



Republic of Botswana

**Ministry of Lands, Housing and Environment
Department of Lands**

BOTSWANA NATIONAL LAND POLICY

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ISSUES REPORT (revised)

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PREPARATION OF A COMPREHENSIVE NATIONAL LAND POLICY FOR BOTSWANA

ISSUES REPORT

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- A Documents consulted**
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Abbreviations

ADR	Alternative dispute resolution
AG	Attorney General
AGOA	Africa Growth and Opportunity Act (US)
APA	Acquisition of Property Act
ARCA	Agricultural Resources Conservation Act
BLIS	Botswana Land Information System
BMC	Botswana Meat Commission
CBNRM	Community Based Natural Resource Management
CHA	Controlled Hunting Area
CL	Common Law Lease
CLG	Customary Land Grant
COR	Certificate of Rights
DBPRS	Draft Botswana Poverty Reduction Strategy
DL	Department of Lands
DLUPU	District Land Use Planning Unit
DO(L)	District Officer (Lands)
DRA	Deeds Registration Act
DSM	Department of Surveys and Mapping
DTRP	Department of Town and Regional Planning
DWNP	Department of Wildlife and National Parks
EIA	Environmental Impact Assessment
FPSG	(Deed of) Fixed Period State Grant
GCC	Gaborone City Council
GDO	General development order
GP	Government Paper
HIV/AIDS	Human Immuno-deficiency Virus/Acquired Immuno-Deficiency Syndrome
JV	Joint Venture
LB	Land Board
LCA	Land Control Act
LGSC II	(Second) Local Government Structure Commission
LSA	Land Survey Act
MCI	Ministry of Commerce and Industry
MFDP	Ministry of Finance and Development Planning
MoA	Ministry of Agriculture
MLG	Ministry of Local Government
MLGL	Ministry of Local Government and Lands
MLHE	Ministry of Lands, Housing and Environment
MPPA	Married Persons Property Act
NAMPAADD	National Agricultural Master Plan for Agriculture and Dairy Development
NEPAD	New Economic Programme for African Development
NSP	National Settlement Policy
RAD/RADs	Remote Area Dweller(s)

RADP	Remote Area Dwellers Programme
SHHA	Self Help Housing Authority
SLIMS	State Land Information Management System
T&CPA, TCPA	Town and Country Planning Act
TCPB	Town and Country Planning Board
TGLP	Tribal Grazing Land Policy
TLA	Tribal Land Act
TLIMS	Tribal Land Information Management System
ULGS	Unified Local Government Service
VAT	Value Added Tax
WMA	Wildlife Management Area
WUC	Water Utilities Corporation

SUMMARY AND OVERVIEW

PURPOSE OF THE REPORT

1. This report contains a review of land policy issues. The TOR for the Consultant conducting the National Land Policy Review are in Appendix B.
2. This report will be discussed by the Reference Group at 14.00 hrs, 24 September 2002, in the Conference Room in the Ministry of Lands and Housing.
3. The findings of the report will be presented in a series of stakeholder workshops to be conducted during the last week of September and the first two weeks of October 2002 in Francistown and Gaborone.

FURTHER WORK ON LAND POLICY FORMULATION

4. Following the workshops, the consultants will meet the Reference Group again to discuss the Land Issues report further in the light of comments made at the workshops. This will enable the Reference Group to give the Consultant guidance on the general thrust of the prescriptions to be incorporated in the Draft Land Policy document. This Reference Group meeting should be held on 22nd October 2002 at 0900hrs.
5. When the findings of the Land Issues report have been accepted (or amended) by the Client, the consultant will start to draft the administrative, social, economic and legal prescriptions of the Land Policy.

INTRODUCTION TO THE ISSUES

6. The Terms of Reference identify over twenty discrete topics and issues to be addressed by the consultant. In this summary, they have been assembled under eight main headings.
7. The dominant theme is the need to adjust the land policy and land laws, administration and management to the changes being brought about by economic development and associated urbanisation in Botswana. These changes are reflected in the rapidly emerging land market, where the buying and selling and leasing of land and property are increasing very rapidly as a result of rising demand.
8. The land market is both a consequence of national development and a contributor to it. Growth in the land market has been made possible by the development of public and private sector services to support the property sector. The evolution of policy and legal reforms extending the scope of permissible land transactions has been a major contributor. Overall, there is an acceptance that the development of a land market is good for Botswana, but that it has to be regulated and controlled.

9. The Government is concerned over the twin evils of landlessness and land hoarding by speculators. It is clear that either through lack of will or through inadequate legal provisions, existing laws restricting amounts of land persons may acquire or hold have not been effective. At the same time, the number of people without land, especially in urban areas is increasing. The land policy issues report considers a series of measures to tackle urban landlessness and the anti-social conduct of land hoarding and land speculation.

LAND RIGHTS ISSUES

10. **Land rights of the poor** Suggested policy prescriptions include the following:
- Strengthen the planning and implementation capacity of land boards and councils to ensure that poor people have access to land.
 - Relieve the severe urban land shortage by:
 - amending policies and existing legislation for the free transferability of customary land rights in certain areas;
 - setting aside more suitably-located, demarcated and surveyed land for low-cost housing under SHHA or other schemes for poor people.
 - Design and implement a low-cost housing scheme for the very poor that is neither subject to distress sales nor speculation (e.g. Council retains the land and/ or structures).
 - Re-introduce the Certificate of Rights on state land in urban areas.
 - Ensure that the fencing of communal rangeland does not run ahead of the capacity of district councils and RADP to accommodate evictees.
 - Ensure that evictees and others displaced by implementation of the Fencing Component receive adequate and just compensation.
11. **Land rights for women** Government could support policies which:
- Educate women and raise their awareness of their rights so that they are conscious of existing opportunities and can make informed choices.
 - Remove all official barriers that make it difficult for women to acquire land.
 - Remove discrimination, either direct or indirect, in determining the occupation or use of land; attendance at, or participation in, decision-making forums regarding the occupation or use of land; or membership of any structure involved in the administration and management of land rights.
 - Recognise that differential treatment of women and men, and of different groups of women, may be necessary to ensure equal outcomes in land tenure.
12. **Land rights of minority groups** The policy should aim to give RADs more control over land management arrangements, as other citizens already have. Appropriate actions following from this principle might include:
- Upholding the rights of minorities to pursue a different life style and maintain a distinct culture from that of the majority,
 - Promoting economic and social empowerment of all citizens, addressing the plight of the rural poor, etc.
 - Promoting sustainable use of land and conservation of natural resources, and
 - Diversification of both the rural and the national economy.

Within the land sector:

- In those localities where RADs or other minority groups form a majority, new sub-land boards or related structures could be established to regulate the use of the land.
- New water development in RAD settlements should be put under the control of the RAD residents themselves.

13. **HIV/AIDS and land rights:** The land policy should address the plight of the poor and the landless, especially those who have been thrown into deeper poverty by HIV/AIDS. Appropriate actions following from this principle might include:

- Conducting a special investigation of the impact of HIV/AIDS on land rights, land use and occupation in urban and rural areas.
- Strengthening property rights for women to reduce the negative impact of surviving dependants in both rural and urban areas.
- Prompt allocation of land and shelter for the very poor, especially in urban and peri-urban areas.
- Ensuring that affected households can draw on their capital assets in a time of need by renting /leasing or transferring potentially productive land, which would otherwise lie idle.

LAND MARKETS AND LAND TAXATION ISSUES

14. **Promoting land market efficiency** Measures might include:

- Ensuring better access to information about parcels of land without inconveniencing the land boards or Deeds Registry officials or undermining the integrity of the land rights in question.
- Identifying ways of speeding up transfers, especially, but not only, those that must pass through the land boards.
- Identifying other transactions costs (surveying, travelling to offices, etc.) that can be reduced.
- Providing efficient, low-cost ways of surveying plots and issuing title deeds.
- Providing more clarity and certainty as to the conditions according to which fixed period state grants (FPSG) are to be renewed.
- Devising low-cost methods to resolve land disputes in urban areas as an alternative to using the courts.

15. **Extending land markets** Particular areas for attention might include:

- Permitting leases/sub-leases of customary land grants and common law grants.
- Re-examining the prohibition on the transfer of undeveloped plots, in conjunction with a re-examination of the principle of allocating plots for free.
- Ensuring that, if the transfer/sale/lease of tribal land is to be allowed, it must also be possible to do so without undue cost and delay.
- Reviewing procedures to ensure that they are not prohibitively time-consuming or costly.

16. **Illegal and extralegal land transactions** Illegal land transactions are those transactions that are conducted in violation of the law, while extra-legal transactions are those that are conducted without the benefit of legal recognition

but which may not be explicitly forbidden. Illegal transactions thwart land policy and force government to reinforce measures to prevent such transactions from taking place. Extra-legal transactions leave one or both parties insecure because neither can have recourse to the law in the event of a dispute. The persistence of illegal and extra-legal land transactions calls for three types of measures:

- addressing the conditions that make non-legal transactions so likely and tempting;
- careful reconsideration of which type of transaction should continue to be restricted or banned; and
- more vigorous enforcement of rules that still apply and the introduction of new rules where necessary.

Subsumed within these points could be the following measures:

- Accelerate the pace at which land of different categories is made available, especially unserviced land on which self-help housing can be erected.
- When engaging in compulsory acquisition, improve compensation to *masimo* holders according to the open market value of their land.
- Revise the functions of the land boards, especially in relation to operations in peri-urban areas, so that they acknowledge and monitor the many land transactions that are taking place, including land rentals.
- Close loopholes that are presently being exploited to transfer ownership to non-citizens without the oversight of the Deeds Registry (e.g. through sub-division into lease areas and via property companies).
- Ensure that the capital gains tax is properly applied in cases of land sales, especially where there have been windfall gains arising from change of use.
- Provide for standard types of lease and develop pre-printed proforma documentation to enable people to enter into these classes of lease agreement.

17. **Strengthening the property tax system** The land policy should provide regulatory arrangements for the efficient, sustainable and equitable occupation and use of land. This requires that users pay for the services they receive. It is therefore necessary to:

- Review the proposed amendments to the Town Council Regulations, and determine if Local Government and/or the Department of Lands can now champion them;
- Make valuation rolls easily available to the public, inform the public as to their publication, and allow ample time for objections to be lodged;
- Examine the possibility of extending liability of rates to all 'built-up' areas, including those that fall outside township boundaries;
- Devise a system for the collection of rates in non-township areas, either by capacitating district councils or co-operative arrangements with town councils;
- Determine criteria for when a private township should fall within the taxing jurisdiction of the adjacent town council, and what rates would apply;
- Establish a valuation tribunal to hear all disputes/grievances/appeals arising from property valuations.
- Review the Transfer Duty regulations to ensure all "proper" transfers are assessed for and pay duty, including transfers on tribal land and sales camouflaged as leases.
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- 18. Land information** Parcel-related land information (topography, size and location, building structures, names and number of occupiers, tenure arrangements, etc), is essential for land administration and management in the broader sphere as well as for assessment of rates and for tax collection.
- The Tribal Land Information Management System (TLIMS) should be extended to obtain the information needed to ensure that it is economically justified by focusing initially on high market value and problem areas.
 - Information should be shared between land boards, and between land boards and urban authorities to limit the unproductive hoarding of land. The capture of land information and maintenance of the TLIMS data base should be an integral part of the work processes.
 - Digital maps should be developed at appropriate scales for ‘urban’ villages, peri-urban areas, other locations such as areas targeted for commercial arable development and DTRP planning areas, etc.
- 19. Access to land by non-citizens** Similar principles and policies relating to access to land by non-citizens should apply to urban and agricultural land.
- The Land Control Act (LCA), which applies to agricultural land, should also apply to urban land. Criteria for the grant or refusal of consent to transfer FPSGs appropriate to urban land should be developed taking as the starting point s.7 of the LCA.
 - It might be appropriate to require a prior residency qualification in Botswana or even in the local authority area where an FPSG is to be obtained so as to help prevent absentee landlordism and fronting.
 - The LCA should be amended to provide for appeals from the Minister’s decision on an application for consent to a Land Tribunal.
 - Land boards should apply s.7 LCA criteria to consent for transfers of land to non-citizens under s.38 of the Tribal Land Act.

URBAN AND PERI-URBAN LAND MANAGEMENT ISSUES

- 20. Regularisation of peri-urban settlements** Three guiding policy principles are suggested: (i) land use planning should precede development; (ii) all citizens should benefit and be empowered equally from land developments and (iii) regularisation of land rights should be just, equitable, transparent and efficient in order to avoid non-compliance practices, unnecessary demolition of ‘illegal’ developments, and protracted legal challenges between field owners, land boards and the government. These may require:
- Developing a working partnership between landholders (including customary land rights holders), district councils and land boards in order to realise full potential of partly developed land without compromising national, local, institutional and rights holders’ interests.
 - Granting customary land rights holders the choice to apply to respective land board and council (individually or as a group) for a planning permit for a change of use and subdivision of their holdings.
 - Applicants paying prescribed fees to their land board and satisfying all provisions of the Town and Country Planning Act (TCPA) and other relevant regulations including approval from the council.

- All plots to be serviced to urban development standards before disposal.
 - Land boards consult with rights holders, if any, in the early stages of the planning and land regularisation process.
21. **Land use planning framework for Gaborone and other urban areas** The aim is to provide for an institutional framework that will facilitate the planning and design, construction and maintenance of urban infrastructure across different tenure categories: tribal, state and freehold land.
- The ideal situation would be a single administrative and planning authority (e.g. creating a Greater Gaborone Metropolitan Council). This is, however, likely to be resisted by interests fearing loss of identity and political influence.
 - Another possibility would be a planning council with all authorities as equal partners. The consultative council would, therefore, have to operate by consensus. This would probably result in less than total commitment by those unhappy with some decisions.
 - Probably the more practical approach would be to establish a legally constituted Metropolitan Council charged only with matters of common interest e.g. public rail and bus transport, road and other infrastructure networks, sanitation and waste disposal sites. The Metropolitan Council would have a budget and capacity to implement projects within its portfolio.
 - The issues arising from the growth of Gaborone are likely to arise in other urban areas, as they continue to grow and expand.

RURAL LAND MANAGEMENT ISSUES

22. Failure to tackle land-use and management issues will allow land use problems to restrict economic growth and impose costs in other areas of the economy; e.g. the landless and jobless poor moving into the towns; slower growth in the tourism industry and continuing decline in wildlife populations and biodiversity.
23. **Rural property rights** Greater flexibility in the allocation of rights to use land would enhance the ability of rural households to diversify their domestic economy in response to the rapid economic changes now taking place in society. The Draft Revised Policy on Rural Development proposes that people should be permitted to lease out residential and arable land held under customary grant or common law lease, and should be able to use a single parcel of land for multiple uses. In addition, arrangements such as sharecropping and share farming should be encouraged. Greater flexibility in the interpretation of the customary land law in respect of minority groups would assist them to retain their rights and use them to generate livelihoods.
24. **Conversion of arable land to other uses** Within planning areas, the Town and Country Planning Act could provide an adequate basis for the protection of high potential arable land. Depending on their scale, proposed changes in land use would require sanctioning at different levels of government. Within planning areas, unless planning permission is obtained, land subdivisions cannot be registered in the land registry. Even where land subdivision may not be required, building construction has to be cleared with the local authority.

25. **Communal grazing** An overarching principle must be that all citizens should have the opportunity beneficially to occupy and use the land. Privatisation and enclosure has already taken place at a pace too rapid for the welfare of many rural people. However, it is imperative that the communal area should be better managed, which requires that communal rights are made more secure.
- Rural communities must be involved in decisions that have a direct bearing on their livelihoods. This is an essential pre-condition for the realization of participatory development.
 - Securing communal grazing rights entails giving legal recognition to the existence and validity of community-based property rights.
 - The over-centralization of communal area management has undermined local institutions and the organic evolution of customary land law in accordance with changing land availability and local needs. The process should be reversed to place resource management in the hands of resource users.
26. **Dual grazing rights** Frequent policy pronouncements have been made about the abolition of dual grazing rights. Legislation is unlikely to have the desired effect in the absence of profound changes in economic orientation, animal husbandry and even social and cultural life.
- Legislation could perhaps require that persons wishing to move livestock from a fenced ranch to a communal area be required to obtain permission from the body responsible for that area's management. At present this will be the land board, but in future it could be a communal grazing committee.
 - The Draft Revised National Policy on Rural Development proposes that leases for fenced ranches should be allocated by tender or auction. This should ensure that successful applicants have an appropriately commercial approach.
 - The policy further proposes that rents for fenced ranches on tribal land should be charged at commercial rates. This would serve to compel inefficient farmers and speculators to review their management practices and tenure arrangements.
 - Provision should be made to allow those who do not wish to continue as ranchers and pay a commercial rent to do one of the following: to surrender their lease and allow the land to revert to communal status; to surrender the lease for re-allocation by the land board; or to sell the lease.
27. **Change of use of TGLP ranches** Some ranch holders would like to diversify land use to include game farming and tourism related activities. In some districts, land boards have been reluctant to sanction such changes of use as they appear to conflict with the District Land Use Plan. Land should find its most profitable use.
- Holders of TGLP leases should be permitted to manage their farms profitably and not be subjected to unnecessary restrictions.
 - Land zoned for commercial use should be used in a commercial manner and leaseholders should be free to select the most appropriate sustainable use.
 - Subsidies, if given at all, should enhance economic returns rather than the financial returns of one class of producer at the expense of others.

28. **Land for wildlife development** Botswana has suffered a major decline in its wildlife resources over the past 30 years. Large tracts of land that were occupied by large and productive populations of wild animals in 1970 are now largely occupied by livestock and only contain relict populations of wild animals. The only region to avoid this outcome has been Northern Botswana where land use planning policy has prevented the loss of wildlife critical habitat. Appropriate policy principles to be introduced and followed might include:
- according competing land uses similar treatment in policy terms,
 - extending more favourable treatment to desirable land uses which have been at an historic disadvantage,
 - promoting the economic and social empowerment of all citizens, addressing the plight of the rural poor, etc.
 - promoting sustainable use of land and the conservation of natural resources, and diversification of both the rural and the national economy.
29. **Land for tourism development** Like land for other uses, land for tourism requires transparency; rules which secure interests once land is allocated; a level playing field for all participants; balance between public and private interests. Despite the intentions to distribute concessions widely, a concentration of control over concessions is taking place due to fronting at the application stage and subsequently.
- The development of monopoly power in the industry needs attention. Action might be needed to reduce the market share of the largest service provider.
 - There is need to educate the public in their rights and responsibilities and to ensure that concessionaires neither assume rights to which they are not entitled nor neglect the duties assumed under their leases.
 - Land boards need to have a more positive approach to concessionaires and joint venture partners – a good landlord/tenant relationship should be the aim.
 - Good monitoring and a supportive attitude by the landlord will materially assist the concessionaires and communities to manage their enterprises better and enhance the social and economic benefits to society. The time, manpower and money invested in the monitoring function should be commensurate with the high value of these leases to the land board.
 - Longer concession periods might encourage more investment in infrastructure and in training and capacity building of community partners.
30. **Management of land and natural resources**
- The Ministry of Agriculture and the Department of Wildlife and National Parks are currently reviewing policy on CBNRM.
 - The policy should encourage the further democratisation of the allocation and management of land and natural resources.
 - Consideration should be given to involving local community-based institutions in the allocation and management of land and natural resources.
 - The nature of the appropriate institution, the powers and rights to be given and the issues they should address all merit further detailed discussion with all stakeholders.

LAND USE PLANNING

31. Recommendations are based on three assumptions. First, separation of power is essential for good governance. It is, therefore, improper for any institution to prepare and approve its own plans. Checks and balances are critical for effective land use planning. Secondly, local authorities and land boards are better placed to appreciate community needs than central government departments. Thirdly, participation of community members in plan preparation and decision-making is essential for effective implementation. Recommendations point to the need to:

- streamline land use planning process;
- improve co-ordination;
- minimise overlaps between national and sub-national institutions; and
- promote co-operation between local authorities on issues of common interest.

In tune with the principles of good governance and, in particular, to enhance trust and accountability, there is need to:

- Accelerate the decentralisation of land use planning and related activities in order to foster efficiency, transparency and accountability.
- The Department of Town and Regional Planning should be primarily concerned with (i) national guidelines and land use planning policies; (ii) and serving as a secretariat for national land use planning matters including preparation of national physical plans.
- Cabinet should approve all national land use planning policies and plans on the advice of the Town and Country Planning Board (TCPB).
- The TCPB should approve all regional, village and other large-scale land use plans.
- District Councils should (i) prepare village structure or development plans for the approval of The TCPB; (ii) prepare local land use development guidelines, policies etc.; (iii) and approve detailed plans submitted by landowners. It is improper to make and approve own plans.
- Land boards, as land lords, should (i) prepare detailed land use plans for approval by council; (ii) assist customary land rights holders to obtain planning permit and approval from council; (iii) and keep proper land records on applications, allocations and transfers.
- An independent tribunal should determine disputes related to town and regional planning issues.

32. **Land use planning processes and plans** Two overriding principles: Increased efficiency in the use of land and resources used in planning; and making plans that are realistic, acceptable and possible to implement. Options available for achieving the above principles include:

- First, declare the whole of Botswana a planning area. This will require preparing a land use plan for all land in the country. All construction works and change of use would require planning permission.
- Second, declare planning regions for critical areas, e.g. the 'hard veld' or '200m along highways', 'greater conurbation' and progressively increase critical areas until the entire country is covered.

- Introduce administrative regions as proposed in the NSP
- Sector plans should follow land use plans - that is, land use plans should play a co-ordinating role and serve as a spatial expression of national, regional, district and sub-district or village plans.
- Sector plans should be prepared before land use plans while national and regional plans should be prepared before district and village plans.

LEGAL ISSUES

33. The context for this group of issues is the land market. Two perspectives impel this context. First, the irrefutable evidence that land markets exist in Botswana. That is the reality on the ground. The second perspective of land markets is the many official statements and inquiries that recognise the reality of land markets and the need to accept this reality.

34. **Institutional/legal reforms** The following priority actions are suggested:

- develop a national legal framework to allocate land planning and approval to appropriate planning authorities and land administration and management to the land authorities (e.g. land boards);
- put in train a fundamental thorough and rapid review of the governance of land in Gaborone with a view to creating a unified and coherent legal and administrative framework for same;
- develop a dedicated system for the handling of land disputes embracing a specialised Land Court or Tribunal, Alternative Dispute Resolution procedures and legal assistance for the poor;
- establish a commission to review the present private law and practice of land transactions and registration with a view to the creation of a land law and practice apt for the needs of all Botswana in the 21st century.

35. **Land tenure and transactions** Land markets must be enabled to work for the benefit of all and all must be enabled to participate on an equal footing in the land market. To apply these to principles to Botswana, Government should:

- set out the content of rights of FPSGs and the criteria for their renewal in law;
- recommence the use of CORs;
- develop a simplified locally based system of recordation of CORs and Customary Land Grants (CLGs) and of transactions in them;
- recognise the existence of a land market in peri-urban areas; validate existing transactions and create a legal framework for the future operation of the market;
- create a range of 'permitted uses' for CLGs and common law leases on tribal land;
- create a more user-friendly and pro-poor legal regime for secured loans and leases;
- re-order and limit the discretion of land boards to regulate tenure and transactions.

