LOCAL CASE STUDIES IN AFRICAN LAND LAW

Robert Home (editor)

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PREFACE

Anglia Ruskin University has a growing number of students – both undergraduate and postgraduate – from the African continent, and UK students of African descent, and is proud to promote research that may aid African development. Professor Home has long experience of research on land issues in Africa. Since joining the University in 2002 he has managed a research project for DFID on land titling, which resulted in the book *Demystifying the Mystery of Capital* (2004), and undertaken research and professional consultancies in several African countries. He was invited by the University of Pretoria to edit these two books on African land law, as part of a publishing project on the rule of law sponsored by the World Bank, and the University is pleased to be associated with the undertaking.

Professor Alan Sibbald
Deputy Vice-Chancellor

CONTRIBUTORS

Raymond Talinbe ABDULAI is Head of Research in Real Estate and Planning at Liverpool John Moores University, United Kingdom. His previous academic positions were at Wolverhampton University and at Kwame Nkrumah University of Science and Technology (KNUST) and Kumasi Polytechnic in Ghana. He holds a PhD in Real Estate, MPhil in Land Economy (Cantab), and BSc (First Class) in Land Economy. He has published extensively in academic books, journals and monographs, and is currently: the editor-in-Chief, *Journal of International Real Estate and Construction* Studies (JIRECS).

Oludayo G AMOKAYE (LLB (Hons), LLM (Lagos), is a Doctoral Candidate at Obafemi Awolowo University and Senior Lecturer in Property and Environmental Law at the University of Lagos, Nigeria.

Robert HOME (MA, Cantab; PhD, London; DipTP, Oxford Brookes) is Professor in Land Management at Anglia Ruskin University, UK. His research interests are planning history and land management, with a strong international and African focus. His PhD was on the influence of colonial government upon Nigerian urbanisation. He has published books on British colonial town planning, land titling in Africa and the Caribbean, and planning regulations. He has also managed higher education link programmes with South Africa and Zambia, undertaken consultancies in several African countries, and supervised PhDs on African land topics.

Faustin Tirwirukwa KALABAMU is Associate Professor at the University of Botswana. He holds a PhD from the University of KwaZulu-Natal, South Africa, and has taught, researched and worked in Tanzania, Bangladesh, Zimbabwe and Botswana. His research and publication activities focus upon housing, land management and gender as a cross-cutting issue.

John KANGWA is a Lecturer at Polytechnic Namibia in Windhoek. He was formerly Lecturer in Surveying at the Copperbelt University, Kitwe, Zambia, and holds in BSc Surveying and Mapping Sciences, University of East London, 1992 and MSc (Geography), University of Zambia, 2000 Research and consultancy on social and environmental impact of of mining activities in southern Africa, and contributed a chapter on Zambia to Demystifying the Mystery of Capital (2004).

Kofi Oteng KUFUOR is Professor of Law at the University of East London, where he is Director of the Law and Development Group. He holds a PhD from the University of Warwick and a LLM from London School of Economics, and is general editor of the African Journal of International and Comparative Law. His research interests include economic integration in West Africa, the new institutional economics, human rights in the developing world and Ghanaian environmental law.

Patrick McAUSLAN is Professor of Law at Birkbeck College, London, and after his undergraduate studies at Oxford University has held academic positions at the University of Dar es Salaam, London School of Economics, University of Warwick and University College London. He has worked as a consultant for UN Habitat in many countries, and was awarded an MBE in 2001 for services to African land use and environment. His books include *Bringing the Law Back In: Essays on Land, Law and Development* (2003).

Chadzimula MOLEBATSI is Lecturer at the Department of Environmental Science, University of Botswana. His academic qualifications include a BA from the University of Botswana & Swaziland, MA in Environmental Planning for Developing Countries from University of Nottingham, and PhD in Town and Country Planning from Newcastle University. His academic publications include a chapter on Botswana in *Demystifying the Mystery of Capital* (2004).

Leah ONYANGO holds a PhD in Physical and Urban Planning (Maseno University). She is Senior Lecturer at Maseno University and previously occupied several positions in the Ministry of Lands. She is currently involved in collaborative interdisciplinary research and development and extensively involved in community work specifically in the areas of environmental conservation and youth programmes.

Geoffrey PAYNE holds a Diploma in Architecture (Nottingham) and MSc (London) in Built Environment Studies. He established Geoffrey Payne and Associates in 1995, which undertakes consultancy, training and research assignments throughout the world for a wide range of clients including national governments. The main focus of GPA activities is to improve options for the urban poor in developing countries to obtain access to land, housing, services and credit on terms appropriate and affordable to the poor. He has published widely in the field, including

Paul VAN ASPEREN is a part-time PhD researcher at the Research Institute of the Built Environment, Delft University of Technology (Netherlands). He is also employed as a senior consultant at the Ministry of Transport, Public Works and Water Management. Educated as a geodetic engineer at Delft University, he has held teaching positions at the University of Zambia and ITC (Enschede, Netherlands) and worked as a consultant. He is currently researching a PhD on pro-poor land registration tools in African peri-urban areas.

ACRONYMS AND ABBREVIATIONS

AALS	Affirmative Action Loan Scheme
ACHPR	African Commission on Human and Peoples' Rights
AIDS	Acquired Immune Deficiency Syndrome
AU	African Union
AUBP	African Union Border Programme
BLCC	Bakweri Land Claims Committee
CBD	Convention on Biological Diversity
CBO	Community-Based Organizations
CDC	Cameroon Development Cooperation
CEFRD	Convention on the Elimination of all Forms of Racial Discrimination
CEMIRIDE	Centre for Minority Rights Development
CLEP	Commission for the Legal Empowerment of the Poor
CRC	Convention on the Rights of the Child
DFID	Department for International Development
DRC	Democratic Republic of Congo
EAC	East African Community
EDPRS	Economic Development and Poverty Reduction Strategy
EEBC	Eritrea-Ethiopia Boundary Commission
FLTS	Flexible Land Tenure System
FPIC	free prior informed consent
GIS	Geographic Information System
GLTN	Global Campaign on Secure Tenure and the Global Land Tools Network
HIV	Human Immunodeficiency Virus
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICSID	Settlement of Investment Disputes
ILO	International Labour Organisation
LAC	Legal Assistance Centre
LPA	Liberal Peace Agenda
LRO	Land Right Office
LRP	Land Reform Programme
LTO	Land Titles Ordinance
MCC	Mogadishu City Charter
MDG	Millennium Development Goals
MINITERE	Ministry of Land, Environment, Forestry, Water and Natural Resources
NGO	Non-Governmental Organisations
NHAG	Namibia Housing Action Group
NIE	New Institutional Economics
OAU	Organisation of African Unity
OHSIP	Oshakati Human Settlement Improvement Project
OLL	Organic Land Law
OTC	Oshakati Town Council
OVCs	Orphans and Vulnerable Children
SADC	Southern African Development Community
SDFN	Shack Dweller Federation of Namibia
SERAC	Center and the Center for Economic and Social Rights
SFT	Settlement Fund Trustee
SG	Surveyor General
SWA	South West Africa
SWAPO	South West Africa People's Organisation
T&CPA	Town and Country Planning Act
TCCF	Technical Committee on Commercial Farmland
TLA	Tribal Land Act
UK	United Kingdom
ULML	Urban Land Management Law

UN	United Nations
UNDP	United Nations Development Programme
UNDHR	Universal Declaration of Human Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

EDITOR'S INTRODUCTION

The importance of land law for the rule of law in Africa can hardly be questioned. Population pressures and competition over access to land and resources generate much conflict, complicated by the historical legacy of colonial laws and land-grabbing, and by post-independence land law reforms. The international development agencies increasingly fund projects related to land law, policy and administration with the Food and Agricultural Organisation (FAO) and Habitat each maintaining specialist land tenure units, and the AU and SADC formulating land policy frameworks.

This book on local case studies in African land law is one of a pair, the other presenting more general themes. It is not so easy to achieve an overview, nor to find specialist writers in the field. Land law has traditionally been regarded as a difficult subject to teach, and specialists are fewer in the law departments of African universities than one might expect. A quick scan of the index to fifty years of the *Journal of African Law* reveals less than one article a year with 'land' in the title, the most popular topics being the Nigerian Land Use Decree and tribal tenure in Botswana. Africa is less well served than other continents by specialist property law networks, and less represented at international academic conferences in the field. While Stellenbosch University in South Africa has a programme training academic land law specialists, that is an isolated initiative. The search for contributors to these books produced more non-Africans and those of the African diaspora than Africans working in their home country. Nor is African land law the exclusive preserve of lawyers, so other professions have represented, such as land surveyors, land economists and planners, as well as those working in NGOs. The list of authors thus includes a Cameroonian based in the USA, two Ghanaians and a Zimbabwean in UK academia, and within Africa a Tanzanian in Botswana and a Zambian in Namibia. With much research coming from outside the continent, non-African authors include three British, one French (geographer), one French-Canadian, one Texan (geographer), and one Dutch (land surveyor).

The two books attempt a balanced regional and thematic coverage. The table below presents basic statistics on the countries discussed, giving some pointers to their diversity, in population size, land area and population density, but a dozen countries from a continent that has over fifty inevitably means omissions.

Table: Basic statistics by country
Source: 2008-2010 official statistics

Country	Area (000 sq.km.)	Population (million)	Density per sq.km	GDP per capita per annum US$000
Botswana	581.7	1.9	3.4	14.1
Cameroon	475.4	18.9	39.7	2.1
Ghana	238.5	23.8	99.9	1.6
Kenya	580.4	39.0	67.2	1.7
Liberia	111.4	3.9	35.5	0.4
Namibia	825.4	2.1	2.5	6.6
Nigeria	923.8	154.7	167.5	2.3
Rwanda	26.3	10.7	401.4	1.1
Senegal	196.7	13.7	69.7	1.8
Somalia	637.7	9.4	6.7	0.6
Tanzania	945.2	43.8	46.3	1.4
Zimbabwe	390.8	12.5	26	0.4

Chapter one (by Patrick McAuslan) draws upon his recent experience in post-conflict Liberia, Somalia and Somaliland to develop a critique of the modern peace-making and state-building 'industry'. Since the early 1990s this has developed as a branch of international administration, returning to the trusteeship/mandate system and civilising mission of the League of Nations and UN, and with the interventionist aim of creating Weberian-style states that will facilitate free-market economies. In post-conflict situations customary rights may have to be rewritten, frustrating the neoliberal emphasis on restitution of property to pre-conflict elites. He is sceptical about the attempt in Somalia to create a western-style Mogadishu city council which ignores the realities of local community politics, and contrasts it with the attempt by Somaliland to indigenise a transformational approach to state-building. He advocates the 'right to the city' (applied in Brazil and Turkey), identifying four dimensions: recognising the social function of property, more participatory budgeting, processes for democratic management, and regularisation of informal settlements.

Chapter two (by Geoffrey Payne) examines the land tenure reform programme in Rwanda, whose population density is probably the highest in Africa, and whose Government has the ambitious aim to register eight million land parcels in three years. The chapter examines how this programme is being implemented, and its effects upon the urban areas where population pressure, land scarcity and economic development are concentrated. The chapter concludes with comments on the implications for policy and practice for other countries in the region facing similar challenges.

Chapter three (by Robert Home and Leah Onyango), after outlining the colonial legacy of laws of urban governance in Kenya, presents a local case study of Kisumu, the country's third largest city, which well exemplifies

the interaction of land laws and tenure patterns, and the challenges facing rapidly growing cities in sub-Saharan Africa.

Chapter four (by Oludayo Amokaye) examines the tension between the Nigerian Land Use Decree of 1978, which vested absolute ownership and management of land and its resources in the government, and customary land tenure, a tension which engenders land conflicts and deprivation. Nigeria has a history of changing land policies and different forms of land tenure, and the Land Use Act 1978 has greatly undermined the land rights of Nigerian people through poor and corrupt implementation.

Two chapters, five (by John Kangwa) and six (by Paul van Asperen), concern issues of land redistribution and land law reform in Namibia, whose post-independence government inherited a legal framework designed to work against the indigenous inhabitants. Kangwa recounts the new Government's long and complex road to land law reforms. Recently Flexible Land Tenure initiatives have aimed to deliver land for the poor at affordable cost and through simpler procedures, and van Asperen field work in the town of Oshakati investigates three elements in this: the transformation of customary land into council land; the regularisation efforts carried out by the Council, including the piloting of Flexible Land Tenure System (FLTS); and private saving schemes to develop housing under secure tenure. The situation of legal pluralism creates varying levels of perceived and legal security, and one may question the addition of yet another mechanism for property rights in an already crowded legal landscape.

The next two chapters, seven (by Faustin Kalabamu) and eight (by Chadzimula Molebatsi), address the distinctive pattern of land law reform in Botswana. Helped by substantial mineral revenues and a small population, Botswana is one of the few African states to have pursued a statutory incremental reform of customary land tenure. Kalabamu finds Hardin's thesis of the 'tragedy of the commons' applicable in Botswana's semi-arid conditions, but criticises incremental reforms for creating 'too much law' and holding onto past practices with little regard to present-day realities. The 'right of avail', which allows citisens to claim free customary land anywhere in the country, has led to long waiting lists for peri-urban plots, while legal and institutional pluralism creates ambiguity and a space where corruption, inefficiency and mismanagement thrive. Molebatsi explores the tensions between the Tribal Land Act and the Town and Country Planning Act (the latter closely following UK and South African models), as experienced in the 'urban villages', originally an indigenous settlement form now undergoing *in situ* urbanisation. These tensions are explained by central government efforts to maintain hold on local government institutions, and the benefit to the country's emerging elite.

Chapters nine (by Raymond Abdulai) and ten (by Kofi Kufuor) concern Ghana. Abdulai, from the perspective of a professional valuer, investigates through empirical evidence de Soto's presumed link between land registration and access to formal credit. By identifying the criteria used by banks for granting loans, he finds that traditionally accepted evidence of ownership is not recognised by banks for mortgage purposes, nor do they accept the landed property of the poor as collateral even if it is registered. Thus land registration is not a prerequisite in mortgage transactions, rather

a post-requirement, and the credit-worthiness of potential mortgagors is the key to formal credit. Kufuor investigates the recent (for Africa) phenomenon of gated communities, applying concepts from the American New Institutional Economics movement, and argues that legislative regulation is needed to avoid their potential future failure. Opportunism on the part of gated community developers can defeat their infrastructural benefits, unless norms sustain collective action to protect their benefits.

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The financial support of the World Bank made possible two authors' workshops, creating the opportunity for many of them to meet in person for the first time. The first was held at Kisumu (Kenya) in May 2010, the second at Birkbeck College (London, UK) in July 2010. As editor I owe a special debt of thanks to two people: Serges Kamga, who steered the project and workshops, and Rory O'Hara, who was independent facilitator at both workshops. In no particular order, I also thank the following: André van der Walt, whose invitation to visit Stellenbosch University in 2008 indirectly led me to the project; Danie Brand and Christof Heyns of Pretoria University, who master-minded it; those who helped organise the Kisumu workshop (Bob Awuor of the African Community Development Foundation, Dan Kaseje and Rose Olayo of Great Lakes University Kisumu); Patrick McAuslan for offering a Birkbeck Collage venue for the second workshop; the independent chapter reviewers (Diane Dumashie and Ambreena Manji); the sub-editor, Oliver Fuo; and Tom Mortimer (my head of department at Anglia Ruskin University), Hilary Lim (University of East London), and Tatiana Beloborodova, who encouraged me throughout.

Robert Home
London
September 2011

CHAPTER 1

POST-CONFLICT LAND IN AFRICA: THE LIBERAL PEACE AGENDA AND THE TRANSFORMATIVE ALTERNATIVE*

Patrick McAuslan

1 Introduction

This paper offers a critical review on the directions that post-conflict state-building is taking, particularly the implications for post-conflict land administration that current approaches are mandating as the 'correct' approach, as evidenced by the plethora of official guides, handbooks, reports and soft international legal instruments produced by the international community for use in post-conflict states. This review has been focused by my work on land issues for UN-Habitat in Somaliland and Liberia, and for the UN and UNDP on local government institutions for Somalia. UN-Habitat's Country Report on Liberia re-orientated my thinking on these issues, as did a proposed local government law for, and land management issues in, Mogadishu.

2 The liberal peace agenda and its critics

The modern peace-making and state-building industry is about two decades old.[1] It got under way after the wars that accompanied the break-up of Yugoslavia in the 1990s. Once the UN became involved, it rapidly developed as a branch of international administration, with its own agencies, approaches, principles via soft international law, and commentaries. Inevitably there were rivalries between countries involved in peace-keeping and state-building, agencies within countries, and

* I want to thank Prof Dr Jitske de Jong (Delft University of Technology) for providing critical comments on the draft version of this chapter.

1 See R Paris & TD Risk (eds) *The Dilemmas of statebuilding: Confronting the contradictions of postwar peace operations* (2009); V Chetail (ed) *Post-conflict peacebuilding; A Lexicon* (2009) for useful introductions to the subject. More critical overviews are OP Richmond *The transformation of peace* (2007); D Chandler *International statebuilding: the rise of post-liberal governance* (2010).

providers and receivers of the various services on offer.[2]

The current orthodoxy is referred to as the liberal peace agenda (LPA). It derives its legitimacy and legality from the 2001 report of the International Commission on Intervention and State Sovereignty (ICISS), which propounded the thesis that 'where gross human rights abuses are occurring, it is the duty of the international community to intervene, over and above considerations of state sovereignty'[3] (what is now known as the Responsibility to Protect or R2P). The General Assembly of the UN endorsed this report, and stated that the international community should be prepared to intervene in such situations through the Security Council.

The issue which sparks most debate in the LPA is the nature of intervention. Should it be externally driven or internally led? What should be the aims of the process? What outcomes are being sought? Commentators have raised serious concerns about the implications of externally driven interventions. States can only be built on strong foundations of social capital and indigenous beliefs and approaches. Durable institutions can only be built through processes of decision-making characterised by informed discourse among the people of the society concerned. Attempting to develop new institutions on the basis of international best practice may exclude the mobilising of public consent, with internal actors disempowered by the presence and capacity of external actors.

More important than these valid concerns is the ideology behind external intervention. The aim is to create a Weberian-style Westphalian state and a liberal economic order (the free market economy), bolstered by a veneer of democracy legitimised by periodic elections and political institutions replicating on the surface those found in the West. This model was developed largely from the interventions in former Yugoslavia, where the new states which were created from the old state understandably were based on the current European state system. So the LPA is in effect a variant of the post-Washington consensus.

Those arguing for external intervention do not dispute the ultimate and ideological aims of intervention. Their concern is that, if state reconstruction is left to internal actors, nothing will change from what caused state breakdown in the past. Calls for internal leadership are stigmatised as 'nostalgia for the state of days gone by'.[4] The new reconstructed state must be equipped to operate 'in multilevel non-

2 P McAuslan 'Land and power in Afghanistan: in pursuit of law and justice?' in A Perry-Kessaris (ed) *Law in pursuit of development* (2009) 269 – 287.

3 'The Responsibility to Protect' report of the International Commission on Intervention and State Sovereignty (2001), available at http://www.responsibilitytoprotect.org/files/R2Pcs%20Frequently%20Asked%20Question.pdf (accessed 27 August 2011).

4 D Moore 'Humanitarian agendas, state reconstruction and democratisation processes in war-torn societies' (2000) *New Issues in Refugee Research* Working Paper 24.

territorial decision-making networks that bring together governments, international agencies, non-governmental organisations and so on'.[5]

If that is an extreme version of the case for externally driven reconstruction, others offer a more moderate approach. External leadership can create a buffer for local actors to renew trust and confidence in themselves; democracy and marketised economies offer the best chances of guaranteeing long-term peace. There must in effect be a partnership between local and international actors, with oversight remaining in the hands of the international community until conditions are ripe for the return of the state to local actors.

This debate is a reprise of debates from by-gone days on the arguments for and against colonialism, and the international mandate/trusteeship system established by the League of Nations in the 1920s and the UN in the 1940s. Indeed some of the discussions on statebuilding do actually pose the issue of whether a formal system of international trusteeship should not be reinstituted for some countries in postconflict situations.[6]

In Liberia, under specific agreements made between the postconflict government elected in 2005 and the international community, the elected government accepted as the price for continued international aid and assistance a system of co-governance over national finances, under which international administrators co-sign most authorisations of expenditure by the Liberian government. This is regarded as a great success by the international community, and may well become part of 'best practice' in the future – *de facto* international trusteeship.

3 Land and the liberal peace agenda

What of land? After a slow awareness of the central role land plays in intra-state conflict, and the need therefore to tackle land issues early on in post-conflict state-building, UN and other agencies have produced many guides, handbooks and principles on the subject.[7] These recommend a clear legal framework as the necessary precondition for programmes of restitution of property, land and housing, which is a cornerstone of the

5 Moore (n 4 above). When international gobbledegook like that is spouted, then you know you ought to be on your guard.

6 See KZ Marten *Enforcing the peace: Learning from the imperial past* (2004), for an excellent discussion of this issue. In Timor Leste, there was indeed a UN trusteeship for a short period.

7 The key document is the *Pinheiro Principles* developed by the UN's Economic and Social Council's Commission on Human Rights' Sub-Commission on the Promotion and Protection of Human Rights in 2005. See too S Leckie *Housing, land and property restitution rights of refugees and displaced persons, laws, cases and materials* (2007); S Leckie *Housing, land, and property rights in post-conflict United Nations and other peace operations: A comparative survey and proposal for reform* (2009); S Pantuliano (ed) *Uncharted territory: Land, conflict and humanitarian action* (2009).

Pinheiro Principles.[8] But a critique of these guides argues that what is needed is a 'post-conflict land policy which focuses on the political dynamics of the conflict over land rather than the technical dimensions of land administration';[9] this has been sidestepped by the guides and the principles, which focus on technical aspects. In urging the restoration of the *status quo ante*, these principles and guides may recreate the conditions that contributed to the conflict in the first place.[10]

One can envision three different approaches to post-conflict property rights. The first two are the rights-based approach being developed by the UN system via international law and internationally developed institutions (as in Bosnia and Kosovo), and the national approach which tries to utilise existing national laws and institutions rather than trying to reinvent the wheel (the model offered here was Iraq). The third approach starts from the position that conflict will have had a profound effect on existing tenure systems, so that it may not be possible to return to the pre-conflict position, and inevitably rights will be re-written. This is especially the position in African states with respect to customary tenure.[11]

This analysis is useful, and certainly applicable to postconflict states in Africa. In several cases, conflict, if not directly about land, certainly involved land, and land was prominent in the public eye. Andre and Platteau[12] have made this point with respect to Rwanda. Land, and the loss of it to foreign and Northern Sudanese investors, lay behind the Nubas joining the Sudanese civil war on the side of the SPLM.[13] The restoration of land to its original owners is a key element of the *Chimurenga* in Zimbabwe. There is evidence that land was an issue in the Liberian and Sierra Leonean civil wars, and may yet trigger renewed fighting. The breakdown of the state in Cote d'Ivoire revolved around land, especially 'foreigners' who had obtained rights in indigenes' land. Land was a major issue in the post-election outbreak of violence in Kenya in 2007. Nor should we forget that South Africa was in the early 1990s a post-conflict

8 The *Pinheiro Principles* are quite explicit on the need for clear national laws: '18.3 States should ensure the national legislation related to housing, land and property restitution are internally consistent…'.

9 Brookings Institution *Addressing property claims of the displaced: Challenges to a consistent approach* (2008) 8.

10 L Alden-Wily 'Tackling land tenure in the emergency to development transition in post-conflict states: from restitution to reform' in S Pantuliano *Uncharted territory: Land, conflict and humanitarian action* (2009) 27.

11 Brookings Institution (n 9 above) 8.

12 C Andre & JP Platteau 'Land Relations under unbearable stress: Rwanda caught in the Malthusian trap' (1995), available at http://www.foodnet.cgiar.org/scrip/docs&databases/ifpriStudies_UG_nonScrip/pdfs/Southwestern_highlands/Land%20relations%20and%20the%20Malthusian%20trap%20in%20NW%20Rwanda,%20Andre%20a.pdf (accessed 27 August 2011).

13 P McAuslan 'High theory, low practice: where's the social justice?' (2006) paper presented at the Human Rights and Global Justice Conference, 29-31 March 2006, University of Warick, UK. The paper is available at http://www2.warwick.ac.uk/fac/soc/law/newsandevents/arc/events/past/2006/rightsandjustice/ (accessed 27 August 2011).

state, and that land was and remains a fundamental element of conflict within the state.

Such an analysis leaves out the ideology behind the international community's increasing involvement in post-conflict land administration. By emphasising restitution of property, reform of land laws, and the resolution of conflicts over land, within a rights-based approach, the international community appears concerned to restore a market-led land management system. People will regain clear rights to land, property and housing; a new and comprehensive land law will facilitate dealings with these property rights; an efficient and effective dispute settlement process will sort out any problems. This brave new post-conflict world of a functioning land market is thus part of the LPA.

A more fundamental criticism of the LPA has not yet been made of the land elements of that agenda. The key term here constantly surfacing now in discussions, is 'transformation'.[14] Van de Walt sets out the theoretical framework of transformation in the context of land reform as follows:

> The central question of this book is whether it is possible to theorise property in the context of social and political transformation that highlights the fundamental tension between protection of established property interests and promotion of socio-economic justice through some form of redistributive politics ... Generally speaking, the upshot of recent property theory has been to provide reasons for the argument that property is not absolute and that it can be and is regularly subjected to restrictive regulation based on valid considerations of morality and public interest ... [B]ut the property analysis I have in mind raises more fundamental issues by asserting that traditional notions of property do not suffice in transformational contexts, where the foundations of the property regime itself are or should be in question because regulatory restrictions, even when imposed in terms of a broadly conceived notion of the public good, simply cannot do the transformative work that is required.[15]

I now relate this approach to my work on local government and land issues in Mogadishu, Liberia and Somaliland.

14 Transformation has been primarily discussed in relation to postconflict state-building. The key text is AJ van der Walt *Property in the margins* (2009) to which I am greatly indebted for the evolution of my thinking.

15 Van der Walt (n 14 above) 13 & 16. Although not mentioned in his book, an early example of a transformation approach to land law reform in South Africa is the Transformation of Certain Rural Areas Act 94 of 1998 dealing with land held by the Coloured communities in South Africa. JM Pienaar 'Lessons from the Cape: Beyond South Africa's Transformation Act' in L Godden & M Tehan *Comparative perspectives on communal land and individual ownership* (2010) 186 – 212.

4 Local government in Mogadishu[16]

In 2007 I drafted a discussion paper on possible future local government in Mogadishu, as part of a UNDP project. The paper took the form of questions to those putting together a Mogadishu City Charter (MCC), together with possible solutions drawn from other local government systems in anglophone Africa. A workshop took place on that paper with Somalis involved with local services and governance in Mogadishu, and was subsequently revised in light of the discussions.

When in 2010 I participated in a workshop in Nairobi to discuss a draft MCC, it bore little relationship to the issues raised and discussed in 2007. I wrote a critical note on the MCC to the UNDP Office on Somalia (based in Nairobi), which is the basis for what follows. The key question is whether such body as a city council should be established in Mogadishu. The draft law provides for an old-fashioned approach to what local authorities should do and how they should do it. It assumes the city council will do everything and regulate a lot of activities, set its own expenses and allowances, and collect local taxes. Contacts with local communities, and delegation of functions to local communities and their organisations would be minimal.

This would be wrong for Somalia. In the absence of effective central or local government, many organisations have come into being to provide services and public goods – business people, CBOs, traditional and religious organisations. Economic progress and improved public goods have flourished in the absence of a monopolistic and corrupt state. On 18 key indicators, Somalia before and after the collapse of central government in 1991 now outscores three neighbouring states (Kenya, Djibouti and Ethiopia) on thirteen.[17] It has been relatively peaceful since 1994, and trade, particularly cross-border cattle trade with Kenya, has flourished. When there has been violence, it has been led or stimulated by the international community – the internationally supported invasion of Somalia by Ethiopia, raids on Somalia to 'root out' al-Qaeda. Successive attempts to establish by international force of arms standard-form central governments fail to recognise the Somali experience of central government. The absence of a central state has not resulted in chaos, but

16 The internationally recognised government in Somalia is the Transitional Federal Government, established in 2007, but it controls little of Somalia. In Mogadishu, which is divided into 16 districts, UN agencies co-operate with CBOs, NGOs, and various other 'unofficial' groups which provide services to the residents of Mogadishu.

17 PT Leeson 'Better off stateless: Somalia before and after government collapse' (2007) 35 *Journal of Comparative Economics* 689 – 710. See also B Powell; R Ford & A Nowrasteh 'Somalia after state collapse: Chaos or improvement?' (2008) *Journal of Economic Behaviour & Organisation* 657 – 670; CJ Coyne 'Reconstructing weak and failed states: Foreign intervention and the Nirvana fallacy' (2006) *Foreign Policy Analysis* 343 – 360. K Menkhaus 'Governance without government in Somalia: Spoilers, state building and the politics of coping' (2007) 31 *International Security* 74 – 108.

endogenous rules and mechanisms allow individuals to 'get things done', and create widespread co-operation.

An old-fashioned local authority thus has no resonance with the lived experience of Somalis. It will be seen as an institution that must be captured or opposed so that its resources can be used to benefit one group and not others. An MCC is not part of the institutional arrangements that have developed over the last two decades to provide some form of governance and service provision. Institutions are more than a set of rules; they are the result of a bargain between rulers and constituents. One needs to restore or support and affirm societal mechanisms, structures and communities, rather than impose alien structures.

Some commentators assert, not just in relation to Somalia, that post-conflict societies and states often need less the restoration of the state but its transformation, allowing local ownership, participation, inclusion and consensus-building. The externally imposed liberal model of peace-keeping and state-building prevalent in relation to Somalia is increasingly questioned:

> Current approaches to state building, primarily dominated by the liberal peace thesis, tend to gloss over indigenous or organic mechanisms rooted in the sociological, historical, political and environmental realities of postconflict contexts ... Such universalised and 'best practice' approaches not only restore superficial states, they also extend the colonial project of undermining organic processes of state formation and state building. Indigenisation stands as a complement to the liberal peace approach. Central to indigenisation is the recognition of the role of emerging agencies and structures as part of the basis for recovery ...[18]

If we take this approach, what should an MCC look like? The law should provide that the city council does little except negotiate with substate and nonstate actors to undertake various tasks, working through local intermediaries which are doing the job already, not setting up local statutory rivals to them. More effort should be made to involve indigenous authorities, especially in keeping the peace. There should be much more decentralisation to localities and more recognition of cultural pluralism. There should be greater reliance on the business community and civil society to provide services. An MCC should follow the mantra now common in humanitarian aid circles of 'do no harm' by *doing* very little.

A different situation exists in Somaliland, which has been developing a city charter for Hargeisa. Once fighting in Somaliland came to an end in 1996, a central government, set up with the agreement of all clans and groups, has provided a modicum of peace and stability, and moved

[18] SG Doe 'Indigenising postconflict state reconstruction in Africa: A conceptual framework' (2009) 2 *Africa Peace and Conflict Journal* 1 – 16.

carefully to develop a statutory system of local government for Hargeisa, based in part on a locally developed local government law already in existence.[19] This was modelled on forms of local government existing in anglophone East Africa (familiar to some local councillors in Hargeisa who had lived in anglophone countries and worked in local government there), but also on existing practices of local government in Somaliland.

At the workshop, I suggested that the concept of the 'Right to the City' (see below) should be the guiding principle for local government in Mogadishu. An informal discussion in UN-Habitat between workshop participants and UN-Habitat officials followed on how necessary information on the land situation could be gathered and relayed to UN-Habitat. This, a rational response to a request for assistance, failed to take account of the realities in Mogadishu. A key issue is the strong feeling by the Hawiye clan in and around Mogadishu that 'their' land should not be taken by non-Hawiye Somalis living and working in Mogadishu as government employees. The Hawiye feel that they have been offered nothing to compensate them for the loss of control over their land, while for the TFG land in Mogadishu must be freely available to any Somali who wants to live and work there. This issue was raised, neither at the UNDP workshop nor at the discussions in UN-Habitat, and tension over land in Mogadishu will continue to bubble beneath the surface. An MCC blundering about trying to apply a standard LPA approach to land will only make matters worse.[20]

There are alternatives. In Fiji, non-native Fijians have restricted rights to occupy and use Fijian land, and such land is managed by a Fijian Native Lands Trust Board on behalf of native Fijians. It introduces an element of 'apartheid', but could reassure the Hawiye that, even if they cannot continue in exclusive occupation or control of all 'their' land, they can at least obtain some financial benefit. So land would not be compulsorily acquired from Hawiye land 'owners', but rather leased, with the rents being paid into some Hawiye Development Trust Fund administered for the benefit of all Hawiye.

A second way would be more complicated but aim to achieve the same end. In many systems of local government, where central government contributes to local finances via grants, the grants are given for specific purposes. It could be possible to value through cost/benefit analysis the impact of the capital on the Hawiye. On the one hand, from increased jobs, better services, facilities and infrastructure, and income flows to Hawiye-owned and controlled businesses; on the other hand, loss of land and

19 Regions and District Law of 2002.

20 The Consultation Draft Constitution, produced by the Independent Federal Constitution Commission after five months debate in Djibouti in July 2010, failed to grapple either with the status of Mogadishu or land, with no clear principles enunciated. Land was ignored until the end of the process, and none of the international experts from the UN knew much about land (private communication).

control over land, loss of traditional ways of living, and losing out on many services and facilities in competition with better educated and wealthier Somalis coming to Mogadishu from elsewhere. If the costs exceed the benefits, then the Hawiye should be compensated for their losses by grants. Such suggestions may not be acceptable to the parties, but not addressing the problem may cripple any attempt to create a local government system for Mogadishu.

5 Land and urban governance in Liberia

In 2009 I participated in an orientation programme for members of the newly established Land Commission in Monrovia, the capital of Liberia. My report on legal approaches to the urban land and governance situation there developed transformational ideas not previous applied in a post-conflict land and housing context.[21]

5.1 Urban problems in Monrovia

To summarise the urban situation in Monrovia, the legal framework of local governance is out of date, geared to a centralised approach (deconcentration at best, as opposed to devolution), while the centre is split between different Ministries which prevents a coordinated approach. Urban planning laws are out of date, and most of the urban population live in unplanned, informal and 'illegal' settlements, either on public land or privately owned land, in poor-quality accommodation with no formal security of tenure. Much of the urban infrastructure was destroyed during the civil wars, and the country is still in a post-conflict situation, with continuing unresolved land disputes. Unless these problems (and wider ones on land tenure generally) are addressed, violent conflict may break out again.

A UN-Habitat Country Report on Liberia raised two key policy approaches, as follows:

> A profound re-conceptualisation of the role of the urban sector … could have an immense impact on institutional and governance structures and the systems that regulate them … Interventions should include a redefinition and refocusing of mandates, structures and functions … of local government … Good governance encourages the participation of local populations in the decision-making process that affects their welfare and well-being …
>
> Land problems are emerging as a matter of urgency … The urbanisation process has been unregulated, haphazard and chaotic resulting in the increase

21 What follows is drawn from my report. For the Liberian conflict see S Ellis (ed) *The mask of anarchy: The destruction of Liberia and the religious dimension to an African civil war* (2008).

> in demand for land, shelter and delivery of basic services…Consequently, land administration and management issues are now impacting on the peace. As a result, there is an urgent and institutional challenge to strengthen security of tenure issues.[22]

5.2 'The Right to the City': towards a transformed urban future for Liberia

A 'profound re-conceptualisation of the role of the urban sector' can best be achieved by adopting policies and laws based on 'The Right to the City': a right for all in the city to be there; to have or acquire secure tenure to their homes (without arbitrary evictions); to participate in the processes of urban governance and in particular in the planning and financial management of their local areas; to have uniform standards of administrative justice applied to them; and to have uniform access to dispute settlement fora and processes.

The Right to the City conceptualises the messages of the Habitat Agenda and the Global Plan of Action adopted at the UN City Summit in 1996, as later developed in the Global Campaigns on Urban Governance and on Secure Tenure for the Urban Poor. It can be seen applied in Brazil's City Statute of 2001 and Turkey's Urban Transformation Law of 2007, which have been summarised as follows:

> The City Statute has four main dimensions, namely a conceptual one, providing elements for the interpretation of the constitutional principle of the social function of urban property and of the city; the regulation of new legal, urbanistic and financial instruments for the construction and financing of a different urban order by the municipalities; the indication of processes for the democratic management of cities; and the identification of legal instruments for the comprehensive regularisation of informal settlements in private and public urban areas …[23]
>
> The intended Law empowers the municipalities in the designation of several types of special planning areas for the purposes of implementing projects concerning protection, regeneration, intensive development, and public and/or private investments … They are entitled to determine the location and size of areas for such operations, prepare plans and projects.
>
> The municipality or the majority of the property owners in an area could form partnerships for the redevelopment and/or joint management of the area. Besides physical operations of clearance, development, protection, such projects are envisaged to cover policies of finance, management, ownership and means of socio-economic development. Protecting the rights of the

22 UN-Habitat *Country Programme Document 2008 – 2009* (2008) 6 & 10.
23 E Fernandes 'Constructing the 'Right to the City' in Brazil' (2007) 16 *Social and Legal Studies* 212.

> original owners, the municipalities in these areas could carry out lease agreements, servitudes, comprehensive project development …[24]

Applying these principles to Liberia would involve a reform of laws on local government and urban planning, compulsory acquisition of land and prescription, and a moratorium on evictions of 'squatters'.[25] Changing the law and applying these principles would transform the administrative and land tenure cultures of Liberia. In one fell swoop, every citizen would be entitled to own his or her own home, to be involved in the governance of their local area (above and beyond voting every now and again for their representatives), and to be treated fairly and with respect by all officials.

5.3 Urban local governance

The Right to the City requires a participative approach to urban governance, beyond just devolution from the centre to *a* local authority. In large urban areas such as Monrovia, it involves the creation and empowerment of local area councils, bringing governance to the people. By way of an example, the one- tier City Council of Dar-er-Salaam (a city of some 3 million inhabitants) was reorganised in the 1990s into three tiers (City Council, three municipal councils and 70 ward councils); the principal operational level is the municipal council, but ward councils have some important powers and bring local government down to a more human level.

The Right to the City is a broad and general policy statement, offering a new way forward for urban governance and urban land management. In the context of Liberia, there is a need for two basic laws, one providing a new approach to urban local government, the other a new approach to urban land management. At the forefront of the law would be a statement of the rights and responsibilities of the residents of the city towards each other and the wider community of the city, and of the local authority towards its residents.

24 A Ulu 'Regeneration of urban areas in cities of Turkey: Case study: Izmit' paper presented at the international conference on sustainable urban area 25-28 June 2007 in Rotterdam. Holland. Available at http://www.enhr2007rotterdam.nl/documents/W17_paper_Ulu.pdf (accessed 28 August 2011).

25 A rigid approach to restitution following the Pinheiro Principles, if applied to urban land problems in Monrovia, would remove thousands of squatters from land privately owned by some of the large landowners in Monrovia. Liberia has a land policy and land practices similar to apartheid South Africa: Amero-Liberians have rights to own land denied to rural 'natives' on the basis of laws dating from the 19th century. The current 1956 land law requires that settler land can only be sold to settlers or to 'civilised' Africans. Grants of freehold land in the interior may be made to such persons, including land in rural areas occupied by 'natives' on the basis of Presidential grants. JB Bruce e*t al Insecurity of land tenure, land law and land registration in Liberia* (2007).

5.4 Urban land management

In dealing with the land question in post-conflict states, the two principal institutions to be rebuilt and supported are local governments and dispute settlement bodies. Central government and its offshoots (e.g. the Land Commission in Liberia) can and should make policy, enact the necessary laws, access finance and expertise from the international community (and the diaspora); but the day-to-day business of dealing with people and their land problems – restitution, resettlement, the rapid growth of informal settlements, disputes over land – fall to local authorities and local judicial institutions. These front-line institutions need to be revived, rebuilt and reorientated to tackle urban land problems in Liberia.[26] The most pressing problem is that of informal settlements, the socio-economic conditions therein, and the political implications of not addressing these conditions. These can best be provided by an urban transformation law.

5.5 Towards an Urban Transformation Act

To summarise the principal deficiencies of informal settlements which a law on urban transformation might be expected to deal with:

- lack of formal title to land, which limits the possibility of obtaining loans to improve accommodation or to develop a commercial enterprise, and might also limit the amount of compensation payable on expropriation;
- continuing post-conflict disputes between different groups, individual returnees and current occupiers who may be IDPs on who is the 'rightful' occupier of land;
- continuing disputes between private landowners and 'squatters' whom the former want off their land;
- buildings built without planning and/or building control permission;
- irregularly shaped plots of land which limit what can be built and what services supplied;
- buildings often built close together, which again limits services;
- hazardous land (slopes, river beds, marshy land, contaminated land, land too close to roads) used for building;
- where public land is used for settlements, the ever-present risk of eviction without compensation;
- exploitation of residents by large-scale landowners renting out property with no legal balancing of rights and obligations between landlords and tenants;

26 There has been little thinking or writing at an official or even unofficial level on local government in a post-conflict state. One exception is the UNDP/Oslo Governance Centre *Report of a Workshop on Local Government in Post-Conflict Situations: Challenges for Improving Local Decision Making and Service Delivery Capacities* (2007).

- lack of full public services, or of outside investment to improve economical and commercial prospects;
- difficulties faced by residents in resolving property, land and housing disputes, where formal courts may not accept or apply the 'informal' laws that exist within settlements, and no mechanism exists to ensure compliance with dispute resolution decisions.

Not all informal settlements in Liberia suffer from all these deficiencies, nor are they present all the time, but the list gives a broad overview of problems that any law aiming to be comprehensive should address.

Countries faced with similar problems of informal settlements use terms such as 'regeneration' or 'transformation', suggesting that the aim of policy (and any accompanying law) is to rejuvenate, revitalise and renovate the designated area. Two Turkish authors have explained urban transformation as follows:

> Transformation can be defined as '*a comprehensive and integrated vision and action which leads to the resolution of urban problems and which seeks to bring about a lasting improvement in the economic, physical, social and environmental condition of an area that has been subject to change*' [italics added]. Urban transformation interventions may vary according to the problems of localities. Some may aim to revitalise a declining activity, or a social function; to encourage social integration in the areas suffering from social exclusion; and/or to return the environmental and ecological deprivation back to a balanced level, while others may aim to regularise squatter areas and illegal urban developments, and to redevelop urban areas where standards of quality of life are highly low compared to other parts of the city. Therefore, urban transformation interventions need to have a deep and multifaceted understanding of the processes and sources of urban problems …[27]

Transformation goes beyond tinkering with land use piecemeal, and seeks to facilitate wholesale change and improvement. A local authority or statutory body should be empowered to bring about improvements, either on its own or in partnership with persons from the areas or from outside; public/private partnerships are a crucial dimension.

The Turkish Urban Transformation Law focuses initially on land issues. Land provides the point of entry but, once in, public agencies may take on various functions. This is the main difference between a traditional approach to informal settlements and a transformational approach: while the traditional approach begins and ends with land, a transformational approach uses land as a way in to transform the social and economic conditions of the people living in informal settlements.

27 Y Egercioğlu & S Őzdemir 'Urban transformation processes in squatter areas: case of two cities in Turkey' (2007) 10. Presented at the 47th Joint Congress of the European Regional Studies Association (on file with author).

Since my report in 2009, there has been no reaction. A transformational approach in Liberia would threaten large landowners, who, even after the traumas of the civil wars of 1990 – 2005, still hold much political and economic power. It might seem surprising that the 'reformist' government of President Ellen Johnson-Sirleaf since 2005 has not addressed land law reform, but the USA, which more or less runs the government, has brought little pressure for reform, and the present laws facilitate large land grants to foreign investors. Thus does a transformational approach to land encounter the LPA.[28]

6 Indigenising land management in Somaliland

Some writers have called 'for a return to the dialogue of indigenising postconflict state rebuilding, especially in Africa', as follows:

> 'indigeneity' as used here refers to institutions, mechanisms and practices predating colonialism and the Westphalian state that draws its roots from the sociological, historical, demographic, environmental and geographical context in which they exist … Beatrice Pouligny[29] has argued that all 'societies have at their disposal social modes of regulation and resources able to serve as a basis for reconstruction and recovery'.
>
> Indigenisation is not the same as endogenisation in that it does not preclude the role of outsiders. The key here is that indigenisation, the materials and structures are organic, with outsiders acting as a type of catalyst ...
>
> Indigenisation argues that the focus of state building must be comprehensive – engaging the political, sociological and technological dimensions of rebuilding authority, institutions and community. It also proposes that the overall aim of state reconstruction should be state transformation, rather than

28 In my report I quoted the 1996 Constitution of Uganda, which conferred ownership rights on all those persons occupying land under customary tenure, who until then were, in law, tenants-at-will of the state. This was the single most transformative action, postconflict or otherwise, taken by any government in Africa towards customary land tenure, and directly resulted from promises made by President Museveni to peasants when he was in the bush fighting the Obote regime in the early 1980s. Suggesting that all peasants in Liberia should at the stroke of a pen receive freehold ownership of their land will hardly get much support in Liberian governing circles. The Liberian government has now signed a Millennium Challenge Corporation programme of assistance, including land matters, which, based upon the MCC approach to land issues in Lesotho, could involve a new land law replacing customary land tenure with 'modern' law thus facilitating foreign acquisition of native-held land, and continuing Liberia's 'apartheid' land policies. An equally challenging transformational approach to land issues in Liberia was offered by L Alden-Wily in *So who owns the forest in Liberia? An investigation into forest ownership and customary land rights in Liberia* (2007), which suggested that Liberia return ownership of land to communities, in hopes of improved forest governance, control of illegal logging and remedial action against historical injustices. That too has not been acted upon, forests being big business in Liberia for foreign investors and the Amero-Liberian elite.

29 B Pouligny 'Building peace after mass crimes' in E Newman & A Schnabel *Recovering from civil conflict* (2002) 202 – 21.

> state restoration, with all emerging institutions drawing their roots from the post-collapse context.
>
> In such cases, transformation basically refers to a qualitative change in the structures, ideologies and networks of relationships ...
>
> Patrick O'Halloran[30] asserts that the current internationally led state reconstruction practice, confined to rational thinking, assumes that states can be restored by modifying their institutions and increasing material incentives for them … [but] … state building is also about society building. It therefore cannot be divorced from constructing the ideas on which a society must craft a state system …[31]

One political entity – Somaliland – has made a real effort to adopt an indigenising transformational approach to state-building, and is worth discussing.[32] In 1991 a conference of Somaliland communities at Burao reaffirmed their independence (granted in 1961 by the former colonial power, the UK), since when the citizens of Somaliland have set about rebuilding their state and nation.[33] Unrecognised by any other state in the world community, and relying overwhelmingly on their own resources (and diaspora remittances), they are doing a remarkable job. A new constitution provides for a President, a two-chamber Parliament (the second being an appointed house of traditional elders), a Bill of Rights and an independent judiciary.[34] Local governments have been re-established, local elections held, services are provided and local taxes collected. Disputes are mostly settled peaceably, although there is still conflict between pastoralists and those who have grabbed communal pastoral land and enclosed it, claiming private ownership.

There was a conscious and deliberate campaign by Siad Barre to wipe out and destroy the legal heritage of Somaliland, destroying the British colonial collections of Somaliland statute laws and the law reports in the

30 P O'Halloran 'The role of identity in post-conflict multiethnic state-building: The case of Bosnia-Herzegovina and the Dayton Accord' (1998).

31 Doe (n 18 above) 8, 11, 14 - 15.

32 M Bradbury *Becoming Somaliland* (2008); F Battera 'State- and democracy-building in Sub-Saharan Africa: The case of Somaliland – A comparative perspective' (2004) 4(1) *Global Jurist Frontiers* 1 – 21; B Poore 'Somaliland: Shackled to a failed state' (2009) *Stanford Journal of International Law* 117 – 150; J Caplin 'Failing the state: Recognising Somaliland' (2009) 30 *Harvard International Review* 9 – 10.

33 The referendum that confirmed this declaration was declared by international observers (including some unofficial ones from the USA) to be free and fair. See generally, I Jhazbhay 'Somaliland: Africa's best kept secret; A challenge to the international community?' (2003) 12 *African Security Review* 79.

34 In a long-overdue presidential election in 2010, the opposition won, and the erstwhile President congratulated his opponent on his victory and left office. During the election campaign, I was in Djibouti with a team of Somalis working on a Mogadishu City Law, when the television showed pictures of a boisterous election procession winding its way through Hargeisa, and the watching Somalis were astonished by the sight of a peaceful contested election taking place. They themselves were at risk of their lives from Al-Shabaab if they were discovered working on secular laws with people like myself, and the team leader banned any photography of our meetings.

High Court, so that there are now no collections of any laws of any kind in Hargeisa, but this has not prevented Somaliland from basing its development on law.[35] Somaliland is slowly, and inevitably with some false starts, creating a new autochthonous constitutional and legal system, geared to its own needs and based on its own traditions. Kaplan puts it thus:

> Somaliland has achieved these successes by constructing a set of governing bodies rooted in traditional Somali concepts of governance by consultation and consent. In contrast to most postcolonial states in Africa and the Middle East, Somaliland has had a chance to administer itself using customary norms, values, and relationships. In fact, its integration of traditional ways of governance within a modern state apparatus has helped it to achieve greater cohesion and legitimacy …[36]

The absence of international legal assistance actually helps the development of a truly national legal system, tailored to national needs, as exemplified by dispute settlement, which is handled in rural areas (urban courts have a poor reputation) almost exclusively by traditional authorities applying customary principles and/or ADR.[37] This society has a high level of commerce both national and international, and a banking and money transfer system handling many millions of dollars, based largely on trust and honour, the foundation of any system of law.

The people I worked with in 2003 and 2009-10 – councillors, officials, lawyers – were concerned to create and work under a law which they and the citizens could understand, having experienced the reverse and not wanting a repeat. My task was not to write the policy or the laws (emphatically not wanted), but to work with the government and the community on a participative inclusive process leading to policy and laws which the Somalilanders will develop for themselves. Far from a 'failed state', Somaliland is committed to building a state governed by law, willing to work with external assistance but not dependent upon it, and determined to pursue their own way in a largely hostile world.

