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THE LAND QUESTION IN BOTSWANA: A COMMENTARY ON THE REPORT OF THE PRESIDENTIAL COMMISSION OF INQUIRY INTO THE REVIEW OF THE CONSTITUTION OF BOTSWANA

ABSTRACT

The land question in Botswana dominated the public deliberations during the Presidential Commission of Inquiry into the Review of the Constitution of Botswana, which was appointed by the President of the Republic of Botswana, Mokgweetsi Masisi, on 17 December 2021. In the Constitution of Botswana, the subject of land is only mentioned curtly in section 8. However, in countries such as Zimbabwe, Zambia, South Africa, and Mozambique, national constitutions extensively deal with land issues. Botswana's (citizens of Botswana) sustained and passionate debate suggests that they want the subject of land entrenched in the constitution should it be reviewed. The article is not a critique of the Report of the Presidential Commission in toto. It only analyses the major land issues raised and captured in it. The (illegal) selling of land; the role of the land boards and dikgosi (chiefs) in land administration; the impact of colonial land alienation; the compulsory acquisition of tribal land; the delays in land allocation; and the shortage of (serviced) land, among others, dominated the inquiries. These issues require an academic analysis to contextualise them and guide the national debate further. The article relies on the Report of the Presidential Commission, published works, and official documents from the government of Botswana. It concludes that the "absence" of the subject of land, and or land rights, in the constitution of Botswana is a concern in a liberal democratic society.

Keywords: Land Question, Land Boards, Constitutional Review, Presidential Commission of Inquiry, President Masisi, Botswana

1. INTRODUCTION AND CONTEXT

The right to land could not be overemphasised. Various individuals and groups lamented poor land management, with emphasis on delay in allocation and corruption of Land Boards across the country. It was emphasised that while the national anthem puts emphasis on land as a gift from God ‘*Fatshe Leno la Rona ke Mpho ya Modimo*’, the reality on the ground was contradictory to the song. Some expressed concern that such corruption favoured foreigners who owned land while Batswana were awaiting allocation at their home villages and lands.¹

On 17 December 2021, the President of Botswana, Mokgweetsi Masisi, appointed the Presidential Commission of Inquiry into the Review of the Constitution of Botswana (hereafter, the Presidential Commission). In its 2019 election manifesto, the Botswana Democratic Party (BDP), in power since independence from Britain in 1966, promised, “a comprehensive review of the Botswana constitution with an aim to aligning it to international standards”.² Botswana’s constitution has only been amended a couple of times but not comprehensively reviewed.³ Therefore, the Presidential Commission was tasked with, “the first wholesome inquiry into the review of the Constitution of Botswana”.⁴ It comprised 19 commissioners from different sections of the society. They were headed by a retired Chief Justice of Botswana, Maruping Dibotelo. The Presidential Commission’s Terms of Reference were,

- a) [to] ascertain from the people of Botswana, their views on the operation of the Constitution and, in particular, the strengths and weaknesses of the Constitution;
- b) [to] assess the adequacy of the Constitution [...]
- c) [to] articulate the concerns of the people of Botswana as regards the amendments that may be required for a review of the Constitution;
- d) to conduct inquiries and obtain information from sources that the Commission considers relevant in the execution of its mandate.⁵

The exercise took nine months. The Presidential Commission covered all 57 constituencies, holding *kgotla* (village/public) and interest groups’ meetings. Written submissions were also sent to the Presidential Commission’s

1 Republic of Botswana, *Report of the presidential commission of inquiry into the review of the constitution of Botswana* (Gaborone: The Secretariat, 2022), pp. 64-65.

2 BDP, *BDP 2019 election manifesto: Advancing together towards a more inclusive economy* (Gaborone: Tsholetsa House, 2019), p. 49.

3 Republic of Botswana, *The constitution of Botswana* (Gaborone: Government Printer, 1966).

4 Republic of Botswana, *Report of the presidential commission of inquiry into the review of the constitution of Botswana*, p. 1.

5 Republic of Botswana, *Report of the presidential commission of inquiry into the review of the constitution of Botswana*, pp. 3-4.

secretariat through post and email. The Botswana national television covered all the 132 *kgotla* meetings countrywide, while the *Daily News* provided written accounts.⁶ The final report, about 221 pages, was submitted to the President in September 2022. The Botswana Law Society (BLS) criticised it, arguing that, “parliament, civil society, and constitutional experts were sidelined by the process”.⁷ In addition to the *kgotla* meetings, the report contains a detailed list and contacts of individuals and organisations that were consulted, as well as the methods used.⁸ Delving into legal complexities, the BLS believes that, “an Act of Parliament should have been the appropriate means to drive the constitutional review process”.⁹ The “opposition coalition”, the Umbrella for Democratic Change (UDC), also queried the report, stating that it can be mistaken for a BDP conference report.¹⁰

The article’s objective is not to critique the entire report nor engage the BLS’s and the UDC’s views on it.¹¹ It analyses the major land issues raised in the report and the proposals and recommendations from the public and commissioners. In Africa, addressing the land question, “requires a thorough understanding of the complex social and political contradictions which have ensued from colonial and post-independence land policies”.¹² The article aims to provoke an academic and public debate. It agrees that, “Land is a very special resource, the very base on which the [Botswana] nation stands. The way in which it is administered [should be] a profound expression of national values”.¹³ During the inquiries, Botswana (citizens of Botswana) raised the land question since it is a contentious and emotive issue, as elsewhere in Southern Africa.¹⁴ Most of the issues they raised are what the Revised Botswana Land Policy of 2019 (hereafter, the Revised Land Policy) and the

6 “Give the review your all-Segotsi”, *Botswana Daily News*, 11 May 2022.

7 “Law society pours scorn on constitutional review report”, *The Botswana Gazette*, 8 February 2023.

8 See annexures 2, 3, 4, 5, and 6 in Republic of Botswana, *Report of the presidential commission of inquiry into the review of the constitution of Botswana*.

9 “Law society rejects constitutional review in new position paper”, *Weekend Post*, 10 November 2023.

10 “Opposition denounces constitutional review report”, *Mmegi*, 8 December 2022.

11 See BR Dinokopila, “A win for the status quo: Critiquing the presidential commission of inquiry’s report on the review of the constitution of Botswana”, *ConstitutionNet*, 30 January 2023, <https://constitutionnet.org/news/win-status-quo-botswana>, accessed 7 March 2024.

12 S Moyo, *African land questions, agrarian transitions and the state: Contradictions of neo-liberal land reforms* (Dakar: CODESRIA, 2008), p. 1.

13 Republic of Botswana, *Report of the presidential commission on land tenure* (Gaborone: Government Printer, 1983), p. 3.

14 See, BT Manatsha and WG Morapedi, “Reflections on a quota system for tribal land allocation in peri-urban areas in Botswana”, *Journal of Contemporary African Studies* 40 (1), 2022, pp. 63-77.

