoma 2009 *Africa Dev* 105.

⁹³ AfDB 2016 *Review of Land Tenure Policy, Institutional and Admin Systems of Botswana* 17.

⁹⁴ Griffiths *Transformations on the Ground; Space and the Power of Land in Botswana* 140.

⁹⁵ Lucas 2022 <https://tinyurl.com/4tnk24zw>.

⁹⁶ Mokwena *Botswana Guardian* 4.

⁹⁷ Kalabamu 2006 *IDPR* 222.

⁹⁸ Kalabamu 2006 *IDPR* 222.

out of subdivisions benefit even high-ranking government officials.⁹⁹ Still today, the challenges persist, with members of the Land Board conspiring with field owners to subdivide their land in return for financial benefits.¹⁰⁰ This creates illegal land markets which often leads to informal settlements.¹⁰¹ Due to high amounts of illegally obtained land, the government has had to evict people and destroy some of the structures erected on that land.¹⁰² There have been reported cases of inequitable distribution of land, with some individuals owning more plots than others, for example.¹⁰³

In April 2004, another Presidential Commission was appointed to deal with state land allocations in Gaborone.¹⁰⁴ The Commission found that many of the state land allocations were made under questionable circumstances - there were corruption and favours in the allocation of the land.¹⁰⁵ Prior to 1991, the Presidential Commission on Land Tenure found that fronting for land allocation was a cause of concern.¹⁰⁶ This occurs when locals apply for allocation of plots and sell them to foreigners for financial benefits.¹⁰⁷ Displeasure with land corruption was also captured by the Presidential Commission of Inquiry into the Review of the Constitution of Botswana.¹⁰⁸ It was noted that Land Boards are corrupt and that foreigners owned massive land parcels at the expense of locals, for example.¹⁰⁹

Land corruption results in tenure insecurity especially for the poor in the rural-urban fringe.¹¹⁰ This is because in African countries tenure systems are mostly

⁹⁹ Kalabamu 2006 *IDPR* 222.

¹⁰⁰ Ramatiti 2022 <https://tinyurl.com/y4kb4dn3>. See also Kolantsho *The Midweek Sun* 8.

¹⁰¹ Adam 2015 *Property Management* 48.

¹⁰² Lucas 2022 <https://tinyurl.com/4tnk24zw>.

¹⁰³ Ramatiti 2022 <https://tinyurl.com/y4kb4dn3>.

¹⁰⁴ *The Report of the Judicial Commission of Inquiry into State Land Allocations in Gaborone, 2004*.

¹⁰⁵ *The Report of the Judicial Commission of Inquiry into State Land Allocations in Gaborone, 2004* 147.

¹⁰⁶ *The Report of the Presidential Commission on Land Tenure 1983* 23-24.

¹⁰⁷ *The Report of the Presidential Commission on Land Tenure 1983* 23-24.

¹⁰⁸ *The Report of the Presidential Commission of Inquiry into the Review of the Constitution of Botswana 2022* 64-65.

¹⁰⁹ *The Report of the Presidential Commission of Inquiry into the Review of the Constitution of Botswana 2022* 64-65.

¹¹⁰ Chiweshe "Urban Land Governance and Corruption in Africa" 233.

customary.¹¹¹ This is also the case with Botswana.¹¹² Customary tenure systems are governed by unwritten rules and property rights are not registered.¹¹³ African tenure systems often lack land registers and record systems.¹¹⁴ Botswana in particular is experiencing land administration challenges as Land Boards rely on outdated records.¹¹⁵ As indicated above, where land is not registered and documented it is open to multiple sales.¹¹⁶ It is argued that the absence of land titling makes the land susceptible to grabbing by the elites.¹¹⁷ As a result of land grabbing, the poor are displaced causing the conflict to worsen.¹¹⁸

Land corruption, especially in the urban centres, hinders urban planning.¹¹⁹ Generally, officials engage in patron-client networks in which they help elites to avoid complying with regulations.¹²⁰ This includes the approval of planning permissions which are not supposed to be approved and illegal demarcations.¹²¹ For example, it was discovered that certain pieces of land in Gaborone were allocated for wrong uses - examples include a plot in the Tsholofelo Extension area.¹²² As Mwathunga and Donaldson¹²³ put it:

...planners are tempted to accept developments which are not in consonant with the very plans they have prepared just because they want to access easy money or protect their job from the powerful hand of the politician...

To contextualise the above assertion, Agheyisi¹²⁴ notes that informal subdivision as driven by corrupt practices affects the direction of urban development. This is

¹¹¹ Mutangadura 2007 *Natural Resources Forum* 177.

¹¹² See para 3.4 below.

¹¹³ Mutangadura 2007 *Natural Resources Forum* 177.

¹¹⁴ Joireman and Tchatchoua-Djomo 2023 *World Dev* 2.

¹¹⁵ Moreri 2020 *AJLP* 11.

¹¹⁶ Mushinge, Simposya and Chowa 2020 *AJLP* 48.

¹¹⁷ Bezabih, Kohlin and Mannberg 2011 *The Journal of Socio-economics* 835.

¹¹⁸ Mushinge and Mwando 2016 *Int Journal of Social Science Studies* 14.

¹¹⁹ Mwathunga and Donaldson 2018 *LUP* 1-2.

¹²⁰ Sawyer 2014 *Afr Studies* 283.

¹²¹ Bandaiko, Annan-Aggrey and Arku 2021 *Urban Research & Practice* 101; Chiodelli 2019 *Urban Studies* 1616.

¹²² The *Report of the Judicial Commission of Inquiry into State Land Allocations in Gaborone 2004* 87.

¹²³ Mwathunga and Donaldson 2018 *LUP* 3.

¹²⁴ Agheyisi 2018 *Ghana Journal of Geography* 103.

because these subdivisions often are not in consonance with planning standards, building codes and land use maps.¹²⁵ Furthermore, people still view spatial planning as a threat to their customary land.¹²⁶ It is also argued that land corruption hinders participatory planning in urban centres.¹²⁷ The ensuing effect of corruption of this kind is that it ultimately affects the realisation of tenure security, especially of the poor.

2.3.3 Urban sprawl in the rural-urban fringe

Rapid urbanisation has brought about spatial transformation in urban centres.¹²⁸ Often due to the unavailability of space, cities and towns sprawl into rural areas on the peripheries.¹²⁹ As a result, most of the planning systems in Africa are strained by this rapid expansion, thereby leading to slums, which brings added challenges.¹³⁰ In Botswana, cities, particularly Gaborone, are experiencing urban sprawl due to the fast rate of urbanisation.¹³¹ As people migrate to cities for better opportunities, population surges.¹³² The pressure on housing in Gaborone leads people to migrate to the settlements on the periphery of cities, which causes sprawl.¹³³

Mosha¹³⁴ argues that rental prices in inner Gaborone are also higher, as government does not have legal mechanisms in place for rent control. Therefore, people rush to housing and land in the peripheral villages. In Gaborone, urban sprawl is exacerbated by the fact that the city is constrained in terms of growth because of the many freehold farms that encircle it.¹³⁵ Rapid urbanisation also intensifies

¹²⁵ Agheyisi 2018 *Ghana Journal of Geography* 106.

¹²⁶ Kleemann *et al* 2017 *Landscape and Urban Planning* 290.

¹²⁷ Alexander *et al* 2022 *HI* 1.

¹²⁸ Adam 2020 *Env and Urbanization* 55.

¹²⁹ Joy 2016 *Journal of Geography and Regional Planning* 185.

¹³⁰ Cobbinah, Erdiaw-Kwasie and Amoateng 2015 *Cities* 67.

¹³¹ Chiguvi and Kgati-Thite 2022 *JLERI* 3.

¹³² Chiguvi and Kgati-Thite 2022 *JLERI* 3.

¹³³ Kalabamu and Lyamuya 2017 *Current Urban Studies* 507. Lack of serviced land has been identified as a major setback to provision of housing in the urban areas such as Gaborone, in turn this leads to a rush for land in the peripheries of the city. -See the *National Policy on Housing in Botswana* 1999 6.

¹³⁴ Mosha 2013 *Urban Forum* 140.

¹³⁵ Batisani and Yarnal 2011 *Landscape and Urban Planning* 78.

competition for land which in turn raises the value of land in urban areas.¹³⁶ High land values in cities consequently drive people to seek land in the peri-urban areas.¹³⁷ Further to this, the lack of integrated spatial development in peripheral settlements such as Mogoditshane is intensifying the sprawl.¹³⁸

Consequently, urban sprawl leads to the commodification of customary rights in peri-urban settlements.¹³⁹ These rights are now formalised into individual titles in an attempt to gain value out of them.¹⁴⁰ Following upon the argument by Ansah and Chigbu,¹⁴¹ Sumbo¹⁴² argues that this commodification is bringing serious changes to customary tenure in Africa in terms of institutional, economic and physical form. As a result, peri-urbanisation is putting property rights under threat.¹⁴³ Rules of access to land in peri-urban areas evolve through competition and negotiation - as a result the elites manipulate the rules for their own benefit.¹⁴⁴ For example, around Gaborone the elites, politicians and chiefs are involved in land grabbing scandals.¹⁴⁵

The conversion of tribal and agricultural land is associated with high economic gains.¹⁴⁶ Due to a population surge, people also find illegal ways to access land which in turn creates an illegal land market.¹⁴⁷ In Botswana, peripheral settlements near Gaborone felt these changes.¹⁴⁸ In Mogoditshane, customary land rights are often eroded due to corrupt practices putting a strain on tenure security of the

¹³⁶ Sumbo, Anane and Inkoom 2023 *LUP* 2.

¹³⁷ Ayambire *et al* 2019 *LUP* 260.

¹³⁸ The *Mogoditshane, Gabane, Metsimotlhabe, Mmopane, Mokolodi and Tloaneng Development Plan (2001-2024)* 21.

¹³⁹ Sumbo *Peri-urbanisation and Changing Usufruct Rights in Customary Land in Ghana-Case Studies in Kumasi and Wa* 48.

¹⁴⁰ Sumbo *Peri-urbanisation and Changing Usufruct Rights in Customary Land in Ghana-Case Studies in Kumasi and Wa* 48.

¹⁴¹ Ansah and Chigbu 2020 *Land* 8-14.

¹⁴² Sumbo 2022 *LUP* 3.

¹⁴³ Areola, Gwebu and Sebego 2014 *Afr Geographical Review* 175.

¹⁴⁴ Barry and Danso 2014 *LUP* 360.

¹⁴⁵ Kalabamu 2021 *TRP* 34.

¹⁴⁶ Korah, Nunbogu and Akanbang 2018 *LUP* 175.

¹⁴⁷ Van Asperen *Evaluation of Innovative Land Tools in Sub-Saharan Africa* 5.

¹⁴⁸ Van Asperen, Hendriks and Zevenbergen 2019 *AJLP* 18.

poor.¹⁴⁹ The elite are mostly the ones who benefit from this, as they are able to buy land at the expense of the poor population.¹⁵⁰ As demonstrated in para 2.3.4 of this study, this results in land conflicts and grievances.¹⁵¹

Urban sprawl in turn depletes agricultural land that surrounds urban centres.¹⁵² The agricultural land is often converted to cater for non-agricultural uses, which include residential and commercial use.¹⁵³ Sebego and Gwebu¹⁵⁴ note that the expansion of Gaborone led to the acquisition of Broadhurst Farm and Bonnington Farm to cater for land needs. Other farms such as Farm Forest Hill have been converted to commercial and residential estates.¹⁵⁵ There is therefore a tension between private investors and farmers regarding land claims.¹⁵⁶ Rural communities run the risk of losing their source of income.¹⁵⁷ Many women, especially, are driven into poverty, as they cannot farm on their land which has been infiltrated by urban development from sprawl.¹⁵⁸ This has led to tenure insecurity for women as their access to land is still defined by culture's patriarchal practices.¹⁵⁹

Urban sprawl normally results in land use changes.¹⁶⁰ The effect of these land use changes is that they reduce accessibility to land and worsen land conflicts.¹⁶¹ Settlements in the periphery of Gaborone which are on tribal land are now transformed into suburbs.¹⁶² Manatsha¹⁶³ notes that urban sprawl happening in the peripheries of cities like Gaborone gives people an opportunity to illegally sell land. They get involved in these illegal sales of land to circumvent the housing problem

¹⁴⁹ Kalabamu 2014 *HI* 477.

¹⁵⁰ Anane 2022 *SN Social Sciences* 5.

¹⁵¹ Balestri 2019 *Tijdschrift Voor Economische en Sociale Geografie* 192.

¹⁵² Van Berkum 2023 *Sustainability* 6.

¹⁵³ Cobbinah, Gaisie and Owusu-Amponsah 2015 *HI* 121.

¹⁵⁴ Sebego and Gwebu 2013 *IJSBE* 205.

¹⁵⁵ Sebego and Gwebu 2013 *IJSBE* 205.

¹⁵⁶ Van Berkum 2023 *Sustainability* 6.

¹⁵⁷ Abass, Adanu and Agyemang 2018 *LUP* 471.

¹⁵⁸ Binns and Nel "Urban Agriculture in Zambia" 230.

¹⁵⁹ Kalabamu 2021 *LUP* 3.

¹⁶⁰ Mpofu, Darkoh and Gwebu 2018 *GeoJournal* 726.

¹⁶¹ Sebego and Gwebu 2013 *IJSBE* 205-206.

¹⁶² Suh *et al* 2023 *Acta Ecologica Sinica* 2-3.

¹⁶³ Manatsha 2020 *JLRS* 192.

in the city.¹⁶⁴ For instance, in Tlokweng agricultural land is being transformed into property developments, such as restaurants and hotels, without planning permission, thereby causing conflicts.¹⁶⁵ These developments constrain spatial planning thereby crushing efforts for sustainable urbanism in the country.¹⁶⁶

Gaborone is said to be experiencing planning failures, which intensify urban sprawl.¹⁶⁷ This is because when the city was initially planned, it was not envisioned that migration would become so significant.¹⁶⁸ Furthermore, the peri-urban areas are heterogeneous to some degree in that they still maintain customary and statutory land tenure systems.¹⁶⁹ There is therefore a disjunction between these two regimes, in the sense that chiefs still believe that they have a grip over land.¹⁷⁰ The superimposition of modernist planning practices in Gaborone's peripheral villages, such as Mogoditshane, has caused planning challenges.¹⁷¹ For example, the spatial plans demand that buildings be constructed in a certain way, which may be expensive for the poor.¹⁷²

In concurrence with the above, Keeton and Nijhuis¹⁷³ also argue urban planning has failed to synchronise the needs of citizens and to be inclusive. It fails to make provision for the rural poor, who are trapped in slums.¹⁷⁴ Consequently, there is little compliance with planning regulations by the poor, which translates to fines and sanctions by the authorities.¹⁷⁵ It was observed that as powerful individuals and companies proceed with development without planning permissions, urban sprawl

¹⁶⁴ Manatsha 2020 *JLRS* 192.

¹⁶⁵ The *Tlokweng Development Plan (2001-2030)* 15.

¹⁶⁶ Cobbinah and Aboagye 2017 *LUP* 232.

¹⁶⁷ Matsila *Green Building Concepts and Town Planning Policy: Assessment of Practices in Gaborone, Botswana* 18-19.

¹⁶⁸ Matsila *Green Building Concepts and Town Planning Policy: Assessment of Practices in Gaborone, Botswana* 18.

¹⁶⁹ Turok 2016 *ADP* 36.

¹⁷⁰ Onoma "Animating Institutional Skeletons" 139.

¹⁷¹ Molebatsi "Re-inscribing the Communal: Towards Decolonial Urban Futures" 30.

¹⁷² Watson "New African City Plans; Local Urban Form" 59.

¹⁷³ Keeton and Nijhuis 2019 *Int Planning Studies* 227.

¹⁷⁴ Banks, Lombard and Mitlin 2020 *The Journal of Dev Studies* 226.

¹⁷⁵ Denoon-Stevens *et al* 2022 *Cities* 2.

is intensified.¹⁷⁶ This could result in tenure insecurity as land use change is performed without spatial planning process.¹⁷⁷ To remedy this challenge, spatial planning should be adaptive and reflective of the past and future realities.¹⁷⁸

2.3.4 Land conflicts

Land conflicts that arise because of urbanisation have become a cause for concern in Botswana.¹⁷⁹ Such land conflicts affect the tenure security of both informal and formal property rights holders, to the extent that they face displacement from their land.¹⁸⁰ Property has often been described as a 'bundle of rights' or web of interests.¹⁸¹ Property embodies a social relations element and therefore may be susceptible to conflict.¹⁸² Werhrmann¹⁸³ theorises land conflicts as contestations or dissents over the use, management, exclusion and who may benefit from the land. They also encompass a power struggle between political and market forces.¹⁸⁴ Kalabamu¹⁸⁵ points out that land conflicts can be categorised into inner-personal, interpersonal, inner-societal and international levels. It is argued that these conflicts often occur between a variety of actors such as individuals, government entities and individuals and between private developers and government.¹⁸⁶ For instance, in Mogoditshane illegal subdivision has over the years caused endless conflicts between Land Boards and citizens in relation to subdivision and ownership of land rights.¹⁸⁷

¹⁷⁶ Alexander *et al* 2022 *HI* 3.

¹⁷⁷ Azadi 2020 *LUP* 11.

¹⁷⁸ Campbell, Nel and Mphambukeli 2017 *LUP* 225.

¹⁷⁹ Mosha 2015 *Commonwealth Journal of Local Governance* 64.

¹⁸⁰ Mwesigye and Matsumoto 2016 *World Dev* 25.

¹⁸¹ *Willow Waters Homeowners Association (Pty) Ltd v Koka* (768/13) [2014] ZASCA 220. See para 3.2.2 below for a full description of the concept.

¹⁸² Marx 2016 *Urban Studies* 2780.

¹⁸³ Wehrmann *Land Conflicts: a Practical Guide to Dealing with Land Disputes* 9-10.

¹⁸⁴ Klaus 2020 *LUP* 2. See generally Lund 2016 *Dev and Change* 1204-1205.

¹⁸⁵ Kalabamu 2019 *LUP* 338.

¹⁸⁶ Denchie, Ablo and Overå 2021 *Afr Geographical Review* 364-365. In peri-urban areas the conflicts are often worsened by acquisition of land by the state for urban development and removal of informal occupants which result in people losing their rights. -See Dadashpoor and Ahani 2019 *LUP* 225.

¹⁸⁷ Fourie "Land Readjustment for Peri-urban Customary Tenure: the Example of Botswana" 88.

These conflicts are caused by many factors such as undefined boundaries,¹⁸⁸ encroachments,¹⁸⁹ urban sprawl,¹⁹⁰ illegal land transactions, weak enforcement of planning regulations and land use changes.¹⁹¹ This is also the case with Botswana.¹⁹² These conflicts are highly prevalent in peri-urban areas.¹⁹³ They are also caused by land grabs.¹⁹⁴ Through rapid urbanisation, land grabs have found their way into the land system.¹⁹⁵ Even though Botswana experiences land grabs, they are not on as large a scale as other African countries like Ethiopia.¹⁹⁶ It is argued that legal pluralism and commercialisation of land in Botswana caused customary land to be receptive to land grabbing over the years.¹⁹⁷ Those that are involved in land grabbing often claim that they have inherited the land from their forefathers through customary law.¹⁹⁸

As mentioned earlier, many urban centres are surrounded by tribal land and freehold land.¹⁹⁹ For example, Gaborone is surrounded by tribal land and freehold farms.²⁰⁰ As mentioned above, Francistown is enclosed by Tati Company land.²⁰¹ This, according to Mpofu, Darkweh and Gwebu,²⁰² has restricted their growth. Therefore, tribal land in the peripheries of the city becomes a centre of contestation and land corruption.²⁰³ It is highlighted that the land use conversion of this agricultural land

¹⁸⁸ In Africa, land boundaries are not clearly defined, they are often marked by unreliable trees and rocks. -See Kansanga, Arku and Luginaah 2019 *LUP* 13. This situation arose as a result protracted displacements, reconfiguration and post-independence land reform that swept through the continent. -See Tchatchoua-Djomo and Van Dijk 2022 *Land* 8. Therefore, such unclear boundaries of land parcels are a source of land conflicts. -See Huntington and Shenoy 2021 *Journal of Dev Economics* 3.

¹⁸⁹ Kandel 2022 *JCAS* 8.

¹⁹⁰ Rubiera-Morollón and Garrido-Yserte 2020 *Sustainability* 8.

¹⁹¹ Kuusaana and Bukari 2015 *Journal of Rural Studies* 54.

¹⁹² Kalabamu 2019 *LUP* 340-341.

¹⁹³ Bergius *et al* 2020 *World Dev* 2.

¹⁹⁴ Land grabs are large commercial takings of land from the people. It is often referred to as 'large scale land acquisition'. -See Abate 2020 *Afr Affairs* 96.

¹⁹⁵ Kalabamu and Lyamuya 2021 *TRP* 39-40.

¹⁹⁶ Wubneh 2018 *LUP* 173.

¹⁹⁷ Effossou and Cho 2022 *South Afr Geographical Journal (SAGJ)* 157.

¹⁹⁸ Kalabamu and Lyamuya 2021 *TRP* 40.

¹⁹⁹ See para 2.3.3 above.

²⁰⁰ Batisani and Yarnal 2011 *Landscape and Urban Planning* 78.

²⁰¹ See para 2.2.2 above.

²⁰² Mpofu, Darkoh and Gwebu 2018 *GeoJournal* 728.

²⁰³ Manatsha and Morapedi 2022 *JCAS* 64-65.

into urban functions has exacerbated the land conflicts.²⁰⁴ Freehold is said to inhibit planning because development plans cannot be executed without the consent of the owner.²⁰⁵ Landowners also subdivide their land disregarding planning, hence defeating the government's planning efforts.²⁰⁶ As a result conflicts ensue which delay the spatial planning process.²⁰⁷

Kalabamu²⁰⁸ argues that legal pluralism has been a cause of many tenure-related conflicts in Botswana. Prior to the arrival of Land Boards, all land was allocated by traditional leaders (*Dikgosi*),²⁰⁹ and during the Land Boards era, some of the people did not formalise their land rights.²¹⁰ This creates a system of forum shopping, where individuals choose an authority that is likely to reinforce their claims.²¹¹ As a result, these two hierarchical systems are prone to manipulation, which exacerbates uncertainty over land rights.²¹² Turok²¹³ succinctly describes the situation in general terms as follows:

Around the periphery of many African cities there are overlapping statutory and customary (traditional) land tenure systems, which coincide with widespread informal practices of land management.

Therefore, people use history and the past to justify their claims over land rights.²¹⁴ As a result, there have been conflicts over boundaries and the rightful owners of the land.²¹⁵ Traditional leaders still have influence in the allocation of customary land, and this makes land administration complex.²¹⁶ This invincible power has been abused over the years, as the chiefs gave land away for financial benefit and other favours.²¹⁷ For example, in Tsolamosese near Mogoditshane, the Land Board did not

²⁰⁴ Sebegu and Gwebu 2013 *IJSBE* 205.

²⁰⁵ Akaabre 2023 *LUP* 3.

²⁰⁶ The *City of Francistown Development Plan (1997-2021)* 67.

²⁰⁷ Adjei-Poku *et al* 2023 *LUP* 3.

²⁰⁸ Kalabamu 2019 *LUP* 341.

²⁰⁹ Ng'ong'ola 1992 *JAL* 142.

²¹⁰ Onoma 2009 *Africa Dev* 110.

²¹¹ Van Leeuwen 2014 *LUP* 293.

²¹² Knight "The Community Land Titling Initiative" 149.

²¹³ Turok 2016 *ADP* 36.

²¹⁴ Kansanga, Arku and Luginaah 2019 *LUP* 13.

²¹⁵ Kalabamu "Land Conflicts and Alternative Dispute Resolution in Sub-Saharan Africa" 172-173.

²¹⁶ Mwathunga and Donaldson 2018 *LUP* 5.

²¹⁷ Kalabamu 2014 *HI* 477.

adequately check the land rights before registering them.²¹⁸ They just endorsed allocations done by *Dikgosi*.²¹⁹ *Dikgosi* capitalised on these weaknesses and enriched themselves. Kalabamu²²⁰ notes that in Mogoditshane, chiefs and headmen received monetary favours, known as '*madi-a-selepe*' or 'thank you' money, to speed up demarcations. This fuelled land corruption, conflicts and informal tenure in that area.²²¹

Additionally, the formalisation of customary land rights has also proliferated land conflicts.²²² Formalisation of community rights to individual property rights is seen as alien to Africa.²²³ The individualistic approach tends to replace the shared property rights, to the exclusion of others.²²⁴ This is because many African countries lack resources and capacity to run a proper land registration system.²²⁵ As a result, such systems are prone to manipulation.²²⁶ In Botswana, land officials and elites have often manipulated records in their own interest.²²⁷

The multiplicity of institutions with incongruent mandates worsens land conflicts in urban settings.²²⁸ In Botswana specifically, diverse institutions deal with spatial planning and land governance.²²⁹ These institutions include council authorities, Land Boards and Department of Town and Country Planning, which operate under different regulatory regimes.²³⁰ The classification of land into different tenure systems in Botswana too subjects it to different legal regimes which makes it difficult to harmonise land administration.²³¹ This makes spatial planning difficult if there is

²¹⁸ Van Asperen *Evaluation of Innovative Land Tools in Sub-Saharan Africa* 181.

²¹⁹ Van Asperen *Evaluation of Innovative Land Tools in Sub-Saharan Africa* 181.

²²⁰ Kalabamu 2014 *HI* 477.

²²¹ Kalabamu "Limits of Incremental Land Tenure Reform in Botswana" 128.

²²² Bottazzi, Goguen and Rist 2016 *The Journal of Peasant Studies* 971.

²²³ Peters 2013 *Afr Affairs* 545.

²²⁴ Chenitz and Richardson "Taking Stock of the Risks Associated with Individualisation" 118.

²²⁵ Chitonge "Land Governance in Africa: the New Policy Reform Agenda" 13.

²²⁶ Valkonen 2021 *LUP* 4.

²²⁷ Sjaastad and Cousins 2009 *LUP* 4.

²²⁸ Teklemariam and Cochrane 2021 *Land* 2.

²²⁹ Griffiths *Transformations on the Ground; Space and the Power of Land in Botswana* 42.

²³⁰ Griffiths *Transformations on the Ground; Space and the Power of Land in Botswana* 47.

²³¹ Griffiths *Transformations on the Ground; Space and the Power of Land in Botswana* 47. It is argued further that different laws dealing with result in varied interpretations and misconceptions

no coherence between these institutions.²³² Hammami²³³ notes the tension between the *TLA* and *TCPA* in Botswana. He argues that whilst the *TLA* provides for tribal life and administration of tribal tenure, the *TCPA* brings complex designs and arrangements that are alien to settlement planning in Botswana.²³⁴ Multiple institutions create a conducive environment for manipulation and lack of accountability.²³⁵ Conversely, these multifarious institutions are argued to offer a range of solutions which a single institution cannot offer, for example.²³⁶

The ultimate effect of all these land conflicts is tenure insecurity.²³⁷ As more conflicts over boundaries and ownership deepen, rights holders whose tenure is insecure do not fully benefit from their land and pass it to their successors.²³⁸ Tenure insecurity is also worsened by planning regulations and laws which are not inclusive of people's traditions, especially in the rural-urban fringe.²³⁹ It is therefore necessary that participatory planning, especially in the wake of rapid urbanisation, be utilised to improve tenure security.

2.3.5 Informality

Cities have often been described as complex engines of economic development bringing together a myriad of players.²⁴⁰ However, cities in the Global South are often urbanising without development.²⁴¹ This has led to a sharp increase in informal settlements.²⁴² It is estimated that today 1 billion people across the world are living

which often complicate the land administration processes. -See the *Revised Botswana Land Policy 2019* 32.

²³² Sebegu and Gwebu 2013 *IJSBE* 196.

²³³ Hammami 2012 *Journal of Planning Education and Research* 268.

²³⁴ Hammami 2012 *Journal of Planning Education and Research* 268. See also the *Revised National Settlement Policy of 2004* 9.

²³⁵ Kalabamu "Limits of Incremental Land Tenure Reform in Botswana" 134.

²³⁶ Van Leeuwen 2014 *LUP* 293.

²³⁷ Agheyisi 2020 *Urban Forum* 2.

²³⁸ Berge 2014 *et al LUP* 62-63.

²³⁹ Asafo *Peri-Urban Development: Land Conflict and its Effect on Housing Development in Peri-Urban Accra, Ghana* 23.

²⁴⁰ Aust and Du Plessis "Good Urban Governance as Global Aspiration: On the Potential and Limits of SDG 11" 204.

²⁴¹ Muzenda 2022 *Afr Urban Review* 4.