Although Somaliland has had stable government for almost 20 years, its land sector still reflects a post-conflict situation: many refugees and

35 My informants were the Minister of Justice and the Dean of the Faculty of Law at the new University of Hargeisa. One official in the City Council produced the Town Planning Ordinance of 1947 (Cap. 83 of The Laws of the Somaliland Protectorate, 1950 edition), which I was told was still, in theory, in force. This official also had a prized copy of the English language version of the Penal Code. Other towns in Somaliland do have old records, and I was told by the former chief executive of Burao District Council that it has land records going back to the 18th century, when the coast was under the Ottoman Empire.

36 S Kaplan 'The remarkable story of Somaliland' (2008) 19 *Journal of Democracy* 143.

37 Academy for Peace and Development *No more 'grass grown by the spear'* (2007). The benefits of using traditional dispute settlement processes as a factor in keeping the peace in rural Somalia are emphasised by commentators (n 12 above).

IDPs,[38] land vacated in the civil wars grabbed by others; pastoral land unofficially privatised; and constant disputes over both rural and urban land. Siad Barre's 1975 Land Law (which attempted to create a modernised statute-based land law) has been set aside and other laws enacted, but there is no clear national land policy, and fundamental issues relating to land are yet to be resolved.

There are three formal sources of law in Somaliland: *xeer* (the customary law with roots in nomadic pastoral societies); *Shari'a* applied by special Islamic courts; and secular law (principally statute law). Under the Constitution, all laws must conform to the principles of *Shari'a*, but rural land and land used for pastoral purposes is still governed by *xeer.* An APD report summarised its understanding of land tenure in rural areas 'especially in pastoral areas where no state law exists', and stated bluntly:

> … official legislation does not have much value in the rural context … In the absence of strong and capable institutions to implement formal laws and manage land issues, traditional councils of elders by and large remain the most influential and effective bodies to address the problem. In cooperation with the Mayor and the District Council they manage land on the basis of customary law.[39]

There is clearly ambivalence about what laws should apply in rural areas. At a workshop to discuss a national land policy, some participants seemed to accept that *xeer* and traditional dispute settlement mechanisms should continue to apply, while others pointed to recent statute law, particularly the Urban Land Management Law,[40] (ULML) and its 2007 amendment, which established a special Ministerial committee to deal with land disputes. The ULML deals with urban land, and covers the following subjects; the allocation of land; the planning and control of development of land; aspects of land tenure including registration of title; appropriation of land for public use and compensation; demolition of buildings; land disputes; and building regulation.

My conclusion on the ULML was that it was a valiant attempt to create the legal framework for land management, but it presumed the existence of Master Plans as the basis for all decisions on land management – and these did not exist. Local authorities were thus left with no guidance on how they should exercise their powers of land allocation or granting construction permits. Another serious deficiency was its unwitting discrimination against the urban poor, who are the vast majority in the urban areas of Somaliland. It needed to be revisited and revised, but this

38 This is a major source of conflict between UN agencies and the government. With Somaliland not recognised as a state by the international community, persons moving from Somalia to Somaliland are deemed to be IDPs by UN agencies, while the government regards them as refugees and treats them accordingly.

39 Academy for Peace and Development (n 37 above).

40 Urban Land Management Law 17, 2001.

has not happened. It is a tribute to the competence of land management at the local level, both by local government in urban areas and traditional elders in rural areas, that land disputes (which proliferate) have not resulted in violent conflict.

The crucial land management issue is: how much of traditional systems should be incorporated into governance, and how much of international 'best practice'? UN-Habitat is clearly committed to international best practice; a complex building code, GIS and a detailed urban planning guide are being developed and local officials being trained.[41]

If, as the APD report indicates, customary tenure and *xeer* still operate in rural areas, it might be preferable to accept that position, rather than imposing the replacement of customary tenure with a new statutory code. Land disputes, both rural and urban, still threaten peace and stability, a manifestation of the socio-economic transformation over the last two decades.[42] Urban areas, particularly Hargeisa, have expanded rapidly, with formerly rural land converted to urban, often disregarding legality, justice and fairness. Large numbers of people now live in urban areas without title or any effective means to obtain it. In rural areas, enclosures and land grabbing have reduced and undermined traditional common land use rights used by pastoralists. Formerly state owned agricultural land has been arbitrarily privatised, and poor enforcement of what law exists, adds to the causes of conflict.

The government is aware of these changes, hence its concern to develop a national land policy and laws, but has no overarching theoretical or philosophical approach.[43] Attempts to introduce international best practices are far removed from the realities of those living in urban areas in Somaliland, but one could adapt the concept of 'The Right to the City' to urban land management in Somaliland, or support traditional dispute settlement mechanisms, rather than try to impose statutory systems with little legitimacy in the eyes of the people. In the case of Somaliland then, a transformational approach to land reform would develop from an indigenous base rather than from an international template.

41 M Barry & F Bruyas 'Land administration strategy in post conflict situations: The case of Hargeisa, Somaliland' (2007); E Agevi 'Pro-poor planning and building regulations, standards and codes for Somaliland' (2008), Report to the Somalia Urban Development Programme, UN-Habitat (these proposals are beyond the building capacity or the pockets of the urban poor in Somaliland, and would illegalise most of the buildings in Hargeisa and elsewhere); Draft Urban Planning Manual for Somaliland December (2009) – not clear at whom it is aimed, urban planners being few and far between in Somaliland.

42 G Norton *Land, property and housing in Somalia* (2008).

43 The Consultation Draft Constitution of the Somali Republic proposes some founding principles based on the *Quran* and *Sunna*, and the higher objectives (*maqasid*) of *Shari'a*, but *shari'a* or Islamic law in general have not developed any equivalent of the right to the city or transformative land reform. See chapter 16 of WB Hallaq *Shari'a theory practice transformations* (2009).

7 Conclusions

A critique of the LPA based upon the concept of transformation has supporters, but making progress with transformational practice is difficult, because of the resistance of the existing ruling elites and the international community. The LPA restores elites to positions of authority, if at the price of the sacrifice of a few mavericks like Charles Taylor of Liberia to the ICC for 'war crimes'. It is designed not to rock the boat, either internally or externally. Yet Somaliland is no longer part of Somalia and will not be, even though the international community pretends that that is not the case. No other post-conflict government in Africa has emulated the dramatic steps taken by Museveni to confer full property rights on peasant farmers, and one may indeed doubt whether the Museveni of 2010 would do what the Museveni of 1996 did. The international community does not hold the Sudanese government to its commitments to restore customary tenure in the two transitional states of Blue Nile and Southern Kordofan, and halt large scale land grants to foreign investors.[44] Huge amounts of aid in Rwanda are creating a statutory system of land tenure and 'abolishing' customary tenure, despite misgivings about the imbalance of land rights between Hutu and Tutsi that that policy will bring about. Inaction in Liberia on the land issue has already been noted.

I see no dramatic new approaches in the peace-building and state-building industry, but the alternative of full-blown transformation is worth discussing, even if it is unlikely to be adopted soon. Nor, as the example of Somaliland shows, is a transformative approach likely to last, because of the temptations to succumb to internal political and external economic pressures. Somaliland has at least shown a way forward which other states could emulate.

[44] USAID, after supporting an initial project to begin the process of implementing the special Protocol to the CPA, ended that project and began another with the unspoken aim of not rocking the boat on land issues. I was involved in the first (and drafted land laws to implement the Protocol), but not in the second, which quickly dropped the laws.

CHAPTER 2 LAND ISSUES IN THE RWANDA'S POST CONFLICT LAW REFORM*

Geoffrey Payne

1 Introduction

Rwanda is a small, landlocked country with an area of 26,338 square kilometres, only 52% of which is used or developed. The country has a population of nearly ten million people, with a population growth rate of 3.1% and a high urbanisation rate of 8% a year. The average population density for the country as a whole has been estimated at 330 persons per km in 2002, making it one of the highest density levels in Africa. This stimulates a high demand for housing, especially in urban areas where 25,000 new dwelling units are said to be needed annually. Land is used intensively, and, while a formal market is expanding, most land continues to be held under customary tenure.

In Rwanda, the existence of the Napoleonic Civil Code offered formal legal titles, but these were only available in the towns and cities and in effect they were available only to those who made substantial investments in the land. This right was not accessible to the majority of ordinary Rwandans; with only 1% of the land registered, almost all of Rwanda's land is still held under customary or local tenure. Successive waves of violence between 1959 and 1994 have weakened these informal structures. Population pressure, land scarcity and economic development are now increasing the demand for and hence the value of land. An active informal market in land has arisen to meet that demand. Customary tenure, such as it is, is no longer enough. As a result, all citizens are increasingly demanding access to formal systems to register their rights in land.[1]

* The author wishes to acknowledge the substantial contributions of colleagues and friends to this chapter.

1 Republic of Rwanda *Strategic road map for land tenure reform programme* (2008) 4.

In 2003, Government started a long process of consultation on land tenure. That revealed broad support for land tenure reform and led to the drafting of the National Land Policy (2004) and the enactment of the Organic Land Law (OLL) in 2005. In 2006, the Ministry of Land, Environment, Forestry, Water and Natural Resources (MINITERRE) carried out detailed field consultations in rural, urban and suburban settings. This was followed in 2007 by field trials that tested formal tenure regularisation procedures and processes that would lead to simple registration of land. These procedures were implemented by locally appointed committees and technicians to see how the population would respond to formal systems and what the practical difficulties would be in its implementation. The trials also served to ensure all of the issues were properly tested to inform the legal and institutional development process.[2] After the successful trial of land registration, the Government of Rwanda introduced a roll out of land tenure regularisation countrywide and this programme is supposed to be completed within three years (2013). The sections below analyse this programme and how land related legislation is implemented. It also discusses the likely consequences and policy implications of the programme.

2 Land tenure systems in Rwanda

Before discussing the current land tenure reform underway in Rwanda in general, and its main land registration programme in depth, it is important to give a cursory description of land tenure systems in Rwanda before, during and after the colonial period.

2.1 Pre-colonial period

As in most parts of the region, the land tenure system in Rwanda before colonialisation was characterised by the collective ownership of land. Families were grouped in lineages, and these were in turn grouped in clans which were represented by their respective chiefs.[3] During this time, land rights varied with the main ones being clan rights, also known as *ubukonde*, held by the clan's chief. Usually this Chief owned a big chunk of land on which he would settle several families known as *Abagererwa* and these were supposed to pay tax in kind based on customary conditions. *Igikingi* or right to grazing land (most dominant aspect of tenure) was granted by the King or his chiefs. Custom or *inkungu* is another aspect of tenure which enabled the local authority to own abandoned or escheated land. Lastly there is *Gukeba* which referred to the process of settling families onto the grazing land or fallow land. However, all these rights were under the supreme authority of the King who was considered as the 'the guarantor of

2 Republic of Rwanda *Field Consultations Report* (2007).
3 *National Land Policy* of the Republic of Rwanda (2004) 10.

the well-being of the whole population'.[4] The King administered these land rights through both the chief in charge of the land, known as '*Umutware w'ubutaka*', and the chief in charge of livestock, known as '*Umutware w'umukenke*'.[5]

During this period, land ownership was collective and not individual and it is said that this system promoted socio-economic development and enhanced community cohesion and mutual trust amongst communities. Based on the customary Rwandan inheritance tradition, land rights were passed on from generation to generation.[6]

2.2 The colonial era

Colonisation started in Rwanda towards the end of the 19th century. German settlers were the first Europeans to arrive in Rwanda before they were defeated by Belgians and left the country in 1916 during the First World War. Although the arrival of Europeans caused some socio-economic disorder and introduced new aspects of life into Rwandan society, other aspects of life were left untouched. For instance, the German colonisers recognised the existing land tenure systems and the land management systems through the traditional royal administration. In this vein, Rurangwa argues that the purchase of land by the first Catholic and Protestant missions was a sign of respect for the King's authority over land by the German colonial authority.[7]

After the Germans left Rwanda, the country was immediately occupied by Belgian forces who imposed a new legal and administrative system. In this regard, Rurangwa argues that:

> Belgian colonisation introduced deep changes in the management of the country which were later to destroy the traditional system. This traditional trilogy, which represented a system of national social balances, was therefore dismantled and transformed into a centralised administration. The 1926 reform divided the country into chieftainships and abolished the system by which a chief could own several land properties in different parts of the country, which characterised his importance in the country's hierarchy.[8]

Rurangwa goes on to say that the purpose of the abolition of the traditional structure by the Belgian colonial administration was to exercise 'better

4 J Pottier 'Land reform for peace? Rwanda's 2005 land law in context' (2006) 6 (4) *Journal of Agrarian Change* 509-537; *National Land Policy* (n 4 above) 10.

5 *National Land Policy* (n 4 above) 10.

6 E Rurangwa 'Perspective of land reform in Rwanda'. Paper delivered at the FIG XXII International Congress, Washington DC USA, 19 - 26 April 2002 at 3; Pottier (n 5 above); E Daley *et al* (2010) 'Ahead of the game: land tenure reform in Rwanda and the process of securing women's land' (2010) 4(1) *Journal of Eastern African Studies* 131 - 152.

7 Rurangwa (n 7 above) 3.

8 As above, 4.

control of the country and get colonial orders accepted'.[9]

Another important change to the traditional land tenure system was the introduction of written law. However, this has been criticised as being very selective and providing tenure security to colonial settlers and other foreigners wishing to invest in Rwanda, rather than to benefit the indigenous population. This critique was based on the 1885 Decree on Land Use introduced by the colonial power. Some provisions stipulate that

> only the colonial public officer could guarantee the right to use the land taken from indigenous [groups]. Settlers or other foreigners intending to settle in the country were to apply to the colonial administration, follow its rules for obtaining land, and conclude settlement agreements. Land use should be accompanied by a title deed. The natives should not be dispossessed of their land. Vacant land was considered as state-owned land.[10]

In spite of the introduction of written law by the colonial authority, the dual tenure system persisted. Customary tenure continued to be the dominant tenure system and land activities were dominated by agriculture and livestock. Between 1952 and 1954, King Mutara III Rudahigwa abolished the system of *'Ubukonde'* and decreed that all the *'Abakonde'* would henceforth share their land property with their tenants, known as *'Abagererwa'*. From 1959 onwards, the land tenure system became a factor of real conflict among the population. It was during this period that, with the eruption of the political crisis, the first ever wave of refugees went into exile, leaving behind both their land and properties.[11]

2.3 Land tenure after independence (1962-2004)

Despite the changes in the political administration and government institutions, customary land tenure continued to be the dominant land tenure system. Between 1959 and 2004 the dualism between written and customary tenure was apparent with written law benefiting only the elite and those in urban areas. The statutory order no 09/76 of March 1976 that was inherited from the colonial era was the main land governing tool used before 2005. However, this had no significant impact on the previous land tenure systems that were too selective and only benefited a small number of people who had made substantial investment on the land and who were mainly living in urban areas.[12] It could be argued that this situation strengthened the duality between the written law, which was very restrictive and confining on the one hand, and the customary law widely

9 As above.
10 Republic of Rwanda *Field Consultations Report* 2007 (n 3 above).
11 As above, 12. See also Pottier (n 5 above) 529; also Field Consultations Report (n 3 above).
12 Pottier (n 5 above) 514; *National Land Policy* (n 4 above) 12.

practiced, but with a tendency to cause insecurity, instability and precariousness of land tenure, on the other hand.

After the 1994 genocide, pressure on land became very intense and a pressing socio-political issue with the sudden return of refugees. These included mainly Tutsis who fled the country in 1959 and 1973 and later mainly Hutus who fled the country during the genocide. As a result of this demographic surge, land scarcity increased and housing for this population influx remained a very crucial and challenging issue for the government.[13] As land remained the main source of livelihood for more than 90% of Rwandans during that time, preventing any potential land conflict became a vital priority for Government action. Old case refugees who had left their land mainly during the political troubles against the Tutsis and moderate Hutus in 1959 and 1973 wanted their land back, though this had often been officially or unofficially occupied by their fellow citizens who had stayed in Rwanda. Consequently, there were multiple claims over agriculture and housing land, property and buildings.[14] Due to the land scarcity and the sensitivity of the issue, the Government allowed some of these returnees to occupy public spaces such as Akagera National park. However, it has been claimed[15] that some people used the opportunity to acquire large estates which they were holding onto for speculative purposes. In 2007, a Presidential commission was established with the responsibility of redistributing these estates amongst landless people of the region.

As a way of solving land scarcity and housing issues, the Rwandan Government introduced a land sharing policy in 1995 and 1996 focusing on the eastern part of the country. This involved the Tent Temporary Permanent (TTP) programme and the '*imidugudu*' policy (villagisation) in the urban and rural areas respectively.[16] Some of these measures, such as the TTP, were considered to be a short term and temporary solution but ended up becoming a permanent solution as there were no other alternatives to remedy the urban land scarcity.

Although there was a general willingness on the one hand for people to share their land, there was a widespread sense of tenure insecurity with some people fearing to share their remaining land or being evicted from their newly acquired land by the former owners.[17] In this situation, the Government was obliged to tackle this socio-political problem which

13 Republic of Rwanda *Brookings initiative in Rwanda: Land and human settlement* (2001). See also E Daley *et al* (n 7 above); S van Hoyweghen *The urgency of land and agrarian reform in Rwanda* (1999) 354.

14 H Musahara & C Huggins *Land reform, land scarcity and post-conflict reconstruction: A case study of Rwanda* (2005) 271.

15 Van Hoyweghen (n 14 above) 354.

16 Musahara & Huggins (n 15 above) 282; J Bruce 'Drawing a line under the crisis: Reconciling returnee land access and security in post conflict Rwanda' Working paper, Humanitarian Policy Group and Overseas Development Institute (2007) 11.

17 Author's observation.

would have created a serious conflict between Rwandans. Thus, the government introduced the land tenure reform programme which is the main focus of this chapter.

3 The Land Tenure Reform Programme (LTRP)

Given the dependence of most Rwandans on land as the source of their livelihoods, and the need to prevent any future socio-political conflict based on land resources, it was imperative for the Rwandan government to introduce a land reform programme in the aftermath of the 1994 genocide. In this regard, the study carried out by the African Centre for Technology Studies (ACTS) between 2000 and 2002 cited by Musahara and Huggins concludes that:

> the government, however, has a moral duty and responsibility to redress gross inequalities in land ownership, and to improve livelihoods for the rural poor. Land distribution to benefit the poorest will be a necessary part of any strategy for meeting these responsibilities. Doing so will reduce powerful tensions related to access to and control of land, and contribute to the process of national reconciliation and peace building.[18]

Thus, in 1996 the Ministry of Agriculture and Livestock held various meetings and workshops on land issues with the idea of developing a land law. During these meetings, delegates stressed that a land law was of prime importance to ensure that the country developed a thriving agriculture sector.[19] As a result, in 1997 with financial support from FAO, the Ministry hired a consultant[20] to conduct a study on land reform. His main recommendations suggested that land subdivision should be avoided and the villagisation policy promoted as a way of increasing agricultural productivity. This paper became very influential in the design of the land law. For instance, article 20 of the Organic Land Law stipulates that a parcel of land which is below 1ha must not be subdivided.[21] Van Hoyweghen argues that a convergence of FAO and the World Bank encouraged the Government of Rwanda to promote the commercialisation of agriculture rather than subsistence agriculture as formulated in the land law.[22]

During this period all the international community and aid agencies had turned their eyes to Rwanda to support the country's efforts to recover from the tragic events which the same international community had failed to stop. Therefore, it was considered very important to have a consultative

18 Musahara & Huggins (n 15 above) 269.
19 As above 286.
20 Olivier Barriere.
21 Republic of Rwanda, Organic Law no 08/2005 of 14/07/2005 *Determining the Use and Management of Land in Rwanda*. Hereafter referred to as the Organic Land Law (OLL). See also Musahara & Huggins (n 15 above).
22 Van Hoyweghen (n 14 above) 367.

process for the design of the land law, given the socio-political and economic situation the country had gone through and in which land issues had played a central role. In this regard, the views of various stakeholders, mainly CSOs and CBOs, were needed to develop coherent and representative legislation that would benefit all Rwandans. Given the sensitivity of the issue, it is perhaps inevitable that a range of responses emerged in terms of the degree to which this was effective. While the Government of Rwanda declared that country-wide consultations were carried out,[23] others believe there remains room for improvement and that civil society has yet to make a substantial contribution to policy formulation. In this vein, Musahara and Huggins argue that there have not been adequate consultations and information campaigns about the land law and conclude that consultations were done in the inter-ministerial committee established for this purpose and local administrative entities.[24] It has also been claimed that circulation of the draft documents was delayed and that awareness of its contents was inhibited because documents were all written in French. This prompted one observer to claim that this did not help 'civil society to articulate its position in advance'.[25]

Rwanda's history and political situation, however, were quite unique and, given the suffering experienced in 1994, it was remarkable that massive consultations for both the land law and land policy took place. In this regard, Palmer observes that:

> In a country where history itself is so contested it will clearly not be easy to produce a land policy and a law which is inclusive – but to attempt to do this must be an essential part of the process of reconciliation.[26]

The function of NGOs, especially those focusing on human rights, is to campaign for the role of civil society organisations, and that part of their remit requires them to put all governments, and occasionally donors, under as much pressure as they can. NGOs that focused more on sectoral issues, such as land, may be more pragmatic in seeking to realise practical progress within political and economic constraints.

Whatever the criticisms of the consultation on the OLL, these did not apply in the preparation of the National Land Policy. According to Palmer:

23 2004 *National Land Policy* (n 4 above).

24 For example, Musahara & Huggins (n 15 above) 283 claim that 'despite the existence of a plethora of NGOs and CBOs, in general, civil society in Rwanda is weak and disorganised'.

25 R Palmer 'Recent Experiences of Civil Society Participation in Land Policy Planning in Rwanda and Malawi' (2000) 4. International Conference on Agrarian Reform and Rural Development (ICARRD), Philippines, 5-8 December 2000.

26 Palmer (as above) 2.

> As an Oxfam colleague observed, the very notably greater openness of the National Land Policy workshop represented in itself a very positive evaluation of the earlier one. MINITERE was clearly now serious about the whole land question and very open about consulting and listening to what people had to say. In response, participants opened up to a quite remarkable degree in the context and a number of highly sensitive issues, such as land grabbing by the rich and the land rights of the 1959 refugees, were discussed. For Rwanda this workshop might well have marked, I felt, an important turning point ... MINITERE officials ... appear to be genuinely committed to listening and learning, and it will obviously be very important for civil society to encourage this. They are also hoping to take this workshop closer to the grassroots. They want to run similar consultative workshops in all the préfectures in the country because (they say) they recognised – as Kigali-based 'outsiders' largely ignorant of rural realities – that they needed to learn more from the préfectures, which better reflect people's views.[27]

The 2005 land law required some twenty decrees, laws and orders for its full implementation. Preparation of some of these decrees involved local as well as international stakeholders, including field consultations where different groups of land users took part in that process and gave their views. Farmers' associations such as *'Imbaraga'* worked closely with the Ministry of Lands and the UK Department for International Development (DFID) funded project[28] to gather views from different farmers on how the secondary legislation could be more representative and address their concerns. However, only a handful of stakeholders were able to contribute substantially and give their views and suggestions on the draft laws. These were mainly NGOs and CSOs with qualified staff for whom land was a component in their daily activities. Groups advocating for children and women' rights were also active in providing their views.

Although the draft land law was finalised before the land policy, one of the recommendations from a meeting convened by a local NGO on Land Use and Villagisation in Rwanda suggested that 'a new land law should be preceded by a national land policy and the policy process should be inclusive'.[29] This recommendation was adopted in full by the Government of Rwanda because, although the draft land law was completed in 1999, it was published in 2005, a year after the publication of the national land policy. Rwanda's inclination to focus first on the land policy might have been triggered by the experience of Uganda, which had difficulties by drawing up a comprehensive land law without first thinking through a policy.[30]

27 Palmer (as above) 5.
28 DFID has been the leading funding agency for the drafting of both the National Land Policy and the OLL in Rwanda, and also funded the LTRP. After a successful trial exercise, DFID has provided £20 million funding for the second phase of LTRP, rolling out land registration country-wide.
29 R Palmer 'Report on land use and villagisation in Rwanda' (1999) 5.
30 Palmer (as above) 10.

It can be concluded that there was a gradual improvement in the consultation process during the preparation of the land policy and implementing legislation. Currently, NGOs such as the International Justice Mission (IJM) and Rwanda Initiative for Sustainable Development (RISD) are deeply involved in the land reform process. IJM has produced the family manual which highlights how women's rights should be respected during land registration and RISD is training local land committees on land disputes resolution mechanisms.[31]

3.1 Summary of the land policy and the organic land law

In its long term strategic development plan known as 'Vision 2020' and in its Economic Development and Poverty Reduction Strategy (EDPRS), the government of Rwanda has set out its objectives for economic growth for the next decade. The land policy which was published in 2004 is at the heart of the realisation of this vision because it contributes to four of its six pillars. These pillars are social capital, agricultural transformation, infrastructure development and private sector development.[32] The architects of the land policy strongly believe that land will continue to be the main basis of wealth for the majority of Rwandans and 'the cornerstone of socio-economic development and poverty reduction for many years to come.' Thus it should be used in a more productive way in order to reduce poverty. Inspired by De Soto's theory that individual land ownership is the key to reducing poverty,[33] designers of the land policy believe that the only way land could benefit landholders in Rwanda and overcome various land issues the country has been facing for ages is land tenure reform through a land titling programme where security of tenure will be increased, help to reduce inequality and contribute to poverty eradication.[34]

The land policy states that:

> In the perspective of the harmonious and sustainable development of our country, the overall objective of the national land policy is to establish a land tenure system that guarantees tenure security for all Rwandans and give guidance to the necessary land reforms with a view to good management and rational use of national land resources. In order to achieve this target, the land policy should:

31 Author's observations (n 18 above).

32 Republic of Rwanda Vision 2020 (2000). See also Republic of Rwanda *Economic Development and Poverty Reduction Strategy (*EDPRS) 2008-2012 (2007). Vision 2020 identifies six interwoven pillars, including good governance, an efficient State, skilled human capital, a vibrant private sector, world-class physical infrastructure and modern agriculture and livestock, all geared towards national, regional and global markets.

33 See H de Soto, *The mystery of capital: Why capitalism triumphs in the West and fails everywhere else* (2000). It should be noted that whilst the theory has been widely supported by many governments and donor agencies, it has also been widely criticised as promoting a policy approach which has not yielded the benefits claimed.

34 *National Land Policy* (n 4 above).

- put in place mechanisms which guarantee land tenure security to land users for the promotion of investments in land.
- promote good allocation of land in order to enhance rational use of land resources according to their capacity.
- avoid the splitting up of plots and promote their consolidation in order to bring about economically viable production.[35]

Article 29 of the Constitution states that 'every person has a right to private property, whether personal or owned in association with others. Private property, whether individually or collectively owned, is inviolable'.[36] The policy seeks to develop a land administration system which guarantees security of tenure to all landholders and an increase in the productive use of land.

The OLL (2005) is a broad, over-arching law that governs everything to do with land in Rwanda. As the basis for land policy, the overall purpose of the law is to increase security of tenure and to ensure proper land management and land administration. Being the first of its kind in Rwanda, the law theoretically also seeks to maintain and strengthen land-owner's rights beyond those that have been held in the past. This includes rights that go beyond the exploitation and use of the land. It is also intended that the law will help to resolve land disputes and promote economic development as it will no longer be used for subsistence, but for commercialisation.[37]

In addition, the OLL describes land as the 'public domain for all Rwandans' which mostly must be held on a long term lease with the State as the guarantor of the right to own and use the land. Under article 7, the law gives equal protection to customary land rights (purchase, gift, exchange and sharing) and to land rights under written law. However, the law needs twenty decrees and laws to be fully implemented. Many of these have been already finalised and are currently in use.

This leads to the main focus of this chapter, examining the current LTRP which is the result of the land policy and the OLL and its implementing decrees. A key element in this discussion is the land registration programme and how these legal tools are being implemented through the land registration process.

35 *National Land Policy* (n 4 above).
36 Republic of Rwanda (2003) 8 'The Constitution of the Republic of Rwanda' art 29.
37 Republic of Rwanda, Organic Law no 08/2005 of 14/07/2005 (n 22 above).

3.2 Registration of eight million parcels in three years: A realistic ambition?

Land regularisation through land registration and titling is a key element in the current land reform programme in Rwanda. The Government of Rwanda believes that land registration will reduce disputes, promote investment and reduce poverty. Article 30 of the OLL makes land registration obligatory, and the relevant Ministry specifies the procedures. A central objective of the land reform programme initiated in 2007 is to register and allocate 7.9 million land titles within a period of three years (2010-2013). When this objective was presented at a workshop in Kisumu in April 2010, everyone in the room laughed, and there was the same reaction at the World Bank Land Policy Conference in Washington when the HTSPE[38] Managing Director advising the government made a presentation on the programme since registering and allocating this number of titles over three years, would require the completion of an average of more than 10,000 every working day, or one every three *seconds* for three years.[39] This is highly ambitious by any definition.

Although there is a mixture of opinion about the timeframe the government of Rwanda is very determined to complete land registration by 2013.[40] Prior to the analysis of the registration process and the examination of the former in relation to land registration decree requirements, it is important to describe the process of land registration and tenure regularisation itself. This involves the following steps.[41]

3.2.1 Notification and public information

Once a certain area is declared as a land registration area, meetings with local leaders are convened to explain how the land registration will take place in their area, its importance and relevant legal provisions. This puts local leaders in a better position to provide information to landowners. Public information campaigns are held to ensure everybody in the land registration area knows about the forthcoming activity.

38 HTSPE (a British Consultancy firm) has been contracted by DFID to provide support to the Rwandan National Land Centre in the ongoing Land registration process.

39 This assumes an average of 50 working weeks a year and a working day of 8 hours.

40 'Give value to land' *New Times* 11 June 2010, quoting the Minister of Land, Mr Kamanzi Stanislas, participating in the ceremony of issuing certificate of registration of Land Titles to Rulindo District.

41 Republic of Rwanda, Ministerial Order determining modalities of land registration Annex 1, August 2008; Land Tenure Regularisation Operational Manual; Land registration training film and Payne's observations from working in the Land Tenure Reform Project.

3.2.2 Demarcation of land

Parcel demarcation is led by the Adjudication Committee together with the para-surveyors, moving from parcel to parcel in a systematic manner for each '*umudugudu*'. Land-holders and their spouses are required to stand by their land holdings and show the boundaries, normally done in the presence of neighbours so they can verify that the boundaries are accurate. The land will not be formally surveyed, but the agreed boundaries must be identified by the land-owner with the field officers on the day of making the claim. The para-surveyors will then draw the boundaries of the land parcel on an aerial photo and give it a unique identification number, done in the presence of the land-owner so they can check that the boundaries being drawn are accurate. The Adjudication Committee will then check/ confirm if the person(s) claiming rights to the land are the real owners.

3.2.3 Adjudication – recording the details

When demarcation of the land and the owners have been confirmed by para-surveyors, the Adjudication Committee and neighbours, the Adjudication Committee will then record all of the details in the Adjudication Record book: the unique parcel reference number, the landowner's name and other details pertaining to the land beside that number. For landowners legally married, both spouses' names and details are recorded, and any children with interests in that land. Landowners must bring with them their identification card and any other documents and/or witnesses that they may have to support their claims to land.

3.2.4 Issuing a claims receipt

When the recording of the details is complete, a Claims Receipt will be prepared by the Adjudication Committee to confirm that a claim has been made on that land parcel. After demarcation and adjudication is completed, the landowner (together with spouse, if any) signs the 'Claims Receipt' to confirm that they have identified their land parcels in the presence of witnesses and the Adjudication Committee, countersigned by the chair of the cell land committee and a survey technician. The claims receipt will only be issued to the landowner after the payment of the registration fee. This receipt does not confer legal rights, but will enable land owners formally to register their land and obtain legal title at the end of the LTR process.

3.2.5 Recording objections and disputes

If anyone disputes the claims being made, they can bring this to the attention of the Adjudication Committee, which will try to resolve the issue immediately. If that is not possible, the Dispute Record Book lists all

unresolved disputes, the names of the disputants and other basic information. The disputant signs an Objections Receipt, countersigned by the chair of the cell land committee and the survey technician. These disputes are then referred to '*abunzi*' (local mediators) for resolution before the claimant can receive title to the land.

3.2.6 Objections and corrections period

When all of these steps have been completed, the following data will be compiled and displayed at the Cell Office, or in another prominent place in the LTR area:

- An index map showing land holdings and their numbers;
- The Adjudication Record Book linked to the parcel numbers on the index map, showing details of all land claimants;
- The Dispute Book, showing details of all unresolved disputes that arose during the compilation of the adjudication record and the index map.

Every person living in the LTR area, and especially all people who own or use land, should go to the appointed place and verify and check the details of these records during this period. If claimants reside outside the LTR area or have relatives owning land, they are encouraged to invite absentee claimants to visit the area to inspect the records. Anyone is free to check the details of these records at any time to ensure that their claim has been properly recorded.

Any person claiming omissions or mistakes must request corrections be made to the information relating to their claim. For example, in the case of a minor omission, such as leaving out the claimant's ID number, the claimant should ask the Adjudication Committee to adjust and correct the mistakes. However, major mistakes or omissions related to ownership or boundaries cannot be corrected until the Adjudication Committee can verify the corrections.

If anyone has a major objection to a claim, they complete an objection form. The Adjudication Committee will help objectors to complete the necessary form if they do not know how to read and write, and they will provide other assistance as necessary during this period. Objections should not be frivolous and people raising objections must have clear reasons to support their objections. To ensure that everyone has time to inspect the record and the index map, the objections and corrections period will last for three months, allowing absentee landowners and other people who own land in the LTR area, but who do not reside there, to come and inspect the records.

3.2.7 Mediation period

After Corrections and Objections, the LTR process allows time for mediation of all unresolved disputes, first by *abunzi* or other local mediation agencies, and, if still not resolved, by the district court. Whatever decision is made through the mediation process should be final and the land registered to its rightful owner.

3.2.8 Final registration and titling

Following completion of the objections and corrections period the final adjudication record book will be submitted to the Sector Land Committee and then sent to the District Land Bureau for final registration and titling, signed and stamped, and then returned to the cell land committee for final issuance. Claimants will be asked to bring their claims receipt and ID to collect their titles.

4 Discussion

These steps of land tenure regularisation (land registration) presented above were developed based on a six months successful trial land registration exercise curried out by a project funded by DFID operating under MINITERE, and further developed and adopted by Ministerial Order. This sequence was based on the fact that land registration was initially intended to be implemented within eleven years across the country, as proposed in the original draft Strategic Road Map for land tenure regularisation presented to a stakeholders workshop in October 2007. The trial land registration results suggested that a systematic land registration could start with a few staff moving from sector to sector and district to district. During the workshop, government officials insisted that they wanted a fast track, and the then Minister of Lands and Environment suggested that:

> It is important to provide a 'fast-track scenario' to show the cost implications and feasibility of moving faster with land tenure regularisation – the first registration of land – than the draft Strategic Road Map currently proposes, and to help establish what the real obstacles to faster progress really are.[42]

The Strategic Road Map was revised with a three-year target completion date approved by the Cabinet. Consequently, DFID contracted the consultancy firm which had done the trial land registration to help implement the LTRP, although the procedures based on the initial 11 year proposal were not been amended (as set out above).

[42] Resolutions from the Strategic Road Map Workshop, 3 - 4 October 2007 in Kigali.

The great advantage of the process is that it is led by local people, bringing communities together to understand and participate. The process also encourages people to resolve their land disputes, thus guaranteeing local ownership of the process and outcomes, and strengthening local communities' ability to deal with any outstanding land issues before there are sent to the competent authority. The process of land tenure regularisation has increased women's confidence in performing some of the tasks formerly considered as men's duties: there are many female para-suveryors and members of the Adjudication Committee.

Since the programme is being implemented nationally, however, some of these steps may not be properly followed and may result in negative consequences, especially with the limited timeframe for the programme. The government of Rwanda may have good intentions, but these may not be achieved. For example, the law stipulates that:

> The Adjudication Committee varies according to the village in which the adjudication and demarcation of parcels is carried out. It is comprised of 10 members among whom five are members of the cell Land Committee while the other five are members of the village committee of the village in which registration takes place. When the boundaries of a registration area go beyond the boundaries of a cell, the adjudication committee in the registration area must include all members of the land committee of the relevant cells.[43]

This may not be the case on the ground. The Adjudication Committee is subdivided into different groups of 3 or 4 members in order to speed up the process. Instead of starting land registration in one *'umudugudu'* in the cell and moving to another afterwards as provided for by the law, registration starts in all '*imidugudu*' of the cell at the same time. Apart from this being contrary to the law, it might also affect the quality of work performed by the Committee, especially in case of disputes and the Adjudication Committee quorum may not be attained to resolve the disputes on the spot. Also, some people might wrongly claim rights over land and this might lead to rightful owners losing their right because the Committee was not sufficiently well informed to know the real owner; also, it is easier to corrupt three people than ten.

Due to the pressure of this process, it is inevitable that there will be many demarcation mistakes. Land parcels will be demarcated, but the quality is likely to be poor and this will be costly in terms of time and money spent to rectify mistakes. Also, disputes are likely to increase due to increased pressure on staff and the Adjudication Committee will not have sufficient time to resolve land related disputes or organise hearings.. This will obviously affect other organs such as local mediators known as '*abunzi'*. There is a real risk that the three year programme will create a backlog of land disputes which the *'abunzi'* will not be able to settle.

43 Ministerial Order (n 42 above), sub-section II.

Apart from the above problems, there remains a lack of capacity in the existing land institutions at policy and implementation level. The National Land Centre and the District Land Offices lack competent human resources: there are very few trained Rwandan surveyors currently working on the programme. Although there is a plan to train many para-surveyors, there is still a huge need of professionally trained Rwandans, leaving a large gap in the institutions supposed to be overseeing and coordinating the whole exercise. To register and allocate an average of more than 10,000 titles a day for three years requires a much larger team of adequately qualified staff than is presently in place.[44] It remains to be seen how some of the technical problems will be resolved although it is questionable that even trained surveyors could complete the work on target. A medium-term land registration programme would have allowed the country to train professionals in fields such as surveying, and improve institutional capacity.

5 Land tenure regularisation and housing development in Kigali

Since the OLL was published, land prices increased sharply, especially when the LTRP started. As a result, land scarcity in Kigali became a very big issue, even though the objective of the policy and law is to *reduce* such scarcity. Rwanda's total population in 2010 is about 11 million, and the country's area, combined with extensive hills and forests, make it one of the most densely populated countries in Africa. The capital, Kigali, is inhabited by more than a million people, growing at about 3% a year, increasing the need for land for affordable housing, industry, commerce and recreation.[45]

The provision of adequate quantities of affordable housing is another challenge facing the government. Kigali City Council tried to introduce low cost housing schemes. However, these were not successful due to inadequate planning mechanisms and financial constraints. The Batsinda project accommodates 280 families previously residents of Kiyovu area, which was expropriated and allocated to private developers. The expropriation of these people has caused considerable local controversy, as many of the displaced households claim they did not get fair compensation as provided for by the expropriation law.

Private land developers have been encouraged to invest in property development for low and medium income households to promote

44 This number refers only to the registration and allocation of new titles and excludes any transfer of newly registered titles which may take place during the three year period, either due to sale or inheritance. A failure to include these in the register would prejudice the accuracy and therefore certainty which the register is intended to provide.

45 www.kigalicitycouncil.gov.rw.

economic investment and development. Despite having got land cheaply from poor urban residents, they have developed properties only affordable for high-income residents, who could presumably afford to build their own houses. In many cases, there are accusations that land acquisition through expropriation has been undertaken in ways not consistent with the legal provisions. Instead of allowing landowners to negotiate land prices directly with any potential land developer as provided for by the expropriation law, city authorities have intervened by setting land prices in advance and at rates often considerably below market values. Having acquired prime urban land at these discounted values, the city authorities then sold the land to property developers at a high price. This market-based displacement benefited developers and investors at the expense of existing land owners, who lost their lands and houses for compensation sometimes insufficient even to allow them to purchase an undeveloped land parcel in the urban periphery.

The Expropriation law has also been breached in various ways, mostly affecting poor households who cannot afford to build according to the city building standards. For example, 200 hectares of land owned by 1, 028 families in one of the Kigali suburbs was officially valued in April 2008 and, according to the law, landowners are supposed to get their just compensation within four months after land valuation. People claim that they were not paid until 2010 after storming the Mayor's office and asking her to urge the private developer to pay them[46] as they were unable to farm their land after land valuation.

6 Conclusions and policy implications

This chapter has reviewed the ambitious efforts by the government of Rwanda at land reform, an issue which has played a key role in previous conflicts and may do so in the future. It is understandable that the government has been ambitious in addressing land issues, by ensuring that all social groups have access to land, with clear and secure tenure rights recognised and protected by law. With support from international donors, the LTRP seeks to realise this policy objective within a very short time, suggesting that political considerations may have exerted a great influence on developments and that, as a result, the institutional and professional capacity to deliver may not be adequate. The risk is clearly that, having raised expectations to such a high level, any shortfall in delivery of the target may itself create the very tensions the programme is intended to prevent. There is an urgent need to increase professional and para-surveying capabilities to the scale required, though a pragmatic relaxation of the deadline may also be desirable to moderate expectations. This is not

[46] Republic of Rwanda, Law no 18/2007 of 19/04/2007 relating to expropriation in the public interest. See also *The New Times* of 20 May 2010.

to question the objectives, but simply to pose the question of the means required to achieve it.

The chapter has also discussed the need for increases in the supply of affordable housing to meet the increasing population, both nationally and in urban centres, particularly Kigali. As Rwanda's economic development gathers pace, it can be expected that increasing numbers of people will seek their fortune in Kigali. Instead of attempting to deter such movements, efforts are needed to plan for growth and identify areas suitable for developing new housing, commerce and industry, while minimising encroachment upon productive agricultural land. To reduce unauthorised urban expansion, strategic development plans are needed which recognise population growth and the limited resources of most of the population to achieve conventional standards of development, as defined by professionals under the current Kigali City Master Plan. Plans which set modest standards of plot size and road reservations will help to reduce the land required for urban growth; recognition that incremental development can give lower-income groups access to legally approved housing can contribute to realising policy objectives. The high building standards in the Master Plan should be revised in order to meet the increasing demand for affordable housing in Kigali.

On a related issue, the process by which local authorities facilitate the displacement of existing residents from inner city locations at below market compensation levels is penalising many households. An alternative means of putting valuable locations to more productive use would be for the local planning authorities to restrict their efforts to preparing land use plans and allowing potential developers to negotiate the acquisition of sites directly with the existing residents, as was the norm in Turkey for many years. This approach received a sympathetic reception during housing workshops, and could enable developments to take place, while enabling all stakeholders to achieve an equitable distribution of costs and benefits.

The government of Rwanda is to be congratulated on measures to create a dynamic economy and a stable society under conditions of considerable change. Urban development and housing policies are under review in many countries, and no country, irrespective of its level of economic development, can claim to have resolved the challenges. Success is more likely where all sections of the population, including the low-income majority, can benefit from these processes and collectively contribute.

CHAPTER 3

LAND LAW, GOVERNANCE AND RAPID URBAN GROWTH: A CASE STUDY OF KISUMU, KENYA

Leah Onyango
Robert Home

1 Introduction

Urban growth in Africa reflects the global transition from rural to urban living, and poses severe challenges to urban development planning and management. Africa is falling seriously short on most of the MDGs, with growing numbers of people living in slums and a rise in extreme poverty. Urban planning is failing, and, while decentralisation is one proposed approach, the capacity of local government appears quite inadequate to the tasks of urban governance.[1] This chapter argues that the failing of urban governance is partly caused by a failure to engage with the complex laws over land, and the particular legacy of the dual mandate approach to colonial management. Land tenure structures have impacts upon urban form and growth which have been under-researched, and law reform might improve the prospects for urban development in the future.

Hernando de Soto has argued that a critical precondition for investment, economic growth and poverty alleviation should be a framework of secure, transparent and enforceable property rights, and that the property held by the world's poor should be recognised by a formal legal system, with informal (or in his words 'extra-legal') property rights integrated into one unified system guaranteed by the state.[2] Recent studies in legal geography have elaborated on de Soto by exploring how colonial legal and regulatory systems shaped urban form by discriminating between different social groups.[3]

1 C Rakodi (ed) *The urban challenge in Africa: Growth and management of its large cities* (1997); R Zetter & R White (eds) *Planning in Cities, Sustainability and Growth in the Developing World* (2002).

2 H de Soto *The mystery of capital* (2000).

3 ND Blomley *et al* (eds) *The legal geographies reader (*2001); RK Home *Of planting and planning* (1997)*;* S Kedar 'On the legal geography of ethnocratic settler states' (2002) 5 *Current Legal Issues* 401; JB Robinson *The power of apartheid* (1996).

Kenya offers a rich case study for research in this area, because of its history of land expropriation by white settlers, complex land laws, and rapid urban growth. The country's population has grown nearly five times since independence in 1963,[4] adding a million a year in the first decade of the 21st century, imposing consequent strains upon the environment, economy and society. Its well-documented history of land theft by both colonial settlers and indigenous elites has created the loss of ancestral lands, landlessness and rural-urban migration on a vast scale. All of these factors have contributed to massive urban population growth under a system of urban governance ill-equipped to cope with it.

The full impact of land laws and regulations upon urban processes can be better understood by locally-based research in a rapidly growing urban centre, tracking development on the ground. There have been several published studies of the capital city, Nairobi,[5] but with little focus on land tenure issues. This chapter, after outlining the legal history of land in Kenya as affecting urban areas, will present a local case study of Kisumu, the country's third largest city, and a railway terminus on the shore of Lake Victoria. It well exemplifies the interaction of land laws and tenure patterns, their colonial origins, and the challenges facing rapidly growing cities in sub-Saharan Africa. The city in 2006 was officially designated the first United Nations Millennium City, an initiative conceived by the United Nations to develop ways of achieving the MDGs, and the urban counterpart to the first Millennium Villages Project (located just outside it, at Bar Sauri).[6] Coincidentally, a village near the city is the African ancestral home of President Barack Obama of the USA.

2 Land law and urban growth in Kenya

2.1 The colonial legacy in land law

Kenya is a country only a century old, having been first a British colony and after 1963 an independent nation state. Its origins are recorded in the opening of one historical study:

4 From 8.2 million in 1963 to 39.6 million in 2009.

5 A Hake *African metropolis* (1971) ; AK Nevanlinna *Interpreting Nairobi* (1996); MH Ross *Grass roots in an African city* (1975); HH Werlin *Governing an African city* (1974).

6 The author wishes to acknowledge the help of Planning undergraduates from Maseno University and of Dr Emmanuel Mutale (Ground-Force, Zambia) and Frederick Omolo-Okoredo (Planning Department, Makere University, Uganda) in undertaking the field interviews. The other Millennium Cities in Africa are: Mekelle (Ethiopia), Accra (Ghana), Kumasi (Ghana), Blantyre (Malawi), Bamako (Mali), Segou (Mali), Akure (Nigeria), Kaduna (Nigeria), Louga (Senegal) and Tabora (Tanzania). The programme is managed by the Millennium Cities Initiative (MCI), a project of The Earth Institute at Columbia University.

> In the ten years between 1895 and 1905, 'Kenya' – if such a retrospective concept may be permitted – was transformed from a footpath 1000 km (600 miles) long into a colonial administration.[7]

Its laws were originally transplants from Britain's older colony across the ocean – India. Indian workers laid much of the railway into the interior (whose Lake Victoria terminus was Kisumu), and British India also provided Kenya's penal code and the laws that have affected land and urban management down to the present day. The Indian Transfer of Property Act 1882 and Land Acquisition Act 1894 were introduced to the new colony, the latter allowing land either side of the railway to be reserved for government buildings and other public buildings.[8] The townships created in the interior were administered under versions of military cantonment rules devised for India.

The decades before Kenyan independence in 1963 were dominated by the politics of white settler land-grabbing, which has continued under the post-independence African elites: 'The land owning ethic has now become a national mania whereby everyone dreams of owning land.'[9] A large academic literature now exists on the politics of white settler domination in Kenya and its consequences,[10] although its tangled legacy of land laws has remained bewildering and complex. Only now is reform and simplification being addressed through an emerging national land policy and process of land law reform.

It is hardly surprising that Kenya's land laws can appear complex and bewildering, since they comprise 'two systems of regulation which are embodied in five different laws, each with its register and unique characteristics.'[11] In practice the land tenure system was even more complicated than this suggests. The early colonial administration introduced a deeds registry system for white settler land grants, and within a few years added a Torrens-style official registry of titles. The Crown Lands Ordinance 1915 vested all land in the crown, while the Government Lands Ordinance of the same year empowered the administration to grant land to individuals (white settlers) on 999 year leases, in effect freeholds. The Devonshire Declaration of 1923 then asserted that African interests were to be paramount,[12] the Native Lands Trust Ordinance 1930 created

7 B Berman & J Lonsdale *Unhappy valley* (1992) 13.
8 SC Wanjala *Land law and disputes in Kenya* (1990) 177.
9 SC Wanjala (ed) *Essays on land law* (2000) 177.
10 See particularly B Berman *Control and crisis in colonial Kenya* (1990); B Berman & J Lonsdale *Unhappy valley* (1992); MPK *Sorenson origins of European settlement in Kenya* (1968); D Kennedy *Islands of white* (1987).
11 SC Wanjala (n 9 above) 90. The five laws referred to are the Registration of Documents Act 1902, Land Titles Act 1908, Government Lands Act 1915, Registered Titles Act 1920 and Registered Land Act 1963.
12 This was more concerned with the conflicting claims of European and Indian settlers than African land rights. See RM Maxon 'The Devonshire Declaration' *History in Africa* (1991) 259-70.

land reserves for the African population, where customary law applied, although individual leases could be granted for 33 years.[13] The Land Registration Act 1963 (passed just before independence) followed the recommendation of the Swynnerton Report (a British colonial response to the Mau-Mau up-rising) that an African landed class be created, by facilitating individual African ownership in the trust or reserve lands. It was intended that the land registration system would eventually replace the older systems, but they still continue under laws as yet unrepealed. The Land Adjudication Act 1968 provided for the 'ascertainment and recording of rights and interests in Trust land', through a procedure that involved systematic adjudication of boundaries, consolidation of holdings, and registration of individual ownership. The manipulation and exploitation of these laws lies behind the recurrent land disputes, often violent, that have plagued the country. Their implications for urban form and governance will be explored in the Kisumu case.[14]

2.2 Urban government

While land laws provide a current focus for reform, their place in the failures of urban governance under conditions of rapid urban growth has attracted little attention. The government stations from which towns in the Kenyan interior developed were initially administered under the Townships Ordinance of 1903.[15] After the First World War the trusteeship principle became increasingly influential, and was transposed into colonial policy through the dual mandate or dual policy, although 'trusteeship in the early years of the century was in constant counterpoint with the parallel policies of increasing deference to the principles of white self-government'.[16] Lugard's concept of the 'dual mandate' intended that towns should be kept separate and directly administered under their own regulations,[17] while Africans were to be kept in reserves under customary law except when their labour was required. The best known example of this approach was in the South African *apartheid* system,[18] but colonial Kenya followed a similar system, with the compulsory registration of Africans (under the much-hated *kipande* system introduced in the Registration of Natives Ordinance 1915) facilitating tight control over their

13 Customary law is concerned more with persons than land, which is only considered in the context of dowry and succession law. See E Otran *Casebook on Kenyan customary law* (1987).