Tribal Land Act (TLA) of 2018 were passed to address.¹⁵ Inexplicably, the Report of the Presidential Commission makes no reference to the Revised Land Policy, while the TLA of 2018 is not directly cited, but is listed in the bibliography.

In Botswana, the administration of land is dealt with under various acts and policies, depending on the land tenure. However, some of these legislations are misaligned and contradictory.¹⁶ Botswana's submissions during the inquiry suggest that they want land issues, mainly access, ownership, and administration, entrenched in the constitution.¹⁷ But, the government should enforce the existing legislation and not wait for the review of the constitution. Should it be reviewed, the constitution should dedicate a chapter to land. It should address issues such as the colonial land question. Section 8 of the constitution protects colonial land "theft". A retired judge of the High Court of Botswana, John Mosojane, questioned this in an open letter to the Minister of Lands and Water Affairs.¹⁸

Botswana in the former colonial enclaves, encircled by freehold farms, such as the North East District (NED) and South East District (SED) (Figures 1, 2 and 3), told the Presidential Commission that, "Botswana remain without land".¹⁹ The SED is the smallest district, followed by the NED. In 2011, the SED total land area was 1 780 square kilometres (km), while the NED was 5 120 square km. In 2017, the SED population was 103.136, with a density of 57.94. In the same year, the NED population was 67 915, with a density of 13.26.²⁰ The national population density is four persons per square km. During the inquiries, some Botswana, "expressed the view that the review of the Constitution will help the country to correct injustices of the past",²¹ such as the colonial land question, as in some countries.

15 Republic of Botswana, *Tribal land act no.1 of 2018* (Gaborone: Government Printer, 2018); Republic of Botswana, *Revised Botswana land policy* (Gaborone: Government Printer, 2019).

16 C Ng'ong'ola, "Botswana's tribal land act of 2018: Confounding innovations with congenital and other defects", *University of Botswana Law Journal* 27, 2019, pp. 3-35.

17 Republic of Botswana, *Report of the presidential commission of inquiry into the review of the constitution of Botswana*, pp. 64-69, and pp. 161-164.

18 "An open letter to Minister of Lands and Water Affairs", *Mmegi*, 12 January 2024.

19 Republic of Botswana, *Report of the presidential commission of inquiry into the review of the constitution of Botswana*, p. 69.

20 World Data Atlas, "North-east", <<https://knoema.com/atlas/Botswana/North-East>>, accessed 1 July 2023.

21 Republic of Botswana, *Report of the presidential commission of inquiry into the review of the constitution of Botswana*, p. 14.

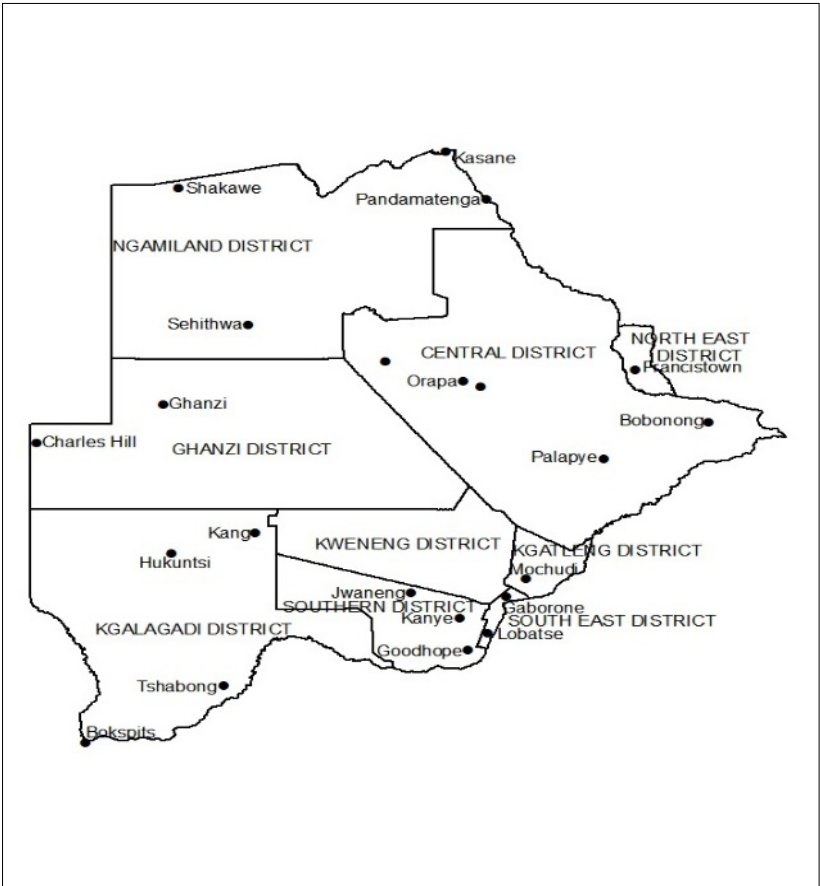


Figure 1: Map of Botswana

In Zimbabwe, South Africa, and Mozambique, national constitutions extensively address the land question. The land was fundamental to their liberation struggles. Zimbabwe's constitution states that, "the people of Zimbabwe must be enabled to re-assert their rights and regain ownership of their land".²² Zimbabwe's government implemented the Fast-Track Land Reform Programme (FTLRP) in the early 2000s. It expropriated white-owned farms and redistributed them to the "landless" blacks. However, criticisms are that the FTLRP largely benefited those linked to the ruling party and the black elite.²³ The South African constitution states that, "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis".²⁴ Section 25 (6) to (8) empowers the state to redress colonial land injustices, although it imposes restraints.²⁵ The opposition Economic Freedom Fighters (EFF) tabled a motion in parliament, which sought to amend section 25 to allow the state to expropriate land without compensation.²⁶ The motion failed.

In Mozambique, the constitution states that, "All ownership of land shall vest in the State".²⁷ It prohibits the selling of land. The Constitution of Zambia details how the land is held, used, and managed. It demands, "equitable access to land and associated resources".²⁸ It provides that the state can compulsorily acquire land or any property without compensation only if the relevant laws back this.²⁹ The Constitution of Botswana is "silent" on land. In the 1960s, the Marxist-Leninist leaning Bechuanaland (Botswana) Peoples Party insisted that it would nationalise all the land should it assume power.

22 Republic of Zimbabwe, "Zimbabwe's constitution of 2013", section 72 (7) (c), <https://www.constituteproject.org/constitution/Zimbabwe_2013.pdf>, accessed 4 January 2023.

23 A Goebel, "Zimbabwe's 'fast track' land reform: What about women?", *Gender, Place and Culture* 12 (2), 2005, pp. 145-172.

24 Republic of South Africa, *The constitution of the Republic of South Africa* (Pretoria: Government Printer, 1996), section 25 (5).

25 R Hall, "Land restitution in South Africa: Rights, development, and the restrained state", *Canadian Journal of African Studies* 38 (3), 2004, pp. 659-561.

26 "EFF blames ANC [African National Congress] for failure to pass expropriation without compensation bill", *City Press*, 7 December 2021.