²⁴² Matamanda 2020 *DSA* 217-218.

in informal settlements.²⁴³ It was estimated further that slums were home to 30% of the world urban population in 2018.²⁴⁴ The 'slums' are caused by rapid urbanisation, incompatible land policies, dynamic housing markets and land governance challenges.²⁴⁵ These factors result in high property values pushing the poor into informality.²⁴⁶ Additionally, they have been referred to as an end product of inequality and social exclusion, for example in South Africa.²⁴⁷

As alluded to earlier, urbanisation in Africa is characterised by urban informality.²⁴⁸ As Africa rapidly urbanises, slum areas also proliferate.²⁴⁹ Informality is thus part of urbanisation trajectory.²⁵⁰ It is often difficult to separate formality and informality in an African city, because the two exist together.²⁵¹ However, informality is often neglected and referred to as something that is unwanted.²⁵² It is argued that, the combative interventions to eradicate informality have undermined informal livelihoods and worsened marginalisation.²⁵³ Informal settlements²⁵⁴ provide housing and shelter for a large proportion of urban populations.²⁵⁵ However, they are often perceived as a threat to human lives.²⁵⁶ This is due to poor sanitation, lack of access to clean water and poor housing conditions.²⁵⁷

Historically, the growth of urban centres in Botswana was accompanied by the proliferation of informal settlements such as Old Naledi in Gaborone.²⁵⁸ In 2022, the

²⁴³ UN Habitat *World Cities Report 2022* 19.

²⁴⁴ Aboulnaga, Badran and Barakat "Global Informal Settlements and Urban Slums" 4.

²⁴⁵ Bah, Faye and Geh "Slum Upgrading and Housing Alternatives for the Poor" 216.

²⁴⁶ Gambe, Turok and Visagie 2023 *HI* 2.

²⁴⁷ Alemie, Bennett and Zevenbergen 2015 *Journal of Spatial Science* 293.

²⁴⁸ Cobbinah 2023 *Journal of Urban Affairs* 298. See also Rogerson 2017 *GeoJournal* 1180.

²⁴⁹ Quaye *et al* 2022 *Sustainable Cities and Society* 1.

²⁵⁰ Pieterse 2011 *Social Dynamics* 6.

²⁵¹ Richmond, Myers and Namuli 2018 *Urban Science* 2.

²⁵² Finn and Cobbinah 2023 *Urban Studies* 406.

²⁵³ Rogerson 2018 *Bulletin of Geography. Socio-Economic Series* 158-159.

²⁵⁴ The term 'informal settlements and 'slum' is used interchangeably to mean one concept in this discussion. The difference, if any, between a slum and an informal settlement is a purely academic exercise. The reality is that all of them lead to deprivation and hardships. -See Mahabir *et al* 2016 *Regional Studies, Regional Science* 401.

²⁵⁵ Lekalakala *The Effects of Urbanisation on Housing Backlog in Johannesburg City* 32.

²⁵⁶ Abunyewah, Gajendran and Maund 2018 *Procedia Engineering* 240.

²⁵⁷ Okyere and Kita 2015 *Journal of Sustainable Dev in Africa* 107. See also Turok and Borel-Saladin 2016 *Housing Studies* 387.

²⁵⁸ Geiselhart "Call it by its Proper Name! Territory-ism and Territorial Stigmatisation" 223.

population of Old Naledi was at 18 194 residents.²⁵⁹ This results in land pressure because Old Naledi is only 115 hectares, and its growth is restricted by a railway reserve.²⁶⁰ The surge in population in this settlement has led to overcrowding and pressure on existing resources.²⁶¹ The poor land record system in Botswana has allowed people to erect informal settlements without proper monitoring.²⁶² Old Naledi for example, lacks liveable space, there is insufficient sanitation and weak materials are used for construction.²⁶³

Gaborone's pace of urbanisation is marked by self-allocation or illegal occupation of land.²⁶⁴ It is reported that currently the number of informal occupants stands at 400.²⁶⁵ This phenomenon occurs mostly in the peripheral villages of Mogoditshane and Tsolamosese.²⁶⁶ The many years of planning neglect in these areas meant that people could take the opportunity to occupy informally.²⁶⁷ *Dikgosi* also feature in the equation by illegally allocating people land.²⁶⁸ Informal occupants were further encouraged by the payment in kind policy that the Land Board adopted.²⁶⁹ Agricultural land owners were told to surrender their ploughing fields in exchange for six plots.²⁷⁰ However, that process took very long, and created opportunity for land fraud by land officials.²⁷¹ As a result, the development plan that was introduced by the authorities did not recognise the rights on the ground.²⁷² The situation was compounded by the fact that there was no participation in plan making which

²⁵⁹ This is a combination of Extension 13 (Old Naledi Industrial) and Old Naledi (Extension 13). -See Statistics Botswana *Population and Housing Census 2022* 3-5.

²⁶⁰ Gwebu 2003 *HI* 411.

²⁶¹ Statistics Botswana *Population and Housing Census Analytical Report 2011* 178.

²⁶² Shabane, Nkambwe and Chanda 2011 *Applied Geography* 678.

²⁶³ The *Gaborone City Development Plan (1997-2021)* 23.

²⁶⁴ Rakodi 2006 *IDPR* 273.

²⁶⁵ Tapologo *Mmegi* 14.

²⁶⁶ Shabane, Nkambwe and Chanda 2011 *Applied Geography* 678.

²⁶⁷ Shabane, Nkambwe and Chanda 2011 *Applied Geography* 678.

²⁶⁸ Mokwena *Botswana Guardian* 5.

²⁶⁹ Tlhankane *Mmegi* 12.

²⁷⁰ For example, it is reported in one instance an elderly citizen in Mogoditshane gave in her 13-hectare field of which she was promised that her 10 children will be allocated plots in return. However, the Land Board somersaulted on its promise, only to issue her with a demolition notice. -See Botlhoko *The Monitor* 3.

²⁷¹ Tlhankane *Mmegi* 12.

²⁷² Van Asperen, Kalabamu and Zevenbergen "Evaluation of Land Administration Tools" 163.

worsened the situation.²⁷³ For example, in Mogoditshane the district council prepared plans without consulting the Land Board to establish the situation on the ground.²⁷⁴ As a result, the 1993 layouts could not be implemented because informal occupants had already occupied the place.²⁷⁵ As a result, the government evicted and demolished their homes.²⁷⁶ Informal occupation is said to delay land allocations, as authorities have to wrestle with occupants for land earmarked for allocation.²⁷⁷

Turok²⁷⁸ asserts that the gravest challenge in informal space is lack of tenure security. Informal dwellers often occupy land that they do not own, thus making it difficult to register, transfer or mortgage such land.²⁷⁹ It is contended that even if they found that land vacant, the structures of exclusion inherited from colonisers make it difficult to formalise their rights.²⁸⁰ Because of the unavailability of title they cannot derive benefits from their land in the form of formal credit.²⁸¹ According to Mosha,²⁸² Botswana has made tremendous efforts in upgrading its informal settlements. For example, Old Naledi, which used to be characterised by unsanitary conditions has now been improved.²⁸³ It is argued that upgrading of existing tenure arrangements, especially in informal urban spaces, is a solution to insecure rights that exist there.²⁸⁴

Informal titles result in a precarious situation for the state. The unavailability of titles in informal settlements makes it difficult for the government authorities to allocate infrastructure.²⁸⁵ This activity requires codification of rights. In Old Naledi, for example people were not connected to water with government citing that they do

²⁷³ Van Asperen *Evaluation of Innovative Land Tools in Sub-Saharan Africa* 183.

²⁷⁴ Van Asperen, Kalabamu and Zevenbergen "Evaluation of Land Administration Tools" 167.

²⁷⁵ Shabane, Nkambwe and Chanda 2011 *Applied Geography* 679.

²⁷⁶ Griffiths *Transformations on the Ground; Space and the Power of Land in Botswana* 150.

²⁷⁷ Mokwena *Botswana Guardian* 5.

²⁷⁸ Turok "Linking Urbanisation and Development in Africa's Economic Revival" 70.

²⁷⁹ Panman 2021 *Oxford Dev Studies* 230.

²⁸⁰ Fox 2014 *World Dev* 197.

²⁸¹ Ngau and Olale "Dialogues on Informality: Land Sharing as a Sustainable Approach" 83-84.

²⁸² Mosha 1996 *Review of Urban & Regional Dev Studies* 51.

²⁸³ Mosha 1996 *Review of Urban & Regional Dev Studies* 61-62.

²⁸⁴ Swanepoel *Efficacy of the Spatial Planning and Land Use Management Act in the Promotion of Spatial Justice in an Urban Land Reform Context* 125.

²⁸⁵ Geyer Jr 2023 *LUP* 2.

not have titles.²⁸⁶ Lack of titles results in illegal means of obtaining titles to secure services such as water and electricity.²⁸⁷ The effects of insecure tenure have excluded the poor from economic development as they do not wish to spend money on improving their homes due to fear of eviction.²⁸⁸ Dodman *et al*²⁸⁹ argue that lack of secure tenure reduces the poor's incentive to upgrade housing and investing in amenities. This makes urban life unbearable.²⁹⁰ Therefore, it is important that the poor's property rights be formalised to attain tenure security.²⁹¹

2.3.6 Shortage of land and housing

The rising population in Botswana's cities and towns has caused serious shortages of land.²⁹² This challenge is worsened by the inefficiency of land administration institutions.²⁹³ It is estimated that Gaborone and Francistown receive nearly 50-70% of land applications in the country, thereby creating urban land scarcity.²⁹⁴ It is reported that in Mogoditshane, the backlog of land applications is over 120 000, while in Kumakwane the waiting list stands at 14 640 and there have not been any allocations since 2006.²⁹⁵ In terms of state land, there are 11 071 applicants to be allocated land in terms of the Self-Help Housing Agency Scheme (hereafter SHAA) program in Gaborone, whilst in Francistown the number stood at 12 746.²⁹⁶ Worse even, an individual can wait for close to twenty years to be allocated a piece of land.²⁹⁷ Lack of serviced land and unreliable land registers are many of the factors leading to delay in land allocations.²⁹⁸

²⁸⁶ Bolaane, Tema and Phuthologo 2021 *HI* 6.

²⁸⁷ Mokwena *Botswana Guardian* 4.

²⁸⁸ UN Habitat 2021 *Tenure Responsive Land Use Planning* 16.

²⁸⁹ Dodman *et al* 2017 *Int Journal of Disaster Risk Reduction* 8.

²⁹⁰ UN Habitat *World Cities Report 2022* 15.

²⁹¹ Geyer Jr 2023 *LUP* 2.

²⁹² Balisi 2020 <https://tinyurl.com/4d884yt6>; Kalabamu 2014 *HI* 474.

²⁹³ Lall, Henderson and Venables *Africa's Cities: Opening Doors to the World* 121.

²⁹⁴ Kalabamu 2021 *LUP* 2.

²⁹⁵ Mokwena *Botswana Guardian* 5. Due to the unavailability of verified statistics of the waiting lists, newspaper statistics have been relied upon.

²⁹⁶ Ramadubu *Botswana Guardian* 14.

²⁹⁷ Mmana 2021 <https://news.thevoicebw.com/a-lifetime-of-waiting-for-a-plot/>; Unknown 2021 <https://tinyurl.com/5xmekvpk>.

²⁹⁸ Mosha "Access to Land in Urban and Rural Areas of Botswana" 67.

The delay in land allocations is leading to overpopulation of Gaborone including its satellite settlements.²⁹⁹ Farms and tribal land that surround the cities constrain their growth. For example, Gaborone is surrounded by free hold farms Bonnington and Kgale.³⁰⁰ In Francistown, the Tati Company still owns large portions of land which was fraudulently obtained from the indigenous people.³⁰¹ Manatsha³⁰² notes that in an effort to address the land shortages in the Francistown area the government has purchased 14 farms from the company. In 1996, the government negotiated with Tati Company and acquired 1500 hectares of land.³⁰³ However, given the pace of the city's growth, there is still serious shortage of land.³⁰⁴

It was estimated that by 2021, Gaborone will need 104 784 plots to cater for the growing population.³⁰⁵ It was also projected that this number of plots will need an additional 10 478.4 hectares of land.³⁰⁶ Land will also be needed for other uses such as sports, civic and commercial.³⁰⁷ The government has purchased some of the freehold farms to ameliorate the shortage of land. This land was used for redistribution for the SHAA³⁰⁸ in Broadhurst and Tsholofelo.³⁰⁹ However, many are seeing these as an economic advantage. Freehold landowners often set high prices for land which may be costly for government to purchase.³¹⁰

²⁹⁹ Montsho *Caught in Between Policies: the Intertwined Challenges of Access to Land and Housing in Gaborone, Botswana* 66.

³⁰⁰ See Sebego and Gwebu 2013 *IJSBE* 202.

³⁰¹ Morapedi 2020 *SAHJ* 522.

³⁰² Manatsha 2020 *Journal of Asian and Afr Studies* 111.

³⁰³ The *City of Francistown Development Plan (1997-2021)* 67.

³⁰⁴ Morapedi 2020 *SAHJ* 528.

³⁰⁵ The *Gaborone City Development Plan (1997-2021)* 34.

³⁰⁶ The *Gaborone City Development Plan (1997-2021)* 34.

³⁰⁷ The *Gaborone City Development Plan (1997-2021)* 34.

³⁰⁸ SHAA is a low-income housing scheme introduced by the government of Botswana in the 1970s. Its mandate was to upgrade squatter settlements in country such as Old Naledi in Gaborone. - See Kalabamu 2006 *IDPR* 220. The scheme was replicated from Zambia and modified to suit the needs of Botswana. -See Nkwae and Dumba 2010 *HI* 369. The scheme utilises a CoR and FPSG to allocate state land with services to the urban poor and improve their tenure security. -See Sjöstedt 2011 *HI* 134.

³⁰⁹ Kalabamu 2006 *IDPR* 219.

³¹⁰ The *Gaborone City Development Plan (1997-2021)* 34.

One of the effects of rapid urbanisation in Botswana is shortage of housing.³¹¹ The World Economic Forum (hereafter WEF) projects that by 2025, almost 1.6 billion people worldwide will be hit by a shortage of housing.³¹² Africa is one of the regions worst hit by this.³¹³ The right to adequate housing is recognised as a basic human right under international law.³¹⁴ Despite housing being recognised as a right, the inability to deal with housing shortages has driven many to slums.³¹⁵ The rural-urban drift is high. Those who migrate to urban centres often do not have finances to take up decent housing or pay mortgages.³¹⁶ Gaborone experiences a housing shortage.³¹⁷ As a result, low-income earners and unemployed citizens resort to poor or inadequate housing within the city.³¹⁸ The SHAA has been lauded for helping to reduce the housing shortage in the country.³¹⁹ However, because there is a minimum requirement to qualify for SHAA,³²⁰ many people cannot take up the scheme.³²¹

2.4 Concluding remarks

This chapter contextualised land use challenges with reference to the process of urbanisation in Botswana.³²² It was shown that the country is experiencing unprecedented rates of urbanisation.³²³ Migration to urban centres in search of economic opportunities is seen as a driver of this rapid urbanisation. The chapter

³¹¹ Chiguvu 2022 *Int Journal of Research in Business and Social Science* 424.

³¹² Masterson 2022 <https://tinyurl.com/y3xv7wka>.

³¹³ Olanrele, Jolaoso and Adegunle 2018 *Afr Journal of Applied Research* 18.

³¹⁴ Vols and Kusumawati 2020 *Asia-Pacific Journal on Human Rights and the Law* 243. For example, the right to housing and shelter is found in article 25(1) of the Universal Declaration of Human Rights (hereafter UDHR) and in the African Charter on Human and Peoples' Rights (hereafter ACPHR) it can be inferred from other rights.

³¹⁵ Marutlulle 2021 *Africa's Public Service Delivery & Performance Review* 2; Agyemang and Morrison 2018 *Urban Studies* 2641.

³¹⁶ Chirisa and Matamanda 2016 *Journal of Settlements and Spatial Planning* 80.

³¹⁷ Boshoff, Kachepa and Pienaar 2013 *Advanced Research in Scientific Areas* 96.

³¹⁸ Unknown 2021 <https://tinyurl.com/kbfsh34u>.

³¹⁹ Kampamba *et al* 2018 *Int Journal of Housing Markets and Analysis* 362.

³²⁰ For one to qualify for the SHAA Scheme one's total earnings must range between P4 400 (US\$650) to P36 400 (US\$5 100) per annum -see Mosha 2013 *Urban Forum* 145. However, these amounts are not fixed and can be adjusted from time to time.

³²¹ Jobe *A Flexible Housing Approach for Self-help Housing in Botswana* 35.

³²² See para 1.4 above.

³²³ See para 2.2 above.

has found that rapid urbanisation brought challenges such as illegal land dealings and corruption, urban sprawl, land conflicts, informality and shortage of land and housing. The cross-cutting effect of these challenges is that they affect tenure security and strain spatial planning in urban Gaborone.³²⁴

Tenure insecurity means that people can easily be evicted from their land, thereby losing their livelihoods.³²⁵ As established above, the lack of secure titles may make access to basic infrastructure difficult for the urban poor.³²⁶ The chapter has also highlighted that a lack of proper planning in Gaborone has contributed to uncontrolled urbanisation.³²⁷ For example, this has manifested through informal occupation resulting in insecure tenure for people.³²⁸ Given the tapestry of these challenges identified above, it is important to see how tenure security and spatial planning law factor into the locale to remedy these challenges. As indicated above spatial planning helps in the orderly development of cities and towns. Tenure security on the other hand may shield rights holders against eviction from their land and may possibly reduce land conflicts. The next chapter explains and critically evaluates Botswana's land tenure and tenure security with the view to dissecting its relevance for controlling some of the effects of rapid urbanisation.

³²⁴ See paras 2.3.2, 2.3.3 and 2.3.4 above.

³²⁵ See paras 2.3.3 and 2.3.5 above.

³²⁶ See para 2.3.5 above.

³²⁷ See para 2.3.3 above.

³²⁸ See para 2.3.5 above.

Chapter 3 Land tenure and security in Botswana in the face of rapid urbanisation

3.1 Introduction

Botswana's land tenure system is a result of many factors such as colonisation and international and historical forces, which include its historical contact with the former Union of South Africa.¹ However, its land tenure system is largely a by-product of colonisation.² When Britain colonised the country in March 1885 it brought with it institutions of power including of land governance.³ These institutions were operated through a system of indirect rule.⁴ These institutions arguably went on to shape how land is held and transacted in the country.⁵ The contemporary laws too, reflect this history.⁶ However, since time immemorial Botswana had strong tribal institutions and values, which included the *kgotla*⁷ and tolerance of diverging opinions.⁸ In the post-colonial Botswana, traditional and modern institutions co-existed to form a formidable functioning state.⁹

Germane to this chapter is that the country currently has a three-tier tenure system, namely, tribal, state, and freehold land tenure. The holding of rights and their transaction in these tenure systems differ. For example, tribal land is regulated by

¹ Griffiths *Transformations on the Ground: Space and the Power of Land in Botswana* 19. According to Ng'ong'ola, for example the creation of freehold farms in the Ghanzi region were allocated to act as a buffer to stop the German expansion from the then South-West Africa (now Namibia). They were first allocated a quitrent and later turned into full freehold farms in 1950s. -See Ng'ong'ola 1996 *SAPL* 3. See also Morapedi 2014 *SAHJ* 568.

² Ng'ong'ola 1992 *JAL* 140.

³ Home 2021 *Land* 4.

⁴ Adjei-Poku *et al* 2023 *LUP* 2. According to Makgala and Mogalakwe, the British government did not develop the country, they used the already existing traditional institutions to rule and stamp authority over tribal communities. The *kgotla* particularly was a powerful institution that held the British administration intact. -See Makgala and Mogalakwe 2021 *SAHJ* 679-681. It was a much cheaper mode of governance, especially to those colonies which were considered barren. -See Xypolia 2016 *Critique* 226.

⁵ Kalabamu 2019 *LUP* 340.

⁶ Griffiths 2014 *The Journal of Legal Pluralism and Unofficial Law (JLPUL)* 42-43.

⁷ *Kgotla* means "the customary meeting place of a tribe or tribal community for the discussion, in terms of customary law, of matters of tribal or communal concern". -See s 2 of the *Bogosi Act* Cap 41:01.

⁸ Cappelen and Sorens 2018 *Commonwealth & Comparative Politics* 199-200.

⁹ Ifezue 2015 *JAL* 287.

Land Boards and may not be alienated to foreigners. Initially all were shaped by colonisation and ultimately embedded in the land governance system of the country after independence.¹⁰

In the context of the above, this chapter aims to critically evaluate Botswana's land tenure system and its state of tenure security with a view to investigate how it intersects with and controls rapid urbanisation.¹¹ To some extent, the chapter questions the linkages between the control and impact of urbanisation in Botswana and the strength of the legal instruments emanating from the national land tenure system.¹² From the onset, general definitions of the terms; land tenure, tenure security and insecurity will be offered to provide a premise for understanding the role of tenure security in the control of some aspects of rapid urbanisation.

3.2 The meaning of land tenure in Botswana

3.2.1 Colonial legacy of dualism and land administration

Botswana has a distinct legal system.¹³ It maintains a mixed legal system comprising customary law and Roman-Dutch law.¹⁴ The legal system also contains elements of English law.¹⁵ These mixed laws were received indirectly from South Africa as configured by the Dutch and English settlers at different times.¹⁶ As a result, Roman-Dutch law principles which were taken forward into Botswana continue to be applied.¹⁷ The position has also been judicially asserted by the courts.¹⁸ Customary law and traditional institutions have existed since time immemorial in Botswana.¹⁹ When Britain colonised the country it allowed the chiefs and tribes to maintain their customary law.²⁰ This was to allow the customs to apply to the people, while the

¹⁰ Kalabamu 2019 *LUP* 340.

¹¹ See para 1.3, objective (b) specifically.

¹² See para 1.3, objective (d) specifically.

¹³ Malila 2015 *Canadian Journal of Afr Studies* 267-268.

¹⁴ Mogomotsi 2014 *UBLJ* 3.

¹⁵ Fombad 2005 *Afr Journal of Int and Comparative Law* 10-11.

¹⁶ Fombad 2022 *JAL* 4.

¹⁷ Van Niekerk 2004 *CILSA* 313.

¹⁸ *Silverstone (Pty) Ltd v Lobatse Clay Works (Pty) Ltd* 1996 BLR 190 (CA).

¹⁹ Dinokopila and Kgoboge 2021 *Nordic Journal of Human Rights* 347.

²⁰ Fombad 2004 *Stell LR* 168.

foreign law was meant to apply to the settlers.²¹ In spite of the semblance of autonomy that the colonial administration extended to the chiefs, it still interfered with their powers.²² This occurred through the style of indirect rule. Indirect rule meant that chiefs could still exercise authority over their community, but where their rule tampered with British rules and aspirations, their powers were interfered with.²³ Therefore, they became accountable to the colonial powers instead of to their communities as was previously the case.²⁴ In this regard, Diala²⁵ posits that:

The genius of the indirect rule policy is that it gave Africans a false sense of political control... In their defence, they had little or no other choice after decades of being educationally, spiritually, and culturally configured to operate with transplanted laws.

The type of rule is often viewed as having caused further tensions between traditional and modernist institutions during Africa's transition to democracy.²⁶ At the dawn of independence, some African leaders tried to abolish traditional leadership and institutions.²⁷ They viewed them as a threat to their legitimacy and wanted to amass all the power for themselves.²⁸ Back in the context of Botswana, traditional institutions survived the torrents of colonisation.²⁹ However, these institutions are now regulated by law, for example traditional courts.³⁰ Under the new laws, the government through the Minister has the power to de-recognise the

²¹ Maripe *The Revisionary Jurisdiction of the Higher Courts of Botswana and England in the Review of Decisions of Private Bodies* 27.

²² Ijagbemi *Land Tenure Reforms and Social Transformation in Botswana: Implications for Urbanization* 118.

²³ Griffiths *Transformations on the Ground; Space and the Power of Land in Botswana* 27.

²⁴ Ali, Fjeldstad and Shifa 2020 *Journal of Economic Behavior & Organization* 83.

²⁵ Diala 2017 *JLPUL* 146.

²⁶ Cappelen and Sorens 2018 *Commonwealth & Comparative Politics* 199.

²⁷ Cappelen and Sorens 2018 *Commonwealth & Comparative Politics* 199.

²⁸ Mengisteab 2019 *Oxford Research Encyclopedia of Politics* 7. In Uganda, for example, traditional institutions were abolished but later brought in through their 1995 *Constitution*. They still have relevance and legitimacy amongst the citizens across the spectrum, from leadership to land administration. -See Werner 2021 *Peacebuilding* 215.

²⁹ Ifezue 2015 *JAL* 281.

³⁰ Chiftainship is now regulated by the *Bogosi Act* Cap 41:01, wherein powers of chiefs and their recognition is outlined.

Kgosi from his chieftainship status.³¹ Morapedi³² argues that this demises the status of the institution.

In the context of land administration in Botswana, remarkable legal and policy changes can be noted.³³ In the pre-colonial era, all land was communal and vested in the tribe or the community. It was controlled by the *Kgosi* and he decided who he allocated it to.³⁴ This power was not absolute; he was required to consult his tribe (*morafe*) and his advisors.³⁵ This power continued even in the colonial era. However, the power to allocate prime land vested in the colonial administration. Kalabamu³⁶ describes the power struggles between traditional and colonial institutions as follows:

the colonial administrations introduced hierarchical, inequitable and racially biased laws and land tenure systems pitting statutory (freehold/leasehold) tenure systems against customary laws, land tenure practices and institutions...

Boone affirms the assertion above. She argues that colonisers designed institutions which assisted them to forcibly expropriate native lands.³⁷ They achieved this goal by maintaining customary tenure as an institution of social control.³⁸ The locus of land power in the hands of colonial administrators has caused many injustices.³⁹ In Botswana, Zimbabwe, and other African countries fertile lands were classified as crown lands and reserved for the white settlers.⁴⁰ Today, whilst many African countries battle with rapid urbanisation, such land still belongs to only a few people, and in South Africa, the situation was worsened by apartheid.⁴¹

³¹ Sections 13 and 15 of the *Bogosi Act*.

³² Morapedi 2010 *JCAS* 222-223.

³³ Frimpong 1993 *CILSA* 387-388.

³⁴ Hillbom 2014 *Journal of Int Dev* 160.

³⁵ Hillbom 2014 *Journal of Int Dev* 160.

³⁶ Kalabamu 2019 *LUP* 339.

³⁷ Boone 2015 *JCAS* 173.

³⁸ Boone 2015 *JCAS* 174.

³⁹ Abebe 2012 *Saint Louis University Law Journal* 442.

⁴⁰ De Pelichy and Afolabi "Understanding Land Issues in Anglophone Africa" 225.

⁴¹ Ndhlovu 2019 *Journal of Multicultural Discourses* 137.

Since the inception of the *TLA* in 1968, land is now regulated by Land Boards.⁴² There is still a clash between traditional institutions and modern institutions on who holds power to allocate land. For example, some *Dikgosi* mislead Land Boards by writing letters of support for false land claimants.⁴³ In Mogoditshane, this resulted in irregularities in land allocations.⁴⁴ It is for this reason that in Mogoditshane *Dikgosi* are subdividing land for the locals without consent of the Land Board.⁴⁵ It is therefore concluded that chiefs should not be completely erased from the land administration role.⁴⁶ Their extensive knowledge on land can help resolve land disputes, especially those that happen in the peri-urban fringe.⁴⁷ The next section addresses the relevance of 'bundle of rights' within land tenure and spatial planning. This is relevant to establishing how property rights within a tenure system assist in spatial planning and whether spatial planning contributes to secure property rights.

3.2.2 The 'bundle of rights' in the land tenure and spatial planning context

Property is a powerful institution that alters societal relations.⁴⁸ It defines power relations within a society. It is historically related with propagating patriarchy in the world.⁴⁹ Property has historically been described as 'despotic dominion'.⁵⁰ This meant exercising rights over something to the exclusion of the broader world.⁵¹ The meaning of ownership has been subject to contention and debate over centuries.⁵² According to the exclusionary theory of property rights, one must exclude others to enjoy use and benefit of one's property.⁵³ However over the years, ownership of

⁴² Griffiths 2013 *Int Journal of Law in Context* 226.

⁴³ Masolotatse 2015 <https://dailynews.gov.bw/news-detail/21661>.

⁴⁴ Thobega *The Midweek Sun* 4.

⁴⁵ Kalabamu 2014 *HI* 477.

⁴⁶ Manatsha 2019 *AJLP* 78.

⁴⁷ Manatsha 2019 *AJLP* 78.

⁴⁸ Blomley 2016 *Law & Society Review* 225.

⁴⁹ Christ 2016 *Feminist Theology* 216.

⁵⁰ The term *despotic dominium* comes from the works of William Blackstone, whereby he in essence reasoned that man who claims ownership of property must exercise it in the exclusion of others and the universe. -See Houghton 2020 *Trinity College Law Review* 228.

⁵¹ Gwaleba and Chigbu 2020 *LUP* 2.

⁵² Sibanda 2019 *South Afr Journal of Human Rights* 132.