14 Some of the most high-profile land disputes are discussed in KHRC (1996) *Ours by right, theirs by might* (1996); KHRC *The state and land* (2000).

15 Modified from British Indian regulations for military cantonments. See RK Home 'Urban growth and urban government' in G Williams (ed) *Nigeria: Economy and society* (1976).

16 R Hyam 'Bureaucracy and "Trusteeship" in the colonial empire' (1999).

17 Lord Lugard *The dual mandate in British tropical Africa* (1922). In Kenya the 'dual policy' after 1922 had a somewhat different meaning, referring to the 'complementary development' of African peasant farming alongside white plantation agriculture; see MR Dilley *British policy in colonial Kenya* (1937) 179.

18 S Dubow *Racial segregation and the origins of apartheid in South Africa 1919-1936* (1989) .

movement, and excluding them from urban areas unless their labour was required.[19] As Berman states,

> The scope and intensity of controls and pressures placed upon the African population in Kenya by the colonial state to provide labour for settler estates were far greater than those found in any other British colony in Africa.[20]

The townships of Kenya provided spacious and racially exclusive European residential areas, largely segregated from the African (and Indian) population by building-free buffer zones that were demanded and justified by on public health grounds.[21] The hostility of colonial administrators to Africans in towns was expressed by C.W. Hobley, who first laid out Kisumu:

> The towns which have sprung up in Africa are a serious disruptive force, as they too often form sanctuaries for youths who wish to avoid tribal obligations, and whose education in the slums of these centres is mainly vicious.[22]

The apartheid approach to townships was justified by a colonial official in 1931:

> Unrestricted movement of natives into and within townships leads to the collection in these areas of the worst class of idle disorderly and criminal natives. Such a class makes its living either by begging or by stealing. In the former case they impose themselves upon the hospitality of those members of their tribe who are in employment, relying upon native custom to preclude refusal, and become an intolerable burden upon a decent and industrious community. In view of the fact that Government has set aside large areas of land for the use and benefit of the native tribes of the Colony, it is only proper than the townships, which were primarily established for occupation by non-natives, should be reserved for those who should properly reside there, and that the residence therein of natives should be confined as far as possible to those whose employment on legitimate business requires them so to reside.[23]

This 'confinement' was extreme: the Townships Ordinance 1930 controlled the use of streets and footpaths by 'natives', and they committed

19 A Clayton & DC Savage *Government and labour in Kenya 1895-1963* (1974). The Registration of Native Ordinance followed an earlier Master and Servants Ordinance 1906, based upon Gold Coast and Transvaal legislation. DM Anderson 'Master and servant in colonial Kenya, 1895-1939' (2000) 41 *Journal of African History* 459.

20 B Berman & J Lonsdale *Unhappy valley* 116.

21 The principal advocate of racial segregation on public health grounds through town planning was Professor WJ Simpson, who reported on East Africa in 1913-14. See RK Home *Of planting and planning* (1997) 43; RA Baker & RA Bayliss 'William John Ritchie Simpson (1855-1931)' (1987) 31 *Medical History* 31: 450-465.

22 CW Hobley *Kenya* (1970) 230.

23 'Memorandum on Legislation and Regulations in Kenya affecting natives living in Municipalities and Townships' (1931) in file CO 822/37/9 'East Africa: Municipalities and Townships: Legislation Discriminating against Natives' (NA for UK).

an offence if they stopped outside the locations overnight or longer than a specified period without permission.

The government stations or townships sat on government land, which had been taken by decree under the Crown Lands Ordinance. After the land had been surveyed, plots were demarcated and auctioned for residential or business leases, with only British and Indians permitted to bid. The townships, having only small populations initially, were administered by part-time colonial officials through a township committee, which employed tax collectors, sanitary inspectors and police. The Municipalities Ordinance 1928 provided for the conversion of townships into municipalities, run by boards, with more than half of their funds provided by central government and the balance from market and other fees. After the Second World War colonial policy was to create local authorities on the British model, and community development and welfare projects were undertaken, some of them concerned with housing and town planning.[24] At independence the Municipalities and Townships Ordinances were repealed by the Local Government Act 1963, and new classes of local authority created.[25]

2.2.1 Under colonial rule

Africans were expected to live either in employer-provided housing, or in the native reserves, often settling just outside the township boundary. A Native Affairs Department was formed in Kenya in 1907, followed in 1918 by the appointment of a Chief Native Commissioner (a white official), who was responsible for regulating African housing under the Native Authority (Amendment) Ordinance of 1924 (imported from South African legislation). Employers were required to provide housing for their workers, usually in rows of single-room barracks with no water or electricity.[26]

Following criticism of insanitary housing conditions, two British colonial officials went from Kenya to South Africa in 1945 to study the approach to African housing there, and the Colonial Development and Welfare Scheme provided some limited funds for building housing estates at sub-economic rentals. The East African Railways & Harbours Administration was the biggest employer of African workers (over 40,000 in three East African territories in the 1940s), and provided housing for them in both barrack and family units.[27]

24 JM Lee & M Petter *The colonial office, war and development policy* (1982).

25 These were city, municipal, county, town and urban authorities. See Kenya *Report of Local Government Commission* (1966).

26 For colonial housing policy, see RK Home 'From barrack compounds to the single-family house' (2000) 15 *Planning Perspectives* 327-347; F Demissie 'In the shadow of the gold mines' (1998) 13 *Housing Studies* 445-469; JB Robinson 'A perfect system of control?' (1990) 8 *Society and Space* 135-162; J Wasserfall 'Early mine and railways housing in South Africa' unpublished PhD thesis, University of Cambridge 1990.

27 Clayton & Savage (n 19 above) 209 and 297

The post-colonial land management system in Kenya was described in the National Land Policy as follows:

> It was expected that the transfer of power from colonial authorities to indigenous elites would lead to fundamental restructuring of the legacy on land. This did not materialise and the result was a general re-entrenchment and continuity of colonial land policies, laws and administrative infrastructure. This was because the decolonisation process of the country represented an adaptive, co-optive and pre-emptive process which gave the new power elites access to the European economy ... The genesis of the land question can be traced to the colonial times when the objective was to entrench a dominant settler economy while subjugating the African economy through administrative and legal mechanisms. The process of colonisation produced an alien concept of property relations into Kenya, where the State or the protectorate as a political entity came to own land and grant to property users subsidiary rights … Politically the land question is related to the administrative controls of the economy that use land as leverage for political support. [28]

2.3 The new Kenyan constitution (2010)

The post-colonial political dispensation in Kenya received a severe shock with the violence after the disputed General Election results in 2007, during which at least a thousand people were killed and thousands internally displaced, leaving the country on the verge of civil war. The intervention of the African Union led to a 'Panel of eminent African personalities' (headed by Kofi Annan, former UN Secretary-General) to guide negotiations towards a National Accord and power-sharing agreement. That process resulted in a new Constitution, approved in a national referendum and promulgated in August 2010, ushering in the era of Kenya's Second Republic. This period of national re-evaluation may optimistically yet place Kenya alongside South Africa as a leader of transformative change through constitutional reform.

Chapter 5 of the new constitution deals with land, planning and environment.[29] It starts with certain governing principles, and declares that all land 'belongs to the people of Kenya collectively as a nation, as communities and as individuals'.[30] It classifies all land as falling into one of three categories:

- Public land (including land held 'in trust for the people resident in the county', the successor to the former trust lands).

28 Kenya *National Land Policy* (2007) 4.
29 *Constitution of Kenya* (2010) 43-50.
30 Articles 60 & 61. The governing principles are: (a) equitable access, (b) security of land rights; (c) sustainable & productive management of land resources; (d) transparent & cost effective administration of land; (e) sound conservation; (f) elimination of gender discrimination; (g) encouragement of communities to settle land disputes.

- Community land, to be defined on basis of 'ethnicity, culture or similar community of interest', and including community forests, grazing, shrines, land for hunter-gatherers, ancestral lands, and also private land held for a community.
- Private land, which was required to be registered, It could be let out on leasehold, but non-citizens were only allowed a maximum of 99 years lease (not the 999 years allowed by the colonial administration). Land could be declared private land by Act of Parliament.

Article 67 provides for the creation of a National Land Commission, whose wide functions are to include land policy, the management of public land, research, 'investigations, on its own initiative or on a complaint, into present or historical land injustices', with appropriate redress, traditional dispute resolution, assessment of property tax, and oversight of the land use planning system. Section 68 commits Parliament to 'revise, consolidate and rationalise existing land laws', 'prescribe minimum and maximum land holding acreages in respect of private land', protect matrimonial property upon the termination of marriage, regulate access to public land, and protect the property of dependants.

Part 2 of the chapter committed the State to 'ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources', including maintenance of tree cover of at least 10% of the territory, and a requirement for environmental impact assessment of major construction projects. Other parts of the constitution promise devolution of government, which has implications for urban governance. Chapter 11 aims to replace within five years the provincial administration system (a colonial legacy) with 47 counties, and sets criteria for classifying areas as urban areas and cities, together with principles of governance.

This new constitution offers the potential for major land law reform, but much detailed work remains to be done, and sustained political commitment will be needed to simplify the complex existing laws.

2.4 The new land policy for Kenya

Even before the post-election violence, land law reform was being considered.[31] The Ndungu Commission, appointed by President Kibaki in 2003 to investigate the corrupt allocation of public land, found a situation of 'unbridled plunder'.[32] Its conservative estimate was that some 200,000 illegal titles were created between 1962 and 2002, 98% of them issued after 1986. Land reserved for public purposes and thousands of government houses and properties had been allocated to private individuals with the

31 CM Njonjo *Report of Commission of Inquiry into Land Law System of Kenya* (2002).
32 Ndungu Commission *Commission of inquiry into the illegal/irregular allocation of public land;* A Southall 'The Ndungu Report' (2005) 103 *Review of African political economy* 142.

complicity of professionals (lawyers, surveyors, valuers, land registrars and planners). The President or local authorities were empowered to 'set apart' trust land, whose trustees were prepared to dispose of irregularly. All kinds of land were affected: urban, state and ministerial lands, settlement schemes and trust lands, forest lands, national parks and game reserves, and protected areas. The extended families of the three past Presidents allegedly hold a tenth of the productive farm-land in Kenya.[33]

A National Land Policy Formulation Process was launched in 2004, with a wide range of participants drawn from public and private sectors and civil society, and resulted in a draft policy being adopted in 2007 and approved by the Cabinet. It was not approved by Parliament before the national elections, but a Land Reform Transformation Unit (LRTU) was formed. The new constitution is committed to the creation of a National Land Commission, and the conversion of the existing Ministry of Lands into a policy co-ordination unit. The timing of this reform process closely tracks the emergence of a new framework for land policy in Africa as a whole, which was the result of a consultative process begun by the AU in 2006.[34]

A major cause of confusion in land laws is still the dual existence of freehold and absolute proprietorship, each recorded on separate registers and index maps, which has facilitated indiscriminate land-appropriation. After independence the land adjudication process granted 'absolute proprietorship' to individuals on former trust land, and was intended to extinguish customary tenure, although freehold land (technically 999-year leases) was retained elsewhere. 999-year leases were given for large tracts of land, the assumption being that they were to be used for large scale farming; for non-agricultural leases the term was 99 years, with the use specified. The 999-year leases are registered under the Registration of Titles Act, and do not appear on the same registry index map as freeholds registered under the Land Registration Act. The Land Policy proposes to merge the two, repeal the principle of absolute sanctity of first registration under the Registered Land Act, and provide for fully decentralised land registries.

As for town planning, in the colonial period this was the preserve of a small number of central government professionals, while conditions upon leases granted by the government within the townships maintained tight control over use and development. Under the Physical Planning Act 1998,[35] planning remains a provincial function (pending devolution under the constitution), with central government planners or consultants undertaking plan-making, while local authorities are responsible for

33 R McLaren 'Formulating a sectoral approach to urban land policy: The case of Kenya' (2009) available at http://www.fig.net/pub/fig_wb_2009/papers/urb/urb_2_mclaren.pdf (accessed 29 August 2011).

34 AU *Land policy in Africa* (2009).

implementation and development control; plans have been criticised as not informed by local needs and not addressing local realities.

As urban population grew rapidly, government at all levels failed to cope. The boundaries between urban and rural were eroded, with the 'peri-urban' becoming an intermediate zone of informal shack settlements. Most urban developments in Kenya (as elsewhere in Africa) take place outside planning control, and an estimated third of land and property transactions occur informally. The annual demand for new urban housing is estimated at 150,000 units, but only a quarter of this demand is being achieved, with the shortfall most acute among low-income households. Although the Ministry of Housing has a policy of non-eviction, local authorities still forcibly evict people in informal settlements and on road reserves without compensation or alternative accommodation. The Kenya Slum Upgrading Programme, linked to the MDGs, aims to improve the lives and livelihoods of an estimated 5.4 million people by the year 2020, but has delivered little.

3 Kisumu case study

The city of Kisumu lies on the shores of Lake Victoria, in a region of some 30 million people divided between Kenya, Uganda, Tanzania and the People's Republic of Congo. It is the provincial, commercial, administrative, transport and service hub of western Kenya.

3.1 Historical development since 1900[36]

In pre-colonial days Kisumu was the place where the caravan trails from the coast reached Lake Victoria, and the name derives from a Luo word meaning a place where the hungry get sustenance, apparently referring to its role as a centre for barter trade. The Imperial British East Africa Company (founded by a Glaswegian shipping magnate with trade interests on the East African coast) sought to develop trade with the rich African kingdoms around Lake Victoria, by building a railway from the coast at Mombasa and introducing steamships onto the lake. Kisumu was the Lake Victoria port-terminus of the Uganda Railways, which arrived on 20 December 1901; at that time some six villages and a market existed in the area. A landing-place and wharves were built near the railway terminus, with workers accommodated initially in tents and corrugated iron shelters. According to Hobley:

35 The 1998 Act replaced the previous Town Planning Ordinances (1919 and 1948). Under the 2010 constitution planning regulates land use and property 'in the interest of defence, public safety, public order, public morality, public health, or land use planning.'

36 This section, where not otherwise referenced, draws upon G Anyumba *Kisumu Town* (1995).

> I then commenced to build a new station, without any funds, as was usual in those days. Eventually a stone house for myself was built, three houses for the staff, an office and store-rooms … [After the terminus location changed] I had again to pack up, and lay out a township on the ridge which is the Kisumu of today. A vote was, however, granted to assist in the foundation of the permanent station, so matters became a little easier.[37]

A township was gazetted in 1903 under the Township Ordinance, with its boundaries initially defined as a 2.5 mile radius of the office of the 'collector' (responsible for collecting taxes and revenues). The first properly surveyed plan dates from 1908, and shows a typical British colonial grid-iron layout running along the ridge above the lake. What is known as the Milimani district contained the European residential area, with spacious plots (usually 1.5 acres), administrative offices, police quarters (called 'lines' after military tented camps), courts, parade ground, prison, and the Nyanza Club (founded in 1915 for 'Whites of British descent'). A town magistrate, judge, and town clerk existed by 1906, and 'collectors' raised revenue from hut tax, conservancy and other fees (registration of carts, water charges, market fees, slaughterhouse licences). Water was pumped from the lake by the Railways Authority, and water and sanitation comprised four-fifths of township expenditure in 1909.

During the colonial period the Milimani district remained largely unchanged, but the rest of the town was remodelled more than once. Outbreaks of plague after 1905 resulted in re-zoning on the basis of racial segregation, with separate European and Asian business areas developed near the railway. Other immigrant groups (Arabs, Nubians, Ganda) employed as tax collectors, police and sanitary workers lived in separate villages reserved for each ethnic group.[38] Kisumu was considered a well-planned town – 'far and away the best laid out and kept town in Kenya' (1922).[39] The township boundaries were extended in 1923, but were reduced in 1930, by excluding certain African settlements. The township was upgraded to a 'Grade A' township in 1930, and in 1941 became the sixth municipality in Kenya (under the Municipalities Ordinance).[40] It not only served as a port for Lake Victoria, but, from the 1930s, as a stopping point on the main sea-plane route from Cairo to Nairobi and Cape Town, sea-planes being the main form of fast long-distance travel at the time.[41] Colonial town planning initiatives included the creation of a Town Planning and Siting Sub-Committee in 1932 and a town planning

37 CW Hobley *Kenya* (n above 22) 105. Hobley (1867-1947) came to East Africa in 1890 originally as a geologist employed by the Imperial British East Africa Company to search for commercially exploitable minerals, but soon switched to become a colonial administrator, and was a member of the Legislative Council of Kenya when he retired in 1921.

38 For instance Arabs in Manyatta, Swahili in Kaloleni

39 Colonial annual report, quoted in Anyumba (n 36 above).

40 The others were Nairobi, Mombasa, Nakuru, Naivasha and Kitale.

41 An aerodrome on land north of the town followed after the Second World War, and is currently being upgraded to take international flights again.

authority in 1938, and successive town plans in 1936, 1948, 1954 and 1960. Before independence the British claimed that it had a 'most progressive and efficient local government'.[42] The town centre assumed its present form in 1954, with a Coronation Park named in honour of the newly crowned Queen Elizabeth II (renamed Jomo Kenyatta Sports Grounds after independence). A new town hall was opened in 1958, reflecting the colonial policy of developing local government. In 1960 a new railway station followed, and plans for a better road network which resulted in the construction of an eastern by-pass road which forms the boundary between Milimani and Nyalenda.

A valuable source for colonial policy on land and housing in early Kisumu is a 1907 report on sanitary conditions.[43] Soon after the discovery that plague was spread by rats, a civil engineer, G Bransby Williams, was sent by the Colonial Office in London to report on the sanitation of Nairobi (which had experienced plague outbreaks in 1902 and 1906), and after completing that extended his mission by visiting the new railway townships of Naivasha, Nakuru and Kisumu. The latter, with a population of 5,000-6,000 (including some 3o Europeans and 600 Indians), suffered badly from plague, malaria and blackwater fever, which he attributed largely to the 'bad water supply and insanitary bazaar'. His report and recommendations, apart from urging 'a vigorous crusade against the rats', distinguished between the housing conditions of the three racial groups. The Europeans lived in stone-built bungalows, and the nearby police were housed in forty huts, which he considered 'the best in the country'. The Indians (mostly former railway workers who had turned to trading) lived in corrugated iron shacks on small plots that were completely built up, with no courtyard space and greatly overcrowded, in the absence of site coverage rules. Williams wrote:

> The greater number of the Indian traders of Kisumu are poor men, and the insanitary condition of the bazaar is, to some extent, the failure of the officials who were responsible for letting the land in the first instance.

The railway workers' housing (called 'landhies') was also of corrugated iron:

> In some of these there are rows of small rooms, about nine feet square, in each of which two men and two women sleep, whilst in others 30-40 people sleep in a one-roomed building which should not be made to accommodate more than half that number.[44]

He recommended moving and replanning the bazaar 'by increasing the area of the holdings, fencing them in, and removing the latrines, washing

42 According to the Minister of Commerce and Industry, in the *Kisumu Guide* 1960.
43 GB Williams *Report on the sanitation of Nairobi, and Report on the townships of Naivasha, Nakuru and Kisumu*, Wellcome (1907) ref WA670, HK4.
44 n 43 above.

places and kitchen out of the houses into the back yards.' The Africans (other than railway employees) housed themselves in a separate 'Native Quarter' on a hill running north-east from the town (ie towards the present Manyatta and Nyalenda). He recommended for them a layout of huts in squares, with each alternate square occupied:

> The inhabitants would subsequently migrate to the unoccupied squares when the ground on which they were living had become fouled' (ie after use as toilets).[45]

Anticipating further growth, he suggested that 200 acres on such a layout would be adequate for 10,000 Africans.[46]

A later historical source is the body of annual reports on Kisumu township development, examined by Anymuba.[47] The population of the old town grew relatively slowly: 6,000 in 1914, 7,000 in 1938, 11,000 in 1948, 23,000 in 1962. The official counts separated the population by race: in 1927 5500 Africans, 5400 Indians or Goans, and 400 Europeans (rounded figures).[48] The housing conditions of Africans remained the poorest of the three racial groups, and the convenient ideology of the dual system allowed the township (and later municipality) to evade responsibility. In 1945:

> In view of the close proximity of the native lands the housing problem has not been so acute as in some of the other municipalities.[49]

In 1947 African housing in Kisumu was:

> the least stable of all municipalities and far the most part goes home nightly or lives in lodging-houses in the surrounding African area [ie the reserves or trust lands] … [T]he density of population on the borders of the town is probably higher than within the town itself, which is an indefensible state of affairs.[50]

The word 'stable' refers to the colonial policy in Africa of 'stabilising' African workers by building family accommodation; in Kisumu most African housing within the town was in the over-crowded barrack-style 'landhies', and many preferred to live beyond the municipal boundaries – the origins of present-day peri-urban slum areas.[51] The colonial policy of

45 n 43 above.
46 This represented a high density of 100 persons per acre, with no piped water or sewerage, or apparently even public latrines. Williams' attitude to Africans (whom he calls 'naked savages') was typically racist for the time.
47 Annual reports were published by the Commissioner for Local Government, Lands and Resettlement for 1931 to 1936, and by the Commissioner for Local Government for 1942 to 1961.
48 The Asian population of Kenya fell from 192,000 to 78,000 in the 1970s. Kisumu still has some 700 families of Asian origin, especially active in construction and business.
49 Annual Report of Commissioner for Local Government (1945) 20.
50 Annual Report of Commissioner for Local Government (1947) 30.
51 Home (n 16 above) 327.

strengthening local government, and the recognition that African migration to the towns was unstoppable, led to some building of municipal housing in the 1950s for the non-white population from the Commonwealth Development and Welfare Fund.[52] The 1946 report had acknowledged the issue:

> There is no municipal African housing scheme, and although the lack of housing is not felt so much in Kisumu since many of the Africans working in the town either own or rent accommodation in the surrounding African land unit, the Board must sooner or later address itself to the problem, not least because its omission means unhealthy suburban development on the perimeter of the municipality.[53]

The Municipal Board had no African representation until the 1950s.

3.2 Urban growth after 1972

A major change in Kisumu's urban governance took place in 1972, the effects of which continue to the present day. Following the Ogutu Commission (1968), the municipal boundary was extended, enlarging the urban area some twenty times, from the 15 sq.km of the pre-1972 Old Town to 297 square kilometres (and a further 120 sq.km of Lake Victoria waters).

The Old Town continued to be closely regulated, reflecting its colonial township origins. It was seen as a community largely 'detached' from the majority of the population, with an 'inherent perception on the traditional role of the local authority'.[54] Strict by-laws dating from the colonial era resulted in a common public perception of the council as harasser of the poor. Meanwhile Kisumu grew rapidly, especially outside the Old Town. In 1962 there were 23,000 people in the Old Town, but by 1990 the expanded urban area had a population of 190,000, which grew to 396,000 by 2010, reflecting both natural growth and inward migration. Meanwhile air, rail and lake traffic declined dramatically in the 1970s, reflecting global changes in transportation but also the break-up of the East African Community in 1977 and political instability in Uganda.[55]

The huge enlargement of the municipal area was followed by a period of rapid urban growth, but weak urban government. In 1974 the graduated

52 After the Second World War redundant armed forces camps were taken over to provide housing for the Indian population. The first African municipal housing scheme (246 rooms in 40 blocks) was completed in 1955; in 1957 16 houses were built and let to African tenants; in 1959 16 three-bedroom semi-detached houses for tenant purchase were completed, and the first 100 plots for sites-and-services were started. In 1961 Phase I of housing in Kaloleni was completed.

53 Kenya *Report of the Commissioner for Local Government 1946* (1947) 31.

54 UN-Habitat *Kisumu City: A strategic framework* (2002) 3.

55 JO Oucho *The port of Kisumu in the Lake Victoria trade* (1980).

poll tax (the main source of local authority revenue) was abolished, and infrastructure improvements had to be funded by the limited source of a road maintenance fuel levy. Kisumu's leading role in opposition politics in the 1970s resulted in the region's political exclusion, two commissions of inquiry and a period of central government direct rule after the municipality was dissolved in 1979. The region's increasing political exclusion under the Kenyatta and Moi governments contributed to massive in-migration from an impoverished rural hinterland. Formal employment has largely collapsed, with a decline in industry and fishing, making subsistence farming increasingly important even within the urban area. Recent estimates classified 48% of the population in absolute poverty, compared with the Kenyan national average of 29%.

The unfortunate combination of rapid growth and poor local government has resulted in an inadequate infrastructure and a deteriorated urban environment. The transport infrastructure is poor, especially in the peri-urban areas, and thousands of boda-boda (bicycle taxis) and tuk-tuk (motor-rickshaws) are the main means of public transport. Piped water supply is concentrated within the Old Town, with the wider municipal area having only 40% coverage (and for piped sewerage only 10%); illegal dumping, animal and dead plant matter clog the drainage system. In the absence of piped water supply wells are dug inevitably close to pit-latrines, leading to outbreaks of waterborne diseases such as cholera and typhoid. The loss of vegetative cover on the hilly slopes east of city has increased surface water run-off, and leachate from poor waste management (collection efficiency is estimated at only 20%) pollutes the groundwater and Lake Victoria. Much peri-urban settlement is in areas of high flood risk, lying at the bottom of slopes.

In 2001 Kisumu celebrated the centenary of the arrival of the railway, drawing attention to how much the town had grown and changed. A new City Development Strategy identified seven 'key challenges':

- poor urban planning;
- inadequate infrastructure and services;
- degraded urban environment;
- increased urban poverty;
- impact of HIV/Aids increasing numbers of orphaned and vulnerable children;
- unregulated urban agriculture and livestock keeping;
- poor urban governance.

The Strategy also identified strategic goals and three growth points or satellite centres, and produced a lengthy schedule of strategic action plan activities, but little has been achieved.[56]

3.3 Land tenure systems and Kisumu's urban growth

Land tenure structures and land speculation have exacerbated Kisumu's problems of unplanned growth after 1972. The town was divided into two largely distinct land-tenure zones: land under leasehold in the Old Town, and freehold outside. The local authority was granted land in bulk by the Government which it allocated to institutions and individuals, while central government also allocated directly.

Much of the land in the Old Town is leased out by the Government. The largest land-owner is still the railway, seen in the colonial era as almost a government in itself, which controls prime but under-used land along the shore line as well as land in other areas for housing.[57] In the 1990s much railway land was allocated to speculators like all public land in Kenya, and subdivided for office and flat development near the town centre.

As part of the expansion of the urban area in 1972 the municipality acquired land compulsorily in the low-lying Kanyakwar area north of the town, as a land bank for future urban development, with residents compensated and removed. The council should have secured the land and ensured a physical development plan to allocate land uses, but in practice the land was left unprotected, open to land speculators. The acquired land was registered under the Registration of Titles Act, not administered by the Kisumu Lands Office and not appearing on its Index Maps. In the 1990s most of this land was allocated to Nairobi-based land speculators, leaving the council little land for either public or private use, while the allocated land often remains undeveloped, held by speculators for future profit. Some leases issued by the municipal council were for 33 and 45 year terms, and many expired with leaseholders unaware of the need to renew them, allowing speculators to apply for re-allocation without their knowledge.

The situation is made more confusing by the dual system of land registration. The land acquired for expansion of the town in the Kanyakwar area is bordered to the north by a hilly low-populated region of freehold land, whose boundaries are clearly shown on the registry index map in the Kisumu Lands Office, but much adjacent land is registered in

56 UN-Habitat *Kisumu City: A strategic framework* (2002) 18. There was also a Kisumu District Development Plan 2002-2008; and UN-Habitat's *Situation Analysis of Informal Settlements in Kisumu* (2005) available at www.unhabitat.org/pmss/getElectronic Version.asp?nr=2084&alt=1 (accessed 28 August 2011).

57 The British East African Railways Company became the East African Railways and Harbours after independence, and the Kenya Railways Corporation was created after the break-up of the East African Community in 1977.

Nairobi under the different Registration of Titles Act. Freeholds are defined by general boundaries (allowing a large margin of error), while leaseholds are defined by fixed boundaries, allowing land-owners in collusion with land surveyors to apply for official boundary corrections, taking the opportunity to enlarge their land into the acquired titled land (which appears blank on the registry index map). This can result in double ownership of the same land parcel because it is registered under two different statutes, both legal but overlapping on the same space, and recorded in two different registries (in Kisumu and Nairobi). Security problems can arise, as previous occupiers compulsorily evicted see others now doing business with the land, and retaliate by threats and violence to those they see as corrupt developers.

Land allocation can also be made by the government without knowledge of the local authority, and has been used to reward political supporters, at the expense of local development because land goes to speculators not developers. In most cases the beneficiaries are not from the local community, and sell on to speculators who hold for future gain (often Asian businessmen).

Confusion over addresses was one consequence of the registration of individual property rights by land adjudication in the peri-urban areas. Registered land is recorded on the Registry Index Map at the local Lands Office, identified by district/section/block/parcel number. Roads into the peri-urban areas were meandering footpaths, and there was no street naming or property numbering, and no postal service, making it difficult to levy property taxes or apply planning and building controls, while the local authority remained responsible for the full cost of road improvements. Densification in the peri-urban areas happened through family expansion, building rooms for rent, and the uncontrolled sale of subdivided plots, but services and infrastructure could not keep up. Planning was increasingly ineffective, with planning functions divided between the provincial planner (responsible for plan-making) and the council (responsible for implementation), so that control of urban growth through planned road layouts and subdivision control hardly existed.

3.4 Peri-urban areas

Peri-urban informal settlements house two-thirds of Kisumu's population, in largely unplanned areas of mixed land use, and a proliferation of rental rooms. These areas lie mostly outside the boundary of the Old Town, on former trust land where land adjudication had replaced customary tenure with individual registered rights. These informal settlements have relatively high densities of 150 households per hectare (compared with 15 in the high-income areas), and an estimated 75% of their inhabitants occupy temporary or semi-permanent structures.

A legacy of the trust land era is that traditional Luo homesteads set up on adjudicated individual plots, with separate mud-and-wattle huts for members of the extended family. These were later upgraded to structures in modern materials (usually concrete block walls and tin roofs), and often rooms for rent were added, while plots were subdivided and sold off piecemeal. Amenities are basic, sometimes electricity supply, and a combination of pit latrines and well-water, creating high risk from water-borne diseases as densities rise. The planning standards followed were those for rural areas, which meant access roads only six metres wide or less.

The main peri-urban areas are Nyalenda to the south of the town, Manyatta and Kondele to the north, and Nyawita and Bandani to the North east.[58] Nyalenda (subdivided into A and B, with some 50,000 inhabitants) lies close to the Milimani high-income area, only separated from it by the ring road, and was incorporated in the city in 1972. A settlement existed from the 1880s as Kassagam, was renamed in 1940 as Nyalenda., and was the location of the first flats built for African residents (today still called Nyalenda Railway Quarters). Its proximity to Milimani makes it convenient for casual workers, but it lacks government investment (although it had good piped water because the town's water main passed through it). Intense subdivision has resulted in plots as small as 100 sq.m, and boundary disputes are difficult to resolve because the margin of error on general boundaries is large and yet plots are small. Proximity to the town centre and the Milimani district across the ring road has created pressures for new dwellings and speculative development. [59]

The Manyatta area (also subdivided into A and B) has experienced frequent subdivision and even multiple fraudulent sales of the same plot. There were attempts at slum clearance from 1948 (as part of a town plan of that year) until the 1960s, and the World Bank after 1967 initiated an upgrading scheme, with sites-and-services plots and infrastructure improvements.

Obunga and Bandani began as high-density housing, providing workers for the industrial area of the city. Mass job losses in the manufacturing sector resulted in redundancy lump-sums being invested in land, and an active land market in subdivided plots has increased the numbers of immigrants until they outnumber the original community. The area has poor access (the railway line cuts it off from the main road), and transport relies upon handcarts and bicycles.

58 This section draws upon UN-Habitat *Situation Analysis of informal settlements of Kisumu* (2005) and *Kisumu City: A strategic framework* (2002). Field interviews were undertaken for this chapter in all of them in 2010, confirming the findings of earlier studies.

59 L Brunsell *Small scale drainage solutions for the Nyalenda slum in Kisumu* (2003).

4 Conclusions: 'We do not want a Kenya of 10 millionaires and 10 million beggars'[60]

These words of JM Kariuki, the Kenyan politician who spoke out against corruption and was murdered in 1975, still have force today. The historical source of the massive inequalities can be seen in two official findings on land in Kenya, one dating from 1926 and the other from 2003. The first, in the British colonial archives, lists land grants made by the colonial administration to British companies and individuals in the first quarter of the 20th century, grants which total some three million acres (12,000 sq.km.) of the best farming and forest land.[61] The second, the Ndungu Commission report, records hundreds of land allocations or allotments made by the Government of Kenya during the last quarter of the 20th century, mostly around election time as political rewards or patronage.[62] There could hardly be a clearer illustration of the continuity of colonial mechanisms for land-appropriation by elite groups. The intervening time between the two was one of unprecedented population growth in Kenya, rising in the post-independence period from 8 million in 1963 to 39 million in 2009, which has placed ever greater pressure upon land.

This chapter has argued that land tenure systems, particularly the inherited complex colonial laws, have a profound influence upon urban form, and indirectly upon urban governance. The rapid urban growth from the 1970s was accompanied by new processes for converting customary and communal land tenure into individual freehold land holdings, and for diverting land acquired for public sector development into the hands of land speculators. Kisumu's situation exemplifies the problems facing Kenya's towns and cities, with its form and character defined by different land tenure arrangements. Within the Old Town the colonial machinery of urban management and land use control survived independence largely intact, with land government-owned and leased out under tight conditions. After independence the responsibilities of local government passed to an under-resourced municipal council, which was ill-equipped to manage the huge expansion of municipal boundaries in 1972.

In the half century since independence Kenya has abolished or reformed some colonial laws (such as those for townships, municipalities and planning), but complex land laws have remained largely untouched, creating rich opportunities for corrupt land appropriation and subsequent disputes. The post-election violence in 2007 has triggered efforts to reform

60 Quoted in Mwangi wa Githungi *Ten millionaires and ten million beggars: A study of income distribution and development in Kenya* (2000).

61 Colonial Office Kenya *Return showing Crown grants of land on over 5000 acres in extent* (1926).

62 *The Ndungu Report* (2003) recommended the revocation of 186 wrongful land allocations in Kisumu. See Ndungu and Southall (n 32 above).

Kenya's constitution and tangled land laws, through a more transparent and consultative process, and greater public awareness and outrage at corrupt land management practices may offer some hope for better in the future.

De Soto would recognise the difficulties that are inherent in multiple land tenure systems, and support their integration into the single system that the Kenyan Land Registration Act envisaged. Kenya's unfortunate experience shows, however, that recognition of private property rights can create complex bureaucratic procedures and piecemeal land adjudication, and may preserve and increase inequitable distribution of land, depriving many people of what they consider to be their ancestral lands, and frustrating any attempt at effective planning of infrastructure and urban expansion.

CHAPTER 4

THE IMPACT OF THE LAND USE ACT UPON LAND RIGHTS IN NIGERIA

Oludayo Gabriel Amokaye

1 Introduction

The Federal Republic of Nigeria comprises a federation of thirty-six states with diverse people, culture, languages, customary land tenure, and a total landmass of 923,768 sq km.[1] In spite of this abundant land mass and resources, land rights are becoming increasingly contentious. Nigerian people increasingly compete for access to arable land and pasture, and land disputes are on the increase across the country. Property market development and population growth are important reasons, as are competing land uses (for example, cultivation, pastoralism, conservation), population mobility, and conflicts.

In Nigeria, like most African countries today, customary systems of land regulation are being undermined and weakened, and more formal regulative mechanisms being developed. Land rights for many rural and urban dwellers are becoming insecure and unclear, and it is generally recognised that vulnerable groups like the poor, women, youth and indigenous peoples are particularly adversely affected. Land rights are increasingly contentious in Nigeria for two major reasons. First, land is an indispensable natural resource God endows on man. To an average Nigerian, land is the essence of human self-definition as the ability to own, control and use land is not only an important expression of both private

1 Nigeria is rich in oil and gas resources, located in the Niger Delta, with an estimated reserve of 20 billion barrels of oil and 120 trillion cu ft of gas. In 1958, Nigeria produced 1.9 million barrels of crude oil. Oil contributes over 80% of federal government revenue. See New Democratic Nigeria *Official publication of the Nigeria High Commission, London, oil and gas* (2001) 28. Under Nigerian law, access and ownership of land excludes the ownership of mineral resources, which are vested in the Federal Government of Nigeria: Constitution of the Federal Republic of Nigeria, 1999, sec 44(3); Petroleum Act, Cap. P., Laws of the Federation 2004, sec 1; *Attorney-General of the Federation v Attorney-General of Abia & 13 Others* (2002) 6 NWLR (Pt 764) 542.

and proprietary right but also a measure of economic wealth and power.[2] Second, there are strong tensions between constitutional rights to property, customary and statutory land law and ownership arising from the enactment of the Land Use Act of 1978 ('the Act'). Governments at different levels seek to control land resources, since the discharge of government responsibility necessarily and implicitly involves the manipulation and use of land.

This chapter focuses on the administration of the Act, which revolutionises land use, tenure and management in Nigeria. It will examine the context of land governance and accessibility, security of title, land rights and interest, acquisition and revocation of interest in land for public purpose, customary land tenure, alienability of interest in land, compensation regime and dispute resolution mechanisms. After examining the constitutional right to own landed property, and the customary land tenure, the chapter discusses the history, justification, institutional framework and effects upon land rights, and weaknesses in the administration of the Act, followed by conclusions.

2 The constitutional right to land in Nigeria

Is there a constitutional right to own and access land in Nigeria? If it exists, can it be demanded as of right from the government? If demanded, is there a corresponding obligation on government to make such land available to every Nigerian promptly? The 1999 Constitution (section 43) provides that every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria, and section 17(2) provides that the State is founded on ideals of Freedom, Equality and Justice, with every citizen having (a) equality of rights, obligations and opportunities before the law; and (b) the sanctity of the human person shall be recognised and human dignity shall be maintained and enhanced. Consequently, under sections 5 and 6 of the Act the governor or local government is enjoined to grant statutory or customary right of occupancy to any person upon application: where an applicant applies for land in any territory of the State, he must be granted it. Thus the Nigerian Constitution and the Act guarantees the right of every Nigerian to unrestrictive access to own and enjoy land. In practice, however, access to land has been viewed by the governments (federal, state and local) as a privilege rather than a right in several respects.

[2] According to Harold Laski, 'possession of property, particularly land, brings security and comfort:
The man of property has a stake in the country. He is protected from the fear of starvation. He need not accept the work he does not desire ... He can, if he so will, surround himself with that environment which makes life an artistic thing ... He can protect his children against the dread of want. He can develop in them the tastes, which give them, also joy in the life creative. He has direct and immediate access – should he desire it – to the social heritage of Western Civilisation'. HJ Laski *A grammar of politics* (1967) 173.

Firstly, allocation of land is not automatic, but depends upon availability of land, location, size and cost. Secondly, where an applicant is denied application, section 47(6) of the Act prohibits an applicant person from challenging the discretion of the governor in his refusal to grant a statutory right of occupancy. Thus the provisions of section 17(2) of the Constitution are not justiciable, in that a claim to access land under the Act can be defeated under section 47, which gives public officers immunity from litigation.

3 Customary land regime

In former times, the people of Nigeria, recognising the importance of land as the essence of human self-definition, economic and socio-cultural survival, developed a social and legal system that guaranteed a fair and equitable distribution. The relationship between the group and the land it held was complex, since the rights of individuals and the group with respect to the same piece of land often co-existed within the same social context. To the indigenous people of Nigeria, land was not merely a possession and a means of production, but an intrinsic part of their social, economic, political and spiritual survival. It is a material element to be cherished, preserved and responsibly enjoyed by the present and future generations including both the living and the dead.[3]

Ownership and management of land in many communities were governed by the customary law of the indigenous community with its varying characteristics and peculiarities.[4] Land was corporately owned by the community[5] or family,[6] and only in isolated cases that land could be owned by an individual.[7] The administration and management of communal or family land is vested in the community head or family head, who could allocate or allot a portion of the communal or family land to the members of the community or family.[8] The basic purpose of communal or family property was to provide for the needs of the members.[9] Consequently, a member is entitled to call on the community head or

3 See the testimony of Elesi of Odogbolu before the West African Land Committee where he said that 'I conceive that land belongs to a vast family of which many are dead, few are living and countless are yet unborn'. The Land Committee further reported that among the people of West Africa 'land is considered and is still the property of the original settlers and thus as belonging to the past, the present and the generation to come'. Colonial Office Legal Library (London) Folio 13080 (April 1917), cited in TO Elias *Nigerian land law* (1971) 147.

4 *Otogbolu v Okeoluwa & Others* (1981) 6 - 7 SC 62, 76; *Lewis v Bankole* (1908) 1 NLR 100 - 101.

5 *Amodu Tijani v Secretary of Southern Nigeria* (1921) AC 399.

6 GB Coker, *Family property among the Yorubas* (1966) 40; Elias (n 3 above); CO Olawoye *Title to land in Nigeria* (1974) 26 - 38 *; Lewis v Bankole* (n 4 above).

7 *Amodu Tijani* (n 5 above).

8 *Amodu Tijani* (n 5 above) was followed by the *Supreme Court in Alao v Ajayi* (1989) 4 NWLR (Pt 118) 1.

9 *Bajulaiye v Akapo* (1938) 14 NLR 10.

family head to allocate to him land upon which to build, reside and farm.[10] The right to an allotment was a legal one and where a member was unreasonably denied such right he could seek redress in court and the court might order the partitioning of the communal or family property or its outright sale.[11]

An allotee to a portion of communal or family land does not enjoy an absolute right but a mere user right, which cannot be extinguished by a member of the community or family.[12] Allotment under customary law permits an allotee to occupy such land, but does not entitle him to a declaration of ownership to such land.[13] It is neither a fee simple interest in land nor a lease as known under the English system. A member enjoys a mere usufruct right over his lifetime (and to transmit to his heir).[14] In Igbo society land cannot be allocated to a woman for any purpose and neither does she enjoy the right to inherit land.[15] An allotee can however create an economic interest in the land by pledging the land as security for loan or other monetary transaction.[16] He can only create a customary or kola tenancy in the land for a customary tenant in return for a pecuniary or non-pecuniary interest.[17] Customary or kola tenancy is the bedrock of the land redistribution policy of the indigenous people which entitles strangers to have access to land for exclusive farming purposes.

4 The Genesis of the Land Use Act

In the context of customary land tenure, it might be assumed that government access to land for developmental purposes may be limited or costly, but successive governments (colonial and republican) have devised the legal strategy through which land may be accessed easily and cheaply. Such statutory framework was contained in the Public Land Acquisition Laws[18] which allowed the government to compulsorily acquire land for development. In 1978 the Federal Government of Nigeria took a bold initiative to subject land ownership, control and use to public regulation. The Act was preceded by an eleven-man Land Use Panel set up by the government with the terms of reference *inter alia* to:

10 *Amodu Tijani* (n 5 above).
11 *Ajibade v Jura* (1948) NLR 27.
12 *Lewis v Bankole* (n 4 above); *Richardo v Abal* (1936) 7 NLR 58; *Alao v Ajayi* (n 8 above).
13 *Ndukwe v Acha* (1998) 6 NWLR (Pt 552) 25; *Bassey v Cobham* (1924) 24 NLR 92.
14 *Chairman, LEDB v Sunmonu* (1961) LLR 20; *Taylor v Williams* (1935) 12 NLR 67; Elias (n 3 above).
15 SNC Obi *The Ibo law of property* (1963) 101
16 Elias (n 3 above) 132; *Chief Jacob v Oladunni Bros* (1935) 12 NLR 1.
17 *Lasisi v Tubi* (1974) 1 All NLR 438; *Taiwo v Akinwunmi* (1975) 1 All NLR (Pt 1) 202.
18 Public Land Acquisition Act of 1917 and the Public Land Acquisition (Miscellaneous Provision) Decree 83 of 1976.

- Undertake an in-depth study of the various land tenure, land use, and land conservation practices in the country and recommend steps to be taken to streamline them;
- Study and analyse all the implications of a uniform land policy for the country;
- Examine the feasibility of a uniform land policy for the entire country, make necessary recommendations and propose guidelines for implementation; and
- Examine steps necessary for controlling future land use and also opening and developing new land for the needs of Government and Nigeria's growing population in both urban and rural areas and make appropriate recommendations.[19]

The fifty-one sections of the Act radically redefine, vary and delimit the existing land rights of the Nigeria people. Public regulation of land is, however, justified on the nebulous public interest and land redistribution theories of making land available to all Nigerian in any state for developmental purposes, regardless of sex, creed, tribe, custom or state of origin.[20] The Act was included in the 1999 Constitution, thus making its amendment rigid and difficult.[21]

Over the three decades of its existence, the Act has elicited divergent views both from the courts and academia as to its precise scope and effect on the land rights of the Nigerian people. It has been argued that the Act is expropriatory because it nationalises the proprietary rights of land owners in land in favour of the State.[22] Section 1 of the Act vests the ownership, control and management of land in the territory of a state in the State Governor who holds the land in trust and shall administer same for the use and common benefit of the Nigerian people. One view expressed by Eso JSC in *Nkwocha v Governor of Anambra State*[23] is that 'the tenor of the Act is the nationalisation of land in the country by vesting of its ownership in the State leaving the private individual with an interest in land which is a mere right of occupancy'.[24] Another view, expressed by Obaseki JSC in *Savannah Bank (Nigeria) Ltd v Ajilo*[25] is that the Act swept away the unlimited rights and interests that Nigerian had in their lands, and

19 *Federal Government White Paper on the Report and Recommendations of the Land Use Panel* (1978) 1.

20 General Olusegun Obasanjo, the Nigerian Head of State at the time the Act was promulgated stated in a special broadcast to the nation that its purpose was 'to make land for development available to all including individuals, corporate bodies, institutions and government ...'. See also the Preamble to the Act underscoring the public interest element of making land available to all Nigerians.

21 The Constitution sec 315(5).

22 *Nkwocha v Governor of Anambra State* (1984) 6 SC 362.

23 n 22 above, 362 - 404.

24 n 22 above, 404. See also JA Omotola 'Does the Land Use Act expropriate?' (1985) 3 *Journal of Private and Property Law* 1; JF Fekumo 'Does the Land Use Act expropriate – a rejoinder' (1989)10 & 11 *Journal of Private and Property Law* 5.

25 *Savannah Bank (Nigeria) Ltd v Ajilo* (1989) 2 NWLR (Pt 97) 305.

substituted them with limited rights and control of use rights by the Governors and the Local Governments.[26]

5 Impacts of the Act upon land rights

5.1 Land governance and accessibility to land

The Act distinguishes between urban and non-urban lands. Ownership of all land in a state is vested in the Governor while the managerial power is restricted to land in urban areas in his capacity as a trustee.[27] In *Adisa v Oyinwola,*[28] the Supreme Court held that the object of the Act, as contained in the preamble, is to vest all land comprised in the territory of each state (except land for the Federal Government or its agencies) solely in the Governor of the State, who would hold such land in trust for the people and would henceforth be responsible for allocation of land in all urban areas to individuals residing in the state and to organisations for residential, agricultural, commercial and other purposes while similar powers with respect to non-urban areas are conferred on the local governments.

Although the Act does not define an urban area the governor under section 3 has power to designate or re-designate any area within the state as an urban area by an order published in the official *Gazette*. When designated or re-designated, the overall control and management of urban land is vested in the governor, assisted in an advisory capacity by a Land Use and Allocation Committee established under section 2, with functions restricted only to resettlement of persons affected by revocation of rights or determination of compensation. Under section 5, the governor has a discretionary power to grant to any person a statutory right of occupancy in or over land in both urban and non-urban areas. Under this statutory scheme, access to land by the ordinary citizen is not automatic, but an individual must apply to the Governor for a grant of land and fulfil other conditions of grants before any land can be allocated to him. The standard practice in most states is that a Land Bureau or Registry under the governor's office is established where individual applicant can apply for a fee and fulfil other conditions for allocation before land can be allocated

26 *Savannah Bank (Nigeria) Ltd v Ajilo* (1989) 2 NWLR (Pt 97) 305, 315 paras E-F, *per* Obaseki JSC.

27 Several writers have argued that the notion of trusteeship in the Act is fallacious. See O Adigun, 'The Land Use Act and the principles of equity or the equity of the Land Use Act' in JA Omotola (ed) *The Land Use Act – Report of a national workshop* (1982) 10 – 20; *E Chianu* 'Land Use Act and individual land rights' in IO Smith (ed) *'The Land Use Act: Twenty five years thereafter,* (2003) 116. Nwabueze appears to support the compatibility of equitable and trusteeship concepts to the interpretation of the Act: RN Nwabueze 'Alienations under the Land Use Act and express declaration of trust in Nigeria' (2009) 53 *Journal of African Law* 59; RN Nwabueze 'Equitable bases of the Nigerian Land Use Act' (2010) *Journal of African Law* 119.