27 Republic of Mozambique, "Mozambique's constitution of 2004", article 109 (1), <https://www.constituteproject.org/constitution/Mozambique_2007.pdf?lang=en>, accessed 14 February 2023.

28 Republic of Zambia, "Zambia's constitution of 1991", article 253 (1) (a), <https://constituteproject.org/constitution/Zambia_2016.pdf?lang=en>, accessed 17 February 2023.

29 Republic of Zambia, "Zambia's constitution", article 16 (2).

It preached pan-Africanism.³⁰ Precautionary, Britain also insisted on the inclusion of a clause in the Constitution of Botswana that protects private property rights.³¹ Section 8 of Botswana's constitution provides that,

No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say-

(a) the taking of possession or acquisition is necessary or expedient-

(i) in the interests of defence, public safety, public order, public morality, public health, town and country planning or land settlement;

(ii) in order to secure the development or utilisation of that, or other, property for a purpose beneficial to the community; or

(iii) in order to secure the development of utilisation of the mineral resources of Botswana [...]³²

Generally, African governments lack the political will to expropriate land to address the unresolved land questions. Below is a summary of the literature on Botswana's land question.

2. A SUMMARY OF LITERATURE ON BOTSWANA'S LAND QUESTION

Across Africa, including in Botswana, power relations determine access to land, shape land conflicts, and influence the rules and institutions governing it.³³ Therefore, arguably, "Of all issues in African local politics, land remains perhaps the most prominent one".³⁴ In Botswana, the Revised Land Policy states that the country has undergone rapid socio-economic, political, and environmental changes, with impact on, "access to land, protection of land

30 CAS Koveya, *The origin and development of Tati town district of Francistown to the 1970s* (BA, University of Botswana, 1985), p. 15.

31 C Ng'ong'ola, "Land rights for marginalised ethnic groups in Botswana, with special reference to the Basarwa", *Journal of African Law* 41 (1), 1997, p. 12.

32 Republic of Botswana, *The constitution of Botswana*, section 8 (1).

33 PE Peters, "Inequality and social conflict over land in Africa", *Journal of Agrarian Change* 4 (3), 2004, pp. 269-314; P Malope and N Batisani, "Land reforms that exclude the poor: The case of Botswana", *Development Southern Africa* 25 (4), 2008, pp. 383-397.

34 C Lund, *Local politics and the dynamics of property in Africa* (Cambridge: Cambridge University Press, 2008), p. 8.

rights as well as land management".³⁵ Studies from various disciplines dissect these issues. Historical studies, for instance, concur that although Botswana did not experience intense colonialism, some regions experienced colonial land alienation³⁶ (Figures 2 and 3). Historian Wazha Morapedi recommends land restitution.³⁷ Socio-legal studies mainly dissect the complexities brought about by Botswana's dual land tenure system. Generally, they posit that freehold titles and common law leases exclude the poor and even dispossess them.³⁸ Studies also critique the post-independence elitist land reforms that exclude the poor, such as the Tribal Grazing Land Policy (TGLP) of 1975.³⁹ The TGLP is discussed later. Botswana's ruling elites exploit gains from land, and this gives them, "a strong incentive to reinforce institutions that guarantee property rights across the country".⁴⁰ Their inclination towards cattle ranching has seen them privatising the commons.⁴¹ Some studies focus on the land rights of the minority and marginalised, especially the San. Generally, they conclude that their relocation from the Central Kalahari Game Reserve (CKGR) by the state violated their human rights.⁴² This is also revisited later.

General studies assess Botswana's customary land tenure regime.⁴³ In Africa, customary land rights are seen as not, "amounting to real property rights, deserving of protection"⁴⁴ in their existing form. Hernando de Soto

35 Republic of Botswana, *Revised land policy*, p. 3.

36 J Croston, An economic and social history of freehold land tenure districts of the Bechuanaland Protectorate (Botswana), 1903-1966 (PhD, Boston University, 1993); WG Morapedi, "The settler enclaves of Southern Africa and the African peripheral areas (reserves): The case of the Ghanzi and Tati white farming districts of Botswana, 1898-1970", *South African Historical Journal* 66 (3), 2014, pp. 546-571; F Morton, "Does Ruretse belong to Batlokwa? What history can tell us", *Botswana Notes and Records* 50, 2018, pp. 278-280.

37 WG Morapedi, "Land restitution and the communities of north-eastern Botswana, 1889-2012", *South African Historical Journal* 72 (3), 2020, pp. 520-545.

38 Ng'ong'ola, "Land rights for marginalised ethnic groups", pp. 1-26; Malope and Batisani, "Land reforms that exclude the poor", pp. 383-397.

39 Malope and Batisani, "Land reforms that exclude the poor", pp. 383-397; A Cullis and C Watson, *Winners and losers: Privatising the commons in Botswana* (Colchester: International Institute for Environment and Development, 2005), pp. 19-23.

40 AK Onoma, *The politics of property rights institutions in Africa* (Cambridge: Cambridge University Press, 2010), p. 63.

41 AL Picard, "Bureaucrats, cattle, and public policy: Land tenure changes in Botswana", *Comparative Political Studies* 13 (3), 1980, pp. 313-356; Cullis and Watson, *Winners and losers*, pp. 15-23.

42 J Sarkin and A Cook, "The human rights of the San (Bushmen) of Botswana: The clash of the rights of indigenous communities and their access to water with the rights of the state to environmental conservation and mineral resource exploitation", *Journal of Transnational Law and Policy* 20, 2012, pp. 1-40.

43 JL Comaroff, "Class and culture in a peasant economy: The transformation of land tenure in Barolong", *Journal of African Law* 24 (1), 1980, pp. 85-113; FT Kalabamu, "Divergent paths: Customary land tenure changes in greater Gaborone, Botswana", *Habitat International* 44, 2014, pp. 474-481.

44 LA Wily, "The law is to blame': The vulnerability status of common property rights in sub-Saharan Africa", *Development and Change* 42 (3), 2011, p. 733.

argues that unregistered land is dead capital.⁴⁵ In Botswana, as in some parts of Africa, customary land tenure has been forced to adapt to new changes, such as land registration.⁴⁶ Studies reveal the benefits of land registration for the poor, such as poverty alleviation and access to credit.⁴⁷ Secure land rights also protect against dispossession. However, land registration may also cause social problems, such as, “inequality and potential social differentiation”.⁴⁸ Studies have also examined land conflicts in Botswana’s peri-urban villages. They reveal rampant (illegal) land transactions because of the high demand of residential land.⁴⁹ A discussion on land expropriation in colonial Botswana follows.