36. **Land planning and control** In line with the principles of enablement and equity, proposals involve:

- a fundamental rethink of the objectives, scope and powers of the Town & County Planning Act, so as to reorientate it to become a more development-friendly law with fewer restrictions on development especially small-scale housing and commercial developments;
- to do the same for the land control powers of the Tribal Land Act;
- limit the scope of developments for which EIAs may be required;
- establish by law co-operative arrangements between local planning authorities and LBs to ensure a complementary, simplified and participatory system of land use planning and controls exists at the local level;
- while vesting the Minister with backstopping and guidance powers to ensure that national interests and policies are implemented, allocate appellate functions throughout the system to a dedicated appellate body;
- involve the private sector and civil society in reviewing land control systems;
- stop demolition of 'illegal' homes pending above reviews.

37. **Equity, land and power** The principles involved on these matters are:

- the principle of non-discrimination;
- the principle of international law and dictates of social justice that distinctive minorities within a country have a right to preserve their own way of life and culture and should be assisted to achieve this;
- the principles of administrative justice;
- the principle of the protection of private property.

Applying these principles involves choices since they do not always point in the same direction.

- **Women's land rights:** equity and efficiency in both land use and land markets will be enhanced by a resolute attack on discrimination against women's rights to acquire, own, use, dispose of and succeed to land in all legal systems in Botswana.
- **RADs:** Government must be seen to be complying with international law, its own laws and the growing global emphasis that tackling poverty is the prime focus of development. It must be prepared to re-assess its policies and practices in relation to RADs (and other minorities) and their land rights and at the same time mount a legal rebuttal of allegations made against it in international fora.
- **Compensation:** compensation for compulsory acquisition, in respect of the reversion of FPSG, common law leases and in other situations needs to be reviewed as a whole in the light of principles above. Alternative forms of compensation need to be provided for in the law.
- **Dual grazing:** customary tenure is not unchanging. Justice requires that where one obtains a benefit from a reform which may disadvantage others, one cannot at the same time retain rights, now diminished because of the reforms, which one had before the reforms.

INSTITUTIONAL ISSUES

38. The essential land sector institutions are in place but they require some considerable adjustment to cope with the demands of the evolving land market.

- First, actions are required to consolidate the institutional restructuring following the separation of the MLHE from the MLG.
- Second, actions are needed to clarify the roles and responsibilities of the land sector agencies and to reassess the institutional relationships, both internally and with local government. The uncertainties relate to the efficiency and applicability of the current land use planning system and the respective roles of the land boards and the DTRP/district councils.
- A choice needs to be made between: either bringing the land boards into a clear and direct line of authority and control under the MLH, or decentralising decision making and making them more accountable to citizens in the areas they serve. If this later option were taken, land boards would have a similar relationship to the MLH as the councils have to the MLG, except that land boards must be apolitical bodies.
- Thirdly there is need to improve the operational efficiency of bodies (land boards and DLUPU) at district level and below which are involved in land administration and management through decentralisation and devolution of power, training and capacity building.
- Once these roles and responsibilities are clarified, there still appear to be some gaps remaining. There is need to broaden the scope of the Land Tribunal to cover disputes and appeals relating to the Town & Country Planning Act and the Land Control Act and land valuation; there is need to cater for the planning and implementation of infrastructure of greater Gaborone; and to provide for community-based management of land and natural resources.

FINANCIAL ISSUES

39. Allocation of public funds for the land sector requires that:
 - expenditure represents a justifiable use of the government's resources;
 - it should be allocated on the basis of legitimate mandates,
 - and to those programmes and projects for which subsidies can be justified in terms of the public interest, social welfare, etc; in other cases, public expenditure in the land sector should be recovered from the users.

40. A review of expenditure and revenue in the land sector in terms of these principles indicates that there is ample scope for improving performance.

1 Land rights issues

1.1 Introduction

Depending on the land tenure category – tribal, state or freehold – land rights may include one or more of the following:

- **rights to occupy** a home or homestead,
- **rights to use** land for crops, for grazing; to make permanent improvements; to have access for gathering fuel, poles, wild fruit, thatching grass, etc.; to hunt and exploit natural resources; and to use land for business or commercial purposes;
- **rights of way** for various purposes;
- **rights to transact**, give, mortgage, lease, rent and bequeath areas of exclusive use;
- **rights to exclude** others from the above-listed rights, and, linked to the above,
- **rights to enforcement** of legal and administrative provisions in order to protect the rights of the holder.

A fundamental goal of tenure reform is to enhance and/ or clarify people's land rights and thus provide tenure security. This may be necessary in order to avoid the suffering and social instability caused by arbitrary or unfair evictions, landlessness and the breakdown of local arrangements for managing common property resources. Tenure reform may be essential if rights holders are to be allowed to manage their land resources, invest in the land and use it sustainably.

As circumstances change, Government has found it necessary to change the terms and conditions on which land is held, used and transacted (e.g. the terms and contracts between the landlord and the grantee or lessee) and the arrangements for land administration.

Before colonisation, Botswana had customary procedures and rules governing land tenure. These have set the basic principles for the occupation and use of both tribal and state land in the modern nation state. An important feature of the customary land tenure system was the *Right of Avail* that was automatically shared by all people belonging to a particular tribe.¹ In land administration, 'citizen' has now replaced 'tribe' and the term 'tribal land' has become something of a misnomer. 'Customary land' would be a more satisfactory term to describe the land that is administered according to rules of customary land law and now vested in the land boards in trust for the benefit and advantage of citizens.

In the past, the allocation of land did not depend on the discretion of the Chief. He was by law required to provide residential, arable and grazing land for all his subjects. A tribesman was entitled to land without giving anything for it, but he had a duty to protect

¹ *Land tenure and management reforms in East and Southern Africa – the case of Botswana*; F.T.Kalabamu, Land Use Policy 17 (2000) 305-319.

and conserve it. Although the concept of individual ownership was unknown, the rights to residential land were exclusive and permanent. The holder could protect his rights by civil action against any person, even the Chief, except when land needed to be acquired in the public interest. In this case the chief would allocate an equivalent piece of land in compensation. The rights of the holder were permanent and inheritable. Customary law permitted tribesmen to transfer interests in residential land among themselves. Although the concept of land sales was unknown, there was no rule forbidding payment for improvements. The free transfer of unimproved land could be taken for granted. It was received free and was given free. It was not viewed as a commercial asset.²

Allocation of arable land was to family heads. The size of the extended family was taken into account. The tenure of allocations was permanent, although allottees often requested new allocations when the original fields lost fertility. Rights to arable land differed from rights to residential land in that the holder enjoyed exclusive occupation only when the land was under cultivation. After harvest it reverted to communal use, if only for grazing purposes. A holder had the right to allow anyone in need to cultivate part of his allocation and to collect payment or part of the harvest in return for the land clearing and ploughing done by the holder.

An area that was neither residential nor arable was regarded as grazing land. All had the right to graze their animals there. There was no fencing and cattle roamed and mingled freely. However, each owner was entitled to a site for the purpose of drawing water, usually from a well. Once a well was sunk, the holder acquired exclusive rights to it.

These customary rules are, of course, unexceptional. They will be recognised across the vast savannah areas of Africa. In Botswana, they provide the basic framework of customary land law. They have secured the land rights of the great majority of the population for generations. Today, this framework has to accommodate new rules governing changes in land use and settlement and development resulting from the growth in the human and livestock population, the economy and the land market. Later sections of this report deal with the issues raised by emerging land markets and the need to reform tenure conditions, both in rural and urban areas.

The four topics in Section 1 focus on the land rights of those who are in danger of being left behind by the land market. The terms of reference for the Land Policy Review require the Consultant to address a number of land rights issues:

- Equitable rights of access to land and shelter for all citizens, especially the poor;
- The removal of gender discrimination in land allocation and access;
- Problems experienced by certain groups of citizens in securing land rights.

To this list has been added the topic of 'HIV/AIDS and land rights' because reports from neighbouring countries show that the pandemic can negatively affect the land rights of

² *Land Problems in Mogoditshane and Other Peri-Urban Villages*. Government Paper No. 1 of 1992. Gaborone: Republic of Botswana Government Printer.

widows and orphans and result in the grabbing of land and property by relatives, among others. Similar problems have been reported in Botswana.

Failure to tackle these land rights issues will allow the relatively few sores in the land tenure system to fester, affecting more and more of the whole; e.g. the landless poor moving into shacks in the towns; the continuing exclusion of women from the land market and the resulting adverse impact on the economic and social good of the country; the continuing hardship of the RADs and the enormous damage done to Botswana's image as a democratic, rights-respecting country and possibly the economy; and the abandonment of land and the loss of property by the rightful owners as a result of the HIV/AIDS pandemic.

1.2 Land rights of the poor

1.2.1 Background

Although the percentage of the population living below the poverty datum line has decreased in the last 10 years, it is possible that the actual number has remained constant. HIV/AIDS is expected to throw an increasing number into poverty. The aged, the unemployed (youth, single mothers), and women heads of household are the most vulnerable as a result of 'income poverty' (i.e. lack of access to employment and land, and exposure to drought-related disaster).

For the poor, it is easier to acquire land rights in rural areas, but even here, their relative position has deteriorated in the last 25 years. In urban areas, land rights are least secure.

In Botswana both public and private efforts have been made to allocate land and housing and to alleviate drought-related hunger. However, in recent years these have not adequately addressed issues of access to land and shelter. Despite the relative overall decline in poverty, the number of poor people who do not have adequate access to land and natural resources has probably continued to increase.

A number of government initiatives to reduce costs (and enhance incomes) have been tried. Self-help housing has been the main thrust. The able bodied are to be assisted by schemes, which have completed a successful pilot phase and are to be replicated, designed both to alleviate poverty and to provide housing. The 'not able' will be assisted through District Council programmes for destitutes.

1.2.2 Related land policy issues

In rural areas Tribal Grazing Land Policy (TGLP) and the Fencing Component have been a major determinant of tenure insecurity. The TGLP fenced 2.6 million hectares. The Fencing Component of the 1991 Agricultural Policy provides for larger areas to be privatised. The benefits of these policies in terms of productivity remain unclear, while the costs in terms of landlessness and poverty are very high. Many people deprived of access to communal grazing rights and veld products end up in townships such as Ghanzi. The land privatisation policies have created great potential for a steep growth in inequality and have made it more difficult for the descendants of the poor to escape from poverty.

In rural areas the government aims to assist poorer households to build better quality housing by granting loans to people allocated plots by land boards. Self Help Housing Agency (SHAA) offices are being established in all District and Sub-District Headquarters as a start. The programme has been running for less than a year. Eligibility for SHHA plots depends on a minimum income of P4400 to P36 000 a year, although the application of the rules seems to vary between districts. Demand in the rural areas has rapidly outpaced the amount of money allocated for the scheme.

In urban areas, low-income groups are no longer eligible for SHAA allocations or able to build to the prescribed standards. In Ghanzi Township, for example, there are some 1600 poor on the waiting list for surveyed plots and more than 2000 squatters too poor to apply. The poor have previously acquired Certificates of Rights (the urban equivalent of a Customary Land Grant) on state land in urban areas, but this form of tenure has been discontinued.

1.2.3 Policy principles and choices

The *Draft Botswana Poverty Reduction Strategy* (April 2002) calls for the review of land policy to ensure that the access of poor people to adequate land is assured and protected, and that land is used productively. Among others things, Government could:

- Strengthen the capacity of land boards in land allocation and management.
- Strengthen the planning and implementation capacity of District Councils to ensure that poor people have access to land.
- Relieve the severe urban land shortage by:
 - amending policies and existing legislation for the free transferability of customary land rights in certain areas;
 - set aside suitably-located demarcated and surveyed land for low-cost housing under SHHA.
- Design and implement a local government low-cost housing scheme for the very poor that is neither subject to distress sales or speculation because Council retains the land and structures.
- Re-introduce the COR on state land in urban areas.
- Ensure that the Fencing Component of the 1991 National Policy on Agricultural Development does not run ahead of the capacity of District Councils and RADP to accommodate evictees.
- Ensure that evictees and others displaced by implementation of the Fencing Component of the 1991 National Policy on Agricultural Development receive prompt, adequate and just compensation.

1.3 Land rights for women

1.3.1 Background

Women should own land and exercise control over its products because:

- Women's access to land will improve both their own and their households' income, improve household food security and child nutrition.
- Securing stronger land rights for women increases productivity because women will invest more in their land.

- Recognizing that women should have equal rights in land is necessary for justice.
- Recognizing that women should have equal rights in land will enhance economic efficiency;
- Equal land rights can empower women to fight for equality, dignity and other economic rights.

Traditionally, every male head of a household was entitled to three pieces of land, one each for his homestead, cultivation and grazing. When a man died, his male children inherited his land. Women, regardless of their marital status or age, could never acquire land or landed property on their own. They had to reside with their parents, husbands or sons. Until the *Married Persons Property Act 1971*, husbands were the sole administrators of property held by either party before and after marriage. In 1993, the *Tribal Land Act* was amended to allow all adult citizens rights to use and occupy tribal land anywhere in the country. In 1996, the *Deeds Registry Act* was amended. This enabled women to acquire land for their sole use and deal with immovable property bequeathed or donated to them even when they were married in community of property.

1.3.2 Related land policy issues

Although the existing legal and policy reforms are progressive, compared with those of other countries, they do not empower women fully when dealing with land and property.

Prior to the amendments to the *Deeds Registry Act*, husbands alone could deal with the Registrar where spouses were married in community of property. Following the amendment of the Act, neither spouse alone could deal with the Registrar where a marriage was in community of property. They had to act jointly. However, the benefits of these amendments to women are illusory while women's status in terms of 'marital powers', under the *Married Persons Property Act*, remains inferior. This law provides for women either to marry in community-of-property or out-of-community-of-property. If married in community of property, all property is pooled and shared upon divorce. If married out of community of property, pre-nuptial property of the spouses remains individual property, but property acquired or accumulated after marriage is treated according to the marriage agreement. If there is no such ante-nuptial contract, then it is 'in community of profit and loss' and treated as a common pool to be divided upon divorce. Occasionally, there is a postnuptial contract which can vary this arrangement. Few women enter marriage with knowledge of these options or their significance.

Adult citizens of either sex are eligible to receive FPSGs (and, formerly, CORs) and customary land grants and common law leases on tribal land. However, despite this equality, men and women are not treated equally when applying for land. It is still assumed that married women should depend on their husbands for access to land. Male domination of decision-making in Botswana's patriarchal society is a major factor in blocking women's access to land. Information that would empower them to make informed choices does not get through to them as they are not seen as potential users of such information.

1.3.3 Policy principles and choices

Overall national policy aims to promote gender equality and the empowerment of women. In *NDP 9*, the Government has committed itself to raising women's representation in

Parliament and Councils to 30% for each by the end of 2008/9. In addition the *Revised National Policy for Rural Development* calls for specific programmes to be put in place to address the special needs of women since they constitute the majority of the rural population. Likewise, the land policy should aim to encompass principles of justice, equity and gender equality.

Among others things, Government could:

- Educate and raise women's awareness of their rights so that they are conscious of existing opportunities and can make informed choices.
- Remove all official barriers (including land application and registration forms and practices) that make it difficult for women to acquire land.
- Remove discrimination, either direct or indirect, in determining the occupation or use of land; attendance at, or participation in, decision-making forums regarding the occupation or use of land; or membership of any structure involved in the administration and management of land rights.
- Recognise that differential treatment of women and men, and of different groups of women may be necessary to ensure equal outcomes in land reform.

1.4 Land rights of minority groups

1.4.1 Background

The Basarwa people, previously known as Bushmen, have since 1976 been included with other minorities under the official heading of Remote Area Dwellers (RADs). Their traditional economy has been eroded for many decades by the loss of land and access to important natural resources. There is no precise information on the size of the RAD population in Botswana. Estimates vary from 3% to 6% with significant numbers in most districts and the largest concentration in the West - Ghanzi and Kgalagadi districts.

During the colonial period, the west was declared Crown Land. There was no official recognition of the RADs' existence nor of their tradition of hunting and gathering. Within the tribal areas, their land rights were ignored in favour of the livestock owners (and others) who wished to move into and utilise the areas occupied by RADs. In 1973, the government introduced a special development programme, now known as the RADP, to meet the RADs' development needs.

The problems now faced by RADs extend far beyond lost land rights. A programme of land restitution, however favourable it might be, cannot resolve them. RADs live in more extreme poverty than any other group. The issues extend into education and training, health and nutrition, housing, social welfare and employment - all beyond the remit of land policy. However, access to land and other natural resources and security of tenure would seem to be the fundamental issues to be addressed.

1.4.2 Related land policy issues

The problem can be formulated as a number of questions.

Over the last 25 years, what has been the impact on RADs of the operational strategies of the TGLP, the land boards, the Department of Wildlife and National Parks and of the RADP upon access to and tenure of land and water resources? What action has been taken to extend land access and rights to RADs displaced in the past or recently by cattle post and ranch development?

What has been the effect of the RADP settlement and water development strategies in terms of land tenure? In what manner and to what extent have RADs been involved in decision-making as regards relocation, establishment of settlements, and rights of access to land and water? What is the nature of rights over land and other resources in RAD settlements? To what extent is land use within settlements managed to protect the tenure security of settlers? What influence do RADs themselves have over land use and access to water and other resources in the settlements? In what manner has title or other mechanisms of security been awarded by land boards?

What are the constraints and limitations imposed on traditional rights, particularly hunting and gathering, in the areas whence the settlers came and had long-term occupation and use? What is the relationship of RADs to the WMAs and protected areas in terms of traditional rights of ownership and use and planned and actual access rights? What is the future role of RADs in the management of land and natural resources? What priority in managing hunting quotas will be given to RADs?

How important is the land issue and what is the way forward?

1.4.3 Policy principles and choices

First and foremost, the land policy should aim to give RADs more control over their own land management arrangements, as other citizens already have.

Appropriate actions following from this principle might include:

- Upholding the rights of minorities to pursue a different life style and maintain a distinct culture from that of the majority,
- Promoting economic and social empowerment of all citizens, addressing the plight of the rural poor, etc.
- Promoting sustainable use of land and the conservation of natural resources and
- Diversification of both the rural and the national economy.

Within the land sector:

- In those areas where RADs form a majority of the local population, new sub-land boards or related structures could be established to regulate the use of the land. Membership of these could be made up of mainly of local residents (i.e. RADs).

- New water development in RAD settlements should be put under the control of the RAD residents themselves. District Council control of these water sources has been a prime cause of invasion of RAD settlements by cattle belonging to non-RADs.

1.5 HIV/AIDS and Land Rights

1.5.1 Background

HIV/AIDS is unique because it deprives families and communities of their young and most productive people. The pandemic is deepening poverty, worsening gender inequalities, eroding the ability of government to maintain essential services, reducing labour productivity and supply, and putting a brake on economic growth.

Elsewhere in the region, where land is scarce, HIV/AIDS-affected households try to cope by renting-out or sharecropping their fields and/or shifting production to their home gardens. In a pastoral setting, e.g. in Lesotho, *mafisa* increases in importance. Many local cultures do not guarantee a wife's rights to inherit her husband's property. Widows are often dispossessed by their in-laws and rendered homeless. Increasing numbers of widows and orphans are arriving in the urban slums. In some districts of Kenya, large areas of fertile land lie unused as a result.

In Botswana, median HIV prevalence among pregnant women in urban areas already stood at 38.5% in 1997. In 2001, it had risen to 44.9%. Among 25–29-year-old women attending antenatal care in urban areas, 55.6% were living with HIV/AIDS. Overall, 39% of adults are infected with HIV. There has been the hope that the epidemic may have reached its 'natural limit' but this appears not to be the case, as yet.

1.5.2 Related land policy issues

The impact of HIV/AIDS on land rights in Botswana has not yet been the subject of a systematic field study. It is estimated, however, that the economy will be one third smaller by 2021 than without HIV/AIDS, while government expenditure will have to increase by 20%.

Dispossession of surviving members of families, principally women and orphans may not be as serious a problem in Botswana as it is elsewhere in the region. Land boards are said to be willing to transfer land to the surviving dependants and issue the appropriate documents.

A number of cases have been reported of relatives trying to dispossess orphans of their inheritance of residential property. Increasing numbers of affected households with loans are expected to default.

With the loss of able-bodied members, HIV/AIDS-affected households will not be able to continue to plough and survive in rural areas and may move to urban and peri-urban areas in search of land and shelter. Current policy makes sub-leasing of portions of land difficult.

There is expected to be a growing area of idle and abandoned land and a falling demand for fields for ploughing. On the other hand, the demand for residential land and shelter for the poor in urban areas or villages will increase.

At the same time HIV/AIDS will strain the capacity of Botswana's land administration and management institutions at all levels.

1.5.3 Policy principles and choices

The land policy should address the plight of the poor and the landless, especially those who have been thrown into deeper poverty by HIV/AIDS.

Appropriate actions following from this principle might include:

- The impact of HIV/AIDS on land rights, land use and occupation in urban and rural areas should be the subject of a special investigation commissioned by the Department of Lands.
- Strengthening property rights for women to reduce the negative impact of surviving dependants in both rural and urban areas.
- Prompt allocation of land and shelter for the very poor, especially in urban and peri-urban areas.
- Ensuring that affected households can draw on their capital assets in a time of need by renting /leasing or transferring potentially productive land, which would otherwise lie idle.
- Better land information and more efficient operation of land boards should reduce the impact of the pandemic on land administration services.

2. Land market and taxation issues

2.1 Introduction

2.1.1 Background

Rights (e.g. leases, grants and rental agreements) to immovable property change hands in the 'land market'.

It may be 'informal', in so far as buyers and sellers do not have recourse to the law if one or other fails to meet the agreed conditions. The high demand for land in and around urban areas in Botswana has led to a rise in illegal and extralegal transactions in adjacent tribal land. Many of these fall between customary and statutory law, conforming to neither, but nonetheless meeting the immediate needs of the poor. This is often the case in informal settlements, where the poor are likely to be preyed upon.

Alternatively, the land market can be 'formal', in so far as transactions are carried out according to the law. An efficient land market encourages transactions between individuals which are underwritten by the law and by registered private service providers. An efficient land market requires only minimal day-to-day government intervention and supervision. In Botswana formal market transactions still receive a relatively high level of official sanction. While there are strong reasons for Government to underwrite tenure security by bringing as many transactions as possible within the ambit of the formal land market, it could probably achieve its economic and social objectives with less direct involvement.

Intelligent information and communications technology that makes cadastral information available to various private service providers and government departments, in a flexible and efficient manner, brings substantial economic benefits. Information in cadastral and legal land registers is an essential infrastructural component with an immense capital value. For this purpose modern Land Information Systems (LIS) have been developed. The term is applied to systems that focus on land parcels (land holdings) as units of information. In other words, they are land administration based. A LIS would permit the rational integration of the work of DSM, DL, Deeds Registry, Land Boards and DTRP as well as the revenue authorities.

By comparison with other countries in the region, facilitation of the land market is relatively advanced in Botswana. Customary tenure has been relatively successfully integrated with a modern and democratic system of land administration. The successful experience of Botswana has been used by development economists to back the view of Hernando de Soto, a Peruvian economist, who has proposed a stronger approach to land titling in poor countries (see Box on following page). However, in a fast developing country, stresses and strains are emerging in the operation of the land market.

The development of the land market provides an opportunity for citizens to generate capital through the formal acquisition of property assets. Without access to the benefits of property ownership, people will remain poor.

Fixing the Economic Potential of Assets

The representation of property (e.g. a house, workplace or farm) in the form of a title, a contract or other such record converts a dead asset into live capital. In the legal (as opposed to the extralegal) sector, property can be used for a loan; as equity exchanged for investment; as an address for collecting debts, rates and taxes; as a locus point for the identification of individuals for commercial, judicial or civic purposes; or a reliable terminal for receiving public utility services, such as energy, water, sewage, telephone or TV. In the formal sector, land and buildings have a variety of additional functions to secure the interests of other parties. By fixing the economic potential of assets through property records, capital is born.