28 *Adisa v Oyinwola* (2000) 10 NWLR 116.

and certificate of occupancy issued by the governor. Conditions for a grant of land include the production of tax receipt for three years, payment of predetermined fees such as survey fee, ground levy fees, stamp duty, registration fee. There is no uniform rate payable and land cost depends on the location and size of land allocated to the applicant. One of the criticisms levied against public land administrator is that the cost of accessing land by the ordinary citizen is prohibitive and conditions unduly stringent. The high cost of land unduly restricts access to land and encourages land racketeering within the public and private sectors.

A statutory right of occupancy may be subject to the terms of any contract between the governor and the grantee, if not inconsistent with the provisions of the Act. Thus, the governor may, under section 8, grant easements; demand rent for the grant and revise the same at specified intervals or at any time during the term; impose penal rent for the breach of any covenant. The governor may waive, wholly or partially, all or any of the covenants and conditions if compliance therewith would be impossible or impose great hardship on the holder; and extend the time for performing any of the conditions. The only limitation on the power of the governor is that he cannot under section 7 grant a statutory right of occupancy or give consent to the assignment or sub-letting of such a right to a minor. Again, a minor upon whom a statutory right of occupancy devolves on the death of the holder shall have the same rights and obligations with respect to this right of occupancy as if he was of full age, notwithstanding that no guardian or trustee has been appointed for him.

The Governor (or a public officer authorised by him) has power under section 11 to enter upon and inspect land, and may enter upon any land not subject of a statutory right of occupancy or of any mining lease, mining right or exclusive prospecting licence, and remove or extract therefrom any stone, gravel, clay, sand or other similar substance that may be required for building or for the manufacture of building materials.[29] The combined effect of section 12 and section 47 of the Act is that, while quarrying leases can still be granted under the Quarries Act, only the governor can now grant a quarrying licence.

In practice, the Nigerian courts have severally construed statutes that tend to oust the jurisdiction of the court restrictively. Relying on constitutional judicial power to adjudicate, in *Lemboye v Ogunsuji*[30] the Court of Appeal held that the provisions of section 47 of the Act are

29 Sec 12. Significantly, this statutory provision is not subject to the power of the prescribed officer to grant a quarrying lease or licence under the Quarries Act.

30 *Lemboye v Ogunsuji* (1990) 6 NWLR (Pt 155) 210. See also the Court of Appeal (Kaduna Division) decision in *Kanada v Governor of Kaduna State & Another*(1986) 4 NWLR (Pt 35) 361. Note that the Supreme Court refrained from making any specific pronouncement on the relationship between secs 47, 6 and 236 of the Constitution even though in *Nkwocha v Governor of Anambra State* and *Dada v Governor of Kaduna State* (1985) NWLR 687 it held that the Land Use Act cannot override the express provisions

inconsistent with section 1, 4(2), 4(8) and 6 of the Constitution, thus restoring the inalienable right of every Nigerian to challenge any unjustifiable expropriation or infraction of their property right arising from public regulation of land resources. It is doubtful, however, if the decision can used to assert a constitutional right to be allotted land.

Lands in non-urban areas are subject to the local government management and control. Under section 6 of the Act, a local government may grant a customary right of occupancy to any person or organisation over non-urban land within its jurisdiction for agricultural, residential and other purposes. A customary right of occupancy cannot be granted to an individual in excess of 500 hectares for agricultural purposes and more than 5,000 hectares for grazing purposes, except with the consent of the governor. The local government has a limited power of revocation subject to payment of compensation. It can under section 6(3) enter upon, occupy and use any land including that used for residential purposes within its area of jurisdiction for public purposes and revoke the customary right of occupancy over such land provided it is not (i) within an area declared to be urban by the governor; or (ii) subject to a statutory right of occupancy; (iii) within an area compulsorily acquired by the Government of the Federation or of a state or; (iv) the subject of any laws relating to minerals or mineral oils.

If the local government refuses or neglects within a reasonable time to pay such compensation, the governor can assess the compensation and direct the local government to pay it to the holder and occupier according to their respective interests.[31] If a customary right of occupancy is revoked under the Act, and was used for agricultural purposes, the local government under section 6(6) is obliged to allocate alternative land for that use.

5.2 Customary land tenure and the Act

The Act does not abolish the existing customary land tenure, the interests of customary land owners being preserved in sections 34(2) and 36(2) of the Act. Under section 34(2), a customary land-owner in an urban area who has developed his land can hold it as if a right of occupancy is granted to him by the governor. But where the land is undeveloped, his right of occupancy is limited to one-half of an acre, the rest being extinguished in favour of the State, which seriously undermines access to land in urban

of the Constitution protecting the proprietary rights of Nigerian people. See JO Akande 'The Land Use Act 1978 and the Nigerian Constitution' (1982) *Journal of Nigerian Institute of Advanced Legal Studies* 319; FO Adeoye 'The Land Use Act, 1978 and the 1979 Constitution, the question of supremacy' (1989) 10 & 11 *Journal of Private and Property Law* 33, G Ezejiofor & IA Okafor 'Jurisdiction to entertain judicial proceedings under the Land Use Act' (1994-97) 6 *Nigerian Judicial Review* 1.

31 Sec 6(7).

areas by private investors.[32] Under section 36(2) of the Act, in non-urban areas, a customary land owner for agricultural or grazing purposes shall continue to use and enjoy the land for the same purpose as if the appropriate local government had granted him a customary right of occupancy to him. Land used for agricultural purposes includes land which is allowed to fallow for the recuperation of the soil.[33]

In considering the provision of section 36(2), arguments might turn on whether or not particular land was used for agricultural purposes. What if lands may not be used as farmlands but grow plants, which are protected and cut periodically for agricultural purposes? This is one of the questions, which the courts may have to tackle, and if the answer is in the affirmative the effect would be that non-farm lands free from immediate take-over by the Government would be drastically reduced. It seems that a customary owner or holder is entitled to keep to himself as much land as he is able to satisfy the authorities that he used for agricultural purposes. A customary owner is not obliged to apply for a customary right of occupancy as the Act deemed him to be the holder. However, he may apply to the local government under to a grant of a customary right of occupancy. If he applies in the prescribed manner and produces a sketch or diagram showing the area of the land as developed, the local government shall register him as one to whom a customary right of occupancy had been granted, provided that the Local Government is satisfied that the land was immediately before the commencement of the Act vested in the person and used for agricultural purposes.

If the land is developed it shall continue to be held by the person in whom it was vested immediately before the commencement of the Act. The right of any person or group of persons to undeveloped land in a non-urban area which was not used for agricultural purposes before the Act is extinguished and such land is expropriated to the government. Since the provision for registration of a person as one to whom a customary right of occupancy had been granted makes such registration optional, it is likely to remain a dead letter as was the case under the Land and Native Rights Ordinance.

Non-urban dwellers that are affected by these provisions are predominantly illiterate and each of them holds small patches of land scattered all over the place. They are therefore bound to be overwhelmed by the trouble and expense of preparing sketches or diagrams of the lands and registering same with the local governments. Besides, they are unlikely to appreciate why they should register the homesteads and farmlands which they inherited from their fathers with authorities located several kilometres away.

32 Sec 34(5).
33 Sec 36(2).

The issue of whether a grant of certificate of occupancy by the Governor or Local Government can turn a community or family member or customary tenant to land owner was subject of a judicial decision in *Abioye v Yakubu.*[34] The appellants sued the respondents for a declaration of title to land and injunction over a parcel of land. The respondents counterclaimed for a declaratory injunction restraining the appellants from removing three signboards which renamed the land. The appellants claimed that the respondents were their customary tenants, but the respondents contended that, being in occupation of the land, they were entitled to customary right of occupancy under sections 34 and 36 of the Land Use Act. The Supreme Court held that sections 36 and 50 in effect wrongly divested the customary owners of their customary rights vis-à-vis their customary tenants, and held that the customary rights of the customary owners were preserved. Bello CJN put the position thus:

> The Land Use Act has been variously described as revolutionary law ... or a law to change the land management in Nigeria. These assertions to a certain extent, may be valid in some incidents of land use. But as a result of this decision, the Act which appeared like a volcanic eruptions is no more than a slight tremor ... The Act did not make a radical change or departure from the traditional land holding. Section 36 of the Act relating to agricultural holdings even though explaining limited holdings per individuals has not divested the traditional holders of their land unless such land is legally required by the government or local authority.[35]

5.3 Security of title

One innovation in the Act was the conversion of the conventional freehold or leasehold interest in land to a right of occupancy. The right of occupancy may be evidenced by a Certificate of Occupancy issued by the governor or local government, but is not conclusive evidence of a grant.[36] The courts can invalidate a Certificate of Occupancy. One commentator has observed that the right of occupancy is unknown to the conventional property law because the holder does not enjoy an absolute and indefinite interest in land, it being neither a conveyance nor a lease, rather a hybrid of the two.[37] The preferred view among jurists is that a right of occupancy supported by a Certificate of Occupancy is a lease, an interest for a definite period of time, usually 99 years.[38] A holder is expected to pay rent to the governor for the duration of the grant. A deemed grantee has an indeterminate interest in land until the right is properly revoked under section 28 by the governor or local government under the Act. Neither the

34 *Abioye v Yakubu* (1991) 5 NWLR (Pt 190) 130.
35 n 34 above.
36 Sec 9.
37 JA Omotola *Essay on the Land Use Act* (2004); *Lang v Mohammed* (2001) 3 NWLR (Pt 700) 389.
38 *Osho v Foreign Finance Corporation* (1991) 4 NWLR (Pt 184) 157 *per* Ademola JCA.

Act nor the Certificate of Occupancy expressly provides for renewal upon expiration, leaving the governor with the discretion to renew or not.

How far has the Act has made the title of the holder of a statutory or customary right of occupancy secure? The starting point is the examination of the provision of section 5(2) of the Act. Section 5(2) of the Act provides:

> Upon the grant of a statutory right of occupancy under the provisions of subsection 5 of the section all existing rights to the use and occupation of the land which is the subject of the statutory right of occupancy shall be extinguished.

The practical effect of section 5(2) on land rights can be demonstrated by an example. A company or individual obtained a statutory right of occupancy from the Governor of a State over land where another person had been enjoying customary right of ownership for decades. A Certificate of Occupancy in favour of the company or individual can be registered in the Land Registry without the knowledge and consent of the previous owner, who will only become aware when the grantee takes possession and commences development. When challenged, the company or individual will flaunt his statutory right of occupancy, and rely upon the statutory defence in section 5(2) to defeat or overreach the title of the previous owners in court. Is it legally permissible for the governor to grant a statutory right of occupancy without first revoking the interest of the prior owner? If so, which of the titles is superior: the previous land owner or the company? What remedy, if any, is available to the landowner whose interest is extinguished?

Earlier judicial pronouncements on the effect of section 5(2) appear to suggest that a prior legal or equitable right in or over land is extinguished where statutory right of occupancy has been granted by the Governor.[39] In two watershed cases,[40] however, the Supreme Court had the opportunity for the first time to construe the provision of section 5(2) of the Act, and drew a distinction between the exercise of the power of the Governor to issue statutory right of occupancy over non-urban land and to correct the making of inconsistent grant under section 5(2). In both cases, the respondents (plaintiffs at the High Court) were granted statutory rights of occupancy over pieces of land at diverse time, with Certificates of Occupancy signed by the Commissioner of Land on the authority of the Governor. Afterwards the Governor subsequently granted statutory rights of occupancy over the same pieces of land in favour of the appellants (defendants at the High Court). The respondents brought actions for declarations that the appellants were not entitled to the piece of land in dispute, having been granted earlier Certificates of Occupancy on the

39 *Saude v Abdullahi*, *Titiloye v Olupo* (1991) 7 NWLR (Pt 205) 519; *Dabup v Kolo* (1993) 9 NWLR (Pt 317) 254.

40 *Dantsoho v Mohammed*, and *Ibrahim v Mohammed* (2003) 6 NWLR (Pt 817) 457 and 615.

same. The appellants contended that the interests of the respondents had been extinguished by virtue of section 5(2) of the Land Use Act. The Supreme Court, rejecting that contention, held that the Governor could not make an inconsistent grant of a right of occupancy over a parcel of land, without having validly revoked (as prescribed under section 28 of the Act), the interest of the earlier holder, otherwise such later grant is null and void. Belgore JSC puts the position succinctly:

> The law is very clear in matters relating to grant of right of occupancy. It is only by the inverted reading of the provisions of the Land Use Act and Land Tenure Law of an existing grant of right of occupancy that a latter grant could destroy. Once a grant or right exists, it can only be extinguished by a lawful revocation and not by another grant to a different person.[41]

These decisions have a far-reaching effect on protecting the land rights of customary land owners whose land had been unjustly expropriated by the inconsistent grant of the Governor. They will also promote transparency and ultimately reduce the incidence of corruption in public land management in Nigeria. Unfortunately it took several years for the Supreme Court to correct the injustice that section 5(2) created for ordinary Nigerians, because the same court when confronted with similar facts in other cases[42] had earlier arrived at a different conclusion on the technical ground that section 5(2) was not canvassed before it.

5.4 Alienability of interest in land

Before the Act, there was no formal consent requirement to validate any transfer of interest in land except that of stamp duties and registration.[43] Under the Act, a holder of statutory rights to obtain the consent of the governor before he can validly alienate or transfer any interest in the land by way of lease, sub-lease, assignment, mortgage, sale or otherwise, without which it is null and void.[44] Omotola has suggested that the consent of the governor could be dispensed with when a deemed grantee under section 34 alienates his interest in land, and the same argument has been applied to the creation of an equitable mortgage by deposit of title deed and equitable charge.[45] The Supreme Court rejected such suggestion in *Savannah Bank v Ajilo,*[46] where the Court held that the consent of the governor is indispensable to validate any alienation of interest in land. In

41 *Dantsoho v Mohammed* (2003) 6 NWLR (Pt 817) 457 at 490.
42 *Saude v Abdullahi* (1989) 4 NWLR (Pt 116) 387; *Dapub* v *Kolo* (1993) 8 NWLR (Pt 317).
43 The Stamp Duties Act Cap 411 of Laws of the Federation 2004 sec 13.
44 Sec 22. See RN Nwabueze 'Alienation under the Land Use Act and express declaration of trust in Nigeria' (2009) 53 *Journal of African Law* 59.
45 JA Omotola *Essay on Land Use Act* (1980) *27;* PE Osho 'Mortgages under the rights of occupancy system in Nigeria' (1989) *Journal of African Law* 19; FO Oditah 'Issues and problems in corporate debt financing in Nigeria' in CO Okonkwo *Contemporary issues in Nigerian law* (1992) 103, 133.
46 *Savannah Bank v Ajilo* (1989) NWLR (Pt 97) 305; *Okuneye v First Bank Plc* (1996) 6 NWLR (Pt 475) 749.

that case, the respondent/mortgagor failed to obtain the requisite consent before mortgaging the property. The appellant/mortgagee contended that since the consent of the Governor was not obtained, the transaction was null and void under section 26. This argument was upheld by the Supreme Court.

The decision in *Ajilo's Case* has been criticised by bankers and academics as unjust, stifling and frustrating to economic and social development. In *Awojugbagbe Light Industries v Chinukwe,*[47] the Supreme Court had the opportunity to revisit the issue, and, cushioning the stifling effect, held that a mortgage is not invalid merely because the consent was not obtained before a loan is disbursed, allowing the parties to seek and obtain Governor's consent after the disbursement of the loan.

No consent of the governor is required for any alienation of interest in land for a deemed right of occupancy under section 34 or 36.[48] This is because it is impossible for a person in whom any land in non-urban area was vested before the commencement of the Act to further sub-divide the same or lay it out in plots or transfer it to any person by virtue of section 36(5). As in the case of urban lands any instrument purporting to transfer any non-urban land to which section 36 applies shall be void and of no effect; and every party to any such instrument shall be guilty of an offence and on conviction liable to a fine of N5,000.00 or to an imprisonment for one year.[49]

The attraction of land markets is conventionally seen as their ability to facilitate the transfer of land from less to more efficient users, and markets permit the conversion of landed capital into other forms of capital, mobilisation of financial credit through use as collateral, and consolidation of fragmented holdings. Restriction on the right of a customary land owner to alienate his land is undoubtedly an impediment to agricultural growth, poverty alleviation and economic emancipation of the rural farmers because it limits access to credit.

5.5 Revocation of interest in land

Section 28 empowers the governor to revoke a right of occupancy and allow an overriding public interest by the federal, state or local government, including acquisition of land for public purpose, mining, and oil activities inter *alia*. A right of occupancy can be revoked where the holder breaches any of the provisions implied in a Certificate of Occupancy, any special contract or where a grant is made in error.[50] What

47 *Awojugbagbe Light Industries v Chinukwe* (1993) 1 NWLR (Pt 270) 485.
48 Sec 34(7).
49 Sec 36(6).
50 *Saude v Abdullahi* (1989) 4 NWLR (Pt 116) 387; *Sachia v Kwande* (1990) 5 NWLR (Pt 152) 548, 558.

constitutes public purpose is defined in section 51(1) as including: (a) requirement of land for exclusive government use or for general public use; (b) use by anybody corporate directly established by law or by any corporate body registered under the company law; (c) sanitary improvement of any kind; (d) control over land contiguous to any part the value of which will be enhanced by the construction of any railway, road or other public work or convenience about to be undertaken or provided by the government; (e) development of telecommunication, electricity and mining; (f) rural development or settlement; (g) industrial or agricultural development; and (h) educational and other social services. The acquisition of land for public purpose is not intended to benefit another private interest, such as private development companies, sharing land among government officials, or access to genetic resources by foreign nationals. In a plethora of cases,[51] both the Supreme Court and Court of Appeal have consistently held that revocation of a right of occupancy other than for the purpose stipulated in the Act cannot be a lawful purpose.

The recent case of *Administrator/Executor of Estate of Abacha v EkeSpiff*[52] graphically illustrates this point. The respondent was granted a lease under the State Land Law in 1975 for a term of 89 years. In 1986, the governor granted a statutory right of occupancy over the land to General Sani Abacha, then the Chief of Defence Staff and later the Head of State. After the General died in 1998, the respondent sought a declaration that his right of occupancy was unlawfully revoked, which the Court of Appeal granted on the following reasoning:

> The Act ... does not authorise the Governor to simply walk in, take the land from the holder and give it to another private citizen and later promulgate an Edict to back up his actions. Even if the land is to be compulsorily acquired, there is a laid down procedure that must be followed ... I have no doubt in my mind that the action of the 1st defendant (governor) in this matter was not only wrongful, it was also illegal, being contrary to section 28(1) of the Act, which permits the dispossession of the holder only for public purpose. The Act does not sanction the robbing of Peter to pay Paul as the 1st defendant did in this case.[53]

The governor must comply with the procedure for revocation. The revocation notice must be made by a person who has the power to revoke it, that is, the governor himself or any public officer duly authorised by

51 *Bello & Others v The Diocesan Synod of Lagos* (1973) ANLR 196 (acquisition of land for the extension of church, considered to be private); *Ereku v Governor of Midwestern State* (1974) 4 ANLR 695 (lease to a company held to be a private acquisition); *Lagos State Development & Property Corporation v Foreign Finance* (1987) 1 NWLR (Pt 50) 413 (grant to a private company); *LSDPC v Banire* (1992) 5 NWLR (Pt 243) 620; *Olatunji v Military Governor, Oyo State (*1995) 5 NWLR *(*Pt 397) 586. But in an isolated case of *Lawson v Ajibulu* (1997) 6 NWLR (Pt 507) 14 the Supreme Court held that allocation to private company or developer for a housing estate was a public purpose.

52 *Administrator/Executor of Estate of Abacha v EkeSpiff* (2003) 1 NWLR (Pt 804) 114.

53 Per Ikongbeh JCA (n 51 above) 208.

him. In *Majiyagbe v Attorney-General & Others*[54] it was held that a revocation of a right of occupancy is not effective unless notified under the hand of a public officer authorised in that behalf by the governor. Until this is done the holder is entitled to remain in possession of the land. Another officer not so authorised cannot revoke the right. A revocation notice is valid only when it is done under the signature of the authorised officer, not under the rubber stamp of his name. Secondly, the notice must state the purpose of revocation as prescribed by the Act.[55] Thirdly, the notice must be served personally on the holder, who must have actual knowledge of the revocation.[56] The rationale lies in the fundamental right to a fair hearing in section 36 of the 1999 Constitution.[57]

The interpretation of the statutory power of revocation by the judiciary reinforces and protects the proprietary land rights of Nigerians in many respects. Firstly, the right of every Nigerian to own property is constitutional and can only be divested under the legally permissible circumstances. Secondly, revocatory power has far reaching implication on the property right of the holder; being expropriatory, and the person being deprived of his property has the right to know about it. Secondly, an Act that seeks to deprive an individual of his property should be strictly construed against the acquiring authority, so the court has not shirked in its responsibility to protect the constitutional right to property of every Nigerian.

5.6 Compensation for the acquisition of land rights

Public acquisition of land carries a constitutional obligation to pay compensation under section 41(1)(a) of the 1999 Constitution and section 29 of the Land Use Act. Section 44(1)(a) of the Constitution provides that:

> No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things:
>
> (a) requires the prompt payment of compensation therefore; and
>
> (b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.

54 *Majiyagbe v AG Northern Nigeria* (1957) NNLR 158.

55 *Osho v Foreign Finance Corporation* (1991) 4 NWLR (Pt 184) 157*; Ereku v Military Governor of Mid-Western States* (1974) 10 SC 59; *Ilemobola & Co. Ltd v Governor of Kaduna State* (2002) 7 NWLR (Pt 666) 481 (notice alleging that the grantee did not obtain governor's consent to sublet but failed to prove the allegation). See generally OG Amokaye 'The Land Use Act and governor's power to revoke interest in land: A critique' in IO Smith (n 27 above) 246.

56 *Nitel* v *Ogunbiyi* (1992) 7 NWLR (Pt 255) 543.

57 *Obikoya & Sons Ltd v Governor of Lagos State & Anor* (1987) 1 NWLR (Pt 50) 385.

What amount of money constitutes 'adequate' compensation? One opinion is that since 1999 Constitution omits the word 'adequate' in section 44(1)(a), it does not guarantee 'fair and adequate', only 'prompt' compensation.[58] Such interpretation negates the principle of distributive justice which the Constitution seeks to achieve. In *Ereku v Military Governor of Bendel State*,[59] the Nigerian Supreme Court deprecated the unconstitutional acquisition of the appellant's land without compliance with due process, but compensation was not considered. The payment of adequate compensation was recognised in the *Attorney-General of Bendel State & Another v Aideyan.*[60] According to the court,

> In Nigeria, one's right to one's property was an entrenched constitutional right under section 31 of the 1963 Constitution as indeed, it is under section 40 of the 1979 Constitution. That right is inviolate. In the *ipsimis verbis* of the Constitution itself, such a property or any right attendant thereto can only be taken possession of or compulsorily acquired by or under the provisions of a law. Furthermore, such a law must provide for the payment of adequate compensation thereof to him and must give the owner the right to access a High Court for the determination of his interest in the property and amount of compensation due to him. It follows therefore that any purported acquisition which is not according to a law containing the above provisions is no acquisition at all in the eyes of the Constitution.[61]

The method of assessment of compensation under the Act departs from the open market value concept under the Public Lands Acquisition Acts[62] and the common law principles.[63] Under the Act, the recognisable compensation is the unexhausted improvement[64] by a holder of either statutory or customary right of occupancy, the test being expenditure of capital or labour.[65] Where there is no pecuniary improvement or physical effort on the land, the land owner is not entitled to any compensation. Improvement includes building, plantation of long lived crops or trees, fencing, well, road, and irrigation or reclamation, but does not include

58 BO Nwabueze *Presidentialism in Commonwealth Africa* (1982) 362. Section 44(1)(a) of the Nigerian Constitution 1999 is a verbatim reproduction of sec 40(1) of the 1979 Constitution. By contrast the 1963 Constitution expressly provided for the payment of 'fair and adequate' compensation.

59 *Ereku v Military Governor of Bendel State* (1974) All NLR 695.

60 *Attorney-General of Bendel State & Anor v Aideyan* (1989) 4 NWLR (Pt 118) 646; *Ferguson v Commissioner for Works and Planning, Lagos State* (1999) 14 NWLR (Pt 638) 315, 328.

61 *Aideyan's Case (n 59 above), per Nnaemeka-Agu* JSC 667.

62 Public Land Acquisition Act of 1916.

63 (n 61 above) sec 15; *Administrator of the Colony v Thomas & Another* (1930) 10 NLR 71; *Commissioner of Lands v Adeleye* (1938) 14 NLR 109; *Chairman LEDB v Joyce* (1939) 15 NLR 50; *Abiodun v Chief Secretary of the Government* (1949) 12 WACA 525.

64 Unexhausted improvements means anything of any quality permanently attached to the land directly resulting from the expenditure of capital or labour by an occupier or any person acting on his behalf, and increasing the productive capacity, the utility or the amenity thereof and including buildings, plantations of long-lived crops of tress, fencing, wells, roads and irrigation or reclamation works, but does not include the result of ordinary cultivation other than growing produce. See sec 51(1) of the Land Use Act.

65 Land Use Act sec 29(1); Oil Pipeline Act sec 20(4) and (5).

ordinary cultivation other than growing produce.[66] The landowner is not entitled to claim compensation for loss or disturbance of the land, since the land is owned by the Governor, and revocation merely affects the occupational rights of the holder. The practical effect is that compensation on acquisition for overriding public purpose is meagre, inadequate and falls short of the market value of the property.

In relation to compensation for land acquired for mining, the Act incorporated the provisions of Mineral and Petroleum Act. Section 29(2) reads,

> If a right of occupancy is revoked for the cause set out in paragraph (c) of subsection (2) of section 28 of this Act, or paragraph (b) of subsection (2) of the same section the holder and the occupier shall be entitled to compensation under the appropriate provisions of the Mineral Acts or the Petroleum Act or any legislation replacing the same.

Fekumo[67] comments that the Act and referenced statutes are conflicting and contradictory, arguing that the Minerals Act excludes the applicability of the compensatory regime under the Land Use Act, and that the scope of compensable items is broader. The Land Use Act provides the benchmark for assessing the quantum of compensation payable to a landowner, but an application for further compensation could be made under relevant oil-related statutes to augment financial compensation, the statutes being in effect complementarily.

Under section 29(3), where the holder or occupier entitled to compensation is a community, not an individual, compensation may be paid to the community or its leader, or into some fund specified by the Governor for the benefit of the community. Furthermore, if a right of occupancy is revokes in respect of developed land on which a residential building has been erected, in lieu of compensation reasonable alternative accommodation may be offered. If the value of the accommodation is higher than the compensation payable, the excess may be treated as a loan, to be refunded. If the offer of resettlement is accepted by the land holder, the right to compensation shall under section 33 be deemed to have been satisfied and no further compensation payable.

5.7 Dispute resolution mechanisms

The only dispute resolution institution recognisable under the Act is the Land Use and Allocation Committee, which under section 2 has sole jurisdiction to determine the amount of compensation. The Committee lacks jurisdiction in other disputes such as disagreement between multiple

66 Sec 51; *Upper Benue River Basin Authority v Aika* (1998) 2 NWLR (Pt 537) 328, 337, 339.
67 JI Fekumo, *Oil pollution and the problems of compensation in Nigeria* (2001) 9.

contestants over the right of occupancy, which are referred to the courts. The courts have consistently sought to confirm their jurisdiction under section 6 of Constitution to entertain any disputes emanating from the implementation of the Act.

6 Critiques of the Act

The Act continues to attract criticism, particularly in relation to the over-centralisation of land use and managerial power. First, this allows state monopoly of land ownership, creating difficulty in access to land for housing and other developmental purposes by individual and institutional investors. Second, it has encouraged and institutionalised corruption in the public sector; promotes land racketing and secrecy in public land management in Nigeria. Massive fraud, corruption, high handedness, official insensitivity and abuse of office emerged from the National Assembly's Senate Committee on the Land Management, probing the administration of land in Abuja under the Minister of Federal Capital Territory during Obasanjo's Presidency.[68] Third, the cumbersome and costly procedures for obtaining Certificate of Occupancy and governor's consent to mortgage, assign, sublease and alienate an interest in land operate as a major disincentive to housing and agricultural business. The poor do not have money to buy land, and have no access to subsidised credit facility or public infrastructure. The price of development land is unduly exorbitant due to land racketeering and speculation in many urban centres. The revocation of a right of occupancy or compulsory acquisition of land accompanied a poor compensatory regime, with arbitrary valuations of improvements. Land revoked for overriding public purposes is sold at prime market value by the government to land speculators and developers, putting land and housing far out of reach for the poor.

Under native jurisprudence, land is redistributed among the people (regardless of status) through the institution of customary or kola tenancy.[69] Urbanisation has taken away this communal system and replaced it with statutory land rights, making many communities and families near the city richer through the sale of land. Strangers who cannot afford the cost of land will settle in unsuitable locations such as swamps, watercourses and gorges. The preservation of customary ownership of land

68 The hearing found that the former FCT Minister Nasir El Rufai secured over 18 plots of land in choice areas of Abuja for himself, friends, and family members, and some land allocations revoked on public interest grounds, or demolished for inconsistency with the master plan, ended up being allocated to private corporate interests and top government officials, including the presidency. Former President Obasanjo, his late wife and their family members were said to have received a total of 19 plots between 1999 and 2007.

69 *Taiwo v Akinwunmi* (1975) 4 SC 143; *Aghenghen v Waghoregor* (1974) 1 All NLR (Pt 1) 81.

has promoted the development of informal housing contrary to regional planning of the urban centres.

The land redistribution which the Act seeks to achieve through the legal processes of revocation is arbitrarily used as a cloak to unjustly deprive private land owners, particularly the customary landowners, of their lands. Some revocations by land administrators were for personal interests. In Lagos only expansive and expensive plots are officially demarcated for allocation and titling with sure access to Certificate of Occupancy. A poor individual or family finds it difficult to be allocated land when needed. The size of an average residential plot of land is about 680 square metres. While a wealthy individual or developer may get several acres or hectares of land, the low-income earner struggles for a plot of 340 square metres, because such allocation of small plots is not envisaged or contemplated by the land use policy and practice. In many government-approved layouts, the cost of a regular plot of bare land anywhere ranges between three and ten million Naira (US$ 24,000-80,000), whereas the federal minimum wage in Nigeria is ₦7,500 per month.

A worrying dimension in public land regulation is the lack of accountability and transparency in the revocatory process. Cases abound where peasant farmers have been deprived of their farmland through large scale acquisition of land for commercial agriculture, with compensation covering only the so-called economic crops on the land, or the improvements that have been made as stipulated by the Act. A classic example of executive insensitivity is the acquisition of all land as an urban area in Lagos State by a gazetted Executive Order without serving the affected communities with notice of revocation or compensation. Subsequent policy to excise small areas of land for the affected communities is fraught with delay, corruption and cost.

The Act has been criticised for promoting insecurity of land title. Although a Certificate of Occupancy confers, at least, a leasehold interest, in reality it does not protect the holder against arbitrary and punitive actions of government officials, even forcible eviction. Between 2003 and 2007, thousands of Abuja residents were forcibly evicted and their houses demolished with impunity, many of them holding legal documents issued by the relevant authorities. Officials of the Federal Capital Development Authority claimed that the relevant documents were inconsistent with the Abuja's master plan, even though they predated it by many years and were issued by the relevant government agencies at that time. In consequence, the banks have become reluctant to accept landed property as collateral because Certificates of Occupancy cannot be relied upon.

Finally, the recurring problems of compensation for expropriated lands are yet to be statutorily, administratively or judicially settled. When paid at all, compensation has always been untimely, and no serious effort

is made to address communities' profound cultural, social-political values and spiritual attachments to land holdings.

7 Conclusion

This chapter has identified the inefficient operation and implementation of the Land Use Act as a major albatross and disincentive to development and investment in Nigeria. The National Assembly should, therefore, initiate the process of removing the Land Use Act from the 1999 Constitution in order to ease its amendment for the twin objectives of equitable land redistribution and efficient land administration. The 1999 Constitution could also be amended to allow federal and state governments to exercise concurrent powers on land.

Such amendment must take cognisance of the land rights of the citizens to accessibility, security of title, compensation and conversion of their rights to economic power. Again, the acquisition of land must be for the public purposes stated in the Land Use Act while acquisition for speculative motives by a state governor should be expressly discouraged. Even in the deserving cases of land acquisition for public interest, there must be a clear and transparent procedure for the acquisition and compensation. Furthermore, there is the need for supplementary regulation to regulate, standardise and improve the procedure for acquisition of land and revocation of title to land, procedure for effecting compensation and for resettlement of displaced persons, procedure for valuation of compensation and procedure for registration of title to land. This should be complemented with formal and compulsory registration of customary rights, detailing the total land coverage, and systematic definition of every parcel of land and interests in it.

CHAPTER 5

THE EVOLUTION OF LAND LAW AND POLICY IN POST-INDEPENDENCE NAMIBIA

John Kangwa

1 Introduction

The post-independence governments of Southern Africa have all with varying degrees of success had to reform their inherited legal systems, particularly as they relate to land and land tenure. Within the region examples abound of post-independence changes to legal systems. In 1975 Zambia abolished freehold tenure and replaced it with statutory leasehold, and subsequently revised the legislation after the first change of government in 1991. Four years after its independence from Portugal in 1979, Mozambique introduced a new land law, followed by other legislation in 1997. Zimbabwe, which had its hands tied by the Lancaster House Constitution of 1979, began making changes to its Constitution after the expiry of the 10-year limitation on constitutional changes to pave the way for an accelerated land reform process. South Africa, whose legal system under *apartheid* was structured so as to keep the blacks in separate homelands, had the uphill battle of reforming centuries of laws after the achievement of majority rule under an ANC government. A new constitution meant new legislations, particularly in the land sector, where white farmers had traditionally owned more than 80% of the agricultural land. A land reform policy providing for such instruments as restitution, redistribution and tenure reform meant that property lawyers were kept busy. In Namibia independence and a new constitution in 1990 required the new SWAPO-led government to seek ways to implement the motivating force behind the war of liberation, which was to get the land back into the hands of indigenous Namibians.

The issue of land policy and land law reform can be framed in terms of the need for these countries to come to terms with their own sovereignty. Once independence was granted by the former colonial power, it became apparent that the legal infrastructure was designed to perpetuate a system catering to the needs of the coloniser, not the colonised. Now that the colonised had shaken off the yoke of colonialism, should they live with the

same legal infrastructure that had been designed to keep them in subjugation? Thus most post-colonial countries have found themselves confronted with the need to reform their legal and institutional structures in order to make them fit for a new dispensation.

Land reforms tend to be implemented within legal frameworks that address the rights and obligations of the state, landholders, and beneficiaries, specifying procedures for acquisition, allocation and land tenures.[1] Managing land reform requires the building of a consensus on the vision, objectives, strategy and implementation framework. Between 1997 and 1999, Zimbabwe produced the Inception Phase Framework Plan by engaging various stakeholders and experts within and outside government through a technical subcommittee of government experts and the commercial farmer lobby. In the South African context, many aspects of the land law contributed to the illegitimacy of the a*partheid* system among the majority of South Africans, and thus the consideration of future options required a broader consensus.[2] The process of land reform in South Africa began during the final period of the De Klerk government and continued after the beginning of majority rule under the ANC. An important principle set by the new constitution was that land reform could not be limited to the scrapping of discriminatory legislation, but had to involve a transformation of the whole legal system.[3]

In Mozambique the process leading to the development of the 1997 land law included the approval of a National Land Policy and an implementation strategy in 1995, followed by the appointment of an Inter-Ministerial Commission with a mandate to draft a new law, with a Technical Secretariat headed by a respected national lawyer. The information dissemination campaign for the new law was led by a prominent law professor at the Eduardo Mondlane University, while NGOs collected public views on the new law, incorporated in submissions to the draft land law. This process was followed by a national land conference with over two hundred representatives from government, civil society organisations, the private sector, academic, religious and other interest groups.[4]

In Namibia, a national land conference was followed by a technical committee of experts drawn from government, civil society and the private sector which led to legislative measures relating to land reform.[5] This

1 S Moyo 'Designing and implementing redistributive land reform: The Southern African experience' in HP Binswanger-Mkhize *et al* (eds) *Agricultural land redistribution: Toward greater consensus* (2009) 360 - 361.

2 H Klug 'Bedevilling agrarian reform: the impact of past, present and future legal frameworks' in J van Zyl *et al* (eds) *Agricultural land reform in South Africa: Policies, markets and mechanisms* (1996) 163.

3 B de *Villiers Land reform: Issues and challenges* (2003) 47.

4 N Kanji *et al The development of the 1997 Land Law in Mozambique* (2002) 2.

5 Moyo (n 1 above).

chapter reviews the evolution of land law and policy in post independence Namibia, focussing on the process of change that was embraced by the SWAPO government after Namibia's independence in 1990, and how that process of land reform is affecting poor people in the agricultural sector. The material was developed partly out of a course on Land Reform and Resettlement that the author has taught for the past three years at the Polytechnic of Namibia. The chapter describes the history of the land question in Namibia, from the colonial period under German occupation and subsequently under South African apartheid rule. It then examines the immediate post independence period and the National Conference on Land Reform and the Land Question, and traces the role played by this forum in the first post-independence legislation on land, and the subsequent implementation of the land reform programme.

Namibia was known as South West Africa (SWA) until its independence from South Africa in March 1990. The period of German occupation lasted from around 1800 until the German defeat in the First World War in 1915. Between 1915 and 1920 the territory was under martial law, and from 1920 South Africa took over administration of SWA under the terms of Article 22 of the Covenant of the League of Nations, with a Class C Mandate.[6] The laws of South Africa were applied in SWA.

2 Historical context?

2.1 German colonisation

The German occupation of SWA began with the arrival in the late 19th century of representatives of the imperial German government who entered into protection treaties with the native chiefs. These treaties meant that the chiefs could not alienate land to other natives or enter into other treaties without the consent of the colonial authorities.[7] During this period, a series of natural disasters helped influence the balance of economic power in favour of the settlers. The rinderpest epidemic of 1897 killed most of the cattle, and in the following years malaria killed more than 10,000 Hereros and Namas, while a locust plague and severe drought destroyed what little native agricultural production remained. Such events altered the economic balance of the colony and led to the establishment of a settler ranching economy, with white settler numbers rising from 1,774 in 1895 to 4,640 in 1903.

The increasing encroachment of German settlers upon native lands, especially in the central Herero lands, led to the recommendation that

6 Class C Mandates applied where self-government by the indigenous people was considered remote.

7 This section draws upon W Werner '"No one will become rich" economy and society in the Herero Reserves in Namibia 1915-1946' (1998) 2 *Basel Namibia Studies* 41.

reserves be established for the natives, and the reserve question became the major cause of rebellion by the Hereros. In 1904 the Hereros attacked German soldiers and settlers killing more than a hundred, destroying German farms and driving away their cattle. The Germans under General von Trotha retaliated, and the Herero were driven into the desert and the area sealed off by a 250km cordon. In May 1905, it was announced that all tribal land would be expropriated and an order to that effect was signed on 26 December 1905. By then, 75-80% of the Hereros had perished and they had lost all their land and cattle. In March 1906 it was announced that all moveable and immoveable property of the Herero north of the Tropic of Capricorn would be confiscated, and that order came into effect on 7 August 1906.

The German colonial government then divided the territory into two sections. One section was called the Police Zone, which was substantially cleared for white settlement, and the rest of the territory (comprising the northern and north eastern areas) was made into 'reserves' or 'homelands' for the indigenous African population.[8] From 1907 onwards all Africans over the age of eight had to carry identity cards and a service book, intended to check their movements. Natives could no longer obtain land rights or engage in stock breeding without the permission of the colonial Governor. The number of Africans residing on white land was strictly limited, nor could they settle on uncultivated or uninhabited land without permission.

2.2 South Africa and apartheid

German colonial forces were defeated by the British South African forces in July 1915, raising the hopes of the Hereros that their traditional lands would be returned to them. These expectations were reinforced by the Governor-General of the Union of South Africa, Lord Buxton, who addressed the natives at all important centres and promised to return their land, their herds and their freedom. Any such hopes were soon shattered, for the end of the war merely paved the way for a second traumatic event in Namibia's colonial history – another foreign power in the guise of the new British South Africa administration.[9]

Between 1915 and 1920 the territory was under martial law. Land held by the German colonial administration became Crown Land and the Governor-General had power over all matters including land allocation.[10] During this period no legislation was promulgated under which land

8 SL Harring & W Odendaal *'One day we will all be equal ...' A socio-legal perspective on the Namibian land reform and resettlement process* (2002) 19.

9 E von Wietersheim *This land is my land! Motions and emotions around land reform in Namibia* (2008) 48.

10 W Odendaal *Our land we farm – An analysis of the Namibian commercial agricultural land reform process* (2005) 1.

settlement could be carried out. When martial law ended, the Union Land Settlement Acts were applied to SWA by the Land Settlement Proclamation of 1920. A Land Board was set up to facilitate rapid settlement, and in 1921 a Land Bank. To assist the settlement of white farmers from South Africa, the Administrator was empowered to advance monies to a lessee for the costs of conveying his family and personal effects and farming equipment by rail to the railway station nearest to the holding allotted to him, up to a maximum of £100. Prospective settlers were not required to provide any capital for the land to be acquired. By 1923, 662 farms comprising over 5m hectares had been allotted to 831 settlers. At the end of March 1926, 880 farms had been allotted to 1106 settlers under the Land Settlement Proclamations at a total value of £636, 895.

To clear land designated for white settlement, the Administration introduced the Native Administration Proclamation in 1922 which provided that natives not employed by land owners or lessees could not squat on land without a magistrate's permission. This proclamation did not however, affect Owamboland, Okavango and other areas in the north, which were located outside white farming areas. The German colonial policy of restricting movement between white and black areas was carried forward by the South African government by maintaining the distinction between the Police Zone and the rest of the country. The 1922 Proclamation was in many ways based on the South African Native Lands Act of 1913 which prohibited land transactions between blacks and whites and provided for separate settlement areas for different race groups. In the same year, a Native Reserves Commission, tasked to formulate a basis for reserve policies, recommended that:

- The country should be more clearly segregated into black and white settlement areas.
- Black squatting on white farms should be prevented.
- Reserves recognised by the German treaties were to be maintained, but the temporary reserves established during the military period should be closed.
- New reserves and more efficient control of existing reserves were to be established.

By 1946, land use in Namibia was well established into areas for white occupation and the reserves where most black Namibians lived. By 1960 the process of allocating farms to whites was almost complete with a total of 39 million hectares in the commercial farming zone, comprising about 5,214 farms of approximately 7,500 hectares each.

With Apartheid policies already functioning in South Africa, the government of that country appointed a Commission of Enquiry into the Affairs of SWA to advise on how a similar policy of separate development could be introduced. Known as the Odendaal Commission (dated 12 December 1963), it recommended the granting of self-government to the homelands and the transfer of all land within homeland boundaries to the respective legislative assemblies. It led to the establishment of ten reserves

(homelands) for the black people of SWA under the Development of Self-Government for Native Nations in SWA Act 54 of 1968. The Act recognised Owamboland, Hereroland, Kaokoland, Okavangoland, Damaraland and Eastern Caprivi as 'native nations'.

2.3 The road to independence

When the League of Nations was superseded by the United Nations in 1946, South Africa refused to surrender its earlier mandate until it was revoked by the UN General Assembly in 1966. In 1977 the Western Contact Group, comprising the USA, UK, Canada, France and the Federal Republic of Germany, launched a joint diplomatic effort to bring an internationally accepted transition to Independence for Namibia. This led to the presentation of Security Council Resolution 435 for settling the on-going guerrilla warfare. Adopted on September 29 1978, it proposed a ceasefire and UN supervised elections, and established the UN Transition Assistance Group to oversee the elections and the withdrawal of South African forces. South Africa agreed to cooperate but in December 1978 acted in defiance of the proposal by unilaterally holding elections in Namibia, which were boycotted by SWAPO and other political parties. South Africa continued to administer Namibia through an Administrator General. In 1982 negotiations between the Western Contact Group, the Frontline States and SWAPO resulted in the Constitutional Principles that would form the basis of a new constitution for an independent Namibia.[11] On December 22, 1988 South Africa agreed to implement the conditions of Resolution 435 upon its signature of the Tripartite Accord at UN headquarters in New York. Elections for a Constituent Assembly were held in November 1989, and the Assembly held its first meeting on 21 November. The 1982 Constitutional Principles were unanimously adopted by the Assembly as the constitutional framework for an independent Namibia.[12]

3 Post-independence land reform

3.1 The Namibian Constitution of 1990

Namibia's Constitution guarantees, among other rights, respect for human dignity, equality before the law and freedom from discrimination, the right for all persons to own and dispose of all forms of property, as well as the right to reside and settle in any part of Namibia. Cognisant of Namibia's

11 The 1982 Constitutional Principles required the institutions of a democratic government based on separation of powers, as well as the inclusion of a Bill of Rights based largely on the 1948 Universal Declaration of Human Rights. See J Diescho *The Namibian Constitution in perspective* (1994) 26; C Alden & A Ward *Land liberation and compromise in Southern Africa* (2009) 131.

12 C Thornberry *A Nation is born: The inside story of Namibia's independence* (2004) 336.

past history of dispossession, colonial rule and the apartheid system, the Constitution makes provision for enacting affirmative action legislation that provides directly or indirectly for the advancement of persons previously disadvantaged by racial and other forms of discrimination.

The Namibian Constitution has two main provisions that relate to property rights, affirmative action and abolition of apartheid, enshrined in Articles 16 and 23 of the Constitution. Article 16 guarantees all Namibians the right to acquire, own and dispose of all forms of property, movable and immovable. The intention of this article is to entrench the principle of a free market in property, giving the right to all Namibians to freely buy and sell all forms of it including real property. This article forms the basis of the willing buyer/willing seller principle which is a cornerstone of Namibia's land reform programme.[13] Article 16 further gives the state the power to compulsorily acquire property in the public interest as long as just compensation is paid.[14] This provision recognises the need for political compromise on the land question in that, on the one hand, the right to property is protected, and, on the other, the post-independence government can address the legacy of the past through affirmative action.[15]

Article 23 of the constitution allows the National Assembly to enact legislation to advance the welfare of previously disadvantaged Namibians, and has given rise to the Affirmative Action Loan Scheme (AALS) administered under the Agricultural Bank of Namibia Act 5 of 1992. The Act allows the government to provide subsidised loans to farmers in the communal areas to acquire farms in the commercial sector, thus attempting to redress the balance of land ownership in the previously 'white only' commercial areas. Under the apartheid government of South Africa, the Land Bank Act 13 of 1944 made provision for poor white South African farmers to get government loans and subsidies to help them settle on farms in SWA. The introduction of the Affirmative Action Loan Scheme (AALS) managed by the Agricultural Bank of Namibia mirrors this apartheid scheme.

3.2 The National Conference on Land Reform and the Land Question

The land question is the most complicated problem that the Namibian government faces, in part due to the nature of land use among indigenous Namibians since pre-colonial times. Most Namibians are subsistence farmers, by living off the land without owning it, while the white settlers

13 G Narib 'Is there an absolute right to private ownership of commercial land in Namibia?' (2003) 2.
14 C Treeger *Legal analysis of farmland expropriation in Namibia: Analyses and views* (2004) 6.
15 J Diescho *The Namibian Constitution in perspective* (1994) 93 - 94.

owned land to accumulate wealth. In the immediate post-independence period, the system of land distribution continued along racial lines, with some 4,500 white commercial farmers holding 43% of agricultural land, while 15,000 black households had access to 42% of the land.

Against this background a motion was tabled within the first month of convening the first National Assembly, requesting the Prime Minister to call a national conference on the 'land question' which, according to former President Nujoma, was 'one of the most burning issues facing our young nation'.[16] In June 1990 the Prime Minister set in train the arrangements for holding a National Conference on Land Reform and the Land Question. In the weeks preceding the conference, large sectors of the population were mobilised to discuss the land question; all available media channels were used to initiate discussions in all parts of the country; and regional information subcommittees were established to facilitate communication between rural organisations and the conference administration. The government's decision to consult the nation before formulating policy on such an important national issue demonstrated its commitment to democratic principles. The government hoped that the conference would address itself to the following issues:

- Contribute towards a better understanding of the issues at stake by providing a forum where relevant land issues and grievances from all parts of the country could be represented and discussed;
- Take stock of relevant experiences of land reform and resettlement in other parts of Africa;
- Consider research data and findings prepared for the conference, with a view to outlining alternative policy options and specifying areas where essential information was lacking;
- Review alternative and strategic options on land reform, especially on problems of distribution and utilisation of land, taking into account regional and local factors; and
- Adopt recommendations to be taken into account in formulating a national policy and programme of action.

The conference was tasked to find the best way forward, while mindful that reconciliation could not be achieved by denying the need to redress historical injustices, that economic and social justice could not be achieved without enabling the present generation and their children to obtain decent standards of living, and that the importance of technical, agronomic and economic factors in land use could not be denied.

The conference was held from 25 June to 1 July 1991 under the chairmanship of the prime minister, attended by 500 local and international participants. It passed 24 resolutions on land use, tenure and environmental issues, and further resolved that, in view of the need to

16 National Conference on Land Reform and the Land Question 'Consensus Document' (1991) 3.

establish authoritative data and arrive at sound policy recommendations, a technical committee be established to evaluate facts regarding underutilised land, absentee ownership, viable farm sizes in different regions and multiple ownership of farms, and make appropriate recommendations for the acquisition and reallocation of such land, possible forms of taxation on commercial farmland and the economic units to which taxation should apply. This in effect meant that while the conference itself had a short mandate within which to achieve its objectives, the technical committee could continue that process and achieve a more definitive result.