⁵³ Wall 2019 *Victoria University of Wellington Law Review* 736.

property has been understood as a 'bundle of rights'.⁵⁴ This recognises that property rights cannot be understood on the compass of absolute control. It has multiple actors and intrinsic relationships embedded in each other.⁵⁵ It has many institutions, and it is constantly evolving.⁵⁶ As Degens⁵⁷ posits, through a bundle "ownership is fluid and malleable". In terms of this theory, what matters is not ownership of the land, but of the right.⁵⁸ One may own the house but not necessarily the air above it.⁵⁹ It is therefore argued that with a bundle, the right to exclude is to be performed within context of the relationship between the owner and another person.⁶⁰

Historically, Roman law explained ownership through the concept of *dominium* over a thing.⁶¹ In terms of Roman law, *dominium* was without exclusivity; restrictions such as safety, public health and neighbour interests applied.⁶² In the context of Roman-Dutch law, it is defined as the complete real right over a thing.⁶³ It involves the use and enjoyment of entitlements, which include the right to physical control and use and benefit, and the right to encumber, alienate and vindicate the thing.⁶⁴ These entitlements define what a holder may do with regard to his or her object.⁶⁵ It has been judicially asserted that ownership is not an absolute right.⁶⁶ Whilst ownership is characterised by exclusive use of real rights, it is subject to limitations.⁶⁷ This is further explained through the subtraction from the *dominium*

⁵⁴ Abdulai and Ochieng 2017 *Property Management* 26. The 'bundle of rights' finds its roots on the works of Wesley Hohfeld and Tony Honoré who conceptualised that property have many subsets of rights and different people may have interest in it. -See Glackin 2014 *Legal Theory* 3-4.

⁵⁵ Baron 2013 *University of Cincinnati Review* 58-59.

⁵⁶ Gwaleba and Chigbu 2020 *LUP* 2.

⁵⁷ Degens 2021 *Social Science Information* 214.

⁵⁸ Buitelaar and Segeren 2011 *Housing Studies* 663.

⁵⁹ Buitelaar and Segeren 2011 *Housing Studies* 663.

⁶⁰ Wilson *Human Rights and the Transformation of Property* 41.

⁶¹ Sibanda 2019 *South Afr Journal on Human Rights* 138.

⁶² Dhiwayo and Van Der Walt 2017 *South Afr Law Journal* 37.

⁶³ Dhiwayo and Muller "General Principles of Ownership" 43.

⁶⁴ Van der Walt and Pienaar *Introduction to the Law of Property* 47-48.

⁶⁵ Badenhorst 2021 *Afr Journal of Int and Comparative Law* 460.

⁶⁶ Pienaar 2015 *PELJ/PER* 1486.

⁶⁷ Dhiwayo and Muller "General Principles of Ownership" 40.

test.⁶⁸ These limitations include neighbour rights and restrictions that stem from planning law and constitutional law.⁶⁹ It has been contended that serious application of exclusivity may transgress other rights such as the right to life.⁷⁰

According to Schlager and Ostrom,⁷¹ these rights include the right to access and withdrawal, management, exclusion and management of property. These rights can either be held by individuals or groups of people.⁷² As it will be shown in the discussion below, a tenure system consists of a bundle of rights.⁷³ However these rights in the context of land tenure vary.⁷⁴ Some tenure may have a dense bundle whilst others a limited one that offers minimal security.⁷⁵ The completeness of these bundles can be used as a measure for tenure security.⁷⁶ It is assumed that tenure security will increase when an individual holds more of these rights.⁷⁷ However, the absence of these rights or of certainty in them leads to tenure insecurity.⁷⁸

Property rights and spatial planning are interdependent.⁷⁹ Planning laws, influence how property boundaries are delineated.⁸⁰ This may, in fact, help in the design of spatial planning and what techniques to use.⁸¹ As such, spatial planning helps to protect property rights.⁸² Planning institutions must be able to answer questions such as:

⁶⁸ See Badenhorst 2018 *Stell LR* 224 where the author explains that:

The subtraction from the *dominium* test is based upon the reasoning that a real right diminishes someone's ownership in the sense that it either: (a) confers on the holder of the real right certain entitlements of ownership; or (b) to some extent prevents the owner from exercising his ownership to full capacity.

⁶⁹ Mostert *et al* *The Principles of the Law of Property in South Africa* 117.

⁷⁰ Dhliwayo and Dyal-Chand "Property in Law" 311.

⁷¹ Schlager and Ostrom 1992 *Land Economics* 251-252.

⁷² Zhou *et al* 2018 *Sustainability* 3.

⁷³ Chigbu 2019 *LUP* 128.

⁷⁴ Teklemariam and Cochrane 2021 *Land* 8.

⁷⁵ Teklemariam and Cochrane 2021 *Land* 8.

⁷⁶ Doss and Meinzen-Dick 2020 *LUP* 4.

⁷⁷ Doss and Meinzen-Dick 2020 *LUP* 4.

⁷⁸ Place 2009 *World Dev* 1327.

⁷⁹ Slaev 2016 *Planning Theory* 32-33.

⁸⁰ Havel 2014 *LUP* 617.

⁸¹ Van Der Molen 2015 *Administration & Society* 179.

⁸² Needham "Interests and Rights in Property, and their Place in Land-use Planning" 26.

Who owns the land in a legal sense?, who—in fact—controls the land?
and how are customary rights integrated in the existing statutory law?⁸³

The relationship between the bundle of rights and spatial planning also lies in the fact that property is subject to limitations.⁸⁴ It has been contended that the entitlements that stem from property must be exercised legally and in the best interests of the community.⁸⁵ A person's property may be subject to zoning restrictions and plans set out by the law.⁸⁶ Zoning puts a constraint on the enjoyment and use of property.⁸⁷ Therefore, property can be limited to achieve the public good.⁸⁸ For example, prohibition of a noxious industry in a residential area may help prevent air pollution.⁸⁹ It is the researcher's submission, that through these limitations, urban sprawl, land conflicts and corruption may be controlled.

This suggests that the understanding of property rights is important not only in the context of understanding tenure security, but also in spatial planning.⁹⁰ Such rights vary between different tenure systems and rights in freehold land may be different from the rights in state land.⁹¹ For example, planning can include modernist and traditional planning, therefore the notion of 'bundle of rights' assists in the distinction between informal and formal property rights.⁹² This is important in spatial planning, because where there is existence of formal and informal rights, informal mixed practices can be used.⁹³

3.2.3 Defining land tenure

Land remains an important resource for wealth creation.⁹⁴ As gleaned from the above discussion, colonisation has had a significant influence on how land is

⁸³ Van Der Molen 2015 *Administration & Society* 179.

⁸⁴ Mostert *et al The Principles of the Law of Property in South Africa* 92.

⁸⁵ Horn, Knobel, Wiese *Introduction to the Law of Property* 57.

⁸⁶ Mostert *et al The Principles of the Law of Property in South Africa* 146.

⁸⁷ Van Wyk *Planning Law* 249.

⁸⁸ Horn, Knobel, Wiese *Introduction to the Law of Property* 57.

⁸⁹ Mostert *et al The Principles of the Law of Property in South Africa* 151.

⁹⁰ Nakamura 2016 *HI* 152.

⁹¹ Teklemariam and Cochrane 2021 *Land* 8.

⁹² Van Assche, Beunen and Duineveld 2014 *Administration & Society* 666.

⁹³ Van Assche, Beunen and Duineveld 2014 *Administration & Society* 666.

⁹⁴ Cobbianh, Asibey and Gyedu-Pensang 2020 *LUP* 1.

governed in Botswana.⁹⁵ As seen from the above, ownership of land comprises a bundle of rights.⁹⁶ Therefore, land tenure defines ways in which these rights are assigned in different societies.⁹⁷ Land tenure is regarded as a crucial facet that drives socio-economic development in a country.⁹⁸ Furthermore, it deals with how land is held, accessed, and transacted.⁹⁹ Dadashpoor *et al*¹⁰⁰ describe land tenure as:

...a concept, process, or institution. The concept includes an extensive set of registered and informal rights, responsibilities, obligations, and restraints associated with land...

Land tenure is often explained through the context of a continuum of rights.¹⁰¹ This is a concept which argues that land rights in a tenure system have an overlapping nature and cannot exist in a straight line.¹⁰² The concept recognises that land rights are evolutionary in nature.¹⁰³ This is also supported by the Evolutionary Theory of Land Rights (hereafter ETLR).¹⁰⁴ In terms of this theory, a change of customary tenure to formal tenure is seen as good, as individual title is productive.¹⁰⁵ It indicates that forces, such as urbanisation, market integration and agricultural commercialisation, bring changes to land rights.¹⁰⁶ As a result, there is an increase in land scarcity which requires people to seek tenure security as a shield to their rights.¹⁰⁷ With this the state must provide land reform that will deal with these challenges.¹⁰⁸ It is asserted that this may reduce conflicts and improve efficiency in

⁹⁵ See para 3.2.1 above.

⁹⁶ See para 3.2.2 above.

⁹⁷ Mabikke 2016 *JLRS* 154.

⁹⁸ Ansah and Chigbu 2020 *Land* 4.

⁹⁹ Antwi-Agyei, Dougill and Stringer 2015 *LUP* 4.

¹⁰⁰ Dadashpoor and Ahani 2019 *LUP* 219.

¹⁰¹ Nara, Lengoiboni and Zevenbergen 2021 *LUP* 11.

¹⁰² Nara, Lengoiboni and Zevenbergen 2021 *LUP* 11.

¹⁰³ Antonio *et al* 2021 *Land* 2.

¹⁰⁴ Platteau 1996 *Dev and Change* 31.

¹⁰⁵ Chitonge *et al* 2017 *Canadian Journal of Afr Studies* 126.

¹⁰⁶ Platteau 1996 *Dev and Change* 31.

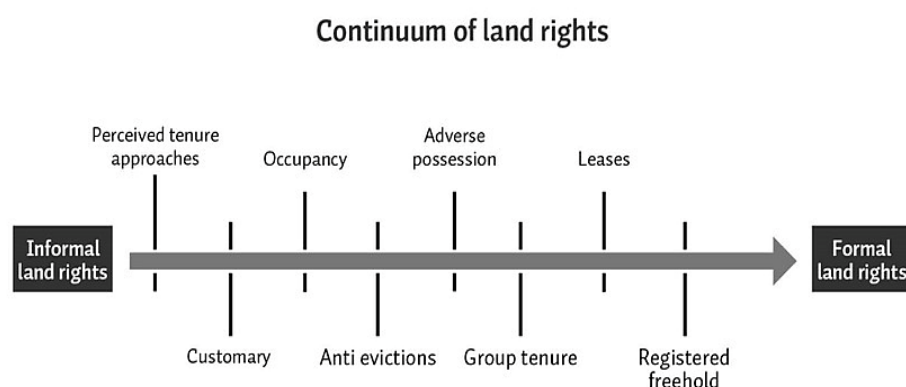
¹⁰⁷ Platteau "Does Africa need Land Reform?" 52.

¹⁰⁸ Mandhu and Mushinge "Theories Guiding Land Reforms Aimed at Promoting Tenure" 163.

land administration.¹⁰⁹ The critics of ETLR are of the view that it has broken down social cohesion of society and widened the inequality gap.¹¹⁰

A continuum of land rights model was proposed by UN Habitat which has helped shape land tenure discourse over the years.¹¹¹ A continuum of land rights is based on the idea that different types of tenure provide varying degrees of tenure security.¹¹² Therefore, there must be recognition of these diverse rights by participants and administrators.¹¹³ The institutions that are created serve as enforcement mechanisms for the land rights.¹¹⁴ The aim of this model is to give legitimacy to different tenure rights, the goal being to create a relationship between them.¹¹⁵

Figure 1:1 The UN Habitat model of 'continuum of land rights'¹¹⁶



The features of this continuum include diverse land rights across a tenure system.¹¹⁷ As the continuum moves from informal to formal rights, the tenure becomes more secure.¹¹⁸ There has however been a counter argument that it does not depict

¹⁰⁹ Hull, Babalola and Whittal 2019 *Land* 10.

¹¹⁰ Chigbu 2019 *LUP* 42.

¹¹¹ Whittal 2014 *South Afr Journal of Geomatics* 13-14.

¹¹² Chigbu *et al* 2019 *IJER* 6.

¹¹³ Chigbu *et al* 2019 *IJER* 6.

¹¹⁴ Lahoti 2022 *Int Journal of Urban Sustainable Dev* 327.

¹¹⁵ Madumere *Customary Land Rights and Gender Justice in Eastern Nigeria and Ghana* 191.

¹¹⁶ Adopted from the UN Habitat *Global Land Tool Network (GLTN)* 8.

¹¹⁷ Lemmen *et al* "The Operationalisation of the 'Continuum of Land Rights' at Country Level".

¹¹⁸ Mabikke 2016 *JLRS* 164.

properly what tenure security entails.¹¹⁹ The model does imply that freehold is the best.¹²⁰ Other tenure systems, such as customary, may offer security similarly as registered tenure when they are strengthened.¹²¹ The model therefore advocates for an incremental recognition of the diverse land rights.¹²² This is whereby rights which are said to be insecure are moved along a continuum and are documented.¹²³

It is noted that in Africa, land tenure was diluted by Western colonisation on the continent.¹²⁴ Du Plessis¹²⁵ asserts that the notion of property in African tenure systems has become problematic. The shift from communal to private ownership has created a sense of individualism, leaving much of the population landless, for example.¹²⁶ On the other hand, African land tenure was marked by men asserting power over land, to the exclusion of women.¹²⁷ That struggle of access to land persists today.¹²⁸ This has led to tenure insecurity for women.¹²⁹

A synthesis of the above conceptualisations reveals that land tenure is an overarching concept.¹³⁰ It includes social, legal, and institutional dimensions.¹³¹ However, for a land tenure system to benefit a country such as Botswana, it should be recognised by the citizens and protected by the country's legal system.¹³² The connection between land tenure and urbanisation is seen through the transformational nature of rapid urbanisation in the property law system.¹³³ Rapid urbanisation, especially to those communities with low tenure system brings changes.¹³⁴ Customary rights are now transformed into land uses which may not be

¹¹⁹ Du Plessis *et al* "The Continuum of Land Rights Approach to Tenure Security".

¹²⁰ Madumere *Customary Land Rights and Gender Justice in Eastern Nigeria and Ghana* 191.

¹²¹ Whittal 2014 *South Afr Journal of Geomatics* 25.

¹²² Antonio *et al* 2021 *Land* 2.

¹²³ Pichel and Weber 2018 *AJLP* 19.

¹²⁴ Mabikke 2016 *JLRS* 154.

¹²⁵ Du Plessis 2011 *PELJ/PER* 50.

¹²⁶ Jacques 2020 *Journal of Land Management and Appraisal* 2-3.

¹²⁷ Chigbu 2019 *LUP* 127-128.

¹²⁸ Ingwani 2021 *Land* 7-8.

¹²⁹ See para 3.3.3 below.

¹³⁰ Chigbu *et al* 2017 *JEPM* 4.

¹³¹ Mostert, Verstappen and Zevenbergen "Introduction" 4.

¹³² Broegaard, Vongvisouk and Mertz 2017 *World Dev* 171.

¹³³ Adam 2014 *Afr Review of Economics and Finance* 135.

¹³⁴ See para 3.1.2 above.

compatible with customary tenure.¹³⁵ It is for this purpose that the study explores how rapid urbanisation effects such changes and how the tenure security and planning law regime respond to such challenges.

Property law scholars and economists argue that secure land tenure is imperative for the improvement of economic conditions of the poor.¹³⁶ This will enable the poor to access finance from financial institutions whilst their property acts as a collateral.¹³⁷ The next section then discusses generally the notion of tenure security, types and its constituent elements. This discussion is relevant as it will assist in establishing whether Botswana's land tenure comprises the necessary elements that can offer tenure security. It will also assist in understanding the most suitable way of achieving tenure security in Botswana, whether is it through legal, perceived or *de facto* means, or a combination of these.¹³⁸

3.3 Tenure security

Tenure security is an elusive concept and has no definite meaning.¹³⁹ This is because it is compounded by different elements and institutions.¹⁴⁰ However, according to the FAO, tenure security refers to the guarantee that landowners will not be deprived of their rights and such rights will be recognised by others.¹⁴¹ Tenure security means the protection of one's vested rights and interests in land.¹⁴² It entails recognition and protection of a person's rights in land by the community in cases of specific challenges.¹⁴³ It acts as a protection for property owners, so as not to be removed from their land.¹⁴⁴ It also refers to the individual's right to legal protection against eviction from their property.¹⁴⁵ Whilst these different conceptions

¹³⁵ Ansah and Chigbu 2020 *Land* 2.

¹³⁶ Lawry *et al* 2017 *Journal of Dev Effectiveness* 61.

¹³⁷ Schwarcz 2019 *Notre Dame Law Review* 11-12.

¹³⁸ See para 3.3.2 below.

¹³⁹ Simbizi *Measuring Land Tenure Security: a Pro-Poor Perspective* 10.

¹⁴⁰ Valkonen *Conceptions, Practices and Power Plays Around the Notion of Tenure Security: Examining the Land Policy Development and Implementation Process in Madagascar* 15.

¹⁴¹ FAO 2002 *Land Tenure and Rural Development* 18-19; Doss and Meinzen-Dick 2020 *LUP* 3.

¹⁴² Muller and Viljoen *Property in Housing* 61.

¹⁴³ Singirankabo and Willem Ertzen 2020 *Land* 1.

¹⁴⁴ Uwayezu and De Vries 2018 *Land* 2.

¹⁴⁵ Abdillah, Manaf and Awang 2022 *LUP* 4.

exist, it can be agreed that the motive of tenure security is to act as a bulwark against threats to individual rights.

Even though the definition of tenure security by the FAO has been widely used in the scholarship over the years, it has been criticised for failing to provide measurements for tenure security.¹⁴⁶ As captured by Arnot, Luckert and Boxall,¹⁴⁷ tenure security is composite and has diverse definitions which vary per context; it is therefore difficult to measure. It also involves complex factors such as how tenure is measured and what are the variables and indicators to include.¹⁴⁸ The measurement of tenure security within the context of the diverse African tenure system is complicated by the narrow notions of tenure security inspired by the Western countries.¹⁴⁹ For example duration of land rights and titles are limited.¹⁵⁰ Whilst these notions are helpful, they impede development of the tenure security in developing countries.¹⁵¹

The rationale behind tenure security is said to be to strengthen the rights of land holders and encourage investment.¹⁵² This in turn will improve the livelihoods of individuals.¹⁵³ The FAO calls states to put safeguards in place to improve tenure security of its citizens.¹⁵⁴ In 2012, the FAO endorsed the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (hereafter *VGGT*) after years of consultations.¹⁵⁵ They are aimed at guiding states to improve security of tenure of their communities.¹⁵⁶ These *VGGT* guidelines call for reform and prioritising women for land access.¹⁵⁷ Whilst

¹⁴⁶ Murken and Gornott 2022 *Climate Risk Management* 3.

¹⁴⁷ Arnot, Luckert and Boxall 2011 *Land Economics* 301-302.

¹⁴⁸ Huntington and Stevens 2023 *LUP* 2-3.

¹⁴⁹ Huntington and Stevens 2023 *LUP* 3.

¹⁵⁰ Simbizi *Measuring Land Tenure Security: A Pro-Poor Perspective* 31.

¹⁵¹ Simbizi, Bennett and Zevenbergen 2014 *LUP* 231.

¹⁵² Nyametso 2012 *Urban Forum* 345.

¹⁵³ Mangíra, Mbathi and Obiero 2019 *Journal of Research on Humanities and Social Sciences* 83.

¹⁵⁴ FAO 2022 *VGGT* 19-20.

¹⁵⁵ Seufert 2013 *Globalizations* 181.

¹⁵⁶ Cotula 2017 *Law, Env and Dev Journal* 118.

¹⁵⁷ Collins 2014 *Globalizations* 199.

these guidelines appear comprehensive, they are only soft law and are not binding upon states.¹⁵⁸

3.3.1 Constitutive elements of tenure security

Different scholars argue that tenure security is constituted by different elements and factors.¹⁵⁹ Abdulai and Ochieng¹⁶⁰ posit that these elements include land rights that are clearly defined, availability of institutions that will enforce these rights and that the said rights ought to be recognised by the community. Land boundaries which are clear and unambiguous have been shown to increase security of tenure.¹⁶¹ These land boundaries must be historically proven or drawn by credible institutions.¹⁶² This discussion is vital because it will help to assist in establishing if the tenure reforms in Botswana have the necessary elements needed for tenure security. This is done through an interwoven analysis of the laws and policies at para 3.5 below.

In terms of duration, the passage of time determines the extent of tenure security.¹⁶³ Duration in tenure relates to the number of years a person has held rights to land.¹⁶⁴ Longer duration of rights enhances certainty and robustness of such rights.¹⁶⁵ It is asserted that over time dwellers tend to develop coherent rules that help them to oppose evictions.¹⁶⁶ Shorter duration of property rights diminishes investment incentives.¹⁶⁷ The duration can also be strengthened when society recognises one's right to such property.¹⁶⁸ This recognition normally derives from

¹⁵⁸ Jansen 2020 *Sustainability* 6.

¹⁵⁹ See Simbizi, Bennett and Zevenbergen 2014 *LUP* 235-237; Doss and Meinzen-Dick 2020 *LUP* 4-5; Uwayezu and De Vries 2018 *Land* 9; Chigbu, Paradza and Dachaga 2019 *Land* 1-2 and Nyametso 2012 *Urban Forum* 344-345.

¹⁶⁰ Abdulai and Ochieng 2017 *Property Management* 39.

¹⁶¹ Valkonen 2021 *LUP* 2.

¹⁶² Lanz, Gerber and Haller 2018 *Dev and Change* 1535.

¹⁶³ Van Gelder 2010 *LUP* 455.

¹⁶⁴ Hagos and Holden 2006 *Agricultural Economics* 187.

¹⁶⁵ Doss and Meinzen-Dick 2020 *LUP* 4.

¹⁶⁶ Zhang and Zhao 2018 *Cities* 122.

¹⁶⁷ Arnot, Luckert and Boxall 2011 *Land Economics* 300.

¹⁶⁸ Valkonen 2021 *LUP* 2.

social relations.¹⁶⁹ This means one's enjoyment of rights irrespective of legal considerations derives from one's relations with the society one belongs to.¹⁷⁰

The availability of institutions is a precondition for tenure security.¹⁷¹ These institutions include both formal and informal institutions.¹⁷² Formal institutions determine amongst other things how land rights are to be administered, enforced and applied.¹⁷³ Informal institutions include community norms and customs which are normally guided by customary law.¹⁷⁴ These institutions must gain legitimacy and trust from citizens to work effectively.¹⁷⁵ Institutional credibility is also rooted in political power.¹⁷⁶ Institutions that fail to perform what they have been established for are prone to rejection by society.¹⁷⁷ When an institution is rejected, it becomes an empty institution with little or no effect on people's lives.¹⁷⁸

It is argued that a functioning and independent judiciary is a corollary for rights enforcement.¹⁷⁹ Africa still grapples with institutions that are socially and physically inaccessible to women.¹⁸⁰ Institutions need to be accessible to all in order to protect rights.¹⁸¹ Because of its complex nature, it is very difficult to measure tenure security.¹⁸² It has been shown that where formal institutions are deficient, informal institutions can be utilised to provide secure rights for the wider community.¹⁸³ Such coexistence is important because with Africa's dual system, formalising property

¹⁶⁹ Valkonen 2021 *LUP* 2.

¹⁷⁰ Amado 2016 *Int Migration* 77.

¹⁷¹ Deininger, Xia and Holden 2019 *The Journal of Dev Studies* 599.

¹⁷² Robinson *et al* 2018 *Conservation Letters* 4.

¹⁷³ Uwayezu and De Vries 2018 *Land* 9.

¹⁷⁴ Robinson *et al* 2018 *Conservation Letters* 5.

¹⁷⁵ Manara and Pani 2023 *LUP* 2.

¹⁷⁶ Ho 2014 *LUP* 15.

¹⁷⁷ Alemie, Bennett and Zevenbergen 2015 *LUP* 555.

¹⁷⁸ Koroso 2023 *LUP* 3.

¹⁷⁹ Nakayi 2023 *JAL* 26.

¹⁸⁰ Chigbu 2019 *LUP* 131-132.

¹⁸¹ Murtazashvili and Murtazashvili 2019 *The Review of Austrian Economics* 258.

¹⁸² Arnot, Luckert and Boxall 2011 *Land Economics* 301-302.

¹⁸³ Panman 2021 *Oxford Dev Studies* 234.

rights is seen to be problematic.¹⁸⁴ They are also hailed as providing the best rights to dispute resolution which is not protracted.¹⁸⁵

3.3.2 Dimensions of tenure security

Tenure security is categorised into three different types or dimensions, which are legal, *de facto* and perceived tenure security.¹⁸⁶ These tenure security types have different elements and perceptions embedded in them. These dimensions of tenure security overlap and converge, for example perceived tenure security can derive from *de facto* tenure.¹⁸⁷ In Africa, particularly where tenure systems are multi-layered, the distinction between these tenure forms is important.¹⁸⁸ Customary tenure systems mostly survive by perceived tenure security. There is merit in discussing the three types of tenure security. This is to demonstrate that tenure security may not necessarily derive from land titling only.¹⁸⁹ It is contended that other factors such as community perceptions could offer tenure security.¹⁹⁰

3.3.2.1 De facto tenure security

De facto tenure security is manifested through the provision of public infrastructure.¹⁹¹ These include amenities such as the supply of electricity, provision of clean water, proper roads, sewage system, census of settlement populations and issuance of individual addresses.¹⁹² It is contended that with *de facto*, it does not matter whether formal legal documents are there - what matters is actual control of property.¹⁹³ It has been argued that this type of tenure provides clearly defined

¹⁸⁴ Siriba and Dalyot 2017 *LUP* 281.

¹⁸⁵ See para 4.5.6 below.

¹⁸⁶ Murken and Gornot 2022 *Climate of Risk Management* 4.

¹⁸⁷ Uwayezu and De Vries 2019 *HI* 5.

¹⁸⁸ Benjamin *et al* 2021 *Forest Policy and Economics* 2.

¹⁸⁹ Asaaga, Hirons and Malhi 2020 *World Dev* 3.

¹⁹⁰ Payne, Durand-Lasserve and Rakodi 2009 *Env and Urbanization* 447.

¹⁹¹ Van Gelder and Luciano 2015 *Env and Planning* 487.

¹⁹² Abdillah, Manaf and Awang 2022 *LUP* 4.

¹⁹³ Van Gelder and Luciano 2015 *Env and Planning* 486.

rights for individuals, and this is seen as a necessary vehicle for economic development.¹⁹⁴ As Uwayezu and De Vries¹⁹⁵ lucidly describe:

It rises from the political and legal framework of spatial organisations. This framework includes spatial planning rules, building codes, and constitutional laws that politically recognise landowners' rights to land...

Van Gelder and Luciano¹⁹⁶ further contend that this tenure offers one accessibility to credit markets, as the property rights are secure. This tenure is also dependent on extrinsic factors such as support from the media and political leadership.¹⁹⁷ It is argued that this security of tenure increases as time passes.¹⁹⁸ Tenure security also offers protections to informal settlers because political institutions recognise their rights and undertake to improve them.¹⁹⁹ This type of tenure security is particularly relevant in informal settings, where achieving legal tenure could be challenging.²⁰⁰

3.3.2.2 Perceived tenure security

Perceived tenure security is a manifestation of an individual's experience of how others perceive his/her property rights.²⁰¹ It is rooted in feelings that one is not likely to be evicted from the property in occupation.²⁰² This security does not need institutions or laws.²⁰³ However, it is asserted that factors such as location of an area, community awareness, government policy and political patronage influence perceived tenure security.²⁰⁴ An individual may be evicted from his property either by government or private actors. It is labelled as a psychological complex because feelings of worry and fear characterise this type of tenure security.²⁰⁵ It is vexed because such factors cannot be easily measured.²⁰⁶ Perceived tenure security is

¹⁹⁴ Voigt and Gutmann 2013 *Journal of Comparative Economics* 66.

¹⁹⁵ Uwayezu and De Vries 2018 *Land* 7-8.

¹⁹⁶ Van Gelder and Luciano 2015 *Env and Planning* 486.

¹⁹⁷ Van Gelder 2010 *LUP* 541.

¹⁹⁸ Van Gelder 2010 *LUP* 541.

¹⁹⁹ Uwayezu and De Vries 2019 *HI* 4.

²⁰⁰ See para 2.3.5 above.

²⁰¹ Van Gelder and Luciano 2015 *Env and Planning* 487.

²⁰² Kanosvamhira and Tevera 2022 *GeoJournal* 2.

²⁰³ Valkonen 2021 *LUP* 2-3.

²⁰⁴ Lahoti 2022 *Int Journal of Urban Sustainable Dev* 331.

²⁰⁵ Qian *et al* 2022 *LUP* 3.

²⁰⁶ Qian *et al* 2022 *LUP* 3.

important within the context of rapid urbanisation, because it offers protections to informal rights holders therefore reducing illegal land grabs that result from rapid urbanisation.

3.3.2.3 *Legal (de jure) tenure security*

This tenure security is viewed as a construction of the laws and rules applicable to a property rights system.²⁰⁷ It finds its basis in the legal institutions that deal with land rights created by the state.²⁰⁸ These institutions are diverse and range from social to public institutions.²⁰⁹ Koroso, Zevenbergen and Lengoiboni's²¹⁰ categorisation and functions of these institutions is comprehensive. Amongst these functions are land, legal and political institutions.²¹¹ It is argued that statutory protection of land rights is vital as tenure security can be achieved *en masse*, rather than through a piecemeal approach.²¹²

Patel²¹³ asserts that with legal tenure the judiciary plays an active role in protecting the rights of the property holders. This view is true in the fact that those whose property rights are threatened can always seek redress from the courts.²¹⁴ Koroso, Zevenbergen and Lengoiboni²¹⁵ argue that there is need for an element of trustworthiness and dependability for them to effectively function. It can be argued that where there is lack of trust in the institutions, there will be anarchy and they cannot serve the intended purposes for which they are created.²¹⁶ Legal tenure

²⁰⁷ Ma *et al* 2015 *LUP* 296.