3. LAND EXPROPRIATION IN COLONIAL BOTSWANA

In 1885, the British declared the Bechuanaland (Botswana) a protectorate (Bechuanaland Protectorate). In 1889, however, they started discussing with the British South Africa Company (BSAC) to take over the country to administer it. They did not want to commit resources to a country they considered unworthy. There were no known minerals then, except for some little deposits of gold. The threat of transferring the country to the BSAC led to three Batswana *dikgosi* (chiefs) travelling to England in 1895 to protest. They prevented the total transfer of “their” land to the BSAC. In exchange, *dikgosi* reluctantly accepted some demands, mainly the granting of land to the BSAC to construct the railway line connecting South Africa, Botswana, and Zimbabwe.⁵⁰ The British introduced the “indirect rule policy” to administer the Bechuanaland Protectorate. The policy somewhat left *dikgosi* to administer “native” affairs while the colonial administration focused on Europeans. A dual legal system was born,⁵¹ which also introduced a tripartite land tenure system: freehold land, “native” land, and crown land.

45 H de Soto, *The mystery of capital: Why capitalism triumphs in the West and fails everywhere else* (New York: Basic Books, 2000).

46 Republic of Botswana, *Tribal land act no.1 of 2018*, see section 23.

47 A Chimhowu, “The ‘new’ African customary land tenure: Characteristic, features and policy implications of a new paradigm”, *Land Use Policy* 81, 2019, pp. 897-902; W Antonio and C Griffith-Charles, “Achieving land development benefits on customary/communal land”, *Land Use Policy* 83, 2019, pp. 124-133.

48 Chimhowu, “The ‘new’ African customary land tenure”, p. 897; also, Peters, “Inequality and social conflict over land in Africa”, p. 269.

49 BT Manatsha, “Reflections on the acquisition of land by non-citizens in Botswana”, *Journal of Land and Rural Studies* 8 (2), 2020, pp. 185-204; C Ng’ong’ola, “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), 1992, pp. 140-167.

50 P Maylam, *Rhodes, the Tswana and the British: Colonialism, collaboration, and conflict in the Bechuanaland Protectorate* (Westport, CT: Greenwood Press, 1980), p. 78.

51 CJ Makgala, *The policy of indirect rule in Bechuanaland Protectorate, 1926-1957* (PhD, University of Cambridge, 2001).

Before 1885, some individual Europeans, including colonial syndicates, had signed land and mineral concessions with *dikgosi*.⁵² All the concessions were later investigated and validated by a Concessions Commission established by the colonial administration on 1 February 1893. This was based on the proclamation passed on 10 June 1891 declaring that, “claims to land in the Protectorate by persons of European descent will not be recognised until approved in such [a] manner as the High Commissioner would determine”.⁵³ The Concessions Commission validated some land claims despite protests from *dikgosi*. Among the Tswana, a *kgosi* could not permanently alienate land since he was only its custodian. However, successful claimants were regarded as having acquired “freehold titles”. Freehold is an English property law concept, and it was not, “part of the vocabulary of the Roman-Dutch law [...] chosen as the general law for the Protectorate in non-tribal matters”.⁵⁴ The Commission assumed that a freehold title conferred, “the “right of ownership” in the more familiar language of the Roman-Dutch law”.⁵⁵

The colonial administration divided the Bechuanaland Protectorate into tribal reserves in 1899. In 1933, the Tribal Territories Act fixed the tribal boundaries⁵⁶ (Figure 2). While in England, *dikgosi* had agreed to these new developments. Non-freehold land falling outside tribal reserves became crown land.⁵⁷ The Bechuanaland Protectorate (Lands) Orders in Council of 1904 and 1910 created crown land, introducing common law land tenure.⁵⁸ In 1911, the Concessions Commission conferred a freehold title on the Tati Concessions (Tati Company) in the NED. A freehold title was also conferred on the BSAC in the SED. The Tati Concessions displaced Africans from their land, crowding them into a tiny and barren Tati Native Reserve (today NED).⁵⁹ Freehold titles granted, “full, free and undisturbed rights”.⁶⁰ The BSAC and the Tati Concessions, “became the major owners of “freehold” land in the Protectorate”.⁶¹ The African Acquisition of Land Proclamation 56 of 2 October 1921 barred Africans, “from acquiring any interest in land in the Protectorate unless the High Commissioner approved such interest”.⁶² Africans could not

52 O Selolwane, “Colonising by concession: Capitalist expansion in the Bechuanaland Protectorate, 1885-1950”, *Pula: Botswana Journal of Africa Studies* 2 (1), 1980, pp. 85-91.

53 Ng'ong'ola, “Land rights for marginalised ethnic groups”, p. 6.

54 Ng'ong'ola, “Land rights for marginalised ethnic groups”, p. 7.

55 Ng'ong'ola, “Land rights for marginalised ethnic groups”, p. 7.

56 Republic of Botswana, *Tribal territories act* (Gaborone: Government Printer, 1933).

57 Ng'ong'ola, “Land rights for marginalised ethnic groups”, pp. 8-9.

58 K Frimpong, “Post-independence land legislation and the process of land tenure reform in Botswana”, *Comparative and International Law Journal of Southern Africa* 26 (3), 1993, p. 385.

59 Morapedi, “Land restitution and the communities of north-eastern Botswana”, pp. 520-527.

60 Republic of Botswana, *Tati Concessions land act* (Gaborone: Government Printer, 1911), section 4.

61 Ng'ong'ola, “Land rights for marginalised ethnic groups”, p. 8.

62 Frimpong, “Post-independence land legislation”, p. 386.

transact in land, while Europeans used it as collateral in banks. In the next section, the article analyses land tenure in postcolonial Botswana.

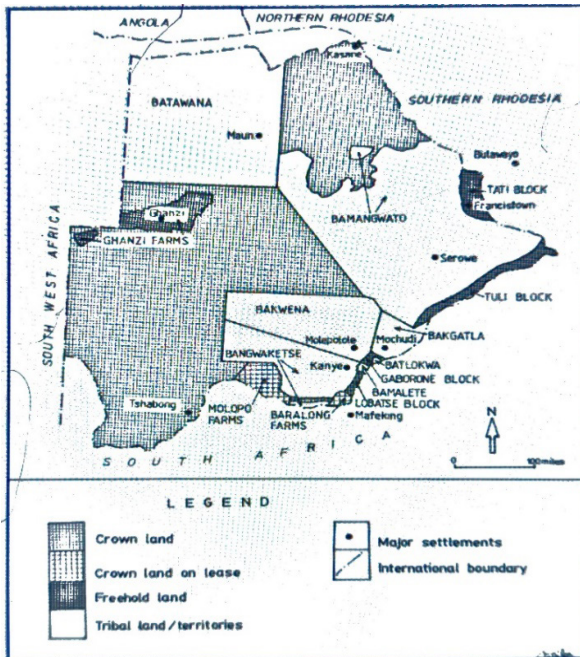


Figure 2: A Map of Botswana Showing Land Tenures in Colonial Botswana

Source: F Kalabamu, "Informal land delivery processes in greater Gaborone, Botswana: Constraints, opportunities, and policy implications" (International Development Department: The University of Birmingham, 2004), p. 7.