The Technical Committee on Commercial Farmland (TCCF) was appointed by cabinet in November 1991. Its mandate was to gather facts regarding under-utilised land, absentee ownership, excessively large farms and multiple ownership of farms, and to make recommendations regarding viable farm sizes in different regions, and procedures for the acquisition and reallocation of land. Its report in 1992 identified the various categories of land potentially available for a land reform programme, and the categories of intended beneficiaries.[17] In carrying out its mandate the committee acted in accordance with the government's policy of national reconciliation and the obligations enshrined in Articles 16 and 23 of the Constitution.

3.3 The Agricultural (Commercial) Land Reform Act 6 of 1995

Following on the report of the TCCF, the National Assembly adopted the Agricultural (Commercial) Land Reform Act, Act 6 of 1995. Its main objective was to make provision for land acquisition by the state for purposes of land reform. Parliament is required to make funds available for land acquisition, to be then made accessible to ordinary Namibian citizens who do not own or otherwise have the use of agricultural land, particularly those Namibians disadvantaged by the former apartheid system. The Minister responsible for land affairs may acquire any agricultural land offered for sale if classified as under-utilised, excessive or owned by a foreign national. The Act also provides a preferential right to purchase any agricultural land coming on to the market. Where the state does not intend to acquire, the Minister will issue a certificate of waiver, allowing the owner to sell the land on the open market. The minister is assisted in making his decisions by a Land Reform Advisory Commission set up under the Act, and a Lands Tribunal deals with any disputed land matters.[18]

The membership of the Advisory Commission is drawn from a wide range of stakeholders in land reform: government, commercial farmers,

17 *Report of the Technical Committee on commercial farmland* (1992) xiii.
18 Agricultural (Commercial) Land Reform Act 6 of 1995 sec 58.

communal farmers, trade unions, Agribank and appropriate members of the public. The Commission also administers the Land Acquisition and Development Fund, set up to help finance land reform. The Commission's main task is to advise the Minister on land reform, including the suitability of farms to be purchased by government. Amongst other things, it must cause land utilisation plans to be drawn up for each farm purchased and make appropriate recommendations to the Minister based on such plans. The Commission does not have capacity to prepare such plans, but relies on the Ministry of Lands, whose Division of Valuation and Estate Management advises on the value of the farms to be purchased.

The Agricultural (Commercial) Land Reform Act 1995 also provides for the establishment of a Lands Tribunal to preside and adjudicate over any matters lodged in terms of the Act. Any decision made by the Tribunal has the force of a judgement passed by the High Court of Namibia. The Act also provides for the establishment of a Rules Board to make rules on procedural matters of the Lands Tribunal.

3.4 The Communal Land Reform Act 5 of 2002

The principal goal of this Act is to provide for the allocation of rights on communal land, to establish communal land boards, and to provide for the powers of chiefs and traditional authorities and land boards in relation to communal land. To date twelve communal land boards have been established.

Two categories of land rights allocations are stipulated in the Act: customary land rights and rights of leasehold. The first allocates rights to residential and farming units, allowing Namibian citizens living in the rural areas to obtain a customary right to the land on which their homestead is located and the land they cultivate.[19] Chiefs or Traditional Authorities allocate customary land rights, with Land Boards verifying the allocations before they can become legally effective. The second category, leasehold, may be granted for agricultural purposes in areas specially designated for such purpose within a communal land area, and the power to allocate vests in the Land Boards of the designated communal areas.

4 The Land Reform Programme

Namibia has approximately 69.6 million hectares of agricultural land, of which 36.2 million is freehold and 33.4 million communal or 'non-freehold'.[20] Land reform in Namibia seeks to:

19 'Guide to the Communal Land Reform Act' (2002) iii.
20 Minister of Lands and Resettlement – Speech in National Assembly (2010).

- Bring about more equitable distribution of and access to land;
- Promote sustainable economic growth;
- Lower income inequalities; and
- Reduce poverty.[21]

The Land Reform programme has two major components; the Resettlement Programme and the AALS. The principal objectives of the Resettlement Programme are to redress the imbalances of the past in the distribution of economic resources, particularly land and secure tenure. The AALS, run by the Agricultural Bank of Namibia on behalf of the government, was introduced in 1992. The Agricultural Bank Amendment Act 27 of 1991 and the Agricultural Bank Matters Amendment Act 15 of 1992 intended the AALS to, among other things, provide for the resettlement of well-established and strong communal farmers on commercial farmland, so as to minimise pressure on grazing in communal areas. Under the NRP and the AALS the Ministry of Lands and Resettlement intends to redistribute 15 million hectares by the year 2020. The Resettlement programme is aimed at the poorest citizens, while the AALS is intended for the emerging black middle class. Since its inception, the NRP has acquired 230 farms totalling 1.5m hectares at a cost of some N$292 million, while the AALS has disbursed 592 loans totalling N$633 million for the purchase of 3.2m hectares of land by April 2009. This would put the cost of a hectare of farmland at an average price of N$195. It is clear from the above figures that spending on the AALS has far outstripped that on the NRP since the beginning of the land reform programme.

4.1 The National Resettlement Policy (NRP)

In its original draft (1997) the NRP identified five main target groups for resettlement, including people expelled from farms as a special category. When it was later introduced in the National Assembly in 2001, farm workers were mentioned in a general section on 'Displaced, Destitute and Landless Namibians'.[22]

The NRP sets out three main categories of beneficiaries for the land redistribution programme:

- People who have no land, income or livestock;
- People who have neither land nor income, but some livestock; and
- People who have an income or are livestock owners, but need land to be resettled on with their families and to graze their livestock.

21 B Kruger & W Werner 'Redistributive land reform and poverty reduction in Namibia, livelihoods after land reform: Country paper' (2007) 11.

22 W Werner 'Promoting development among farm workers: Some options for Namibia' in J Hunter *Who owns the land*? (2004) 20-21. This order of priority covers members of the San community, ex-soldiers, displaced persons, people with disabilities and people from overcrowded communal areas.

The NRP is ambiguous as to whether need or ability should be the main criterion for land redistribution. It is not clear whether land should go to those who need it or to those who will farm successfully. A tighter definition of beneficiaries is needed, and a policy decision on whether need or farming experience or a mixture of both should be the criteria for getting land.[23]

4.2 Introducing a land tax on commercial agricultural land

Following the discussions at the National Conference on Land Reform and the Land Question in July 1991, a major area of consensus was that a land tax on commercial farmland was desirable, as it would generate revenue for the state from the wealthier section of the farming community and would promote the productive use of land.

A research paper presented at the National Conference on Land Reform and the Land Question in 1991 argued for phased removal of all subsidies and tax concessions on the commercial farming sector, which had received substantial subsidies in the 1980s, the largest being the implicit subsidies on low interest loans from the Land Bank and the Agricultural Credit Board. Farmers benefited from a number of tax concessions which non farmers did not enjoy, and combining tax concessions and subsidies resulted in a negative net contribution by commercial agriculture to the nation's coffers. This situation was both inefficient and inequitable because it encouraged excessive investment in commercial agriculture and inhibited the deployment of these resources elsewhere in the economy. Removing the tax concessions and subsidies would thus release cash resources for development projects aimed at the least well off, and commercial farmland prices would fall, an advantage for communal farmers wishing to purchase land in the commercial sector. The author argued against a land tax because the practical difficulties of introducing it meant that it could not be a major tool for agrarian reform. He instead recommended that the investment climate be clarified and stabilised as soon as possible; that the subsidies and tax concessions be removed over a period of say 3 to 5 years; and that the activities of the land bank be redirected to communal farmers and development projects.

The TCCF in reviewing the land tax aspect of the land question concluded that the tax system treated commercial farmers more favourably than communal farmers, and that the net effect of combined subsidies and tax concessions to the commercial farming sector was a disproportionately low contribution from agriculture to the national coffers. Furthermore the tax system encouraged an undue proportion of the country's financial resources to agriculture at the expense of other sectors, and the host of tax

[23] Ministry of Lands and Resettlement *Background Research Work and Findings of the PTT Studies* (2005) 21.

concessions enjoyed by farmers had become legal loopholes for tax evasion, to such an extent that only a few farmers actually paid tax. This amounted to deliberate neglect of the needy sectors of society, and a highly questionable empowerment of one section of society over others.

The objectives of the land tax were set out as follows:

- to encourage efficient utilisation of commercial agricultural land
- to discourage multiple ownership of farms (through application of a progressive rate of tax)
- to encourage redistribution/diversification of ownership
- to reduce land prices and thus broaden the access to ownership
- to redress the skewed pattern of land ownership
- to relieve poverty through resettlement and decongestion of communal areas
- to raise revenue for the Land Acquisition and Development Fund (to facilitate and accelerate the process of land acquisition, distribution and development).

Over the first five years of the tax N$120 million has been collected, of which N$117 million has contributed to the land reform process.[24]

4.3 Expropriation

Article 16(2) of the Namibian Constitution provides for expropriation, as long as it is in accordance with procedures determined by an Act of Parliament and is in the public interest and subject to payment of just compensation. A legal analysis under international law shows that the right to expropriate is not absolute, but has limitations. The international minimum standard (that compensation must be prompt, adequate and effective) must be regarded as a prerequisite for the valid expropriation of private property by a sovereign state. Under international and comparative criteria, the Namibian government can generally exercise the power of expropriation for its resettlement and agrarian reform schemes, but the Agricultural (Commercial) Land Reform Act 1995 does not deal with the expropriation of absentee landlords, and so the Act needs to be amended, as will be seen.[25]

The limit of the expropriation principle on land reform in Namibia was soon tested in the courts.[26] Three farms (Ongombo West, Okorusu and Marburg) were the first to be expropriated under the 1995 Act. One was specifically expropriated for the benefit of its workers (Ongombo West), while in the case of the other two the workers were left out of the process,

24 Ministry of Lands and Resettlement, Directorate of Valuation and Estate Management.
25 C Treeger *Legal analysis of farmland expropriation in Namibia* (2004) 1.
26 W Odendaal & SL Harring *'No Resettlement Available' An assessment of the expropriation principle and its impact on land reform in Namibia* (2007) 2.

and the farms used to resettle five farmers[27] from another resettlement farm about 50 km away which had become the site of a cement factory. The issue of expropriations where the farm workers are not direct beneficiaries has been a bone of contention for the Namibian land reform process, with the Namibia Farmworkers Union threatening in 2003 to invade 15 white-owned farms to make a point about their members being marginalised in the whole process.[28] The plight of farm workers under Namibia's land reform programme deserves serious consideration, as they have few land tenure rights, and no choice but to establish their home at their workplace. Their situation has been described by a Commission of Inquiry into labour related matters affecting agriculture as a 'continuous cycle of dependency and vulnerability'.[29]

A more recent test case of the expropriation principle under Namibian law is the Kessl case, concerning three German citizens owning farmland in Namibia, all resident in Germany at the time of the expropriation and employing resident farm managers.[30] The farms were chosen for expropriation on the basis that the owners were absentee landlords, but the procedure for expropriation was deemed to have been outside the law, and so the Ministry lost the case. The court ruling revealed that the Ministry of Lands did not have its own legal department, and lacked legal capacity to carry out land reform properly. A legal culture had not been instilled in the Ministry since its founding in 1990, rather there was a culture of secrecy, conspiracy, insiders and outsiders, and bureaucrats who thought their job was to shuffle papers. Officials did not follow rules and did not co-operate with the public, decisions were veiled in secrecy, and poor decisions, often based on poor evidence, were then made and concealed.[31] One can hope that the Ministry of Lands will be more careful with future expropriations.

4.4 National Land Policy

Land policy is concerned with the security and redistribution of land rights, land use and land management, and access to land. It defines the principles and rules governing property rights over land and the natural resources it bears, as well as the legal methods of access and use, and validation and transfer of these rights.[32]

A good land policy therefore should be clear, have a permanent agenda, and uphold good governance. It should:

27 These included a university professor, a Police inspector general and a former fighter in the People's Liberation Army of Namibia.
28 LM Sachikonye 'Land reform in Namibia and Zimbabwe: A comparative perspective' in J Hunter *Who should own the land*? (2004) 74.
29 W Odendaal (n 10 above) 35.
30 W Odendaal & SL Harring *Kessl: A new jurisprudence for land reform in Namibia?* (2008) 8.
31 'Lands Ministry mismanaged ... in bad shape'. *The Namibian* 1 August 2008.
32 S Mbaya *Land policy: Its importance and emerging lessons from Southern Africa* (2000) 8.

- identify the objectives of the policy process,
- identify policy issues to be addressed,
- develop the policy framework,
- outline key programmes to effect the expected outcomes,
- outline administrative arrangements for policy implementation,
- consider the legal framework required to facilitate the implementation,
- consider necessary institutional arrangements, and
- account for resolutions of international conventions and summits.

The draft National Land Policy was circulated in 1996 to NGOs and other sectors for comment and input. This opportunity was used by them to hold workshops and other consultations throughout the country, and the public opinion accumulated from these campaigns brought the sentiments of the people behind the draft Land Policy finalised in 1998.[33]

The overriding objective of land policy in Namibia since independence has been to redress the injustices of the past as far as land ownership and access to land are concerned, and to promote sustainable economic development. It is based on a number of commitments and the principles enunciated in the national Constitution.[34] In its introduction, the National Land Policy identifies a number of issues:

- Clear policy and administrative structures for land allocation and management in the rural areas,
- Clarification of legitimate access and rights to land in communal areas,
- Inefficient land administration by traditional authorities in some areas,
- Absence of clear or widely accepted authority over land in parts of the country,
- Uncertain roles and rights of government, the chiefs, the rich and the poor.

The process of formulating the National Land Policy, however, post-dated the enactment of the Agriculture (Commercial) Land Reform Act 1995. While the 1991 National Conference established a process of consultation on the land question, it was not continued during the five years that followed, so that the Agricultural (Commercial) Land Reform Bill was tabled in the National Assembly without offering stakeholders the opportunity to consider it. Procedurally this was unsound, and it should have been formulated in the context of a national land policy framework.[35]

The intervening four-year period was one of disagreement and some turmoil within the SWAPO government over the Act.[36] Elements within SWAPO favoured a radical and broad-based land reform process, but the final version of the Act took a more conservative and accommodationist

33 W Werner *Land reform in Namibia: The first seven years* (1997) 6.
34 Equity before the law, A mixed economy, A unitary land system, Focus on the poor, Rights of women, Security and protection, Sustainable land and natural resources use, Public accountability and transparency, Land as property, Land as a renewable resource, and Multiple forms of land rights.
35 B Karuuombe *The land question in Namibia: Still unresolved* (2003) 6.
36 SL Harring & W Odendaal (n 26 above) 10.

position. Minority parties in the National Assembly were well organised and clear about their demand for a moderate and legal land reform process, and the SWAPO government had little to gain in destabilising the commercial agricultural sector, because it employed a large number of blacks and was seen as critical to a stable economy. A few years into the implementation of the Act, however, it was realised that loopholes were being used by farm owners to circumvent the land reform process.[37] As a result various amendments had to be effected between 2000 and 2003. The first, in July 2000, inserted certain definitions and provided for the establishment of a Land Acquisition and Development Fund. The second amendment, in May 2001, regulated the appropriation of monies to the fund, restricted the transfers of agricultural land, and provided for the imposition of a land tax. The third amendment, in December 2002, was more thorough-going, and provided that the passing of a controlling interest in a company or closed corporation owning agricultural land be deemed an alienation of such land and therefore subject to the state's preferential right of purchase. The amendment also imposed a duty on the Registrar of Companies and the Registrar of Closed Corporations to report changes in the controlling interest of companies and closed corporations owning agricultural land, and criminalised the sale of agricultural land to foreign nationals and certain nominee owners.

5 Conclusions

The history of the land question in Namibia traverses a wide time span, from pre-colonial times to colonisation under German rule and South African Apartheid. Land use during the pre-colonial period among the indigenous peoples of the region consisted mainly of pastoral and agricultural production systems. German colonisation saw the dispossession and extermination of large numbers of the indigenous Herero and Nama peoples and the take-over of their lands. The territory was divided into two sections, comprising the Police Zone reserved for white occupation, and the reserves or homelands for the indigenous African population. Under South African rule following the First World War, the system of separate development was further entrenched by a number of proclamations that prohibited Africans from engaging in land transactions. The disenfranchisement of the indigenous populations led to the war of liberation and the independence of Namibia in 1990. Under the new Constitution, non-discriminatory provisions gave all persons the right to own property in any part of Namibia, while the State could

[37] Under the Act as originally formulated, the state's preferent right to buy any agricultural land coming on to the market did not apply to the administration of deceased estates or the liquidator of a company, closed corporation or cooperative society or land that was the subject of a court order (section 17(3)(a-f)). Owners of agricultural land began turning the ownership of farms into closed corporations by the sale of shares.

compulsorily acquire land in the public interest on payment of just compensation. This provision was further strengthened by the Agricultural (Commercial) Land Reform Act 1995, setting out the legal framework within which land may be expropriated and redistributed to landless Namibians. The objectives of land reform were to bring about more equitable distribution of land, promote sustainable economic growth, lower income inequalities and reduce poverty. Other major policy and legislative mechanisms include the National Land Policy, the National Resettlement Policy, and the Communal Land Reform Act 2002.

The implementation of the land reform programme in Namibia has not been without its hurdles both from a legal and policy perspective. The Ministry of Lands and Resettlement needs to do more to ensure the success of the programme, particularly strengthening the technical and legal capacity in the Ministry to ensure that legal loopholes are dealt with before court challenges expose weaknesses in the legal and institutional frameworks. A crucial part of the success of the land reform programme is how farm workers are treated, as they are more likely to make a success of farming than most other beneficiary groups. The National Resettlement Policy does not give priority to farm workers as a group of beneficiaries for land redistribution, and their eviction upon the resettlement of other beneficiaries of the programme creates one problem while trying to resolve another. A legal framework setting out the conditions under which farm workers obtain land rights would go far to resolve their plight in Namibia.

CHAPTER 6 LAND REGISTRATION FROM A LEGAL PLURALISTIC PERSPECTIVE: A CASE STUDY OF OSHAKATI - NAMIBIA

Paul van Asperen*

1 Introduction

Multiple legal frameworks are normally referred to as legal pluralism, which can be defined, with respect to land law, as the simultaneous existence of multiple normative constructions of property rights in a social organisation.[1] Hoekema distinguishes between legal (*de jure*) and actual (*de facto*) pluralism.[2] Pluralism exists *de jure* when the national law explicitly recognises customary law. The national law may be the constitution or national sector laws, like land law. Recognition of customary law in the constitution will cover all aspects of law, where recognition through sector law is specific. Pluralism exists *de facto*, when state and customary law co-exist without formal linkages.

As Africa urbanises rapidly, rural areas transform to urban through a peri-urban phase. Changes in land use and population density are obvious characteristics of peri-urban areas, but a less visible, but important, characteristic is the dynamic of land tenure. Multiple tenure systems co-exist and interfere with each other, customary inherited from the rural past, and statutory gradually expanding from the town centre, while informal tenure emerges as people cannot access land through formal ways.

The existence of multiple tenure systems contribute to lower levels of tenure security.[3] Tenure security is defined as the degree of confidence held by people that they will not be arbitrarily deprived of the land rights enjoyed, and/or of the economic benefits deriving from them. Tenure security cannot be determined easily, as it contains both objective and

* I want to express gratitude to Professor Doctor Jitske de Jong (Delft University of Technology) for providing critical comments on the draft version of this chapter.

1 H Dekker *In pursuit of land tenure security* (2005) 240.

2 AJ Hoekema *Rechtspluralisme en interlegaliteit* (2004) 7.

3 D Fitzpatrick '"Best practice" options for the legal recognition of customary tenure' (2005) 36 *Development and Change* 453.

subjective elements, or legal and factual dimensions.[4] This chapter distinguishes between legal and perceived (*de facto*) tenure security. For instance, people might perceive a high level of security concerning their tenure situation, even while their legal title to the land might be weak. The existence of multiple tenure systems can result in multiple land claims, with varying levels of legal validity. A continuum of land rights can be used to relate the existing land rights to tenure security.[5] Land registration is a possible tool to upgrade areas with multiple tenure regimes and formalise property rights, and justifies itself by the claim that tenure security of the beneficiaries will increase, leading to more investment and improvement of livelihoods.

This chapter focuses on poor people, who resort to informal tenure when access to formal land is limited for various reasons. This results in squatting and the emergence of informal settlements with tenure insecurity, so that the occupiers get evicted or do not reap the benefits from their investments. Wealthy people, often better informed, may have easier access to land and more opportunities to bring land under formal tenure.[6] Large-scale land registration projects have not had the intended results, with the poor often not benefiting at all.[7] Pro-poor land registration has been suggested, specifically aimed at improving tenure security for the poor, and this chapter assesses the impact of these tools. The conceptual model of relations between urbanisation, land tenure, land registration and tenure security is given in figure 1.

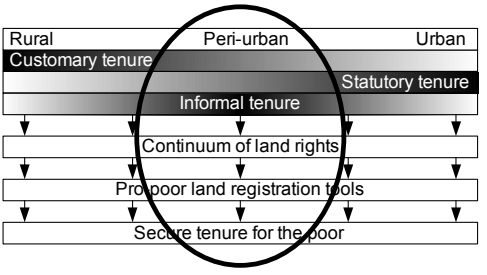


Figure 1:Conceptual model (the author)

4 N Kanji *et al Can land registration serve poor and marginalised groups* (2005) 3; K Deininger *Land policies for growth and poverty reduction* (2003) 36.

5 G Payne 'Urban land tenure policy options: titles or rights?' (2001) 25 *Habitat International* 418.

6 C Fourie 'Reviewing conventional land administration approaches and proposing new alternatives: peri-urban customary tenure and land readjustment' (2002) 4. Presnted at the symposium on land redistribution in Southern Africa, Cape Town South Africa available at http://www.fig.net/commission7/pretoria_2002/papers/SYM_LR_PRETORIA_PAPER_FOURIE.pdf (accessed 28 August 2011).

7 G Payne *et al* 'Social and economic impacts of land titling programmes in urban and peri-urban areas: A review of the literature' (2007) 12. Research proposal available at www.gpa.org.uk/News/proposal.doc (accessed 28 August 2011).

Namibia was chosen as a case study because its Flexible Land Tenure System (FLTS) is a promising pro-poor land registration tool. The research investigates land registration, how central and local government deal with land registration in areas with multiple tenure systems, and how local inhabitants perceive developments concerning land registration and tenure. Oshakati was chosen as a local pilot study for various reasons: it is a rapid growing town, it is expanding into former customary land, it contains informal settlements, and pro-poor land registration pilots have been carried out.

To capture local perceptions on tenure security from local residents, semi-structured interviews were undertaken with 26 local residents in the peri-urban and informal settlements, using an interpreter with a background in land administration, and interviews conducted in the local language (Ovambo). In addition, local stakeholders were interviewed and available reports and documents studied. The interviews focused on how people perceived their property rights, land registration activities and titles.

This chapter describes the existing legal framework within Namibia for peri-urban and urban land, including the FLTS. The reality on the ground is described through the multiple tenure regimes in Oshakati and the land tenure related activities of its Town Council (OTC). Tenure security is assessed through the continuum of land rights and conclusions drawn, ending with a view of the future.

2 Legal framework

The Constitution of Namibia offers rights to acquire and own land, and free settlement for all its citizens.[8] The legal framework consequently provides for the delivery of freehold plots through systematic planning and land registration. In urban areas the following Acts are important:[9]

- The Land Survey Act of 1993 (specifying the terms for cadastral surveying in Namibia);[10]
- The Deeds Registries Act of 1937 (stipulating that all land in Namibia must be surveyed before it can be registered). All transactions resulting in change of land ownership require a survey by a professional land surveyor, approved by the Surveyor General (SG), and registration in the Deeds Office;

8 Constitution of the Republic of Namibia of 1990 art 16.

9 W de Vries & J Lewis 'Are urban land tenure regulations in Namibia the solution or the problem?' (2009) 26 *Land Use Policy* 1116. For other land, the registration of communal lands is covered under the Communal Land Reform Act 5 of 2002 and Agricultural (Commercial) Land Reform Act 6 of 1995. See M Lankhorst 'Land tenure reform and tenure security in Namibia' in JM Ubink *et al* (eds) *Legalising land rights: local practices, state responses and tenure security in Africa, Asia and Latin America* (2009) 193.

10 The Land Survey Act is almost identical to the Land Survey Act of 1927 of South Africa; see W de Vries & J Lewis (n 9 above) 1116.

- The Townships and Division of Land Ordinance no 11 of 1963 (providing for the township establishment, subdivision and consolidation);
- The Town Planning Ordinance 60 of 1954 (providing for township development and town planning guidelines);
- The Squatters Proclamation (AG 21 of 1985), providing for the removal of buildings and people who have settled unlawfully. Although this proclamation is still in force, it has never been applied after Independence.

These acts (the Land Survey Act excepted) have not been reformed since the new Constitution was promulgated.

There have been attempts at independent assessments of titling programmes around the world,[11] and research has assessed land access and land tenure in urban areas in Namibia. A report on the City of Windhoek concludes that it is applying the principles of FLTS, developing settlements with varying levels for people with corresponding income categories.[12] Mooya and Cloete, investigating the relationships between property rights, real estate markets and poverty alleviation in informal settlements in Windhoek, compared freehold, group rights (savings schemes) and informal rights.[13]

For peri-urban and urban land tenure, the Flexible Land Tenure Bill (with several revisions since it was introduced in 1996) aims to overcome problems related to land delivery for people with low income, mainly attributed to lack of affordable freehold land. A second property registration system is proposed, parallel to and interchangeable with the existing system. Such a system should provide an affordable, more secure, and simple right which can be upgraded according to what the government can afford at any given time.[14] The proposed FLTS can only be applied within proclaimed villages, settlements and towns (not on communal lands), to upgrade existing settlements and develop new ones (see figure 2). It introduces two new sub-tenures:

- Starter title: a statutory form of tenure registered in respect of a block of land (*blockerf*);
- Landhold title: a statutory form of tenure with all of the most important aspects of freehold ownership but without the complications of full ownership.

11 G Payne *et al* (n 7 above) 7.

12 Legal Assistance Centre 'A place we want to call our own – a study on land tenure policy and securing housing rights in Namibia' (2005) 21. Available at http://www.lac.org.na/projects/lead/Pdf/aplaceweanttocallourown.pdf (accessed 28 August 2011).

13 MM Mooya & CE Cloete 'Property rights, real estate markets and poverty alleviation in Namibia's urban low income settlements' (2010) 34 *Habitat International* 436.

14 SF Christensen & PD Hojgaard 'Report on a flexible land tenure system in Namibia' (1997) 18.

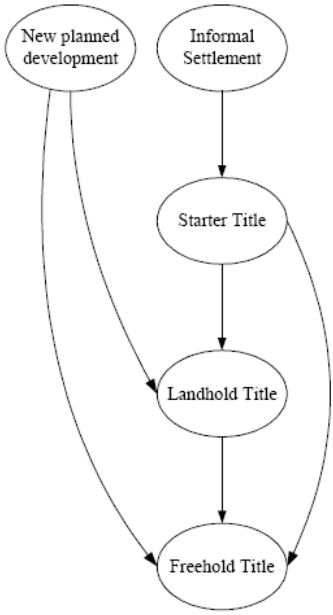


Figure 2:Principles of FLTS[15]

The starter title is given within a block, without delimiting the extent of each individual plot. The *blockerf* may be held in ownership with a government body, community organisation (group, association) or even private developer. The whole block is registered as a single entity in freehold ownership, both at the Registration of Deeds in Windhoek and the Land Right Office (LRO).[16] All (potential) inhabitants of the block have to form an association with a Constitution. The maximum size of a group is set at 100 members (or households). Within the block, the starter titleholder must abide by the rules set up by the association. The starter title is transferable; it cannot be used as collateral for credit. The *blockerf* is surveyed according to the Land Survey regulations. The landhold title relates to defined plots for individuals. A starter title can be given to a new settlement, but, to prevent random settling, a layout plan has to be prepared as the basis of the landhold titles.

The Land Rights Office, located at the local authority, registers the landhold titles, and the cadastral layout is done by a land measurer (with

15 Christensen & Hojgaard (n 14 above) 74.
16 Early drafts of the Flexible Land Tenure Bill referred to Local Property Offices, which deal with freehold tenure, but the latest draft refers to Land Rights Offices.

at this stage no intervention from the Ministry of Lands). The landhold title can be used as collateral for credit and is, with respect to credit facilities, comparable to freehold. In order to upgrade to freehold, the individual plots have to be resurveyed according to the applicable laws relating to surveying and subdivision of land.[17] It is assumed that the conversion from landhold to freehold would be less costly than registering freehold directly. In order to upgrade, at least 75% of the members have to agree, and the local authority may compensate those who refuse to upgrade and sell the *erven* to interested outsiders.[18]

The FLTS was piloted in Windhoek, Rundu and Oshakati, and gained international attention because of its innovative character. Hackenborch and Kozonguizi assessed the pilots and concluded (from expert interviews without a field survey) that land survey was being done without registration, and was raising expectations on tenure security, leading to improvements to homes.[19] The improvement of buildings can also be attributed to the fact that OTC may grant development permission when a plot is surveyed.

Lankhorst and Veldman assessed the potential of FLTS in Otjiwarongo (where FLTS was not piloted), and argued that conditions were not favorable there or nation-wide, because of the difficulty of establishing decentralised offices and services. Instead, they proposed to bolster extra-legal practices, like exempting the 300 m^2 rule (the stipulated minimum plot size), and managing layout problems at micro level.[20] Such measures would facilitate upgrading (like building permission, services construction), and improve perceived tenure security, but the *de jure* tenure security will not change. They underscore the advantages of extra-legality, an aspect often ignored in current literature. Results on the pilot projects in Oshakati, however, are not in the public domain, hence the present study.[21]

3 Land tenure in Oshakati

Oshakati, founded as recently as 1966, is the regional capital of Oshana region, within the jurisdiction of Owambo Traditional Authority.[22] Its

17 Flexible Land Tenure Bill 4th draft 2004 sec 15 (2).
18 Flexible Land Tenure Bill (n 17 above) secs 14(2), 15(4) & (5).
19 K Hackenborch & GK Kozonguizi *Security of tenure for urban areas in Namibia* (2005) 24.
20 M Lankhorst & M Veldman 'Regulating or deregulating informal land tenure? A Namibian case study on the prospects of improving tenure security under the Flexible Land Tenure Bill' in JM Ubink *et al* (n 9 above).
21 MM Mooya & CE Cloete 'Property rights, land markets and poverty in Namibia's "extralegal" settlements: an institutional approach' (2007) 3(1) *Global Urban Development* 14.
22 Oshakati means center in the local Owambo language, as the town is regarded as the center of all Owamboland; L Hangula 'The Oshakati Human Settlement Improvement Project: The Town of Oshakati: A Historical Background' (1993) 8. Project report.

population grew from 2950 in 1970[23] to an estimated 42,000 in 2005.[24] An important physical characteristic of Oshakati is the existence of *oshanas* (low-lying areas prone to flooding), which cover an estimated 50% of the total area and limit the available land for urban expansion, but are already partly built-up by informal settlers.[25] Annually since 2008 Oshakati has been flooded severely, with many houses flooded and casualties reported.[26] The OTC responded by announcing that people in informal settlements might be relocated to higher areas, and those in informal settlements were no longer allowed to develop, or even rebuild damaged buildings. Official plot allocation and development of services in informal settlements was stopped.

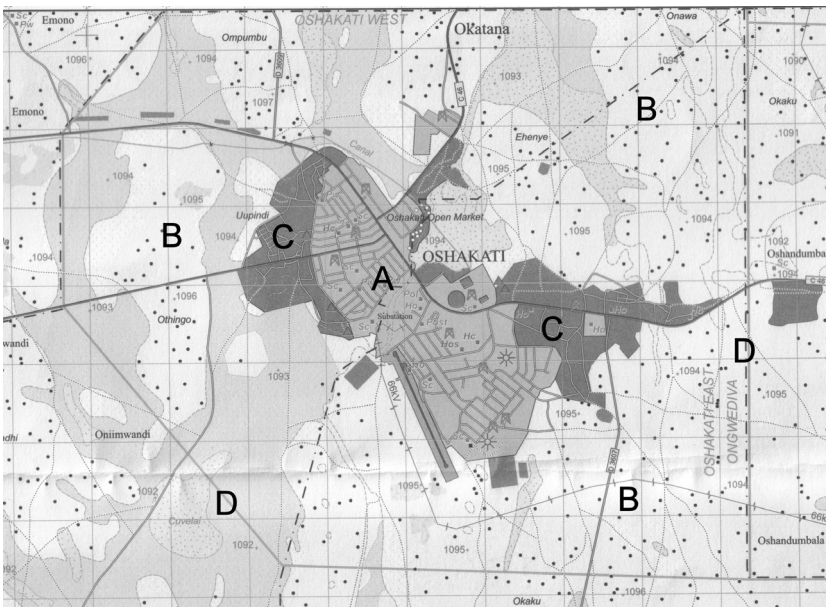


Figure 3:Topographic map Oshakati (1996)[27] ©Ministry of Lands and Resettlement, Namibia

23 L Hangula (n 22 above) 25.
24 Legal Assistance Centre (n 12 above) 10.
25 Urban Dynamics 'Oshakati Structure Plan' (2001) 30. See The First Namibian National Development Plan published in 1995.
26 See The Namibian 'North under water' 13 February 2009 http://allafrica.com/stories/200902130439.html (accessed 1 September 2010); The Namibian 'Oshakati floodwater recedes' 13 April 2010 http://allafrica.com/stories/201004130730.html (accessed 1 September 2010).
27 Original in full color, original scale 1:50:000 (figure not to scale).

In Oshakati, one can distinguish three main land tenure systems (as for all Namibia), which are discussed below.

3.1 Statutory tenure

Statutory tenure in Oshakati deals with urban land where standard concepts of state, municipal and private ownership apply within proclaimed boundaries under statutory law.[28] The most significant appearance of statutory tenure is the area where private ownership applies, displayed on the topographic map as Built-up area (area A in figure 3). Most plots are held under freehold registered at the Registry of Deeds of the Ministry of Lands and Resettlement (MLR) in Windhoek. The conditions of the Lands and Deeds Registry Act and the Land Survey Act apply. Vacant plots can be sold to the public under freehold, with transactions handled by the Local Property Office of OTC. Around 1140 freehold plots (also called *erven* [plural] or *erf* [singular]) were registered in Oshakati in 2001.[29] Besides the freehold areas, areas with traditional huts (also called homesteads, see areas B in figure 3) and informal settlements (see areas C in figure 3) are subject to statutory tenure, although other tenure systems play a significant role.

3.2 Customary tenure

Around 40% of the territory of Namibia, the so-called communal areas, is governed by traditional authorities, where customary tenure applies. Mostly use rights are given for residential and agricultural uses, and the national government holds the land in trust for the indigenous communities.[30] People live in homesteads; a group of which are represented by a traditional headman.

Before Independence, the freehold areas of Oshakati were surrounded by the communal areas. Over time, settlements have developed on these communal areas near the town, and settlers normally asked permission from the traditional headman to settle and built a residential house. The informal settlements were thus legally developed under control of the traditional authority, and can be regarded as customary settlements, although in literature are referred to as informal. The former colonial administration discouraged black urbanisation, and land ownership by blacks was not permitted.[31]

Oshakati, like other towns in northern Namibia, grew rapidly in the post-Independence period, especially in the communal areas, and in 1993,

28 Legal Assistance Centre (n 12 above) 18.
29 Urban Dynamics (n 25 above) 25.
30 Legal Assistance Centre (n 12 above) 18.
31 Legal Assistance Centre (n 12 above) 2.

through the Local Authorities Act of 1992, Oshakati was proclaimed townland.[32] In figure 3, the communal areas which were proclaimed townland are denoted as B, and the townland boundary as D. From the moment of proclamation, the area fell under the jurisdiction of OTC, and so the official land tenure regime suddenly changed from customary into statutory tenure.[33] Thus the OTC got control over rural or unused land and existing informal settlements, and the traditional people and informal settlers were suddenly subject to statutory tenure, liable to register with the local authority and to pay a monthly plot rent.[34]

The conversion of customary into statutory tenure did not end customary and informal practices. The traditional authority continued to exist for communal areas outside the townland boundary, and the traditional institutions within the townland boundary mostly remained intact. Examples were found during fieldwork:

- Cattle owned by the homesteads walking freely through informal settlements, sometimes destroying gardens and other property. Cattle walking freely are a customary right, but not recognised under statutory tenure.
- Informal headmen exist within some informal settlements, are still recognised by the community, and have a role in resolving land disputes. Asked who has the final authority over land, one traditional headman replied: 'I am the one with the final authority, but the municipality is the one that has the most.' He was keeping a land register, for both the homesteads and the informal settlers within his area.

3.3 Informal tenure

Informal tenure is the result of informal land acquisition, and the Namibia Housing Action Group (NHAG) estimates that currently 130,000 people live in informal settlements in Namibia. There are about ten informal

32 S Hamata *et al A socio-economic assessment of the enclosure of communal land within the townland boundaries of Oshakati and Ongwediva, and the relocation of Ndama settlement in Rundu* (1996) 3. The Local Authority Act defines 'townlands' as the land within a local authority area situated outside the boundaries of any approved township which has been set aside for the mutual benefit of the residents in its area, and for purposes of pasturage, water supply, aerodromes, explosive magazines, sanitary and refuse deposits or other public purposes or the extension of such township or the establishment of other approved townships.

33 Article 3(a) of the Local Authority Act reads: If the area of any township or village management area established or purporting to have been established by or under any law on the establishment of townships or village management boards on communal land is, in terms of subsection (1), declared to be, or, in terms of subsection (5), deemed to have been declared to be, a municipality, town or village, the assets used in relation to such township or village management area and all rights, liabilities and obligations connected with such assets shall vest in the municipal council, town council or village council of such municipality, town or village, as the case may be, to such extent and as from such date as may be determined by the Minister.

34 OH Fjeldstad *et al* 'Local governance, urban poverty and service delivery in Namibia' (2005) 16. Report prepared under the auspices of the Chair Michelsen Institute.

settlements in Oshakati (denoted as C in figure 3), most dating from the 1960's and 1970's, first when land was under control of the traditional authority and since 1993 under control of the OTC. The characteristics of these informal settlements are discussed in section 4(3). OTC faces challenges both to manage and control urban development, with measures like eviction or relocation of illegal settlers, managing urban expansion and formalising the existing informal settlements.

4 Tenure-related urban processes

4.1 Eviction/relocation

Eviction and relocation are possible measures for a local authority council to deal with informal settlements, but have a large impact on the livelihoods of those affected, and contribute to higher levels of perceived tenure insecurity.

Informal settlement dwellers are reported to be 'accepted' by Namibian authorities, although the ones living in so-called impermanent houses (usually iron shacks) are particularly vulnerable to eviction.[35] COHRE reported on one eviction in an urban area within the period 2003-2006.[36] LAC, however, found that:

> Eviction is uncommon in Windhoek, it is usually due to water and electricity payment arrears continuing for long periods.[37]

In one news article, homes were reported to be bulldozed,[38] and eviction of tenants by landlords seems to be frequent.

The field interviews found that some respondents knew about evictions, which turned out to be relocations of illegal settlers by OTC to more suitable areas, either because they have settled illegally, because the settlement is re-zoned for other purposes (like a business area), or because the land is prone to flooding. In such relocations, no cash compensation was offered, but those relocated were offered a new place with transport assistance to move (often the shacks are taken and rebuilt). Only people with permanent buildings approved by OTC or the traditional homesteads are entitled to cash compensation when relocated. One relocation area was visited during the fieldwork, and was found to have been surveyed and plots demarcated, but people were not allowed to build permanent structures, so continued to stay in shacks.

35 Fjeldstad *et al* (n 34 above) 16.
36 Centre on Housing Rights & Eviction (COHRE) 'Global survey on forced evictions, violations of human rights' (2006) 26.
37 Legal Assistance Centre (n 12 above) 40.
38 'Opuwo Homes bulldozed: Otuzemba residents homeless after council action' *The Namibian Sun* 31 July 2008.

Illegal settlers interviewed were confident that they could stay at their place, but some said that they felt threatened by the OTC. They were aware of the possibilities of relocation as they knew of such council actions. One relocated resident felt more secure, having been relocated once.

4.2 Urban expansion

For formal urban development, OTC has to follow the statutory acts, which lead to the sale of freehold plots. It includes the Town Planning Ordinance and Township and Division of Land Ordinance requiring approval from the Namibian Planning Board and the Surveyor-General.

When the local authority needs land for development, it first has to relocate and compensate the homesteads. In the early years of Independence, such practices were viewed by the local community as continuing colonialism and exploitation of the peasants by the development planners.[39]

> Although many people hold the view that the state owns such land and should be able to deal with it as it sees fit, the Constitution nevertheless requires that it is necessary to formally acquire the land rights that certain citizens hold in relation to it.[40]

Where homesteads are relocated, compensation (set by MLR) is considered to be low. Land made available in this way can be subdivided according to the rules and made available as freehold plots, but poor people, the majority in Oshakati, cannot afford to buy them and plots are made available by the OTC, surveyed and registered at the Planning Department, but not subject to statutory planning procedures.

The field research sought to interview people in the peri-urban areas over their access to land and awareness of tenure status, but access was not allowed because the OTC was in the process of negotiating their relocation. Only one headman was interviewed, who was still influential on land issues to both OTC and inhabitants of his former area of jurisdiction (both the traditional farmers and informal settlers).

4.3 Formalisation

The majority of Oshakati's people live in informal settlements, which OTC aims to formalise. A standard procedure does not exist, but the most basic approach is to apply house numbering, and register inhabitants for election

39 For more historical information and socio-economic effects of the proclamation on Oshakati, see Hamata *et al* (n 36 above).

40 UN Habitat *Land Tenure, Housing Rights and Gender in Namibia* (2005) 39.

and census purposes, although without affecting legal tenure status. The first significant steps towards formalisation were carried out within the Oshakati Human Settlement Improvement Project (OHSIP) between 1993 and 1996.

That project aimed at improving livelihoods in the informal settlements, especially through the construction of services and development of small businesses. A key role was given to Community Development Committees of settlement representatives, who were given a role in land allocation. Traditional leaders joined the committees later to reduce ambiguities and confusion on land allocation, and the headman became the chairman of the land allocation sub-committee.[41] Some such committees still exist, helping the needs of the people and cooperating with OTC. Some members indicated that they have no more powers to allocate land, others claimed that they still have the power, but there is no more land available.

Over time, not all households have been formalised and the influx of illegal settlers continues, so a new tenure category was suggested by Urban Dynamics, subdividing the informal component into a legal and illegal component. People in legal informal settlements have permission from OTC to reside, and are registered at OTC Planning Department by name and plot or house number, the plot being part of an *erf* (the legal entity under statutory tenure). Plot numbers are issued when the area is planned and surveyed by order of the Council, and plot-holders should pay land rent to OTC. I refer to these arrangements as council leases, although there are no formal lease agreements. Those in informal settlements without a council lease are considered illegal. Urban Dynamics estimated the number of households in legal informal settlements as 4120, in illegal informal settlements as 875.[42]

People may apply for development permission to erect permanent structures. An example of development permission given by OTC reads as follows:

> According to our records Mr ... has right on this plot no ... at Oneshila, but the plot in question is not yet proclaimed. The plot is still a part of Portion of Erf 1373, Extension2-Oshakati. He has the right to develop the above erf.[43]

41 B Frayne *et al* 'Urban development and community participation in Oshakati, Northern Namibia' in A Tostensen *et al* (eds) *Associational life in African cities: popular responses to the urban crisis* (2001) 284.
42 Urban Dynamics (n 25 above) 26.
43 Letter from Planning Department, Oshakati Town Council on 13 September 2006.

Only such plots are eligible for the construction of services (individual water, sewerage and electricity connections). The distribution within each land category is given in table 1.[44]

Tenure category	Estimated population	% of population
Formal residential: freehold	7918	22,1
Informal residential: legal	21425	59,9
Informal residential: illegal	4551	12,7
Homesteads	1875	5,2
Total	35769	100

Table 1: Population and tenure in Oshakati (derived from Urban Dynamics (n 28 above))

5 Tenure-related projects

5.1 Flexible Land Tenure System (FLTS)

The FLTS concept resulted from the formalisation exercise within OHSIP, and was piloted from 2000, in existing settlements and on vacant urban land. Two pilots were carried out in Oshakati, aimed to test the technicalities of the surveying exercise.[45] The settlements were surveyed and plots demarcated, although it is unclear whether any documentary evidence was given to the households (experts and inhabitants contradict on this matter). Two respondents mentioned that they paid land rent, but, surprisingly, some community members did not know about the existence of the FLTS.

Four FLTS pilots were carried out by a land surveyor (seconded from MLR to OTC) after 2000 in Oshakati, and an estimated 2000 individual 'landhold' plots were surveyed (out of 3600-5400 households eligible), but no association was set up nor starter titles issued. As FLTS has not been enacted yet, no formal arrangements could be made after the pilots, no title certificates issued, and cadastral maps not been maintained.[46] So the pilots were more or less surveying exercises, in anticipation of an enactment of FLTS. Although the pilots did not cover all aspects of FLTS, the people involved appreciated the exercise, and some got permission to build permanent structures after the land was surveyed. People paid charges to

44 Urban Dynamics (n 25 above) 12.
45 J Gold 'The flexible land tenure system in Namibia: enabling sustainable options to urban poor' (2006) 29-30. Paper presented at the Africa Region CASLE Conference, 1417 March 2006, Bagamoyo, Tanzania.
46 Hackenborch & Kozonguizi (n 19 above) 39.

OTC, although not all of them paid land rent (those who have are effectively entering into a council lease).

5.2 Saving schemes

Saving schemes allow community-based organisations to improve the livelihoods of its members, with members paying fixed contributions on a regular basis. A saving scheme can support small businesses or provide access to land and housing, and operate both in urban and rural areas. They may be linked to umbrella organisations, of which the Namibia Housing Action Group (NHAG) and Shack Dweller Federation of Namibia (SDFN) are the largest. The NHAG was established in 1992 as an umbrella organisation for low-income housing groups, while SDFN started in 1998 with 30 saving schemes from NHAG.[47] It was decided to separate support (technical, legal and financial) through NHAG from community organisation and empowerment through SDFN. The latest available annual report discloses that:[48]

- In 2008, there were 587 SDFN saving schemes (138 in Windhoek), representing around 18 000 members. (SDFN saving groups may have other objectives than providing access to land, and are located in both rural and urban areas.)
- In some regions, the number of members was falling, attributed to slow land delivery processes causing impatience and withdrawals.
- The total value of savings in 2008 was reported to be N$ 4.8 million (U$ 375 000), of which 44% were land savings.
- SDFN also manages a Loan Fund (Twahangana Fund). In 2008, 317 beneficiaries received a total of housing loans of about N$ 5.6 million (U$ 440 000).
- In 2008 3,530 members secured tenure in Namibia, mostly as community-managed land tenure.

The general procedure for a SDFN saving scheme dealing with land and housing development is as follows: A saving group starts when a community is formed after one or more meetings. All members sign a constitution, which regulate the group's affairs and describe each member's rights and duties. The scheme will apply for a group *erf* from the council, delivered either as freehold plot (comparable to a *blockerf* within FLTS) or as council land. Members will sign an agreement for property rights with the association. A layout plan is prepared, plots surveyed, and the Land Committee of the association allocates plots to members, who can then apply for a loan (either through Twahangana Fund or other funds). When the loans are issued, every member can build their own

47 UN Habitat (n 40 above) 35.
48 Namibia Housing Action Group 'Annual report Shack Dweller Federation of Namibia (SDFN) & Namibia Housing Action Group 1 July 2007 to 30 June 2008' (2009).

house. At the last stage, services should be provided, either by the council or by the members themselves.[49]

In Oshakati, there are 18 SDFN saving schemes, with 13 to 79 members per scheme. Some members are trained in FLTS-principles, and try to use it in their projects, but, according to the SDFN-coordinator, knowledge on land issues by the people is limited. There is one saving scheme in Oshakati dealing with access to land. The members of this saving scheme originated from other groups, formed a new one to develop their own area, and got a block of land from OTC. With help from NHAG and the MLR land surveyor at OTC, a plan with individual plots was made, and the intention was to register the block as freehold. The savings scheme holds weekly meetings, so that members are well informed (and gave similar answers to most questions). They did not pay land rent, only water bills and sometimes charges for waste collection. The members of the saving scheme got building permission from OTC, a document seen as an important proof of ownership of the building and tenure security on the land. Once again, the land is assumed to be delivered under a council lease.

Fear of relocation was especially strongly articulated within the saving scheme. Building permission was given before the severe flooding in 2008. When media announced the council's decision that people living in flood-prone areas would be relocated to higher grounds, members of the saving scheme consulted SDFN, which established from the Council that relocation was possible, but members of the saving scheme continued to build and moved in to their new homes in the period August-November 2008.

6 Analysis

The tenure systems in the peri-urban areas have been influenced by the following developments:

- Conversion of customary tenure;
- Relocation of illegal settlers (FLTS);
- Formalisation in existing settlements (both OHSIP and FLTS);
- Urban development (saving scheme, FLTS).

Four tenure regimes in Oshakati can be distinguished: formal, informal, illegal and urban saving regimes.

[49] Mooya & Cloete (n 21 above) 438 refer to group rights, although within the group the rights are individualised through these agreements.

6.1 Formal

This comprises land formerly already under Oshakati Town or formally planned urban expansions after Independence. Plots are sold to the public under freehold title, in conformity with the laws and policies concerning land survey and registration and urban planning, and people build permanent homes, subject to development permission by the council.

6.2 Informal

This is held by the council and given out to people under tenancy agreements. People pay land rent and/or other charges to OTC. The land may be surveyed, and may be located in existing settlements or in urban extensions (some of them temporary relocation areas after the flooding in 2008). Most people build permanent buildings, subject to development approval from OTC. In the one relocation area visited during fieldwork, people were not allowed to erect permanent structures.

A special case within informal tenure is the saving scheme. The council has delivered land under a council lease to the saving scheme, although freehold title is envisaged. The saving scheme made individual land right agreements with all its members. At the time of fieldwork, people did not pay land rent, only for water at OTC. All members erected permanent buildings for which development permits were issued.

6.3 Informal with customary influences

The people in traditional homesteads live on council land and pay land rent to OTC, under a council lease with OTC. When the land is needed for urban expansion, the people are relocated and compensated. If they wish, and fits the layout, they can be given a residential plot at the location of their homestead.