²⁰⁸ Ren *et al* 2019 *Society & Natural Resources* 1403.

²⁰⁹ Simbizi, Bennett and Zevenbergen 2014 *LUP* 235.

²¹⁰ Koroso, Zevenbergen and Lengoiboni 2019 *LUP* 553.

²¹¹ Koroso, Zevenbergen and Lengoiboni 2019 *LUP* 554.

²¹² Mostert, Verstappen and Zevenbergen "Introduction" 11.

²¹³ Patel 2016 *LUP* 103.

²¹⁴ Simbizi, Bennett and Zevenbergen 2014 *LUP* 234.

²¹⁵ Koroso, Zevenbergen and Lengoiboni 2019 *LUP* 555-556.

²¹⁶ In most African countries, harmonising institutions of legal tenure with traditional institutions has been problematic, because customary practices and customs relating to land access in Africa are complex. Many of the customs still prohibit women from accessing property rights. -See Amado 2016 *Int Migration* 76.

security helps to reduce land conflicts. This is because it clarifies the role of formal institutions and informal ones on land administration.²¹⁷

3.3.3 Tenure insecurity

Tenure insecurity is the antithesis of tenure security as defined in para 3.3 of this study. It is a probability of one's eviction from one's own land.²¹⁸ It is also a perception that one's rights in land will likely not be recognised by the community.²¹⁹ If a person's rights are not recognised by others, his land will be insecure and may face possible eviction.²²⁰ Tenure insecurity is said to cut across formalised and informal land rights.²²¹

Institutions that enforce land rights are very important because lack of such institutions may result in land tenure insecurity.²²² As already asserted above, these institutions protect individual property rights and cushion against eviction.²²³ Besides legal institutions, social institutions act as legitimising apparatus in the eyes of the community.²²⁴ The weakening of these institutions through state politics and /or social dynamics is also a cause of tenure insecurity.²²⁵ For example, it is contended that traditional institutions are disposed to abuse of power by their leaders and this can perpetuate discrimination against the community, leading to tenure insecurity.²²⁶

As already mentioned, different factors cause tenure insecurity.²²⁷ These factors include leadership crises, shifts in municipal politics and historical segregation,

²¹⁷ Deininger and Castagnini 2006 *Journal of Economic Behavior & Organization* 322.

²¹⁸ Ege 2017 *LUP* 57.

²¹⁹ Olapade and Aluko 2022 *Urban Forum* 33.

²²⁰ Olapade and Aluko 2022 *Urban Forum* 33.

²²¹ Robinson and Diop "Who Defines Land Tenure Security? De Jure and De Facto" 51.

²²² Valkonen 2021 *LUP* 4.

²²³ See para 3.3.2.3 above.

²²⁴ Simbizi, Bennett and Zevenbergen 2014 *LUP* 236.

²²⁵ Valkonen 2021 *LUP* 4-5.

²²⁶ Hull, Babalola and Whittal 2019 *Land* 8.

²²⁷ Mushinge *A Role of Land Governance in Improving Tenure Security in Zambia: Towards a Strategic Framework for Preventing Land Conflicts* 24.

amongst others.²²⁸ Mutangadura²²⁹ argues that other societal elements in Africa have contributed to tenure insecurity over the years, such as the HIV/AIDS, land transfers without compensation and weak cadastral systems that are prone to manipulation and corruption. For example, in many African societies when a woman has died of HIV/AIDS, her children are often discriminated against and are denied the right to inherit from their mothers.²³⁰

Women are mostly affected by tenure insecurity.²³¹ This has its origins in patriarchal practices which are underpinned by fear that access to land for women will alter power relations.²³² Historically African customs and traditions prevented women from owning land.²³³ This insecurity was further perpetuated by the colonial regimes which supported oppression against women relegating them to a nugatory status.²³⁴ Even today it is challenging for women to inherit land from their fathers or husbands.²³⁵ Women may also have no right to claim land under customary law in some African countries.²³⁶ Their rights to land are encumbered by the wishes of their husbands or sons.²³⁷ This results in extreme poverty for women.²³⁸ For example, in Botswana and South Africa, there is a customary practice of homogeniture.²³⁹ This is when succession occurs through the male bloodline.²⁴⁰ This means that women have weaker rights and it is even worse for those born out of

²²⁸ Mutangadura 2007 *Natural Resources Forum* 179-180.

²²⁹ Mutangadura 2007 *Natural Resources Forum* 179-180.

²³⁰ Joireman 2008 *World Dev* 1239.

²³¹ Feyertag *et al* 2021 *LUP* 4.

²³² Cross and Friedman "Women and Tenure: Marginality and the Left Hand Power" 28.

²³³ Makhado and Pelizzo 2016 *Afr Politics and Policies* 33.

²³⁴ Vitoh 2023 *Cambridge Law Journal* 143.

²³⁵ Akinola 2018 *Frontiers in Psychology* 4.

²³⁶ Akinola 2018 *Frontiers in Psychology* 4.

²³⁷ Fletschner, Deo and Mhoja "Championing Women's Tenure Security" 82.

²³⁸ Masengu 2016 *Afr Journal of Int and Comparative Law* 582.

²³⁹ For example, in the case of *Mmusi and Others v Ramantele and Another* 2012 2 BLR 590 (HC), the High Court declared the primogeniture custom unconstitutional. Whilst the judgement was celebrated for upholding women's rights, the Court Appeal in *Ramantele v Mmusi and Others* 2013 2 BLR 658 (CA) said that it was bad law, as the said custom was not discriminatory against women and noted that customary law is ever evolving. -See Jonas 2013 *AHRLJ* 244. Fombad notes that customary law must be developed through consultation to remove those customs that are inimical to citizens -Fombad 2014 *The Journal of Modern Afr Studies* 486. See also Diala on a clear exposition of the concept of 'living customary law'. -Diala 2017 *JPUL* 148.

²⁴⁰ Raseroka *Widows, Land, Property and Inheritance Rights: an Analysis of Affirmative Action Proposals in Botswana's 2015 Land Policy, with a Legal Comparative Dimension* 23.

wedlock.²⁴¹ Mubangizi and Tlale²⁴² argue that other practices, such as payment of *lobola* and customary marriages, upset women's property rights and tenure security.

3.4 The architecture of the Botswana land tenure system

Before its colonisation, all land was communal in Botswana.²⁴³ Botswana was under the colonial rule of Britain from 1885 to 1966.²⁴⁴ The country inherited a colonial land regime and institutions.²⁴⁵ After gaining independence, Botswana's laws continued to reflect aspects of colonial era laws.²⁴⁶ The formal land tenure system comprises freehold, state land (formerly crown land) and tribal or customary land tenure.²⁴⁷ The land tenure was described in terms of Tswana hegemony to the exclusion of the Khoi/San who are the first inhabitants of the land.²⁴⁸ This is a product of colonialism.²⁴⁹

Today, freehold land occupies 3%, state land occupies 26% and customary land occupies 71% of Botswana's land mass.²⁵⁰ There are different land rights that attach to these land systems, such as the right to inherit and alienate.²⁵¹ Land tenure has developed and reformed over time through the national law and policy framework of Botswana.²⁵² This is relevant to know for present purposes because rapid urbanisation as alluded to above is accompanied by land use challenges. These challenges cut across the different tenure systems. It is therefore important for this study to explore how these different tenure systems affect tenure security and what the added effects of urbanisation may be.

²⁴¹ Djurfeldt 2020 *LUP* 2.

²⁴² Mubangizi and Tlale 2023 *Women's Studies Int Forum* 2-5.

²⁴³ Hillbom 2014 *Journal of Int Dev* 161.

²⁴⁴ Mogalakwe and Nyamnjoh 2017 *JCAS* 1.

²⁴⁵ Kalabamu 2019 *LUP* 340.

²⁴⁶ Griffiths 2014 *JLPUL* 44.

²⁴⁷ Kalabamu 2019 *LUP* 340; Frimpong 1993 *CILSA* 384.

²⁴⁸ Besada and Goetz "The Land Crises in Southern Africa; Challenges for Good Governance" 176.

²⁴⁹ Ng'ong'ola 1997 *JAL* 9.

²⁵⁰ Ng'ong'ola 2019 *UBLJ* 3.

²⁵¹ Kalabamu 2019 *LUP* 338.

²⁵² Bayer "Land Governance and Land Reform in Southern Africa" 53.

3.4.1 Customary/tribal land tenure

In the pre-colonial era, *Dikgosi* (chiefs) administered land on behalf of their tribes.²⁵³ The chief was a ruler, judge, and a maker and guardian of the law.²⁵⁴ His powers also included custodianship of the land.²⁵⁵ Tribes enjoyed exclusive rights over their tribal land.²⁵⁶ According to Polavarapu,²⁵⁷ customary tenure is mainly regulated by the customs and traditions of the community, and it was purely reserved for the people or tribe within the community and not outsiders. The nature of these rights was captured by Viscount Haldane in *Tijane vs Secretary, Southern Nigeria*.²⁵⁸

The notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have an equal right to the land...

The above quote suggests that customary rights have no element of individual ownership.²⁵⁹ There is a sense of community ownership of the rights.²⁶⁰ Ng'ong'ola²⁶¹ however disagrees with the communal tenure description in the context of the Tswana customary tenure. He argues that even though there was equal access to grazing land, this equality did not extend to arable and residential land.²⁶² The notion of individual rights was acknowledged.²⁶³ Following on the argument of Cousins, Hull, Babalola and Whittal²⁶⁴ contend that the concept of communal ownership is misconstrued in the sense that the British assumed that there was no individual ownership of the rights, which was wrong. Land is held by

²⁵³ Isaacs and Manatsha 2016 *BNR* 384.

²⁵⁴ Ifezue 2015 *JAL* 274.

²⁵⁵ Antonio and Griffith-Charles 2019 *LUP* 127.

²⁵⁶ Manatsha 2020 *JLRS* 190.

²⁵⁷ Polavarapu 2013 *Georgia Journal of Int and Comparative Law* 96.

²⁵⁸ 1921 2 AC 399.

²⁵⁹ Hull, Babalola and Whittal 2019 *Land* 4.

²⁶⁰ Hull, Babalola and Whittal 2019 *Land* 4.

²⁶¹ Ng'ong'ola 1992 *JAL* 145.

²⁶² Ng'ong'ola 1992 *JAL* 145.

²⁶³ Ng'ong'ola 1992 *JAL* 145.

²⁶⁴ Hull, Babalola and Whittal 2019 *Land* 3. See similar arguments by Murata *et al* 2022 *Journal of Law, Society and Dev* 7-9.

clans or families and hence elements of individual ownership can exist within this tenure setup.²⁶⁵

In the Tswana setting, the chief administered land for his tribe, but he was not the absolute owner thereof.²⁶⁶ The land belonged to the community he led, and he only held it in trust.²⁶⁷ The power to allocate arable land was also vested in the chief.²⁶⁸ Tribesmen were not allowed to sell land for cultivation, nor appropriate land to themselves.²⁶⁹ However, a man was allowed to transfer the land to his children or family at no price.²⁷⁰ The chief followed his community's established customs and practices to allocate such land.²⁷¹ During colonisation, chiefs effectively lost most of their powers as they were controlled and answerable to the colonial administration.²⁷²

Other important land included cattle posts (*meraka*) where cattle were kept and grazed.²⁷³ The land was hereditary, and it was often easily passed to male heirs.²⁷⁴ Grazing lands were also controlled by chiefs, but were shared by the community.²⁷⁵ It was forbidden to plough on grazing land and over public roads.²⁷⁶ However, in 1975, the *Tribal Grazing Land Policy* (hereafter *TGLP*) was introduced and communal lands were zoned into ranches for private ownership, which many viewed as land grab by the elites.²⁷⁷ This policy did not meet its intended objectives as conflict arose over land and the elites enriched themselves.²⁷⁸

²⁶⁵ Tlale *A Critical Evaluation of the South African Land Tenure Policy: a Comparison with Selected Aspects of the Kenyan and Tanzanian Law* 28-29.

²⁶⁶ Schapera *Native Land Tenure in Bechuanaland* 40.

²⁶⁷ Schapera *Native Land Tenure in Bechuanaland* 40.

²⁶⁸ Marr 2019 *Social Identities* 46.

²⁶⁹ Ng'ong'ola 1992 *JAL* 142.

²⁷⁰ Schapera *A Handbook of Tswana Law and Custom* 205.

²⁷¹ Ng'ong'ola 1992 *JAL* 142.

²⁷² Molebatsi and Morobolo 2021 *Afr Studies* 141.

²⁷³ Ng'ong'ola 1992 *JAL* 142.

²⁷⁴ Schapera *A Handbook of Tswana Law and Custom* 231.

²⁷⁵ Ng'ong'ola 1997 *JAL* 5.

²⁷⁶ Schapera *Tribal Innovators; Tswana Chiefs and Social Change (1795-1940)* 97.

²⁷⁷ Poteete 2009 *Dev and Change* 288.

²⁷⁸ Malope and Batisani 2008 *DSA* 386-387.

After independence, the role of *Dikgosi* in land administration was replaced by Land Boards.²⁷⁹ Land Boards were established in terms of section 3 of the *Tribal Land Act* Cap 32:02 (hereafter *TLA* of 1968). The Act was repealed by the *Tribal Land Act* 1 of 2018 (hereafter *TLA* of 2018), which provides for the continuation and functions of the Land Boards.²⁸⁰

3.4.2 State land tenure

In Botswana, state land was initially referred to as crown land during the colonial era.²⁸¹ Crown land came about as a special dispensation for a very small white population.²⁸² It was sold to members of the white population for commercial farming.²⁸³ Some of the land which the coloniser declared *terra nullius* was sold to mines and the railways.²⁸⁴ In Francistown, some of the state land is now owned by Botswana Railways.²⁸⁵ State land mainly comprises national parks, forest reserves, game reserves and wildlife management areas.²⁸⁶ There are remnants of state land in urban areas still today.²⁸⁷ This land is allocated to citizens as residential land, as Fixed Period State Grants which last for ninety-nine (99) years.²⁸⁸ State land now vests in the Republic.²⁸⁹ Land which was granted by or on behalf of Her Majesty does not constitute state land.²⁹⁰ Currently, state land is regulated by the *State Land Act* Cap 32:01 (hereafter *SLA*). The *SLA* confers power on the President to dispose of state land.²⁹¹

²⁷⁹ Manatsha 2020 *Journal of Asian and Afr Studies* 115.

²⁸⁰ Land Boards administer tribal land in every district of Botswana. The *TLA* permits any citizen of Botswana, regardless of tribal origin to apply for any land in Botswana. -See s 5(1) and (2) of the *TLA*.

²⁸¹ Ng'ong'ola 1992 *JAL* 140.

²⁸² Ng'ong'ola 1992 *JAL* 140.

²⁸³ Ng'ong'ola 1992 *JAL* 140.

²⁸⁴ Home 2020 *Journal for Juridical Science* 76.

²⁸⁵ The *City of Francistown Development Plan (1997-2021)* 37.

²⁸⁶ Malope and Batisani 2008 *DSA* 385.

²⁸⁷ Manatsha 2020 *JLRS* 191.

²⁸⁸ Adams, Kalabamu and White 2003 *Journal fur Entwicklungspolitik* 56.

²⁸⁹ Ng'ong'ola 1996 *SAPL* 11.

²⁹⁰ Section 2 of the *SLA* Cap 32:01.

²⁹¹ Section 3 of the *SLA* Cap 32:01.

Some of the state land within towns and cities has been allocated to low income earning citizens through the SHAA Scheme.²⁹² Mosha²⁹³ notes that since the start of the SHAA Scheme, a total of 12 000 houses have been delivered in Gaborone. Initially these were performed using the CoR.²⁹⁴ CoR confers user rights, whilst the land belongs to the state.²⁹⁵ The use and enjoyment of the usufruct rights in the CoR are perpetual and inheritable, hence high tenure security is provided.²⁹⁶ However, it may not be collateralised to obtain credit from banks, but the CoR holders have an opportunity to incrementally convert their rights to FPSG.²⁹⁷ This FPSG is in the form of a 99-year and 50-year lease.²⁹⁸ Whilst FPSG is transferable and inheritable, a right holder is only allowed to transfer the number of years left in the lease and not excess.²⁹⁹

The time cap which is associated with this type of ownership has been said to be strange.³⁰⁰ This is because property ought to be owned in perpetuity.³⁰¹ It is indicated that after the lapse of 99 years and 50 years, the land inclusive of developments will revert to the state at no compensation.³⁰² However, it should be noted that the duration of the FPSG was influenced by the prevailing circumstances in Selibe-Phikwe where it was first introduced. The reason for the duration was because it was assumed that the local mine was going to have a limited life span.³⁰³ Government was also uncomfortable with giving foreigners land in perpetuity at the expense of citizens.³⁰⁴ It is rightly argued by Ng'ong'ola that this limited duration will breach a constitutional clause³⁰⁵ on the right to protection from deprivation of

²⁹² Manatsha 2020 *JLRS* 191.

²⁹³ Mosha 2013 *Urban Forum* 145.

²⁹⁴ Mosha *et al* 2022 *Property Management* 6.

²⁹⁵ Yahya "The Certificate of Rights Story in Botswana" 195.

²⁹⁶ *The Report of the Presidential Commission on Land Tenure 1983* 18.

²⁹⁷ Nkwae and Dumba 2010 *HI* 370.

²⁹⁸ Mosha *et al* 2022 *Property Management* 6.

²⁹⁹ Frimpong 1993 *CILSA* 392.

³⁰⁰ Ng'ong'ola 2017 *UBLJ* 116.

³⁰¹ Ng'ong'ola 2017 *UBLJ* 116.

³⁰² Ng'ong'ola 1996 *SAPL* 12.

³⁰³ Dickson *Land Tenure in a Developing Country; The Case of Botswana (1966-1985)* 22.

³⁰⁴ Dickson *Land Tenure in a Developing Country; The Case of Botswana (1966-1985)* 22.

³⁰⁵ Section 8 of the *Constitution* 1966.

property.³⁰⁶ The state may have to compensate for or extend the leases after their expiry.

3.4.3 Freehold land tenure

Freehold land is land that was designated for agricultural purposes during the colonial era.³⁰⁷ This land is mainly found around the Tuli block, Lobatse block, Ghanzi ridge and Tati farms.³⁰⁸ It was mainly reserved for the white population.³⁰⁹ The transfer of freehold land rights within the Bechuanaland Protectorate was done in accordance with the laws as obtained from the Cape Colony of Good Hope.³¹⁰ The colonial master was historically only interested in this land tenure.³¹¹ This tenure is argued to be the most secure land tenure in a property rights system.³¹² The absoluteness of the freehold title enabled land dispossession by British chartered companies.³¹³ For example, the British South Africa Company and the Tati Company dispossessed large tracts of land through *Dikgosi* fraudulently.³¹⁴ The ingenuity of the colonial regimes was that they protected these lands through legislation, which the post-independent regimes have not done away with.³¹⁵

Further, this type of land is found around urban centres such as Gaborone and Francistown as freehold farms.³¹⁶ Over the years, the government had purchased more than 19 farms, to assuage land shortages in Gaborone and Francistown.³¹⁷ The *Land Control Act* Cap 32:11 (hereafter *LCA*) was adopted to halt the continual

³⁰⁶ Ng'ong'ola 1996 *SAPL* 12.

³⁰⁷ The *Revised Botswana Land Policy* 2019 6.

³⁰⁸ Morapedi 2014 *SAHJ* 548.

³⁰⁹ Manatsha and Morapedi 2022 *JCAS* 3.

³¹⁰ Ng'ong'ola 1996 *SAPL* 4-5.

³¹¹ Rammapudi, Minyoi and Council "Customary Land Conflicts in Peri-Urban Areas" 54.

³¹² Manatsha 2020 *JLRS* 191.

³¹³ Home "The Colonial Legacy in Land Rights in Southern Africa" 10.

³¹⁴ See paras 2.2.2 and 3.2.1 above.

³¹⁵ See *Tati Concessions Act* Cap 32:05 and *British South Africa Company Land Act* Cap 32:06, the long title of Act read 'an act to grant to the British South Africa Company Limited the title to certain land'. It grants the B.S.A. Co land with the power to dispose such land.

³¹⁶ Raseroka *Widows, Land, Property and Inheritance Rights: an Analysis of Affirmative Action Proposals in Botswana's 2015 Land Policy, with a Legal Comparative Dimension* 87.

³¹⁷ Manatsha 2020 *Journal of Asian and Afr Studies* 112.

freehold transfer between non-citizens. This is to allow freehold land to revert to the citizens.³¹⁸ Freehold can be transferred from one person to another.³¹⁹

3.5 Botswana's state of land tenure security

There has been significant development of the land tenure of Botswana since independence.³²⁰ The evolutionary theory has influenced this tenure reform in the country.³²¹ It is argued that the purpose of land tenure reform is to provide equitable distribution of land rights, their re-organisation, and the strengthening of such rights to attain social development.³²² Raseroka³²³ notes that in the context of land rights, access was available - what needed to be reformed was the security of the rights. Land tenure reform in Botswana has led to establishment of institutions that create a synergy between customary and formal tenure, as well as protecting the land rights.³²⁴ The establishment of Land Boards, the Land Tribunal and Department of Maps and Surveys amongst others have helped with land administration thereby improving tenure security. However, despite a number of these departments, they remain decentralised and access to their services remains largely poor.³²⁵

3.5.1 Tribal Land Act Cap 32:02

Ng'ong'ola³²⁶ notes that the first major reform of land governance in Botswana happened two years after its independence. This was done through the enactment of the *TLA* of 1968 and the establishment of Land Boards in 1970.³²⁷ The main rationale for the introduction of this legislation was to modernise tribal tenure and make land accessible to all citizens of Botswana.³²⁸ There was also the need to make land tenure compatible with modern land use, hence a more formalised approach

³¹⁸ The *Botswana Land Policy 2015* 8.

³¹⁹ Nkwae and Dumba 2010 *HI* 368.

³²⁰ Kalabamu 2019 *LUP* 341.

³²¹ Kalabamu 2000 *LUP* 308.

³²² Edwin, Glover and Glover 2020 *Land* 5.

³²³ Raseroka *Widows, Land, Property and Inheritance Rights: an Analysis of Affirmative Action Proposals in Botswana's 2015 Land Policy, with a Legal Comparative Dimension* 100.

³²⁴ Kugbega 2020 *Land* 4-5.

³²⁵ Bayer "Land Governance and Land Reform in Southern Africa" 54.

³²⁶ Ng'ong'ola 1992 *JAL* 140.

³²⁷ Onoma 2009 *Africa Dev* 107.

³²⁸ Morolong and Ng'ong'ola "Revisiting the Notion of Ownership of Tribal Land in Botswana" 146.

was needed.³²⁹ This was the enactment of the *Tribal Land Act* Cap 32:02. In crisp and lucid language, section 13 (1) of *TLA* of 1968 stated that:

All the powers previously vested in a Chief and a subordinate land authority under customary law in relation to land...shall vest in and be performed by a land board...

This meant that the power of chiefs to allocate land or deal with land affairs was now transferred to the Land Boards.³³⁰ The *TLA* of 1968 granted Land Boards powers which included granting of rights to use land, their cancellation and restricting land use, amongst others.³³¹ No other person or authority other than the Land Board may allocate tribal land.³³² According to the *TLA* of 1968, tribal land is held in trust.³³³ This emanated from the sense that the chief was a trustee, hence that position was transplanted into a Land Board model.³³⁴ Whilst it was held in *Kweneng Land Board v Matlho and Another*³³⁵ that customary law has evolved to allow private ownership of tribal land,³³⁶ this was rejected in *Kweneng Land Board v Mpofu and Another*.³³⁷ The court in *Mpofu* stated that there was no private ownership in tribal land, no matter how long that land was held. The court reasoned that this would defeat the intent of the legislature expressed in section 10(1) of the *TLA* of 1968.³³⁸

Griffiths³³⁹ notes that even though customary rights are not defined by the *TLA*, in practice they extend to cover residential land (*motse*), arable land (*masimo*) and cattle posts (*meraka*). The holders of a Certificate of Customary Land Grant (hereafter CLG) have the right to use and effect developments on tribal land.

³²⁹ Morolong and Ng'ong'ola "Revisiting the Notion of Ownership of Tribal Land in Botswana" 146.

³³⁰ Kalabamu 2006 *LUP* 240.

³³¹ Section 13 of the repealed *TLA* Cap 32:02.

³³² *Popego v Kweneng Land Board* Case No. MAHGB-000770-15 (Unreported).

³³³ *Phumaphi v Ngwato Land Board* 2005 (2) BLR 318 (CA).

³³⁴ Ng'ong'ola 1992 *JAL* 152.

³³⁵ 1992 BLR 292 (CA).

³³⁶ In his analysis of the case, Ng'ong'ola made a strong indictment on the bench's reasoning, which he argues was bereft of intellectual rigour, as they ignored other surrounding factors such as policy developments underpinning land administration. -See Ng'ong'ola 1993 *JAL* 197.

³³⁷ 2005 (1) BLR 3 (CA).

³³⁸ Morolong and Ng'ong'ola "Revisiting the Notion of Ownership of Tribal Land in Botswana" 170.

³³⁹ Griffiths "The Changing Dynamics of Customary Land Tenure" 89.

However, it cannot be sold. Instead, citizens can sell developments in the land.³⁴⁰ Land Boards are categorised as main and subordinate Land Boards.³⁴¹ The power to establish the subordinate Land Boards originally rested with the President, however, with reforms, such power now lies with the Minister.³⁴² The Minister can by order establish the subordinate Land Boards without a cumbersome legislative process.³⁴³

Pienaar³⁴⁴ argues that the idea of Land Boards in Botswana acted as a solution to formalising customary rights, therefore providing tenure security. Ng'ong'ola³⁴⁵ indicates that the new law introduced profound aspects such as the granting of common law rights leaseholds. These common law leases ranged from 99 years for residential and 50 years for commercial and industrial land.³⁴⁶ Customary rights holders could convert their rights to common law leases if they so wished.³⁴⁷ These leases provide the same measure of tenure security as freehold titles and can be collateralised to obtain credit from financial institutions.³⁴⁸ Previously, tribal land without lease could not act as a collateral to get credit from financial institutions.³⁴⁹ Land Boards allocate land to citizens, issue certificates and keep registers.³⁵⁰ This in turn improves land tenure security because rights ownership can be clearly ascertained.³⁵¹ Therefore, individuals can use their titles to resist eviction by using them as evidence before the courts.³⁵²

In the new *TLA*, the composition of the Land Board included the *Kgosi*, District Commissioner and Council Secretary, amongst others.³⁵³ Even though the chiefs'

³⁴⁰ Griffiths "The Changing Dynamics of Customary Land Tenure" 108-109.

³⁴¹ Manatsha and Morapedi 2022 *JCAS* 65.

³⁴² Ng'ong'ola 2019 *UBLJ* 8.

³⁴³ Ng'ong'ola 2019 *UBLJ* 8.

³⁴⁴ Pienaar 2000 *Journal of South Afr Law* 464.

³⁴⁵ Ng'ong'ola 1997 *JAL* 15-16.

³⁴⁶ Kalabamu 2019 *LUP* 341.

³⁴⁷ Kalabamu 2019 *LUP* 341.

³⁴⁸ Kalabamu 2019 *LUP* 340.

³⁴⁹ Mogomotsi and Mogomotsi 2018 *Anthropology Southern Africa* 204.

³⁵⁰ Kalabamu 2019 *LUP* 341.

³⁵¹ Kalabamu 2019 *LUP* 341.

³⁵² Agegnehu *et al* 2016 *Society & Natural Resources* 323.

³⁵³ Isaacs and Manatsha 2016 *BNR* 384-385.

powers were taken away, their inclusion in the new land Act is a testament that they played a pivotal role in efficient land management. The *TLA* of 1968, was majorly reformed in 1993, this to vest the title of all tribal land in Botswana in the Land Boards.³⁵⁴ The initial wording of 'tribesmen' was replaced with 'citizens of Botswana'.³⁵⁵ This amendment allowed every citizen of Botswana to apply for land wherever they wish in Botswana.³⁵⁶ Previously only tribesmen could be allocated land within their tribal area.³⁵⁷ It is noted that these changes increased demand for land in cities and nearby settlements, especially around Gaborone. Under the *TLA* of 1968, the Minister had the power to expropriate land for redistribution for the benefit of the whole population.³⁵⁸ This Act was repealed by the *TLA* 1 of 2018 which makes fundamental changes to customary tenure in Botswana.³⁵⁹

3.5.2 State Land Act Cap 32:01

The *SLA* vests state land upon the President.³⁶⁰ He is empowered to dispose of state land.³⁶¹ The Act does not specify how the President is to deal with such land.³⁶² As indicated at para 3.4.2 above, state land includes national parks and game reserves. The notable aspect of state land is that it can be placed in the hands of citizens through the FPSG or CoR.³⁶³ The FPSG was first introduced in Selibe-Phikwe in the 1960s to increase tenure security.³⁶⁴ This meant that land occupiers could use and derive benefits without fear of eviction.³⁶⁵ The concept was later adopted in other urban areas in the 1970s.³⁶⁶ As opposed to freehold title which may lead to

³⁵⁴ Ng'ong'ola 1996 *SAPL* 24.