Integrating Dispersed Information into One System

Most people in developing nations cannot enter their assets into a legal property system, no matter how they try. In consequence they end up holding them extra-legally. This failure to integrate the assets of the majority into a comprehensive property information system is a fundamental constraint to economic development. Integration in the Western nations did not happen casually, but as a result of statutes, judicial decisions and administrative measures over the last 150 years or more. In Japan, the process was not completed until the late 1940s. As a result of this integration, the potential of assets has become easier to evaluate and exchange, enhancing the production of capital.

Making People Accountable

The integration of landed property under one formal legal system helps shift legitimacy from the local community to the impersonal context of the law. Releasing owners from restrictive local arrangements and incorporating them into an integrated legal system increases both their financial opportunities and their obligation to behave responsibly. People who do not pay for goods and services can be identified, charged interest on unpaid bills, fined and have their credit ratings downgraded. Authorities can suspend services and place liens against their property. A great part of the potential value of the formal property system is derived from the possibility of its forfeiture. The lack of a legal property system explains why citizens in developing countries cannot readily make profitable contracts with strangers, cannot get credit, insurance or utilities services. They have no property to lose.

Making Assets Fungible

The incorporation of assets into a formal property system transforms them from a less to a more accessible condition so that they can do more work. The representation of property assets in the form of a title makes them 'fungible' – able to be fashioned to suit practically any transaction. Assets may be split into shares, each of which can be owned by different persons, to carry out different functions. Investors can divest themselves of their shares without affecting the integrity of a physical asset.

Networking People

By making assets potentially divisible, combined or mobilised, by attaching owners to assets, assets to addresses, and ownership to enforcement, and by making information on assets and owners easily accessible, formal property systems convert citizens into a network of individually identifiable and accountable business agents. The legal property system of an economically developed nation is the centre of a complex web of connections that equips ordinary citizens to form ties both with the government and the private sector and so obtain additional goods and services.

Protecting Transactions

The keeping of public records containing all the economically useful descriptions of fixed assets (e.g. land, buildings, businesses, industries) alerts potential buyers to encumbrances, easements, leases, arrears, bankruptcies and mortgages. The records are established to protect both the security of ownership and that of transactions. Security assures the authenticity and legitimacy of transactions so that people can more easily make their assets lead a parallel life as productive capital.

Based on the work of Hernando de Soto, *The Mystery of Capital*, 2000

The TOR for the study require the consultant to address the following land market issues:

- the high demand for plots in urban and peri-urban areas, land fronting and other illegal land transactions;
- land pricing and funding mechanisms which would make land more accessible to citizens in these areas;
- controlling land acquisition by foreigners.

Between 1992 and 2001, the number of annual market transactions of state and freehold land increased by about 56%. Transactions of tribal land are also accelerating. For example, the number of property transfers recorded annually by the Mogoditshane Sub-land Board increased by 93% between 1993 and 2001.

The upsurge in the land market is due to the absolute increase in the number of properties, rapid urbanisation, and greater immersion in the monetary economy. The land market is both a consequence of national development and a contributor to it. Expansion has been made possible by the development of public and private sector services to support the property sector and by the evolution of policy and legal reforms extending the scope of permissible land and property transactions.

Overall, there is an acceptance that the development of a land market is good for Botswana, but that it has to be regulated and controlled. Aspects that must be taken into account are:

- the different types of land tenure – tribal, state, and freehold – with different laws and institutions and associated market conditions;
- the policy of allocating free customary land grants on tribal land and subsidised allocations of state land to eligible citizens, which is contributing to the growth of land fronting and illegal property transactions;
- the concentration of property transactions within Gaborone (with about three quarters of all transactions by number and value of state and freehold land in 2001) where the greater support accorded to the operation of the land market may be a factor contributing to uneven urban development in the country as a whole;
- the requirement that, with the exception of the small area under freehold, land *per se* is not owned and traded, which has had important financial implications for compulsory acquisition and for the value of property assets as fixed-period state grants approach their date of expiry;
- the concern over the need to encourage foreign investment without an excessive amount of property ending up in the hands of foreigners; and
- the concern that greater tradability of land rights will contribute to further landlessness, as members of lower-income groups engage in distress sales.

The continuing growth in transactions raises a number of important issues:

- How can the land market operate more efficiently? Do existing institutions have the capacity to support (and regulate) the increasing number of transactions? Do members of the public have adequate access to information to help them make decisions about land transactions? Are there unnecessary impediments to transacting land? What will be the impact of applying VAT to land transactions, either in addition to, or instead of, transfer duties?
- How can land markets be extended? For example, the Draft Revised National Policy for Rural Development states that: *the principal issue is whether or not holders of tribal land grants or common law leases should be allowed to sub-let freely, effectively allowing them to trade their right to use land.* People holding residential plots in terms of CORs or customary grants find it difficult or impossible to sell their rights because they cannot afford to have the land surveyed and thus cannot obtain the title deed that would allow prospective buyers to access mortgage finance.
- The introduction of the Botswana Land Information System (BLIS) has greatly benefited urban land management. In the rural areas, progress has been achieved more slowly - there are large areas of low value land with a small and scattered population where few problems are perceived. However, there are places where the pressures are higher, such as the peri-urban areas and the urbanising villages, and where land management is hampered by the overall lack of information.
- The big question is whether extending the land market will contribute to landlessness and land speculation and whether there are ways of doing so that are relatively benign.
- How is it possible to reduce illegal and extra-legal transactions? People engage in various types of illegal land transactions. Perhaps the most common illegal transaction is 'land fronting', whereby a person who applies for a plot has pre-arranged to sell it to someone else with more resources to develop it – perhaps a foreigner –who might not be eligible to apply direct. Land fronting is in breach of the “development covenant” which forbids people to whom land has been allocated to sell it undeveloped. One option would be to enforce the rules more aggressively, and close the legal loopholes which evade the prohibition. Another would be to abandon the development covenant altogether.
- In addition there are issues relating to property taxes in all declared townships, an important tool for fiscal decentralisation and for funding the provision of services. However, for a variety of reasons property rates systems have a tendency to become weak over time. Large arrears and out-of-date valuation rolls are symptomatic of this weakness. Some of the problems with the existing systems were addressed in the amendments proposed in 1995 to Part VI of the Town Council Regulations that fall

under Section 9 of the Townships Act.³ These were not adopted due to the governmental restructuring of the mid-1990s that resulted in Local Government being split from Lands. It may be time to revisit these amendments. There are concerns too that people in peri-urban areas do not pay rates even though they may receive the same types of services as their counterparts in urban areas.

Although it is premature to make specific recommendations in respect of land markets and property taxation, a few principles emerge which are likely to guide the development of more specific recommendations to follow:

- **Increase homogeneity of treatment:** While distinct tenure regimes will no doubt remain in Botswana, there should be greater homogeneity the rules that govern property transactions. Liability for paying property rates should be extended to built-up peri-urban areas and private townships, hereby removing the arbitrary distinction between such areas and declared townships.
- **Address capacity constraints in land-related departments:** This can mean increasing internal capacity, outsourcing some functions to the private sector, and/or making strategic decisions to lower demands on departments, for example, by relaxing the standards that apply to surveys.
- **Promote access to and synthesis of information:** This includes information kept at the Deeds Registry, at the Department of Surveys and Mapping, at the Department of Town and Regional Planning, at the Department of Lands, in the land boards, and by town and district councils. Some information can be made available on a cost-recovery basis.
- **Accord legal recognition to more types of transactions:** Of particular concern here is the sub-letting of tribal plots and the obstacles to transacting unsurveyed land in urban and peri-urban areas.
- **Increase the supply of unserviced or minimally serviced land for settlement:** This is critical for the poor and will reduce the need to engage in illegal transactions.

2.2 Promoting land market efficiency

2.2.1 Background

In a so-called 'free market', market transactions take place in relation to rules and procedures, whether statutory or customary law defines these. Numerous kinds of rules have direct implications for the land market, e.g. pertaining to land registration and to land use. Rules may strengthen the market by promoting certainty and safeguarding the

³ The amendments to the Town Council Regulations referred to are the Rating Review proposals of 1995. These were examined and approved by Dept of Lands, all Urban Councils and members of the Urban Development Committee in 1995. The advantage of these proposals is that they build on and improve the existing system and avoid any radical changes.

public interest against uncontrolled land development. They may also have the potential to hinder the market.

Where the market in land is accepted, it is in the interest of good governance and the public good that it operates efficiently. Market efficiency depends most of all on three conditions:

- costs being kept to a minimum, so as not to deter land transactions;
- decisions being informed by near-complete knowledge of the nature and specifications of the property in question and of the land market in general; and
- minimising any uncertainty relating to the rights and obligations of land owners and tenants.

Promoting efficiency in the land market is thus largely about government providing an enabling regulatory framework and performing the necessary administrative functions effectively and efficiently.

2.2.2 Related land policy issues

The efficiency of the land market in Botswana is hindered by a number of factors. While more investigation is needed better to understand the obstacles to greater efficiency, the following points describe the most important constraints.

- The public has poor access to the kind of information that would help them decide whether or not to engage in transactions. For example, access to information in the Deeds Registry is restricted (unofficially if not officially).
- For a variety of reasons, transactions costs are probably higher than they need to be. One reason is that services required for urban land transactions are centralised in Gaborone, an inconvenience to those living in distant parts of the country.⁴
- For tribal land, it takes a very long time to process applications for transfers of customary land grants and leases and thus discourages transactions.
- Too much uncertainty prevails. A prime example is the lack of clarity regarding the renewal of FPSG, not least the terms and conditions according to which decisions will be made about their renewal.
- Many people who would like to sell are hindered from doing so because they do not have a title deed, which means that prospective buyers cannot get mortgage finance. The lack of title deeds relates to the fact that many plots have not been surveyed; surveys are either expensive, if one hires a private surveyor, or take a long time, if one relies upon the land board.

⁴ The Deeds Registry has opened an office in Francistown recently.

2.2.3 Policy principles and choices

Mindful of Botswana's unique circumstances, many of the measures that should be examined so as to improve the efficiency of the land market can be ascertained by referring to international best practice. These measures might include:

- Ensuring better access to information needs to be balanced against legitimate concerns about privacy. If necessary, facilities may need to be created to allow the public better access to information without inconveniencing Deeds Registry officials or undermining the integrity of the rights.
- Identifying ways of abbreviating the time it takes to effect transfers, especially, but not only, those that must pass through the land boards.
- Identifying other types of transactions costs that can be reduced.
- Providing more clarity as to the conditions according to which fixed period state grants are to be renewed.
- Devising low-cost methods to resolve land disputes in urban areas as an alternative to using the courts.
- Providing efficient, low-cost ways of surveying plots and issuing title deeds.

2.3 Extending land markets

2.3.1 Background

Land can be allocated and acquired either administratively or through the market. In theory, market allocation of land (or of particular rights in land) results in efficient land use, meaning that the land ends up in its 'best use', and thus promotes development generally. It also allows for greater mobility and flexibility, for example by enabling households to trade land rights for cash that can then be invested in other productive activities or land elsewhere.

In some countries, governments forbid certain kinds of transactions, for example, because they contradict other policy objectives such as protecting vulnerable groups from becoming landless. In Botswana, there has been a gradual evolution towards greater tradability of land in tribal areas. This is evident for example when in 1968 the Tribal Land Act provided for the common law lease on tribal land and in 1993 when the amendments to the Act first permitted the transaction of customary land grants.

Despite this trend, some kinds of transactions in tribal land are still not permitted. Others are very difficult and/or costly to effect. And still others are subject to conditions that might need to be reviewed.

2.3.2 Related land policy issues

The issue of extending land markets in tribal areas can be disaggregated into three distinct sub-issues.

- Although both customary land grants and common law leases are already tradable, the application procedures can discourage transactions to such an extent that a formal market barely exists in some areas. (This is largely addressed in section 2.2 above. It should also be recognised however that an absence of a market could be due to an absence of demand or supply.)
- Second, it should be recognised that opening up the land market need not mean an increase in *sales*, but rather *rentals*. Evidence from East Africa shows that land sales can sometimes lead to increased inequality, while land rentals tend to promote equality. Presently, there is no procedure in Botswana for legal recognition of leasing land held under a customary land grant or sub-leasing land held in terms of a common law lease. The introduction of the former might promote efficiency without the twin evils of landlessness and land hoarding.
- Third, the most important requirement that transactions of tribal land must meet is that, prior to transfer, the land must have been developed according to the use for which it was allocated. While the intentions of this condition are understandable, it must be asked whether the disadvantages exceed the advantages, e.g. by restricting the supply of land and encouraging informal transactions.

2.3.3 Policy principles and choices

The Draft Revised National Policy for Rural Development identifies ‘the need to introduce market forces on tribal land’ ... ‘the principal issue is whether or not holders of tribal land grants or common law leases should be allowed to sub-let freely, effectively allowing them to trade their right to use land.’

It is necessary to consider the effects of further extending land markets to tribal land. One possibility is that there will be a rise in speculative activity and an even greater rush for applications for unallocated land. Moreover, at a fundamental level, the right to sell or lease land at its market value calls into question the principle that only improvements and not the land itself may be sold. This distinction, which is increasingly difficult to grasp in today's environment, may have to be reformulated or simply abandoned.

Particular areas for attention might include the following:

- The possibility of permitting leases/sub-leases of customary land grants and common law grants should be explored.
- The prohibition on the transfer of undeveloped plots should be re-examined, in conjunction with a re-examination of the principle of allocating plots for free.
- If the transfer/sale/lease of tribal land is to be allowed, it must also be procedurally possible. Procedures would have to be reviewed to ensure that they are not prohibitively time-consuming or costly.

2.4 Illegal and extra-legal land transactions

2.4.1 Background

Illegal land transactions are those transactions that are conducted in violation of the law, while extra-legal transactions are those that are conducted without the benefit of legal recognition but which may not be explicitly forbidden. Both types of transactions present problems for land policy. Illegal transactions thwart land policy and force government to reinforce measures to prevent such transactions from taking place. Extra-legal transactions leave one or both parties insecure because neither has recourse to the law in the event of a dispute.

Illegal land transactions are increasingly common in Botswana, especially in urban and peri-urban areas, where market pressures tend to be strongest. Land fronting is one manifestation of this, whereby a person who applies for a plot allocation has pre-arranged to sell it to someone else with more resources to develop it, but who might not have been eligible to apply on his own behalf. Another form of illegal transfer is when a person owning *masimo* land in a peri-urban area subdivides and sells it off for residential purposes without the consent of the land board. The large numbers of rental transactions which take place on urban and rural land, but which have no legal status, provide examples of extra-legal land transactions.

2.4.2 Related land policy issues

Non-legal transactions may be an indication that the institutional and regulatory framework is unsuited to the prevailing economic conditions. The fact that valuable land is allocated to Botswana citizens for free creates a situation whereby some apply mainly for speculative purposes. Others find themselves tempted to sell even if that was not their original intention.

The situation is made more acute by the fact that the amount of land available for settlement in urban and peri-urban areas is restricted, not least because of the administrative burden of making more land available in a manner consistent with existing government policies.

On the other hand, only releasing land according to its market value would be likely to lead to a socially undesirable pattern of ownership. Private developers, for example, rarely cater for the needs of low-income households. Low-income households would seldom be able to live in well-located areas if 'ability to pay' were the sole criterion for land allocation.

A key problem that runs through the land policy is the distinction between ownership of improvements and ownership of the land itself. Increasingly the distinction is proving too abstract and too at odds with economic reality. The *masimo* holders are a case in point. Their land might be valuable by virtue of its advantageous location for future settlement, but according to the law the land is not theirs, and thus they cannot benefit from the value attributed to it by the market.

2.4.3 Policy principles and choices

The persistence of illegal and extra-legal land transactions calls for three types of measures:

- addressing the conditions that make non-legal transactions so likely and tempting;
- careful reconsideration of which type of transaction should continue to be restricted or banned; and
- more vigorous enforcement of rules that still apply and the introduction of new rules where necessary.

Subsumed within these points could be the following measures:

- Accelerate the pace at which land of different categories is made available, especially unserviced land on which self-help housing can be erected.
- When engaging in compulsory acquisition, improve compensation to *masimo* holders according to the market value of their land.
- Revise the functions of the land boards, especially in relation to operations in peri-urban areas, so that they acknowledge and monitor the many land transactions that are taking place, including land rentals.
- Close loopholes that are presently being exploited to transfer ownership to non-citizens without the oversight of the Deeds Registry (e.g. through sub-division into lease areas and via property companies). Similarly, resolve the various uncertainties relating to the Tribal Land Act and the Town and Country Planning Act.
- Ensure that the capital gains tax is properly applied in cases of land sales, especially where there has been a change of use.
- Provide for standard types of lease and develop pre-printed proforma documentation to enable people to enter into these classes of lease agreement.

2.5 Strengthening the property tax system

2.5.1 Background

It is generally agreed internationally that local government is more responsive to the people it represents when it relies on local sources of revenue. This is the principle of “fiscal decentralisation”.

In Botswana, town councils collect rates on property, but district councils do not, and these therefore rely almost entirely upon transfers from central government for their budgets.

However, even within town councils the property rates system is generally not performing as well as it should: re-valuations are not occurring as frequently as they should according to law; an unnecessary level of rigour is required for the rating of residential properties; the valuation basis (capital value) is not as convenient as it could be (rental value); and valuations are rarely contested, in large measure because of a lack of easy access to the valuation rolls, but also because of general apathy; and finally, collection is very poor and arrears are very high.

Some of these problems were addressed cogently in the amendments proposed in 1995 to Part VI of the Town Council Regulations that fall under Section 9 of the Townships Act. The non-adoption of these proposed amendments appears to have been due to the governmental restructuring of the mid-1990s that resulted in Local Government being split from Lands. Revisiting these proposed amendments would be a major step in the right direction to addressing the ills of the property tax system.

2.5.2 Related land policy issues

There are two main issues to be explored with regard to the strengthening of the property tax system.

What measures would be needed to strengthen the system as it already exists within town councils? In the first instance, a review of the proposed amendments from 1995 to Town Council Regulations is necessary.

The second issue that must be explored is whether owners of properties in peri-urban areas should also be liable for property rates, thus providing a stream of revenue to district councils.⁵ The main issues here are:

- whether the extension of liability would be politically acceptable;
- how to enable the district councils to cope with assessment and collection of property rates; and
- on what basis new property rating areas would be included.

2.5.3 Policy principles and choices

The land policy should provide regulatory arrangements for the efficient, sustainable and equitable occupation and use of land. This requires that users pay for the services they receive. Rates and property elsewhere are subsidised by central government. It is therefore necessary to:

- Review the proposed amendments to Part VI of the Town Council Regulations, and determine if Local Government and/or Lands can now champion them;
- Make valuation rolls easily available to the public, inform the public as to their publication, and allow ample time for objections to be lodged;
- Examine the possibility of extending liability of rates to all ‘built-up’ areas, including those that fall outside township boundaries;
- Devise a system for the collection of rates in non-township areas, either by capacitating District Councils or through co-operative arrangements with town councils;

⁵ Extension of rating to peri urban areas was a recommendation of the Second Presidential Commission on Local Government Structure in Botswana.

- Determine criteria for when a private township should fall within the taxing jurisdiction of the adjacent town council, and what rates would apply;
- Establish a valuation tribunal to hear all disputes/grievances/appeals arising from valuation (e.g. compensation, rental and rating valuations).

2.6 Land information

2.6.1 Background

In Botswana freehold land and urban state land plots are held in terms of registered title deeds supported by survey diagrams. Rural land held on customary tenure may have no formal documentation, or may be leased from the land board, in which case the land parcel is normally described by a sketch plan. A relatively small amount of such land is now surveyed prior to allocation.

Much rural land was allocated through grants made prior to the formation of land boards or on customary grant at a time when the need for comprehensive land records was not anticipated. Neither did the technology exist that would allow land administration and management bodies to easily access such information. Technology and communications have improved dramatically in recent years – it is now possible to keep information in a way that can be accessed and checked by computers through the telephone system.

The need for better land records in rural areas has long been recognised, and several pilot land inventory projects have been undertaken. None of these has been followed up. However, they have generally served to raise awareness of the potential benefits of better land information and the technical options that are becoming available to achieve this. The latest of these, the Tribal Land Information Management System (TLIMS) is ongoing.

2.6.2 Related land policy issues

Occupation of most tribal land in rural areas is either unrecorded, or inadequately recorded for present day needs. Without reliable information, it is not possible for land boards to make numerous decisions without costly and laborious site visits. Without reliable records, land boards are faced with numerous speculative applications and are unable to control land hoarding. The efficient administration of state land by the Department of Lands is dependent on ready access to land board records. Without such access, applications for state land cannot be evaluated fairly, as rural land holdings cannot be taken into account.

Records should to be in such a form as to facilitate the use of land and property as security for credit, and to support the development of an open market through enabling registration of title.

2.6.3 Policy principles and choices

The land allocation process should be equitable, unbiased and transparent – based on government policies regarding the amount and type of tribal and state land that should be

allocated. It should have regard to the need for control of hoarding and speculation through accumulation to the disadvantage of others. It should ensure that land allocated is developed and brought into beneficial use, and is thereafter well managed. Registered title to rural land should be an attractive option. It should be cost effective and take into account people's rural land values and respect for traditional ways of land occupation and use.

- An early objective should be to extend TLIMS and quickly build up the critical mass of information to achieve a return on investment, focusing on concentration of use, high market value and problem areas. Information should be shared between land boards, and between land boards and urban authorities. The capture of land information and maintenance of the data base should be an integral part of the work processes.
- Digital maps should be developed at appropriate scales for 'urban' villages, other locations such as areas targeted for commercial arable development, DTRP planning areas, etc.
- Introduce a "land object" based registration system in rural areas; examples of legal objects include parcels of land in individual occupation, subject to access rights, administrative units and natural features.

2.7 Access to land by non-citizens

2.7.1 Background

Many countries restrict the opportunities for non-citizens to own land. There are either outright restrictions – no non-citizen may own land – or limitations on ownership. Ministerial permission must be obtained; or a limitation is imposed on the amount, the whereabouts or the use of the land; or a limitation is imposed on the nature of the right which may be obtained; for instance only leasehold of a specified duration may be permitted. Any restrictions that do exist usually apply also to corporate bodies, partnerships and cooperatives etc., the majority of whose members or shareholders are non-citizens.

The Land Control Act (LCA) provides for the regulation of foreign ownership of land via the Ministerial permission approach: no dealing in agricultural land (land other than tribal land or land within a township) where the person acquiring the interest in the land is a non-citizen is valid without a Ministerial consent.⁶ Companies where the majority of the shares are owned by non-citizens are similarly constrained. The proposed sale and the agreed price for the land must be advertised. The Minister must have regard to criteria set out in s.7 of the Act in determining whether to grant a consent: these relate to economic development and productivity of the land; standards of good husbandry; any objections

⁶ The Land Control Act covers outright transfers recorded at the Deeds Registry. Transfers of shares in property owning companies to non-citizens are not recorded at Deeds. This is what causes a "blur" in property ownership and transfer information, and should be addressed by legislation.

made by any person and in particular whether a citizen might wish to enter into the transaction; and whether the person in question already has sufficient agricultural land. The Minister's decision is final and shall not be questioned in any court.

2.7.2 Related land policy issues

The deleterious social and economic effects of past foreign owned land on many countries in Africa provide ample justification for countries to regulate foreign ownership and occupation of land, especially agricultural land. On the other hand, a regulatory system which operates in an inefficient and discriminatory way – some non-citizens seem to get a better deal than others – will likely deter the foreign investment which many countries are seeking to develop their economies and which is one of the key elements of NEPAD. A further factor that needs to be taken into account is the US African Growth and Opportunity Act (AGOA) that extends trade benefits to African states that fulfil certain criteria with respect to providing a level playing field for foreign investors. It may be argued that to have in place a legal regime governing access to land that applies only to non-citizens infringes the principles of AGOA. Against this, it may be argued that the LCA is just one of a number of regulatory barriers to land transfers in Botswana; non-citizens are not being specially picked out.