4. LAND TENURE IN POSTCOLONIAL BOTSWANA

At independence, Botswana did not fundamentally change the land tenure system as happened in some African countries. Tanzania, Mozambique, and Ethiopia abolished indigenous and colonial land tenure systems and nationalised all the land. In Malawi, customary land tenure was replaced by privatisation.⁶³ As the article shows, Botswana adopted a dual legal system

63 Peters, "Inequality and social conflict over land in Africa", especially p. 273.

where customary and common law land tenure co-exist. The Revised Land Policy states that the land tenure has been retained because it has, “served the country well save for few shortcomings in administrative purposes”.⁶⁴ In 1966, crown land became state land, freehold land remained unchanged, while native land became tribal land. In the same year, state land accounted for 46 per cent, freehold land five per cent, and tribal land 49 per cent of Botswana’s total land area.⁶⁵

4.1 State Land

The State Land Act of 1966 vested the administration of state land in the President. The President later delegated that function to the Minister of Lands.⁶⁶ State land allocated to low-income earners (citizens) under the government-funded Self-Help Housing Agency is managed by the City/Town Councils. State land is also held by private individuals and companies as leaseholds under the Fixed Period State Grant (FPSG). In 1985, the government ceased the conversion of state and tribal land into freehold land. This made the FPSG the standard grant in the urban areas (state land). Only citizens are eligible for the direct allocation of residential land under the FPSG.⁶⁷ Non-citizens can acquire it in the market. An FPSG lease runs for, “fifty years for commercial and industrial concessions, and 99 years for residential purposes”.⁶⁸ Leases, “can be alienated and inherited”, but cannot be transferred, “for a period exceeding the remaining period of the grant”.⁶⁹ The transfer should satisfy the development covenant of the grant.⁷⁰ State land also includes forest land, national parks, game reserves, and wildlife management areas.

4.2 Freehold Land

Freehold land is held, occupied, and administered, “in conformity with common law notions and conceptions” brought in by colonial rule.⁷¹ It is regulated by the Deeds Registry Act and the Land Control Act of 1975,

64 Republic of Botswana, *Revised land policy*, p. 13.

65 Republic of Botswana, *Revised land policy*, p. 4.

66 Republic of Botswana, *State land act* (Gaborone: Government Printer, 1966).

67 Republic of Botswana, *Botswana land policy* (Gaborone: Government Printer, 2015), p. 10; Frimpong, “Post-independence land legislation”, p. 392.

68 Frimpong, “Post-independence land legislation”, p. 392.

69 Frimpong, “Post-independence land legislation”, p. 392.

70 Frimpong, “Post-independence land legislation”, p. 392.

71 Ng’ong’ola, “Land problems in some peri-urban villages”, p. 140.

amended in 1986.⁷² The rights conferred by a freehold title are perpetual, inheritable, transferable, and registrable. These make it, “the most valuable” type of land.⁷³ Unlike state and tribal land, undeveloped freehold land can be transacted. The Land Control (Amendment) Act of 1986 requires that any proposed transaction should be published in the *Government Gazette* and one newspaper circulating in Botswana. “[A]ny citizen of Botswana” shall, “receive priority”.⁷⁴ This is to encourage citizens to acquire freehold land. It is aimed at redressing unequal ownership of this land, which historically benefited the whites.

Freehold land is mainly commercial farms. It is also found in the urban areas as residential and commercial plots. The government has been purchasing and converting freehold land into state and tribal land.⁷⁵ In 2021, a study commissioned by the United Nations Development Programme (UNDP) on *Inequality in Botswana* found that the highest concentration of freehold land was in the Central, Kweneng, Southern, and South East Districts. It concluded, as expected, that, “it would appear that this land is in the hands of wealthier households because of their ability to purchase this land on the free market”.⁷⁶ Freehold land is generally exclusive.

4.3 Tribal Land

At independence, *dikgosi* were removed from land administration and replaced by statutory land boards, created in 1970, following the enactment of the TLA in 1968. *Dikgosi* and some Batswana resisted this without success.⁷⁷ Among the Tswana, and elsewhere in Africa, the land was/is linked to power and territorialism. It has been argued that, “Territoriality provides a means of reifying power”.⁷⁸ Therefore, when the government of Botswana introduced the land boards, *dikgosi* and their “subjects” viewed this as a pretext to

72 Republic of Botswana, *Land control act no. 23 of 1975* (Gaborone: Government Printer, 1975); Republic of Botswana, *Land control (amendment) act no. 17 of 1986* (Gaborone: Government Printer, 1986), section 2 (e); Republic of Botswana, *Deeds registry act* (Gaborone: Government Printer, 1960).

73 C Ng'ong'ola, “Reflections on Botswana’s 2015 land policy”, *University of Botswana Law Journal* 24, 2017, p. 115.

74 Republic of Botswana, *Land control (amendment) act*, section 2 (e).

75 Republic of Botswana, *Revised land policy*, p. 4.

76 B Martorano *et al.*, “Inequality in Botswana: An analysis of the drivers and district-level mapping of select dimensions of inequality” (Gaborone: UNDP, 2021), p. 37.

77 QKJ Masire, *Very brave or very foolish? Memoirs of an African democrat* (Gaborone: Macmillan Botswana, 2006), p. 184.

78 RD Sack, *Human territoriality: Its theory and history* (Oxford: Oxford University Press, 1986), p. 32.

detritorialisation.⁷⁹ It has been posited that, “linking people to place, nation to territory, are not simply territorialising, but deeply metaphysical”.⁸⁰ Rural communities that rely on communal land, “usually have a special emotional, cultural, and spiritual relationship and connection with the land”.⁸¹ Historically, traditional leaders played a pivotal role as the link between the people, their land, and their ancestors. But Botswana’s political ruling elite argued that, “the chiefs had over time become too dictatorial, conservative, and resistant to progressive changes on land”.⁸² Therefore, this necessitated legislative and institutional reforms. The TLA states that, “All the powers previously vested in a Chief and a subordinate land authority under customary law in relation to land [...] shall vest in and be performed by a land board [...]”.⁸³ The functions of the land boards are:

(a) the granting of rights to use any land; (b) the cancellation of the grant of any rights to use any land; (c) the imposition of restrictions on the use of tribal land; (d) the authorising of any change of use of tribal land; or (e) the authorising of any transfer of tribal land.⁸⁴

Since their inception, the land boards have been embroiled in intractable corruption and the mismanagement of land.⁸⁵ *Dikgosi* only sit in the land boards as advisors and have no voting rights.⁸⁶ The elites take advantage of the loopholes in the laws to amass and privatise tribal land.⁸⁷ To try and address this, all tribal land is now registered with the Deeds Registry Office.

79 Masire, *Very brave or very foolish?*, pp. 184-185.

80 L Malkki, “National geographic: The rooting of peoples and the territorialisation of national identity among scholars and refugees”, *Cultural Anthropology* 7 (1), 1992, p. 27.

81 Antonio and Griffith-Charles, “Achieving land development benefits”, p. 124.

82 FG Mogae, “Keynote address at the annual World Bank conference on land and poverty” (Washington DC: The World Bank, 2013), p. 5.