6.4 Illegal

People without land who do not want to rent, erect shacks at the fringe of informal settlements or at empty spaces within. They do not pay charges to OTC, which does not recognise them as inhabitants (although the shacks may have been numbered for census or election purposes). In case of urban expansion, they will be evicted or relocated, without any compensation.

Table 2 summarises the relation between land tenure and tenure security through the continuum of land rights. As people from homesteads were not interviewed and formal areas were outside the scope of the

research, they are not included in the table. Existing informal settlements were also excluded, and only the FLTS-pilots were investigated.

Concerning informal tenure, there was a wide range in recognition by OTC, through administering house numbers, surveying plots, allowing permanent buildings, and raising land rent and other charges. These variations might result in variations in perceptions of tenure security as well. The legal tenure security for the council leases is considered low, and not defined in national laws and regulations.

	Illegal	**FLTS-pilots (council lease)**	**Saving scheme (council lease)**
Perceived tenure security	Little: people feel not recognised, fear of being relocated	Sufficient; although fear of being relocated due to flooding risk	High because of development approval and land right agreement; although fear of being relocated due to flooding risk
Legal tenure security	None	Low	Low

Table 2: Continuum of land rights in peri-urban Oshakati (the author)

FLTS and saving schemes are both community-based systems. Potential land holders have to join the community, which forms the base for success, as is proved with the savings scheme. Because savings are collected almost daily, and there are weekly meetings, people are informed and help each other. People are also stimulated to share experiences with other saving schemes, at regional, national and international level. Those who want to settle individually, can either do so illegally or approach OTC for the (unlikely) provision of plots (either freehold or council lease).

7 Conclusions

The key problem is that poor people, who are the majority in Oshakati, cannot afford to buy formal freehold plots, but must resort to informal or illegal settlement. Although the whole of Oshakati is under statutory tenure, customary and informal structures are also in place, a clear example of legal pluralism which allow people to access land informally.

7.1 Tenure security in Oshakati

Statutory tenure is the official tenure regime within the jurisdiction of Oshakati, but underneath are significant influences from customary tenure

and informal tenure. All tenure regimes co-exist, especially in the peri-urban areas, and OTC tries, within its limited resources, to provide tenure security and development opportunities to its inhabitants. Due to the fact that the formal procedures are expensive and lengthy, OTC has resorted to some kind of informal planning system, with simple layouts and surveying to create plots against which permission for permanent buildings can be given, and council charges for land and services collected. However, OTC cannot fully cope with the continuing influx of illegal settlers and the already existing non-formalised settlers. Within the peri-urban areas in Oshakati, implementation of the land registration system is incomplete. Nevertheless, layouts and land surveying in some areas have increased perceived tenure security among the beneficiaries, but the announcement by OTC that all flooding-prone areas could be relocated had the opposite effect.

The saving scheme has succeeded in providing land and housing to the poor. Through the provision of land to the scheme, the land rights agreement between the association and each individual, the provision of loans and the development permission issued, people managed to develop their own house in a secure way. Even here, however, the danger of relocation had negative effects on perceived tenure security. Since no freehold title had been issued, the legal security is regarded as low. With freehold, the group would have a stronger position against relocation. Saving schemes cannot be seen as an overall solution, as their numbers are too small and depend on individual willingness to join, while slow land delivery to the groups is also a problem.

7.2 The Flexible Land Tenure System

The FLTS pilots have contributed to peri-urban development, but so far only the surveying stage has been successfully applied. Although the Flexible Land Tenure Bill has not been enacted for over a decade, the delay did not significantly affect perceived tenure security (most respondents were unaware of the Bill). The FLTS can, when enacted, fill the legal gap between the informal land tenure and freehold tenure, and increase legal tenure security. The saving schemes operate on FLTS-principles, without the enactment of the Bill. When the saving scheme has acquired a freehold title to the *blockerf*, there are no barriers for the members to subdivide and get individual freehold titles. In other words, what the Bill envisages, is already being achieved in reality. The main difference seems to be in perception: the saving schemes try to provide for security and improvement of livelihoods for its members, whereas the FLTS forms an intermediate step towards freehold title, encouraged by the Namibian government. Additionally, saving schemes fully depend on private initiatives, in most cases backup by CBOs and NGOs, whereas local authorities may establish as many starter and/or land hold schemes as they find necessary. The crux of FLTS seems to be reduced costs of surveying

and registration, and by-passing costly and lengthy planning procedures. An alternative way might be to subsidise costs of land acquisition for those on lower incomes, but it is not known if such alternatives have been attempted.

The current Bill provides for upgrading schemes to individual titles. In both cases, more then 75% of the right holders have to agree to upgrade. The ones who don't agree will be granted a starter title in a similar scheme, or paid fair compensation (in case of a land-hold scheme). This puts unfair pressure to people to agree, otherwise they have to leave their house, almost comparable to expropriation and against the aims of FLTS.

FLTS creates local land registers at local authorities. In general, local registries are preferred, as local staff knows the local situation and beneficiaries do not have to travel far. A problem might be the requirement that a person granted a starter title may not have any immovable property or landhold title in Namibia, which requires a search through all local land rights offices and the Deeds Registry in Windhoek for all starter title applications.

If there is eventual enactment and implementation, challenges lie ahead:

- It is questionable if all existing settlements can or should be formalised through FLTS. Many *blockerven* have to be registered as freehold, all settlers within a *blockerf* should join the starter or land hold association to participate. This also holds for the FLTS-pilots which have been carried out, no associations have been formed. There are no rules should the layout of *erven* need adjusting.
- Land Right Offices would need funding, personnel, and equipment.
- Other than those in saving schemes, people are not yet familiar with FLTS. Amoo and Skeffers have assessed that the rule of law exists in Namibia, but is hampered by lack of education and information amongst much of the population.[50] Raising awareness on land rights and FLTS will therefore contribute to improved rule of law as well.

7.3 Conversion of customary tenure into statutory tenure

In peri-urban Oshakati customary tenure was abolished and replaced with statutory tenure at a stroke of the pen. OTC, however, was incapable of monitoring and controlling the land in their jurisdiction, and customary structures remained intact, with traditional leaders still executing powers in land issues.

50 SK Amoo & I Skeffers 'The rule of law in Namibia' in N Horn &A Bösl (eds) *Human rights and the rule of law in Namibia* (2006) 37-38.

Mapaure has examined the legal aspects of proclaiming towns, focusing upon the Communal Land Reform Act of 2003, with a case study of the Helao Nafidi town, where the traditional authority and local authority clashed over land allocation powers.[51] Legally the traditional authority loses power when communal land is proclaimed townland, but in reality local people still regard headmen as representatives of the area, and the town council feels the need to cooperate with them.

8 The way forward

Both saving schemes and the principles of FLTS (simple procedures, upgradable titles) have potential application in other countries, and saving schemes are already internationally promoted through Shack Dwellers International. When implementing a pro-poor land registration system, the main option is to choose between incremental upgrading and full titling within the existing statutory framework. Namibia has chosen incremental upgrading, while the government continues to implement land registration for specific tenure regimes: the statutory freehold systems in rural and urban areas for the well-to-do; communal land registration for the poorer rural communities; and FLTS for the poorer urban communities. It is hoped that these measures will alleviate poverty and give the poor more secure land rights. An alternative would be to design and implement a unified land registration system, as advocated for Zambia by Mulolwa.[52]

The Namibia case has shown that, due to the existence of legal pluralism, the realities of land ownership and control are complex and need to be understood before a land registration system can be designed. Awareness and knowledge by the targeted people about land registration and its effects are indispensable, so that they can make proper decisions concerning acquisition of land rights and benefit from land registration.

51 C Mapaure 'Jurisprudential aspects of proclaiming towns in communal areas in Namibia' (2009) 1 (2) *Namibia Law Journal* 23.

52 A Mulolwa 'Integrated land delivery: towards improving land administration in Zambia' unpublished PhD thesis, Delft University of Technology, 2002 3

CHAPTER 7

LIMITS OF INCREMENTAL LAND TENURE REFORM IN BOTSWANA

Faustin Tirwirukwa Kalabamu

1 Introduction

Land tenure reform has been defined as a process of removing some rights from a bundle of specific rights and duties held by one body and awarding them to others, adjusting the relative powers and responsibilities among the state, community and individuals.[1] It has also been defined as a process of enabling individuals to upgrade their land rights from a lesser right (eg informal or squatting) to ownership.[2] Upgrading of land titles is a process through which customary or informal land rights are formalised or officially accepted and supported by legal documents and codified rules.[3] The formalisation process entails issuing deeds, certificates, permits or leases to holders of customary or informal land rights.

Bruce[4] divides land tenure reforms into two categories: replacement and adaptation reforms. Replacement reform refers to the situation whereby communal, traditional or customary land tenure rules and practices are repealed and replaced with statutory and marketed oriented ones. Through legislation, ownership of land that was hitherto vested in jural communities (eg tribe) is either privatised or vested in the state. On the other hand, adaptation reform refers to the situation whereby modifications or changes in communal, tradition or customary land tenure are introduced incrementally, recognising of prevailing needs and

1 JW Bruce 'Learning from the comparative experience with agrarian reform' in M Barry (ed) *Proceedings of the international conference on land tenure in the developing world* (1998) 39-48.

2 DL Carey-Miller 'Revision of priorities in South African land law' in Bruce (n 1 above) 49-60.

3 C Toulmin & J Quan (eds) *Evolving land rights, policy and tenure in Africa* (2000); TA Benjaminsen *et al* 'Formalisation of land rights: some empirical evidence from Mali, Niger and South Africa' (2008) 26 *Land Use Policy* 28-35; TA Benjaminsen & E Sjaastad 'Where to draw the line: Mapping of land rights in a South African commons' (2008) 27 *Political Geography* 269.

4 Bruce (n 1 above).

circumstances. It seeks to integrate traditional, communal and customary practices with modern and market-oriented land tenure systems.

In Africa, land reforms have also been directed at the tenure systems instituted by colonial regimes. Nationalist governments in Tanzania, Mozambique and Ethiopia abolished both imported and indigenous systems, nationalising land and replacing freehold and customary land tenure systems with leaseholds and group land holdings. In Zambia, Nigeria, Sudan and Uganda freehold land titles were also abolished and replaced with long term leaseholds, while Kenya and Malawi opted to replace customary land tenure systems with private land ownerships, thereby eliminating the community interest in land. Senegal and Botswana are examples of countries that have persistently pursued adaptation or incremental land tenure reform – retaining and promoting customary, statutory and common law land rights systems, but seeking ways for integrating them.

While replacement reforms have been criticised as insensitive to established traditions and disrupting economic systems and people's everyday life, incremental reforms have been praised as flexible, gradualist and avoiding widespread departures from existing systems.[5] The sustainability of incremental reforms has however neither been adequately questioned nor interrogated. This chapter aims to explore the limits and sustainability of incremental or adaptive land tenure reform, with particular reference to Botswana. It draws upon secondary data sources and the author's previous studies on land tenure reform and informal land delivery. The author is not a lawyer but has worked with lawyers on land issues in Botswana.

2 Some theoretical considerations

Land reforms in nationalist and socialist oriented countries (eg Zimbabwe, Tanzania, Ethiopia and Mozambique) have been driven by equality and social exclusion issues, while those in market-oriented countries (eg Botswana, Malawi, Senegal and Kenya) are underpinned by sustainability philosophies. The philosophies question the appropriateness of age-old customary tenure practices in the face of increasing populations and demand for land. It is, therefore, appropriate to examine the key elements that link sustainable development and land tenure systems, as a preamble to land tenure reforms in Botswana.

5 M Adams *et al* 'Land tenure policy and practice in Botswana' (2000) XIX *Australian Journal of Development Studies* 55 – 74.

2.1 Sustainable development and Hardin's tragedy of the commons

The concept of 'sustainable development' was conceived out of concerns over the ever increasing use, misuse and exploitation of land and land based resources. The World Commission on Environment and Development (WCED) – which coined the term, 'sustainable development' – noted that, in light of the current inexorable rise in population growth, coupled with ever greater consumption of land and other resources, the earth's ability to support human life could be compromised in the near future.[6] It consequently recommended the principle of 'sustainable development' as a tool for guiding development worldwide. The commission defined sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.

Although 'sustainability' is a contested term, it highlights 'some concern for intergenerational equity or fairness in long-term decision-making of a whole society'.[7] In practical terms, sustainable development should guarantee economic growth and effectiveness of action in all spheres of human activity and environmental needs 'by not allowing [economic] growth rates to fall, and by forestalling any economic collapse due to the exhaustion of resources, excessive degradation of natural capital or destructive social conflicts'.[8]

Hardin[9] was one of the first scholars to draw the world's attention to the link between sustainable development and various land tenure systems. He argued that land resources held in common were in danger of being over-exploited and degraded. He noted that freedom in the exploitation of common property resources, against the backdrop of unlimited population increases, was bound to bring ruin to all people dependent on those resources. Hardin argued that, in a pasture open to all, for example, each herdsman would try to keep as many cattle as possible in order to maximise his gain, but gains for each herdsman would dwindle as the pasture approaches or exceeds its carrying capacity. To avert diminishing returns, Hardin envisaged two options: either sell the common property as private property, or to keep them as public property but regulate the right to access and use. As will be discussed, the government in Botswana combined both options in its land tenure reforms. To Hardin, access and use could be regulated in the following ways: (i) auction (ii) lottery

6 World Commission on Environment and Development *Our common future* (WCED) (1987) 4-9.

7 JCV Pezzey & MA Toman *The economics of sustainability: A review of journal articles* (2002) 2

8 Z Hull 'Sustainable development: premises, understanding and prospects' (2008) 16 *Sustainable Development* 77.

9 G Hardin 'The tragedy of the commons' (1968) 162 *Science* 1243-1248.

(iii) approved criteria; (iv) first-come-first-served basis. He proposed the establishment of private property to regulate access and use of real estate and other material goods. To limit depletion and control abuse, misuse and pollution of the commons, taxing was 'a good coercive device', depending upon size, duration or extent of pollution or use.

Hardin has been criticised for being simplistic, deterministic and failing to distinguish between the various forms of common recourses and regimes under which they are held. Feeney and his colleagues note that Hardin's 'conclusion of unavoidable tragedy follows from his assumptions of open access [to all forms of common resources], lack of constraints on individual behaviour, conditions in which demand exceeds supply, and resource users who are incapable of altering the rules'.[10] Drawing on case studies in Asia, Africa, America and elsewhere, they note that (i) human beings are not helpless in the face of decreasing carrying capacity of their communal resources; and (ii) most communal resources are characterised by neither open access nor free for all practices. Faced with dwindling resources or threats of environmental degradation, communities are able to organise themselves and re-design regulations on how to (a) exclude non-community members (b) monitor resource use by members (c) allocate use rights among community members (d) adjust aggregate utilisation levels to maintain sustainability. Feeney *et al* further note that rules and regulations – as well as institutions set up to manage, monitor and enforce them – depending upon many factors, these include the nature of the resource; local culture; institutional arrangements governing access and use of the resource; operative property rights regime; and the nature of interactions between users and regulators. The rules, regulations and institutional arrangements 'build on knowledge of the resource and cultural norms that have evolved and been tested over time'.[11] Finally, Feeney et al note that regulation and institutional arrangements may, however, break down following technological, economic or political changes. While by economic changes they refer to new market opportunities, for them political changes refer to take over of administrative and legal institutions by politically or militarily powerful groups or by external powers, notably colonisation.

2.2 Formalisation of land rights

The foregoing feature prominently in Hernando de Soto's arguments for upgrading or formalisation of customary and informal land rights.[12] To de Soto, widespread impoverishment and poverty in the developing world and former communist states is largely due to lack of formal and legally

10 D Feeney *et al* 'The tragedy of the commons: Twenty-two years later' (1990) 18 *Human Ecology* 12.
11 Feeney (n 10 above) 13
12 H de Soto *The mystery of capital: why capitalism triumphs in the West* (2000).

recognised property rights. He identifies two views of landed property: one which focuses on the physical and intrinsic value of houses as shelters or workplaces; and the other which focuses on the social, economic and extrinsic value of property or the potential of being 'used to produce, secure or guarantee greater value in the expanded market'.[13] The former view fixes property as 'dead assets or capital' while the latter views property as 'live capital'. Formalisation of property rights, he argues, should not just seek to protect ownership or enhance tenure security, but to enable properties to carry 'out a variety of additional functions to secure the interests of other parties'.[14] He further argues that, to be successful, land rights formalisation processes and other land reforms must absorb all extralegal practices, customs and norms, the law has to catch up with the way people define, use, distribute and exchange property rights. The official legal order must interact with extralegal arrangements to create a social contract on property and capital – not 'laws and regulations that look good on paper but rather about designing norms that are rooted in people's beliefs and are thus more likely to be obeyed and enforced'.[15]

Scholars have criticised de Soto's views on several grounds.[16] First, they note that formalisation of land rights has been tried all over the developing world and failed to produce the results he predicts. Second, they note that for property to be used as collateral and therefore function as capital, there must be a market for it – a condition often lacking in much of the developing world. Third, they argue that the poor and the extralegal sector are highly differentiated, rather than the homogenous entity portrayed by de Soto. Fourth, they note that de Soto only acknowledges the capital-formation function of property and ignores other functions (eg securing livelihoods) that underpin social security. They also criticise de Soto for ignoring the role played by states as property owners. The foregoing criticisms notwithstanding, De Soto's views have mesmerised many policy makers and politicians the world over.

3 Colonial land tenure reforms

Botswana, with a population of 1.7 million people in 2001, became a British Protectorate in 1885. At that time, Botswana was sparsely inhabited by the San (or Bushmen), Khoi (or Hottentots), Tswana (or Sotho-Bantu peoples) and several Bantu tribes (eg Kalanga). The Tswana and Bantu peoples were organised as several politically and administratively independent tribes, although sharing similar social-

13 n 12 above, 48.
14 n 12 above, 51.
15 n 12 above, 159.
16 See, for example, B Cousins *et al Will formalising property rights reduce poverty in South Africa's 'second economy'?* (2005) 2 - 4; MM Mooya & CE Cloete 'Property rights, land markets, and poverty in Namibia's 'extra-legal' settlements' (2007) 3 *Global Urban Development* 1 - 23; R Home & H Lim (eds) *Demystifying the mystery of capital* (2004).

political structures; each tribe lived in a territory of its own, the boundaries of which were ill defined. The hunter-gatherer San and Khoi were not organised in formal tribes, and occupied the Kalahari Desert or sandveld, while the Tswana and other Bantu speaking tribes were sedentary pastoralists-cum-farmers and occupied the hardveld. The sandveld receives little rains and only supports shrubs and grass, while the hardveld receives relatively more rains and supports vegetation and agro-based livelihoods.

The British invested little in Botswana, compared to its neighbours Zimbabwe and South Africa. At independence in 1966, Botswana was one of the poorest countries in Africa. Since the country's discovery and exploitation of minerals (mainly diamonds, copper and nickel), it has experienced tremendous economic growth, averaging 6% per annum between 1966 and 1995, accompanied by huge increases in formal employment – from 69,500 in 1978 to 234,500 in 1995. The population living in urban areas has grown in absolute and relative terms. In 1964, only 4% of the country's population lived in urban areas compared to 17% in 1981 and 52% in 2001.[17] These social, economic, demographic and political changes have drastically affected the use, demand and supply of land, impacts that have been strongest and more visible on land within townships and peri-urban areas.[18]

The following discussion will be confined to Tswana land tenure practices, because the Tswana constitute the majority of the country's inhabitants and their customary land tenure system is relatively well documented.[19]

3.1 Tswana customary land tenure practices

Tswana customary or traditional land tenure systems, as elsewhere in sub-Saharan Africa, were characterised by unwritten rules and procedures, generally accepted within each respective tribe or jural community. Tswana and other customary land tenure systems in the region had several outstanding features or principles.[20] First, and contrary to Eurocentric misconception, land was vested in respective communities or tribes and not in chiefs. Chiefs and headmen simply administered and enforced the customary rules and procedures. Second, Tswana customary land tenure systems were characterised by the *Right of Avail* – a right that was shared

17 FT Kalabamu & S Morolong *Informal land delivery processes and access to land for the poor in Greater Gaborone* (2004) 68 - 69.

18 Kalabamu & Morolong (n 17 above); see also Government of Botswana *Land problems in Mogoditshane and other peri-urban villages* (1992); Government of Botswana *Report of the presidential commission of inquiry into land problems in Mogoditshane other peri-urban villages* (1992).

19 See I Schapera *Native land tenure in the Bechuanaland Protectorate* (1943) 35 - 47.

20 FT Kalabamu 'Land tenure and management reforms in East and Southern Africa – the case of Botswana' (2000) 17 *Land use Policy* 305 - 319.

and applied to all people belonging to each tribe or community. All other rights were deduced from the right of avail. Third, all pieces of residential and agricultural land acquired through allocation by the chief/headman or through inheritance remained, in perpetuity, the exclusive property of the allotee. Fourth, land not allocated to individual households was accessible to all members of the tribe, who could use it to graze their livestock, collect natural products (eg wild vegetables and fruits, honey, firewood and timber). Five, whenever agricultural land allocated to households was not in active use (eg after crop harvest), other members of the tribe or community had a right to harvest natural products such as mushrooms and wild vegetables or graze their livestock on such land. Sixth, in times of need land could be reorganised and reallocated to community or tribal members. Seventh, under Tswana customary tenure land rights were allocated to or inherited by men only. Women accessed land through fathers, husbands, sons or paternal uncles. Regardless of marital, social or economic status, no woman could own land rights, although land rights were held and inherited along matrilineal linage among some tribes in Zambia, Malawi and Tanzania.[21]

The above Tswana customary tenure practices, rules and procedures were developed over generations through trial and error, whereby good and workable results were retained and poor ones dropped. The practices were shaped by socio-economic and geopolitical conditions – especially the arid and fragile conditions that characterised the land in this country.

3.2 The reforms

Although Botswana became a British Protectorate in 1885, the practical administration of the protectorate began in May 1891 when the Queen by Order in Council delegated her judicial and administrative powers and responsibilities over the territory to the High Commissioner for South Africa.[22] The High Commissioner was empowered to rule by proclamation but respect native laws and customs, and in 1891, he promulgated the General Administrative Proclamation which, among many other things, introduced Roman-Dutch law, as operative in the Cape Colony which was to co-exist with customary law. While Roman-Dutch law was to be applied to European and non-African settlers, customary law applied to indigenous populations and Africans in general. Thus colonisation transformed the country into a dual track legal system – customary and statutory.

21 FT Kalabamu *Gender and generational perceptions on renegotiated customary inheritance in Tlokweng, Botswana* (2006) 12 - 14.

22 A Aguda 'Legal development in Botswana from 1885 - 1966' in DL Cohen & J Parson (eds) *Politics and society in Botswana* (1973) 52 - 68; Kalabamu and Morolong (n 20 above).

The country's boundaries were defined through two proclamations in 1896 and 1899.[23] [24] Subsequently, the country's land mass was subdivided into three categories: native reserve lands or tribal territories for Africans or indigenous populations; crown lands which were vested in the British majesty or crown; and freehold land reserved and sold to settlers from Europe. Freehold land covered some of the country's most fertile and wet areas, while crown lands covered the sandveld and most of the land utilised by the San and Khoi tribes and which were considered by colonial administrators to be unused.

The introduction of crown and freehold land tenure in addition to customary land transformed the Botswana land space from a single to a multiple track tenure system, with each system governed by separate rules and procedures for access, ownership and transfer. Although 'freehold' titles were not part of the Roman-Dutch law that was applied in Botswana, they were offered on the assumption that they conferred the same entitlements as a 'dominium' or the 'right of ownership' in the Roman-Dutch law.[25] Thus freehold titles conferred on owners fairly unrestricted and exclusive control over their pieces of land. According to Ng'ong'ola,[26] the precise nature and content of the rights of the crown in land were unclear. The legal documents for crown lands simply stated that rights in crown land would be exercised by the High Commissioner who would also have power to make grants or leases over the lands on terms and conditions he deemed fit. Leaseholders and freehold title holders were legally permitted to sell, cede or otherwise dispose their rights. Although some chiefs had reportedly sold land to European settlers and companies during the first years of colonisation, the colonial administration later disallowed sale of land in tribal reserves.

Besides transforming the country into a dual legal system and multiple land tenure systems, colonisation – through examples set by settler farmers – exposed Batswana to the concept of private and exclusive land ownership, commoditisation of land rights, borehole/dam technology and intensive agriculture. As result, some chiefs, headmen and indigenous farmers with large herds of cattle sunk wells and boreholes in communal grazing areas and claimed exclusive grazing rights of up to 8 kilometres in radius.[27]

23 Bechuanaland Protectorate Boundaries Proclamation 1 of 1896.
24 Bechuanaland Protectorate Boundaries Proclamation 8 of 1899.
25 C Ng'ong'ola 'Land rights for marginalised ethnic groups in Botswana' (1997) 41 *Journal of African Law* 7
26 C Ng'ong'ola *Land tenure reform in Botswana: post-colonial developments and future prospects* (1996) 1-29.
27 I Schapera *A handbook of Tswana law and custom* (1994) 209-211.

4 Post colonial land tenure reforms

The first post-colonial land reforms focused upon restitution. The State Land Act of 1966 (Cap. 32:1), renamed crown land as state land, vested in the President, with day-to-day management assigned to the Minister responsible for land matters. To increase the amount of land under customary tenure, the Government converted some state land into tribal land, and also bought freehold land and converted it to state land. Consequently, the proportion of tribal land has increased to almost 71% (table 1) while state land has decreased from about 47% to 25%.

Table 1: Land tenure categories in Botswana

Category	1966	1979	1998
Tribal land	48.8%	69.4%	70.9%
State land	47.4%	24.9%	24.9%
Freehold land	3.7%	5.7%	4.2%

Source: Adams* et al*, 2003:57

4.1 Replacement of freehold titles with leaseholds

With effect from 1975 freehold land is administered by the Minister responsible for land matters under the Land Control Act [Cap. 32:01] of 1975. The Act prohibits the division, sale, transfer or long term (exceeding 5 years) leases of agricultural freehold land to non-citizens (or companies not fully owned by citizens) without the Minister's consent. In addition, no additional land has since been converted from customary or state land to freehold land. Two types of leases – Fixed Period State Grant (FPSG) and Certificate of Rights (COR) have replaced freehold titles on state land.

Introduced in the late 1960s, the FPSG is a long-term (50 or 99 years) leases on state land. Under the FPSG lease system, the total rent is paid at the commencement of the lease period rather than periodically. FPSG titles are registered in the Deeds Registry and may be freely transferred, sold or assigned provided the initial development covenants have been satisfied. The FPSG leaseholds were preferred over freehold titles because the former 'pre-empts the build up to perpetual landlessness among the citizens'.[28]

The COR lease system was developed as a means of providing the urban poor with free but secure land title, while avoiding the complexities and costs associated with statutory titles. Under this lease system, the plot

28 W L Dickison *Land tenure and management in a developing country* (1990) 26.

holder is granted usufruct rights while the state retains ownership rights. In order to guard against gentrification, land under held under the COR – whether developed or not – may not be transferred without the consent of the state. CORs have been extensively used in self-help housing schemes in townships. Although the land rights conferred by the COR are perpetual and inheritable, financial institutions have not accepted them as collateral because they are quasi-legal documents, not registrable with the Deeds Registry. Legally speaking, lenders would have to sue or seek approval from the state (as land owners) before disposing of the property to recover any debts. A holder of COR title may only register his/her interests by converting to FPSG; this requires sponsoring and obtaining a survey diagram approved by the Director of Surveys and Mapping. Issuance of COR titles was discontinued in 1992 in favour of FPSG titles.

The Certificate of Rights is similar to customary land rights, only offering individuals the right to occupy and use the land but not to own it. Thus, state land in urban areas was being subjected to customary rules.

4.2 Formalisation of customary land tenure

The Tribal Land Act [Cap. 32:02] of 1968 'was the first piece of legislation to propose substantial changes to the dominant Tswana tribal system of land tenure which had been left intact after the proclamation of the tribal reserves.'[29] To Mathuba, the Act 'was never meant to uproot the [customary land tenure] system … but to improve it by introducing a modernised land institution and by having a written law which can be easily referred to'.[30] Officially, the Act sought to 'improve agricultural production by removing constraints that inhibited the adoption of *efficient methods of crop and especially animal husbandry*'[31] (emphasis added). By good animal husbandry, the government meant reducing 'the heavy overstocking, which occurs in many areas, particularly in the eastern parts of the country'.[32] However, the 'speed or haste of the new rulers in proposing the reforms also suggested that they appreciated that greater political control over land administration could strengthen the hand of the government'.[33] Whatever the justifications, the introduction of the Tribal Land Act (1968) was consistent with the concepts of sustainable land utilisation, avoidance of the 'tragedy of the commons' and formalisation of customary land rights. Several sections of the Act dealt squarely with these issues.

29 Ng'ong'ola (n 26 above) 14.
30 BM Mathuba *Report on the review of the Tribal Land Act, land policies and related issues* (1989) 2 - 3.
31 Government of Botswana *National development plan* (1970) 31.
32 Government of Botswana (n 18 above).
33 Ng'ong'ola (n 26 above) 14.

Part II, the first substantive part of the Act, established and defined the composition and functions of Land Boards in respect of each tribal area. The first generation of land boards consisted of (i) two District Council representatives; (ii) two persons appointed by the Minister responsible for land matters; (iii) two tribal authority representatives; and (iv) up two co-opted members. Co-opted members were persons deemed to have expert knowledge or experience that would assist a land board in discharging its functions. Co-opted members could participate in the deliberations of land board proceedings but had no voting powers. Each land board was established as a 'body corporate capable of suing and being sued in its own name'.[34] For the day to day management of affairs in various land board, section 8 of the Act empowered the Minister to appoint a Secretary for each land. More importantly, section 10 (1) of the Act vested tribal law in land boards. Section 10(1) states that, 'All the right and title to land in each tribal area … shall vest in the [respective] land board … in trust for the benefit and advantage of the tribesmen[35] of that area and for the purpose of promoting the economic and social development of all the peoples of Botswana'.

Having established land boards and vested tribal land in these bodies, the Act transferred all land allocation and administrative powers that were previously vested in chiefs under customary law to the said land boards.[36] These included:

- The granting of rights to use land;
- The cancellation of the grant of any rights to use any land including a grant made prior the coming into operation of this Act;
- Hearing appeals from, conforming or setting aside any decision of any subordinate land authority; and
- The imposition of restrictions on the use of tribal land

Sub-section 3(1) of the Act required land boards to issue certificates to persons allocated customary land rights while sub-section 3(2) required land board secretaries to retain and keep a register of all the certificates it issued.

Besides allocation of customary land rights, part IV of the Act provided for the land boards to grant, vary, and cancel common law forms of tenure on tribal/customary land. Under sections 23 and 24, a land board could lease, on monthly basis, to any person an area of land not exceeding five acres (= 2ha) or, with the consent of the Minister, lease larger pieces for longer periods. In addition, section 24(1) mandated land boards, with the permission of the Minister, to 'grant to any person land ... in ownership on such terms and conditions as it may determine'. The Act required

34 Tribal Land Act of 1968 sec 9(1).
35 The Act defines 'tribesman' as a 'citizen of Botswana who is a member of the tribe occupying the tribal area'.
36 Tribal Land Act of 1968 sec 13.

grantee of long term leases and ownership in land to demarcate and register their interests within a period of six months of being allocated. Section 26 prohibited the sale and transfer of long term leaseholds and ownerships without the written consent of the respective land board.

4.3 Challenges in implementing the TLA

Although the TLA was passed in 1968 it only became operative in 1970 when its commencement was gazetted under Statutory Instrument 6 of 1970. The Act has been lauded as innovative and a fine piece of legislation 'in that it provides for almost everything that is required in terms of issuing title, providing for customary title, leases and even freeholds (Grants of Ownership)'.[37]

Interpretation and implementation of the Act has been controversial. First, it appears the Act was drawn up for the purpose of eroding chiefs' powers by creating a state-controlled land allocation authority. As Dickson observes, land board's responsibilities were limited to land administration duties – selection of applicants, processing of grants, collecting rent and dealing with disputes – while land management functions (eg preparation and implementation of land use plans) were assigned to district councils.

Second, despite assuming responsibilities for administering the allocation and cancellation of land rights, land boards lacked information on vacant and occupied pieces of land. They were forced to rely on chiefs and headmen in the execution of their responsibilities. Some chiefs, headmen and individuals capitalised upon this weakness to improperly acquire land through self-allocation or misleading the land board. This resulted in frequent and numerous appeals and litigations against land board decisions. These litigations were further complicated by lack of evidence and, to a large extent, unfamiliarity with the new rules and procedures.[38] This problem was aggravated by the land boards' inability to issue and keep proper records of their customary land grants.

Third, various stakeholders interpreted the Act (notably section 10) differently. While, as noted earlier, sub-section 10(1) vested tribal land in respective land boards, sub-section 10(2) divested lands allocated before 1970 from the land boards. The latter sub-section provided, 'Nothing in this [section 10] shall have the effect of vesting in a land board any land or right to water held by any person in his personal or private capacity'. The section has been interpreted to mean that 'all land that was allocated prior to the existence of the Land Boards is held by individuals and their heirs in the private and individual capacity … in perpetuity and can do anything

37 Dickson (n 28 above) 51.
38 Dickson (n 28 above) 53 - 54.

they like with it without interference from the Land Board'.[39] The differing interpretation led to the High Court case between Kweneng Land Board and a certain Kabelo Matlho and Pheto Molthabane. The land board alleged that Kabelo Matlho had, without its authority, occupied a piece of land in the tribal area of Mogoditshane, west of Gaborone, and sought an interdict to evict him.[40] Pheto Molthabane, who had inherited the land from his late father and given part to Kabelo Matlho, argued that he was the rightful owner in terms of section 10(2) while the land board also believed it owned all the Kweneng Tribal Land as per section 10(1). The court ruled in favour of the respondent, as did the Court of Appeal later.

Fourth, it appears that the TLA was ill prepared to address land demands related to urbanisation because it focused on rural land and the needs of cattle owners in particular. The effects of this weakness have been evident in urbanising villages and peri-urban areas where the demand for residential, commercial, industrial and institutional uses has been overwhelming. The inability of land boards to deal with demand for land in peri-urban areas resulted in widespread self-allocation and extra-legal sales of land as revealed by the 1991 Presidential Commission of Inquiry into Land Problems in Mogoditshane and other Peri-urban Villages.[41]

4.4 Further customary land tenure reforms

To address challenges identified during implementation, the Government amended the TLA more than a dozen times before introducing major amendments in 1993. Unlike earlier amendments which 'were concerned with the calibre and efficiency of land board members and the need to exert greater political control over land administration through Ministerial appointees to the land boards', the 1993 amendments were both extensive and comprehensive. Only key features will be highlighted.

First, the composition of land boards was amended to increase the number of popularly elected representatives, and exclude chiefs, politicians and public officers such as District Council officials. Second, section 13 expanded the powers of land boards, authorising any change of user of tribal land; and authorising any transfer of tribal land. Third, the requirement for land boards to obtain the Minister's consent in order to grant common law land rights for land in excess of 2 ha, or periods longer than five years, was removed but still obtains in the case of non-citizens. Land board powers to grant land in ownership were also removed. Fourth, and more importantly, sub-section 10(2) was repealed because of the different interpretations to which it lent itself. In addition, the phrase

39 Government of Botswana (n 18 above).
40 C Ng'ong'ola 'Ownership of tribal land in Botswana: Kabelo Matlho and Pheto Motlhabane' (1993) 37 *Journal of African Law* 193-198.
41 Government of Botswana (n 18 above).

'tribesmen of the area' which appeared in sub-section 10(1) was replaced by the 'citizens of Botswana'. This was partly an attempt to make the Act gender blind or neutral. Although the amendments to section 10 were not expected to automatically qualify citizens for allocation of land in any tribal area, most people have construed the amendment to mean exactly that. It has resulted in many people applying and acquiring customary land rights in various parts of the country. It has enhanced the legitimacy and increased the demand for peri-urban land since many citizens feel entitled to acquire land in any part of the country. The increased demand for peri-urban land has, in turn, led to increased land values and competing claims for land rights in villages on urban fringes. Contrary to customary norms, and to sections 15 and 38 of the Tribal Land Act, undeveloped land in urbanised villages and peri-urban areas is being 'sold' through newspaper advertisements, estate agents and lawyers.[42] Land being sold includes residential plots allocated or acquired for free or at no cost to beneficiaries.

Despite deletion of sub-section 10(2) designed to pre-empt the recurrence of litigations and legal scenarios encountered in the Kabelo Matlho case, land disputes and conflicts have persisted. Most disputes are against land board decisions and concern on either ownership of tribal land occupied under customary land grants, or the amount of compensation given by land boards in respect of repossessed arable land in urban villages and peri-urban areas[43]. In accordance with section 33 of the Tribal Land Act, compensation is generally limited to un-exhausted improvements such as the value of standing crops, fences and buildings, or costs of clearing or preparing land for agricultural or other purposes.

Over time, land-related litigation has tended to overwhelm both customary and common law courts. Consequently, the Government of Botswana, through Statutory Instrument 59 of 1995, decided to establish a Land Tribunal with responsibilities of hearing and determining appeals from land boards and against land board decisions. Until then, appeals were brought to land boards and later to the Minister – a practice found wanting because land boards were judges in their own causes, while ministers were politicians and not necessarily well vested in judicial matters. Besides land boards were unable to enforce their decisions to the extent that people took advantage of the weakness to allocate themselves pieces of land while others persistently ignored land boards' decisions.[44] The Land Tribunal sits as a court presided over by a qualified lawyer. Enforcement of the tribunal's decision is the same as that of the Magistrate Court. Any party aggrieved by the decision of the tribunal has leave to appeal to the High Court.

42 Government of Botswana (n 18 above); Kalabamu & Morolong (n 18 above); GeoSolutions *Report for self-help agency* (2007) 34-36.
43 Kalabamu & Morolong (n 18 above).
44 Mathuba (n 30 above) 32.

Since 1993 the TLA has been revised six times. The latest amendments have focused on structures and institutions for tribal land administration. Part II which initially dealt with the establishment of land boards has been extended to include the establishment of the Directorate of Land Board Services and the Land Board Service Commission. The amendments do not deal with rules, norms and procedures governing access, utilisation, transfer etc of land rights and interests, but dwell on procedures for appointment, duties, remuneration and retirement of land board officers.

5 Assessing Botswana's land reforms

As noted earlier, Botswana's land reform initiatives have been hailed as exemplary in comparison to experiences within other eastern and central African countries. To Ng'ong'ola, Botswana's legislation

> provides a better legal framework for the management of the intractable problems customary land reform … [because] first, the vesting of title in land boards and the land board system of administration, can be adapted for application where it becomes politically desirable and feasible to rein back excessive powers of corruptible customary land administration functionaries … the position is preferable to the vesting of title to customary land in the President or his Ministers and surfeiting them with excessive, arbitrary powers of land control. [Second,] Land boards can also be mandated to retain or to facilitate the transformation of the customary land tenure as and when the situation demands.[45]

The government has maintained continuity by retaining and respecting the land rights and other tenurial provisions granted by the colonial administration, while limiting absolute and relative growth of land in ownership. Through the purchase of freehold land and the Land Control Act, the Government has facilitated a gradual restitution of freehold land from European settlers to citizens. The number of citizens holding freehold titles has increased without corresponding increase in acreage of freehold land. Furthermore, through the conversion of state land to tribal land the government has been able to decrease shortages of tribal land that existed among some tribes. Additional successes have been achieved by the replacement of freehold titles with long term leaseholds that are secure, easily accessible and flexible. Through regular reviews and amendments of policies and legislations, the government has been able to maintain fair, transparent, democratic and equitable land tenure systems. The inclusion of chiefs, deputy chiefs or their representatives in the composition of first generation land boards was a commendable practice as it provided a smooth transition.

45 Ng'ong'ola (n 26 above) 413.

Botswana's achievements in land reforms may be attributed to prudent use of ample mineral revenues, tolerant multiparty democracy, extensive grass root consultations and general respect for law and order. Despite the government's cautious, pragmatic and transparent approach in introducing land reforms, a number of problems have surfaced and persisted for quite some time now.

6 Weaknesses

Weaknesses of any incremental land tenure reform arise from four interrelated premises: too much law; too many institutions; delays in integrating changes; and differing positions by various stakeholders.

6.1 Too much law

Botswana is presently characterised by statutory, quasi-statutory, customary and informal land rights systems – freehold, fixed period state grants, certificate of rights, certificate of customary land grants, common law leases on freehold and tribal land plus those who occupy land without any formal certification. Each of these systems is governed by a separate set of written and/or unwritten policies, rules and procedures which bestow varying entitlements, privileges, benefits and restrictions on land rights holders. Freehold land measuring less than 2 ha may be freely transferred or sold, while freehold land bigger than 2 ha may not be sold or otherwise transferred without the consent of the Minister. Land held under Certificate of Rights or Certificate of Customary Land Grant – whether developed or not – is neither registered, mortgageable nor transferrable (except through inheritance) without a written consent from the relevant municipal council or land board. Non-citizens may not acquire land rights on state or tribal land (developed or otherwise) without the consent of the minister. State land is leased to citizens according to various exclusion and eligibility criteria. As de Soto argues, legal pluralism and numerous administrative restrictions tend to create ambiguity and conditions for corruption and nepotism.

6.2 Focus on administrative issues

While land reforms taken during the first two post-independence decades were bold, innovative and comprehensive, subsequent reforms have focused on land administration issues and tended to be rather conservative. For example, a large part of the Tribal Land Act (part IIA – IIF) is presently dedicated to administration issues – guidelines and procedures for appointment, promotion, remuneration, termination and retirement of personnel employed or to be employed in various land boards, the Department of Land Board Services, and the Land Board Service Commission. The reforms have not taken cognisance of emerging critical

issues – such as dual grazing rights; land markets and commoditisation of land rights; land taxation; land rights for women, the poor, youth and marginalised groups; and local management of land resources.[46] The inability to address emerging issues – which in effect reflect contemporary people's needs, aspirations and livelihood strategies – has resulted in differing interpretation of customary law and land tenure. Customary tenure is interpreted to refer to either rules as applied during the pre-colonial era, rules as recently interpreted by customary courts, or norms as currently practiced and generally accepted by people in their everyday life. This is probably the weakest point of incremental reform, especially when it tends to be unduly conservative by holding on to past practices out of step with present realities. The varying interpretations are largely to blame for the numerous litigations instituted by or against land boards.[47]

6.3 The 'Right of Avail' and speculative demand for urban land

The 'right of avail' is a customary norm that has been observed to date. Under the right of avail, every household or adult person, regardless of his or her income, is entitled to residential, agricultural and any other land for free. Unlike in the past when applicants could only be allocated land in their tribal territory, at present every citizen is entitled to acquire several pieces of land in various parts of the country. This has led to unprecedented and insurmountable demand for land in urban and peri-urban areas. The number of applicants waiting to be allocated residential plots on state land within townships increased from 29020 in 1990 to 47880 in 2001, despite the allocation of 15083 plots during the same period.[48] Data obtained from the Department of Land Board Services in April 2010 indicate that the waiting list for peri-urban villages surrounding cities and Francistown stands at 177827 for Gaborone and 39025 for Francistown; these are phenomenal figures given Botswana's small population.

6.4 Informal land markets

Speculative demand for urban and peri-urban land has resulted in the emergence of informal land markets. Unauthorised subdivision and sale of peri-urban started in the mid-1980s and has flourished unabated despite government's punitive measures, particularly demolition of offenders'

46 For details of the emerging issues see: Natural Resource Services & Land Flow Solutions *Report on the review of the Botswana land policy* (2002).
47 Kalabamu and Morolong (n 18 above).
48 Kalabamu and Morolong (n 18 above).

houses.[49] A recent study shows that many urban and peri-urban residential plots allocated to low and medium income earners are sold undeveloped, with the aid of estate agents and lawyers.[50] Undeveloped plots acquired for free are sold at prices ranging between P80 000.00 and P120 000.00 which is equivalent to USD 12 000.00 - 18 000.00, enough to build a two bedroom low cost house.

6.5 Too many institutions

One might expect successive reforms progressively to integrate customary, modern and informal land tenure systems, yet the practice in Botswana has been to keep them apart. Instead of integration, we note the mushrooming of central and local government institutions mandated to deal with tribal land matters. They include the Department of Lands, the Directorate of Land Board Services, Land Board Service Commission, Land Tribunal, 12 Land Boards, 38 Subordinate Land Boards, District Councils and land overseers in each village. Like legal pluralism, the existence of too many institutions dealing in land matters diminishes accountability and creates environments conducive to mismanagement of land resources.

6.6 The way forward

As noted earlier, pre-colonial Tswana customary rules, norms and practices were designed to facilitate subsistence farming in semi-arid conditions, while statute and common law were introduced to protect and serve settler interests. Efforts aimed at formalisation of customary land rights through the Tribal Land Act were geared at serving the needs of African farmers as well as averting the 'tragedy of the commons' that threatened communal grazing areas. As observed earlier, Botswana has since experienced tremendous socio-economic and demographic transformations. It now has a highly urbanised and market oriented economy, whereby almost all goods and services are obtained at costs determined by demand and supply forces. Yet recent land tenure reforms appear to be oblivious of these changes. The plurality of legal and tenure systems, together with the existence of numerous institutions involved in land administration and development, is causing ambiguity and creating space for corruption, inefficiency and mismanagement of land resources.

Future land reforms need to consider integrating or harmonising informal, customary, common and statutory systems with the aim of

49 Government of Botswana (n 18 above); C Fourie 'Land readjustment for peri-urban customary tenure: the example of Botswana' in R Home & H Lim (eds) *Demystifying the mystery of capital* (2004) 31-49; C Molebatsi 'Botswana: self-allocation, accommodation and zero tolerance in Mogoditshane and Old Naledi' in Home & Lim (eds) *Demystifying the mystery of capital* (2004) 73-97; Kalabamu and Morolong (n 18 above).

50 GeoSolutions (n 42 above).

establishing a nationwide single land tenure system informed by contemporary settlement patterns, people's needs, aspirations and livelihood strategies. The traditional right of avail needs to be deeply interrogated because, in today's market economy, the practice of availing land - which is probably the most highly priced and valued commodity – is neither justifiable nor sustainable, for two main reasons. First, the high costs involved in land administration and provision of infrastructure services (water, roads, sewerage, electricity etc). Second, availing land for free tends to promote corruption, illegal dealings and mushrooming of informal land markets; it should be at prices that cover administration and servicing costs for low and medium income earners, and at market prices for high income earners.

7 Conclusion

Although Botswana's colonisation did not replace or directly interfere with customary land tenure, it ushered into the country the concept of legal pluralism and multiple but parallel land tenure systems. Both legal pluralism and tenure systems were divided along racial lines – customary land tenure for Africans, and common law and statutory land tenure for Europeans. Despite the separation, a number of practices (eg privatisation and commoditisation of land) were introduced into customary land tenure, albeit at a marginal level. However, soon after the country's attainment of independence the government introduced statutory reforms that sought to democratise customary tenure practices and bring them closer to common law provisions, by transferring responsibilities for customary land administration from hereditary chiefs to land boards composed of elected and nominated members. The land boards were mandated with powers to either grant of freehold titles or enter into common law lease agreements with beneficiaries. However, subsequent reforms have neither embraced recent socio-economic, cultural and demographic transformations, nor taken cognisance of people's current needs, aspirations and livelihood strategies. They have instead tended to uphold out moded customary practices and strengthen institutions for enforcing them. In response, land owners and seekers have, with the help of estate agents and lawyers, developed new extra-legal ways of delivering and accessing land.

Botswana's experience shows that, to attain sustainability, successful and effective utilisation of land resources, incremental land reform must be dynamic, inclusive, up-to-date, and reflect the unfolding cultural, social, economic and political changes. Otherwise, it makes itself irrelevant to people's everyday life and becomes a burden to taxpayers.

CHAPTER 8

UNDERSTANDING THE COEXISTANCE OF THE TRIBAL LAND ACT AND TOWN AND COUNTRY PLANNING ACT IN BOTSWANA'S URBAN VILLAGES

Chadzimula Molebatsi

1 Introduction

Botswana's legal system is characterised by dualism in which customary law coexist[1] with common law.[2] The traditional court system, the *kgotla*,[3] exists alongside modern legal institutions such as the magistrate courts and the High Court, and marriage unions can be entered into through the traditional *kgotla* as well as through the District Commissioner's office. 'Urban villages' define a special genre of settlements in Botswana that originated as indigenous settlements but have experienced *in situ* urbanisation.[4] In these areas, land development processes are governed by provisions of both the Tribal Land Act of 1970 (TLA) and declared planning areas under the Town and Country Planning Act of 1977 (T&CPA). One major consequence of legal dualism in urban villages is the fragmentation of land development functions. While the TLA confers land allocation and land use functions to Tribal Land Boards, the T&CPA places development control functions with the Minister of Lands and Housing, and by extension the District Council. The present chapter seeks to explain how legal dualism has affected the spatial development of the settlements. The coexistence of the two laws is explained from two perspectives: efforts by central government to maintain hold on local government institutions, and benefit to the country's emerging elite who can use either Act to their advantage. It is argued that the co-existence has

1 As used in this chapter, the term 'coexist' refers to a situation where by the two pieces of legislation exist at the same time in the same place. It does not necessarily imply a peaceful or harmonious existence.

2 See B Otlhogile *Aspects of administration of justice in colonial Bechuanaland* (unknown date).

3 The term *Kgotla* has two meanings: It refers to a place where villagers gather to discuss community and developmental issues. It can also serve as a place where customary court cases are conducted. All proceedings at the *kgotla* are presided over by traditional leaders.

4 See F Kalabamu & B Thebe 'Effects of urbanisation and changes in technology on traditional settlements in Botswana' (2005) 14 *Botswana Journal of Technology* 11-20.

produced a situation in which informed groups benefit from the advantages offered by both laws.