Aside from agricultural land, access by non-citizens to land is relatively free of regulation. FPSGs may be acquired from citizens on the free market: this is giving rise to concern where it is argued that non-citizen activity in the market is driving up the price of land. With respect to tribal land, the transfer of an interest in tribal land is subject to the consent of the relevant land board and, with some limited exceptions, this applies to all transfers.

Where arguably less favourable rules apply to non-citizens is in relation to refusals of consent under the LCA. Refusals of consent to transfer interests under the TLA may be appealed to the Land Tribunal while no appeal lies from a Ministerial refusal under the LCA.

2.7.3 Policy principles and choices

Two fundamental principles of equity and efficiency in land markets may be seen to be in conflict here.

Equity stresses the perfectly proper social goal of developing a land policy that gives priority to the land needs of all citizens in rural and urban areas. Efficiency stresses the importance of a land market which facilitates the movement of land via market processes to those who can put the land to its highest and best use: if that means non-citizens acquiring land, so be it: it will be for the greater economic good of the whole country.

Insofar as policies and practices do discriminate, they appear to discriminate in favour of citizen purchasers of agricultural land (who can object to non-citizen would-be purchasers) and against citizen purchasers of urban land who cannot stop non-citizen purchasers of FPSGs. This infringes the principle of equity yet there is no evidence that it is advancing the principle of efficiency.

Similar principles and policies should apply to urban and agricultural land. The LCA should apply to urban land. Criteria for the grant or refusal of consent to transfer FPSGs appropriate to urban land should be developed taking as the starting point s.7 of the LCA. It might be appropriate to require a prior residency qualification in Botswana or even in the local authority area where one wishes to obtain an FPSG as being one criterion: this would help prevent absentee landlordism and fronting for non-citizens. The LCA should be amended to provide for appeals from the Minister's decision on an application for consent to a Land Tribunal. Land boards should apply s.7 LCA criteria to consent for transfers of land to non-citizens under s.38 TLA.

3 Urban land management issues

3.1 Introduction

Although traditional villages in Botswana, notably chiefs' capitals, were called towns by early European explorers, towns and cities as we know them today are a colonial and post-colonial phenomenon. Francistown and Lobatse were the only towns established during the colonial days while Gaborone was established on the eve of independence as a new administrative capital. Five more towns (Selibe-Phikwe, Jwaneng, Orapa and Sowa) have been established since independence. All the five post-colonial towns are mining centres.⁷

3.1.1 Rapid urbanisation

At the time of independence only 4% of Botswana's population lived in urban areas. However, the proportion has since increased rapidly to almost 10% in 1971, 18% in 1981 and 46% in 1991. The rapid urbanisation has been due to population migration from rural to urban areas in search of cash employment and a better quality of life as well as in-situ urbanisation of rural settlements. Due to the emergence of urban type employment and work opportunities in rural areas, some villages have turned into urban centres. Villages close to cities have become 'dormitory towns' for people working in Gaborone, Francistown or Selibe-Phikwe. According to census results, two villages - Tlokweng and Palapye - had become urbanised by 1981. The number of urbanised villages had increased to 17 by 1991. The 2001 census shows that the villages of Gumare, Kopong, Lerala, Letlhakeng, Maitengwe, Otse and Tsabong may have attained urban status.

The Government of Botswana has responded to the rapid urbanisation process and the earlier bias of investment to towns (notably Gaborone) by decentralising government operations and introducing the National Settlement Policy (NSP). In order to achieve spatially balanced development across the whole country, four towns and eight villages were designated as 'Primary centres'. According to the policy, the centres sought to provide a base for industrial and commercial development through the delivery of serviced land, housing and social infrastructure to accommodate investors and workers.

Despite government's concerted efforts, rural populations have continued to migrate to towns or villages close to major towns. According to the 1981 census, half of the country's population lived within a radius of 200 km from Gaborone. This radius had been reduced to 100 km by 1991. Results from the 2001 census indicate that urban villages close to Gaborone (Mogoditshane, Metsimothlabe, Tlokweng, Gabane and Mmopane) were among the fastest growing settlements in the country while the national population growth rate was declining.

Although urbanisation generally improves the quality of life through better paid employment, housing and infrastructure services, the pace at which it has happened in

⁷ The reference to towns refers to urbanised areas in demographic terms. Francistown and Lobatse were the only towns established in the colonial days, which were demographically urbanised. Ghanzi and Kasane were proclaimed as townships in 1961 but were tiny administrative and trading settlements at the time of Independence.

Botswana has caused several problems, e.g. expansion of cities, towns and village settlements onto scarce arable land; degradation of land in the outskirts of towns and large villages through the indiscriminate disposal of waste and quarrying activities; and land use conflicts. Two of the major problems have been unauthorised change of land uses and housing development on unserviced land. Owners of ploughing fields and some freehold farms have tended to subdivide and sell land without seeking permission from the land boards and local authorities responsible. Land boards, with central government support, have exerted their authority through demolition of unauthorised developments. Some of the 'illegal' developers have challenged the authority and actions of land boards and the government in court. It seems customary land rights holders are unhappy with compensation offered by the government when fields are repossessed for urban developments.

3.1.2 The way forward

Future policies need to take cognisance of people's desire to benefit equally from increases in land values as a result of the urbanisation process. They may have been allocated the land for free, but their rights and commitments to those pieces of land are real. At the same time, demolition causes many social, economic and political costs to those involved - including field owners, land boards, local authorities and the central government. It is in the light of these considerations that some form of collaborative and partnership arrangements are hereby proposed. Under the proposed partnership, the government will save money that it would otherwise have paid out in the form of compensation; revenues of land boards will increase through the receipts of development gains fees; owners of ploughing fields will be empowered; and land will be properly serviced before allocation or transfer.

3.2 Regularisation of peri-urban settlements

3.2.1 Background

Towns and cities grow through lateral and vertical expansion and through socio-economic and cultural transformation.

Vertical expansion is often preceded by land use changes in city centres followed by increased building densities and intensification of activities. Lateral expansion results from land use activities that were previously located in city centres and those that fail to bid for central locations relocating on city fringes.

Socio-economic and cultural transformation accompanies lateral physical expansion as the inhabitants of the rural hinterland switch from farming and other primary production activities to manufacturing, commerce, service provision and become urbanised.

Urbanisation in Botswana has followed this trend. The growth of peri-urban settlement is not peculiar to this country. The challenge is how to cope as more peri-urban areas and traditional villages become urbanised. Already about 17 villages have attained urban status. The latest census shows that another 7 villages have also met the criteria for re-classification.

3.2.2 Related land policy issues

The lateral growth of existing towns and cities has resulted in uncontrolled peri-urban settlements and in-situ urbanisation of villages:

- One major problem is how to regularise peri-urban settlements and large villages that have tended to urbanise rapidly with neither proper guidance nor planning. At present the settlements are characterised by land use conflicts, lack of basic infrastructure services, unauthorised land subdivisions and transfers.
- Some agricultural freehold land around Gaborone is also being sub-divided for non-agricultural uses (notably housing) without approved plans or infrastructure services.
- At the same time, the declaration of planning areas on tribal land under the Town and Country Planning Act has caused tension between land boards and district councils.

The above problems underline the need to establish a land development policy that will:

- arrest unplanned peri-urban developments and land use changes;
- facilitate the provision of water, roads, electricity and other services with minimal disturbances to residents;
- not disadvantage existing land rights holders but facilitate an open, just and transparent land market;
- enable owners of agricultural fields in peri-urban areas legally to sub-divide, service and dispose of their land rights;
- Be pro-active, plan well ahead and deliver just in time to meet demand.

3.2.3 Policy principles and choices

Three guiding policy principles are suggested: (i) land use planning should precede development; (ii) all citizens should benefit and be empowered equally from land developments and (iii) regularisation of land rights should be just, equitable, transparent and efficient in order to avoid non-compliance practices, unnecessary demolition of 'illegal' developments, and protracted legal challenges between field owners, land boards and the government. These require:

- Developing a working partnership between landholders (including customary land rights holders), district councils and land boards in order to realise full potential of partly developed land without compromising national, local, institutional and rights holders' interests.
- Granting customary land rights holders the choice to apply to respective land board and council - individually or as a group -for a planning permit for a change of use and subdivision of their holdings.

- Applicants pay prescribed fees to their responsible land board and satisfy all provisions of the TC&P Act and other relevant regulations including approval from the council.
- All plots be serviced according to operative urban development standards before disposal.
- Land boards consult with rights holders, if any, in the early stages of the planning and land regularisation process.

3.3 Land use planning framework for Gaborone and other urban centres

3.3.1 Background

From a modest government camp and trading post during the colonial era, Gaborone has grown, contrary to its envisaged size by its early planners, into a large city. By nature of its location, Gaborone is sandwiched between tribal land areas (due east and west) and freehold land (on the north and south). Any lateral expansion of the city has tended to either encroach on villages on tribal land or spread over agricultural land. For the purpose of land use planning, the city's boundaries have regularly been extended to incorporate freehold hold areas and settlements on tribal land.

Gaborone and outlying villages continue to be the destination for internal migration. While in 1981 about 50% of the national population lived within a radius of 200 km from Gaborone, in 1991 50% lived within a radius of 100 km from Gaborone. It is thus justified to consider Greater Gaborone as a conurbation extending beyond the city boundaries to include numerous small and large villages within a radius of 50-100 km from Gaborone. Many people commute daily for work, shopping etc. from these villages to Gaborone and vice versa.

Greater Gaborone may be seen as being composed of a number of settlements falling under five administrative districts - Kgatleng, Kweneng, Southern, South-East and Gaborone). It also covers three land tenure systems.

3.3.2 Related land policy issues

A number of problems arise out of the location and land tenure systems in and around Gaborone:

- At present, Greater Gaborone Planning Area covers 3 administrative districts - Gaborone City Council plus Kweneng and South East district councils; and several land categories of land owners - Gaborone City Council; the Government (Lands Department and several other departments, parastatals and ministries); Malete, Batlokwa and Bakwena land boards; and private freehold land owners of which the Catholic Mission, Phakalane Estates, Setidisho Holdings and Happy Acres

(Proprietary) are notable.⁸ These juridical land owners have varying and sometimes conflicting interests, plans and programmes as to how and when to develop their land.

- Providing land for public utilities (e.g. solid waste disposal sites and sewerage treatment plants) has been particularly problematic.
- State land under COR, government ministries and departments, and the city council is not responding to land use dynamics - including pressure for land use changes, conversions, change of ownership and increasing building density.

3.3.3 Policy principles and choices

The major concern here is to provide for an institutional framework that will facilitate the planning and design, construction and maintenance of urban infrastructure.

- The ideal situation would be a single administrative and planning authority with an efficient, robust, and just land market – i.e. creating a Greater Gaborone Metropolitan Council. This is, however, likely to be resisted by interests that would fear loss of identity and political influence.
- Another possibility is to establish a consultative Planning Council with all the named authorities as equal partners. This is however likely to provide less than total commitment by those unhappy with some decisions. The consultative council will, therefore, have to operate by consensus. This is what is loosely on the ground already.
- The more practical approach would be to establish a legally constituted Metropolitan Council charged only with matters of common interest e.g. public rail and bus transport, road and other infrastructure networks, sanitation and waste disposal sites. The metropolitan council would have a budget and capacity to implement projects within its portfolio. Existing local planning authorities would continue working within their jurisdiction.
- The issues arising from the growth of Gaborone are likely to arise in other urban areas, as they continue to grow and expand. To some extent, this is already happening with Francistown, where Shashe/Tonota and other villages are becoming part of the urban area. The integrated planning policy adopted for Gaborone should be applicable in broad terms to other urbanising settlements.

⁸ There are of course other notable holdings of freehold land, these include: Brink Holdings, Mokolodi, Gaborone North, Notwane, Ruretse, Galetshoge and Lion Park (Kannemeyer).

4. Rural land management issues

4.1 Introduction

Most land in Botswana is rural and supports the 47% of the population who reside in the rural areas. A significant proportion of the 53% of the population who live in urban areas derive important benefits from rural land use and many have land rights in the rural areas.

Economically and socially important rural land-uses include the following:

- **Pastoral farming**, this can be conducted on communal, leasehold or freehold land. The owners of larger herds have a primarily commercial orientation whichever tenure category they occupy;
- **Arable farming**, mostly conducted on communal land, often in conjunction with pastoral farming in the traditional agro-pastoral farming system. Productivity and returns to land, capital and labour have been declining for many years;
- **Intensive production** of poultry, milk and vegetables on relatively small areas of land near towns;
- **Gathering** of fuel, poles, wild fruits, thatching grass, etc.;
- **Hunting** whether for subsistence, recreation or for commercial purposes as part of tourism (below);
- **Tourism** mostly catering for foreign visitors but domestic tourism is becoming more important.

All these rural land uses and economic activities have evolved in response to environmental conditions and economic circumstances (as modified by government policy). A fundamental goal of policy review should be to promote social equity and human welfare and to minimise economic inefficiency.

As society and the economy change, it may be necessary for Government to alter the rules governing access to land for these activities. Rural land use remains vital for the economic well being of a large proportion of Botswana's citizens.

The currently predominant production system based on communal land use and tenure supports large numbers of people in the rural areas for whom there are no viable economic alternatives. It also provides a form of social security in that people hold on to rural land, even if they are not using it, in the knowledge that they can obtain subsistence from it if their present livelihood strategy should fail.

The communal system as it now operates is based upon the traditional subsistence farming system as modified by a century and a half of exposure to outside influences and the regional cash economy. The livestock industry on communal land is based on the

traditional cattle post system and is both economically and biologically efficient and productive. It makes effective use of a variable environment by mitigating the negative aspects of an unreliable climate as well as exploiting low land costs to maximise Botswana's comparative advantage. As a result, Botswana is one of the world's lowest cost producers of beef.

Concern has been expressed in Botswana for over 40 years at what is perceived in certain quarters to be the over utilization of pasture resources in the communal grazing areas leading to 'degradation'⁹. There is, however, disagreement about what constitutes degradation, and there is a growing body of scientific evidence that a wide variety of stocking rates are in fact sustainable in savanna rangelands. While changes in vegetation are apparent as a result of increased grazing pressure, such changes do not necessarily constitute degradation. During the wet season, vegetation production exceeds consumption by herbivores, while in the dry season the vegetation is much less prone to damage. The length and severity of dry seasons and droughts prevent herbivore numbers from building up to a level at which they might challenge vegetation in the growing season. There are a variety of both economic and biological feedback mechanisms that contribute to this outcome.

Nevertheless, bush encroachment by Moselesele (*Dichrostachys cinerea*) and Mongana (*Acacia mellifera*) has become a major problem for pastoralists in some Low Tree and Shrub Savanna rangelands in Botswana, one that is costly to reverse in the short term. In addition, grazing by domestic livestock at moderate to high intensity leads to a reduction in the availability of important food plant resources for hunter-gatherer communities.

Management of communal resources is an outstanding unresolved issue with communities who have lost their rights to manage these resources to distant and largely unaccountable institutions which have not addressed the issues adequately.

Arable farming has proved less able to cope with the variable physical environment in Botswana and competition within the SACU from farmers in South Africa who have benefited from a more favourable physical environment and a long history of subsidy and infrastructural support from the South African Government. As a result, output from arable agriculture has stagnated although the amount of land allocated as fields and cleared has increased. This has led to a long decline in yields and returns to labour and capital invested. Large numbers of poorer rural households have dropped out of agricultural production altogether, although many retain a holding of arable land.

Attempts to modify agricultural systems are usually costly and slow and frequently have unplanned consequences. In the livestock sector, Botswana has introduced a policy of privatisation of rangeland as ranches, initially of land that was not used communally, under the TGLP. Since 1991, under the Fencing Component of the New Agricultural Policy, communal land is to be privatised. The available evidence suggests that privatisation has neither resulted in productive investments, nor superior land

⁹ A decline in the rate at which land yields livestock products under a given system of management which cannot be reversed within a reasonable time or at a reasonable cost.

management, with ranches being managed in the same way as cattle posts. These privatised ranches have higher intermediate costs than the communal system and frequently have lower outputs and are thus less economically efficient.

It is noteworthy that no Cost/Benefit Analysis or Strategic Environmental Impact Assessment has been undertaken for the Fencing Component of the New Agricultural Policy of 1991.

Privatisation of rangeland has high costs in other areas of the economy. People were displaced under the TGLP and will again be displaced under the Fencing Component. Government has spent large sums of money accommodating displaced people under the RADP. Rural dispossession, with increasing numbers of people owning no livestock and abandoning arable agriculture and holding no land is fuelling an accelerating rural to urban migration that has very high costs to government. These involve the provision of housing, services and welfare support to destitute migrants for whom no alternative economic opportunities are available in the present state of development of the economy.

In Ghanzi District, where privatisation and commercialisation of rangeland has been more extensive than elsewhere, 30% of the district's population now live in Ghanzi Township. Since 1991, at least 35% of the population of the Ghanzi Farms have migrated to the township as a result of commercialisation and reduction in labour requirements. Of the township's population of 10,200 persons in 2002, about half live on unsurveyed plots with a low level of services and 20% are squatters living in squalid conditions. There is a high incidence of unemployment and poverty in Ghanzi Township with all their attendant social ills.¹⁰

The Government proposes to address the problems of the arable sector by encouraging the development of larger scale mechanized farms under NAMPAADD. It is proposed that the minimum size of farms should be 150 hectares but that within group farms of that size, the minimum size of individual holding should be 40 hectares. This will require change in the way that farmers get access to land and may require consolidation of holdings or leasing of existing fields.

There has been rapid growth in the production of poultry in Botswana over the past 20 years with producers varying in size from small, backyard operators to large industrial operators. The country is now approaching self-sufficiency in the sector. Growth in horticultural and dairy production has been slower, due to a less favourable physical environment and competition from lower cost producers in neighbouring countries.

Hunting has declined in economic importance due to the decline in wildlife populations, resulting from land use changes, and reductions in the quotas made available. The underlying demand for hunting opportunities is still large. Gathering of a wide variety of veld products remains economically important, particularly for poorer households. Fuel wood remains the most important source of domestic energy although other fuels are increasing in relative importance.

¹⁰ See *Ghanzi Township Development Plan*, Ove Arup and Partners for DTRP (in press).

Tourism is the major growth activity within the rural sector. Returns to the national economy from tourism now exceed those from agriculture and the industry continues to expand rapidly. It is now the third largest source of foreign exchange earnings.

The eight topics in Section 4 of this report focus on the traditional land rights in rural areas and then examine the outstanding issues that are coming to the fore as the economy grows and develops. The terms of reference for the Land Policy Review require the Consultant to address the following rural land management issues arising from the growth in the human and livestock population and the expansion of the economy:

- To assess the impact of the dual grazing system in communal areas and recommend solutions;
- The need to enable TGLP ranch holders to diversify their activities beyond livestock production.
- The expansion of villages on to arable land has led to encroachment of lands onto grazing areas thereby reducing land available for both and pushing farmers onto marginal and unsuitable land.

To which is added:

- The need to accommodate commercial arable production under the National Master Plan for Arable Agricultural and Dairy Development.

Failure to tackle these land-use and management issues will allow the relatively few problems in the land use system to restrict economic growth and to impose costs in other areas of the economy; e.g. the landless and jobless poor moving into shacks in the towns; slower growth in the tourism industry and continuing decline in wildlife populations and biodiversity.

4.2 Rural property rights

4.2.1 Background

Most occupied land in rural areas is held under tribal or customary tenure. There are still a small number of communities occupying state land in Ngamiland and northern Central District in accordance with customary rules.

Under the traditional Setswana system, a person is entitled to sufficient land to meet his needs for a residence (*motse*) in his village, for arable farming (*tshimo*) and for a cattle post (*moraka*) to keep his cattle in the communal grazing area. These rights are permanent and heritable, although ploughing fields are accessible for communal use outside the ploughing season. These rights can be lost if left unused for some time. Some minority communities have different rules.

People also had the following common rights:

- to draw water from any natural water source, e.g. spring, river, rain water pool, pan etc.,
- to gather wood fuel, as well as timber, soil and cow-dung for construction from anywhere in the unalienated communal land.
- to hunt wild animals and gather wild foods anywhere in the unalienated communal land subject to such rules as the chief might make about which animals might be hunted and where.

Rights to artificial water sources, wells, boreholes, dams etc. are private and may only be used with the consent of the owner. Where such assets were created communally, members of that community share the private rights.

4.2.2 Related land policy issues

These traditional systems of land rights were well adapted to the traditional subsistence life style of the people in the past. They are not necessarily suitable for life in a modern cash economy.

Shortage of labour has compelled many households in eastern Botswana to concentrate their lives on a single home, often at their *tshimo* where they reside permanently and keep their livestock. Poorer households, which have insufficient assets to farm effectively, may resort to keeping a few chickens and goats and possibly cultivate a garden in the village. Wealthier households may focus on their cattle post and develop *mashimo* there.

Near the larger urban villages and urban areas there is considerable potential for people to establish enterprises such as chicken farming, market gardening etc. which require the proprietor to live on the spot. Many households in settlements operate small businesses (called *dimausu*) that are not permitted to be located within their residential compounds. The prescribed system of land tenure does not accommodate such developments.

The interpretation of customary law by the land boards seems to have accommodated the Kalanga pattern of living in small settlements, in which *motes*, *tshimo* and *moraka* are combined for each household, reasonably well. It has not recognized the needs and rights of the Basarwa communities who have lost their band territories, in which non-members who wished to hunt and gather within the band territory had to obtain permission from the resident band, to the grazing needs of the larger cattle owners.

4.2.3 Policy principles and choices

To date in Botswana, changes in land tenure and the content of rights have been incremental rather than revolutionary.

Greater flexibility in the allocation of rights to use land would enhance the ability of rural households to diversify their domestic economy in response to the rapid economic

changes now taking place in society. This flexibility does not require a change in the law but could be achieved by administrative action.

The Draft Revised Policy on Rural Development proposes that:

- people should be permitted to lease out residential and arable land held under customary grant or common law lease,
- that people should be able to use a single parcel of land for multiple uses.

In addition, arrangements such as sharecropping and share farming should be encouraged

Greater flexibility in the interpretation of the customary land law in respect of minority groups would assist them to retain their rights and use them to generate livelihoods.

It may be desirable to allow land occupied by minority communities to be included in a separate sub-land board territory to be administered by a sub-land board composed primarily of members of that community.

4.3 Conversion of arable land to other uses

4.3.1 Background

The debate about the conversion of arable land to other uses arises from the belief that government should regulate land use. A free market in land among private owners is not able to give expression to the value of land to society as a whole. It fails to allocate land among competing users in an environmentally sustainable manner.

The problem arises from two fundamental characteristics of land. First the supply is fixed and in this respect it differs from other factors of production – labour and capital. Fertile agricultural land tends to be in great demand for non-agricultural uses. Although science has led to increasingly higher production of food per head of population and per unit of land, there is widespread demand in Botswana for the protection of prime agricultural land. The National Settlement Policy discourages change of use from arable to residential, commercial or industrial use.

Most developed economies resolve these land use conflicts by designating areas of significant agricultural potential for that use, but with the proviso that decisions on planning applications for the conversion of agricultural land can be reviewed. This is because the most economical and sustainable use of the land could be for an airport, an industrial concern or a tourism development. In such situations an EIA is prepared in the course of which planners consult all the stakeholders and advise the appropriate decision making body.