83 Republic of Botswana, *Tribal land act* (Gaborone: Government Printer, 1994), section 13 (1).

84 Republic of Botswana, *Tribal land act no. 1 of 2018*, section 5 (1).

85 AK Onoma, “Mutual gains from hostile confrontations: Land boards, their clients and ‘self-allocation’ in Botswana”, *Africa Development XXXIV* (1), 2009, pp. 103-124.

86 BT Manatsha, “Reflections on chiefs as ex officio members of the land boards, Botswana”, *Journal of Asian and African Studies*, published online on 17 February 2024, <https://doi.org/10.1177/00219096241228757>, accessed 6 March 2024.

87 Ng’ong’ola, “Land problems in some peri-urban villages”, pp. 140-167.

Table 1: Land Tenure Categories in Botswana by Proportion (Percentage)

Year	Tribal Land	State Land	Freehold Land
1966	48.8	47.4	3.7
1979	69.4	24.9	5.7
1998	70.9	24.9	4.2
2009	70.9	24.9	4.2
2013	71	26	3

Source: Botswana Institute for Development Policy Analysis, “Review of land tenure policy, institutional and administrative systems of Botswana” (Abidjan: African Development Bank, 2016), p. 13.

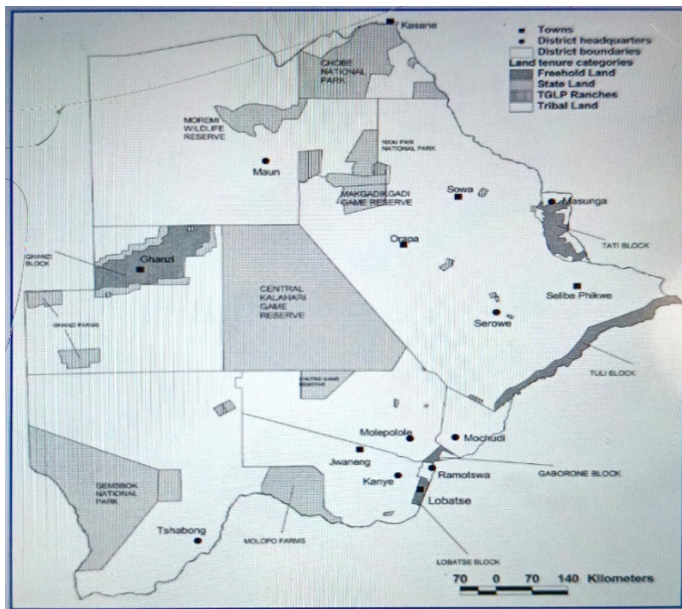


Figure 3: A Map of Botswana Showing Land Tenures in Postcolonial Botswana

Source: Kalabamu, “Informal land delivery processes”, p. 12.

5. THE LAND QUESTION IN POSTCOLONIAL BOTSWANA

The government of Botswana, “appears to have failed to adequately resolve land conflicts arising from post-colonial socio-economic and demographic transformations”⁸⁸, as this article also shows. The Report of the Presidential Commission of Inquiry confirms this as well. The government implemented the TGLP in 1975, which privatised the commons (Figure 3).⁸⁹ The TGLP was possibly inspired by Garrett Hardin’s thesis in “The Tragedy of the Commons”.⁹⁰ Hardin avers that, “communal/collective ownership” is bad for managing resources. He blames it for overexploitation and resource depletion due to selfishness, weak norms, and rules.⁹¹ His thesis gained prominence in the 1970s and 1980s. It even informed land management policies in Botswana. A former president of Botswana, Ketumile Masire (1980-1998), also believed that, “Communal ownership gives a false sense of ownership” because, “what belongs to everybody belongs to nobody”.⁹² His views and Hardin’s thesis undermine the socio-cultural and political factors behind resource utilisation and management in various communities.⁹³

The TGLP expropriated over two million hectares of communal grazing land, about four per cent of Botswana’s land area of 58 million hectares. Consequently, some communities were permanently displaced from their communal grazing lands and ancestral lands, as happened with the hunter-gatherers, part-time pastoralists, and agriculturalists in Kgalagadi.⁹⁴ The TGLP demarcated 342 ranches (measuring 8 km x 8 km each, about 6 400 hectares) in the communal areas and allocated them to cattle barons on a 50-year lease.⁹⁵ Pauline Peters contends that, “there is no doubt that some of the highly placed members of the government and [the ruling] party who promote[d] the policy [TGLP] benefit[ed] directly as wealthy cattle and

88 FT Kalabamu, “Land tenure reforms and persistence of land conflicts in sub-Saharan Africa: The case of Botswana”, *Land Use Policy* 81, 2019, pp. 337-345.

89 Cullis and Watson, “Winners and losers”, p. 15.

90 G Hardin, “The tragedy of the commons”, *Science* 162, 1968, pp. 1243-1248.

91 Hardin, “The tragedy of the commons”, pp. 1243-1248.

92 Masire, *Very brave or very foolish?*, p. 187.

93 D Feeny *et al.*, “The tragedy of the commons: Twenty-two years later”, *Human Ecology* 18 (1), 1990, pp. 1-19.

94 RK Hitchcock and JI Ebert, “Modelling Kalahari hunter-gatherer subsistence and settlement systems: Implications for development policy and land use planning in Botswana”, *Anthropos* 84 (1/3), 1989, pp. 58-59.

95 M Taylor, “Rangeland tenure and pastoral development in Botswana: Is there a future for community-based management?” (University of the Western Cape, School of Government: Centre for Applied Social Sciences and Programme for Land and Agrarian Studies, Commons Southern Africa occasional paper series no. 16, 2007), p. 7.

borehole owners".⁹⁶ Presidents Seretse Khama (1966-1980) and Masire directly benefited from the TGLP. The government availed loans under the TGLP, but, "the large down payments they required limited their uptake to the richest cattle owners".⁹⁷ Initially, the government had assumed that about 1 000 ranches could be established on "empty land" in communal (grazing) areas. However, the assumption that, "the land was empty was conclusively shown to be false".⁹⁸ In an African setting, communal land is hardly "empty". Robert K Hitchcock states that the government wrongly thought that the TGLP would reduce overgrazing in communal lands.⁹⁹

President Masire concurs, "Some of us thought: We have plenty land, and if we could provide exclusive access for those who could afford to drill boreholes and manage their farms, we might better preserve all of our land".¹⁰⁰ On the contrary, the TGLP beneficiaries continued to enjoy "dual grazing rights". Whenever grazing deteriorated in their ranches, they moved their herd back to the communal lands. The TGLP had mixed impacts on the hunter-gatherer communities, part-time pastoralists, and agriculturalists. The creation of commercial ranches and the sinking of boreholes reduced their mobility. They started gaining, "access to water, milk and employment opportunities".¹⁰¹ This impacted on their traditional way of life.