³⁵⁵ Ng'ong'ola 1996 *SAPL* 24.

³⁵⁶ Kalabamu 2006 *IDPR* 214.

³⁵⁷ Kalabamu 2006 *IDPR* 214.

³⁵⁸ Kampamba *et al* "Land Governance in Botswana".

³⁵⁹ See para 3.5.5 below.

³⁶⁰ Section 3 of *SLA* Cap 32:01.

³⁶¹ Section 3 of *SLA*.

³⁶² Maripe "Land Administration, Politics and Governance in Botswana" 194.

³⁶³ Manatsha 2020 *JLRS* 191.

³⁶⁴ Manatsha 2020 *JLRS* 191.

³⁶⁵ Abdillah, Manaf and Awang 2022 *LUP* 7.

³⁶⁶ Manatsha 2020 *JLRS* 191.

landlessness of citizens, every citizen is entitled to be allocated state land and be granted CoRs which can be converted to FSPGs.³⁶⁷

State land is administered by the Department of Lands under the Ministry of Land and Water Affairs.³⁶⁸ Such functions have also been decentralised to local councils; they allocate SHAA housing for low-income earners. At the end of the lease period, the land and the improvements return to the state.³⁶⁹ Compensation is not paid when this occurs.³⁷⁰ It is argued that this contravenes the *Constitution*, especially the right to adequate compensation following acquisition of such property by the state.³⁷¹ The *Constitution* is clear that adequate compensation needs to be paid.³⁷²

3.5.3 National Settlement Policy of 1999 and Revised Settlement Policy of 2004

One of the policy documents that provided guidance on rapid urbanisation and land tenure is the *National Settlement Policy* of 1999 (hereafter *NSP of 1999*).³⁷³ The policy acknowledged that rapid urbanisation is a challenge, in the sense that urban expansion puts pressure on available facilities.³⁷⁴ It noted that serviced land is in demand in urban centres in Botswana.³⁷⁵ In terms of land tenure, urban sprawl and encroachment are identified as major challenges brought about by rapid population growth.³⁷⁶ The policy recommended that there shall be no construction of new settlements, especially on arable land.³⁷⁷ This has helped in the protection of agricultural land which is often encroached upon by rapid urbanisation. There is therefore a need to monitor land use change in urban areas, to survey plots and synchronise the *TLA*, *TCPA*, *DRA* to achieve sustainable settlements.³⁷⁸

³⁶⁷ Kalabamu "Limits of Incremental Land Tenure Reform in Botswana" 125-126.

³⁶⁸ Kalabamu 2021 *LUP* 2.

³⁶⁹ Kalabamu 2006 *IDPR* 215.

³⁷⁰ Nkwae and Dumba 2010 *HI* 369.

³⁷¹ Ng'ong'ola 1996 *SAPL* 6.

³⁷² Ng'ong'ola "Property Guarantees in Old and New Southern African Constitutions" 160-161.

³⁷³ See the *NSP of 1999* 3 for comprehensive policy objectives and goals.

³⁷⁴ The *NSP of 1999* 20.

³⁷⁵ The *NSP of 1999* 73.

³⁷⁶ The *NSP of 1999* 74-75.

³⁷⁷ The *NSP of 1999* 83-84.

³⁷⁸ The *NSP of 1999* 90.

The 1999 policy was revised and gave birth to the *Revised National Settlement Policy* of 2004 (hereafter *RNSP* of 2004). The policy acknowledges that rapid urbanisation continues to be a pressing issue.³⁷⁹ In particular, Gaborone and Francistown are attractive to migrants because of their infrastructure.³⁸⁰ It notes that as a result, unbalanced settlement growth is experienced and there is high demand for serviced land in urban areas.³⁸¹ The policy recommends that land be utilised through high density development so that urban sprawl can be reduced.³⁸² There is also a need for joint sharing of infrastructure between settlements.³⁸³ This may help reduce unnecessary migration to urban centres. The policy also proposes that land use changes shall be done strictly under the confines of planning legislation to avoid undesirable spatial development.³⁸⁴

3.5.4 The 2015 and 2019 Land Policies

The 2015 and 2019 Botswana Land Policies are the key policy documents on land tenure. First the 2015 policy was a culmination of many efforts such as the 2002 Land Policy Review and the 2011 Land Policy.³⁸⁵ The 2015 policy was revised and gave birth to the 2019 Land Policy. The 2015 policy provides that tribal tenure will be surveyed before allocation, which was not done in the past, for example.³⁸⁶ The CoR will also be registrable under the *Deeds Registry Act* Cap 32:02 (hereafter *DRA*).³⁸⁷ The 2015 Land Policy pronounces that land alienation will be monitored so that citizens do not lose their land.³⁸⁸ For example, land allocated under special dispensation will not be alienated unless 15 years have passed.³⁸⁹ This will help reduce landlessness as people will not be allowed to sell their land.

³⁷⁹ The *RNSP of 2004* 11.

³⁸⁰ The *RNSP of 2004* 11.

³⁸¹ The *RNSP of 2004* 11.

³⁸² The *RNSP of 2004* 21.

³⁸³ The *RNSP of 2004* 21.

³⁸⁴ The *RNSP of 2004* 27.

³⁸⁵ Kalabamu 2021 *LUP* 2.

³⁸⁶ The *Botswana Land Policy 2015* 10.

³⁸⁷ Ng'ong'ola 2017 *UBLJ* 115.

³⁸⁸ The *Botswana Land Policy 2015* 17.

³⁸⁹ The *Botswana Land Policy 2015* 17.

The Revised Botswana Land Policy of 2019 is the most recent policy document. It is the revision of the 2015 Land Policy. The 2019 Land Policy largely speaks to affirmative action being put in place for historically affected groups of people, particularly women.³⁹⁰ This will help reduce the injustice that has been meted out against women on land access over the years.³⁹¹ In terms of land administration, the policy states that a citizen will be eligible for one plot allocation in either state or tribal land.³⁹² It is argued that this will help reduce land being concentrated in the hands of a few people.³⁹³

The 2019 Land Policy acknowledges that tenure insecurity is a challenge for citizens. This is mainly caused by the poor cadastral system.³⁹⁴ Therefore the policy pronounces that tribal land will be subject to planning and survey.³⁹⁵ It is also indicated that such land rights will be registrable under the *DRA*.³⁹⁶ This has been realised by the enactment of *TLA* of 2018 in which all customary rights will be registerable in the Deeds Registry.³⁹⁷ The policy also proposes that a Land Information Centre will be established where all land information will be shared.³⁹⁸ This is important because boundary conflicts over ownership of land could be avoided. The policy indicates that the entire country will be declared a planning area.³⁹⁹ This may help reduce illegal land use changes, including on freehold land, as alluded to previously.⁴⁰⁰

³⁹⁰ Raseroka *Widows, Land, Property and Inheritance Rights: an Analysis of Affirmative Action Proposals in Botswana's 2015 Land Policy, with a Legal Comparative Dimension* 115-116.

³⁹¹ Ng'ong'ola 2017 *UBLJ* 121-122.

³⁹² The *Revised Botswana Land Policy 2019* 16.

³⁹³ Kalabamu 2021 *LUP* 4-5.

³⁹⁴ Kalabamu 2021 *LUP* 3.

³⁹⁵ The *Revised Botswana Land Policy 2019* 12.

³⁹⁶ The *Revised Botswana Land Policy 2019* 12.

³⁹⁷ See para 3.5.5 below.

³⁹⁸ The *Revised Botswana Land Policy 2019* 28.

³⁹⁹ The *Revised Botswana Land Policy 2019* 26.

⁴⁰⁰ See paras 2.3.3 and 2.3.4 above.

3.5.5 Tribal Land Act 1 of 2018

The new *TLA* was assented to and came into force on the 20 April 2022. The new Act provides for the continuation of Land Boards as body corporates.⁴⁰¹ Tribal land continues to be vested in the Land Board in trust for the benefit of all citizens of Botswana.⁴⁰² Under this new legislation, Land Boards may with the approval of the Minister establish a subordinate Land Board.⁴⁰³ The establishment has been made easier compared to how it was previously done.⁴⁰⁴ The Land Board may delegate its functions to the subordinate Land Board.⁴⁰⁵ The functions include granting of land rights and their cancellation.⁴⁰⁶ It also imposes restrictions on the use of land and such change of land use as may be necessitated by the rights owner.⁴⁰⁷

The new *TLA* brought about profound innovations especially on the registration of customary rights.⁴⁰⁸ The Registrar of Deeds will now have power over tribal land.⁴⁰⁹ Section 23(1) of the *TLA* of 2018 provides that:

...no person may occupy any land granted under the provisions of this Act or the repealed Tribal Land Act unless there has been issued to him or her by the Registrar of Deeds...a deed of customary land grant in relation to such land.

The new *TLA* brought notable changes to customary tenure specifically.⁴¹⁰ The only title to tribal land will be deed of grant which will be signed by the Registrar of Deeds.⁴¹¹ This deed of grant has been named a Secure Land Title (hereafter SLT).⁴¹² The nature of the rights of the grant are perpetual and inheritable.⁴¹³ A person who is in occupation of tribal land and holds a Certificate of Customary Land Grant

⁴⁰¹ See s 3(1) and (2) of the *TLA*.

⁴⁰² Section 4 of the *TLA*.

⁴⁰³ Section 53(1) of the *TLA*.

⁴⁰⁴ See para 3.5.1 above.

⁴⁰⁵ Section 53(7) of the *TLA*.

⁴⁰⁶ Section 5(1)(a) and (b) of the *TLA*.

⁴⁰⁷ Section 5(1)(c) and (d) of the *TLA*.

⁴⁰⁸ Ng'ong'ola 2019 *UBLJ* 22.

⁴⁰⁹ Section 23(1) of the *TLA*.

⁴¹⁰ Ng'ong'ola 2019 *UBLJ* 22.

⁴¹¹ Section 23(2) of the *TLA*.

⁴¹² The *State of the Nation Address 2022* 47.

⁴¹³ Regulation 10(a) of the *TLA Regulations*.

(hereafter CLG) or lease in terms of the repealed Act shall register such land within six months.⁴¹⁴ Land which was previously granted by the chief shall also be registered within six months.⁴¹⁵ The said registration must be made in a format that is prescribed by the Registrar of Deeds.⁴¹⁶ Similarly, there is a need to re-register the common law leases made under the previous Act.⁴¹⁷ It is stipulated that if a person fails, refuses or neglects to register, the Land Board will complete the registration and sign the documents on their behalf.⁴¹⁸ It is asserted that the simplistic approach of registration will be realised without the engagement of conveyancers.⁴¹⁹

The *TLA* also provides that boundaries of land for which a grant has been made be demarcated.⁴²⁰ Initially, the CLG only used a simple boundary system which was prone to conflicts.⁴²¹ It is also provided that if the boundaries are not demarcated the Land Board may cancel the grant.⁴²² The diagram and plan from the Director of Surveys shall also be considered in such demarcation.⁴²³ Maps and diagrams are important in the sense that they help in virtualisation of space and allow people to ascertain their land claims especially in customary tenure.⁴²⁴ As asserted in para 3.3.1 above, tenure security is dependent upon clearly defined boundaries. It is the author's submission that survey and demarcation of customary land as required by the new *TLA* will reduce land related conflicts, especially over boundaries, and

⁴¹⁴ Section 23(3) of the *TLA*.

⁴¹⁵ Section 23(4) of the *TLA*.

⁴¹⁶ Section 23(5) of the *TLA*. The duties of the Registrar of Deeds in s 5 of the *DRA* were amended to capture registration of customary land grants. S 5 read together with the amended provision in s 3 of the *Deeds Registry (Amendment) Act* 15 of 2017 (hereafter the *DRAA*) provides that:
the Registrar shall, subject to the provisions of this Act-
(c) register customary land grants, grants or leases of land lawfully issued by the Government or grants issued by any other competent authority and register amendments, renewals and cancellations of such leases, and releases of any part of the property leased.

⁴¹⁷ Section 23(9) of the *TLA*.

⁴¹⁸ Section 23(8) of the *TLA*.

⁴¹⁹ Ng'ong'ola 2019 *UBLJ* 24.

⁴²⁰ Section 41(1) of the *TLA*.

⁴²¹ Van Asperen *Evaluation of Innovative Land Tools in Sub-Saharan Africa* 197.

⁴²² Section 41(1) of the *TLA*.

⁴²³ Section 41(2) of the *TLA* of 2018. See also s 19A of the *DRAA*.

⁴²⁴ Paradza, Mokwena and Musakwa 2020 *Land* 6.

improve tenure security.⁴²⁵ Clearly defined boundaries also reduce land-related disputes. Because information exists in land cadastres, it becomes difficult to illegally transact land.⁴²⁶

As previously mentioned, illegal land dealings are alarming in Botswana's urban centres, especially Gaborone and its peripheral villages.⁴²⁷ The *TLA* provides that a person who wants to deal with his/her land will require consent from the Land Board.⁴²⁸ The consent is needed specifically for land transfers, the division of land into two parcels, and dealing with shares.⁴²⁹ The Registrar of Deeds is also empowered to reject any registry or conveyance which is not accompanied by a certificate or lease issued by the Land Board.⁴³⁰ Any transaction which does not involve the Land Board's consent is forbidden and will be void.⁴³¹

Concomitantly, a Land Board may cancel the grant if the holder of the right fails to observe these restrictions and restrictions imposed by laws relating to town and country planning or husbandry.⁴³² Furthermore, when such land has not been developed or is not used for the purpose for which it has been granted the grant can be cancelled.⁴³³ Additionally, it may be cancelled if the grant was prompted by fraud or misrepresentation and when a grantee fails to demarcate the boundaries of the land in terms of section 42.⁴³⁴ This will help reduce land conflicts and illegal land transactions as Land Boards and the Deeds Registry will be involved in land dealings in Botswana. These provisions may also ensure that land use laws and spatial planning laws are complied with.

⁴²⁵ See particularly para 2.3.4 above.

⁴²⁶ Ayano 2018 *Law & Society Review* 1062. In para 2.3.4 above it was argued that land conflicts are caused by unclear land boundaries thereby leading to tenure insecurity.

⁴²⁷ See para 2.3.2 above.

⁴²⁸ See s 33(1) of the *TLA*.

⁴²⁹ Section 33(1)(a), (b) and (c) of the *TLA*.

⁴³⁰ Section 33(2) of the *TLA*.

⁴³¹ Section 37(1) of the *TLA*.

⁴³² Section 43 of the *TLA*.

⁴³³ Section 43 of the *TLA*.

⁴³⁴ Section 43 of the *TLA*.

Following the mass acquisition of land by foreigners, especially in the villages that surrounded Gaborone such as Mogoditshane and Mmopane, the government legislated some interventions.⁴³⁵ Under the *TLA* of 2018, no land shall be alienated to a foreigner unless in special circumstances.⁴³⁶ However, the Minister is empowered to make exemptions for granting of land grants to foreigners.⁴³⁷ However, the said grant shall be by way of a common law lease.⁴³⁸ These will reduce land grabs, particularly those that happen at the peri-urban fringes.⁴³⁹ Furthermore, a land transaction between a local and non-citizen must be published in the government *Gazette* and in at least one local newspaper circulating in Botswana.⁴⁴⁰ Those who try to circumvent the law and engage in illegal land dealings will be met with a heavy fine of P50 000.00 or a prison term not exceeding 5 years.⁴⁴¹ This may help to reduce peri-urban land corruption in the rural-urban interface.⁴⁴²

With this as a backdrop, it is argued that tenure security can reduce persistent land conflicts that arise because of rapid urbanisation.⁴⁴³ It is reasoned that where land rights are clearly defined, citizens are less likely to be susceptible to land grabs and corruption, for example. This can in turn reduce at least some of the negative land use challenges that result from rapid urbanisation.⁴⁴⁴

3.5.6 Other key legislation and policy

Other crucial legislation that has shaped the tenure system of Botswana is the *LCA*.⁴⁴⁵ This legislation allowed citizens to purchase freehold land which was mainly

⁴³⁵ Manatsha 2020 *JLRS* 200.

⁴³⁶ Section 24 of the *TLA*.

⁴³⁷ Section 24 of the *TLA*.

⁴³⁸ Section 24 of the *TLA*.

⁴³⁹ Manatsha 2020 *JLRS* 200-201.

⁴⁴⁰ Section 34(1) of the *TLA*. Additionally, s 34(1) of the *TLA* specifies that such notice must include: a description of the land which is subject to such a transaction, the full names of the parties, details of the proposed transaction, consideration of the proposed transaction and a reference to the fact that citizens of Botswana who are interested in a similar transaction will be given priority.

⁴⁴¹ Section 40 of the *TLA*.

⁴⁴² Manatsha 2020 *JLRS* 201.

⁴⁴³ Huntington and Stevens 2023 *LUP* 2.

⁴⁴⁴ See Chapter 2 above for a detailed discussion of the land use challenges.

⁴⁴⁵ Ng'ong'ola 1996 *SAPL* 6.

reserved for the white settlers.⁴⁴⁶ The Act indicates that citizens should be given priority when it comes to disposal of freehold land.⁴⁴⁷ This land is argued to have the most secure tenure as it confers perpetual title to land.⁴⁴⁸ Freehold land was often fenced making it difficult for informal occupation or land grabs as opposed to tribal land which is predisposed to land grabs.⁴⁴⁹ Therefore the high security associated with this tenure meant that people can reap the full fruits of their land.⁴⁵⁰ The enactment of this legislation saw a decline of freehold land from 5% to 3% as of today.⁴⁵¹ Ng'ong'ola⁴⁵² argues that this may be an indicator to do away with the legislation as it has served its purpose. The author disagrees with this proposition, because the *LCA* continues to ensure that freehold land reverts to the citizens in a transparent manner.

Furthermore, the *Acquisition of Property Act* Cap 32:10 (hereafter *APA*) has also resulted in some reform to land holding in Botswana. In terms of this law, land which has been privately held can now be expropriated by the state. Ng'ong'ola⁴⁵³ notes that the expropriation law evolved such that even customary land could be expropriated. For example, under the *TLA* of 2018, the Land Board has the power to expropriate tribal land in Botswana for public interests.⁴⁵⁴ This law was aligned with the *Constitution* in 1966.⁴⁵⁵ Under the *APA*, the *Constitution* mandates that there be prompt and adequate compensation.⁴⁵⁶ The effect of this legislation is that state can acquire land and redistribute it equally to citizens for residential or civic and community purposes.⁴⁵⁷

⁴⁴⁶ Frimpong 1993 *CILSA* 393.

⁴⁴⁷ Ng'ong'ola "Property Guarantees in Old and New Southern African Constitutions" 162.

⁴⁴⁸ Manatsha 2020 *JLRS* 191.

⁴⁴⁹ Molebatsi 2019 *TRP* 46.

⁴⁵⁰ Wamukaya and Mbathi 2019 *TRP* 81.

⁴⁵¹ The *Revised Botswana Land Policy 2019* 4.

⁴⁵² Ng'ong'ola 2017 *UBLJ* 121.

⁴⁵³ Ng'ong'ola 1992 *Int and Comparative Law Quarterly* 119.

⁴⁵⁴ See s 31(1) and (2) of the *TLA*.

⁴⁵⁵ Ng'ong'ola 1996 *SAPL* 5.

⁴⁵⁶ Section 8(1)(b)(i) of the *Constitution*. See also Ng'ong'ola 1989 *CILSA* 306-307.

⁴⁵⁷ See para 2.3.6 above.

3.5.7 Inadequacies of Land Boards in Botswana

Even though Botswana's Land Board system has been hailed as the best land administration system in Africa, it is beset with challenges.⁴⁵⁸ The Land Boards are criticised for lack of inclusivity, for example they are state dominated with few representations from the traditional authorities.⁴⁵⁹ In Botswana, Land Board members are appointed by the Minister responsible for land affairs and *Dikgosi* have been relegated to *ex officio* members.⁴⁶⁰ Even though there are elections, such elections are dominated by elites and membership is based on political patronage.⁴⁶¹ Maripe⁴⁶² argues that the *status quo* undermines the knowledge *Dikgosi* can bring especially in land governance.

As noted earlier, Land Boards can either be categorised as main or subordinate.⁴⁶³ Even though both have the power to allocate residential and ploughing land, their operative powers differ.⁴⁶⁴ In her study in Kweneng, Griffiths found that the effectiveness of Land Boards is often hampered by internal divisions that result from allocation of duties between staff of main and subordinate Land Boards.⁴⁶⁵ For example, subordinate Land Boards have power to allocate certain types of land grants, and with common law leases they can only make recommendations.⁴⁶⁶ It is argued that sometimes main Land Boards do not have regard to recommendations of subordinate Land Boards.⁴⁶⁷ The complex institutional arrangements sometimes cause the boards to work in isolation.⁴⁶⁸

Land Boards also lack autonomy in the sense that they are still under the firm grip of the Minister.⁴⁶⁹ For example the Minister may give the Land Boards directions

⁴⁵⁸ Kalabamu 2000 *LUP* 312.

⁴⁵⁹ Maripe "Land Administration, Politics and Governance in Botswana" 185.

⁴⁶⁰ Morolong and Ng'ong'ola "Revisiting the Notion of Ownership of Tribal Land in Botswana" 151.

⁴⁶¹ Quan "Land Boards as a Mechanism for the Management of Land Rights" 198.

⁴⁶² Maripe "Land Administration, Politics and Governance in Botswana" 185-188.

⁴⁶³ See the discussion at para 3.5.1 above.

⁴⁶⁴ Manatsha and Morapedi 2022 *JCAS* 65.

⁴⁶⁵ Griffiths "Negotiating Space and Place in Relation to Land" 185-186.

⁴⁶⁶ Griffiths *Transformations on the Ground; Space and the Power of Land in Botswana* 66.

⁴⁶⁷ Griffiths "Negotiating Space and Place in Relation to Land" 186.

⁴⁶⁸ Griffiths "Negotiating Space and Place in Relation to Land" 186.

⁴⁶⁹ See s 6 of the *TLA*.

regarding how they should exercise their functions.⁴⁷⁰ Additionally, they lack fiscal autonomy to carry out most of their functions.⁴⁷¹ Their financing is heavily reliant on the central government. In terms of policies, Land Boards are subservient to the control of central government.⁴⁷² This is because appointments of key officers of the board and financial budget is dependent upon the Minister.⁴⁷³ In light of the rapid urbanisation in Botswana, these challenges may hinder the Land Boards from performing their mandates, and realisation of tenure security may be a far distant dream.

3.6 Critique of land titling for tenure security

Titling of land has been based on the following reasons: tenure security, economic prosperity, conflict resolution over property rights.⁴⁷⁴ There was a misconception that customary tenure lacked clear rights which are able to be transferred.⁴⁷⁵ The lack of clearly defined rights was construed to be lack of secure tenure.⁴⁷⁶ Therefore it was unattractive for agricultural investment.⁴⁷⁷ This proposition is erroneous. As already argued above, customary tenure had individualised rights, which can be claimed separately.⁴⁷⁸ According to De Soto,⁴⁷⁹ the African tenure system is 'dead capital' and as such it cannot act as a collateral in acquiring credit from financial institutions.⁴⁸⁰ This proposition has found support from Bretton Woods institutions such as the World Bank and the International Monetary Fund (hereafter IMF).⁴⁸¹ From the World Bank perspective, it is argued that land titling improves investment

⁴⁷⁰ See s 6 of the *TLA*.

⁴⁷¹ Quan "Land Boards as a Mechanism for the Management of Land Rights" 205.

⁴⁷² Bruce and Knox 2009 *World Dev* 1365.

⁴⁷³ Ng'ong'ola 2019 *UBLJ* 8.

⁴⁷⁴ Zuka 2019 *LUP* 682.

⁴⁷⁵ Ossome 2014 *Feminist Economics* 158.

⁴⁷⁶ Ossome 2014 *Feminist Economics* 158.

⁴⁷⁷ Peters 2009 *World Dev* 1318.

⁴⁷⁸ See para 3.4.1 above.

⁴⁷⁹ Hernando De Soto is an acclaimed Peruvian economist, he is a widely cited scholar on property titles and formalisation. His work 'The mystery of the capital', in which he argues that capitalism provides the solution to poorer countries' failing economic systems, has been a centre for debate for many years. -See Manders 2004 *Cornell Int Law Journal* 178-179.

⁴⁸⁰ Basupi, Quinn and Dougill 2017 *Land* 2.

⁴⁸¹ Greiner 2017 *Dev and Change* 80.

and productivity on land.⁴⁸² Against the above assertions, a powerful line of critique has developed. For example, it is argued that titling has fuelled 'capricious and rancorous evictions' and fails to address the needs of citizens.⁴⁸³

Higgins *et al*⁴⁸⁴ contend that:

Security over land activated by the inputs of improved land demarcation and mapping, issuing and facilitating the obtaining of ownership proof, and from institutional strengthening is also expected to increase land rental and sale...if properly managed, land-related conflict is also expected to decrease, creating increased community cohesion and cooperation...

It may thus be argued that legal titles are an important source of tenure security.⁴⁸⁵ Land titling provides clear information on who owns which property rights and where.⁴⁸⁶ It also acts as a protection of land rights which were allocated by traditional authorities.⁴⁸⁷ Therefore, land transfer process becomes easier.⁴⁸⁸ A great cadastre system provides efficient property tax collection for the state.⁴⁸⁹ It is for this reason that land titling is a corollary of the development process in a country.⁴⁹⁰ In Botswana, especially in Mogoditshane and Tlokweng, residents indicated that they felt secure with land titles.⁴⁹¹ It was also asserted that titles provide documentary evidence in the resolution of disputes.⁴⁹²

De Soto contends that the poor hold a valuable asset, which is the land.⁴⁹³ However they are poor because their land lacks documented title.⁴⁹⁴ He stresses that an individual whose rights are secure can look beyond the future and use his or her

⁴⁸² German and Braga 2021 *The Journal of Peasant Studies* 1237-1238.

⁴⁸³ Obeng-Odoom and Stilwell 2013 *IDPR* 320.

⁴⁸⁴ Higgins *et al* 2018 *Journal of Rural Studies* 36.

⁴⁸⁵ Getie, Birhanu and Dadi 2023 *LUP* 3.

⁴⁸⁶ Muchomba 2017 *World Dev* 311.

⁴⁸⁷ Edwin, Glover and Glover 2020 *Land* 7.

⁴⁸⁸ Abdulai and Owusu-Ansah 2014 *HI* 135.

⁴⁸⁹ Getie, Birhanu and Dadi 2023 *LUP* 2.

⁴⁹⁰ Abdulai and Owusu-Ansah 2014 *HI* 135.

⁴⁹¹ Van Asperen, Kalabamu and Zevenbrgen "Evaluation of Land Administration Tools" 165.

⁴⁹² Van Asperen, Kalabamu and Zevenbrgen "Evaluation of Land Administration Tools" 165.

⁴⁹³ Shaw 2013 *Urban Forum* 156.

⁴⁹⁴ Agboola and Amidu 2022 *Urban Forum* 9.

rights to better his or her life.⁴⁹⁵ According to him, property formalisation as it obtains from the West, can improve the lives of the poor.⁴⁹⁶ It is argued that the theory fails to provide a clear link between land titling and economic benefits.⁴⁹⁷ Additionally, De Soto has been criticised as failing to recognise the fact that in the absence of legal titles, the poor can still enjoy *de facto* tenure security.⁴⁹⁸ The idea that individual ownership increases one's economic status has been labelled as 'flawed'.⁴⁹⁹

It is argued that regularisation may be too expensive and may perpetuate further inequality between the rich and those in lower societal strata.⁵⁰⁰ In some countries such as Tanzania, prices for land surveying can go up to as 350US\$.⁵⁰¹ The poor may be excluded whilst strangers are favoured solely on the basis of clientelism.⁵⁰² The costs associated with attaining legal titles makes it uneconomical to attain one.⁵⁰³ It has also been argued that titling perpetuates tenure insecurity for women, as most of the land titles are registered on men's names, thereby restricting women's access and use of the land.⁵⁰⁴ Affordability does not only affect individual citizens but extends to the state also.⁵⁰⁵ Some countries do not afford resources for land administration for their citizens, as they have other priorities such as health and education.⁵⁰⁶ In the same vein, Patel⁵⁰⁷ contends that when rights are formalised, local authorities can collect property tax. This will further plunge local

⁴⁹⁵ Assies 2009 *The Journal of Peasant Studies* 578.

⁴⁹⁶ Latorre 2015 *Third World Quarterly* 1550.

⁴⁹⁷ Stein *et al* 2016 *The Journal of Dev Studies* 1307-1308; Musembi 2007 *Third World Quarterly* 1466.

⁴⁹⁸ Arfvidsson *et al* 2017 *Afr Geographical Review* 107.

⁴⁹⁹ Patel 2016 *LUP* 104.

⁵⁰⁰ Fontana 2016 *plaNext-Next Generation Planning* 43-44. According to Awuah, Hammond and Lamond these costs include conveyancing fees, engagement of professionals, administrative costs which normally the poor could not afford, especially in Africa. -See Awuah, Hammond and Lamond 2013 *Property Management* 393.

⁵⁰¹ Bezu and Holden 2014 *LUP* 194.

⁵⁰² Carrilho and Trindade 2022 *Sustainability* 13.

⁵⁰³ Geyer and Geyer Jr 2014 *Urban Forum* 39.