4.3.2 Related land policy issues

In many parts of Botswana there is now perceived to be an overall shortage of well-located land for development. The National Land Settlement Strategy requires that urban expansion should not encroach on agricultural land. The Ministry of Agriculture are

currently making an inventory of the whole country with a view to identifying and gazetting all land suitable for crop production.

Most settlements were originally located close to fertile soils and water. As settlements have grown, demand for additional land for residential and other uses has led to encroachment into developed arable land. Well-located arable land near urban settlements is the subject of speculative extra-legal marketing.

Although the economy as a whole is growing rapidly, many households lack the resources and skills needed to take advantage of rapid economic growth. Such households need to retain their arable land in order to remain self sustaining and productive. There may not be suitable land available as an alternative within reach of peoples homes to enable them to surrender fields now needed for development and transfer their production elsewhere.

There are areas of land suitable for cultivation that are currently used for grazing. They are often not well located in relation to water, physical infrastructure or where people now live. Grazing is also at a premium in many parts of Botswana and pastoralists may not be content to see arable use encroaching into 'their' grazing area.

4.3.3 Policy principles and choices

The National Land Policy should encourage the sustainable use of land and the conservation of natural resources.

The legal framework of the Town and Country Planning Act, which governs the zoning of land and prevents unauthorised change of use in planning areas, could provide an adequate basis for the protection of high potential arable land. These zoning regulations should be based on national norms monitored and enforced at national and district level by the appropriate government structures.

Depending on their scale, proposed changes in land use usually require sanctioning at different levels of government. Within planning areas, unless planning permission is obtained, land subdivisions cannot be registered in the land registry. Even where land subdivision may not be required, building construction has to be cleared with the local authority.

Change of land use leads to large gains in economic value. Present policy is that the land board or the new allocatee should capture these. Denying a share of these gains to the former holders limits their ability to adapt to change. As a result, the holders often prefer to sell their rights in the land in the extra-legal land market or to hold on to their land and not permit change of use. Allowing holders to capture some of these gains would encourage them to part with their land and permit change of use.

4.4 Communal grazing

4.4.1 Background

About 47% of Botswana is used for communal grazing. Beef, most of which is produced, at least in part, from this land, is the third most valuable export and the second largest source of income to the rural economy.

Concern has been expressed at what is perceived to be the over-utilization of communal grazing areas leading to 'degradation'. Stockowners are believed to be over exploiting communal grazing because, while individuals receive the benefits, the costs are shared. However, there are linked biological and economic feedback mechanisms, which protect the rangeland from over-exploitation.

There is a growing body of evidence that a wide variety of stocking rates are sustainable in savannah rangelands. While changes in vegetation are apparent as a result of increased grazing pressure, such changes don't necessarily lead to a long-term productivity loss.

Part of the alarm over overstocking and degradation of communal grazing land arises from the assumption that economically profitable stocking rates for commercial ranchers are the ones that are biologically sustainable and that communal farmers' stocking rates are not.

For a variety of reasons, communal farmers are able profitably to sustain higher stocking rates than commercial beef ranchers. The communal stockowners maximize returns per unit area rather than per beast.

4.4.2 Related land policy issues

Wealthy livestock owners, who are often influential are engaged in commercial production and resent competition from the large numbers of poor people exercising their communal rights. They perceive communal grazing as a problem leading to over-use of the rangeland.

However, most Botswana farmers, particularly those within the traditional farming sector, view the issue rather differently. They see a shortage of rain, leading to a shortage of fodder, and lack of water sources as the main problem. The communal areas also provide building poles and fuel and other vital products on which rural households depend.

The communal system enables the land to support many more people than could be supported by any of the alternatives. At present, there are no livelihood alternatives available for the majority of the people who would be displaced if the communal system were to be abandoned.

While the statements about degradation and overstocking may be exaggerated, the sustainable management of communal range resources is not without its problems:

- Decision-making powers over the management of communal grazing have passed from local tribal leaders and local stockowners to officials in distant bureaucracies.
- Commercial farmers and subsistence farmers compete for scarce water and pasture.
- Straying animals cause damage to crops.
- Livestock are lost to predators, straying and theft.
- It is also becoming increasingly difficult to employ reliable herd boys.
- Grazing by domestic livestock at moderate to high intensity leads to a reduction in the availability of food plant resources for hunter-gatherer communities.

4.4.3 Policy principles and choices

An overarching principle must be that all citizens should have the opportunity beneficially to occupy and use the land. The legal and administrative framework must provide for equitable and sustainable use of the land. In the present circumstances, the further privatisation and enclosure of common land will have damaging and costly social and economic effects. Enclosure has already taken place at a pace too rapid for the welfare of many rural people. However, it is imperative that the communal area should be better managed, which requires that communal rights are made more secure.

- Any attempt to secure communal grazing rights must be informed by a clear understanding of the reality of pastoral land use. Rural communities must be effectively involved in decisions that have a direct bearing on their livelihoods.
- Securing communal grazing rights entails giving legal recognition to the existence and validity of community-based property rights. These are rights that derive their authority from the community in which they are practised and realized. This is an essential pre-condition for the realization of participatory development.

The over-centralization of communal area management has undermined local institutions and the organic evolution of customary land law in accordance with changing land availability and local needs. The process should be reversed to place resource management in the hands of resource users. How this might be achieved through the modification of the current institutional framework needs to be discussed.

4.5 Dual grazing rights

4.5.1 Background

TGLP had two broad objectives:

- to ensure grazing control, better management and increased productivity through fencing;

- to safeguard the interests of small owners of livestock and those who own no livestock, and the right of every tribesman to have as much land as he needed to sustain himself.

The assumptions underlying the TGLP were:

- that the old system of grazing had led to lower productivity due to land degradation;
- that the old system only favoured the rich and had no room for improvement;
- that simple management techniques could double productivity;
- that giving individuals or groups private rights would help them to secure loans and invest;
- that communal area stocking rates would be reduced by moving big farmers to ranches;
- that farmers would be compelled to adhere to compulsory stocking rates;
- that large empty areas of grazing existed and that some could be reserved for the future;
- that legislation and sanctions would be enforced.

TGLP provided large farmers with a chance to acquire exclusive grazing rights and increase their income, but it worsened the lot of the poor. A comparison of production between TGLP ranches and large cattle posts does not point to any increased production or employment. TGLP did not relieve pressure on grazing in communal areas. It provided a temporary stopgap whilst cattle were still building up in ranches during years with good rainfall. When drought came overstocking in farms spilled back into Communal Areas.

4.5.2 Related land policy issues

It is now acknowledged that the great majority of the TGLP ranches have been used as extensions of the communal area and as no more than enclosed cattle posts. The assumption that communal areas could be converted into commercial farms by simply fencing them has not been shown to be correct.

There is a view that fencing induces a realisation of finite grazing resources and hence of the necessity to adjust stock numbers to forage reserves. On the contrary, occupation of fenced ranches in Botswana has often encouraged stocking rates far higher than those normal for communal areas. When this causes the rapid depletion of the grazing on the ranch, the owners drive their cattle back onto the communal range. The protests of small farmers on the communal areas and occasionally of officials have made no impression on this practice.

During drought, commercial farmers normally de-stock by reducing their herd to a breeding nucleus. Communal area farmers tend not to do this, for a variety of reasons that make sense under their conditions. The mere enclosure of communal areas does not alter this strategy.

Government has made frequent policy pronouncements about the abolition of dual grazing rights. The Review of the Tribal Land Act, 1989, went so far as to propose that government should legislate against dual grazing rights. In the event, this did not happen.

It is necessary to ask whether or not legislation would have the desired effect in the absence of profound changes in economic orientation, animal husbandry and even social and cultural life. To legislate against dual grazing would be to legislate against TGLP ranching.

4.5.3 Policy principles and choices

Legislation could perhaps require that persons wishing to move livestock from a fenced ranch to a communal area be required to obtain permission from the body responsible for that area's management. At present this will be the land board, but in future it might be a communal grazing committee.

The Draft Revised National Policy on Rural Development proposes that leases for fenced ranches should be allocated by tender or auction. This should ensure that successful applicants have an appropriately commercial approach.

The Draft Revised National Policy on Rural Development further proposes that rents for fenced ranches on tribal land should be charged at commercial rates. This would serve to compel inefficient farmers and speculators to review their management practices and tenure arrangements. Provision should be made to allow those who do not wish to continue as ranchers and pay a commercial rent to do one of the following:

- to surrender their lease and allow the land to revert to communal status. They should be required to remove the fences if they adopt this approach;
- to surrender the lease for re-allocation by the land board;
- to sell the lease.

4.6 Change of use of TGLP ranches

4.6.1 Background

Fencing of communal rangeland does not increase primary production of the grazing resource but it does increase costs. Unless farmers can find a way to enhance returns, farming in a fenced ranch is less profitable than farming on the communal open range.

The apparent enhanced profitability of fenced freehold farms is achieved by a cross subsidy in the pricing structure at the BMC which favours freehold producers of fatstock at the expense of communal area producers of leaner animals. Freehold farmers produce fatstock by reducing the stocking rate to sub-economic levels. The BMC price structure unfairly compensates them for this.

In economic terms, freehold and leasehold farms generate lower returns than the communal areas. Most TGLP ranch leaseholders are not able to reduce the stocking rate in their farms to freehold farm levels due to social pressures to accommodate more cattle.

4.6.2 Related land policy issues

The financial returns to investment in fenced ranches are low and the economic returns are close to nil.

Neither a proper socio-economic cost benefit analysis nor an environmental impact assessment of the fencing component of the New Agricultural Policy (1991) have been undertaken. As a result, the full extent of the social, economic and environmental costs and benefits of the policy and of alternative strategies are not known.

Some ranch holders would like to diversify land use in their ranches to include game farming and tourism related activities. In some districts, land boards have been reluctant to sanction such changes of use as they appear to conflict with the District Land Use Plan.

4.6.3 Policy principles and choices

Land should find its most profitable use.

- Holders of TGLP leases should be permitted to manage their farms profitably and not subjected to unnecessary restrictions.
- Land zoned for commercial use should be used in a commercial manner and leaseholders should be free to select the most appropriate manner of use for the land they hold.
- Subsidies, if given at all, should be designed to enhance economic returns rather than to enhance the financial returns of one class of producer at the expense of others.

4.7 Land for wildlife development

4.7.1 Background

Botswana has suffered a major decline in its wildlife resources over the past 30 years. Large tracts of land that were occupied by large and productive populations of wild animals in 1970 are now largely occupied by livestock and only contain relict populations of wild animals. The only region to avoid this outcome has been Northern Botswana where land use planning policy has prevented the loss of wildlife critical habitat.

In western Botswana, although large areas of land were set aside as Wildlife Management Areas, Game Reserves or National Parks, over 90% of wildlife biomass has been lost. This happened because land use planning policy permitted the erosion of core areas of critical habitat that, although small in area, were essential to the maintenance of viable wildlife populations over much larger areas.

In the eastern and central parts of Botswana, many large populations of wild animals had already been eliminated by change of land use before 1970. After 1970, land use planning policy made little attempt to prevent the loss of the remaining wildlife habitat to other land uses.

Large numbers of poorer people, including many minority communities have suffered substantial losses of subsistence income and, in the case of most of the minority communities affected, have seen their entire economic support system destroyed. A major opportunity to diversify both the rural and the national economy has also been lost.

4.7.2 Related land policy issues

Government has treated the wildlife sector very differently from the livestock sector in policy terms.

The livestock sector is privately owned but supported by a range of government services and subsidies including tax benefits. Individual producers are largely free to make their own management decisions with minimal interference from government.

On the other hand, the government claims ownership of the wildlife resource. Its use and management is subject to rigid central control. Those who wish to utilize the resource (who are producers in economic terms) are subject to numerous restrictions and are heavily taxed.

The introduction of CBNRM has not really changed the position as the communities' freedom of manoeuvre to make their own management and policy decisions is limited by the extent of government's involvement. For example, government centrally determines utilization quotas and licence fees.

Most CBNRM projects have limited their activities to commercial safari hunting and photographic tourism operators. Very little empowerment of communities to manage their natural resources or the associated business activities or the revenues generated has taken place.

In this policy framework it is not surprising that every community that was free to make the choice between wildlife and livestock production systems has chosen to adopt the latter.

4.7.3 Policy principles and choices

Appropriate policy principles to be introduced and followed might include:

- according competing land uses similar treatment in policy terms,
- extending more favourable treatment to desirable land uses which have been at an historic disadvantage,
- promoting the economic and social empowerment of all citizens, addressing the plight of the rural poor, etc.

- promoting sustainable use of land and the conservation of natural resources, and
- diversification of both the rural and the national economy.

4.8 Land for tourism development

4.8.1 Background

The Tourism Industry in Botswana has grown rapidly over the past 35 years. Tourism is now the third largest source of foreign exchange after minerals and earnings of interest on foreign exchange reserves. Tourism receipts exceed income from beef sales.

By the early 1990s, it had become clear that the system for allocating sites and concession areas was not generating adequate returns and was not using land or wildlife resources efficiently.

The number of Controlled Hunting Areas (CHAs) was increased substantially. CHAs in the Wildlife Management areas were classified into Commercial and Community areas, while CHAs in Communal Areas were classified into Community areas and Citizen Hunting (i.e. open access) areas. Within these categories, CHAs are divided into hunting areas, multiple use areas and photographic areas in which no hunting is allowed.

In commercial areas, concessions for CHAs and camp sites were let by competitive tender in which bidders had to prepare a management plan as well as make a financial offer. Concessions were awarded with the intention of distributing them fairly. Concessionaires get exclusive rights to commercial use of natural resources.

In community areas, communities were expected to enter head leases with the land boards and then to form partnerships through Joint Venture (JV) Agreements with commercial operators with the aim of enhancing returns to the communities as well as empowering them and their members.

4.8.2 Related land policy issues

The public perceives these changes as “handing over (our) land to foreign companies” and is upset by the behaviour of some concessionaires who attempt to exclude the public from exercising traditional rights, e.g. of travel, collecting veld foods, fishing etc for non commercial purposes. These concessionaires act as if they have the right to exclude the general public. Some members of the public engage in harvesting some natural resources such as grass, reeds and fish for sale. It is not entirely clear if this is a customary right.

Despite the intentions to distribute concessions widely, a concentration of effective control over concessions is taking place due to fronting at the application stage and subsequent acquisitions. One operator now controls 18 of the 57 camps in the Delta area and also has a significant proportion of the market in mobile safari operations. This operator is now acquiring monopoly power in the industry due to its large market share and will be able to reduce returns to the public revenue in the long term.

There is a lack of transparency concerning the terms and conditions of the leases, which are treated as confidential documents. Transfers of control over concessions, whether by purchase, through fronting or the letting of management contracts are not subject to scrutiny by the proper authorities or the public.

Few concessionaires are meeting the terms and conditions of their leases. These conditions are not being enforced and the proper authorities are not inspecting the concessions sufficiently often or thoroughly.

The JV Agreements with the communities are not leading to transfer of skills or to security for commercial operators.

4.8.3 Policy principles and choices

- The basic requirements of the land market should apply to land for tourism as other uses. Requirements include: wide availability of accurate information; rules and procedures which secure interests once land is obtained; a regulatory framework to ensure a level playing field for all participants; mechanisms to ensure an appropriate balance is maintained between the public and private interests.
- The development of monopoly power in the industry needs attention. Action might be needed to reduce the market share of the largest service provider.
- There is need to educate the public in their rights and responsibilities and to ensure that concessionaires neither assume rights to which they are not entitled nor neglect the duties assumed under their leases.
- The land boards and communities need to change their attitude and have a less adversarial approach to their concessionaires and JV partners. A good “Landlord and Tenant” relationship should be the aim, in which both parties see themselves as engaged in a common enterprise for mutual benefit. Good monitoring and a supportive attitude by the land board will materially assist the concessionaires and communities as tenants to manage their enterprises better and enhance the social and economic benefits to society. The time, manpower and money invested in the monitoring function should be commensurate with the high value of these leases to the land board.
- Longer concession periods might also contribute to resolution of these problems by encouraging more investment in infrastructure and in training and capacity building of community partners.

4.9 Management of land and natural resources

4.9.1 Background

Prior to the introduction of the TLA in 1970 there was a hierarchical and diffused system of land allocation and management in place. While overall authority rested with the Paramount Chief in Tribal Territories (or the District Commissioner in Crown Land

Districts)¹¹, Sub-Chiefs, Chiefs' Representatives, Headmen and Ward Heads all had delegated authority within their area of jurisdiction. Below them were the Land Overseers (a role often combined with that of Ward Head) who advised on who held what rights in their area and if there was a potential conflict with any application for new rights.

The land boards have replaced the Chiefs and their subordinates in the allocation process, although they still rely heavily on the Land Overseers to avoid conflicts between new allocations and existing rights.

The chief and his subordinates did not simply allocate land. In addition, in consultation with the leading members of the community, they planned its use and managed not only the land itself but also the natural resources derived from it, such as grazing, timber etc.

When the land boards supplanted the chiefs in 1970 the land boards did not take up this planning and management function although they were empowered to do so by the TLA. As a result, there is now a management vacuum at the community level.

4.9.2 Related land policy issues

The consequence of this management vacuum is that local communities now have no say in or control over the allocation of land within their area or the use of the natural resources derived from that land. Legal power over the allocation of land and the use of natural resources now resides with a number of bureaucratic institutions, all of which are distant from the community level and none of which are more than remotely accountable at the local level.

This represents a real loss of rights at the local level. The situation has been made worse for some communities, particularly in peri-urban areas, by the provisions of the 1993 amendments to the TLA, which gave all citizens equal rights on Tribal Land. As a result, the land boards lost the right to control the activities of non tribesmen in their areas. Communities in peri-urban areas in particular have seen a large influx of outsiders into their area to the extent that it is now becoming difficult for young people who originate in these areas to get land there. They want to acquire land and continue to live at home while they work in the nearby urban area. It is of no value to them that they have equal rights in Kgalagadi or Chobe.

There is also competition for essential resources, notably firewood and building sand, which are being depleted near urban centres. In the case of firewood, the problem is compounded by the fact that firewood is the obligate fuel of the urban poor as well as of their rural counterparts. Experience elsewhere shows that any attempt to control or limit harvesting near urban centres leads to large increases in price with damaging consequences for the livelihoods and health of the urban poor.

4.9.3 Policy principles and choices

The National Land Policy should encourage the further democratisation of the allocation and management of land and natural resources.

¹¹ After 1966, the Crown Land Districts became State Land Districts and remained so until tribalised.

Consideration should be given to involving local community-based institutions in the allocation and management of land and natural resources. The nature of the appropriate institution, the powers and rights to be given and the issues they should address all merit further detailed discussion with all stakeholders.

The Department of Wildlife and National Parks has pioneered the use of Community Based Natural Resource Management of Wildlife Resources as a mechanism to address these issues in the management of wildlife resources. Progress is being made although problems remain due to unresolved policy differences (see subsection 4.7).

The Ministry of Agriculture has made a start on introducing Community Based Natural Resource Management of some veld resources. In Ngamiland and Chobe, some communities that have obtained rights over wildlife resources are trying to extend community management to other renewable natural resources.

The Ministry of Agriculture and the Department of Wildlife and National Parks are currently reviewing policy on Community Based Natural Resource Management.

5 Land use planning

5.1 Introduction

5.1.1 Scope and Context

In the quest for development Botswana is characterised by many national, sub-national and local plans and planning institutions. At the top of the list are National Development Plans (NDPs) prepared by the Ministry of Finance and Development Planning. NDPs describe programmes and projects to be undertaken in various parts of the country over a period of six years. Besides showing government's financial budget, NDPs highlight government policies and identify roles to be played by various ministries, departments, local authorities and the private sector. Ministries, departments and other state organs prepare sector programmes, projects and budgets as inputs for the NDP.

Of late some ministries and departments have prepared national plans independent of the NDP. Such plans include the National Water Master Plan prepared by the Department of Water Affairs; the National Master Plan on Arable Agriculture and Dairy Development (NAMPAADD) prepared by the Ministry of Agriculture; and the National Settlement Policy (NSP) prepared by the Department of Town and Regional Planning (DTRP). DTRP intends to prepare a national physical development plan soon.

Sub-national level land use plans include integrated land use plans prepared by District Land Use Planning Units (DLUPU); and Regional Master Plans, District Settlement Strategies and Village/Town Development Plans prepared by the Department of Town and Regional Planning (DTRP). Other departments (e.g. Wildlife Management and Agriculture) have also prepared land utilisation plans. In addition, DLUPU as a co-ordinating committee (composed of staff from the district administration, central government, district council and land board) prepares District Development Plans as part of the National Development Plan. To date only DTRP prepares detailed land use plans at large scale (i.e. less than 1:5000).

5.1.2 Too many planning institutions and plans

The above discussion highlights a couple of issues that need to be addressed. First, while DTRP and DLUPU are mandated to prepare land use plans, other organs - especially land boards - do not consider themselves obliged to adhere to them. Land boards and other departments ignore DTRP and DLUPU plans. Land boards have allocated land to applicants without following any spatial plan, even where detailed plans exist. At present, sub-national level planning and implementation is uncoordinated and less effective than it could be.

Secondly, and as a result of the above, it seems that there is too much planning. One district, for example, may be covered by up to three land use plans - a district settlement strategy, a DLUPU land use plan, a wildlife management plan and a regional master plan. Furthermore, proposals for developing particular resources or specific pieces of land may either be contradictory, inconsistent or less than complementary at best.

Thirdly, despite decentralisation measures undertaken to date, land boards and local authorities continue to depend on central government personnel and financial grants for project implementation. Ministries and central government departments are involved in the preparation and implementation of local plans because it is apparently easier for them to secure funds than it is for local authorities.

Fourthly, personnel assigned to local authorities and land boards depend on the Ministry of Local Government for their career services and prospects and to respective line ministries on technical and policy matters. It is possible that this arrangement is adversely affecting planning and implementation capacities.

5.1.3 The way forward

Recommendations presented in the following sub-sections point to the need to

- streamline land use planning process;
- improve co-ordination;
- minimise overlaps between national and sub-national institutions; and
- promote co-operation between local authorities on issues of common interest.

The recommendations are based on three assumptions. First, separation of power is essential for good governance. It is, therefore, improper for any institution to prepare and approve its own plans. Checks and balances are critical for effective land use planning. Secondly, local authorities and land boards are better placed to appreciate community needs than central government departments. Thirdly, participation of community members in plan preparation and decision-making is essential for effective plan implementation.

5.2 Hierarchy of land use planning

5.2.1 Background

Land use planning institutions in Botswana comprise of a multiplicity of agencies characterised by three levels - national, sub-national and local/community levels.

- At the national level several ministries and departments (e.g. Department of Town and Regional Planning in the Ministry of Lands, Housing and Environment, Ministry of Local Government, Ministry of Agriculture, and the Ministry of Energy and Water Affairs) are involved in land use planning and/or implementation.
- At sub-national level institutions involved in land use planning and/or implementation include some line departments (e.g. Town and Regional Planning, District Administration - DLUPU, and Wildlife), land boards, city, town and district councils.
- Private sector plus weak local communities and non-governmental institutions are involved in land use planning at local levels.

Despite past calls for the need to decentralise finance and decision making powers, national and central government departments continue to dominate and undertake

activities (detailed layouts, development control etc.) that should ideally be carried out by sub-national and local agencies.