In 1991, the government introduced the National Policy on Agricultural Development (NPAD), which further recommended the fencing of massive communal grazing lands around private and syndicate-owned boreholes.¹⁰² The NPAD supported cattle barons and syndicates to fence between 3 600 and 6 400 hectares. It guaranteed, "exclusive rights in a 55-year lease to all contained renewable resources".¹⁰³ By December 2005, 602 ranches had been demarcated under the NPAD, enclosing an additional two million hectares.¹⁰⁴ The TGLP and the NPAD show that the elites in Botswana are hugely involved in cattle ranching.¹⁰⁵ Across Africa, including in Botswana, customary land is susceptible to compulsory acquisition by the state under the pretext of public interests. Thus, "National legal reforms are needed to ensure

96 Quoted in Cullis and Watson, "Winners and losers", p. 15.

97 Taylor, "Rangeland tenure and pastoral development", p. 7.

98 R White, *Livestock development and pastoral production on communal rangeland in Botswana* (Gaborone: The Botswana Society, 1993), p. 22.

99 RK Hitchcock, "We are the owners of the land": The San struggle for the Kalahari and its resources", *Senri Ethnological Studies* 70, 2006, pp. 236-237.

100 Masire, *Very brave or very foolish?*, p. 187.

101 Hitchcock and Ebert, "Modelling Kalahari hunter-gatherer", p. 58.

102 Cullis and Watson, "Winners and losers", p. 10.

103 Taylor, "Rangeland tenure and pastoral development", p. 7.

104 Taylor, "Rangeland tenure and pastoral development", p. 7.

105 Onoma, *The politics of property rights institutions*, p. 72.

all community land and resource rights are recognised and protected”.¹⁰⁶ However, “Effective articulation by the poor rural subordinate classes requires political power, because in most cases the process of organising, processing, and articulating demands is constrained by the very social and political environment that necessitates the land-based demands of the poor”.¹⁰⁷

Another contentious land question in Botswana is the state’s forced removal of the San from their ancestral land, the CKGR. The state contends that they have been relocated so that they can enjoy social services like other citizens. This has been rejected by the San themselves and some local and international human rights groups.¹⁰⁸ Some scholars and activists contend that the San have been relocated from the CKGR for mining and tourism ventures.¹⁰⁹ The opponents of their forced relocation argue that the San have been co-existing with flora and fauna for time immemorial, and their forced relocation is a travesty of their human rights.¹¹⁰ In 1989, Hitchcock and James Ebert advised the government of Botswana, “not [to] be involved in policies which are geared towards reducing the mobility of Kalahari populations”.¹¹¹ Like most indigenous communities, the San value their land, which is critical to their existence. In another study in 2006, Hitchcock examines the struggle of the San over land rights and resources in the CKGR. One of the San he interviewed stated that, “We are the first peoples. We are the owners of the land”.¹¹² The government’s position is that all Batswana are indigenous to the country. The Revised Land Policy, however, recognises that,

106 P Veit *et al.*, “3 Ways to tackle the global problem of insecure land rights”, *World Resources Institute*, 2015, <<https://www.wri.org/insights/3-ways-tackle-global-problem-insecure-land-rights>>, accessed 15 January 2024.

107 SM Borras Jr, “Questioning market-led agrarian reform: Experiences from Brazil, Colombia and South Africa”, *Journal of Agrarian Change* 3 (3), 2003, p. 389.

108 Survival International, “Bushmen win landmark legal case”, <<https://www.survivalinternational.org/news/2128>>, accessed 14 January 2024; E Boonzaier, “An ‘historic victory’ for the Basarwa in Botswana?: Reading the evidence”, *Anthropology Southern Africa* 34 (3-4), 2011, pp. 96-103.

109 MN Marobela, “The state, mining and the community: The case of Basarwa of the Central Kalahari Game Reserve in Botswana”, *Labour, Capital and Society* 43 (1), 2010, pp. 139-143.

110 GEJ Mogomotsi and PK Mogomotsi, “Recognition of the indigeneity of the Basarwa in Botswana: Panacea against their marginalisation and realisation of land rights?”, *African Journal of International and Comparative Law* 28 (4), 2020, pp. 555-576; Sarkin and Cook, “The human rights of the San”, pp. 1-10.

111 Hitchcock and Ebert, “Modelling Kalahari hunter-gatherer”, p. 47.

112 Hitchcock, “We are the owners of the land”, p. 233.

Land is not just a place to reside and a source of livelihood. It is also a place to be buried, a place shared with spirits of the ancestors, a sense of place that is central to the identity of people and as such this relationship has to be recognised and protected.¹¹³

In addition, the inordinate time that the land boards take to allocate tribal land, especially residential land, is a major concern. In 2020, the Ministry of Lands and Water Affairs revealed that the, “longest applicant waiting period is 27 years in tribal land at Mogoditshane”,¹¹⁴ a peri-urban village adjacent to Gaborone, the capital city. To circumvent the delays in land allocation, the illicit selling of land, mainly in the peri-urban villages, is rampant, as noted. The government response has been harsh, as it demolishes structures built on any illegally acquired land.¹¹⁵ Batswana are also increasingly concerned about the rate at which non-citizens acquire tribal and freehold land. Quantitative data was hard to get.¹¹⁶ All these issues were also raised during the Presidential Commission of Inquiry, the topic the article now addresses.

6. MAJOR LAND ISSUES RAISED DURING THE PRESIDENTIAL COMMISSION OF INQUIRY

Some argue that in Africa, land tenure is instrumental in state-building.¹¹⁷ Thus, it is not startling that in Africa, competition over land has, “intensified public debate over the legitimacy of governing institutions and the accountability of public officials to the citizenry at large”.¹¹⁸ During the Presidential Commission of Inquiry, Batswana, with vigour, raised the land question and recommended solutions to specific issues.¹¹⁹ In 2019, during his State of the Nation Address (SONA), President Masisi stated that, “[the] [g]overnment has identified land use as a critical factor in the development of the economy and empowerment

113 Republic of Botswana, *Revised land policy*, pp. 3-4.

114 “Land allocation backlog nears 700 000 countrywide”, *Sunday Standard*, 20 August 2020.

115 Onoma, “Mutual gains from hostile confrontations”, pp. 103-124; Ng’ong’ola, “Land problems in some peri-urban villages”, pp. 140-167.

116 Manatsha, “Reflections on the acquisition of land by non-citizens”, p. 185.

117 N Badiey, “The strategic instrumentalisation of land tenure in ‘state-building’: The case of Juba, South Sudan”, *Africa: Journal of the International African Institute* 83 (1), 2013, pp. 57-77.

118 S Berry, “Debating the land question in Africa”, *Comparative Studies in Society and History* 44 (4), 2002, p. 639.

119 Republic of Botswana, *Report of the presidential commission of inquiry into the review of the constitution of Botswana*, pp. 57-64, pp. 113-122, pp. 161-169.

of citizens of this country”.¹²⁰ Worldwide, land plays a critical role in economic development. In post-war Japan, for instance, a successful land reform contributed greatly to economic development.¹²¹ Botswana’s Revised Land Policy stresses the criticality of land management and land tenure, but warns that, “any change required is to be made with great care”.¹²² This section aims to analyse the land issues raised by Botswana during the Presidential Commission of Inquiry.