⁵⁰⁴ Lambrecht 2016 *World Dev* 191. Chigbu argues in the context of ETLR and indicates that when societies move towards titling, men assert their masculinity traits over women to deny them access to land. -See Chigbu 2019 *LUP* 42.

⁵⁰⁵ Zevenbergen *et al* 2013 *LUP* 597.

⁵⁰⁶ Zevenbergen *et al* 2013 *LUP* 597.

⁵⁰⁷ Patel 2016 *LUP* 104.

citizens into poverty.⁵⁰⁸ In cases where the cost of attaining legal titles is higher, it is advisable that the state helps such as in Botswana with regards to CoRs for the urban poor.⁵⁰⁹

It may also be cumbersome to register land titles in a pluralist society.⁵¹⁰ There is a higher risk of other people's rights on land, especially customary rights, not being recognised by formal institutions.⁵¹¹ De Soto argues that poorer countries must follow Western countries and formalise their rights.⁵¹² He cautions of the long and complex titling systems that often results in people creating extra-legal proofs.⁵¹³ However, tenure systems in Africa are complex.⁵¹⁴ Formalisation may result in the elites exploiting the system at the expense of the poor.⁵¹⁵ Land titling also requires strong institutions in place.⁵¹⁶ These institutions minimise corruption and ensure accountability in land governance.⁵¹⁷ As indicated in the preceding chapter, Africa is beset by land corruption.⁵¹⁸ Its institutions are fragmented and not capacitated enough and this will translate into delay in formalising titles.⁵¹⁹

It can be argued therefore that, though land titling as proposed by De Soto increases land tenure security, it does not necessarily mean it is a panacea for poverty. As argued above, the formalisation of land may benefit the elites thus fuelling intra-community land conflicts.⁵²⁰ Despite titling efforts, people remain poor.⁵²¹ Financial institutions may still be reluctant to offer the poor credit.⁵²² For example, those who reside in slums may acquire title but banks may want them to be employed to

⁵⁰⁸ Sjaastad and Cousins 2009 *LUP* 4.

⁵⁰⁹ Kalabamu "Limits of Incremental Land Tenure Reforms in Botswana" 125-126.

⁵¹⁰ Mintah *et al* 2020 *Journal of Property, Planning and Env Law* 9.

⁵¹¹ Ayano 2018 *Law & Society Review* 1077-1078.

⁵¹² Latorre 2015 *Third World Quarterly* 1550.

⁵¹³ Otto 2009 *Hague Journal on the Rule of Law* 178.

⁵¹⁴ Benjamin *et al* 2021 *Forest Policy and Economics* 1.

⁵¹⁵ Earle 2014 *Int Journal of Urban and Regional Research* 630.

⁵¹⁶ Koroso, Zevenbergen and Lengoiboni 2019 *LUP* 554.

⁵¹⁷ Koroso, Zevenbergen and Lengoiboni 2019 *LUP* 554.

⁵¹⁸ See para 2.2.2 above.

⁵¹⁹ Getie, Birhanu and Dadi 2023 *Survey Review* 11.

⁵²⁰ Holland and Diop "Strategies for Securing Tenure" 235.

⁵²¹ Hutchison 2008 *Australian Journal of Int Affairs* 338.

⁵²² Hutchison 2008 *Australian Journal of Int Affairs* 338.

advance credit to them.⁵²³ Other factors such as location and property insurance are reckoned with by banks when issuing out credit.⁵²⁴ For those living in slums, their land is likely to be less lucrative for credit institutions.⁵²⁵ However, in Zambia it has been shown that even though it is hard to access credit from financial institutions, title holders do access finance from savings and cooperative societies.⁵²⁶

Whilst it has been asserted in paras 3.4.2 and 3.5.2 that CoRs for example provide tenure security, the drawback is that they do not offer requisite security to secure a loan.⁵²⁷ This is because financiers are against the idea of a third party, city or town council involved in the process.⁵²⁸ The conversion to a FPSG appears expensive to the urban poor, as there has to be a cadastral survey, water connection and registration of title deeds within the Deeds Registry.⁵²⁹ However it is argued that introduction of SLT in tribal tenure in Botswana will offer a solution. SLT will now be used as a collateral to attain credit from banks, as tribal land is now registrable within the Deeds Registry.⁵³⁰ Initially one had to convert tribal land grant into a common law lease.⁵³¹ These common law leases were used as collateral to obtain credit from financial institutions.⁵³² As such SLT is said to be at par or even better than leases which have a specified period of 50-99 years.⁵³³

De Soto argues that customary tenure systems are dysfunctional, but it is arguable that they are not.⁵³⁴ Customary tenure has proven to offer security. As indicated above this security may be perceived rather than legalistic.⁵³⁵ Customary tenure has

⁵²³ Umar *et al* 2023 LUP 2.

⁵²⁴ Domeher, Abdulai and Yeboah 2016 *Journal of Property Research* 166.

⁵²⁵ Domeher and Abdulai 2012 *Third World Quarterly* 173.

⁵²⁶ Umar *et al* 2023 LUP 6.

⁵²⁷ *The Report of the Presidential Commission on Land Tenure 1983* 19.

⁵²⁸ *The Report of the Presidential Commission on Land Tenure 1983* 19.

⁵²⁹ Nkwae and Dumba 2010 *HI* 370.

⁵³⁰ Itshomeng 2022 <https://shorturl.at/nJRTV>.

⁵³¹ Kalabamu 2000 LUP 309.

⁵³² AfDB *Review of Land Tenure Policy, Institutional and Administrative Systems of Botswana* 16.

⁵³³ Ng'ong'ola 2016 *UBLJ* 26.

⁵³⁴ Goldfinch 2015 *Progress in Dev Studies* 88.

⁵³⁵ See para 3.3.2.2 above.

shown to provide flexibility and adaptability, for example it now provides access to land through gifts, exchanges and pledges, which was not possible in the past.⁵³⁶

3.7 Concluding remarks

The purpose of the chapter was to critically discuss the Botswana land tenure system and state of tenure security. The chapter also delved into the linkages between the control and impact of urbanisation in Botswana and the strength of the legal instruments emanating from the national land tenure system. A general discussion of the notions of tenure security was necessary to understand what Botswana has.⁵³⁷ The chapter found that the instruments of land tenure and institutions adopted by Botswana after independence have strengthened the country's tenure security.⁵³⁸ It was also shown that the reallocation of power from chiefs to Land Boards to allocate land was a rational move.⁵³⁹

The chapter established that the tenure law reforms in Botswana have helped shape land administration in way that improves tenure security.⁵⁴⁰ Customary tenure is now regulated under the *TLA*, and chiefs' powers are now limited. Therefore, this will reduce the incidence of corruption in which chiefs help people to claim land, making land administration chaotic. The registration of tribal land into leases under the *TLA* of 2018 will allow ordinary citizens to use their land as collateral to access credit.⁵⁴¹ Certificates and titles have reduced land conflicts that emanated from illegal land dealings and sales. The chapter points out that the large scale of land sales to foreigners will now be curtailed under the new *TLA*.⁵⁴² It is also important not to lose a lot of tribal land to foreigners, therefore transactions between locals and citizens are controlled under the *TLA*.⁵⁴³ Land is now allocated after survey, and

⁵³⁶ Platteau "Does Africa need Land Reform?" 53.

⁵³⁷ See para 3.3 above.

⁵³⁸ See para 3.5 above.

⁵³⁹ See para 3.2 above.

⁵⁴⁰ See para 3.5 above.

⁵⁴¹ See para 3.5.3 above.

⁵⁴² See para 3.5.3 above.

⁵⁴³ See para 3.5.5 above.

this will help reduce the incidence of land boundary conflicts discussed in chapter 2.⁵⁴⁴

Despite the complexity of rapid urbanisation, the chapter has illustrated that Botswana's state of tenure security helps to control some of the effects of rapid urbanisation.⁵⁴⁵ It does so by reducing land conflicts through use of titles, allocation of land through Land Boards, and SHAA to reduce shortages of land, and registration of rights which were not registered previously. The survey and allocation of plots means that urban sprawl especially in the rural-urban fringe can be controlled.⁵⁴⁶ Premised on the above discussion, the next chapter aims to critically explain and evaluate the spatial planning law system in Botswana. It will also discuss the nexus between tenure security and spatial planning in Botswana.

⁵⁴⁴ See para 2.3.4 above.

⁵⁴⁵ See para 3.6.2 above.

⁵⁴⁶ See paras 3.5 and 3.6 above.

Chapter 4 Botswana's spatial planning law: features and role players interfacing with tenure security

4.1 Introduction

As indicated in the preceding chapters, spatial planning is generally used to direct and oversee developmental process on land.¹ It assists in balancing competing demands on land with the goal to meet society's land and spatial access needs.² It determines how cities, towns and rural areas should ideally grow.³ Spatial planning is cross-cutting in nature and does not only apply to regulation and control of land use.⁴ It spreads to other sectors such as health, housing, water, the environment and energy, amongst others.⁵ Spatial planning is often assigned different names such as town and regional planning, urban planning and city planning.⁶ In Botswana spatial planning used to be the reserve of central government but this function has since been delegated to local authorities.⁷ In the context of tenure security, the chapter shows that there is a linkage between spatial planning and land tenure security.⁸ Spatial planning organises space while tenure has an element of connecting people to space.⁹ As a result, spatial planning law is deemed to be able to help increase tenure security and to counter some of the related effects of rapid urbanisation, including land conflicts and urban sprawl.¹⁰

The purpose of this chapter is to explain and critically evaluate Botswana's spatial planning law system with a view to determine if and how it helps regulate rapid urbanisation.¹¹ At the onset, the chapter lays down a historical account of spatial

¹ See para 1.1 in Chapter 1 above.

² Carter 2007 *The Geographical Journal* 331.

³ Van Wyk *Planning Law* 10.

⁴ Taylor 2010 *The Town Planning Review* 205.

⁵ Hurlimann and Wilson 2018 *Water* 2.

⁶ Mnguni *Spatial Planning and Densification: the Case of Glenwood, eThekwin Municipality, South Africa* 13.

⁷ See paras 4.2 and 4.4.1 below.

⁸ See detailed discussion in para 4.5 below.

⁹ Dachaga and De Vries 2021 *Land* 2.

¹⁰ Chigbu *et al* 2017 *JEPM* 1623.

¹¹ See para 1.3 above.

planning law in the country and continues to discuss the role of some of the government institutions involved. The chapter also delves into the nexus between spatial planning law and tenure security.

4.2 History of spatial planning law

The history of spatial planning in Botswana is defined by three eras, namely, pre-colonial, colonial and the post-colonial era.¹² After independence, the *NSP* of 1999 introduced a hierarchy of settlements to properly conduct spatial planning in settlements in Botswana.¹³ This classification included primary, secondary and tertiary centres. Large villages, such as Molepolole and Maun, formed part of the primary centres together with Gaborone and Francistown.¹⁴ This *NSP* of 1999 was revised in 2004 to address the challenges that affected the country, brought mainly by rapid urbanisation.¹⁵

The pre-colonial Tswana settlements were spatially organised.¹⁶ Such organisation provided a form in which the community managed their affairs.¹⁷ The chief was the repository of power and social control, and directed how the village was organised.¹⁸ Villages were usually situated where there were water sources, such as rivers.¹⁹ There was a formal arrangement and order in which settlements existed.²⁰ The settlements were arranged in a horseshoe pattern, and this is still visible in the oldest parts of major villages such as Kanye, Molepolole and Serowe.²¹ The *kgotla* was considered important and located at the village's centre.²² These settlements were based on status and relation to the royal lineage.²³ Commoners were placed

¹² Tapela 2016 *Indilinga Afr Journal of Indigenous Knowledge Systems* 85.

¹³ The *NSP* of 1999 26.

¹⁴ The *NSP* of 1999 27.

¹⁵ See para 3.5.3 above.

¹⁶ Griffiths *Transformations on the Ground; Space and the Power of Land in Botswana* 24.

¹⁷ Griffiths *Transformations on the Ground; Space and the Power of Land in Botswana* 24.

¹⁸ Marr 2019 *Social Identities* 47.

¹⁹ Schapera *A Handbook of Tswana Law and Custom* 7.

²⁰ Mosha "A Reappraisal of Spatial Planning in Botswana" 113-128.

²¹ Molebatsi "Re-inscribing the Communal: Towards Decolonial Urban Futures" 34.

²² Nawa 2018 *SAGJ* 263.

²³ Marr 2019 *Social Identities* 47.

at the most peripheral end of the village.²⁴ The striking feature of the Tswana traditionalist planning was that the village was subdivided into wards.²⁵ Mosha notes that different spaces were designated for different use such as cattle rearing, ploughing and markets.²⁶

Major villages had multiple wards headed by the *Kgosana*.²⁷ These wards were demarcated in terms of roads.²⁸ Ward demarcation was mainly done in terms of relatedness.²⁹ However, most of the times the chief would use his powers to create a ward for his son.³⁰ In that case, different men and women were grouped together to start the ward, and they were not necessarily related.³¹ The grazing lands and cattle posts were allocated by the *Kgosi* but were beyond the village precincts.³² The cattle posts were hereditary, but only to sons.³³ Following colonisation, the Bechuanaland Protectorate was divided into native reserves through the *Tribal Territories Proclamation* No.9 of 1899.³⁴ This was mainly done for easy administration of the protectorate by also allowing chiefs to have power of land administration in their respective reserves.³⁵

In terms of their design, towns and cities in Botswana are an outcome of the colonial spatial planning process.³⁶ The colonial authorities claimed that in order for betterment of lives to take place, their planning laws were necessary for Africa.³⁷ However such spatial planning laws were associated with oppression and curtailing economic activities of the black population.³⁸ Colonial powers exercised inestimable

²⁴ Morobolo, Molebatsi and Moatshe 2018 *Botswana Journal of Technology (BJT)* 43.

²⁵ Nawa 2018 *SAGJ* 263.

²⁶ Mosha "A Reappraisal of Spatial Planning in Botswana" 116.

²⁷ Schapera *A Handbook of Tswana Law and Custom* 8.

²⁸ Schapera *A Handbook of Tswana Law and Custom* 8.

²⁹ Schapera *A Handbook of Tswana Law and Custom* 20.

³⁰ Schapera *A Handbook of Tswana Law and Custom* 20.

³¹ Schapera *A Handbook of Tswana Law and Custom* 20.

³² Adamolekun and Morgan 1999 *Int Journal of Public Sector Management* 586.

³³ Ndobochani 2020 *Azania: Archaeological Research in Africa* 264.

³⁴ Frimpong 1986 *JAL* 51.

³⁵ Ng'ong'ola 1997 *JAL* 9.

³⁶ Horn 2019 *Planning Perspectives* 960.

³⁷ McAuslan *Land Law Reform in Eastern Africa: Traditional or Transformative* 165.

³⁸ Berrisford 2011 *Urban Forum* 215.

power over space and land resources in Africa.³⁹ Often the power was accompanied by threats and persuasion to endorse the spatial planning agenda.⁴⁰ Traditional planning in Africa was seen as backward by the Europeans, however the imported planning was not compatible with the African setting.⁴¹ This type of planning was often not inclusive and no participation was conducted with the indigenous people.⁴² The planning fostered racially dividing policies which continue to define most African cities.⁴³

The spatial planning law of Botswana was modelled on British planning law.⁴⁴ The British *Town and Country Planning Act* of 1947 specifically was the casting instrument for most of Africa's planning law.⁴⁵ Towns such as Francistown and Selibe-Phikwe usually followed the grid pattern, unlike the traditional horseshoe that was used in villages.⁴⁶ This type of planning totally ignored African cultural practices in the planning process as they were perceived as regressive and without value.⁴⁷ In Gaborone, prime space was bought by the elites, blocking the growth of the city.⁴⁸ This land was mainly freehold with secure titles.⁴⁹ There was coordinated development in this land category.⁵⁰ The first master plan was initiated in 1963.⁵¹ As the city grew there was need for more space. This necessitated the planning of Broadhurst and Gaborone West to cater for the soaring populations.⁵²

Settlements which were on crown land (now state land) were declared towns.⁵³ These settlements included Lobatse, Francistown and Ghanzi and these was done

³⁹ Yakubu 2021 *LUP* 2.

⁴⁰ Yakubu 2021 *LUP* 2.

⁴¹ Njoh 2009 *Planning Perspectives* 304.

⁴² Matamanda and Chinozvina 2020 *LUP* 2.

⁴³ Home 2021 *Land* 6.

⁴⁴ Morobolo, Molebatsi and Moatshe 2018 *BJT* 49.

⁴⁵ Morobolo, Molebatsi and Moatshe 2018 *BJT* 49.

⁴⁶ Mosha "A Reappraisal of Spatial Planning in Botswana" 118.

⁴⁷ Molebatsi "Re-inscribing the Communal: Towards Decolonial Urban Futures" 36.

⁴⁸ Marr 2019 *Social Identities* 42.

⁴⁹ See para 3.4.3 above.

⁵⁰ Mwale *Culture, Heritage and the Politics of Identity in National and Tribal Spaces: the City and the Traditional Village in Botswana* 50.

⁵¹ Mosha 1996 *Ambio* 120.

⁵² Mosha 1996 *Ambio* 120.

⁵³ Kapamba *et al* "Land Governance in Botswana".

in accordance with the *Townships Proclamation* No.66 of 1955 which clothed the High Commissioner with powers over townships in the protectorate.⁵⁴ Most of the settlements such as Serowe were declared villages.⁵⁵ Planning was only focused on areas designated townships while villages were left out.⁵⁶ This further perpetuated inequality, as black communities were often situated remotely where there was little or no access to services.⁵⁷ Molebatsi and Kalabamu⁵⁸ reason that this was the greatest setback in the planning system. As a result, major settlements around the urban areas are experiencing uncoordinated spatial growth.⁵⁹ The *Township Proclamation* No.66 of 1955 subsequently became the *Townships Act* Cap 40:02 (hereafter *TA*) which provided for guidelines on formation of townships and cities in Botswana.⁶⁰

Due to Botswana's historical contact with the then Union of South Africa, the *Town and Country Proclamation* of 1961 was used in the planning process.⁶¹ The proclamation was based on South Africa's *Cape Province Townships and Town Planning Ordinance* of 1935.⁶² However, in post-colonial Botswana, settlements were demarcated into districts.⁶³ These new districts mirrored the boundaries of tribal reserves established by the *Tribal Territories Act* Cap 32:03 (hereafter *TTA*), albeit with minor adjustments.⁶⁴ The *Town and Country Planning Act* of 1977 (hereafter repealed *TCPA* of 1977) came into force in 1980 and governed the spatial planning process.⁶⁵ The legislation emerged as a result of the findings of two reports, namely the Ball Report and Heap Report, prepared by British town

⁵⁴ Nengwekhulu *An Evaluation of the Nature and Role of Local Government in Post-Colonial Botswana* 70.

⁵⁵ Potts 2018 *Urban Studies* 980.

⁵⁶ Molebatsi "Botswana: 'Self-allocation', 'Accommodation' and 'Zero Tolerance'" 85-110.

⁵⁷ Mosha "A Reappraisal of Spatial Planning in Botswana" 113-128.

⁵⁸ Molebatsi and Kalabamu 2016 *UBLJ* 72.

⁵⁹ Molebatsi and Kalabamu 2016 *UBLJ* 72.

⁶⁰ Sections 2, 3 and 4 of the *Townships Act* Cap 40:02. This legislation was repealed and replaced by the *LGA* -see para 4.3.2 below.

⁶¹ Parnell and Simon "National Urbanisation and Urban Strategies" 237-256.

⁶² Molebatsi "Understanding the Coexistence of the Tribal Land Act" 141.

⁶³ See the *Administrative Districts Act* Cap 03:02.

⁶⁴ Ijagbemi *Land Tenure Reforms and Social Transformation in Botswana: Implications for Urbanization* 164.

⁶⁵ Molebatsi "Understanding the Coexistence of the Tribal Land Act" 141.

planners.⁶⁶ According to Molebatsi and Kalabamu,⁶⁷ it was the Ball Report that introduced the dominance of central government in the planning process, whilst local authorities were to be consulted.

The *TCPA* of 1977 extended a lot of powers to the central government to carry out the planning processes of the country.⁶⁸ The Minister was clothed with extensive powers with regard to such processes.⁶⁹ The purpose was to make provision for the orderly development of land in both urban and rural areas.⁷⁰ It is through the *TCPA* of 1977 that most of the villages in Botswana, such as Molepolele, were put through planning processes.⁷¹ However, this only happened from 1995. This law was only revised in 2013. Thereafter a development code was formulated.⁷² The notable aspects of the *TCPA* of 2013 is that it decentralises planning, thereby mandating local authorities to conduct spatial planning in the country.⁷³

4.3 Government and other authorities responsible

Spatial planning is done by different departments within different spheres of government; the local government has been given the mandate to carry it out.⁷⁴ Local government comprises of District Councils created by the *Local Government (District Councils) Act*.⁷⁵ Other governmental departments responsible for spatial planning include the Department of Town and Country Planning, the Department of Maps and Surveying and Land Boards.⁷⁶ The Land Tribunal also plays a critical role in dealing with appeals emanating from planning decisions.⁷⁷

⁶⁶ Molebatsi and Kalabamu 2016 *UBLJ* 66-67.

⁶⁷ Molebatsi and Kalabamu 2016 *UBLJ* 66-67.

⁶⁸ Section 3 of the repealed *TCPA* Cap 32:09.

⁶⁹ Maripe "Land Administration, Politics and Governance in Botswana" 196-197.

⁷⁰ Molebatsi and Kalabamu 2016 *UBLJ* 67.

⁷¹ Molebatsi "Re-inscribing the Communal: Towards Decolonial Urban Futures" 36.

⁷² Kapamba *et al* "Land Governance in Botswana"

⁷³ Section 5 (1) of the *TCPA*.

⁷⁴ See para 4.3.2 and 4.4.1 below.

⁷⁵ Section 4 of the *Local Government (District Councils) Act* Cap 40:01. This piece of legislation was repealed, but councils continued to exist. -See para 4.3.2 below.

⁷⁶ Section 4(1) of the *TCPA*.

⁷⁷ Section 27(1) of the *TCPA*.

4.3.1 *The role of traditional institutions*

As indicated in Chapter 3 above, Botswana has maintained both traditional and modern institutions.⁷⁸ Despite the threat of decimation by the colonisers and post-independence leadership, traditional institutions still survived.⁷⁹ These institutions further influence spatial planning decisions and outcomes. Traditional authorities are considered key actors in spatial planning processes.⁸⁰ The chiefs disseminate information and implement policies at a local level.⁸¹ Simelane,⁸² when commenting on traditional authorities in Africa in general, had this to say:

the institution of traditional authorities on the continent is an integral part of the social, political and cultural establishment of African communities. Traditional authorities were responsible for the welfare of their subjects through land distribution...

It is argued that the role of traditional authorities has only been limited to an advisory role and not active participation in the planning process as it was in the past.⁸³ The above assertions are also relevant in the context of Botswana. Molebatsi⁸⁴ notes that traditional institutions are undermined by modernist planning institutions such as district councils and Land Boards. This makes the participation of the community through those institutions difficult. It is therefore vital that traditional institutions are incorporated in the planning process.⁸⁵ This is because legitimacy of modern institutions takes time, and as such traditional institutions may chip in.⁸⁶ This has also been asserted by Anane and Cobbinah⁸⁷ in relation to Ghana, which is also relevant for the context of Botswana:

As peri-urban areas undergo transformation, land administration and land use planning should involve pragmatic collaboration of traditional authorities and statutory planning agencies.

⁷⁸ See the discussion at para 3.2.1 above.

⁷⁹ Welman 2021 *Journal of Finance and Economics* 233.

⁸⁰ Fuseini 2021 *Afr Studies* 236-237.

⁸¹ Fuseini 2021 *Afr Studies* 236-237.

⁸² Simelane and Sihlongonyane 2021 *Afr Studies* 156.

⁸³ Bikam and Chakwizira 2014 *Int Journal of Humanities and Social Science* 143-144.

⁸⁴ Molebatsi "Re-inscribing the Communal: Towards Decolonial Urban Futures" 38.

⁸⁵ Balasuriya 2023 *The Journal of Dev Studies* 639.

⁸⁶ Toulmin "Decentralisation and Land Tenure" 235.

⁸⁷ Anane and Cobbinah 2022 *HI* 3.

Settlements are planned in the hope that they will improve the lifestyle of those who occupy them.⁸⁸ Nawa⁸⁹ asserts that in most African societies, culture has played a significant role in the process of planning their settlements. Molebatsi⁹⁰ notes that the case of Botswana is peculiar in the sense that modernist institutions have diluted the role of culture to the extent that only Western ideologies dominate planning in Botswana. For example, the inherited planning system did not give much power to the people to participate in planning in line with their cultural practices.⁹¹ They were merely reduced to spectators, and chiefs' control over planning was overlooked.⁹² Mosha⁹³ notes that to achieve an inclusive and better planning process, culture and tradition must be embedded in spatial planning.

In Botswana, the *kgotla* and the chief play vital roles in the planning process.⁹⁴ It is a forum for discussions and the place where the opinions of locals are voiced.⁹⁵ This place provides a kind of participation from the community before key decisions are to be taken.⁹⁶ Under the *TCPA*, *Bogosi*⁹⁷ shall be consulted for development of the plans.⁹⁸ However, the weakness of this legislation is that the manner of public participation and decisions are at the behest of the Minister.⁹⁹ As affirmed by Mogomotsi *et al*,¹⁰⁰ the *kgotla* provides a blended opportunity for participation in policy formulation. It enjoys the greatest legitimacy among the citizens especially in the rural areas.¹⁰¹ Citizen participation, especially in spatial planning and urban development is key.¹⁰² However, as time went by the role of the *kgotla* in planning

⁸⁸ Morobolo, Molebatsi and Moatshe 2018 *BJT* 39.

⁸⁹ Nawa 2018 *SAGJ* 262-263.

⁹⁰ Molebatsi "Re-inscribing the Communal: Towards Decolonial Urban Futures" 38.

⁹¹ Hammami 2012 *Journal of Planning Education and Research* 23.

⁹² Hammami 2012 *Journal of Planning Education and Research* 23.

⁹³ Mosha "A Reappraisal of Spatial Planning in Botswana" 127.

⁹⁴ Molebatsi and Morobolo 2021 *Afr Studies* 139.

⁹⁵ Molebatsi 2013 *TRP* 12.

⁹⁶ Du Plessis "An Overview of Land Use Management and the Role of Traditional Leaders".

⁹⁷ *Bogosi* means "the institution of traditional leadership or the position of *Kgos*". -See s 2 of the *Bogosi Act* Cap 41:01.

⁹⁸ Section 18 of the *TCPA*.

⁹⁹ Section 18 of the *TCPA*.

¹⁰⁰ Mogomotsi *et al* 2018 *Chinese Journal of Population Resources and Env* 3.

¹⁰¹ Hjort 2010 *The Economic History Review* 690.

¹⁰² Abbot 2020 *Legal Studies* 270.

were diminished to only mere spectators accountable to the Minister.¹⁰³ It is the author's argument that given the biased history of planning in the country, *Dikgosi* should be integrated in planning processes. This will guide the planning process especially of villages and peri-urban areas in which culture and tradition are still maintained.¹⁰⁴

In the pre-colonial era, settlement planning was done by the *Kgosi*, and often centred around his *kgotla* and homestead.¹⁰⁵ Such planning was a reflection of societies' socio-political structure.¹⁰⁶ The layout was mainly to protect the chief, who was the repository of the tribe's power.¹⁰⁷ Homesteads were arranged in a horseshoe format.¹⁰⁸ The village was partitioned into wards, and there was provision for spaces in between them.¹⁰⁹ As noted earlier, these institutions serve as conduits for public participation.¹¹⁰ Kariuki¹¹¹ notes that participation is vital because it guides the developmental process, especially in an era of increasing urbanisation.

4.3.2 *The role of local government*

Local government is a political institution that is aimed at ensuring that basic services are provided to local citizens.¹¹² Generally, its functions derive from the idea of decentralisation.¹¹³ Decentralisation is a process where powers and functions of the central government are transferred to sub-national governments.¹¹⁴ It represents a degree of autonomy from central government which extends to policy making, finance administration and personnel management.¹¹⁵ Botswana embraces a bottom-up decision-making system.¹¹⁶ This is seen through institutions such as

¹⁰³ Molebatsi and Morobolo 2021 *Afr Studies* 144.

¹⁰⁴ See para 2.3.4 above.

¹⁰⁵ Mosha 2014 *Afr Resources Dev Journal* 65.

¹⁰⁶ Morobolo, Molebatsi and Moatshe 2018 *BJT* 42-43.

¹⁰⁷ Morobolo, Molebatsi and Moatshe 2018 *BJT* 44.

¹⁰⁸ Nawa 2018 *SAGJ* 262-263.

¹⁰⁹ Nawa 2018 *SAGJ* 262-263.

¹¹⁰ Obasi and Lekorwe 2014 *Public Policy and Administration Research* 4-5.

¹¹¹ Kariuki "The Changing Notion of Democracy and Public Participation in Cities in Africa" 17.

¹¹² Phago and Molosi-France 2018 *Local Economy* 741.

¹¹³ Adjeia, Busia and Bob-Milliar 2017 *Journal of Political Power* 303.