Section 2 of the chapter discusses the urbanisation process in Botswana, highlighting the place of urban villages. Section 3 discusses the land use planning functions, Section 4 how the application of the two Acts affects the planning of urban villages. It is argued that the overlap of the two Acts creates a disharmonious planning environment in urban villages. Section 5 explores some of the factors that perpetuate the application of the two Acts in urban villages. The final section suggests measures that could promote a better co-existence of the Tribal Land Act and the Town and Country Planning Act.

2 Urbanisation process in Botswana

Botswana has one of the fastest growing economies in Africa, largely as a result of the discovery of diamonds in the late 1970s. Proceeds from the mining sector were invested in other sectors of the economy and through prudent economic management Botswana has transformed from one of the poorest countries in the world to a middle- income country (according to the World Bank). With a population of 1.7 million, rapid urbanisation is a post-independence phenomenon. Botswana regained her political independence from Britain in 1966 and at that time less than 7% of the population was urban. By 2006 57.4 % of the country's population was urban, set to increase by 2011 to 65%. The official definition of urban area in Botswana is a settlement with a population of more than 5000, 75% of which draw their sustenance from non-agricultural activities. While the increase in urban population is attributed to rural-urban migration and natural increase, the increase in urban population is also attributed to *in situ* urbanisation of major villages, also known as urban villages.[5]

The term urban villages was first used in Botswana's National Settlement Strategy, and identifies traditional settlements that have over the years transformed in terms of size, morphology and economic structures. Urban villages have played several roles in the pre-colonial, colonial and post-colonial periods, and the different historical roles which they played have left an imprint upon their morphology. In the pre-colonial period tribal towns were the economic, social and political nerve-centres of Tswana polities, from which the chief ruled his kingdom. Urban villages were administrative centres and the main trade centres through which trade with other communities was conducted, and the first shops in the tribal territories were located there.[6]

5 Republic of Botswana *National Development Plan* 10 (2007) 10.
6 N Parsons 'Settlements in East-Central Botswana c 1800-1920' in RR Hitchcock & MR Smith (eds) *Settlements in Botswana* (1982) 115-128.

In the colonial period urban villages served as administrative centres for the colonial government to reach the people through their chiefs, as dictated by the policy of indirect rule. Land was communally owned, and each member of the community had access to land for residential, arable and (stock) grazing uses. Land allocation was controlled and handled by the Chief, assisted by headmen and ward heads. Land was not allocated on an individual basis, but in blocks of land to the different wards. Within each ward, the ward head was responsible for the allocation of land among the ward residents, and there was no close prescription on how plot development should proceed. Mixed land use was common, and small livestock like goats and sheep could be kept in the villages. Shops were also located within the residential areas. The results were a seemingly amorphous predominance of crescent or horse-shoe pattern. To date, mixed land uses and the keeping of small livestock remain a source of conflict between planning authorities and the community.

In the post-independence period urban villages operate as district administrative, commercial and industrial centres for their respective districts. Despite the intensification of the new functions, urban villages continue to retain tribal traits, with the chiefs and the kgotla still important institutions. With regard to morphological features, more grid-iron and linear patterns have been added.

3 Land use planning functions under the TLA and the T&CPA

Both the TLA 1968 and the T&CPA deal with physical planning, but conferred upon different institutions.

3.1 The TLA 1968

Promulgated in 1970, it established land boards as trustees of tribal land, a function hitherto performed by the chiefs. Botswana operates three types of land tenure namely tribal land, stateland and freehold. Tribal land constitutes 71% of the country's total area, stateland and freehold 23 % and 6% respectively. The majority of Botswana's population reside in tribal areas where land development is governed by the provisions of the TLA, with land use planning functions contained in Sections 13 and 17 of the Act. Section 13 defines the functions of the land board to include the granting of rights to use land, cancellation of grants, and authorisation of land use changes; Section 17 empowers the land board to determine land use zones within the tribal areas. While the TLA empowers land boards to prepare land use zones and allocate land on the basis of these zones, it does not specify the content and scale of the zoning exercise. Section 17 subsection 4 empowers the land board to commission the preparation of management plans and their revision. Interpretation of these sections has

led to the preparation of planning documents that differ in both detail and coverage. In the North West District, district-wide documents such as the Ngamiland District Settlement Strategy and Okavango Ramsar Site Integrated Land Use Plan were prepared at the request of the Tawana Land Board.[7] More recently, detailed layouts[8] for settlements like Matsaudi in Maun and Khwai were also prepared at the request of the Tawana Land Board under Section 17.

The TLA has often been portrayed as an attempt by the Government of Botswana to modernise land allocation processes in tribal areas.[9] The replacement of chiefs from land allocation by the land board is thus part of the Botswana Government attempts to democratise the land allocation process, and are reflected in the membership of the land board, and the operational procedures they adopt. Although the final appointment of land board members rests with the Minister of Lands and Housing, communities have a role in electing people who constitute the pool from which the Minister makes the final appointment. The promulgation of the TLA introduced systematic documentation of land allocation and ownership in tribal areas.

The above notwithstanding, the customary nature of the TLA is still reflected in the role played by the land overseers, and the choice enjoyed by applicants in determining where they want to be allocated plots. Despite the systematic removal of the chiefs from the land board membership, land overseers still remain important players, an offshoot of traditional leadership. They are appointed by chiefs on the basis of their knowledge of the area, and are often ward headmen. Applications submitted to the land board should bear the signature of the land overseer, and their role is particularly evident in those areas without surveyed layouts, as the land overseers would know which pieces of land have been allocated or not. This is an arduous task which often leads to multiple and disputed land allocations, as land overseers usually do not use maps but rely on their local knowledge. The procedure followed is that the individual identifies an area he wants allocated and approaches the land overseer, who will apply for the plot. The application forms require that neighbours be consulted and their approval obtained. The TLA also tacitly recognises mixed land uses, common characteristics of urban villages reflected by the

7 Following the declaration of the Okavango Delta as a Ramsar Site under the Ramsar Convention (Convention on Wetlands of International Importance especially as Waterfowl) 1975. A District Settlement Strategy is prepared under the National Settlement Strategy, and defines a settlement hierarchy in the district and level of infrastructural services associated with each settlement level, in accordance with academic Central Place Theory.

8 Detailed layouts are planning schemes showing how land in a particular area usually a part of a settlement, shall be used. This is meant to guide the land allocation by land boards.

9 F Kalabamu *Informal land delivery process in Greater Gaborone, Botswana* (2004) 10; C Ngo'ngo'la 'Land rights for marginalised ethnic groups in Botswana, with special reference to the Basarwa' (1997) 41 *Journal of African Law* 1 - 26.

presence of livestock enclosures (or kraals), which are commonly found in places like Mogoditshane and Tlokweng. From the foregoing discussion, it is evident that the TLA has elements of traditional land use practices that reflect local cultures, but sit uncomfortably with the T&CPA 1977 (as will be shown).

3.2 The T&CPA 1977

This is currently the principal Act guiding land use planning in Botswana, and came into effect in 1980. Two key documents behind it were the Ball Report (prepared in 1968 by DR Ball, a British town planner) and the Heap Report (prepared in 1974 by the prominent British Planning Law expert, Sir Desmond Heap). Some of the planning challenges arising from the Act in urban villages can be traced back to its evolution.

The Ball Report's primary task was to develop a physical planning framework to complement the country's national socio-economic planning. The general contention was that the socio-economic development proposals as put forward in the National Development Plans did not adequately take into account planning issues. As Ball wrote of the 1968-1973 National Development Plan,

> like most national development plans, it paid little attention to geographical co-ordination of national and regional development, socio-economic consideration at community and settlement levels. [10]

Part of the technical assistance which the government of Botswana received from the British government was for an adviser on town and country planning, to address planning legislation, procedure and machinery, and 'any matters related to, or having a bearing on effective land use planning'. At the time physical planning in Botswana followed the Town and Country Planning Proclamation of 1961, which was modelled on South Africa's Cape Province Townships and Town Planning Ordinance of 1935. The Ball Report identified a number of deficiencies in the proclamation. Although it called for the preparation of a town planning scheme (section 22), 'the purpose and form of the town planning scheme was not specified'. A more crippling omission was no provision 'for the government to prepare a scheme as of right, or on behalf of a local authority by agreement or in the event of a local authority failing to do so'. Ball also found little co-ordination between national socio-economic planning and local physical planning, which was proceeding in an un-coordinated manner.

Ball turned to South African and British planning legislation as his models. Instead of calling for the preparation of plans for all parts of the

[10] BR Ball 'Report on a visit to the Republic of Botswana' (1968) 31.

country, as with the British planning system, he opted for the South African planning legislation, with plans prepared for selected areas. 'In Botswana as in South Africa, it is impracticable and unnecessary to prepare plans for the entire country'. He argued that it was essential to plan urban and possibly other areas to reflect and further the policies in the national development plan. Outside the planning areas Ball recommended that the government define the minimum scale of private development beyond which planning control will be exercised on the basis of advisory outline plans. On the form of plans, Ball turned to the British T&CPA of 1968 and called for the preparation of Outline Development Plans, defined as a long-term framework within which short-term detailed plans could be prepared.

The translation of the Ball Report into new legislation was taken up by yet another British consultant, Sir Desmond Heap, whose task was

> to review and revise the present town planning and related legislation in order that it may form an adequate framework to carry out the objective of guiding the development of the villages, towns and regions in such a way as to promote and safeguard the health of the inhabitants bearing in mind the essential need for flexibility and simplicity in Botswana town planning and to prepare a report together with a draft of outline legislation.[11]

Heap's Report and the resultant legislation endorsed most of the recommendations in the Ball Report. Heap called for the replacement of the Proclamation of 1961, and was of the opinion that 'not all the country needs planning control.' The towns of Gaborone, Francistown, Selibe-Phikwe and Lobatse required immediate demarcation as planning areas, but that status could be accorded to the villages of Kanye, Serowe, Molepolole, Maun and Mahalapye 'later and perhaps not very much later on'. He was explicit on the exclusion (at least temporarily) of 'villages' from being declared planning areas.

Out of the Ball and Heap Reports emerged the idea of planning areas where planning control was to be exercised, which were the official urban areas. Thus planning areas have became synonymous with those areas defined by the government as urban: Gaborone, Francistown, Ghanzi, Jwaneng, Kasane, Lobatse and Selibe-Pikwe. Not included were urban villages. On the exclusion of indigenous urban centres from planning area status, Heap's opinion was that 'these were matters for town planners to advise upon', and his role was to 'provide that the law is there waiting to be called into use as and when any particular area is regarded as in need of planning control'. At the heart of the idea of planning areas was the view that certain areas were not 'ripe for planning control', and the Act is silent on them.

[11] D Heap 'Review of the Town and Country Planning Legislation' (1974) 3.

The T&CPA 1977 seeks to ensure the orderly development of settlements and the built environment in Botswana. It requires that planning permission should be obtained for any development on, under or above land to take place. Part I covers issues relating to interpretation, Part II central administration, part III development plans, part IV control of development, part V land subdivisions, and part VI is supplemental. Parts II, III and IV are relevant to the argument in this chapter, the overlap between the TLA and the T&CPA. The Act empowers the Minister of Local Government and Lands 'to declare by order published in the *Gazette*, areas of land in Botswana to be planning areas,' and its provisions becoming applicable at the date set by the Minister.

Part III section 6 (2) of the Act requires the Minister to 'prepare in draft a plan indicating the manner in which he proposes that the land in the planning area may be used ...' section 8 requires the Minister to 'consult with any local authority in whose district such development will have effect', and with any other persons, bodies of persons or authorities as he sees fit. The public in the area for which a development plan has been prepared is to be informed through the *Gazette* and a local newspaper where the copies may be inspected.

Part IV, section 9(1), requires that in a planning area, all development shall require planning permission, development defined as 'carrying out of buildings, engineering, mining or other operations in, on, over or above any land or the making of any material change in the use of any building or other land', with exceptions listed in the Development Order.

The Development Control Code (DCC) provides a streamlined interpretation of the T&CPA, specifying conditions and standards for development, such as site coverage, building heights and number of structures per plot. For major land uses (residential, commercial, industrial, civic and community, mixed land uses and advertising), the DCC stipulates guiding principles, and aims and objectives of design of development. It is stated that development controls allows development to proceed in a pleasant, healthy, beneficial, useful, serviceable and compatible manner.

Table 4 summarises the land use planning functions in both the TLA and the T&CPA. While section 17 of the TLA empowers the land board to determine land use zone in tribal areas, the T&CPA empowers the Minister of Land and Housing to do the same, through development plans in declared planning areas. Both Acts require that in the course of preparing a development plan or land use zoning, the land board or the minister should consult with other authorities and interested parties. Both Acts regard land use change as an activity that requires permission, in the case of the TLA from the land board, in the case of the T&CPA from the planning authorities (in most cases the Town and Country Planning Board).

Table 4: Overlapping functions provided by the TLA 1970 and the T&CPA, 1977

Function	Relevant sections with overlapping functions	
	Tribal Land Act 1970	**Town and Country Planning Act, 1977**
Preparation of land use plan	**Section 17 Land use zones** **Sub-section (1)** A land board shall, after due consultation with the district council, determine and define land use zones within the tribal area, and may from time to time make amendments thereto **Sub-section (3)** The land board shall not make grants of land under this Part for any land use which is in conflict with the use for which the land is zoned **Subsection (4)** After consultation with the District council , village development committees, tribal authorities and any other interested institutions, the land board may determine management plans, and their revision from time to time for purpose of assisting or giving guidance on the use and development of each land use zone within the a tribal area.	**Section 6 Preparation of development plan** **Sub-section (2)** not later than 2 years … the minister shall prepare in draft a development plan consisting of a report of the survey together with a plan indicating the manner in which he proposes that the land in the planning area may be used … **Section 7 Revision of development plan** The minister may at any time prepare proposals for such alteration or additions to any development plan as appear to him. **Section 8 Making of development plans** **Sub-section (1)** The minister shall, in the course of preparing a development plan relating to any land or proposals for the revision of any such plan, consult with any local authority in whose district such development plan will have effect and may consult with such other persons, bodies of persons or authorities as he thinks fit

Granting change of use/ development control	**Section 27 Change of user** **Sub-section (1)** where the grantee of any land under the provisions of this Part desires to change the user of any land or where the grantee of any land under the provisions of this Part wishes to hold such land under the provisions of this Part, he may make application in writing to the land board Sub-section (2) The land board may after considering the application, refuse or allow the application	**Part IV Control of development of land permission for development** **Section 9 Provisions** as to development **Subsection (1)** subject to provisions of this section and to the following provisions of this Act, permission shall be required under this part for any development of land that is carried out … **Subsection (2)** In this Act, except where the context otherwise requires, the expression development means carrying out of buildings, engineering … or making of any material change in the use of any building or other land

4 Physical planning challenges in urban villages

The application of the TLA and the T&CPA in tribal areas has resulted in various planning challenges at local level. The fragmentation of land use planning function and their subsequent allocation to different institutions has resulted in conflict and minimal coordination of land use planning activities at local level, negatively affecting the physical growth of urban villages. The T&CPA in urban villages has been superimposed on areas that developed primarily according to local traditions. These challenges are discussed below.

4.1 Fragmentation of planning functions

Table 5 shows the distribution of land use planning activities. While the Land Board has land allocation functions, the preparation of development plans and their enforcement remains the responsibility of the District Councils. The practice is that once an urban village has been declared a planning area, the T&CPA 1977 is supposed to supersede the TLA, so that the Land Board loses some of its functions, retaining only granting of rights to use land, and cancellation of grants. Authorisation of land use changes and determination of land use zones, conferred to the land board by the TLA Sections 13 and 17 respectively, are ceded to the District Council, justified on the basis that the district councils are better placed to deal with these functions.

Table 5: Land development activities and institutions involved in urban villages

	Land development function	Institution involved
1	Decision to prepare a development plan/layout plan	District Council in consultation with the Land Board
2	Land/plot cadastral survey	Land board
3	Preparation of detailed layouts	Physical planning- district council
4	Plot demarcation	Land board
5	Servicing and infrastructure provision	District council
6	Plot allocation to developers	Land Board
7	Development control and monitoring	Physical Planning

4.2 Uncoordinated land development and servicing

Fragmentation of planning functions in urban villages is further compounded by lack of coordination between the district council and the land board. Where more than one institution is involved in planning or development activity, it cannot be assumed that the activity will proceed in a coordinated manner, as evidence suggests otherwise. The land board see their mandate as allocation of land and view the Tribal Land Act as the only Act that governs their activities. Once the land board has allocated the plots, the development of those plots and issues pertaining to infrastructure provision and development control becomes the responsibility of the District Council. Poor coordination between land servicing and plot allocation is particularly experienced in the provision of water.

Often the land board allocates residential plots ahead of service provision by the district council. One such case occurred in Maun, in the North West district of Botswana and the tourism capital of Botswana at the southern edge of the world-acclaimed Okavango Delta. To cater for the tourists the Government of Botswana embarked upon a major airport expansion, requiring residential plots around the existing airport to be relocated to Disaneng in eastern Maun. Layouts were prepared, plots allocated, and gravel roads constructed, but in all this haste there was no proper cadastral survey or services provided, and the area flooded during the rainy season. The land board was castigated by the local councillor for allocating plots without services. According to one land board official, lack of coordination between land board and the district council engenders a culture of diminished accountability: failure to deliver can always be blamed on the other institution. In this case, the land board was blamed for allocating plots without services, but the council had failed to service the land. The blame game continues *ad infinitum*.

Minimal coordination between the land board and district council is further illustrated by the violation of recommendations in the revised

Maun Development Plan concerning the retention of open space.[12] The plan recommended that undeveloped spaces between residential plots be kept as open spaces, but the Maun Subordinate Land Board was inundated with applications for residential expansion over such areas, which they approved contrary to the plan, reflecting poor co-ordination and collaboration, and perhaps an unrealistic planning approach unaware of realities on the ground. Despite the fact that the Physical Planning Committee plays an important role in urban villages, land board representation is limited to only one person, and suggestions to transfer planning functions from the district councils to the land board have met resistance from the former.[13]

4.3 Super imposition of the T&CPA 1977 in Urban villages

Urban Villages encouraged mixed land uses. In places like Mogoditshane and Tlokweng livestock can be seen grazing within open spaces in the villages. Enclosures or kraals are found next to some of the residential plots. In the case of Tlokweng, local culture dictates that the dead be buried within the residential plots, and proposals in the Tlokweng Development Plan for separate land reserved for graveyards were rejected. Applicants were allocated land for whatever purpose needed, and the land board did not prescribe how the plot should be developed. For its part the T&CPA discourages mixed land uses and demarcates separate land use zones in accordance with the Development Control Code standards.

4. 4 Limited public awareness on planning

The greatest challenge has been helping the local communities understand and appreciate the order that the Development Control Code seeks to achieve, and the transition from TLA to the T&CPA is not accompanied by public education and community sensitisation. Effective application of the T&CPA and the Development Control Code requires structures to monitor and enforce against breaches with appropriate sanctions. Generally, the urban planning process in Botswana remains largely unknown to the general public.[14] Often the only time people become aware of planning provisions and the Development Control Code is through their architects or contractors, since efforts by the planning authorities to sensitise the public are slow. Brochures, posters, adverts and commercials on local media can go a long way, as well as public meetings

12 Ministry of Land and Housing *Review of Maun Planning Area Development Plan* 1997-2021 (2008).

13 A proposal for the land Board to have a physical planning division was rejected.

14 A recent survey of public sector bodies and CBOs revealed limited knowledge about the Gaborone Revised Development Plans. See University of Botswana *Pascal Universities Regional Engagement (PURE) Group* (2010).

which it has been reported are poorly attended.[15] To deal with low attendance some land boards embarked on house-to-house campaigns to sensitise communities on development plan preparation.[16]

Lack of sensitisation of communities is reflected in the manner in which communities deal with applications for land use changes in the urban villages. Despite the requirement that land use change should be handled by the District Council-'s Physical Planning Committee, land board officials see these as their responsibility. The Acting Secretary for Kweneng Land Board explained in an interview that 'all land uses including land use changes in Mogoditshane are handled by them with the aid of Physical planners and the District Land Use Planning Committee (DLUPU)'[17] Members of the community continue to direct their application for land use changes to the land board, even though it may just re-direct the applications to the Physical Planning Committee.

5 Explaining the co-existence of the TLA and T&CPA

As shown in the introductory section of this chapter, the coexistence of the TLA and T&CPA in urban villages should be understood as an attempt by central government to maintain control of local government institutions, and benefit the knowledgeable elite who can use the two Acts to its advantage.

5.1 Co-existence as a vehicle for control

The institutional set-up within which the TLA 1970 and the T&CPA 1977 coexist is characterised by a history of rivalry among four local government structures, namely the tribal administration, the Land Board, the District Councils and the District Administration. Each tries to assert their independence from each other: land board see themselves as equal to the District Councils, the Tribal Administration and the District Administration. Each institution was established by a specific Act which stipulates its composition and functions, and the formation of each new institution entailed the reduced powers for existing ones.[18] Thus central government has managed to maintain control of what happens at local or district level, in the process creating a centralised planning and

15 C Molebatsi 'Botswana: Self allocation, accommodation and zero tolerance' in R Home & H Lim (eds) *Demystifying the mystery of capital* (2004) 82.

16 Notes from interview with Acting Land Board Secretary, Mogoditshane Subordinate Land Board, Mogoditshane 2005.

17 (n 16 above).

18 For a discussion of institutional rivalry at local government level, see N Parsons 'The evolution of modern Botswana: Historical revisions' in L Picard (1985) *The evolution of modern Botswana* (1985) 39.

administrative system through the transfer of responsibilities from 'traditional' to 'modern' institutions with elected representatives. Centralisation was realised through the systematic and subtle erosion of the autonomy of the same 'modern' institutions that the state had created.

Of the four local government institutions mentioned above, the oldest is the Tribal Administration dating back to the pre-colonial period. As a result of the policy of Indirect Rule, the colonial period left the Tribal Administration largely unchanged, with chiefs left to attend to development issues in their respective territories. The introduction of modern institutions in the post-colonial period resulted in a substantial reduction of the administrative functions and responsibilities of the Tribal Administration. The modern institutions were made up of what Wiseman dubbed 'representatives of modern bureaucratic and political control, a shift from a traditional system where office was based on traditional legitimacy to one which was based on the principle of direct election'.[19] The creation of the District Councils in 1965 and the Land Board in 1968 transferred responsibilities from the chiefs and the Tribal Administration, to these new institutions. While the District Councils took over most of the administrative and developmental responsibilities formerly enjoyed by the chiefs, the land board took over responsibility for the allocation and administration of tribal land.

The introduction of the modern institutions was detested by the chiefs who saw their susceptibility to central government control. The discontent was expressed in attempts by some of the chiefs to align with opposition political movements.[20] An alliance with far-reaching consequences was that forged between Chief Bathoen of Bangwaketse and the Botswana National Front at the time of the 1969 general elections, as a result of which the Southern district remains a stronghold of the opposition Botswana National Front.[21]

Institutional rivalry between the land board and other district authorities can be discerned from the changes that took place in the land board membership since its inception. Section 1(6) of the Tribal Land Act empowers the Minister of Lands and Housing to determine membership of any land board. Since the introduction of the Land Board, the Minister invoked this provision in 1981, 1984 and 1989, resulting in a systematic removal of Tribal Authority and District Council representatives from the land board. When they were introduced in 1970, the Land Board were

19 Parson (note 6 above) 112; J Wiseman 'Conflict and conflict alliances in Kgatleng District of Botswana' (1978) 16(3) *Journal of Modern African Stu*dies 487-494.

20 Parson (n 19 above).

21 Since Independence in 1966, Botswana has been ruled by one political party – the Botswana Democratic Party. Chief Bathoen rose to become the President of the Botswana National Front.

made up of six members drawn from other district authorities.[22] These included two members from the Tribal Authority (the chief or his deputy and the chief's appointee), District Councils were represented by two councillors, and two members appointed by the Minister of Lands and Housing. In 1981 the Minister increased his nominees to up to six.[23] Changes introduced in 1984 were ostensibly aimed at the democratisation of the Land Board membership. Before 1984 the public had no role in the selection of land board membership. The changes were justified on the grounds that, since the land boards were trustees of tribal land, there should be more active participation by members of the public in the selection of land board members.

The 1984 changes also saw the dropping of chiefs from the land board, although their representatives still remained members of the Land Board together with three representatives elected publicly by the tribe. Council representatives to the Board were reduced from two to one. Two members were brought in *as ex-officio* from the Ministries of Agriculture, and Commerce and Industry. Through the 1984 changes the land board was beginning to lose its composite nature whereby it drew its membership from other district institutions. Chiefs ceased to be members of the Board and District Council representatives were reduced from two to one. The exclusion of the Tribal Administration from the Board was completed by Statutory Instrument 36 of 1986 when chief's representatives ceased to be members of the Land Board. The 1989 changes also terminated District Council representation in the land board. The main objection to District Council membership to the Land Board seems to have been that the latter was considered an autonomous body equal in status to the District Council: if the land board was not represented in the District Council, why should the District Councils be represented in the land board. This argument symbolises the struggle for power and autonomy among district institutions.

Membership of the land board has once again been changed. The system of electing land board members by the general public has been repealed and replaced by a system in which land board positions will be advertised and applied for to a committee comprising the District Commissioner, Chief, Land Board Secretary and the Council Secretary. The number of land board members has been reduced from ten to eight. Once the committee has identified the eight who qualify, names will be forwarded to the Minister who then chooses the chairperson and deputy chairperson. The main reason advanced for these changes is that the previous system was prone to abuse, with candidates bringing in voters from outside. In addition it was argued that selection of board chairperson

22 The term district authorities refers to different local government structures consisting of Tribal Authority, District Council, District Administration and the Tribal Land Boards.

23 Republic of Botswana *Report of the review of the Tribal Land Act and other land related issues* (1989) 40.

by the members compromised the chairperson, who had to show favour to those who elected them.[24] While the proposed changes might be addressing the limitations of publicly elected land board members, it can be argued that it has centralised appointment of land board membership.

The co-existence of the TLA and T&CPA in urban villages benefits Botswana's emerging elite who can exploit the advantages offered by both Acts. The TLA permits transfer of land from one person to another. Land in tribal areas is relatively cheap compared to urban areas and can be acquired through allocation by the land board, transfers of ownership, or purchase of development on the plot. In the case studies below, entrepreneurs utilise the provisions in the TLA to acquire residential plots cheaply in urban villages. Using the provisions of current development plans prepared under the T&CPA 1977 they apply for change of use fully aware of what is permitted. As shown in the first case study, application for change of land use was based on knowledge that the area had been rezoned for commercial land use.

Case study 1: Change of land use: Residential to commercial use

Figure 1 shows land use conversion in Mogoditshane. The plot was converted from residential to commercial fig 1(b), being rezoned to commercial use in 1997. Following provisions in the TLA the current owner bought the land as a residential plot from a resident in Mogoditshane. Since Mogoditshane is a Planning area, the conversion of the plot from residential to The TLA allows for such transfers and converted it into a commercial plot with the approval of the Town and Country Planning Board. According to the new owners of the plot no difficulties were experienced in changing the land use on grounds that most plots in the area were already operating as commercial plots. The TCPB approved the proposed layout, and a shopping complex has since been developed with shops and offices space. The main tenant is the South African supermarket, OK Foods. The owner subsequently acquired the adjacent residential plot, and developed it as a commercial area which now houses Fruit and Vegetable and Fresh Produce Supermarket. The two plots are now consolidated and the buildings joined to form a single shopping complex. The owner revealed that they have spent around P16 million in developing the whole area into what it is today (picture 1).

24 'No election for land boards' (2010) 27 *Mmegi* 139.

Picture 1: OK Shopping Complex, Mogoditshane

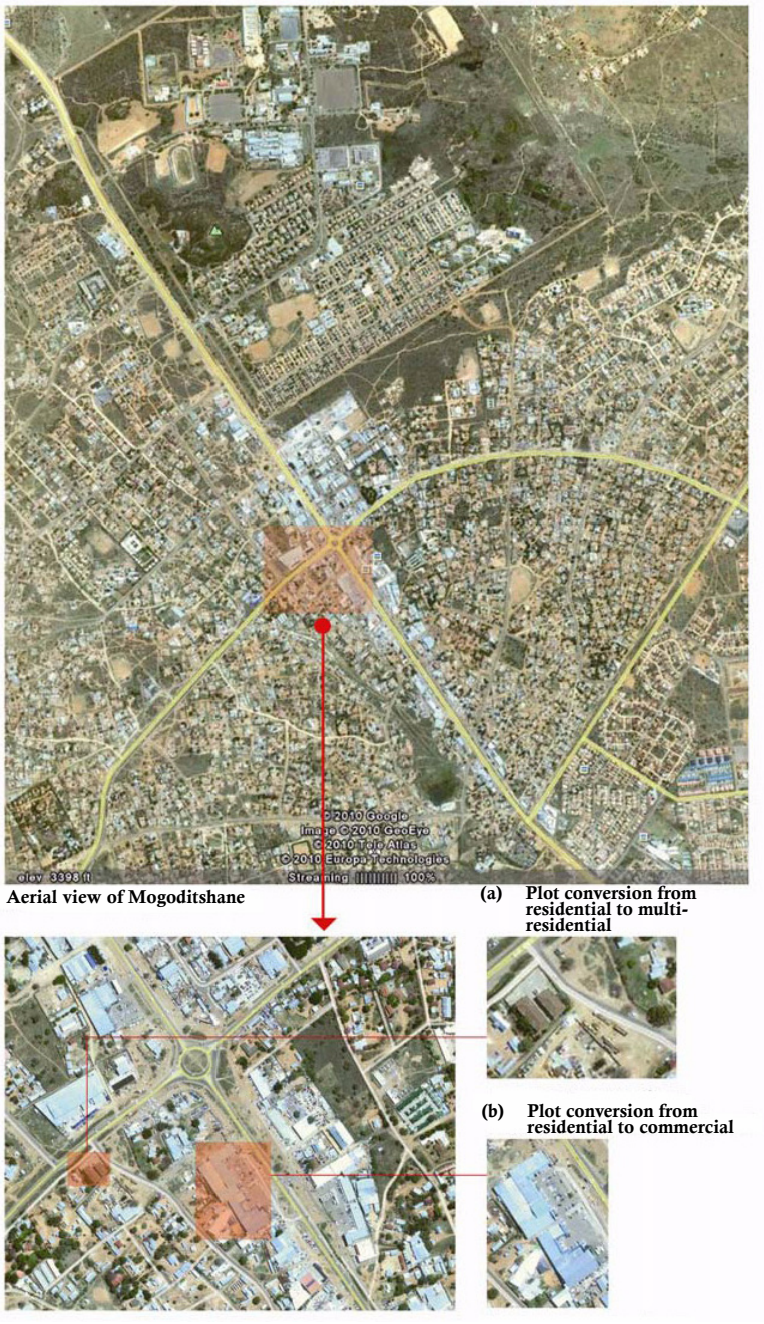
Picture: Tshepo Sitale, 2005

Case study 2: Plot conversion from residential to multi-residential

This plot started as single-family residential plot, was bought by a South African company, who then got permission to develop a multi-residential property of two double story structures each with four high-cost houses, subsequently sold on (see fig 1(a)).

Pictures 2 & 3: Conversion from single family to multi-residential, Mogoditshane

Picture: Tshepo Sitale, 2005



Aerial view of Mogoditshane

(a) Plot conversion from residential to multi-residential

(b) Plot conversion from residential to commercial

Case study 3: Conversion of agricultural land use to commercial- residential

Boiketlo Country Estate is a private housing estate in Gaphatshwa, a tribal area near Gaborone, developed by a Real Estate company called Diplomatic Services which had other development projects at Millennium Estate in Block 6, Gaborone. The six-hectare land was initially a ploughing field, and, when Diplomatic Services bought it in 2003, the original owner had already changed it into residential use, with a lease issued. As a result Diplomatic Services did not have to apply for change of use but instead just surveyed and subdivided, with individual plot numbers provided by the Department of Surveys and Mapping. The Kweneng land board approved the proposed development, and passed the application to Town and Country Planning Board, which also approved. In 2004 the land was serviced with electricity, piped water and sewerage, telephone lines, and tarred access roads. Since this was the first time a company converted a tribal land into a private estate, Diplomatic Services engaged a legal advisor, who found land board and other government officials hesitant to process the transaction. The process proved to be tedious and time consuming and required constant follow-ups and inquiry with government officials.

From these case studies cited above, one can conclude that project developers need to be well-informed and resourced. In the case of OK Foods supermarket, the applicants were also aware of the rezoning exercise which would allow the development of commercial activities in what was originally a residential area. Testimony from the Directors of Diplomatic services reveals the need for costly expert advice from lawyers, architects and surveyors.

6 Conclusions

The chapter highlighted challenges emerging from the coexistence of the TLA and T&CPA in Botswana's urban villages. Measures are now proposed which could bring about a more cordial and peaceful coexistence.

6.1 Re-definition of the Physical Planning Committee

As currently constituted the Physical Planning Committee under-represents the technical cadre from the land board, who can help synchronise the activities of the land board and the land servicing programmes of the district council. Although the proposal to transfer land use planning functions to the land board has been rejected, it would greatly assist if the Botswana Association of Land Authorities could initiate a debate on the issue.

6.2 Sustained and continuous public education

The lack of public education and community sensitisation on land use planning legislation in urban villages could be remedied through brochures on procedures and development control practice. As part of the public education local communities could also be empowered on procedures and advantages of land use conversion from residential to commercial, arable to residential etc.

6.3 Review of the T&CPA

Since its introduction in 1977, the T&CPA has not been reviewed. It does appear, however, that with its extension to urban villages, there is a compelling case for it to be reviewed, efforts being confined to the Development Control Code. One such review was commissioned by the Ministry of Lands and Housing in 2008, with the objective:

> To make the Development Control Code applicable to different levels of land use planning in Botswana. This will entail providing flexibility in application of the code in rural areas, taking cogniance of their unique character and circumstances, while at the same time ensuring that developments are carried out in a manner that ensures safety, compatibility of land uses and a healthy environment.[25]

The findings of the above study are yet to be made public.

[25] Republic of Botswana 'Review of the Development Control Code of 1995: Report of Survey' (2008) 5.

CHAPTER 9

LAND REGISTRATION AND POVERTY REDUCTION IN GHANA

Raymond T Abdulai

1 Introduction: Testing de Soto

The issue of land is far too important a subject to be left out of consideration in the collective quest for sustainable development, poverty alleviation, human rights and access to justice in Africa. Land provides space for activities. Indeed, it is the most basic aspect of subsistence for many people around the world and, thus, a strategic socio-economic asset, particularly, in poor societies where wealth and survival are measured by control of, and access to land.[1] In many African countries, land accounts for 50% to 75% of national wealth.[2]

Landownership insecurity is a major concern to both developed and developing countries, as well as to international donor agencies. Security of landownership refers to the certainty that a person's land rights will be recognised by not only the law, but also members of the relevant society, and protected when there are disputes over such rights.[3] Absence of disputes over land rights and enforceability of land rights are, thus, measures of ownership security. Prospective investors are unlikely to

* I wish to acknowledge the financial support of the School of the Built Environment, Faculty of Technology and Environment, John Moores University, Liverpool.

1 United States Agency for International Development (USAID) *Land and conflict: A toolkit for intervention* (2005) 35; K Deininger 'Land policies for growth and poverty reduction: A World Bank policy research report' (2003) 292.

2 KC Bell 'World Bank support for land administration and management: Responding to the challenges of the Millennium Development Goals' (2006) 15. Available at http://www.fig.net/pub/fig2006/papers/ts45/ts45_02_bell_0772.pdf (accessed 28 August 2011.

3 RT Abdulai *Traditional land holding institutions in Sub-Saharan Africa - the operation of traditional landholding institutions in Sub-Saharan Africa: A case study of Ghana* (2010) 344; RT Abdulai *et al* 'Land registration and security of land tenure: Case studies of Kumasi, Tamale, Bolgatanga and Wa in Ghana' (2007) 29 *International Development Planning Review* 475-502; Food and Agriculture Organisation (FAO) *Access to rural land and land administration after violent conflicts* (2005) 81.

invest in land based activities unless they are confident that their land rights would not be contested or, where they are contested, their rights would ultimately be upheld and protected. Security of ownership is, therefore, an incentive for investing in land-related activities.

It can, however, also be argued that landownership insecurity is an incentive for investment. Investments in trees, irrigation furrows, buildings or other fixed structures may provide a litigant in a land dispute with a case, so that, even though insecurity is a disincentive to invest, it is paradoxically often also an incentive to invest for security.[4] This assertion assumes that the legal framework guarantees the protection of investors in land-based activities (whether or not they truly own the land), and payment of compensation to investors who lose their investment, whether or not they truly own the land.

Undertaking visible investments on land may demonstrate an individual's presence or occupation of the land, but such an association with the land cannot be equated to recognition as the rightful owner by the community and the legal system. Investing in a parcel of land that one does not rightfully own may in itself trigger disputes or insecurity rather than reduce or eliminate them. When an ownership dispute is brought before the courts, the court has to establish the true legal owner of the land. Court judgements are, thus, not delivered based on whether the land has already been developed, or whether any of the disputants has invested in the land. Investments *per se* cannot provide the investor with indefeasible landownership rights.

Landownership insecurity has negative effects. Firstly, land disputes negatively affect infrastructure and real estate development projects and agriculture, because the development cannot proceed until any dispute is effectively settled, constituting risk to investors. A study from Uganda established that land disputes reduced the output on a plot of agricultural land by at least 30%.[5] The negative impact is even more pronounced where there are delays in settling the land dispute in the courts, with possible court injunctions against any use of the land pending the court's decision. Secondly, in a climate of insecure landownership, entrepreneurs are often compelled to spend valuable resources defending their ownership rights, diverting effort and resources meant for other productive purposes. Thirdly, although traditional economic models do not consider land disputes and rather focus on rent-seeking arguments,[6] there is a direct link

4 E Sjaastad & DW Bromley 'Indigenous land rights in Sub-Saharan Africa, appropriation, security and investment dynamics' (1997) 25 *World Development* 271 - 285.

5 K Deininger & R Castagnini 'Incidents and impact of land conflict in Uganda' (2006) 60 *Journal of Economic Behaviour and Organization* 321-345.

6 HI Grossman 'A general equilibrium model of insurrections' (1991) 2 *American Economic Review* 912 - 921; P Collier & A Hoeffler 'On the economic causes of Civil War' (1998) 50 *Oxford Economic Papers* 563 – 573.

between land disputes and civil strife, even including wars. Population growth, globalisation and environmental stresses have exacerbated many people's perception of land as an essential but dwindling resource, tightening the connection between land disputes and violent conflict. Civil strife arising from land disputes has arisen in many countries; examples are Ghana, Uganda, Angola, Uzbekistan, Kazakhstan, Namibia, Peru, Brazil, East Timor, Kosovo, Mozambique, Mexico, Iraq, Nigeria, Ethiopia, Nepal, Venezuela, Papua New Guinea, Zimbabwe, Guatemala, Columbia, El Salvador and South Africa.[7] Conflict entrepreneurs use land disputes to manipulate the emotional, cultural and symbolic dimensions of land for personal political or material gain, fomenting civil strife as in the cases of Rwanda and Burundi.[8]

The link between land disputes and development has not been lost on the international development agencies. The World Bank has identified land disputes, often associated with poor governance, as a major factor inhibiting development in Africa,[9] whilst land-ownership security has been identified by UN-HABITAT as one of the most important catalysts in stabilising communities, improving shelter conditions, reducing social exclusion and improving access to urban services.[10] The MDGs also give prominence to the role of secure land rights in helping to alleviate poverty and achieve development in third world countries.[11]

The importance of ownership security and the negative impacts of land disputes have triggered the search for a better system, with land registration embraced as the answer. Thus, efforts at securing land rights have often concentrated on the implementation of land registration policies and programmes. Research in various countries has shown that land registration *per se* is incapable of guaranteeing landownership security: Ghana, Cambodia and Rwanda, Egypt, India, Philippines, Honduras, Afghanistan, Ivory Coast, Kenya and Pacific Islands.[12] Studies that have supposedly linked land registration to security in the developing world

7 RT Abdulai (n 3 above); RT Abdulai *et al* (n 4 above); USAID (n 1 above); Deininger & Castagnini (n 5 above); R Bullard & H Waters 'Land tenure, the root of landownership conflicts in Southern Africa, past, present and future' (1996) 185-196. The Proceedings of the 1996 Rural Practice Research Conference of the Royal Institution of Chartered Surveyors, London.

8 USAID (n 1 above); C Andre & P Platteau 'Land relations under unbearable stress: Rwanda caught in Malthusian trap' (1998) 34 *Journal of Economic Behaviour and Organization* 1 – 47.

9 World Bank *World Bank assistance to agriculture in Sub-Saharan Africa: An IEG review* (2007) 144.

10 UN Centre for Human Settlements *The global campaign for secure tenure* (1999) 55.

11 G Payne *et al* 'Urban land titling programmes' in ME Brother & JA Solberg (eds) *Legal empowerment – a way out of poverty* (2007) 11.

12 Abdulai (n 3 above); Abdulai *et al* (n 3 above); A Durand-Lasserve & G Payne 'Evaluating impacts of urban land titling: Results and implications: Preliminary findings' (2006) 19. Available at http://siteresources.worldbank.org/RPDL PROGRAM/Resources/459596-1161903702549/S7-Durand.pdf (accessed 28 August 2011); D Sims 'What is secure tenure in Egypt?' in G Payne (ed) *Land rights and innovation: improving tenure security for the urban poor* (2002) 79; B Benerjee 'Background

have been subjected to rigorous analysis, which often concludes that owners of landed property in those studies enjoyed security before the introduction of land registration programmes.[13] Abdulai concludes that studies supposedly linking land registration to security either have research methodological problems, or that the researchers seem to have misinterpreted the meaning of ownership security.[14] Indeed, some studies show land registration to be a cause of insecurity in some cases, and not a solution.[15]

The argument that equates registration to security asserts that land registration guarantees accessibility to formal credit, as it provides a secure form of collateral for mortgage purposes, leading to investment, wealth creation and, generally, development. This assertion probably dates back to the 1970s when the World Bank started to recommend registration of indigenous/traditional land rights as a critical precondition for investment and modern economic development in Africa.[16] African countries subject to colonialism have two basic types of landownership systems – formal/state landownership based on the property law of the colonial rulers, and traditional/customary landownership systems. It is generally believed that the traditional landownership systems are insecure, creating a disincentive for investing in land-based activities, a perception premised upon the fact that customary ownership of land is not formally recorded or registered in a central system controlled by the state. Traditionally, proof of ownership of land is by physical possession and occupation, and the recognition of this fact by the community, especially adjoining owners.[17] It is, therefore, argued that the absence of ownership registration in indigenous systems of landownership implies insecurity of ownership, an argument used to justify introducing land registration.

The World Bank's assertion (linking land registration to investment and development) gained momentum in 2000 with de Soto's book, attributing the undercapitalised economies of Third World countries and the existence of poverty to non-registration of landed property

note prepared for the design of Kolkata urban services for the poor project' (2002) 15; World Bank *Doing business in 2005: Removing obstacles to growth* (*2005) 155*; World Bank 'Afghanistan' urban land policy notes series 5.2 (2006) 43; V Stamm 'Land tenure policy: an innovative approach from Cote d' Ivoire, dry' lands issue paper 91 (2000) 29; P McAuslan 'Only the name of the country changes: The diaspora of "European" land law in Commonwealth Africa' in C Toulmin & J Quan (eds) *Evolving land rights, policy and tenure in Africa* (2000) 75; E Acquaye 'Principles and issues' in E Acquaye & R Crocombe (eds) *Land tenure and rural productivity in the Pacific Islands* (1984) 11.

13 Payne *et al* (n 11 above).

14 Abdulai (n 3 above).

15 Durand-Lasserve & Payne (n 12 above); R Barrows & M Roth 'Land tenure and investment in African agriculture: Theory and evidence' (1990) 28 *Journal of Modern African Studies* 265 - 297; D Fitzpatrick 'Best practice options for the legal recognition of customary tenure' (2005) 36 *Development and Change* 449 – 475.

16 World Bank 'Land reform policy paper' (1975) 52.

17 RT Abdulai 'Is land title registration the answer to insecure and uncertain property rights in Sub-Saharan Africa?' (2006) 6 *RICS Research Paper Series* 1-27.

ownership.[18] De Soto's research has been criticised and his argument disputed by various authors.[19] Indeed, the World Bank, which first linked registration of indigenous landownership to development and has been promoting land registration as a critical precondition for development in Africa, now recognises that ownership security can be provided within the indigenous landownership systems without registration, and that the systems do not hamper development.

De Soto's prescription of land registration as the panacea to the problem of poverty in the Third World continues to be promoted. For example, Mahama, a supporter of de Soto's thesis, claims that the 'dead capital' locked up in property in Ghana is worth US $ 8-10 billion.[20] The main aim of the International Commission on Legal Empowerment of the Poor (CLEP) seems to be to spread the idea that land registration is a necessary aspect of poverty reduction in third world countries.[21] Not surprisingly African countries, supported by the international donor community, have pursued land registration policies and programmes for many years, supposedly to guarantee landownership security and accessibility to formal credit for investment.

The preceding discourse provides the context for this chapter. Using Ghana as the case study, the field research undertaken has the primary aim to examine critically the link, if any, between land registration and access to formal credit for investment, by identifying the factors that banks consider in granting investment loans, and examining the extent to which land registration determines access to formal capital. Studies of the relationship between land registration and access to formal credit have tended to focus on the demand side, while this study concentrates on the supply side.

In the rest of this chapter, section 2 describes the landownership systems in Ghana; section 3 provides an overview of Ghana's sources of legal landownership; section 4 discusses the structure and findings of a research project; and section 5 looks at the causes of poverty, with conclusions presented in the last section.

18 H de Soto *The mystery of capital* (2000).

19 Abdulai (n 3 above); Abdulai *et al* (n 3 above); AG Gilbert 'On the mystery of capital and the myths of Hernando de Soto: what difference does legal title make?' (2002) 24 *International Development Planning Review* 1 - 19*;* E Fernandes 'The influence of de Soto's *The mystery of capital*' (2002) 14 *Land Lines: Newsletter of the Lincoln Institute of Land Policy* (31, January, 2002) 5 – 8.

20 C Mahama 'The mortgage market in Ghana' in D Ben-Shahar *et al* (eds) *Real estate issues: Mortgage markets worldwide* (2008) 215.

21 DW Bromley 'Formalising property relations in the developing world: The wrong prescription for the wrong malady (2008) 26 *Land Use Policy* 20 – 27.

2 Ghana's landownership systems

In Ghana, there are primarily two types of land-ownership, private and state. Private land comprises traditional land (land vested in communities represented by chiefs and families) and individual land. State land refers to land that has been acquired by the State from the private land sector under various enactments. Sandwiched between the public and private land is vested land, which is a form of split ownership between the state and traditional owners.[22]

2.1 Customary landownership system

Ghana has over thirty different ethnic groups, and in the traditional land sector the allodial interest[23] in land is vested in communities represented by chiefs or families depending on the ethnic group. Both chiefs and families as allodial interest-holders derive their legitimacy from conquest or first settlement. In southern Ghana[24] chiefs as traditional rulers sit in state on specially designed stools/chair, in northern Ghana on the specially-prepared skin of an animal (cow or sheep). The symbol of authority is, therefore, the stool or skin.[25] Where the allodial interest is vested in chiefs, it is called skin land in northern Ghana, and stool land in southern Ghana.

Where land is vested in chiefs, they play two roles - they are in charge of the traditional governance of the areas and at the same time own, manage and allocate land within their jurisdictions. In some ethnic groups, the allodial interest is vested in families (sometimes called *tindamba*), in which case chiefs play only the traditional governance role, and families own and manage land. Depending upon the ethnic group, first level suppliers of land are chiefs or families, who allocate land to prospective acquirers or purchasers of land for various purposes. Traditional land is estimated to be over 90% of the total land area of 92,100 sq miles in Ghana and thus traditional landowners are the main suppliers of land.[26]

In the traditional land market, oral grants are made before witnesses after the open market price of the land (known as 'drink money' or 'kola

22 National Land Policy (NPL), Ministry of Lands and Forestry of the Republic of Ghana (1999).

23 The allodial interest is the highest proprietary interest, beyond which there is no other superior interest. It is variously referred to as paramount, absolute, ultimate, final or radical interest. In England the allodial interest in land is vested in the Monarch or Crown.

24 Ghana is divided into ten regions for political administrative purposes, each region with a capital, seven in southern Ghana, the other three in northern Ghana.

25 Chiefs in southern Ghana in the olden days sat in state-owned stools. In time they started using specially designed chairs, but the stool remains the symbol of the chief's authority.

26 Abdulai (n 3 above).

money' depending on the ethnic group) is paid. Traditionally, proof or evidence of landownership is not based upon writing, but physical possession and occupation, and recognition of that fact by the members of the society, particularly adjoining owners. The potency of physical possession and occupation as evidence of landownership is amply demonstrated by the operation of limitation or prescription laws. Under such laws, a true owner of land can be dispossessed of his property after a reasonable period of occupation by a squatter. In Ghana, under the Limitation Decree of 1972 (NRCD 54), a trespasser dispossesses the true owner of land if the trespasser occupies the land for 12 years, and within such period the true owner fails to assert his ownership. At the end of the prescription period, the true owner loses his ownership and his right to sue is extinguished. Even where the property has been registered by the true owner, he still forfeits the property. Under the French Civil Code the prescription period is 20 years where the true owner is resident outside the territory in which the land is located; if the true owner lives within the territory, the limitation period is 10 years. This also applies in England and Wales, where the relevant law is the Land Registration Act 2002.

In some parts of Ghana, however, customary land law has evolved to a stage where the transfer of land is evidenced by a form of documentation like a receipt or an allocation paper. In the traditional land market, any land grantee can commission lawyers or solicitors to prepare a title deed or indenture (often considered more formal evidence of ownership) after the allocation of land by traditional land suppliers at any time if he so wishes.

2.2 State landownership system

State land is land acquired by the State for public use under any of the following laws: State Lands Act, 1962 (Act 125); Lands (Statutory Way Leaves) Act, 1963 (Act 186); Administration of Lands Act, 1962 (Act 123); and 1992 Constitution of the Republic of Ghana.