5.2.2 Related land policy issues

- Higher level institutions wield and exercise undue control and power on lower level agencies;
- Planning decisions and appeals are made based more on political considerations than professional merits;
- Lower level institutions are indecisive as they depend on higher levels for decision making - which causes delays even on simple issues;
- Sub-national agencies report to different ministries resulting in poor co-ordination and undue delays in the planning, servicing, delivery, and development of land;
- The multiplicity of agencies and their location in different ministries compounded by the top heavy structures has contributed to unsatisfactory vertical and horizontal communication - which, in turn, have contributed to long delays in land delivery and development processes as well as dispute resolution;

The persistence of the current hierarchical system begs a number of questions: are sub-national level human and other resources being fully utilised? Is there a lack of trust between national and lower level institutions? If yes, why? If not, then why the reluctance to delegate funds, activities etc. to lower levels? Are there power struggles between ministries, departments or agencies?

Is there too much planning and little implementation? To what extent do land boards, local authorities, other ministries consult each other and respect plans and decisions by DTRP and council planners? To what extent do local authorities and plan implementing agencies 'own' land use plans?

5.2.3 Policy principles and choices

In tune with the principles of good governance and, in particular, to enhance trust and accountability, there is need to:

- Accelerate the decentralisation of land use planning and related activities in order to foster efficiency, transparency and accountability.
- The Department of Town and Regional Planning should be primarily concerned with (i) national guidelines and land use planning policies; (ii) and serving as a secretariat for national land use planning matters including preparation of national physical plans.
- Cabinet should approve all national land use planning policies and plans on the advice of the Town and Country Planning Board (TCPB).

- The TCPB should approve all regional, village and other large-scale land use plans.
- District Councils should (i) prepare village structure or development plans for the approval of The TCPB; (ii) prepare local land use development guidelines, policies etc.; (iii) and approve detailed plans submitted by landowners. It is improper to make and approve own plans.
- Land boards, as land lords, should (i) prepare detailed land use plans for approval by council; (ii) assist customary land rights holders to obtain planning permit and approval from council; (iii) and keep proper land records on applications, allocations and transfers.
- An independent tribunal should determine disputes related to town and regional planning issues.

5.3 Land use planning processes and plans

5.3.1 Background

Land use planning processes and the type of plans prepared emphasise sector interests.

The Department of Town and Regional Planning in the Ministry of Lands, Housing and Environment prepares several physical plans. Besides preparing the National Settlement Policy (NSP) which covers the whole country, the department makes Regional Master Plans, District Settlement Strategies, Village/town/city Development Plans and detailed layout plans. It has proposals for a National Physical Development plan for implementing the NSP.

District Administrations, under the Ministry of Local Government, make District Land Use Plans.

Other departments make sector plans too - e.g. Wildlife Management Area plans. Several ministries (e.g. Ministry of Agriculture, and the Ministry of Energy and Water Affairs) have national sector master plans such as the National Water Master Plan and Arable Agriculture and Dairy Development plan.

5.3.2 Related land policy issues

- Sub-national plans (e.g. Regional Master plans and Greater Gaborone Development plan) cover several administrative districts which makes co-ordination and implementation difficult since there are no regional authorities to oversee or fund proposals made in such plans.
- Some areas (e.g. Gaborone and Chobe sub-district) are covered by several land use plans - it is not clear which plan takes precedence.

- There is no defined planning process. Should sector plans feed into physical plans or vice versa? Should national and regional plans provide frameworks for district plans or should local plans form a basis for regional and national plans?
- Despite the prevalence of many plans, proliferation of small settlements continues unabated especially along major highways and around large towns.

5.3.3 Policy principles and choices

Two overriding principles: Increased efficiency in the use of land and resources used in planning; and making of plans that are realistic, acceptable and possible to implement. Options available for achieving the above principles include:

- Declare the whole of Botswana a planning area. This will require preparing a land use plan for all land in the country. All construction works and change of use will require planning permission. Increasing the list of permitted developments would ease the logistical problems related to such a proposal.
- The second option is to declare planning regions for critical areas eg the 'hard veld' or '200m along highways', 'greater conurbation' and progressively increase critical areas until the entire country is covered.
- Introduce administrative regions as proposed in the NSP - an operational and consultative spatial unit between districts and the national level. Its role will be to address issues cutting across several districts but below national importance. Regional administration authorities will be required.
- Sector plans should follow land use plans - that is, land use plans should play a co-ordinating role and serve as a spatial expression of national, regional, district and sub-district or village plans.
- Sector plans should be prepared before land use plans while national and regional plans should be prepared before district and village plans.

6 Legal issues

6.1 Introduction

The context for this section of the report is the land market. Two perspectives impel this context. First, the irrefutable evidence that land markets exist in Botswana. That is the reality on the ground. As the figure on the next page illustrates, there are four land markets in Botswana and it is this reality which forms an important sub-text of this paper. First, there is the formal private sector land market where transactions take place in freehold land, FPSGs, common law leases, and to some extent, tribal land. Much but not all of this land is registered under the Deeds Registry Act (DRA) and involves the services of professionals and para-professionals— lawyers, surveyors, valuers and estate agents— to carry out the transaction or parts of it and may involve funding by banks and building societies.

Second, there is the state land ‘market’; that is, the disposal of interests in state land for a price (fee), decisions on whether to permit certain transactions in state and tribal land by state agencies, compulsory acquisition of land by the central government, whether from private individuals or from land boards; and the provision of loan guarantees and subsidies to certain actors in one or more of the other land markets.

Third, there is the informal market which in many respects simulates the formal sector land market: land is bought and sold, leased, sub-divided, developed and occupied using practices, documents and sometimes estate agents which are similar to the practices of the formal market. What is missing is the imprimatur of formal legality and any recordation of the title to or boundaries of the land or transactions in respect of the land. No formal funding agencies or programmes are involved in this market but unofficial savings and loans societies and groups may be involved.

Fourth, there is the customary market. This too is in a sense an informal market but also a hidden one. For instance, the allocation of a Customary Land Grant (CLG) although meant to be based on customary principles take place in the state market via decisions made by land boards so the formality of the land board decision hides the reality of the application of customary law. But once a CLG is allocated, any transactions with or dispositions of that interest may be in accordance with customary law, albeit not sanctioned by a land board so that it is both informal and customary. Dispositions arising out of the death of a holder of an interest in land under customary law may also be seen as both customary and informal: customary when disposition follows the accepted rules of customary law; informal when they do not.

THE UPPER CIRCUIT OF LAW

PRIVATE MARKETS

Dispositions of freehold, and FPSG – mortgages, leases, sale and assignment – and rights granted under TLA subject to compliance with s.38.

Survey and Registration via the SLA and the DRA

The rights and non-rights of married women subject to the marital power with respect to non-tribal land – MPPA, DRA

Decisions of general courts on land issues

COMMON LAW & STATUTES

THE STATE 'MARKET'

Allocation of state land via SLA: FPSG and COR; renewal of FPSG

Decisions on acquisition by non-citizens under LCA

Allocation of tribal land by LBs: CLG; common law leases under TLA

Compulsory acquisition of land via APA

Conversion of tribal land to state land under TLA

Decisions of general courts on land issues

LAW BASED DISCRETION

THE LOWER CIRCUIT OF LAW

THE INFORMAL MARKET

Buying, selling and renting on tribal land without reference to LB

Leasing, selling and subdividing undeveloped land held under a common law lease or a CLG contrary to s38 TLA

Transactions with land held through a COR

No secure tenure: no record of rights held or acquired

Non-recognition by courts

EXTRA LEGAL SYSTEM

THE CUSTOMARY 'MARKET'

The right of citizens to have access to a plot for a house, for ploughing and to graze stock on communal land

The rights and non-rights of citizens who are women occupying land and/ or married under customary law

Occupation and use of forest and wildlife land and use of products therein

Hunting and gathering

Decisions of courts on customary tenure issues

UNWRITTEN LAW

The figure uses the terms upper and lower circuit to classify the four markets. This refers to the nature of the legal regimes that govern these markets. The upper circuit markets of private market and state market use formal laws having nation wide application; the sale or lease or acquisition of an interest in land in the upper circuit land markets is the same in the North of the country as it is in the South; the same in urban as in rural areas. These laws are public knowledge in the sense that one can buy the primary sources of the law, statutes and law reports, and secondary sources, texts on the law that inform one of what the law is. One can consult a lawyer for information and advice on the law. With the lower circuit legal regimes, this is not the case. These are local laws and practices; customary laws differ from one part of the country to another; informal practices may not yet have reached the stage of crystallising into law – practices accepted as binding by the community within which they apply. There are no or very few written primary sources of customary law or informal law and fewer secondary sources. What the law is on any particular aspect of land tenure or transactions is not easy to discover and authoritative informants in the area might differ on the matter.

The second perspective of land markets is the many official statements and inquiries that recognise the reality of land markets and the need, indeed, the desirability of accepting this reality. The upper circuit is fully recognised and has been since the creation of Botswana more than a century ago; since independence, this circuit has been fully and freely open to all citizens and, subject to some fairly minimal restrictions, any foreigner. Official concern here focuses on the need to ensure that the market operates efficiently.

The lower circuit land markets are more problematic. There was a recognition of the informal market in the Report of the Presidential Commission of Inquiry into Land Problems in Mogoditshane and other Peri-Urban Villages (1991) and in follow-up action taken as a consequence of that report in the Government Paper No. 1 of 1992: Land Problems in Mogoditshane and other Peri-Urban Villages. Since then there has been some ambivalence about this market at least in peri-urban areas where it is considered to be part and parcel of illegal development which must be curbed.

On tribal land however, there is a greater willingness to recognise the existence of a land market and the need provide for it through formal means. The draft Revised National Policy for Rural Development states:

*One of the emerging central themes is that rights over productive resources in rural areas need to be clarified and strengthened, and that rights transfers should be made easier. This...implies the need to **introduce market forces** on tribal land...The principal issue is whether or not holders of tribal land grants or common law leases should be allowed to sub-let freely, effectively allowing them to trade their right to use land... (para. 3.4)*

It may be suggested that unless the authors of the policy document had some evidence that such transactions were already taking place, it would be unlikely to have featured as an “emerging central theme” to make rights transfers on tribal land *easier*.

Thus this brief review of the legal issues takes its starting point from the twin facts of the existence of a land market and the official position that this is a positive good that must be more adequately provided for. The issues to be addressed are: what are the basic requirements of a land market; what is and should be the role of law in providing for a land market and what principles should be the determinative ones in building a legal framework for the creation and operation of a land market.

6.2 Institutional/legal reforms

6.2.1 Background

The land law of Botswana is derived from three sources: customary laws; the common law and statute law. “Customary law consists of rules of law which by custom are applicable to any particular tribe or tribal community in Botswana, not being rules which are inconsistent with the provisions of any enactment or contrary to morality, humanity or natural justice.” Cap. 16:01, s.4. The common law of Botswana is based on Roman-Dutch law, and Botswana is part of the Roman-Dutch common law family that exists throughout Anglophone Southern Africa. There has been a great deal of statutory reform of laws applicable to land in Botswana since independence in 1966.

For purposes of tenure classification, land in Botswana falls under the three main categories of freehold land, (5%) state land (25%) and tribal land (70%). Different laws govern these different categories of land. Principally customary law and the Tribal Land Act 1968 (as amended) govern tribal land. State land is governed principally by the State Land Act, and together with freehold land, by the common law and a whole range of statutes applicable to land other than tribal land of which the Deeds Registry Act, the Land Survey Act and the Town and Country Planning Act are very important.

Any ‘real property’ may be compulsorily acquired for public purposes under the Acquisition of Property Act. Section 2 of the Act excludes tribal land in its definition of ‘real property’. The acquisition of tribal land is provided for under the TLA, which provides for compensation of standing crops and improvements but excludes compensation for the value of the land itself.

Special categories of state land are governed by specific laws; e.g. forests and national parks.

6.2.2 Related land policy issues

The different bodies of laws applicable to the different categories of land have been developed over the years in a discrete manner and do not always tie in with each other. At the same time, there has been a rapid growth of attitudes to and uses of land throughout the country, which in practice is leading to the development, albeit somewhat haphazard, of a land market. These two factors are putting considerable strains on the legal framework of land management in Botswana. Four major problem areas may be singled out.

First, conflicts are arising between land boards with the responsibility of managing tribal land and allocating plots to those who apply for same and planning authorities in cases where tribal land becomes a part of an area declared to be a planning area under the T&CPA. Although the T&CPA takes precedence over the TLA, the conflict between the two Acts arises in the roles they take and the failure of the public and the land boards fully to recognise them. If recommendations that the whole of Botswana be declared a planning area are accepted, this conflict will become universal throughout the country.

Second, a particular manifestation of this conflict which merits separate attention is the situation in Gaborone where the very rapid growth of the city means that the urban area now encompasses several local authorities and land boards, none of which have either the necessary legal powers or expertise to grapple with the chaotic growth of a peri-urban land market and land development.

Third, disputes over land issues are increasing rapidly. This is yet another manifestation of the growth of a land market in an inadequate policy framework.

Fourth, the fundamental question needs to be raised of whether an institutional/legal framework for a land market for a very small minority of the population is apt for a land market which, if unofficial land markets are taken into account, is embracing more and more of the population.

6.2.3 Policy principles and choices

The problems averted to must be addressed in the context of clear principles and a justifiable order of priorities. The overarching principle to be used is derived from the Commitments of the Habitat Agenda:

Provide legal security of tenure and equal access to land to all people, including women and those living in poverty. Ensure transparent, comprehensive and accessible systems in transferring land rights and legal security of tenure. Protect all people from and provide legal protection and redress for forced evictions that are contrary to law...

Applied in this context, these commitments suggest the following priority actions:

- develop a national legal framework to allocate land planning to planning authorities and land management to land boards;
- put in train a fundamental thorough and rapid review of the governance of land in Gaborone with a view to creating a unified and coherent legal and administrative framework for same;
- develop a dedicated system for the handling of land disputes embracing a specialised Land Court or Tribunal, ADR procedures and legal assistance for the poor;

- establish a commission to review the present private law and practice of land transactions and registration with a view to the creation of a land law and practice apt for the needs of all Batswana in the 21st century.

6.3 Land tenure and transactions

6.3.1 Background

Under the TLA, all citizens are entitled to apply for plots of land which are issued under either a customary land grant (CLG) or a common law (CL) lease. CLGs may be of indefinite duration but s.15 TLA sets out grounds for the cancellation of a CLG, some of which are rather broad and general. CL leases are granted for a fixed term in accordance with conditions set by the land board. S.38 TLA restricts transactions in tribal land: generally the consent of the relevant land board is required for any transfer, but not where land has been developed “to the satisfaction of the land board concerned” (which in practice amounts to the same thing) or hypothecation by a citizen or devolution on death. Subject to these and any other statutory provisions applying to tribal land, customary law applies to the incidents of CLGs and Roman-Dutch law to CL leases.

Land in urban areas is either state land or freehold. State land is granted via a fixed period state grant (FPSG) – the equivalent of a long lease paid for with a lump sum at its commencement. Until the arrangement was suspended an alternative form of allocation was a Certificate of Rights (COR) which provided the urban poor with secure land tenure for an indefinite period. A COR may be converted to a FPSG but this is expensive and time-consuming. FPSGs are freely transferable; CORs are not. Roman-Dutch law applies to both interests.

Peri-urban areas develop mainly on tribal land. An unofficial and a-legal land market operates in such areas with undeveloped tribal land being bought, sold and developed contrary to the TLA.

6.3.2 Related land policy issues

The interests in land developed over the years have been effective and efficient in providing for secure land tenure and the evolution of customary land tenure towards a more market-orientated form of land management. The system now shows signs of not adjusting to a rapidly developing land market, especially in urban and peri-urban areas.

Land allocated free of charge or below market value, whether tribal or state land, offers opportunities to the landholder, not always resisted, illegally to sell undeveloped land for development not authorised by a land use zone on tribal land or development plan in a planning area. A landholder may wish to vary conditions on which s/he obtained land to permit commercial development or sub-lease the land or part of it and there is a lack of flexibility in allowing this.

Notwithstanding the recommendations of GP No.1 of 1985, holders of FPSGs and common law leases are still in the dark as to the criteria to be used to determine whether they will be allowed to renew their interests; this also acts as a disincentive to holders of CORs to convert to FPSGs.

The existence of informal land markets in peri-urban areas is good evidence that the formal system is not catering to the needs of the citizenry. People do not enter the informal market in order to break the law; they break the law in order to enter the informal market as the only way they can obtain land for housing and small workplaces.

The whole process of surveying land and registering a formal title via the LSA and DRA is expensive and slow, acting as a further disincentive to enter the formal market. Neither hypothecation law nor the law on leases are geared to the interests of persons of limited means. Both are based too closely on the common law and have insufficient locally relevant content.

6.3.3 Policy principles and choices

The thrust of the principles in the *Habitat Agenda* is enablement and equity: land markets must be enabled to work for the benefit of all and all must be enabled to participate on an equal footing in the land market. Accordingly, the *Global Plan of Action* suggests the following actions to governments. Governments must:

- *develop appropriate cadastral systems and streamline land registration procedures in order to facilitate the regularisation of informal settlements, where appropriate, and simplify land transactions;*
- *develop land codes and legal frameworks that define the nature of land and real property and the rights that are formally recognised;*
- *support the development of land markets by means of effective legal frameworks and develop flexible and varied mechanisms [to] mobilise lands with diverse juridical status*

To apply these to Botswana, Government should:

- set out the incidents of and the criteria for the renewal of FPSGs
- recommence the use of CORs
- develop a simplified locally based system of recordation of CORs and CLGs and of transactions in them
- recognise the existence of a land market in peri-urban areas; validate existing transactions and create a legal framework for the future operation of the market
- create a range of 'permitted uses' for CLGs and CL leases on tribal land
- create a more user-friendly and pro-poor legal regime for secured loans and leases
- reorder and limit the discretion of Land Boards to regulate tenure and transactions.

6.4 Land planning and control

6.4.1 Background

There are several laws that deal with the planning and regulation of land use. On tribal land, the TLA is empowered to impose restrictions on land use; authorise the change of land use and is mandated to determine and define land use zones and develop management plans to give guidance on the use and development of land within such zones. Failure to use land in accordance with TLA controls may lead to loss of a CLG or CL lease.

The T&CPA provides a comprehensive framework for the planning and regulation of land declared by the Minister to be a planning area. Within such an area, a development plan must be prepared within 2 years, and permission is required for any development of land. Development is given a wide meaning by the Act. The Minister made an order – the T&CP (General Development) Order (GDO) – which permits certain classes of development to take place without the need to obtain planning permission. Failure to comply with the Act may lead to enforcement action being taken.

The Agricultural Resources Conservation Act (ARCA) empowers a Board to issue order to owners and occupiers of land requiring them to take measures to conserve agricultural resources on their land. Orders may impose restrictions on land use and positive actions to be taken on the land.

Proposals are being brought forward for a law on environmental management which will provide for overarching control over the environment including land and for EIAs in certain situations.

Other laws provide for specific regimes of control over forests, national parks, wildlife areas etc.

6.4.2 Related land policy issues

The TLA and the T&CPA both assume that their spheres of operation will not overlap. This may have been the case once; it is not so now especially with regard to tribal land in peri-urban areas declared to be planning areas. Although the T&CPA takes precedence over the TLA, the conflict between the two Acts arises in the roles they take and the failure of the public and the land boards fully to recognise them. This operates negatively on the efficient, effective and equitable development of land for the low-income sector.

Recommendations have been made that the whole of Botswana be declared a planning area, thus extending the reach of the T&CPA and creating the possibility of conflict with the TLA nationwide.

The T&CPA and the GDO have been unchanged for 25 and 22 years respectively. While the benefits of planning are appreciated, enforcement of the law is weak. During this period, urban and peri-urban areas have greatly expanded; a land market has developed;

thinking about the appropriate and necessary scope of planning and control of land use has shifted from a top-down regulatory to a facilitative and participative mode to encourage economic development and the integration of the urban poor into the formal structures of the city.

The planning and land control powers of the TLA were increased in 1993 without any significant increase in the professional and technical capacity of the LBs which have to apply the Act. This has resulted in unauthorised and illegal land uses by holders of CLGs and common law leases and a lack of enforcement of the law.

The development of a new regime of environmental management and EIAs will create another layer of controls over land use and development. Has sufficient consideration been given to ensuring that this new regime will not create more conflicts over land use controls?

6.4.3 Policy principles and choices

The enablement and equity principles of the *Habitat Agenda* suggests the following actions on land use controls:

- *review restrictive, exclusionary and costly legal and regulatory processes, planning systems, standards and development regulations;*
- *adopt an enabling legal and regulatory framework based on an enhanced knowledge, understanding and acceptance of existing practices and land delivery mechanisms so as to stimulate partnerships with the private business and community sectors.*

Applied to Botswana, these proposals involve:

- a fundamental rethink of the objectives, scope and powers of the T&CPA, so as to reorientate it to become a more development-friendly law with fewer restrictions on development especially small-scale housing and commercial developments
- ditto for the land control powers of the TLA
- limit the scope of developments for which EIAs may be required
- establish by law co-operative arrangements between local planning authorities and LBs to ensure a complementary, simplified and participatory system of land use planning and controls exists at the local level
- while vesting the Minister with backstopping and guidance powers to ensure that national interests and policies are implemented, allocate appellate functions throughout the system to a dedicated appellate body
- involve the private sector and civil society in reviewing land control systems

- stop demolition of ‘illegal’ homes pending above reviews

6.5 Equity, land and power

6.5.1 Background

Land markets can, unless regulated in appropriate ways, harm vulnerable groups. So too with governmental powers over land. Absent proper legal regulation, these can be too easily abused. Four matters must be addressed here.

Women. Several legislative steps have been taken to tackle the disadvantages which women have under the common law with respect to ownership and dispositions of land. These include the MPPA of 1971 and amendments to the DRA in 1996. However, the Constitution exempts customary law from provisions as to discrimination so that customary tenure rules still quite lawfully discriminate against women.

RADs. An important case on the rights of RADs, is pending in the High Court so that anything written here is tentative. Over the years, the Government has attempted to provide specifically for RADs and their land use, most recently through RADP, while at the same time arguing in authoritative legal opinions that the community has no property rights in any definable area of land in Botswana. LBs operating in areas where RADs are a majority do not always reflect RAD concerns.

Compensation. There are complaints about the inadequacy of compensation when Government takes land for public purposes. Also, certain procedures on acquisition under both the APA and the TLA are at odds with the Constitution.¹²

Dual Grazing. The practice of dual grazing benefits those who have fenced ranches and operates against the interests of those who rely on communal land to graze their stock.

6.5.2 Related land policy issues

Women’s land rights. The lives and livelihoods most women in Botswana are governed by customary law. While it is still legal for customary law to discriminate against women, any policy aimed at improving women’s rights to land will, effectively, remain a dead letter.

Similarly with women’s land rights under the common law. While the law on the marital power remains as it is, it will always be a minority of women who will, in practice, be able to take advantage of recent legislative changes.

RADs. There is a perception amongst certain people, organisations and groups inside and outwith Botswana that RADs are being treated unfairly and contrary to both national and international law. This perception cannot be wished away. It has to be addressed and insofar as part of the alleged problem concerns the land rights of RADs, it has to be addressed by the new National Land Policy.

¹² The inadequacy in procedures mainly affects tribal land. Most freehold cases seem to receive the approval of the claimant.

Compensation. The principal issue here is whether, on compulsory acquisition of land, the dispossessed landowner should receive any more than the market value for the existing use of the land, with any possible future use being disregarded. Per APA, the answer is 'no'. If the answer is to be 'yes', then either complex calculations have to be made on hypothetical future uses of the land so as to do justice between all persons especially where the actual future use might *decrease* the existing value of the land or one just pays a percentage over the existing use as a *solatium* to buy off objections to the acquisition.¹³

Dual Grazing. To tackle dual grazing involves altering one of the most fundamental principles of customary tenure in Botswana: that every Motswana male is entitled to a plot of land for a home and for ploughing land and to access to communal grazing land for his stock.. The TLGP was never designed to alter that principle of law.