¹¹⁴ Siddle and Koelble *The Failure of Decentralisation in the South African Local Government* 19.

¹¹⁵ Siddle and Koelble *The Failure of Decentralisation in the South African Local Government* 20.

¹¹⁶ Obasi and Lekorwe 2014 *Public Policy and Administration Research* 4.

district administration, local councils, Land Boards and tribal administrations.¹¹⁷ Land Boards have been hailed as the best decentralised model of land administration as their representation also includes local people.¹¹⁸

Botswana inherited a very weak local government system from the colonial power.¹¹⁹ The *Constitution* 1966 does not provide for local government, nor does it outline its functions.¹²⁰ The relationship between the two is also not adequately defined.¹²¹ Phirinyane¹²² argues that the government of Botswana was extremely cautious because, at times local government can be seen as a threat to central government. Generally, in Africa local government has been left fiscally weak but its responsibilities have continued to pile up.¹²³ All efforts to give the local government full autonomy in Botswana under the *Constitution* were quashed.¹²⁴ This could have otherwise strengthened its capacity to effectively deliver on its mandate.¹²⁵

In Botswana councils form the core of local government.¹²⁶ They were previously established by the President in terms of the *Local Government (District Councils) Act* Cap 40:01.¹²⁷ This piece of legislation was repealed by the *Local Government Act* 18 of 2012 (hereafter *LGA*).¹²⁸ Furthermore, the *TA*, which establishes townships, has also been repealed.¹²⁹ However, the power to establish townships continues to rest with the Minister under the *LGA*.¹³⁰ The Act now provides for the

¹¹⁷ Obasi and Lekorwe 2014 *Public Policy and Administration Research* 4-5.

¹¹⁸ Toulmin "Decentralisation and Land Tenure" 241.

¹¹⁹ Cirolia 2020 *HI* 3.

¹²⁰ Pieterse 2020 *Afr Journal of Int and Comparative Law* 616.

¹²¹ Du Plessis, Steyn and Rantlo 2023 *Transnational Env Law* 13.

¹²² Phirinyane *Human Resource Management and Decentralization in Botswana and South Africa* 109.

¹²³ Cirolia "Financing African Cities: a Fiscal Lens on Urban Governance" 43.

¹²⁴ The *Report of the Second Presidential Commission on the Local Government Structure in Botswana* 2001 12.

¹²⁵ Mooketsane, Bodilenyane and Motshegwa 2017 *Afr Journal of Public Affairs* 48.

¹²⁶ Samboma 2022 *Journal of Public Affairs* 2.

¹²⁷ Section 4 of the repealed *Local Government (District Councils) Act* Cap 40:01.

¹²⁸ Section 93 of the *LGA*.

¹²⁹ Section 93 of the *LGA*.

¹³⁰ Section 8(1) of the *LGA*.

establishment of local authorities.¹³¹ Their powers include provision of education, health and water supply.¹³² In terms of the *LGA*, the power to establish local authorities rests with the Minister.¹³³ The Minister has the authority to merge or subdivide councils for purposes of administrative expediency.¹³⁴ The declaration of a township also falls within the powers of the Minister.¹³⁵ The Minister's power also extends to the conferment of city status upon a township.¹³⁶ This process however, must be informed by consultations with the district councils, the community and *Dikgosi*.¹³⁷

The Minister possesses extensive executive powers regarding the administration of local authorities.¹³⁸ These powers include dissolving of the council if he/she wishes. In terms of fiscal autonomy, the Minister exercises power over council finances. He may issue instructions and supervise how a council use and manage their finances.¹³⁹ Bodilenyane¹⁴⁰ argues that these sweeping powers have been used to diminish the independence of local government in Botswana. Local councils are now deemed functionaries of the Ministry of Local Government, and the Minister wields considerable power over them.¹⁴¹ This executive power may accordingly be abused. It is argued that to control such power, the Minister's action must be subjected to a parliamentary committee for scrutiny.¹⁴²

¹³¹ Section 3 of the *LGA*.

¹³² Schedule 1 of the *LGA*.

¹³³ Section 3 of the *LGA*.

¹³⁴ Section 5(1) of the *LGA*.

¹³⁵ Section 8(1) of the *LGA*.

¹³⁶ Section 9 of the *LGA*.

¹³⁷ Section 8(2) of the *LGA*.

¹³⁸ For example, the Minister has the power to establish local authorities under s 3 of the *LGA*. He/she also has the power to restructure them.

¹³⁹ Section 65(2) of the *LGA*.

¹⁴⁰ Bodilenyane 2022 *Journal of Public Administration and Dev Alternatives* 35.

¹⁴¹ Sharma 2010 *Commonwealth Journal of Local Governance* 137-138.

¹⁴² The *Report of the Presidential Commission of Inquiry into the Review of the Constitution of Botswana* 2022 50.

Local authorities are empowered to make bye-laws.¹⁴³ However, the Minister has power over bye-laws in the country.¹⁴⁴ After the council promulgates them, the bye-laws must be submitted to the Minister for approval.¹⁴⁵ The bye-law will be a nullity in law if it does not have the approval of the Minister.¹⁴⁶ These laws, however, have to be consistent with national law and must not derogate from it.¹⁴⁷ In the scheme of spatial planning the *TCPA* is the backbone of planning law in Botswana.¹⁴⁸ The local authorities are given a mandate to coordinate the spatial planning process in their respective planning areas.¹⁴⁹ The *LGA* too empowers local authorities to conduct physical planning for areas under their jurisdiction.¹⁵⁰

Despite efforts for decentralisation in Botswana, there are many challenges to it.¹⁵¹ Human and financial resources remain a key impediment for service delivery at a local government level in Botswana.¹⁵² The financial reliance of local government on central government curtails its independence.¹⁵³ For example, it is noted that over 80% of councils' recurrent budget is financed by central government.¹⁵⁴ Furthermore, their developmental budgets are financed wholly by the central government.¹⁵⁵ Accordingly, their financial survival continues to be at the behest of the financiers who can choose to cut the budget anytime.

The revenue collection from taxes, rates and service delivery fees is often not enough for financing local projects, therefore heavy reliance is on the central government.¹⁵⁶ Pieterse¹⁵⁷ argues that most of the local authorities are unable to

¹⁴³ Section 44(1) of the *LGA*. In Botswana bye-laws are referred to as bye-laws. The study adopts the use of bye-laws as used in the Botswana legislation.

¹⁴⁴ Section 45(1) of the *LGA*.

¹⁴⁵ Section 45(1) of the *LGA*.

¹⁴⁶ Section 45(1) of the *LGA*.

¹⁴⁷ Section 47 of the *LGA*.

¹⁴⁸ Molebatsi and Kalabamu 2016 *UBLJ* 61-62.

¹⁴⁹ Section 5(1) of the *TCPA*.

¹⁵⁰ Schedule 1 of the *LGA*.

¹⁵¹ Dipholo, Mafema and Tshishonga 2011 *Journal of Public Administration* 1439-1441.

¹⁵² Dipholo, Tshishonga and Mafema 2014 *Journal of Afr and Asian Local Gov Studies* 44.

¹⁵³ Smoke 1993 *World Dev* 902.

¹⁵⁴ Mooketsane, Bodilenyane and Motshegwa 2017 *Afr Journal of Public Affairs* 49.

¹⁵⁵ Kalabamu and Lyamuya 2017 *Current Urban Studies* 507.

¹⁵⁶ Mfundisi "The Formation and Structure of Central Government" 170.

¹⁵⁷ Pieterse 2020 *Afr Journal of Int and Comparative Law* 626.

collect taxes and rates due to prevailing circumstances in their own countries. Failure to collect taxes constrain revenue raising potential of councils.¹⁵⁸ For Botswana, the lack of enforcement mechanisms, poor communication by councils and generally low tax collection altogether cripples their financial independence.¹⁵⁹ The revenue from the central government is not enough also, thus leading to poor project implementation at local government level.¹⁶⁰

4.4 Relevant features of spatial planning law

Spatial planning is a function of both the central and local government.¹⁶¹ The purpose of this section is to assess if the laws provide some possible solutions to the land use challenges identified in Chapter 2 above.¹⁶² These spatial planning law includes the *TCPA* and bye-laws. Spatial planning law is further conducted through several regulatory instruments.¹⁶³ These are building codes, building regulations and building moratoria.¹⁶⁴ These instruments are founded in law and have a legal effect.¹⁶⁵ In Botswana these include the *Town and Country Planning Act* 4 of 2013, the *National Spatial Plan 2036*, the *Revised Development Control Code* of 2013, the *Urban Development Standards* of 199 and *bye-laws*.

4.4.1 The Town and Country Planning Act 4 of 2013

As already asserted, the *TCPA* is the centrepiece of planning law in Botswana.¹⁶⁶ This legislation repealed the old planning law.¹⁶⁷ Its provisions and regulations are also binding on the state.¹⁶⁸ In terms of this Act, the power of planning is decentralised to local government, and councils are appointed as planning authorities for their respective planning areas.¹⁶⁹ Previously, the Minister held

¹⁵⁸ Berrisford, Cirolia and Palmer 2018 *Env and Urbanization* 39.

¹⁵⁹ Kampamba *et al* 2018 *Journal of Property Tax Assessment & Administration* 38.

¹⁶⁰ Samboma 2022 *Journal of Public Affairs* 5.

¹⁶¹ Van der Berg *Municipal Planning Law and Policy for Sustainable Cities in South Africa* 129.

¹⁶² See para 2.3 at Chapter 2 above.

¹⁶³ Van der Berg *Municipal Planning Law and Policy for Sustainable Cities in South Africa* 132.

¹⁶⁴ Van der Berg *Municipal Planning Law and Policy for Sustainable Cities in South Africa* 132.

¹⁶⁵ Van der Berg *Municipal Planning Law and Policy for Sustainable Cities in South Africa* 132-133.

¹⁶⁶ See paras 1.1 and 4.1 above.

¹⁶⁷ Section 55 of the *TCPA*.

¹⁶⁸ Section 54 of the *TCPA*.

¹⁶⁹ Section 15 of the *TCPA*.

extensive powers in terms of planning of the country.¹⁷⁰ Such powers were to be exercised in light of the constituted planning board.¹⁷¹ In terms of the new *TCPA*, the policy coordination and capacity are provided by the Department of Town and Country Planning which is led by a Director.¹⁷² Under the *TCPA*, the Minister has the power to declare planning areas.¹⁷³ In terms of planning areas, all settlement areas have been declared planning areas. The supervision of planning and control is done by the Director of Town and Country Planning.¹⁷⁴ It is argued that the Minister, despite the decentralisation of planning to local government, still has a grip over the planning process in the country.¹⁷⁵ The *TCPA* incorporates elements of public participation in plan making.¹⁷⁶

Public participation is vital for the community to participate in decisions that affect them.¹⁷⁷ Lack of public participation leads to usurping and centralised power by the political authority.¹⁷⁸ Section 18(1) provides that in the preparation of a regional plan the Minister should consult local authorities, a regional planning advisory committee and the *Bogosi*. This means that *Bogosi* still plays a pivotal role in advancing the participation process. Its legitimacy can be traced from history, because the chief was the repository of all power regarding his tribe.¹⁷⁹ Plans should be in conformity with the laws and enable participation.¹⁸⁰ Public participation fosters engagement.¹⁸¹ The society's engagement in planning is very important

¹⁷⁰ See generally part II of the repealed *TCPA* Cap 32:09.

¹⁷¹ Section 5 of the *TCPA* Cap 32:09.

¹⁷² Section 4(2) of the *TCPA*.

¹⁷³ Section 15 of the *TCPA*.

¹⁷⁴ Section 4(2)(a) of the *TCPA*.

¹⁷⁵ For example, the Minister declares planning areas under s 15 of the *TCPA*. The Minister determines which area requires a regional plan under s 16 of the *TCPA*. The Minister has the power to direct a local authority to alter or replace a local plan under s 19(6) of the *TCPA*. All these powers limit the independence of the local authorities in the spatial planning process in Botswana. For example, a local authority may come up with a plan that addresses the planning needs of a particular area, but the Minister may turn it down.

¹⁷⁶ See ss 18 and 20 of the *TCPA*.

¹⁷⁷ Oliveira and Hersperger 2018 *LUP* 625.

¹⁷⁸ Meyer and Auriacombe 2019 *Sustainability* 12.

¹⁷⁹ Morolong and Ng'ong'ola "Revisiting the Notion of Ownership of Tribal Land in Botswana" 145.

¹⁸⁰ Kombe and Kreibich 2000 *HI* 235.

¹⁸¹ Nomdo, Masiya and Khambule 2019 *Journal of Human Ecology* 42-43.

because it helps to provide better conditions for society and other social groups.¹⁸² As argued previously, one of the many challenges that affect spatial planning is defective plans and policies that are not in consonance with the current spatial challenges that the country experiences.¹⁸³ Therefore, participation will help identify planning needs and help remedy challenges such as informal land occupation around Gaborone.¹⁸⁴ UN Habitat advocates for all modes of public participation, including the informal ones, to be utilised in the planning process.¹⁸⁵ Participation should be incorporated from diagnosis to plan formulation and evaluation.¹⁸⁶

Previously, it was indicated that land conflicts are caused by illegal subdivisions and unclearly defined boundaries.¹⁸⁷ The *TCPA* provides that no person shall make a subdivision or consolidation of land without the permission of the planning authority.¹⁸⁸ The Act provides penalties for illegal subdivisions, which includes a fine of P1000 or an imprisonment term of one (1) year or both.¹⁸⁹ These sanctions are very small. This means that they do not deter illegal subdivisions. There is a need for stricter and tougher sanctions to deter individuals from engaging in subdivision. It has been argued previously that around Gaborone, especially in peripheral villages such as Mogoditshane and Mmopane, the cause of concern is illegal subdivisions that lead to land conflicts and perpetuate land corruption.¹⁹⁰

The *TCPA* provides for developmental control of land.¹⁹¹ In terms of section 21(i) permission shall be required for the development of land. The Act lists activities that are deemed not to be the development of land for which permission will not be required.¹⁹² It does not state what constitutes development of land. The *TCPA*

¹⁸² Slaev *et al* 2019 *Planning Theory* 463.

¹⁸³ See para 2.3.3 above.

¹⁸⁴ See para 2.3.5 above.

¹⁸⁵ UN Habitat 2015 *Int Guidelines on Urban and Territorial Planning Handbook* 12.

¹⁸⁶ UN Habitat 2015 *Int Guidelines on Urban and Territorial Planning Handbook* 13.

¹⁸⁷ See para 2.3.4 in Chapter 2 above.

¹⁸⁸ Section 37(2) of the *TCPA*.

¹⁸⁹ See generally s 37(3) of the *TCPA*.

¹⁹⁰ See paras 2.3.2 and 3.2.1 above.

¹⁹¹ See Part V of the *TCPA*.

¹⁹² Section 2(a)-(d) of the *TCPA*.

provides that zoning may be incorporated into plans to control development.¹⁹³ Other strategies may include setting out of housing layout, density, and spacing, amongst others.¹⁹⁴ This is particularly relevant for urbanisation because with urbanisation, land is mostly used for purposes it was originally not intended for, for example commercial use instead of agricultural purposes.¹⁹⁵

4.4.2 The National Spatial Plan 2036

The *National Spatial Plan 2036* (hereafter *NSP 2036*) is a policy document that contains the country's spatial vision.¹⁹⁶ It is the first ever *NSP* in Botswana and acts as a planning tool that guides the country's spatial planning process.¹⁹⁷ It aims to develop strategy to manage the growth of settlements in Botswana.¹⁹⁸ The *NSP 2036* identifies several deficiencies of the Botswana's spatial planning system including failure to address sprawl, control of urban settlements that are not adequately defined, and weak settlement policy.¹⁹⁹ As such the *NSP 2036* calls for regional planning that will include creation of new planning regions in Botswana and the promotion of a balanced population distribution.²⁰⁰

The *NSP 2036* proposes a settlement hierarchy which will assist with spatial planning. It indicates that the settlement hierarchy provided by prior regulatory instruments no longer serves its purpose.²⁰¹ In terms of the *NSP 2036*, the national settlement system will be arranged as follows; Gaborone will remain the national capital, secondary cities will include Francistown, Maun and Palapye, and there will also be regional centres, resource towns, gateway towns, district and sub-district headquarters and villages.²⁰² The urban centres with higher population will be

¹⁹³ Schedule 2 of the *TCPA*.

¹⁹⁴ Schedule 2 of the *TCPA*.

¹⁹⁵ See para 2.3.3 above.

¹⁹⁶ The *NSP 2036* 10.

¹⁹⁷ The *NSP 2036* 11.

¹⁹⁸ The *NSP 2036* 12.

¹⁹⁹ The *NSP 2036* 38.

²⁰⁰ The *NSP 2036* 41.

²⁰¹ The *NSP 2036* 61.

²⁰² The *NSP 2036* 61.

provided with services and investment.²⁰³ The concentration of country resources in urban centres leads to urban bias.²⁰⁴ As already defined, urban bias means that a share of the country's resources is allocated to urban areas whilst rural areas suffer.²⁰⁵ It has been proven that due to urban bias, living conditions in rural areas in Botswana have deteriorated.²⁰⁶ Generally, the distribution of infrastructure and services as per the needs of each settlement could reduce urban bias.²⁰⁷ This infrastructure and these services include health care, roads, electricity, telephone connectivity, internet and banks.²⁰⁸ This may help reduce net migration to Gaborone and other urban centres thereby reducing land use challenges.

In terms of Gaborone, the plan notes that the city must be planned in a way that ensures that it continues to play a major role as an economic hub.²⁰⁹ This includes encouraging mixed land use and negotiating a new spatial governance regime between the city and peripheral regions such as Kweneng.²¹⁰ The plan indicates that planning, especially for Gaborone and its peripheral settlements, must be harmonised.²¹¹ Plans help to chart a path of how the city should grow and in turn this will minimise the effects of rapid urbanisation.²¹² This may assist in guiding urban development especially in areas such as Mogoditshane where property rights are under threat of commodification by the elites.²¹³

4.4.3 The Revised Development Control Code of 2013

One of the planning tools that Botswana has devised is the *Revised Development Control Code 2013* (hereafter *DCC* of 2013). The *DCC* is a set of regulations that are aimed at controlling development in a country.²¹⁴ These regulations have a legal

²⁰³ The *NSP 2036* 61.

²⁰⁴ See para 2.2.1 above.

²⁰⁵ See para 2.2.1 above.

²⁰⁶ Sechele 2015 *Int Journal of Social Science Research* 56.

²⁰⁷ Barrett *et al* 2017 *Journal of Afr Economies* 24.

²⁰⁸ Barrett *et al* 2017 *Journal of Afr Economies* 24.

²⁰⁹ The *NSP 2036* 63.

²¹⁰ The *NSP 2036* 64.

²¹¹ The *NSP 2036* 109.

²¹² Amin, Lewis-Lettington and Njuguna "Effectiveness of Planning Law in Sub-Saharan Africa" 111.

²¹³ See para 2.3.3 above.

²¹⁴ Kapamba *et al* "Land Governance in Botswana".

effect whilst plans do not.²¹⁵ The purpose of the code is to regulate development and land use in Botswana.²¹⁶ The *DCC* is used to provide a detailed interpretation of the *TCPA*.²¹⁷ The *DCC* of 1995 was revised and the *DCC* of 2013 was developed.²¹⁸ The departure from the *DCC* of 1995 was informed by new land development uses which were complex which the earlier code had failed to address.²¹⁹ This included the rise of commercial interests on peri-urban settlements such as Mogoditshane.²²⁰ It is noted that it was difficult to implement the *DCC* of 1995 due to Botswana's lack of planning history.²²¹ Instead of following the code, people built their houses incrementally in Botswana with little regard to the planning laws.²²² The *DCC* of 1995 was regarded as rigid and overly prescriptive, and the need was felt for flexibility to respond to planning contexts and needs of various settlements.²²³

The local authorities are now using the *DCC* of 2013 in both urban and rural settlements to help in the planning process.²²⁴ The *DCC* of 2013 recommends that all development plans must contain their own set of standards fit for their areas.²²⁵ The *DCC* of 2013 categorises activities in land use which include residential, civic, commercial and industrial uses.²²⁶ Land must be used for what it has been zoned for, for example residential land is used for residences, not commercial purposes.²²⁷ A land use activity that is in conformity with the regulations is declared legal.²²⁸ This may reduce land use conflicts and protect property rights.²²⁹

²¹⁵ Goodfellow 2013 *Geoforum* 84.

²¹⁶ The *DCC of 2013* 22.

²¹⁷ Molebatsi "Understanding the Coexistence of the Tribal Land Act" 143.

²¹⁸ Molebatsi and Kalabamu 2016 *UBLJ* 64.

²¹⁹ The *DCC of 2013* 3.

²²⁰ Mabin, Butcher and Bloch 2013 *Social Dynamics* 171.

²²¹ Hammami 2012 *Journal of Planning Education and Research* 268.

²²² Boamah, Gyimah and Nelson 2012 *HI* 137.

²²³ The *Botswana Habitat Report III 2014* 28.

²²⁴ Mosha "A Reappraisal of Spatial Planning in Botswana" 122.

²²⁵ The *DCC of 2013* 3.

²²⁶ The *DCC of 2013* 27.

²²⁷ Van Wyk *Planning Law* 245.

²²⁸ Nel 2016 *Urban Forum* 84.

²²⁹ The *DCC of 2013* 27.

4.4.4 *The Urban Development Standards of 1992*

The *Urban Development Standards* of 1992 (hereafter *UDS* of 1992) were approved by cabinet and by a Presidential Directive in 1992.²³⁰ Prior to this, there was the 1981 *UDS* which was revised in 1992. It was found out that in Botswana, plot sizes were large, thereby taking out a lot of land which could be used for development.²³¹ The resultant effects of these larger plot sizes, especially in urban areas, lead to urban sprawl and high serving costs.²³² As such government was not able to provide infrastructure, such as sewage, water and drainage systems.²³³

In terms of the *UDS* of 1992, plots are categorised into larger, medium and small.²³⁴ Larger residential plots are only allowed under special circumstances.²³⁵ The regulation of plot sizes may help reduce land usage which leads to urban sprawl and high shortages of land in urban areas like Gaborone. In terms of the provision of basic services, the *UDS* provides that they should be within one kilometre or walking distance.²³⁶ The *UDS* helps to determine how much land is needed for development.²³⁷ As stated earlier, urban centres in Botswana are experiencing serious shortages of land.²³⁸ Therefore providing plot size limits may address land shortages. This is because more people can be allocated land in a smaller piece of land if it is properly managed.

4.4.5 *Bye-laws*

As indicted earlier, councils are empowered to promulgate bye-laws at local level in order to address the needs of the community.²³⁹ Despite the semblance of independence of the local authorities on the promulgation of bye-laws, they are still

²³⁰ The *UDS* of 1992 3.

²³¹ The *UDS* of 1992 2.

²³² The *UDS* of 1992 2.

²³³ Scholz, Robinson and Dayaram "Colonial Planning Concept and Post-colonial Realities" 71.

²³⁴ The *UDS* of 1992 4.

²³⁵ The *UDS* of 1992 4.

²³⁶ The *UDS* of 1992 7.

²³⁷ Molebatsi and Kalabamu 2016 *UBLJ* 63.

²³⁸ See para 2.3.6 above.

²³⁹ See para 4.3.2 above. An extensive search on the bye-laws of Gaborone and other urban centres in Botswana was conducted, but there was no specific bye-law that dealt with spatial planning in the country.

subject to the scrutiny of the Minister.²⁴⁰ As already mentioned above, the bye-laws need to be submitted to the Minister before they are published in the government *Gazette*.²⁴¹ The Minister has the power also to make model bye-laws and possesses the authority to suspend a bye-law.²⁴² There is also the Parliamentary Committee on subsidiary legislation, which sits to examine all the subsidiary legislation that comes before it.²⁴³ It is contended that these legislative controls sometimes limit the independence of local authorities in bye-law promulgation.²⁴⁴ It is the researcher's contention that in order for councils to effectively carry out their mandate, full autonomy of bye-law making should be extended to them.

4.5 The marriage between spatial planning law and tenure security

4.5.1 Introductory remarks

Chigbu²⁴⁵ developed an idea of tenure responsive land use planning (hereafter TR-LUP). He argues that there is merit in combining tenure security and planning to tackle land tenure insecurity.²⁴⁶ According to Akaateba,²⁴⁷ TR-LUP helps to safeguard the rights of indigents during preparation of plans, thereby guaranteeing their security. Land use planning deals with the design of areas in consonance with the needs of the community.²⁴⁸ It may decide that the best land parcels can be preserved for the future.²⁴⁹ UN Habitat advocates for a tenure-responsive planning.²⁵⁰ It involves incorporating tenure goals in the planning process.²⁵¹ However, due to the interconnectedness of land use and spatial planning, that

²⁴⁰ See para 4.3.2 above.

²⁴¹ Fombad *The Botswana Legal System* 70.

²⁴² See ss 48 and 49 of the *LGA* respectively.

²⁴³ Fombad *Botswana Legal System* 70.

²⁴⁴ *The Report of the Second Presidential Commission on the Local Government Structure in Botswana 2001* 24.

²⁴⁵ Chigbu *et al* 2017 *JEPM* 1623; Chigbu, Alemayehu and Dachaga 2019 *Dev in Practice* 372; Chigbu *et al* 2019 *IJER* 4; Chigbu *et al* "Tenure Responsive Planning".

²⁴⁶ Chigbu, Alemayehu and Dachaga 2019 *Dev in Practice* 372.

²⁴⁷ Akaateba 2023 *Int Planning Studies* 109.

²⁴⁸ Cobbinah, Asibey and Gyedu-Pensang 2020 *LUP* 1.

²⁴⁹ Cobbinah, Asibey and Gyedu-Pensang 2020 *LUP* 1.

²⁵⁰ UN Habitat 2021 *Tenure-Responsive Land Use Planning* 2.

²⁵¹ UN Habitat 2021 *Tenure-Responsive Land Use Planning* 2.

relationship is borrowed to advance an argument that spatial planning is a corollary for tenure security.²⁵²

According to the FAO, spatial planning should be conducted in a manner that recognises all tenure rights including overlapping ones.²⁵³ Customary tenure systems must also be considered in the formal planning processes.²⁵⁴ Modernist planning in most African countries has been viewed as the imposition of western power by traditional authorities.²⁵⁵ It is argued that the two must complement each other.²⁵⁶ The reason for such complementarity is to avoid power dynamics and clashes which often lead to the elites displacing the poor off their land.²⁵⁷ The two can help protect customary rights through participatory approaches in the making of plans.²⁵⁸

The nexus between spatial planning law and land tenure is not an obvious one.²⁵⁹ However, Chigbu *et al*²⁶⁰ assert that both play important roles in the attainment of a country's developmental goals. Africa experiences tenure related conflicts, and the problem is worse when there is a lack of proper spatial planning.²⁶¹ The two can arguably be intertwined to improve land tenure security²⁶² and help control rapid urbanisation. Babalola²⁶³ observes that improvement of tenure security encompasses a process of legitimacy, legality and certainty with a tenure system. Legitimacy can be achieved through land cadastres and clearly defined boundaries.

²⁵² Lagopoulos 2018 *Urban Science* 5.

²⁵³ FAO *VGGT* 32.

²⁵⁴ FAO *VGGT* 32.

²⁵⁵ Siiba, Adams and Cobbinah 2018 *Cities* 101.

²⁵⁶ Anane and Cobbinah 2022 *HI* 3.

²⁵⁷ Akaateba 2019 *LUP* 8.

²⁵⁸ Akaateba 2023 *Int Planning Studies* 109.

²⁵⁹ Akanbang, Ibrahim and Yakubu 2021 *SN Social Sciences* 259.

²⁶⁰ Chigbu *et al* 2017 *JEPM* 1624.

²⁶¹ Agegnehu *et al* 2021 *Land* 10.

²⁶² Chigbu, Alemayehu and Dachaga 2019 *Dev in Practice* 373.

²⁶³ Babalola *Measuring Tenure Security of the Rural Poor Using Pro-Poor Land Tools: a Case Study of ItajiEkiti, Ekiti State Nigeria* 23.

Certainty is realised when there is no corruption and no land conflicts.²⁶⁴ Van Molen²⁶⁵ argues that:

Knowledge of the existing land tenure arrangements determines the interventions that the government should design: restrictions, takings, subsidies, monitoring measures, and permits.

Urban development happens in the context of an established tenure system.²⁶⁶ Therefore, it ought to be orderly so that it meets developmental needs of a country.²⁶⁷ African countries particularly have diverse land tenure systems.²⁶⁸ It is therefore important that spatial planning reflect these dynamics and must harmonise each land tenure system's needs.²⁶⁹ Therefore, spatial planning is dependent on effective land governance and clearly defined land rights.²⁷⁰ In order for spatial planning to work effectively, there is a need to know the property rights arrangements that underpin a parcel of land.²⁷¹ Chigbu *et al*²⁷² note that spatial planning can be combined with tenure security to provide for functional land markets, and affordable housing. The reasons for this argument are as follows:

- a) The functions of spatial planning and tenure security coincide;
- b) Spatial planning fosters infrastructure planning which enhances tenure security;
- c) The institutions of spatial planning and tenure complement each other thereby enhancing spatial planning and tenure security;
- d) Common dispute resolution techniques enhance both spatial planning and tenure security.