The State Lands Act 1962 (Act 125) empowers the State or President to compulsorily acquire any private land by publishing an executive instrument identifying the land and stating that it is required in the public interest. Thus, the power of eminent domain exercised by the State provides it with an overriding interest over access, control, allocation and management of land rights, irrespective of the type of landholding system under which land rights are owned. Acquisition of land under Act 125 extinguishes all existing rights in the land. It provides for expropriated owners to be paid prompt compensation (or land of equivalent value).

The Lands (Statutory Way Leaves) Act 1963 (Act 186) provides for statutory way-leaves to be created via an executive instrument for highway or utilities. The instrument provides for entry onto land for such works,

with persons who suffer consequential losses or damages entitled to compensation.

The Administration of Lands Act 1962 (Act 123) provides via executive instrument for stool/skin land to have management powers transferred to the State (in the form of the President), although the absolute or equitable interest remains with the stool/skin as beneficiary owner. Such land is referred to as vested or trust land, in a form of split ownership between the State and traditional owners. Under section 10 of the Act, the President may also authorise the *occupation and use* of such land in the public interest and conducive to public welfare. Owners of land acquired under section 10 are entitled to compensation, abated by whatever benefits the people in the affected communities may derive from the use to which the land will be put.

The 1992 Constitution of the Republic of Ghana leaves intact the powers of the State to compulsorily acquire land, if necessary in the public interest, only to be used in the public interest or for the public purpose for which acquired. Where the property is not so used, the prior owner has the first option to re-acquire. Compulsory acquisition requires prompt payment of fair and adequate compensation, with a right of appeal.

2.3 Legal validity of landownership

Legal validity of landownership in Ghana derives from the Land Registry Act 1962 (Act 122) and Land Title Registration Law 1986 (PNDCL 152).[27] Act 122 provides in section 25(1) that registration is necessary for the validity of instruments, except a will or a judge's certificate. Land registration is conclusive evidence of land title or land-ownership, and makes ownership indefeasible. Under both laws, only title deeds can be registered. Where a title deed is registered under Act 122, it is stamped to show that it has been recorded in the system of the Deed Registry but where it is registered under PNDCL 152, the title deed is normally replaced with a land certificate, which is issued to the owner after registration.

The second source of legal ownership is the Conveyancing Decree of 1973 (NRCD 175), which specifies the mode of transfer of land for legal validity. Section 1(1) provides that:

> A transfer of an interest in land shall be by writing signed by the person making the transfer or by his agent duly authorised in writing, unless relieved against the need for such writing by the provisions of section three.

27 Two main types of land registration systems exist globally, deed and title registration. Deed registration is mostly used in the USA, whilst title registration is the norm throughout Europe and in Canada. In Africa, title registration is used in some countries, and in some both are in operation.

Section two states that no transfer of an interest will be enforceable unless it is evidenced in writing. However, section three recognises an oral grant under customary law, which is legally enforceable.

The third source of legal validity of landownership is Ghana's 1992 Constitution. Article 11(1) of the Constitution provides that, the Constitution is the supreme law of Ghana and any other law that is inconsistent with any of its provisions is void. It further provides that the laws of Ghana shall comprise: the Constitution; enactments made by or under the authority of Parliament; any orders, rules and regulations made by any person or authority under a power conferred by the Constitution; the existing law; and common law. Clause two of the Constitution defines common law as follows:

> The common law of Ghana shall comprise the rules of law generally known as the common law, the rules generally known as the doctrine of equity and the rules of customary law including those determined by the Superior Court of Judicature.

Clause three explains customary law as the rules of law that by custom are applicable to particular communities in Ghana, and under the Conveyancing Decree and Constitution the traditional system of landownership is legally recognised, whether evidenced in writing or not.

3 Research study

3.1 Evidence of landed property ownership

In Ghana the main forms of evidence for landed property ownership are physical possession and occupation, a land allocation note, an unregistered title deed, and registered title deed or title certificate. The author's research sought to investigate which of them are accepted by banks as collateral for investment loans, based upon primary survey data collected in Ghana in April and May of 2009.

Eighteen banks were randomly selected (drawing lots from a sampling frame of 26 banks obtained from the Bank of Ghana, the central bank of the country). A structured questionnaire was designed and administered to investment loan officers of the sampled banks, with open-ended questions allowing the respondents to answer as they deemed appropriate. The questionnaire covered requirements for the application of investment loans, and forms of evidence of landed property ownership accepted by the banks for mortgage purposes. The researcher met with each respondent to explain the aim of the survey, and left the questionnaire with them to answer at a convenient time. Subsequently, the researcher met each respondent to collect the completed questionnaire, and follow up with further questions based upon the answers provided. This process helped

clarify various issues and elicit further information. There was a 100% response rate, and the survey data was coded with the aid of Nvivo for analysis.

The responses of 16 out of 18 (89%) of the loan officers surveyed showed that their banks accept both unregistered title deeds and registered title deeds or land certificates as proof of ownership for mortgage purposes. Once the ownership is documented in the form of a deed, and the bank is satisfied that the loan applicant has the ability to repay (from proof of financial capability provided by the applicant), the mortgage deed will be executed and the loan amount lodged in the applicant's account. Thus, the basis for the banks granting the loan is financial capability, and the title and mortgage are registered concomitantly through an expert commissioned by the bank (or the bank's Property Department). For the remaining two respondents, their banks accept only registered title deeds or land certificates since according to them security of title can only be established by registration.

Physical Possession and Occupation is the customary form of proof of ownership, not evidenced in writing. The research found from the responses of all respondents that banks do not accept such evidence for mortgage purposes, because such ownership relies upon oral evidence by members of the community (making it more difficult in case of ownership disputes), and because such form of evidence cannot be registered. A land allocation note is a form of documented proof of ownership, but the survey showed that banks do not accept it for mortgage purposes, considering it not a 'formalised' form of documentation.

Two things stand out from the preceding analysis. Firstly, most banks in Ghana accept unregistered title deeds/indentures as collateral in granting investment loans. Thus, generally, land registration is not a constraint that inhibits the ability of Ghanaians to access loans from banks for investment purposes. Where the title deed is not registered, it will ultimately be registered any way upon the execution of the mortgage deed since under the Land Registry Act 1962, Land Title Registration Law 1986, and Mortgages Decree 1972, a mortgage deed must be registered for legal validity but the mortgage cannot be registered if the title itself is not registered. There is no legislation in Ghana that makes it mandatory for titles to be registered before they can be used as collateral for loans from banks. The laws rather make provision for registration of mortgage deeds for legal validity but the registration of title and registration of mortgages tend to be confused and considered to be the same , while they are completely different processes. It is based on this that most banks accept unregistered title deeds for mortgage purposes; if the title will finally be registered (where not previously registered) for the mortgage to be recorded as an encumbrance on the title, a bank need not insist on registration as a prerequisite if satisfied of the financial strength of the applicant. Thus, most Ghanaian banks are pro-active in this matter.

Secondly, even though the customary form of ownership is legally recognised, it is not accepted by banks for mortgage purposes. When something is documented, it is easier to prove when there are problems. This explains why the banks do not accept 'physical possession and occupation' as a form of evidence, even though it is a legal form of evidence, and court judgements can be made on that basis. It should be stressed that documentation may not constitute conclusive evidence, as there can be false documents.

The banks thus do not consider land allocation papers, even though they are a documented form of evidence legally recognised, as 'formalised'. The banks' arguments regarding the customary form of ownership evidence are unconvincing. If they can accept unregistered indentures and take it upon themselves to register them, they should equally be able to accept the customary form of ownership evidence or allocation papers, after which indentures could be prepared for registration and the cost passed on to the mortgagors.

3.2 Using landed property of the 'poor' and 'rich' as collateral

In order to determine the types of landed property normally accepted by banks as collateral for granting investment or business loans, photographs of typical properties owned by 'poor' and 'rich' people in Ghana were shown to bank survey respondents to check which would be accepted as collateral. Those owned by the 'poor', even with duly registered title deeds, were not considered acceptable, due to their poor quality and location, their poor saleability in case of default, and uninsureability. In the words of one respondent:

> The main purpose of collateral is for the bank to be able to sell the property within a reasonable time in circumstances where the mortgagor fails to fulfil his financial obligations in terms of servicing the loan granted, but for properties like this, not many people will be interested in purchasing them.

Even if they were saleable, the banks were concerned with the time it might take for such properties to be sold in times of default and foreclosure.

A similar question was asked regarding the landed properties of the 'rich', given that the ownership of such properties is evidenced by unregistered title deed. Sixteen out of 18 (89%) of the respondents considered that such properties would be accepted as collateral, with ownership evidenced by title deeds, property in a good location and of high quality, insurance companies will be willing to insure, and the banks would take it upon themselves to register the title upon execution of mortgage deed. The remaining 11% of respondents indicated that their banks will not accept such properties as collateral because property ownership security can only be established by land registration.

Thus most banks accept the property of the 'rich' for mortgage purposes even if the ownership is not registered, but they are not prepared to do so for the 'poor', even if the property is legally registered.

3.3 Determinants of access to formal credit

The bank officials, when asked to indicate the one factor they consider to be the most important in determining access to capital, were unanimous in responding that the key determinant is financial capability or ability to repay loans and the interest thereof, judged by the loan applicant's creditworthiness and the viability of the proposed investment project. It was explained that, before an investment loan is granted, the historical records of the applicant in terms of borrower credibility and financial strength (for example, bank statements and cash flows/income) must be investigated to establish his creditworthiness.

As to why they did not consider land registration as the main determinant, those interviewed stated that investment loans were not granted even where registered landed property is to be used as collateral if the applicant could not provide proof of how the loan would be repaid. Sometimes investment loans could be granted in some circumstances based on only the creditworthiness of the applicant (achieved via past sound financial dealings with the bank and high regular savings).

4 The wrong prescription for the wrong malady?

The empirical evidence above shows that land registration does not guarantee access to formal credit, with financial capability the overarching determinant, and indeed, registration is a subsequent requirement in mortgage transactions. Thus, to argue that land registration is the panacea to the problem of poverty and underdevelopment, on the basis that it establishes security and guarantees accessibility to investment capital, amounts to a wrong prescription for the wrong malady, with the role of land registration being misunderstood. It is a record-keeping system, creating a landed property ownership database, which is very important in any economy as it serves various purposes, such as facilitating property transactions and reducing transaction costs.

Major causes of poverty and underdevelopment in Africa are land disputes, mismanagement of national resources, and poor governance. One manifestation of mismanagement of a nation's resources and poor governance are electoral disputes leading to civil strife with its devastating consequences. Greed and corruption constitute a second, it being estimated that 40%-60% of national resources are lost through corrupt

practices in Africa.[28] A third is weak and non-independent state institutions like the judiciary, which are incapable of performing or functioning effectively.

In Ghana, issues relating to corruption and weak state institutions have been vividly captured in the remarks of a leading clergyman, the Presiding Archbishop of the International Council for Clergy.[29] The Archbishop rightly noted that corruption was inimical to the development of any nation, and called on the government to commence the crusade against corruption from its ranks in order to have the moral authority to stamp out the national canker without fear or favour. 'When allowed either conscientiously or inadvertently to operate in a free environment at whatever level, it (corruption) becomes very destructive' the clergyman lamented. He opined that democracy goes with leadership and accountability, adding that good leadership reflects the quality of life of the people and not necessarily policies**.** On the issue of government interference in the operation of state-sponsored institutions, the Archbishop appealed to the government to respect the independence of the judiciary, and strengthen institutions like the Ghana Police Service, the Bureau of National Investigations and the Commission of Human Rights and Administrative Justice to improve on the country's justice system.

5 Conclusions

It is asserted by Hernando de Soto and his advocates that poverty exists in pandemic proportions in third world countries because of the small proportion of landed property ownership that is recorded in a central system controlled by the state. This assertion is premised on the common perception that only registered property is considered acceptable by banks for mortgage purposes, and so land registration guarantees access to formal capital for investment and wealth creation, which leads to poverty reduction and development. Consequently African countries have been implementing land registration policies and programmes with donor agency assistance.

This chapter has critically examined these arguments by investigating the link between land registration and access to formal capital for investment, using Ghana as a case study. The empirical findings from the study show that land registration alone does not unlock investment capital. The problem with the poor is that, where they own landed property, it is usually of low quality, inappropriately located and thus unsuitable for mortgage purposes. Where the title to the landed property of the poor is even registered, it is not accepted by banks. For the rich, however, a

28 Abdulai (n 3 above).
29 GS Ofori-Atta 'Corruption is inimical to national development – Archbishop' www.news.myjoyonline.com/news/200908.asp (accessed 30 August 2011).

majority of banks in Ghana accept their property for mortgage purposes even if the ownership is not registered (providing it is evidenced by title deeds). Financial capability has been identified as the main determinant of access to formal credit. It seems surprising that the literature focuses on land registration as if when one's property ownership is registered, banks will automatically grant that person an investment loan. Land registration is important in any economy, but it serves a different role, as a record-keeping system that creates a database of landed property owners, which can be used for various purposes like the facilitation of property transactions that reduces transaction costs.

To argue that land registration is the panacea to the problem of poverty is to prescribe a simple solution to a complex problem, a solution which is insufficient and is not working. The major causes of poverty include poor governance, mismanagement of a nation's resources as well as land and electoral disputes. The policy implication of the research findings is that international organisations and donor agencies should concentrate on implementing policies and programmes that address these issues and empower the poor financially on a sustainable basis.

CHAPTER 10 GATED COMMUNITIES IN GHANA: A NEW INSTITUTIONAL ECONOMICS APPROACH TO REGULATION

Kofi Oteng Kufuor

1 Introduction

With a number of Nobel Laureates in its ranks and a growth in influence, New Institutional Economics (NIE) has had a remarkable impact on research and policy.[1] NIE has relevance for getting to grips with why institutions (defined as the humanly devised constraints that structure human interaction and their enforcement characteristics)[2] emerge, their durability, why some institutions succeed in transforming the lives of persons to whom they are addressed, while other institutions fail.[3] Given the success of the NIE research programme, we deem it appropriate to apply its tools to gated communities in Ghana. In Ghana gated communities are mainly found in Accra, but have started to spread to other cities as Ghana catches up with what is becoming a global phenomenon.[4] Our application of NIE to gated communities is done in the belief that specific to Ghana, this is a new approach. Not much research has been done on Ghana's gated communities in general, understandable given that they are a rather new development.[5] More generally also, with its focus on the origin, function and effect of rules, NIE offers a useful framework for examining gated communities as a whole for two reasons: first there is the interaction between the residents and second, there is the role of their

1 M Shirley & C Menard 'A history of the new institutional economic: from intuition to institutionalisations' (2010) paper presented at the 14th Conference of the *International Society for the New Institutional Economics, Stirling, Scotland 17-19 June pages*; OE Williamson 'The new institutional economics: Taking stock, looking ahead' (2000) 38 *Journal of Economic Literature* 595; H Stein *Beyond the World Bank agenda* (2008), especially chapter 4; JD Cameron 'The World Bank and the new institutional economics' (2004) 31 *Latin America Perspectives* 97.

2 DC North *Institutions, institutional change and economic performance* (1990) 3.

3 DC North *Understanding the process of economic change* (2005) 4.

4 C Webster *et al* 'The global spread of gated communities' (2000) 29 *Environment and Planning* 315.

5 AB Asiedu & G Arku 'The rise of gated housing estates in Ghana' (2009) 24 *Journal of Housing and the Built Environment* 227; R Grant 'The emergence of gated communities in a West African context' (2005) 26 *Urban Geography* 661.

governing bodies.[6] Inter-personal relationships will play a vital role in sustaining communities. Therefore positive relationships in a community will minimise or completely eliminate free riding. On their part governing bodies develop procedures, protect rights, and constrain the actions of homeowners, and thus devise rules that reduce uncertainty, one of the vital functions of institutions. Thus our hope is that in addition to its contribution to Ghanaian literature, this paper adds to the general literature on the relevance of NIE for gated communities.

The NIE research programme is broad, encompassing a variety of fields. Richter has identified the following approaches: property rights, transaction cost, evolutionary economics, constitutional choice, collective action theory, public choice theory, economic contract theory, new institutional approach to economic history and modern Austrian economics.[7] There are also those scholars who have included social relationships in the NIE research programme.[8] In this paper, we focus on the following NIE concepts that are either schools in their own right or are issues of study under the umbrella of some schools: collective action, opportunism and norms. Collective action dilemmas have the potential to undercut the expected benefits of gated communities, and can emerge in gated communities in the absence of strong intra-community mechanisms to compel compliance with community rules. Thus we argue that legislation is needed to prevent the collapse of gated communities and the loss of material and non-material benefits they are associated with. Opportunism on the part of gated community developers has the potential to repel potential homeowners by defeating gated communities' infrastructural benefits. Norms are also of significance, as they can reinforce the rules set by community-governing bodies and also support regulation by the legislature of gated communities, as we propose in our conclusions.

Stemming from the above, this chapter explores the rationale for gated communities, the collective action dilemmas their homeowners and residents could face, and how opportunism complicates the cost of establishing gated communities. After also considering how norms can sustain collective action in gated communities, we conclude with proposals for their regulation in Ghana.

6 BC McCabe 'An institutional comparison of cities and homeowners associations' (2005) 37 *Administration and Society* 404.

7 R Richter *The new institutional economics* (2005) 4.

8 M Granovetter 'Economic action and social structure: The problem of embeddedness' (1985) 91 *American Journal of Sociology* 481; V Nee & P Ingram 'Embeddedness and beyond: Institutions, exchange and social Structure' in MC Brinton & V Need (eds) *The new institutionalism in sociology* (1998) 19-45.

2 The rationale for gated communities

Gated communities are defined as residential areas with restricted access in which normally public spaces are privatised. In NIE theory they have been defined as a 'nexus of contracts that assign property rights over local public and private goods'.[9] Gated communities have a long history with purely residential ones being traced to the 1800s.[10] Gated communities therefore imply an innovative set of social and economic relationships, or a re-arrangement of prior social and economic interactions between people within particular spatial boundaries. Though throughout this paper we use the term gated community, the literature uses various terms such as residential community association, common interest community, and residential private government.[11]

The chief features of gated communities are, as noted above, security developments with designated perimeters, usually walls or fences, and controlled entrances that are intended to prevent unauthorised entry by non-residents.[12] However, they also provide leisure amenities, street lights, paved roads and other infrastructure. Governance of a gated community tends to be the responsibility of its homeowners' association. The homeowners' association is formed by the real estate developer to control the community's appearance and manage the common areas. The developer usually has a role and voting rights in the association, but is discharged from any financial and legal responsibilities owed to the association after selling off a pre-determined number of housing units. A uniform rule across gated communities tends to be that homeowners are obliged to become members of the homeowners' association upon purchasing a house.[13]

People choose to live in gated communities for a variety of reasons. We should note here however, that although the demand for gated communities tends to be driven by private interests, local government may shed its municipal functions and services onto gated communities. Local government decision-makers can demand that before approving a request by a developer to establish a homeowners association, the developer agrees to assume functions that were traditionally the responsibility of local government. The advantage that local government derives is that pressure

9 C Webster 'The nature of the neighbourhood' (2003) 40 *Urban Studies* 2591.

10 EJ Blakely & MG Snyder *Fortress America: Gated communities in the United States* (1999) 3 - 4. Blakely & Snyder state that occupying Roman soldiers in England in 300 B.C. built gated communities for security reasons. This practice of gating continued by the Kings of England and they note that Kings of England also fortified themselves behind gated communities as a means of avoiding criminals and rebellious nobles or dangerous villagers. Gated communities for purely residential purposes appeared in the latter half of the nineteenth century. See Blakely & Snyder (1999) 3 - 4.

11 RH Nelson *Collective private ownership of American housing* (2000) 24.

12 Blakely & Snyder (n 10 above) 3.

13 Nelson (n 11 above) 14.

on its budget is lessened. A developer could also be required to compel the homeowners association to maintain streets and parks, and also provide other municipal services that local government would normally pay for. In addition gated communities have a demonstration effect and they therefore allow for new mechanisms of local government to be devised that can be copied by other local administrations. Thus in a way it could be said that they are desired by decision-makers seeking improvements in local government based on the efficiencies associated with such communities.[14]

On the part of residents some find gated communities desirable because the efficient land use results in an appreciation of property values.[15] Another attraction of gated communities is their ability to efficiently deliver services that municipal government cannot provide at all, or fails to provide to community residents' satisfaction. Then there is the security that gated communities can provide leading to the reduction if not elimination of crime.[16] Gated communities also provide an opportunity for like-minded people to band together in self-governing communities. Some households want their independence, often in a neighbourhood of people with similar tastes, interests and characteristics, and gated communities satisfy this need.[17]

In Ghana, gated communities are a post-1990 phenomenon.[18] Their exact number is not known, and indeed as at writing the numbers continue to grow as new ones are under construction. Also there is inconsistent data collection and updates by the Department of Town and Country Planning and the Statistical Service Department. Distilled from a variety of sources however, Arku and Asiedu identify 23 communities. Since the work by Arku and Asiedu, and as at writing, we have identified other schemes bring the total to 45 communities.[19] While the overwhelming majority of them are in Accra, they also exist in Aburi, Kumasi and Sekondi-Takoradi, respectively in the Eastern, Ashanti and Western Regions.

Gated communities in Ghana have emerged in response to a raft of issues that are similar to the general demand for them. Ghanaians claim that they help potential home buyers circumvent the myriad of intricate unofficial procedures linked to land purchase, finance and construction management outside of planning applications. There is also the social

14 P Franzese & S Siegel 'Trust and community' (2007) 72 *Missouri Law Review* 1111; SP French 'Making common interest communities work' (2005) 37 *Urban Lawyer* 359.

15 A Agan & A Tabarrok 'What are private governments worth?' (2005) 28 *Regulation* 14.

16 SM Low 'The edge and the center' (2001) *103 American Anthropologist* 45.

17 J Grant *et al* 'The planning and policy implications of gated communities' (2004) 13 *Canadian Journal of Urban Research* 70.

18 Asiedu and Arku (n 5 above) 231.

19 Arku and Asiedu (n 5 above) 233. We have identified other developments at Aburi Heights, Acacia Court, Afariwaa Homes, Arabella Residency, Bay Tree Gardens, DMI Homes, Emefs, Falcon Crest, Hansen Court, Hydraform Estates, Judeville Homes, Kasa Global Villas, Krypton Gardens, Magna Terris, Oasis, Orchid Gardens, Polo Court, PS Global Estates, Sandpark Properties, Shidam Estates and Villaggio Vista.

status that supposedly comes with owning a house in a gated community, and the view that the more expensive developments can attract persons of similar socio-economic standing. Ghanaians further state that they prefer communities and their security arrangements on account of a recent escalation in crime. Another factor is in the superior quality of the environment that they offer, in particular the type of infrastructure that Ghana's urban authorities have failed to deliver.

A criticism of gated communities is that they are in effect the privatisation of local government with all the negative consequences of such action, bringing about the domination and exploitation of vulnerable groups in society, and the exclusion or secession of the rich from the rest of society.[20] For example, it is alleged that gated communities breed civic secession by fostering the lack of empathy by the more successful to the less fortunate, especially disadvantaged racial and economic groups.[21] A further criticism is that in practice homeowners' associations can act irrationally, leading in extreme instances to situations where owners and residents constitutional rights are violated.[22] Then there is the claim that homeowners' associations abuse their power of foreclosure on the homes of residents who are delinquent in paying community fees and other assessments. (A fine of $50 levied by a Homeowner's Association on a couple in Houston, Texas, led to the threat of foreclosure when the sum due had escalated to $20,000).[23]

3 Collective action and gated communities

The provision of infrastructure and the management of common areas amount to what is known as the provision of public goods. As noted above success in the delivery of public goods is what marks gated communities as attractive for potential homeowners. Public goods are those goods and services that can be consumed by individuals simultaneously without diminishing the value to any one individual, this is termed non-rivalry. Public goods are also marked by non-excludability, that is an individual cannot be prevented from consuming the good whether the individual pays for it or not.[24]

The modern study of the free rider and collective action can be traced to Olson who challenged the view that groups would organise to secure

20 F Miraftab 'Neoliberalism and casualisation of public sector services' (2004) 28 *International Journal of Urban and Regional Research* 874.

21 SD Cashin 'Privatised communities and the ''secession of the successful''' (2000-2001) 28 *Fordham Urban Law Journal* 1675.

22 K Maxwell *Gated communities and homeowner's associations in Canada* (2003) 5.

23 RT Garrett 'State Legislators told of HOA fines, foreclosure threats' *Dallas Morning News* (20 April 2010) available at http://www.dallasnews.com (accessed 6 August 2010); G Giantomasi 'A balancing act' (2003-2004) *72 Fordham Law Review* 2503; P Franzese 'Privatisation and its discontents' (2005) 37 *The Urban Lawyer* 335.

24 RH Coase 'The lighthouse in economics' (1974) 17 *Journal of Law and Economics* 357.

collective benefits whenever necessary, resting his argument on two main premises. One account of public goods is that they will usually, if not always, be under-supplied as there is no incentive for anyone to provide them. As he argues, economically rational individuals will have no reason to supply public goods as they cannot prevent the consumption of the good others who have not contributed to costs, and at the same time will find it hard (if not impossible) to recover investment laid out in the supply of the good. This problem of undersupply will persist unless the size of the group to benefit from public goods is quite small. Therefore the larger the size of the group the easier it is to free ride on the actions of others. Second, the voluntary provision of public goods was, in the main, irrational behaviour largely due to the characteristics of public goods that we have noted earlier on in this paper: they are non-rival and non-subtractable. Thus unless some form of coercion exists to dissuade free riders and compel contribution to the cost of providing public goods, or unless Olson's conditions are met, public goods will be under-supplied or not provided at all.[25] The free rider then paralyses and destroys beneficial collective action, as no individual moves to provide public goods.

If we confine ourselves to understanding individual decision-making through the lens of rational choice theory, then any doubts about the viability and sustainability of gated communities in Ghana are logical. Rational choice theory tries to explain social phenomena in terms of how self-interested individuals make choices shaped by their preferences. Rational choice theory stems from the hypothesis that individuals premise their behaviour on notions of wealth-maximisation or utility-maximisation.[26] The rational actor can therefore lead to the problem of free riding.

A study of one gated community in Ghana indicates the potential problem with collective action and the long-term existence and survival of its homeowners' association.[27] It was noted in the study that patronage and support for the association's decisions, programmes, and activities was weak, resulting in the need to reduce the quorum for meetings from 15% of the residents to 5%. Of greater importance was the fact that about 35% of homeowners did not pay mandated service fee charges. Obviously then, gated communities have the potential to be inhabited by rational actors, calculating in their decision-making and thus free riding on the financial and other contributions of fellow residents to the community.

25 M Olson *The logic of collective action: Public goods and the theory of groups* (1971) 2 & 50.
26 J Estler *Nuts and bolts for the social sciences* (1989) chapter III, especially 24 - 25.
27 KB Boison 'Environmental and institutional sustainability of Regimanuel Gray's East Airport Estate' unpublished MSc Thesis, Royal Institute of Technology, Stockholm 2002 66-67.

4 Opportunism

Another problem, for which there is evidence, is opportunism by developers of gated communities. As noted earlier in this study, developers assume responsibility at some stage for constructing the community's houses and common infrastructure, and undertake to provide refuse collection, de-silting of drains, maintaining the lawns, replacing burnt-out street bulbs, security, underground drains, tarred roads, fence walls and luxurious landscaping. Developers are therefore of paramount importance in the formative stages of a gated community as communities are not created by the homeowners, but by developers who plan, design, and construct them, and then offer individual units for sale. A developer of a gated community also plays the primary role in creating its governance structures. Thus the community's homeowners although they will be bound by the rules, play no direct role in designing them in their early stages.[28]

The role of the developer and the subordinate position of the homeowners are of particular significance to the issue of opportunism. Assuming a convergence between the interests of the developer and the interests of the homeowners then the fact that the homeowners play a relatively minor role in the formative stages of a community would not be an issue of significance. But developer and homeowner interests are not always harmonious. A developer sells houses: thus a developer seeks to make a profit. In addition, a developer would want to profit from any additional services and amenities provided to the community. Thus it is rational to argue that from the developer's point of view, the sale of housing units and provision of subsidiary services should not be compounded by the imposition of strict rules on the standard of work to be bequeathed to the homeowners, more so if the developer has raised finance from a lender. The homeowners on the other hand, as noted previously in this paper, purchase units because they want quality public goods and an appreciation of the value of their property. Thus the developer and the homeowners' interests will not necessarily be in harmony, but a gated community's homeowners must live with the developer's standard of work.

The potential for opportunism occurs at the point of transfer of the community to the homeowners' association. In one instance in Ghana, a developer of a community failed to fulfill expected obligations. The residents of Manetville Estates accused Manet Housing Limited of failing to provide them with amenities as agreed and set out in the sales brochures. The residents found that years after moving into the estates, common infrastructure in the form of schools, a shopping centre, street lights,

28 Franzese & Siegel (n 14 above) 1127.

recreational facilities and tarred roads that the developer agreed to construct have not been provided. In another instance concerns expressed over gated communities focused on the standard of work and over-reliance upon imported materials for construction. In 2009 the Minister of State at the Ministry of Water Resources, Works and Housing claimed that the unacceptable practice of shoddy work by real estate developers is a problem for the housing industry.[29]

5 Norms and gated communities

Norms can help ensure compliance with the rules governing gated communities, aid cooperation, and so help overcome collective action dilemmas that could stem from free rider problems. Norms provide the legitimacy for rules, and are essential for beneficial social interaction. Thus while in the concluding part of our research we suggest legislation be used to reduce problems of free riding, we also inspect the role that norms can play.

A considerable body of research suggests that collective action situations can be resolved successfully with the use of norms, and thus there is no need for the kind of external intervention that Olson argued is essential. This is because, as the assertion goes, Olson's theory does not fit with real-world situations and that cases of collective action can be found in instances that are opposed to Olson's conditions. Thus while we accept that Olson's thesis has its merits, we also argue that in some instances it will be possible for the homeowners to overcome the problems of collective action without the need for legislation or limiting the size of gated communities.

Elinor Ostrom, noting that there is a 'substantial gap between the theoretical prediction that self-interested individuals will have extreme difficulty in coordinating collective action and the reality that such cooperative behaviour is widespread, though far from inevitable' [30] lays out a number of conditions under which collective action is possible without Olson's conditions. For norms to be effective in facilitating collective action, Ostrom argues that users of a resource must clearly define who has rights to use the resource, assign costs proportionate to benefits, and the users must design their own rules. Furthermore, the users must enforce their own rules and be accountable to them and any sanctions imposed must be gradual, starting from a low base to much stricter punishments. The success of norms will also depend on whether there are

29 'Manet residents call for supply of social amenities' *The Ghanaian Journal* 25 March 2007, available at http://www.theghanaianjournal.com/2007/03/25 (accessed 23 September 2007). 'Government unhappy with shoddy work by developers' http://www.ghandistricts.net/news/read (accessed 22 July 2010).

30 E Ostrom 'Collective action and the evolution of social norms' (2000) 14 *Journal of Economic Perspectives* 138.

rules in place to monitor behaviour, there is access to speedy, low-cost dispute resolution mechanisms, and that local users of a resource have the right under national law or local law, to organise.[31]

A norm exists in a given setting when individuals usually act in a certain way and are often punished when seen not to be acting in this way.[32] In some instances sanctions for breach of a norm are not necessary as norms are internalised by individuals of their own accord. Norms can be of three kinds: first there are rationality-limiting norms. Rationality-limiting norms are those norms that stop individuals from pursuing personal wealth-maximising or utility-maximising decisions. The second type of norms, preference-changing norms, is when what starts out as a norm can, over time, become part of one's preferences. The third type of norms, equilibrium-selection norms, are those which fit with self-interested behaviour.[33] We argue here that a combination of rationality-limiting norms and preference-changing norms allow us to modify the theory of collective action and so lessen our apprehension about any problems of rule compliance in gated communities.[34]

Available evidence suggests that there is an appreciable level of interaction among the residents of some gated communities in Ghana as a study of three gated communities revealed that their residents had developed rather close and deep levels of contact.[35] This process of interaction can generate positive, collective action-enhancing norms. The study did not stress whether interaction resulted in compliance with community rules; however given the research in the NIE literature that repeated personal exchanges among actors promotes the development of norms and thus community cohesion without the need for an intrusive third-party, then to some extent there might not necessarily be the demand or need for legislation by Parliament.

Another factor supporting the importance of norms is that they can be path dependent. Path dependence occurs when institutions cannot shake off the effects of past events, and in some instances can produce positive feedbacks which will ensure the original set of institutions are maintained. Community-strengthening norms can become path dependent as they can be costly to overturn. An attempt to undermine or erode existing norms can set in motion actions that will affect other norms that govern a gated community; this is the so-called network effect of norms. Therefore norms of compliance with assessments or non-financial obligations can be linked

31 (n 30 above) 149-153.
32 R Axelrod 'An evolutionary approach to norms' (1986) 80 *American Political Science Review* 1097.
33 K Basu 'Social norms and the law' in P Newman (ed) *The new palgrave dictionary of law and economics* (1998) 477.
34 H Simon 'A mechanism for social selection and successful altruism' (1990) 250 *Science* 1665.
35 Asiedu & Arku (n 5 above) 241-242.

to valued norms of good neighbourliness. For example, homeowners who fail to pay their assessments can lose the respect, trust and friendship of their neighbours who regularly meet their obligations. Thus the benefits of compliance with one set of norms can have a positive feedback towards another set of obligations, and so a network of functionally linked rules develops.[36]

A further importance of norms lies in the fact that unravelling them can be very complicated, as it could lead to the unravelling of most if not the entire network of other community norms. Thus the interdependence of norms through network effects, and the costs associated with reforms, can embed any positive norms in a gated community, and therefore make their reversal a rather complicated and costly business. Path dependence is reinforced further, as beneficiaries of norms have not only made investments in norms but also in the community infrastructure (roads, street lights, houses etc). Thus the reluctance to abandon these investments through reversal of institutions explains the importance of path dependence.

We do not claim in this paper that law that emanates from a third party is superfluous or irrelevant for sustaining a gated community, but rather that norms and laws tend to support each other. This is so because norms can develop into laws, and also because laws provide external validation for norms. Moreover, the effectiveness of norms is limited; they tend to be appropriate for preventing minor defections, where the cost of enforcement is low. Laws, on their part, serve to prevent rare but large defections, because law-makers tend to have considerable resources to support their enforcement.[37] It is this importance of the law that leads us to suggest that Parliament in Ghana enacts legislation to regulate gated communities.

6 Conclusions

Sustaining a gated community in the absence of a coercive central authority can frustrate collective action, on account of the free rider exploiting this loophole in the power of the homeowner's association. This potential problem can be overcome using a variety of approaches, either individually, or in conjunction with one another. The first approach would be to leave regulation to the gated communities themselves. If some residents fail to comply with community rules, either the associations sustain the community on the back of those residents willing to pay fees, and so accept free-riding as inevitable yet not damaging enough to destroy

36 PA David 'Path dependence in economic processes: Implications for policy Analysis in dynamical system contexts' in K Dopfer (ed) *The evolutionary foundation of economics* (2005) 151.

37 Axelrod (n 32 above) at 1106-1107.

the community or associations find relief in the corpus of existing laws to compel compliance by homeowners. Existing legislation would be for example, contract statutes and related case law, as relationships between homeowners associations are contractual in nature.[38]

However, we argue that community-specific legislation should be passed by Parliament, to serve two purposes. We should note that although ostensibly contradictory, i.e. norms or self-regulation on the one hand and a call for governmental regulation on the other, our position, influenced by Ostrom's, is that any claim that relies solely on norms or self-regulation, or centrally provided legislation is not quite correct or appropriate.[39] Institutions should be tailored to fit given circumstances and thus whether top-down centrally-delivered regulation or self regulation or norms are appropriate depends on a particular set of circumstances.

Regulation by the legislature is beneficial: First, it has an advantage over reliance on general legislation and court decisions to enforce regulations, in that an act of Parliament allows for developers and existing homeowners' associations to influence legislation based on their learning. The NIE research programme sees legislation as the outcome of lobbying by special interests. This is known as rent-seeking. Parliament is therefore a broker, supplying goods, legislation that is, to the party willing to pay for such a service. This process allows for special interests to influence the content of legislation to their advantage.[40] In some instances the sale of legislation can produce outcomes that are to the disadvantage of the wider public, but, if the process of drafting legislation is transparent and allows for input from all existing developers and homeowners' associations, then the perverse outcomes that tend to occur in the wake of rent-seeking can be minimised or avoided.

Accordingly homeowners' associations and developers can set the agenda and in effect play a major role in crafting community-specific legislation to suit their interests. The purchase of legislation that strikes a balance of their interests will lead to well-developed communities. Homeowners' associations will demand legislation to impose clear obligations on developers and developers will demand legislation that spells out their obligations up to the point of transfer of the community to the association. The clearer specification of rights and obligations makes for predictability in the law, and allows for both developers and homeowners to decide on the investments they make in developing a gated

38 Webster (n 9 above) 2591.

39 E Ostrom *Governing the commons: Evolution of institutions for collective action* (1990) 14.

40 G Tullock 'The welfare costs of tariffs, monopolies, and theft' (1967) 5 *Western Economic Journal* 224; FS McChesney 'Rent-extraction and interest-group organisation in a Coasean model of regulation' (1991) XX *Journal of Legal Studies* 73 - 90; FS McChesney 'Rent extraction and rent creation in the economic theory of regulation' (1987) XVI *Journal of Legal Studies* 101.

community or purchasing a unit. In our suggestions for the role legislation can play, we are influenced by experiences of gated communities in other countries as NIE scholars see the importance of comparative institutional analysis. Thus an analytical framework incorporating contributions from different disciplines will assist in gaining a deeper understanding of the workings of economic institutions.[41]

At the heart of any legislation should be the power of foreclosure. Without such a tool it is possible that homeowners would stop paying their assessment fees and so lead to the bankruptcy of the homeowners' association. This in turn would lead to the failure to provide the service homeowners have contracted for, thus defeating the purpose of living in a gated community. Assessments are the major, if not sole source of income that the homeowners' association has. Thus an association's budget is based on the expectation that homeowners will meet their financial obligations. Furthermore the failure of homeowners to pay would shift the burden of their non-payment onto the other homeowners who have kept faith with their obligations. As a consequence non-payment by one or more homeowners means higher charges for other homeowners. In addition one instance of non-payment could lead to multiple infractions by members of the community.[42]

Earlier in this paper we identified opportunism on the part of developers, and pointed out that the absence of repeated interactions between developers of a community on the one hand, and the homeowners' association on the other, creates the conditions for opportunism. Legislation should therefore clearly spell out the point at which the developer can hand over the community to the association. This legislation should detail the obligations on the developer, and provide for independent assessment of the quality of work by the developer prior to a handover to the homeowners' association. Legislation should also provide for sanctions to be imposed on opportunistic developers. For example, under the South African Sectional Titles Act,[43] a developer is obliged to convene a meeting not more than 60 days after a body corporate to manage a community has been established. The purpose of this meeting is to furnish its members with evidence that all rates due to the local authority from the developer have been paid, and proof of revenue and expenditure concerning the management of the community from the date of first occupation of any unit until the date of establishment of the body corporate. Failure by a developer to fulfill his obligations in this regard is a criminal offence.[44]

41 M Aoki *Toward a comparative institutional analysis* (2001) 3.
42 G Giantomasi 'A balancing act' (2003 – 2004) 72 *Fordham Law Review* 2503.
43 Sectional Titles Act 95 of 1986.
44 (n 43 above) art 36.

Another possible clause in any legislation should be on the size of gated communities. As Olson argues, the higher or greater the number of actors the more difficult collective action becomes. Evidence from gated communities in Taiwan suggests that, as the size of a gated community expands, there is a decrease in the likelihood of beneficial collective action. Hong Kong shows similar problems related to the size of the community and collective action where the large the community the lesser the inclination of property-owners to form homeowners' associations to replace the management committees established by developers.[45] Thus Ghanaian legislation should, probably based on existing experiences, set out the maximum number of residential units in a community.

Another issue for consideration in an act of parliament is that homeowners' associations can be oppressive. Covenants that govern gated communities can either be detailed in the terms that homeowners are subject to upon purchase or vague and yet still have the potential to allow for oppressive conduct by the association.[46] With the power to set fees, levy fines, the authority to regulate extension to housing units, painting, and other run-of-the-mill activities by homeowners or residents, and the power to engage service-providers for such public goods as street lights or security, the activities of homeowners' associations and their management boards need to be transparent, to engender accountability and help ensure that oppressive conduct is reduced to a minimum if not eliminated completely. Thus gated community legislation should make for transparency of association activities, giving homeowners access to the minutes of association meetings so that it remains accountable to them, and does not act in an overbearing manner inimical to sustaining the community and improving the quality of goods and services it provides. Furthermore, any legislation should include the control of the directors of homeowners associations. For instance the Seychelles Condominium Property Act[47] lists a long set of obligations on management corporations, including an obligation to establish a fund for the management of administrative expenses needed to sustain condominiums. The Act also sets out procedures as to how and when funds can be raised from owners to administer condominiums.[48] Another example of the control of the directors of a homeowners' association is in the South African Sectional Titles Act. This Act sets out the fiduciary relationship between the trustees of the body corporate set up to manage an estate and the homeowners. The legislation prevents trustees from spending over a prescribed amount without the express permission of the owners of housing lots. Neither can trustees effect improvements to common areas of an estate without the homeowners' permission. A trustee must avoid any material conflict

45 SCY Chen & C Webster 'Homeowners associations, collective action and the costs of private governance' (2005) 20 *Housing Studies* 206 - 207.
46 Maxwell (n 22 above).
47 Seychelles Condominium Property Act 14 of 1992.
48 (n 47 above) art 17.

between his interests and that of the body corporate and the Act sets out sanctions imposed on a trustee for a breach of his fiduciary relationship.[49]

A gated community can come to an end. In fact, some gated communities in Ghana anticipate the end of their lives after a period of time. Regimanuel Estates will be decommissioned after 85 years from inception on expiry of the leasehold, and renewal will require re-negotiations with the traditional land owners.[50] Other gated communities have similar lease expiry dates.[51] What should happen when a community reaches the end of its life? Should the homeowners re-constitute the community by re-affirming their obligations to themselves or should they end any obligations they owe? If they decide on the former path of action then it bears stressing that the end of an estate poses a dilemma for its homeowners. Assuming a well-run estate which is beneficial in terms of the quality of public goods provided, the value attached to interaction among the homeowners, and the rising values of the properties, it is reasonable to assume that the homeowners would like to continue with the estate, but the transaction costs associated with the re-negotiation of the leasehold could thwart extension of the community's life.

Moreover, assume that even though property values in the estate have appreciated favourably, and that public goods are provided efficiently, there could still be a situation of weak inter-personal relations in the community on account of the changes in the demographics of the community, for example. The increased spread of technology use among homeowners (or residents) can also impact on person to person, face-to-face contacts. Moreover if homeowners pay their assessments and comply with rules because of the fear of enforcement action by the homeowners association and therefore are not influenced by norms, then collective action to extend the life of the community could be rather difficult as some persons could thwart efforts to continue with the community's life as they do not have strong ties to their neighbours and thus see no reason to pay to extend the bond that the gated community has helped to create and sustain. The benefits associated with a gated community, we believe, support the assertion that legislation should take extension of the life of the community into account, and make provision for third-party intervention by the local authority or some other arm of government, with the aim of working towards a mutually acceptable agreement between all interested parties to extend the life of the community.

Legislation should also focus on the possibility of a breakup of the community before the lease period expires. In Uganda, under the Condominium Property Act 2001, termination of a condominium may be

49 See article 40(2) of the Sectional Titles Act.
50 Boison (n 27 above) 65.
51 Leases on the Buena Vista estates extend for 60-90 years. See http://www/mybuenahomes.com/fmFaqs.aspx (accessed on 6 February 2011).

done by unanimous resolution of the members of a given homeowners' association. Another pathway towards termination can be through the corporation, owner of a unit, a registered chargee of a unit or a purchaser of a unit making an application to a court for termination. Where the court is satisfied that it is just and equitable that the condominium status of the property be terminated a declaration to that effect shall be made.[52] The requirement of unanimous consent is of importance to us. On its face, the condition of a unanimous resolution does seem to make the premature destruction of a community a rather difficult task, as what has been described as an anticommons system has been written into Ugandan legislation on gated communities.

Hardin described the 'tragedy of the commons', as how overuse of the commons can result in its degradation.[53] Heller has popularised the term anticommons as an inversion of the commons property and its potential for tragedy.[54] Heller argues that attempts to reverse the tragedy of the commons through institutional reforms can lead to the creation of an anticommons property, a system in which several owners hold formal or informal rights of exclusion in a scarce resource. Anticommons regimes can lead to the under-use of property, as holders of rights have the power acting alone or in combination with others and in a non-hierarchical decision-making system, to paralyse the use of resources. Thus for Heller in designing rules to govern resources, care should be taken to avoid systems that will enable individual decision-makers to stifle their use. He does, however, stress the point that an anticommons can be of value, and he underscores its role in stabilising and preserving informal norms that have evolved gradually to manage private property. An anticommons system could also lead to the promotion of communitarian values that may be lost in instances where no anticommons regime existed.

Paradoxically therefore, the deliberate creation of anticommons can benefit the durability and sustainability of gated communities, and any legislation in Ghana should focus on this. As noted above, gated communities have benefits for homeowners and residents. By choosing to live in a community, homeowners and residents make financial and social investments in their properties and communities, and have a stake in its long-term robustness. One means of ensuring sustainability of communities is by making it difficult to dismember them before the lease period has expired. Inferred from this is that residents and homeowners expect benefits to accrue over a considerable period of time, and thus any premature extinguishing of these benefits should be avoided.

52 Art 25 (2).
53 G Hardin 'The tragedy of the commons' (1968) 162 *Science* 1243 - 1248.
54 MA Heller 'The tragedy of the anticommons' (1998) 111 *Harvard Law Review* 621; JM Buchanan & YJ Yoon 'Symmetric tragedies: Commons and anticommons' (2000) 43 *Journal of Law and Economics* 1-13.

CONCLUSION

African land law is a rich tapestry, for which the term 'legal pluralism' might have been invented. This book and its companion volume try to reflect some of that richness, and these conclusions cover both books (*Essays* and *Local case studies*). Africa's sheer size and diversity underlays its land law – a human population of about a billion, speaking hundreds of languages, on a land mass of some 30 million square kilometres. The continent has experienced over the last century unprecedented changes. European colonisation was succeeded after only a few decades by decolonisation and the creation of new nation states, with over fifty members in the African Union. Violent upheavals are being caused by pressures of population growth, environmental change, urbanisation and competition for natural resources. The rule of law may be an urgent aspiration, but whose law? The very structures of law can be seen as colonial imports, as discussed in Home's chapter (*Essays* book) on the prospects for a pro-poor land law, while the boundaries of national jurisdictions are largely colonial demarcations upheld through the Cairo Declaration, as discussed in Donaldson's chapter.

Pre-colonial or indigenous legal cultures mostly evolved over centuries in hundreds of tribal and clan communities, and were rarely codified in written form until the 20th century. The religion of Islam did provide something of a legal code over much of the continent, spreading from the north over centuries, as discussed in Sait's chapter (*Essays* book) through specific country case studies. Customary law, developed by and for local communities rather than imposed by the state, was acknowledged but marginalised by the dual mandate or trusteeship ideology of colonial administrations. It has shown lasting resilience, but remains in continuing tension with imported concepts of private property and state intervention, while the colonial powers confiscated the best land for white settlement and economic development (or exploitation, depending upon one's viewpoint). How to deal with these conflicts and contradictions is the great challenge facing African land law, as explored by Kangwa's chapter on Namibian land reform (*Local case studies* book) and Amokaye's two chapters on Nigeria (respectively on the Land Use Act and land expropriation for mineral exploitation).

The emergence of an international human rights movement since the Second World War is having a growing impact upon African land law. It has exposed the failure of customary law to respond adequately to social and economic change, as shown in two chapters on Kenya (*Essays* book) – on the disadvantage faced by women in rural areas (Onyango and others), and by orphans and vulnerable children (Anang'a and others). It has revived indigenous land rights claims in Africa as in other continents, as explored by two chapters in the *Essays* book: Gilbert and Couillard's, and

Njoh's chapter. Such emerging human rights law potentially challenges the legal centralism of the postcolonial nation-state, and Chigara's chapter (*Essays* book) on the *humwe* principle raises the possibility of a new African jurisprudence, recognising and applying legal principles that have roots in African society and history.

The *Local case studies* book further explores national and local situations. Western concepts of trusteeship (formerly the 'civilising' mission) still permeate the liberal development and peace agenda, as discussed in McAuslan's chapter on post-conflict land policies in several African countries. The case presented by Hernando de Soto for the legal empowerment of the poor through formalising their property rights also exercises strong influence upon land and property law in Africa: Payne's chapter discusses one example, the ambitious Rwandan land tenure reform programme, which is seeking to formalise millions of land holdings as state-registered titles. Abdulai's chapter questions de Soto's assumed link between land titling and mortgage credit through empirical work on bank lending practices in urban Ghana. Kufuor's chapter discusses another form of property imported to Africa – the gated community for high-income residents – and links it to new institutional economics theory.

Postcolonial nation states have undertaken many land law initiatives, sometimes resulting in confusion and conflicts of laws. Molebatsi's chapter discusses the problems arising for Botswana's traditional settlements (its so-called 'urban villages') by the co-existence of a much-acclaimed Tribal Land Act and a Town and Country Planning Act imported from Britain. Van Asperen's chapter presents field research on the Namibian town of Oshakati, on an experiment with a flexible land tenure alternative to past land tenure practices. The result of legislative hyper-activity may simply be too many laws, exceeding local implementation capacity. The chapter by Home and Onyango on Kisumu (Kenya) explores the impact upon urban governance of multiple land tenure systems, while Kalabamu's chapter on Botswana warns of the danger of too much law and too many institutions concerned with land, creating opportunities for corruption and confusion.

African land law is, therefore, dynamic, and the prospects are of continuing challenge and change in many arenas: national constitutions, policy-making, statute law, administrative and executive capacity, and local and community involvement.

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