6.5.3 Policy principles and choices

The principles involved on these matters are:

- (i) the principle of non-discrimination;
- (ii) the principle of international law and dictates of social justice that distinctive minorities within a country have a right to preserve their own way of life and culture and should be assisted to achieve this;
- (iii) the principles of administrative justice;
- (iv) the principle of the protection of private property.

Applying these principles involves choices since they do not always point in the same direction.

Women's land rights: equity and efficiency in both land use and land markets will be enhanced by a resolute attack on discrimination against women's rights to acquire, own, use, dispose of and succeed to land in all legal systems in Botswana.

RADs: Government must be seen to be complying with international law, its own laws and the growing global emphasis that tackling poverty is the prime focus of development. It must be prepared to re-assess its policies and practices in relation to RADs and their land rights and at the same time mount a legal rebuttal of allegations made against it in international fora.

Compensation: compensation for compulsory acquisition, in respect of the reversion of FPSG, CL leases and in other situations needs to be reviewed as a whole in the light of principles (iii) and (iv) above. Alternative forms of compensation need to be provided for in the law.

¹³ It should be noted that possible future use forms part of Market Value. In Customary Tenure, other intangible factors may be present such as ancestral homes, burial sites, rights of use, religious practices and other attachments, which may be communal or group based. Compensation was paid to the Kgatling Land Board for communal land taken around Bokaa Dam for loss of rights thereto by the community.

Dual grazing: customary tenure is not unchanging. Justice requires that where one obtains a benefit from a reform which may disadvantage others, one cannot at the same time retain rights, now diminished because of the reforms, which one had before the reforms.

7 Institutional issues

7.1 Introduction

As is frequently acknowledged, Botswana's land administration system has been one of careful change, responding to particular needs with specific tenure innovations. Land boards constituted under the Tribal Land Act are the custodians and administrators of all tribal land. Other land institutions include the District Land Use Planning Unit, the Land Tribunal, the Department of Surveys and Mapping, the Department of Lands, the Department of Town and Regional Planning and the Attorney General's Chambers Lands Division & Deeds Registry. It would seem that the essential land sector institutions are in place but they require some considerable adjustment to cope with the demands of the evolving land market.

First, actions are required to consolidate the institutional restructuring following the separation of the Ministry of Lands, Housing and Environment¹⁴ (MLHE) from the Ministry of Local Government (MLG).

Second, actions are needed to clarify the roles and responsibilities of the agencies operating in the land sector and to reassess the institutional relationships, both internally and with local government. The uncertainties relate to the efficiency and applicability of the current land use planning system and the respective roles of the land boards, the DTRP/district councils – not uncertainties in the law.

Thirdly there is need to improve the operational efficiency of bodies (land boards and DLUPU) at district level and below that are involved in land administration and management through decentralisation and devolution of power, training and capacity building.

Once these roles and responsibilities are clarified, there still appear to be some gaps remaining in the land sector which have already been identified in this report. There is need to broaden the scope of the Land Tribunal to cover matters relating to the TCPA and the LCA and land valuation; there is need to cater for the planning and implementation of infrastructure of greater Gaborone; and to provide for community-based management of land and natural resources in rural areas.

Finally, it is necessary to make provision for the regulation of the providers of land-related services in the private sector.

7.2 Institutional restructuring

7.2.1 Background

The MLHE was formed in 1999 from the subdivision of the Ministry of Local Government, Lands and Housing. Important steps must be taken to complete the reorganisation. Despite the transfer of the land portfolio to another ministry, the Department of Local Government Service Management (under the MLG) continues to

¹⁴ The MLHE is to lose Environment when two new ministries come on stream in April, 2003.

provide personnel to the land boards in terms of the Unified Local Government Service Act. The DLGSM provides training and administrative support to Land Board staff, etc.

Management dysfunctions also arise from the placement of the Deeds Registry under the AG's Chambers.

7.2.2 Related policy issues

The land boards currently come under two ministries. They report directly to the PS MLHE for implementation of the Tribal Land Act, planning, zoning, demarcation and allocation. In matters of human resource management, training, employment and welfare land board staff are administered under the MLG's Department of Local Government Service Management. Difficulties arise in assigning management responsibility for the land boards to the MLHE and MLG and drawing a line between 'technical' and 'personnel' matters. Management in both the ministries feel that there is a lack of adequate control over the staff and a lack of direction of the work of the land boards.

At the same time, the land board personnel are 'in limbo' and are being deprived both of leadership and opportunities for professional advancement in the land sector. If the Land Boards are to be placed entirely under the MLHE, the ULGS Act will have to be amended. Unless land board staffs are to become members of the public service, separate legislation to provide for their recruitment, advancement, discipline, etc. will be needed.

7.2.3 Policy principles and choices

In keeping with the well-recognised management principle of 'unity of authority and responsibility', it is necessary to bring the land boards fully within the portfolio of the Minister of Lands and Housing without further delay. Most, if not all, of the actions needed to improve the operational efficiency of land boards and to re-align their work require a clear and direct line of authority and control from the office of the Permanent Secretary to the land board secretaries and below.

An alternative might be to further democratise the Land Boards by providing for direct election of the members by secret ballot by registered voters in their constituency, as part of the normal electoral process so that Land Boards would be accountable to the electorate as District Councils are. The relationship between the Land Boards and the Minister responsible for Lands would then be similar to the relationship between the District Councils and the Minister of Local Government.

The Deeds Registry, currently part of the AG's Chambers, should be reconstituted as a separate Department, with its own legal staff, under the MLHE, or as an independent (self-funding) statutory body reporting direct to the Minister. Scope for greater decentralised registration and lodgement of deeds (possibly electronic lodgement) will be essential in the medium term.

7.3 Roles and responsibilities for land use planning

7.3.1 Background

District Land Use Planning Units throughout the country, complain of the overlapping jurisdiction of the Tribal Land Act and the Town and Country Planning Act. For example, it is held that authority to grant change-of-use in planning areas on tribal land lies with both the DTRP/Council and with the Land Board. Officials report difficulties in ensuring that proper procedures are followed. It is held that authority for land use planning should be withdrawn from land boards.

7.3.2 Related land policy issues

In law there is no overlap in jurisdiction between the TLA and the TCPA with regard to planning. In practice, problems arise as a result of misunderstandings among officials and the public as to the relative roles and responsibilities of the district council (for planning and development control) and the land boards (for land allocation) both inside and outside designated planning areas.

Legally, the TCPA takes precedence over other Acts in those area 'declared planning areas by Order published in the gazette' under the TCPA (section 41). Where the areas are not declared planning areas as per the provisions of the TCPA, even in the event of change of use, the TCPA does not apply.

The Tribal Land Act confers responsibility on the Land Board to allocate tribal land. Its jurisdiction in land control matters is confined to that tenure category. The Town and Country Planning Act does not provide for the allocation of land and its jurisdiction is not confined to any specific land tenure system. It is applicable to all tenure systems including tribal land.

Under the Tribal Land Act land boards are responsible for identifying and zoning land on tribal land in consultation with the District Council to facilitate land allocation for different purposes. The different purposes are: land for residential, agriculture, commercial and, in some parts of the country, CBNRM projects. This land use planning does not appear to cause difficulties where the level of economic activity is low. However, where there is a high level of economic activity or where there is great potential for a range of other land uses, disagreements are more likely to arise.

Land use planning and zoning in terms of the Town and Country Planning Act applies to 'planning areas' that have been declared by Order published in the gazette in consultation with a broad spectrum of stakeholders and has to take into consideration environmental concerns in its plans.

The ownership of tribal land is vested in the land board, and it is responsible for granting user rights to individual members of the community. These individual user rights can be converted, subject to conditions, to exclusive private rights by the individual granted the land. Once the land is privatised, the real rights cease to be vested in the Land Board. The new individual 'owner' is no longer under the jurisdiction of the Tribal Land Act and will have to seek permission for further development in terms of the Town and Country

Planning Act, but only if the land falls under a ‘planning area’ as declared in an Order under the provisions of the Town and Country Planning Act. In the absence of such Order, the standards that are set in the Country and Town Planning Act are inapplicable. The same applies to the standards and requirements of the Building Control Act, with exception to commercial buildings of more than 232 square metres. The Town and Country Planning Act does not confer ownership over any land nor does it confer rights of use or any other ownership right. It merely provides for the orderly development of land according to set minimum standards which could be of value to tribal lands.

Even if the TLA (which gives a land board certain responsibilities for land use planning) were amended, as the law now stands, customary grant holders would still need the consent of the land board, as the landowner and holder of ‘real rights’, for any change of use on land allocated in terms of a customary grant.

The Tribal Land Act does not facilitate planning as understood from the perspective of the Town and Country Planning Act. It is limited in its approach to land use issues. Where other lucrative opportunities exist for employment, especially near urban areas and as the country develops other sectors and moves from being an agriculture-based society, there is need within the law to accommodate change of use. But the capacity of the land board in planning, land use and land management appears to be wanting.

7.3.3 Policy principles and choices

A national legal framework for planning is already in place, what is needed is a policy direction that will strengthen and/or create legal linkages between the land boards responsible for land administration and DTRP and the district councils responsible for land management.

A policy decision has to be made whether or not to allow the application of appropriate land planning, land zoning, land use and land management requirements to apply to tribal land outside planning areas, as well as allowing, on the basis of planning conditions, the change of use upon fulfilment of certain conditions.

A policy decision is also needed whether or not to change the functions of the land board for the above purpose, either by requiring application of other Acts, or amending the existing functions and institutional structure.

Consideration must be given to whether a land board should be given all the powers, responsibilities and capacities necessary for land use planning and development or whether these powers should be reserved for DTRP/district councils.

7.4 Decentralisation, training and capacity building

7.4.1 Background

Almost all the policy prescriptions of this report would have an impact on the workload of land boards and the supporting District Land Use Planning Units (see following table). This raises the issue of the capacity of these institutions to change in order to meet the demands placed upon them.

Issue	Role of Land Boards
1.2 Land rights of the poor	Strengthen capacity in land allocation and management
1.3 Land rights of women	Strengthen women's participation in decision-making in matters of land allocation
1.4 Land rights of minorities	New sub-land boards to be established to accommodate RADs and other disadvantaged minorities
1.5 HIV/AIDS and land rights	Introduce measures to improve operational efficiency, including better land information
2.2 Promoting land market efficiency	Shortening the time it takes to effect transfers and allocations
2.3 Extending land markets	Review procedures to ensure that they are not prohibitively time consuming and costly
2.4 Illegal and extra-legal transactions	Revise functions, especially operations in peri-urban areas, so that land boards increasingly bear responsibility for recognising land transactions that in any event are taking place, including rentals.
2.6 Cadastral information	Co-operate in the development and management of the TLIMS
2.7 Land access by non-citizens	Apply LCA s.7 criteria to consents for transfers to non citizens under s.38 of TLA
3.2 Regularisation of peri-urban settlements	Develop a working partnership between landholders (including tribal land rights holders), district councils and land boards in planning and servicing of land ripe for urban land use activities.
4.2 Rural property rights	Land occupied by minority communities to be included in a separate sub-land board territory to be administered primarily by members of that community.
4.3 Conversion of arable	Enforcement of national norms monitored at district level by the land boards and district councils
4.4 Communal grazing	Securing communal grazing rights entails Land Boards and other institutional stakeholders giving recognition to the existence and validity of community-based land rights.
4.5 Dual grazing rights	Persons wishing to move livestock from a fenced ranch to a communal area should be required to obtain permission from the body responsible for that area's management. At present this will be the LB, but in future it might be a communal grazing committee.
4.6 Use of TGLP Ranches	LBs should be more flexible in allowing variations to the use of fenced ranches on tribal land.
4.8 Land for tourism development	LBs should work with communities to develop a better relationship with concessionaires and invest more in the monitoring function.
4.9 Management of Land & N.R.	Support and assist the development of community based institutions to manage land and natural resources
5.2 Hierarchy of land use planning	Land boards, as land lords, should (i) prepare detailed land use plans for approval by council; (ii) assist customary land rights holders to obtain planning permit and approval from council; (iii) and keep proper land records on applications, allocations and transfers.

7.4.2 Related land policy issues

Land boards: The land board system was introduced soon after Independence. At the time, the intervention was justified to Parliament as being necessary for the modernisation of rural and urban land tenure and the democratisation of land administration.

Botswana's experience with land boards in southern Africa is unique. It is to be expected that the system has its detractors. The reform entrenched a fairly uniform system of Tswana land tenure. It did not accommodate other forms deviating from the Tswana patterns of land holding and use. It was never designed to accommodate variations in land tenure practices prevailing in the different tribal territories. Nor was scope provided to vary the composition of land boards to fit the needs of the different groups.

Judging by the frequent adjustments in board membership criteria and appointment arrangements, it has proved extremely difficult to mould the land boards simultaneously to fit the diverse objectives of modernisation, democratisation and the pursuit of sometimes conflicting policies (e.g. the privatisation of the commons at the same time as upholding the egalitarian principles of customary tenure).

The current system provides for 12 members for the main boards and 10 for the subordinate boards. Two members on each main and subordinate board are representatives of the MoA and MCI. Five members on the main boards and 4 on the subordinate boards are appointed by the Minister MLHE to hold office for 3 years, but subject to reappointment. The remaining 5 members on the main boards and 4 on the subordinate boards are appointed by the Minister for a four year renewable term after being selected by a Land Board Selection Committee¹⁵ from lists of candidates compiled in the area of jurisdiction of each subordinate board and endorsed by a meeting in the *Kgotla*.

Experience has shown that the powers and duties of land boards have to be set down with great care because any gaps or ambiguities will be exploited. From the outset, one problem that has continued to severely undermine the system has been the failure to provide for the recording of all existing customary land rights. The land boards are reported to have always suffered from a bad case of 'land information myopia'.

Over the years, it has also been clear that the role, responsibilities and institutional relationships of land boards have to be adjusted to changing circumstances, particularly those arising from the emerging need to respond to the land market. A distinguished observer of Botswana's land board experiment has stated the following:

*A land board system must be capable of accommodating the natural evolution of land tenure without perhaps seeking to engineer, accelerate, or, indeed, obstruct the process. From these various experiences it must also be appreciated that the introduction of a land board system must be seen as a process, not an event. It must be seen as continuing process of land tenure reform that will require periodic adjustments and reorientation.*¹⁶

¹⁵Land board Selection Committees comprise of the District Commissioner as chairperson, Council Secretary for the District Council concerned, Land board Secretary for the area, the Chief or Sub-Chief of the area, and a member appointed by the Minister.

¹⁶ Professor Clement Ng'ong'ola, Law Department, University of Botswana.

DLUPUs: The effectiveness of a District Land Use Planning Unit¹⁷ depends on the willingness of officials to work together in support of the land board. The energy and leadership qualities of the Secretariat, under the DO(L), are crucial to its success.

Despite the efforts of the DLUPU, a land board might still go ahead with land allocation or granting change-of-use without reference to the advice given. Part of the problem may lie with the inadequacy of the guidance and the lack of competence of the planning staff.¹⁸ Part of the difficulty may relate to the land board's failure to give sufficient priority to planning considerations and to its preoccupation with so-called 'local politics'.

Although there is undoubtedly room for improvement, the DLUPU system seems to work reasonably well. Its strength lies in the wide representation of professional interests. It is noticeably less effective when one faction or interest group dominates. It is doubtful that DLUPU would enjoy the same respect and authority if it were made up entirely of members of one department (e.g. the Department of Lands).

Some members of DLUPUs have expressed scepticism about the usefulness of central government's policy-making processes (e.g. as is currently underway with the national land policy). There is a strong perception that policies are too often formulated without reference to the implementation difficulties at district-level. Lack of devolved decision-making authority, scarcity of transport, technical equipment and lack of information are causing frustration. The case of state land in rural areas is given as an example. Responsibility for management of the land is vested in the Department of Lands in Gaborone. Its remoteness results in lack of supervision, self-allocation and lawlessness. Should this land not be tribalised and transferred to the Land Board?

This disenchantment with the policy-making process is perhaps an indication of the over-centralisation of the government administration, past lack of consultation and poor follow-up of the various national policies which have been developed, often with substantial inputs from the district level, but have not lived up to expectations, frequently because of lack of support and funding from central government.

7.4.3 Policy principles and choices

As prescribed in the Draft Rural Development Strategy, a fundamental principle to guide the further development of land administration and management is that of greater devolution of powers of decision making and greater involvement of local people in the planning and implementation of the actions necessary to satisfy their needs. In the context of the land boards and DLUPU, this would require:

- Consideration of ways and means for the more democratic selection of land boards. (Land allocation decisions can rarely be de-linked 'from politics'. Hence the

¹⁷ This is an advisory and co-ordinating committee comprising the District Officer (Lands) attached to the District Administration, professional officers from central government departments (MOA, DWNP etc.), the Physical Planner attached to the District Council and the Secretary of the land board.

¹⁸ Due perhaps to high turnover, inadequate training and inexperience in the district.

importance of a democratically elected land board, which is more likely to reflect the view of the majority of citizenry in the areas concerned.)

- The reservation of half the seats on the board for women members (Section 1.3)
- Greater decentralisation of powers and responsibilities for land administration and management (including land use planning) to the district, sub district and local community level as proposed in Sections 1.4, 4.4, 4.9, 5.2 of this report.
- Amendment of the TLA to provide for greater flexibility of land administration and management of tribal land, both in urban and peri-urban areas (i.e. the current planning areas) (Section 2.4 and 3.2), and areas culturally different from mainstream Tswana culture.

Training and capacity building:

- Related to the need greatly to increase the efficiency of land boards, it will be necessary to implement a comprehensive programme of training and capacity building linked to the legal, administrative and technical developments arising from the land policy review process.
- An important part of any programme of implementation of new laws would be campaigns of public education and awareness, programmes of training and capacity building within the institutions and amongst the professions, which would have the responsibility for administering the new laws and implementing the land sector plan.
- In the field of institutional development, government would have to provide for:
 - building the capacity of the decentralised land administration and dispute resolution bodies through training and the provision of a framework of rules and guidelines to regulate discretionary authority;
 - building the capacity of the citizenry through expanding their knowledge about new laws and the opportunities provided by the laws to acquire and safeguard their right to land;
 - building the capacity of the MLHE by providing the training and information necessary to develop a coherent, cost-effective and responsive plan to implement the National Land Policy and laws in the medium and long term.
- Proposals have been made to transfer the DO(L) from the District Administration, where the officer tends to be caught up in 'other duties', to the land board. Others have recommended assigning the DO(L) to the District Council to join the Physical Planner. Both proposals have their merits as does leaving the DO(L) with the District Administration. Probably more important is that the DO(L) (and perhaps other key DLUPU members) receives the appropriate amount of training and technical support wherever s/he is located.

8 Financial issues

8.1 Background

In current 2002/03 prices the combined recurrent expenditure of all the institutions in the land sector grew from P51 million in 1989/90 to P165 million in 2002/03.¹⁹ This represents 0.8% to 1.2% of total annual government expenditure over the period.

The land boards share of this grew from 57% to 77%. The tripling in real terms of the recurrent budget over 14 years constitutes real and substantial growth. However, it appears to come off a low base and if the views of the institutions are to be believed, the level of funding is still inadequate. In four of the 14 years when there was double-digit growth over the preceding year, land boards were the engine of growth in each case.

Land board revenues (not including the revenue support grant), in current 2002/03 prices, have grown from P4.8 million in 1989/90 to a peak of P21.3 million in 2001/02. However, this latter figure was an estimate, not an audited total.

Since 98/99 the Department of Lands has received revenue from the sale of state land that is more than double its total operating expenses. Over the same period the AG's Land Division has had a four to eight fold revenue-over-expenses ratio, again via proceeds from the sale of state land.

One major new source of revenue is Value Added Tax, currently at 10%. The impact of VAT on the transaction costs for dealings in land will be substantial, especially for residential purchases. In virtually every case, the buyer will have to borrow the VAT component as part of mortgage financing and repay it over 10-25 years also repaying the interest required to finance the VAT component.

8.2 Related policy issues

There are three policy issues to be considered in relation to the funding of the land sector:

8.2.1 Does expenditure represent a justifiable use of public funds?

The land boards receive the lion's share of the land sector budget. This continues to increase. In April 2002, when presenting his budget for P347 million to Parliament, the Minister said that, after receiving complaints of slow land delivery, his ministry had increased both recurrent and capital allocations to the land boards. Sitting allowances for land board members had been increased to enable them to have more days to attend to applications. A sub land board was to be established in Marapong to relieve the workload on Tutume sub-land board. Sub land board offices at Hukuntsi, Charleshill, Shoshong, Moshupa, Phitshane/Molopo and Mmathethe were under construction. The Kgalagadi main land board office at Tsabong and sub land board offices at Thamaga are at the tender stage for construction. The ministry required funds for the construction of sub land board offices at Seronga, Tonota, Nokaneng, Palapye, and Lentsweletau during 2002/3. More sub land boards were to be established during the next plan period (NDP9).

¹⁹ This includes, Land boards, the Land Tribunal, the Department of Surveys and Mapping, the Department of Lands, the Department of Town and Regional Planning and the Attorney General's Chambers Lands Division & Deeds Registry.

Whether the land boards currently represent value for money is a moot point. The recently released Report of the Second Presidential Commission on the Local Government Structure in Botswana notes at Section 4.3 that land boards are widely perceived as inefficient and slow. The Commission strongly recommended that Land Boards be given fully adequate financial and human resources to execute their mandate.

A 2002 survey of land boards by the MLHE reveals that land board members and staff definitely feel they are under funded and understaffed, especially regarding technical support. Yet, land board secretaries are salary graded at D1, which is on par with a medium size Government department. The five smallest land boards have an average total staff complement of only 28 each.

8.2.2 Is the allocation of funds based on a realistic assessment of the costs?

One problem often faced by local government is that of ‘unfunded mandates’, arising from new legislation or policy, handed down to local government without the funds necessary to execute the mandate.

An example of an unfunded mandate is land use planning by land boards and the DLUPU. Sufficient financial and human resources have not been provided. Another example is the provision of plots and basic shelter for destitute persons. The Report of the Review of the Housing Policy recommended that land boards and councils provide such housing and this was endorsed by Government. However, staff and funds have not been forthcoming. The Revised Policy on Destitute Persons, 2002, stated the same, though it is too soon to ascertain if the mandate will be funded or not.

The Draft Botswana Poverty Reduction Strategy proposes 16 distinct Programmes. No. 15 targets ‘Strengthening Capacity of Land Boards in Land Allocation, Administration and Management’ to the sum of P 1.9 million over five years.

8.2.3 Does the user pay or is there a subsidy involved?

The principle of free allocation of land to all adult citizens according to need is deeply rooted in Setswana culture. However, while a case can be made for the provision of subsidised land and land services (i.e. land parcel, survey and title deed registration) to ensure the tenure security of the poor, there is no valid reason why the ‘well-heeled’ should not pay the market price and the associated transaction costs incurred by the state in delivering land in the 21st century.

Tribal land: Currently, there is an overwhelming dependence by land boards on revenue support grants to balance their recurrent budgets. Land board revenue as a percentage of total recurrent expenditure has fluctuated from 17% in 89/90 to 10% in 94/95 to 19% in 00/01 and down to an estimated 13% in 02/03. Even the Tawana Land Board still requires a 53% revenue support grant. Due to the requirement to visit sites, the staff and members of land boards spend an inordinate amount of time and money on travelling.