²⁶⁴ Babalola *Measuring Tenure Security of the Rural Poor Using Pro-Poor Land Tools: a Case Study of ItajiEkiti, Ekiti State Nigeria* 23.

²⁶⁵ Van der Molen 2015 *Administration & Society* 179.

²⁶⁶ Dadashpoor and Ahani 2019 *LUP* 218.

²⁶⁷ Cobbinah 2017 *LUP* 223.

²⁶⁸ Effossou and Cho 2022 *SAGJ* 159-160.

²⁶⁹ Van Rij and Altes 2010 *The Town Planning Review* 284.

²⁷⁰ Mitchell, Enemark and Van der Molen 2015 *LUP* 195.

²⁷¹ Chigbu *et al* 2017 *JEPM* 1623.

²⁷² Chigbu *et al* 2017 *JEPM* 1624.

4.5.2 *The link viewed through interlinking functions from legislation*

The relationship between land tenure security and land use planning lies in the fact that land use planning is subject to the tenure arrangements and rules for access to land and alienation.²⁷³ Policies which result in land rights formalisation may increase tenure security.²⁷⁴ Spatial planning on the other hand assists in anticipating and preventing land use conflicts, in that it helps to remedy rights and border disputes.²⁷⁵ For example, under the *TCPA*, an individual is not allowed to subdivide land without the consent of the planning authority.²⁷⁶ In Botswana, each tenure system is regulated by legislation which has shaped and developed it over time. As already established, customary tenure is administered by Land Boards in terms of the *TLA*.²⁷⁷ State land is administered in accordance with the *SLA*.²⁷⁸

Spatial planning law plays a pivotal role in controlling and regulating urban sprawl.²⁷⁹ The delineation of urban boundaries can help control the impact and direction of urban sprawl,²⁸⁰ but this should be informed by urban use regulations and urban planning.²⁸¹ The development of spatial plans in terms of spatial planning law and regulations helps to regulate land where urban sprawl occurs.²⁸² It does so by means of land use restrictions, for example.²⁸³

As noted earlier on Chapter 2,²⁸⁴ African tenure systems, including those of Botswana, are beset by land conflicts.²⁸⁵ Spatial planning techniques can be

²⁷³ Yeboah and Shaw 2013 *IDPR* 27.

²⁷⁴ Holden and Otsuka 2014 *Food Policy* 93.

²⁷⁵ Metternicht *Land Use Planning* 4.

²⁷⁶ See para 4.4.1 above.

²⁷⁷ See paras 3.5.1 and 3.5.5 above.

²⁷⁸ See para 3.5.2 above.

²⁷⁹ Pagliarin 2018 *Urban Studies* 3650.

²⁸⁰ Burton and Ramírez 2019 *Sustainability* 5.

²⁸¹ Jiang *et al* 2016 *Annals of the American Association of Geographers* 1322.

²⁸² Wang, Han and Lai 2014 *HI* 121; Amin, Lewis-Lettington and Njuguna indicates that the drafting of spatial plans needs participation from the community to harmonise their different interests as this will also enhance the rule of law. -See Amin, Lewis-Lettington and Njuguna "Effectiveness of Planning Law in Sub-Saharan Africa" 111.

²⁸³ Nel 2016 *Urban Forum* 82-83.

²⁸⁴ See para 2.3.4 above.

²⁸⁵ See para 2.3.4 above.

deployed to reduce these conflicts.²⁸⁶ Spatial planning is closely connected with development by providing people with access to basic services.²⁸⁷ This can be deployed particularly in customary tenure which is said to have weak security.²⁸⁸ This will in turn lead to tenure security improvement.²⁸⁹ Gwaleba and Chigbu²⁹⁰ argue this for participatory property formation. They reason that in preparation of maps, landowners show the boundaries of their plots and this in turn, reduces the land conflicts.²⁹¹

4.5.3 The link viewed through infrastructure planning

Spatial planning fosters infrastructure planning.²⁹² This include services such as electricity, water and sanitation that are key in the realisation of spatial plans.²⁹³ Spatial planning enables access to housing and health facilities.²⁹⁴ Access to basic services coincides with tenure security.²⁹⁵ In this light, people are inclined to invest in land where there are adequate services.²⁹⁶ The provision of basic services to the informal settlements improves *de facto* tenure security.²⁹⁷ It is revealed by Simiyu, Cairncross and Swilling²⁹⁸ that legal titles sometimes does not confer security, but the provision of basic services does. In Botswana, the government eventually provided essential services to informal settlements such as Old Naledi and Monarch that emerged within Gaborone and Francistown, respectively.²⁹⁹

Additionally, the provision of such infrastructure was coupled with the allocation of land to the urban poor at no cost, whilst housing is provided at a highly subsidised

²⁸⁶ Agegnehu *et al* 2021 *Land* 14.

²⁸⁷ Brown and Lloyd-Jones "Spatial Planning, Access and Infrastructure" 191.

²⁸⁸ Chikaya-Banda and Chilonga 2021 *LUP* 3.

²⁸⁹ Akaateba 2023 *Int Planning Studies* 3.

²⁹⁰ Gwaleba and Chigbu 2020 *LUP* 11.

²⁹¹ Gwaleba and Chigbu 2020 *LUP* 11.

²⁹² Metternicht *Land Use and Spatial Planning: Enabling Sustainable Management of Land Resources* 8.

²⁹³ Cirolia and Berrisford 2017 *HI* 72.

²⁹⁴ Shekhar, Schmidt and Wehling 2019 *HI* 69.

²⁹⁵ Lahoti 2022 *Int Journal of Urban Sustainable Dev* 328.

²⁹⁶ Wagah *et al* 2017 *Int Journal of Sciences* 40.

²⁹⁷ See para 3.3.2.1 above. See also Bhanjee, and Zhang 2021 *DSA* 195.

²⁹⁸ Simiyu, Cairncross and Swilling 2019 *Urban Forum* 234.

²⁹⁹ Mosha 2013 *Urban Forum* 144.

price.³⁰⁰ This is done through the SHAA program.³⁰¹ It is argued that, the CoR has helped people to access services such as electricity, telephone connectivity and water.³⁰² As argued in para 2.3.5 above, these services could not be accessed without land titles. The CoRs have also increased women's participation in ownership of land.³⁰³

In Botswana, the introduction of CoRs in the 1970s has helped to improve tenure security.³⁰⁴ It is argued that there is assurance that one will not be evicted from this land and that capital investment increases.³⁰⁵ A CoR can be easily converted into a FPSG (a 99 or 50 year lease) and through survey registered within the Deeds Registry.³⁰⁶ The author concurs with Mosha *et al*³⁰⁷ when they contend that security of tenure was an enabler to control informal settlements in Botswana. Whilst it has been argued above, that it is expensive for the urban poor to convert their CoRs to FPSGs due to finances involved, the government has promised that CoRs will be registrable.³⁰⁸ Land which was not surveyed will be surveyed.³⁰⁹ It also indicates that exorbitant costs for deeds registration will be reduced and a standardised price will be maintained.³¹⁰ Whilst there has been discomfort on whether FPSG will be extended after their expiry, there is a policy commitment that FPSG will be renewed at the end of their duration.³¹¹ This strengthens their security further.

³⁰⁰ Mosha 2013 *Urban Forum* 146.

³⁰¹ Abdillahi, Manaf and Awang 2022 *LUP* 6-7.

³⁰² Yahya "The Certificate Rights Story in Botswana" 200.

³⁰³ Yahya "The Certificate Rights Story in Botswana" 200.

³⁰⁴ Dixon-Gough and Molobeng "Managing Informal Settlements in Botswana" 103.

³⁰⁵ Abdillahi, Manaf and Awang 2022 *LUP* 6-7.

³⁰⁶ Mosha *et al* 2022 *Property Management* 6.

³⁰⁷ Mosha *et al* 2022 *Property Management* 6.

³⁰⁸ See para 3.6 above. The *Revised Botswana Land Policy 2019* 15.

³⁰⁹ The *Revised Botswana Land Policy 2019* 30.

³¹⁰ The *Revised Botswana Land Policy 2019* 30.

³¹¹ The *Revised Botswana Land Policy 2019* 15.

4.5.4 *The link viewed through complementary institutions*

Tenure security depends on a myriad of institutions that interact with each other.³¹² These institutions act as an authority within society to enforce tenure rights.³¹³ Spatial planning institutions play a critical role in ensuring security of tenure.³¹⁴ These institutions conduct detailed surveys of land, and demarcation improves land tenure security.³¹⁵ For example, the Department of Surveys and Mapping deals with surveying of all land in Botswana.³¹⁶ Land institutions in Botswana, especially the Land Boards, have been lauded as the best model for African countries to improve customary tenure security.³¹⁷ This model was adopted in Namibia and Malawi as a way to improve customary rights to real security.³¹⁸

The Land Boards have helped to register informal land rights that existed within the customary land tenure.³¹⁹ Certificates issued by the Land Boards are now registrable under the Deeds Registry.³²⁰ Van Asperen, Kalabamu and Zevenbergen³²¹ argue that in Mogoditshane and Tlokweng, which are mostly affected by rapid urbanisation, those issued with certificates felt secure in their land. Women are also able to title their land and feel secure.³²² The certificate of customary land grants is now elevated to the deed known as SLT which will enable one to secure credit from financial institutions with it.³²³ Even though customary land may be repossessed by the Land Board, the law prescribes that the community will be consulted six months prior to such repossession.³²⁴

³¹² Marcenko 2019 *JLPUL* 154.

³¹³ Valkonen *Conceptions, Practices and Power Plays Around the Notion of Tenure Security: Examining the Land Policy Development and Implementation Process in Madagascar* 26.

³¹⁴ Ansah and Chigbu 2020 *Land* 23.

³¹⁵ Byamugisha *Securing Africa's Land for Shared Prosperity; A Program to Scale Up Reforms and Investments* 9.

³¹⁶ Section 3(2) of the *Land Survey Act* Cap 33:01.

³¹⁷ Jain *et al* 2016 *Int Journal of Social Science Studies* 88.

³¹⁸ Wily 2011 *Dev and Change* 748.

³¹⁹ Kalabamu 2019 *LUP* 341.

³²⁰ Kalabamu 2021 *LUP* 6.

³²¹ Van Asperen, Kalabamu and Zevenbergen "Evaluation of Land Administration Tools" 165-166.

³²² Griffiths *Transformations on the Ground; Space and the Power of Land in Botswana* 98.

³²³ Ng'ong'ola 2019 *UBLJ* 2022.

³²⁴ Section 18(1) of the *LTA Regulations*.

4.5.5 *The link viewed through the lens of dispute resolution*

Customary tenure has greatly reduced the persistent land conflicts taking place on the urban fringe.³²⁵ This has been achieved through the formalisation of tenure rights.³²⁶ The *TLA* introduces novel aspects such as deeds of customary land.³²⁷ As already stated, a person who does not possess a deed of grant is not allowed to occupy the land, this will reduce informal occupation.³²⁸ Ng'ong'ola³²⁹ argues that this would reduce land dispossessions and enhance investment.³³⁰ Kalabamu³³¹ notes that even before British colonisation, Botswana has had the best Alternative Dispute Resolution (hereafter ADR) mechanisms in dealing with land disputes. The tribal courts presided over by a chief and his assessors listened to land complaints and issues.³³² It is warned that the co-existence of these institutions may further exacerbate conflicts leading to tenure insecurity.³³³

In Botswana, those who have grievances can also present them to Land Boards which are empowered to hear disputes.³³⁴ It is cautioned, however that Land Boards should not assume the role of judicial bodies, as they have a direct interest in land matters.³³⁵ Cases can be launched at the Land Tribunal, a special court established under the *LTA* to deal with land disputes.³³⁶ In planning disputes, tribunals provide an avenue where technical matters regarding planning are solved.³³⁷ This type of ADR is often commended for providing quicker and more accessible justice to

³²⁵ Kalabamu "Land Conflicts and Alternative Dispute Resolution in Sub-Saharan Africa" 177-178.

³²⁶ Kabigi, De Vries and Kelvin "Integrating Customary Land Tenure" 105-120.

³²⁷ Ng'ong'ola 2019 *UBLJ* 22.

³²⁸ See para 3.5.5 above.

³²⁹ Ng'ong'ola 2019 *UBLJ* 26.

³³⁰ Boone 2019 *The Journal of Dev* 389.

³³¹ Kalabamu "Land Conflicts and Alternative Dispute Resolution in Sub-Saharan Africa" 177.

³³² Kalabamu "Land Conflicts and Alternative Dispute Resolution in Sub-Saharan Africa" 177.

³³³ Kobusingye, Van Leeuwen and Van Dijk 2016 *JPUL* 240.

³³⁴ Kalabamu "Land Conflicts and Alternative Dispute Resolution in Sub-Saharan Africa" 179.

³³⁵ Kalabamu 2000 *LUP* 310.

³³⁶ See s 3 of the *Land Tribunal Act* 4 of 2014.

³³⁷ Mualam 2014 *Journal of Planning Literature* 371. The FAO urges states to introduce specialised tribunals that will deal with the resolutions of tenure rights disputes. The said tribunals must also exercise power over spatial planning and survey issues. -See FAO *VGGT* 33.

ordinary citizens who cannot afford exorbitant court fees.³³⁸ This is in line with the argument of the FAO that countries must put in place affordable and effective administrative bodies to resolve tenure disputes.³³⁹ If parties are dissatisfied with the outcome, they have a right of appeal to the High Court or Court of Appeal.³⁴⁰ This is vital because disputes that arise from land contestations need to be resolved to secure land rights and increase investment.³⁴¹

4.6 Concluding remarks

The nub of this chapter was to explain and evaluate Botswana's spatial planning law system with a view to determine how it controls rapid urbanisation. Historically, Botswana has had a way in which planning of settlements was done.³⁴² However, this planning was later diluted by the British planning systems that were brought about by colonisation in the country.³⁴³ Before the British colonised the country, the *Kgosi* played a pivotal role in the planning process of settlements, and such planning was done according to the needs of his people.³⁴⁴ Today, the role of the *Kgosi* in spatial planning have been deposed by modernist institutions.³⁴⁵ This includes central government institutions and the local government. The problem with these modernist institutions is that planning is not done in consonance with what the society needs. The author argued that public participation is vital in the spatial planning process, and such participation must include voices from traditional authorities.³⁴⁶

³³⁸ Ibrahim *et al* 2022 LUP9. The Land Tribunal may disregard technicalities and may not be bound by the rules of evidence in dealing with disputes. -See *Matshedi and Another v Kwadibana and Others* 2014 2 BLR 273 (CA).

³³⁹ FAO VGGT 32-33.

³⁴⁰ The High Court of Botswana has original and unlimited jurisdiction to determine all cases that come before it. It is also clothed with supervisory jurisdiction to supervise all the subordinates courts. -See ss 95(1) and 95(5) of the *Constitution* 1966.

³⁴¹ Deininger, Hilhorst and Songwe 2014 *Food Policy* 83.

³⁴² See para 4.2 above.

³⁴³ See para 4.2 above.

³⁴⁴ See para 4.2 above.

³⁴⁵ See para 4.3.1 above.

³⁴⁶ See para 4.3.3 above.

The *TCPA* has brought many fundamental changes, in that planning is now done by local authorities. This decentralisation is important because, unlike with the central government, the local government is close to the people.³⁴⁷ It is argued that with local authorities, it is easy to carry out spatial planning, which is in consonance with the needs of the local people.³⁴⁸ Even though the *TCPA* incorporates elements of public participation, however, the role of traditional institutions such as *Bogosi* in planning is minimal.³⁴⁹ *Dikgosi* need to be incorporated in the planning process because they have knowledge of what planning needs the community they lead have.³⁵⁰ The chapter also found that spatial planning and tenure security are interlinked. Spatial planning helps in the realisation of tenure security.³⁵¹ This interface helps the two to work together to control rapid urbanisation. Spatial planning assists in anticipating and preventing land use conflicts, in that it helps to remedy rights and boundary disputes.³⁵² The next chapter concludes the study with views on how the land tenure security and spatial planning law framework may be optimised to respond adequately to some of the impacts of rapid urbanisation.

³⁴⁷ See para 4.4.1 above.

³⁴⁸ See para 4.3.2 above.

³⁴⁹ See para 4.4.1 above.

³⁵⁰ See para 4.3.1 above.

³⁵¹ See the discussion at para 4.5 above.

³⁵² See para 4.5 above.

Chapter 5 Conclusion

5.1 Overview

The study explored how tenure security and spatial planning law may help control some of the impacts of rapid urbanisation, focusing on land use. This was done in the context of Botswana. In general, spatial planning laws may help control aspects of rapid urbanisation by containing and somehow steering the trajectory of urban sprawl.¹ Tenure security on the other hand protects property rights, and when these rights are protected land conflicts are reduced. The study revealed that well managed urbanisation potentially brings economic returns to countries.² However, unplanned urbanisation leads to challenges. In Botswana, these challenges have been demonstrated through land conflicts, corruption, urban sprawl, and shortages of land.³ These challenges lead to a phenomenon of peri-urbanisation which results in pressure and manipulation of property rights in peripheral areas around Gaborone.⁴ The overall implications of this are that many residents face tenure insecurity.⁵ However, whilst this is the case, it has been shown that Botswana, through its tenure reforms, has strengthened tenure security.⁶

Chapter 2 of this study contextualised the effects of rapid urbanisation on land use in Botswana. These challenges were identified to include land corruption, urban sprawl, land conflicts, informality and shortage of land and housing.⁷ It was found that as cities like Gaborone urbanise, it leads to the phenomenon of peri-urbanisation. As such the land use challenges put a strain on the security of property rights in these settlements.

Chapter 3 sought to explain and critically evaluate Botswana's land tenure system and state of tenure security. The Chapter distils the notions land tenure, tenure

¹ See para 4.5 above.

² See para 1.1 above.

³ See para 2.3 above.

⁴ See paras 1.1 and 2.3.3 above.

⁵ See paras 2.3.2, 2.3.3, 2.3.4 and 2.3.4 above.

⁶ See para 3.5 above.

⁷ See paras 2.3.2, 2.3.3, 2.3.4, 2.3.5 and 2.3.6 above.

security, insecurity and the constitutive elements that makes tenure security. The chapter featured tenure arrangements and reforms that are aimed at enhancing tenure security in the country.

Chapter 4 of the study sought to explain and critically evaluate Botswana's spatial planning law system. This was done with a view to determine how it assists in controlling rapid urbanisation. There was merit in discussing the role players and tenure security's interface with spatial planning. It indicated the two concepts can be fused together to help control rapid urbanisation by strengthening property rights and controlling land conflicts.⁸

5.2 Limitations of the study

The study focused on urbanisation trends in and around Gaborone and examined the land use challenges in this area. This approach has presented some limitations to the study in that it did not focus on other areas such as Palapye and Maun which are also experiencing migration. Further, whilst the study discussed legislation and how it assists in controlling rapid urbanisation, it is generally difficult to see how these laws work in practice. The implementation assessment cannot be ascertained through a desktop analysis. Therefore, empirical research could have acted as a gauge to see how in practice these laws are implemented and adhered to, or not. While this is a drawback of the current study, it does leave room for future research in the field.

The study in some instances had to incorporate information from popular media sources, such as newspapers, for example, the data on land allocations waiting lists.⁹ This was done due to the unavailability of official data on land allocations and related data. This information was treated and interpreted with caution as it is acknowledged that the data may not be fully correct or up to date.

⁸ See para 4.5 above.

⁹ See para 2.3.6 above.

5.3 Main findings

The substantive chapters of this dissertation produced the following findings relative to the questions that underpinned the study;

- *Factors such as migration for economic opportunities have fuelled rapid urbanisation.*¹⁰ As a result, land corruption, urban sprawl, land conflicts, informality and shortages of land have been experienced.¹¹ These challenges put strain on individuals' land rights thereby leading to tenure insecurity.¹² Historical factors, such as initial exclusion of villages in planning in the country have also contributed to these challenges.¹³ As such, people in peri-urban villages such as Mogoditshane are still struggling to adapt to modernist planning techniques implored by government.¹⁴
- *Tenure reforms have strengthened tenure security in Botswana.*¹⁵ For example, through the introduction of CoR and FPSG property rights of land owners are secure.¹⁶ CoR especially has helped in improving access to land and basic services, such as clean water and electricity by the urban poor.¹⁷ Secure tenure was also achieved through certificates in tribal land. The *TLA* of 2018 for example, introduced innovative ways of titling tribal land which is through a deed named the SLT.¹⁸ This made it possible for tribal land to be surveyed and registered within the Deeds Registry.¹⁹ This will help reduce boundary conflicts and informal occupation that happens especially in peri-urban areas.²⁰ This is also hoped to unlock economic potential of tribal land.

¹⁰ See para 2.2 above.

¹¹ See paras 2.3.2, 2.3.3, 2.3.4, 2.3.5, 2.3.6 respectively.

¹² See paras 2.3.3 and 2.3.4 above.

¹³ See paras 2.3.3 and 4.2 above.

¹⁴ See para 2.3.3 above.

¹⁵ See para 3.5 above.

¹⁶ See para 3.5.2 above.

¹⁷ See para 4.5 above.

¹⁸ See para 3.5.5 above.

¹⁹ See para 3.5.5 above.

²⁰ See para 3.5.5 above.

- *The institutions established through tenure reform (for example, Land Boards, Land Tribunal and others) work well in protecting rights in Botswana.*²¹ It has been shown that there is merit in these reforms, for example under the new *TLA* of 2018, maps and diagrams are required to register deeds.²² This may reduce incidences of land corruption and boundary conflicts.²³ As a result these institutions enhance tenure security. Whilst these institutions are hailed, it has been acknowledged that they have their own deficiencies.²⁴ As asserted above, Land Boards are plagued by corruption and fail to assuage the long duration of land applications, for example.²⁵
- *Spatial planning law plays an indispensable role in the control of some of the impacts of rapid urbanisation in Botswana.* The *TCPA* of 2013 provides that permission be sought before development of land can be conducted.²⁶ This may reduce the propensity of haphazard urban development especially in the city fringes. The planning tools such as the *DCC* of 2013 also provide for land use zoning.²⁷ Zoning may reduce conflicts over the use of land and on property rights. Further, the *NSP* 2036 provide planning strategies for settlements in Botswana to reduce problems such as urban sprawl.²⁸ It indicates that there is need to integrate Gaborone's peripheral villages into the city's planning.²⁹
- *Traditional authorities have been relegated to mere spectators in spatial planning in Botswana.*³⁰ Historically, traditional institutions such as the *Kgotla* and *Bogosi* were the crux of planning in the country.³¹ The super-imposition of modernist planning in peri-urban and rural areas remains problematic as

²¹ See paras 3.5 and 4.5.1 above.

²² See para 3.5.5 above.

²³ See para 3.3.5 above.

²⁴ See para 3.5.7 above.

²⁵ See para 2.3.2 above.

²⁶ See para 4.4.1 above.

²⁷ See para 4.4.4 above.

²⁸ See para 4.4.3 above.

²⁹ See para 4.4.3 above.

³⁰ See para 4.3.1 above.

³¹ See para 4.2 above.

it leads to land conflicts.³² This is because these areas maintains both customary tenure and modern practices. Initially, these places were segregated from the colonial planning.³³ Whilst this is the case, the current *TCPA* provides for a minimal role of traditional authorities in planning.³⁴

- *Local government largely remains weak in dealing with spatial planning, because the central government exercises authority over it.*³⁵ Whilst the local government has been given the mandate to conduct spatial planning in terms of the *TCPA*, such is diminished by the firm grip of the central government over the local government.³⁶ This may impede its autonomy to deliver on its mandates, especially the planning function.
- *There is a meaningful link between spatial planning and tenure security.* This link is evident through institutional setup, interlinking functions from legislation, infrastructure planning and dispute resolution.³⁷ It has been argued that such nexus is important because tenure security provides a basis on which ownership of rights is established and spatial planning a mechanism for protection of those rights, as such the two can be intertwined to control impacts such as urban sprawl and land conflicts.³⁸ It has been established that spatial planning has fostered infrastructure planning which aids tenure security.³⁹ This is evident from informal settlements in Gaborone and Francistown in which individuals can use their certificates, namely CoRs, to connect water and electricity.⁴⁰ The interface between spatial planning also surfaces through institutional setup in Botswana.⁴¹ Land Boards register land rights thereby increasing tenure security.⁴² These land rights are now

³² See para 2.3.3 above.

³³ See para 4.2 above.

³⁴ See para 4.3.1 above.

³⁵ See para 4.3.2 above.

³⁶ See para 4.3.2 above.

³⁷ See paras 4.5.3, 4.5.4, 4.5.5 and 4.5.6 above.

³⁸ See paras 4.5.1 and 4.5.2 above.

³⁹ See para 4.5.4 above.

⁴⁰ See para 4.5.4 above.

⁴¹ See para 4.5.5 above.

⁴² See para 4.5.5 above.

registrable within the Deeds Registry after survey.⁴³ There are also institutions that deal with surveying and mapping in Botswana.⁴⁴

5.4 Recommendations

Following the outcomes and findings of this study, the following recommendations are made;

- Traditional institutions such as *Bogosi* and the *kgotla* must be interwoven in national policies and laws. *Bogosi*, should be incorporated in planning in Botswana - not only should they be consulted but they should take part in planning. The *TCPA* must be reformed to define the role of *Dikgosi* and how their voice can be heard. Therefore, if traditional authorities are involved in planning, it will reduce incidences of illegal land dealings in which some *Dikgosi* take part.
- The national government should revise its spatial planning instruments such as the *UDS* of 1992 and the *DCC* of 2013 so that they keep pace with spatial development. This is crucial because these instruments are obsolete, given the pace of rapid urbanisation, and they may not serve their intended purpose. For example, Gaborone has rapidly urbanised in the past 20 years, hence new development standards and *DCC* may be ideal.
- It is recommended that spatial planning instruments such as the *DCC* of 2013 and the *UDS* of 1992 must be aligned with the main spatial planning law, namely the *TCPA* to avoid conflict and fragmentation.
- The *TCPA* must be amended to specifically outline the process of plan making and what is to be included. The *TCPA* does not outline the process of plan preparation and does not detail how public participation should be conducted. These are critical processes in achieving good spatial outcomes

⁴³ See para 3.5.5 and 4.5.5 above.

⁴⁴ See para 4.5 above.

in the country. Therefore, necessary amendments to the *TCPA* should be done.

- It is recommended that, for the local government to effectively carry out its mandate of bye-law making and planning in term of the *TCPA*, it must be given independence. The *LGA* must be amended to increase the powers of local government especially with regard to planning. Such level of autonomy will help the local government to meaningfully conduct its own affairs and strengthen its fiscal autonomy in a fashion that works for its local context.
- There should be close liaison between the Department of Town and Country Planning and the Land Boards and local authorities. The working relationship between these institutions must be clearly set out in the legislation. The *TCPA*, *TLA* and *LGA* must not work in parallel with each other in issues of spatial planning.
- Council authorities should generate their own income to conduct spatial planning. As already indicated district and town councils rely heavily on central government for funding.⁴⁵ They should be capacitated enough to be able to collect rates, taxes, and other levies. This may help reduce fiscal reliance on the central government.
- Land Boards must speed up land allocations and reduce waiting lists in urban areas and peri-urban villages such as Mogoditshane, Tlokweng and Mmopane to reduce land conflicts and self-allocation.
- Land Boards must explore technological and innovative ways to store and process land information. This can be achieved by computerising all land parcels and the processes of land allocation.⁴⁶ A land administration centre is required to complement the Deeds Registry.⁴⁷ A strong cadastre system and institution is important to reduce corruption and land conflicts.

⁴⁵ See para 4.3.1 above.

⁴⁶ This will be in line with the recommendation by the *Revised Botswana Land Policy 2019* 27.

⁴⁷ This will be in line with the recommendation by the *Revised Botswana Land Policy 2019* 28.

- There is a pressing need to expropriate idle freehold land around the cities to cater for expansion of cities like Gaborone and Francistown. However, this should be done in line with the *Constitution* and adequate compensation should be paid.
- Cities like Gaborone should enact spatial planning bye-laws in line with the *TCPA* and the *LGA* to complement the existing instruments such as the *UDS* of 1992 and the *DCC* of 2013. These bye-laws should clearly define how to deal with issues such as illegal occupation. It should also impose sanctions on those involved in informal occupation.

5.5 Pointers for future research

In summation, it is imperative to point that tenure security and spatial planning law are complex. Land tenure in Botswana, as elsewhere in the world, is evolving. Furthermore, rapid urbanisation as it has been established continues to present complex dynamics impacting on land rights and planning laws. Given Botswana's lack of planning history, planning must be confronted with caution. The imposition of modernist planning without regard to conflicting realities in peri-urban areas for example, can yield terrible outcomes such as informal occupation. This study was limited in finding out how tenure security and spatial planning law can in real-life control rapid urbanisation which means that many legally relevant questions linger on, amongst them:

- What is the legally relevant effect of rapid urbanisation on other sectors such as transport, energy and climate change in Botswana's urban centres?
- How can spatial planning law and land laws be aligned to achieve desirable spatial outcomes that foster sustainable urbanisation in Botswana?
- What are practical challenges that will impede the titling of tribal land in terms of the new *TLA* and what strategies can be adopted to address them?

- What are the weaknesses of Botswana's execution of its land tenure and spatial planning law and what are lessons that can be learned from comparable countries elsewhere on the continent?

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