The rents for commercial and industrial plots on tribal land are triflingly small, as they have never been indexed to reflect annual inflation. There is no evidence that nominal

rents will encourage investment and productivity. Indeed, the contrary seems to be the case on ranch land and encourages land hoarding. The rents for TGLP ranches are so low at 8 Thebe per hectare per annum that they are not worth the time and effort spent in collection, nor the cost of court action to deter defaulters. It is unclear what the rents will be for the 478 new ranches demarcated on tribal land under the fencing component of the 1991 Agricultural Policy. If the experience with TGLP rentals were any guide, it would be worth considering a fixed-period grant arrangement with a payment at the outset, if the positive covenants could be retained.

The Second Local Government Structure Commission recommends that Section 37 of the TLA be repealed and that Land Boards be empowered to set their own rates for all types of commercial, industrial, residential, agricultural and other types of land use leases.

State land: In the guidelines for the Allocation of State Land - New Policy 1990, it is stated as follows-

Only citizens of Botswana will forthwith be eligible to be allocated land from Government. All citizens of Botswana regardless of where they live will be eligible for two residential, commercial and industrial plots in the eight urban areas of Botswana provided a first plot has been developed.

As there is not an application fee to serve as a minimal demand regulator, not only has potential revenue been forfeit, but also long waiting lists have developed. These are purported to reflect real demand, but most probably indicate large numbers of speculative applications, given the very large incentive offered by the differential between the official price and the market value.

Rates: The Second Local Government Structure Commission has recommended the establishment of free standing local authorities for those villages on tribal land that are classified as urban in nature. The establishment of such bodies would have profound revenue implications for both the existing district council, for the urban village and for the new authority. However, for both practical and political reasons, such a change would have to be introduced incrementally (e.g. first for commercial plots and in well-located sites and so on).

The preparation of valuation rolls would be dependent on up-to-date land information (topography, size and location, building structures, names and number of occupiers, tenure arrangements, etc), which is essential for assessment of rates and for tax collection. The proposed Land Information System (TLIMS) is needed, not only for land administration and management in the broader sphere, but for the development of an equitable and up-to-date valuation roll. This is one activity in the land sector for which cost recovery can be assured.

There is already a strong case for preparing valuation rolls in Mogoditshane and Tlokweng and other peri-urban settlements in the greater Gaborone area, where government has invested over P200 million in water and sanitation in addition to roads. Until recently, no rates have been levied although proposals to do so in South East District have been announced.

The level of urban rates is a clear policy choice. A user pays principle is generally held to be efficient, equitable and sustainable. In the 1970s, during the early days of the SHHA programme, there was a clear cross subsidy element whereby ratepayers subsidised the cost of the service levy. However, this has been abandoned. Even the urban user pays policy has been largely set aside. It is an 'urban myth' that the rates level in Gaborone is cost covering. In 1996/97, 53% of the GCC recurrent budget was in the form of a revenue support grant from Government, rising to 65% in 1998/99. In comparison Francistown fell from 79% to 75% over the same period and Lobatse stayed constant at 76%. Some of the revenue support grants, particularly in the case of Gaborone could be regarded as a contribution by the State in lieu of rates. However, the value of Government real property assets in all urban areas (including urban villages) should be determined in regular valuation exercises so that the degree of subsidisation as opposed to contribution can be objectively assessed.

8.3 Policy principles

Three fundamental principles for the allocation of public funds for the land sector are proposed:

- expenditure should represent a justifiable use of the government's resources;
- it should be allocated on the basis of legitimate mandates, and
- to those programmes and projects for which subsidies can be justified in terms of public health, safety, social welfare, etc; in other cases, public expenditure should be recovered from the users.

The foregoing brief review of expenditure and revenue in the land sector indicates that there is ample scope for improving performance.

It is not clear whether the current difficulties faced by the land boards are the result of 'unfunded mandates', low morale, lack of technical support and leadership, or whether they arise from dysfunctional policies and the chronic lack of land information. A combination of all these factors probably constrains operations. There has never been a study to determine just what financial, technological and human resources a land board would require to discharge properly the various mandates entrusted to it.

Appendix A

Documents Consulted

Official publications other than Acts of Parliament and regulations (in chronological order)

- Republic of Botswana (1972) *Rural Development in Botswana*, Government Paper No. 1, March 1972. Gaborone: Government Printer.
- Republic of Botswana (1973) *National Policy for Rural Development: the Government's Decisions on the Report on Rural Development* by R. Chambers and D. Feldman, Government Paper No. 2 of 1973. Gaborone: Government Printer.
- Republic of Botswana (1975) *National Policy on Tribal Grazing Land*, Government Paper No. 2 of 1975. Gaborone: Government Printer.
- Republic of Botswana (1982) *Report of the Presidential Commission on Economic Opportunities*, May 1982. Gaborone: Government Printer.
- Republic of Botswana (1983) *Report of the Presidential Commission on Land Tenure*, December 1983. Gaborone: Government Printer.
- Republic of Botswana (1985) *National Policy on Land Tenure*, Government Paper No. 1 of (April) 1985. Gaborone: Government Printer.
- Mathuba, B.M. *Report on the Review of the Tribal Land Act, Land Policies and Related Issues*, Lands Division, Ministry of Local Government and Lands, September 1989. Gaborone: Government Printer.
- Republic of Botswana (1990) *National Conservation Strategy* Government Paper No. 1 of 1990. Gaborone: Government Printer.
- Republic of Botswana (1990a) *Tourism Policy*, Government Paper No. 2 of 1990. Gaborone: Government Printer.
- MOA (1991) *Botswana's Agricultural Policy: Critical Sectoral Issues and Future Strategy for Development*, February 1991. Gaborone: Government Printer.
- Republic of Botswana (1991) *National Policy on Agricultural Development*, Government Paper No. 1 of 1991. Gaborone: Government Printer.
- Republic of Botswana (1991a) *Report of the Presidential Commission of Inquiry into Land Problems in Mogoditshane and Other Peri-Urban Villages*. Gaborone: Government Printer.
- Republic of Botswana (1992) *Land Problems in Mogoditshane and Other Peri-Urban Villages*. Government Paper No. 1 of 1992. Gaborone: Government Printer.
- Republic of Botswana (1992a) *Report of the Presidential Commission of Inquiry into the Operations of the Botswana Housing Corporation*. Gaborone: Government Printer.
- Republic of Botswana (1992b) *The Botswana Housing Corporation*. Government Paper No.2 of 1992. Gaborone: Government Printer.
- Mathuba, B.M. (1994) *Implementation of the Tribal Land (Amendment) Act, 1993*. Memorandum to all Land Board Secretaries, 18 July 1994. MLGLH Gaborone: Government Printer.
- MLGLH (1995) *Development Control Code*, Revised August 1996, Department of Town and Regional Planning. Gaborone: Government Printer.

- MLGLH (1995a) *Report of the Task Force Commissioned to Determine Factors Contributing to Poor Response to Accelerated Land Servicing Programme Plot Allocation Offers*, 31 May, 1995. Gaborone.
- MFDP (1997) *National Development Plan 8, 1997/98-2002/03*, Ministry of Finance and Development Planning. Gaborone: Government Printer.
- Republic of Botswana (1997a) *Long Term Vision for Botswana: Towards Prosperity for All*, Presidential Task Group for a Long Term Vision for Botswana, September 1997.
- Republic of Botswana (1998) *Botswana National Settlement Policy*, Government Paper No 2 of 1998. Gaborone: Government Printer.
- MLGLH (1998a) *National Settlement Policy*, Department of Town and Regional Planning. Gaborone: Government Printer.
- Republic of Botswana (1998b) *Community Based Natural Resources Management Policy*, Revised Discussion Draft of 28 October 1998.
- Republic of Botswana (2000) *National Policy on Housing in Botswana*, Government Paper No. 2 of 2000. Gaborone: Government Printer.
- Republic of Botswana (2000a) *Privatisation Policy for Botswana*, Government paper No. 1 of 2000, MFDP. Gaborone: Government Printer.
- MFDP (2000b) *Mid-Term Review of NDP 8*. October 2000. Gaborone: Government Printer.
- MOA (2001) *National Master Plan for Agricultural Development*, Draft Government White Paper. Ministry of Agriculture, Gaborone.
- Department of Surveys and Mapping (2001) *The Botswana National Atlas*
- Republic of Botswana (2002) *Budget Speech by Honourable B. Gaolathe, Minister of Finance and Development Planning*, 11 February 2002. Gaborone: Government Printer.
- Republic of Botswana (2002) *Draft Revised National Policy For Rural Development*, Government Paper No: of 2002, Ministry of Finance and Development Planning.
- UNDP (2002) *Draft Botswana Poverty Reduction Strategy*, April 2002, United Nations Development Programme for Government of Botswana.
- Republic of Botswana (2002) *Report of the Second Presidential Commission on the Local Government Structure in Botswana 2001*, Government Printer Gaborone
- Republic of Botswana (2002) *National Master Plan for Arable Agriculture and Dairy Development*, Government White Paper No.1 of 2002, Ministry of Agriculture, Government Printer, Gaborone
- Republic of Botswana (2002) *National Master Plan for Arable Agriculture and Dairy Development (NAMPAADD), Implementation Guidelines*, Ministry of Agriculture, Government Printer, Gaborone 2002.
- Books, Reports and Articles**
- Abel, N.O.J. and Blaikie, P.M. (1989) *Land Degradation, Stocking Rates and Conservation Policies in the Communal Rangelands of Botswana and Zimbabwe, Land Degradation and Rehabilitation*, 1, pp 101-124.
- Acemoglu, D., S. Johnson and J. A. Robinson (2002), 'An African Success Story: Botswana', *CEPR Discussion Paper* No. 3219, February 2002.
- Adams, M. (2000) *Breaking Ground: Development Aid for Land Reform*. London: Overseas Development Institute.

- Chr. Michelsen Institute (1996) *NORAD's Support of the Remote Area Development Programme (RADP) in Botswana*. Evaluation Report No 1.96, Oslo: Royal Norwegian Ministry of Foreign Affairs.
- Dickson, W.L. (1990) *Land Tenure and Management in a Developing Country: the case of Botswana 1966-1985*, Working paper No. 54, May 1990, National Institute of Development Research and Documentation, University of Botswana.
- Egner, B. (1987) *The District Councils and Decentralisation 1978-1986*. Gaborone: Economic Consultancies.
- Frimpong, K. (1986) A Review of the Tribal Grazing lands Policy in Botswana, *Pula: Botswana Journal of African Studies*, 9, 1, pp 2-15.
- Good, K. (1992) Interpreting the Exceptionality of Botswana, *Journal of Modern African Studies*, 30, 1, pp 69-95.
- Gulbrandsen, Ø.G. (1996) *Poverty in the Midst of Plenty*. Bergen: Norse Publications.
- De Soto, H. (2000) *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Elsewhere*. London: Bantam Press.
- Hodgson, S., Cullinan, C. and Campbell, K. (1999) *Land Ownership and Foreigners: A Comparative Analysis of Regulatory Approaches to the Acquisition and Use of Land by Foreigners*, FAO Papers On Line, December 1999
www.fao.org/legal/default.htm
- Hyden, G. (1995) 'Governance and the Study of Politics' in *Governance and Politics in Africa*, edited by G.Hyden and M.Bratton, Boulder Colorado: Lynne Reiner.
- Kalabamu, F. (1998) 'Effects of gendered land rights on urban housing by women in Botswana', Proceedings of the International Conference on Land Tenure in the Developing World with a focus on Southern Africa, University of Cape Town, January 1998.
- Keijsper, V. (1993) 'Livestock Development in Botswana: Consequences for the rural poor', *Afrika Spectrum*, 28 3, pp 323-339.
- McAuslan, P. (2000) *From Greenland's Icy Mountains, From India's Coral Strand: The Globalisation of Land Markets and its Impact on National Land Law*. Ordem dos Advogados do Brasil-Seção, Minas Gerais, Prefeitura de Belo Horizonte-PBH, 10. Congresso Brasileiro de Direito Urbanístico "Direito Urbanístico e Gestão Urbana no Brasil" December 2000.
- McAuslan, P. (2002) *The Legal Basis for Land Administration in an African Context; the Five Circles of Law in Land Administration*. The World Bank Regional Workshop on Land Issues in Africa, Kampala, April 2002.
- Ng'ong'ola, C. (1992) 'Land problems in some peri-urban villages in Botswana and problems of conception, description and transformation of "tribal" land tenure', *Journal of African Law* 36, 2, pp 141-167.
- Ng'ong'ola, C. (1996) 'Land tenure reform in Botswana: post-colonial developments and future prospects' SARP/P 11
- Ng'ong'ola, C. (1997) 'Land rights for marginalized ethnic groups in Botswana, with special reference to the Basarwa', *Journal of African Law*, 41, 1, pp 1-26.
- Ng'ong'ola, C. (1999) 'National Land Boards: The Experience of Botswana', National Stakeholder Workshop on National Land Policy, Harare, Zimbabwe, June 1999.
- Peters, P.E. (1994) *Dividing the Commons: Politics, Policy and Culture in Botswana*, Charlottesville and London: University Press of Virginia.

- Pistor, K. and Wellons, P.A. (1999) *The Role of Law and Legal Institutions in Asian Economic Development 1960 – 1995, Hong Kong.*
- Sandford, S. (1983) *Management of Pastoral Development in the Third World.* John Wiley: Chichester.
- Schapera, I. (1938) *A Handbook of Tswana Law and Custom.* London: Oxford University Press.
- Schapera, I. (1943) *Native Land Tenure in the Bechuanaland Protectorate.* Alice: Lovedale Press.
- Selolwane, O. D. (????) Fencing Botswana's Commonage: A Recipe for Environmental Disaster or Conservation? *Pula: Botswana Journal of African Studies*, 9, 2, pp 90-117.
- TAHAL Consulting Engineers Ltd (2000) *National Master Plan for Agricultural Development* (five volumes) for the MOA, September 2000, Gaborone.
- Werbner, R.P. (ed) (1982) *Land Reform in the Making: Tradition, Public Policy and Ideology in Botswana.* Rex Collings, London.
- White, R. (1993) *Livestock Development and Pastoral Production on Communal Rangeland in Botswana,* Botswana Society, Gaborone.
- White, R. (1999) *Livestock and Land Tenure in Botswana,* Conference on New Directions in Land Tenure, Africa Studies Centre, University of Leiden, The Hague, 1999.
- White, R. (1999a) *Land Issues Paper,* IUCN and ZERO Study on NGO's involvement in land issues www.iucnbot.bw
- Wilmsen, E.N. (1988) 'The Political History of Minorities and its Bearing on Current Policy', In *Botswana: Education, Culture, and Politics*, 29-52. Edinburgh: Centre of African Studies, University of Edinburgh.

Appendix B

NATIONAL LAND POLICY TERMS OF REFERENCE

1. *Preamble*

The Project involves a review of available Botswana land-related policies and the preparation of a comprehensive National Land Policy. In preparation of the Policy the consultants should review, integrate and consolidate all available land related policies, procedures, and programmes that have been employed in the administration and management of land in Botswana. The Land policy should encompass practices and decisions made in the administration, management, development, acquisition and disposal of land in all tenure systems.

2. *Client*

The client will be the Ministry of Lands, Housing and Environment represented by the Department of Lands.

3. *Background*

Since independence in 1966, the Government of Botswana has been appointing commissions and carrying out studies to facilitate land administration and development. Some of the policies resulting from these studies are the following:

i) **Tribal Grazing Land Policy**

The Tribal Grazing Land Policy (TGLP) was formulated in 1975. The 1975 TGLP Policy provided for zoning of tribal land into communal, commercial for livestock production and reserve land for future use.

Since approval of this policy, land has been zoned and allocated for commercial livestock production. In the spirit of sustainable economic diversification, TGLP farmers have been submitting proposals for changes of land use from livestock production to other viable economic activities to the Land Boards. Land Boards have however been unable to accede to these proposals as the designated land uses were in accordance with the requirements of the policy.

In order to attain sustainable development and diversification of the economy, it is important to review this policy to allow for accommodation of viable agricultural projects.

ii) **National Policy on Land Tenure**

The White Paper Number 1 of 1985 on National Policy on Land Tenure addressed issues pertaining to improvement to delivery of land for development and management of land. The major concerns were to remove obstacles that made both state and tribal land difficult to acquire and develop. Through the policy it has become possible to mortgage tribal land to facilitate

encouragement of financial institutions to extend credits to people or investors in these areas.

- iii) **Review of the Tribal Land Act, Land Policies and Related Issues**
The policy document was prepared in 1989 to facilitate the amendment of the Tribal Land Act to update it as well as to clearly specify control measures in the Act. The Tribal Land Act has since been amended. It may be necessary to review some of the policy issues raised in this document.

- iv) **National Policy on Agricultural Development.**
The Policy was formulated in 1991 for purposes of facilitating improvements in agricultural production. A significant change to land use introduced by the policy is to allow communities opportunities to be granted exclusive rights to grazing areas. Individuals with water points sites are to be allowed, where feasible, to fence land areas around the water points in an effort to encourage range resource management and increase livestock production. The granting of exclusive rights is based on the potential carrying capacities of the land.

- v) **Land Problems in Mogoditshane and Other Peri-Urban Villages**
The White paper addressed issues pertaining to illegal occupation of tribal land. As a result of this policy the Tribal Land Act was amended. The land problems in Mogoditshane have established the need for closer integration of planning, land acquisition, surveying, and allocation activities. Lessons learnt from these problems should be taken into consideration in formulation of Botswana land policy proposals.

- vi) **Accelerated Land Servicing Programme**
In 1986 there was widespread concern that serviced land was not available in urban centres. Government embarked on this programme mainly to alleviate the chronic shortage of serviced land in urban areas on a cost recovery basis. The programme was launched in 1987 and with it government introduced waiting list to give all applicants opportunities to be considered for land allocation. This formed the basis for the current state land allocation policy. The programme should be examined and its appropriateness in facilitating efficient state land allocation be established.

The computerised State Land Allocation System being used for state land allocation is now being re-developed under a separate project.

- vii) **Tourism Policy**
This policy was formulated in 1990 to promote tourism in Botswana. Since the formulation of this policy, the demand for land for tourism development has increased tremendously. In order to facilitate the growth of the tourism industry, the National Land Policy should provide guiding principles for allocation of land for tourism related activities.

- viii) **National Conservation Strategy**

White Paper No.1 of 1990, (National Policy on Natural Resources Conservation and Development) was formulated to assure implementation of the Botswana National Conservation Strategy. Its goals were:

- to increase the effectiveness with which natural resources are used and managed, so that beneficial results are maximised and harmful environmental side effects are minimised; and
- To integrate the work of many sectoral ministries and interest groups, thereby improving the development of natural resources through environmental conservation.

On the basis of the principles of the National Conservation Strategy, the Land Policy should indicate possible environmental conditions/situations under which certain land areas may be allocated and developed.

i) **National Settlement Policy (NSP)**

The National Settlement Policy (NSP) was approved in 1998 to provide a comprehensive set of guidelines for National Physical Planning and to provide a framework to guide the distribution of investment. The NSP provided guiding principle for preparation of District Integrated Land Use and Settlement Development Plans to facilitate allocation of land based on land suitability and capability to sustain particular land uses, minimise land use conflicts and preservation of suitable land for arable agriculture. The policy therefore calls for efforts to use land in an environmentally and economically sustainable manner.

x) **Housing Policy**

White Paper number 2 of 2000 on National Policy on Housing in Botswana is to facilitate provision of decent and affordable housing for all within a safe and sanitary environment. The policy addresses key elements of the housing section such as institutional, land finance, subsidies, rentals, and housing standards, building materials and housing legislation. Further, the policy re-defined the roles of stakeholders to ensure efficient use of resources. In order to achieve these the policy highlights the following:

- i To change the emphasis of Government from home provision to facilitation in the various settlements in partnership with other stakeholders;
- ii To channel more Government resources (and emphasis) to low and middle lower income housing in both urban and rural areas;
- iii To promote housing as an instrument for economic empowerment and poverty alleviation; and
- iv to foster a partnership with the private sector and all major employers in home development and facilitation of home ownership.

Based on the above the National Land Policy set a framework to facilitate provision of housing.

xi Legislation

Some of the relevant legislations with a bearing on land include the following:

State Land Act
Tribal Land Act/Tribal Land (Amendment) Act
Town and Country Planning Act
Land Control Act
Land Survey Act
Acquisition of Property Act
Deeds Registry Act

These Acts and others that have not been mentioned here provide regulatory measures in land administration. It is important that the consultants acquaint themselves with their provisions - and establish their relevance to the current and future land management and development.

xii Other Policy Issues

There are other policy issues on land which may have been raised through Presidential Directives which should be considered during the preparation of Botswana Land Policy. The list of policy issues on land is not exhaustive and the consultants are expected to cover them as widely as possible. The consultant should examine available land related policies and link them to community and cultural integrity, economic and sustainable development.

4. *Formulation of a Land Policy*

There is need for a comprehensive Land Policy that would provide a holistic approach to land administration and development.

In preparing the land policy, the consultant shall take cognisance of the National Vision and Mission for Botswana as well as the Ministry of Lands, Housing and Environment Vision and Mission, with respect to land and development.

5. *Tasks*

The task of the consultants shall be to prepare a comprehensive land policy document that should facilitate efficient, appropriate and sustainable land administration and management. The specific tasks to be undertaken by the consultants are:

- a) To establish a framework for preservation of productive agricultural land. The current trend is that settlements expand at the expense of productive agricultural land. Often farmers find themselves being pushed into marginal and unsuitable land for arable agricultural production.
- b) To study the relevant legislation and policies and harmonise the conflicting parts.
- c) To establish the most viable options to facilitate equitable distribution of and access to land for citizens.

- d) To review the land allocation procedures and recommend the most viable procedures that take due regard to environmental factors in land development.
- e) To review land pricing and funding mechanism with the view to make land more accessible to citizens.
- f) To identify factors responsible for gender inequalities in the allocation of land, and further recommend appropriate and effective legislation amendment in the existing laws/procedures to ensure that both women and men have equal rights/opportunities in land ownership/allocation.
- g) To establish problems experienced by any particular group or groups of citizens in securing land rights and recommend actions to be taken to guarantee such rights.
- h) To establish circumstances surrounding land fronting in Botswana and recommend effective restrictive covenants of title deeds.
- i) To review policy on private sector participation in land servicing and development to facilitate attraction of citizens to the scheme.
- j) To establish impacts of transfer of land to non-citizen with regard to land and property ownership. Recommend ways and means of preventing the loss of land ownership by citizens to non-citizens.
- k) To assess the impact of dual grazing system in communal areas and recommend positive and most viable solution.
- l) To review the current standard sizes of plots and recommend sizes that provide adequate floor spaces without compromising sustainable and intensive use of land.
- m) To review the current status of abandoned land areas (Matlotla-ruins) and recommend the most viable options to put them to good uses.
- n) To review all land management structures for purposes of facilitating quick delivery and control of land development.
- o) In view of shortage of land and conflicts on land use, the consultant shall assess and recommend ways for protecting, preserving, and conserving land for optimal and sustainable uses.
- p) To address any other relevant aspects that may facilitate development of a comprehensive land policy.

6. Critical Issues to be taken into consideration during the review of land policies

- i) The human population has tremendously increased putting more pressure on land.
- ii) Increased urbanisation has intensified demand for residential, commercial and industrial land.

- iii) The increased economic opportunities are putting pressure for land use change to allow diversification of the economy.
 - iv) The high demand for plots in urban areas and peri-urban centres has led to development of illegal land markets on adjacent tribal areas.
 - v) Expansion of human settlements villages in to arable land has in turn led to encroachment of the latter onto grazing areas thereby reducing land available for arable and grazing respectively.
 - vi) New settlements are mushrooming in agricultural lands requiring provision of services.
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