6.1. Replace the Land Boards with *Dikgosi*

Across Africa, including in Botswana, the institutions and legislative framework governing land are experiencing intense public scrutiny.¹²³ For example, the role of traditional leaders (chiefs) in land administration has received sustained attention from academics. Some scholars argue that chiefs compromise the democratisation of land administration.¹²⁴ Lungisile Ntsebeza contends that, unlike modern institutions, the chieftainship is feudalistic, undemocratic, and resistant to change.¹²⁵ However, Tinashe Chigwata maintains that the chieftainship is still relevant to the rural populace, mainly on local government matters.¹²⁶ Similarly, during his maiden SONA in 2018, President Masisi informed Botswana that, “the institution of Bogosi [chieftainship] is still relevant in the modern democracy and development processes of Botswana”.¹²⁷ At independence, the government of Botswana retained the House of Chiefs (renamed Ntlo ya Dikgosi). It advises the government and parliament on culture and tradition.¹²⁸ Botswana repeatedly complained to the Presidential Commission about the incompetency, corruption, and ineffectiveness of the

120 Republic of Botswana, *State of the nation address (SONA) by His Excellency Dr Mokgweetsi E. K. Masisi* (Gaborone: Government Printer, 2019), p. 78.

121 RP Dore, “The Japanese land reform in retrospect”, *Far Eastern Survey* 27 (12), 1958, pp. 183-188.

122 Republic of Botswana, *Revised land policy*, p. 4.

123 Berry, “Debating the land question in Africa”, p. 639; Manatsha, “Reflections on chiefs as ex officio members of the land boards”, pp. 1-15.

124 L Ntsebeza, *Democracy compromised: Chiefs and the politics of the land in South Africa* (Leiden and Boston: Brill Academic Publishers, 2005), pp. 13-35; S Kirst, “Chiefs do not talk law, most of them talk power”: Traditional authorities in conflicts over land grabbing in Ghana”, *Canadian Journal of African Studies* 54 (3), 2020, pp. 519-539.

125 Ntsebeza, *Democracy compromised*, p. 14.

126 T Chigwata, “The role of traditional leaders in Zimbabwe: Are they still relevant?”, *Law and Democracy Development*, 20, 2016, p. 73.

127 Republic of Botswana, *State of the nation address by His Excellency Dr Mokgweetsi E. K. Masisi* (Gaborone: Government Printer, 2018), p. 35.

128 JH Proctor, “The House of Chiefs and the political development of Botswana”, *Journal of Modern African Studies* 6 (1), 1968, pp. 59-79.

land boards.¹²⁹ Some Batswana, including *dikgosi*, had been complaining about the same issues prior to the inquiry.¹³⁰ In 2001, the Presidential Commission of Inquiry on Local Government Structures unearthed the same challenges. It recommended the availing of resources and the capacitation of the land boards.¹³¹

Some Batswana proposed to the Presidential Commission of Inquiry into the Review of the Constitution that, “the responsibility of land allocation should revert to Dikgosi”.¹³² When the land boards were introduced, *dikgosi* and some Batswana resisted. Academics have also raised issues of corruption and mismanagement by the land boards.¹³³ Some Batswana rejected the idea of reverting to *dikgosi* arguing that they are also corrupt. Batswana raised mixed views,

the abolition of Land Boards and that the responsibility [of tribal land administration should] revert to Dikgosi; Land Boards working [or should work] in collaboration with dikgosi; Land Board [should be] responsible for [the] allocation of commercial land, [while] Dikgosi [should be] [...] responsible for residential and land for subsistence farming. It was further suggested that dikgosi should not be involved in Tribal land management on the grounds that they are corrupt.¹³⁴

The *kgosi* (chief) is the head of the *morafe* (tribe), and, “occupies a position of unique privilege and authority. He is a symbol of tribal unity, the central figure around which the tribal life revolves”.¹³⁵ Before colonisation, residential and ploughing land was permanently allocated to the family heads by *dikgosi* or *dikgosana* (headmen). All community members were allocated land for free. Some Batswana believe that the extant delays in land allocation can be resolved by *dikgosi*, whom they see as truly representing their interests than the land boards. But some view *dikgosi* as corrupt, while others support a hybrid system. Gretchen Bauer argues that chiefs, “may be viewed as one half

129 “Transfer land board powers to *dikgosi*”, *Mmegi*, 11 February 2022.

130 “Kgatleng chiefs warn land board”, *Weekend Post*, 29 December 2014; “Matshelagabedi residents to meet on unfair land allocation”, *Botswana Daily News*, 8 February 2001.

131 Republic of Botswana, *Report of the second presidential commission on the local government structure in Botswana* (Gaborone: Government Printer, 2001).

132 Republic of Botswana, *Report of the presidential commission of inquiry into the review of the constitution of Botswana*, p. 161.

133 See Onoma, “Mutual gains from hostile confrontations”, pp. 103-124.

134 Republic of Botswana, *Report of the presidential commission of inquiry into the review of the constitution of Botswana*, p. 66.

135 I Schapera, *Handbook of Tswana law and custom* (London: Oxford University Press, 1938), p. 62.

of a viable and effective hybrid system at the local level".¹³⁶ The Presidential Commission rejected the proposal to revert the mandate of allocating tribal land to *dikgosi* because, "they have many other functions, including judicial duties".¹³⁷ *Dikgosi* were stripped off their authority over land to "democratise" and "modernise" land administration.

In 1970, *dikgosi* became ex officio members of the land boards. They had a major influence until 1984. The TLA empowered them to appoint one member, a person of their choice, to the land board.¹³⁸ Their "subjects" had little input on whom they appointed. In many instances, *dikgosi*, or their appointees, chaired the land boards. *Dikgosi* were often accused of influencing the allocation of land to themselves, friends, and relatives. There was a major amendment to the TLA in 1984. *Dikgosi* remained ex officio members, but their powers were reduced. They could no longer appoint anyone to the land board. Democratic elections, at the *kgotla*, were introduced to elect six individuals to serve on the land board. The Minister appointed only two from the six.¹³⁹ The 1984 amendment was a blow to *dikgosi*, who were used to appointing their "people". In 1986, another amendment to the TLA barred *dikgosi*, who were members of Ntlo ya Dikgosi, from serving on the land boards. The government wanted separation of powers.¹⁴⁰

The government has since discontinued the election of land board members by communities in favour of the appointment by the Minister. This follows a recruitment process through open application.¹⁴¹ This has further alienated the communities from the land boards. It reinforces their views of them as corrupt and elitist. Batswana told the Presidential Commission that they want the public election of members of the land boards reinstated, and the appointment by the Minister, "abolished as it has politicised the system".¹⁴²

136 G Bauer, "'What is wrong with a woman being chief?' Women chiefs and symbolic and substantive representation in Botswana", *Journal of Asian and African Studies* 51 (2), 2016, pp. 222-223.

137 Republic of Botswana, *Report of the presidential commission of inquiry into the review of the constitution of Botswana*, p. 161.

138 Comaroff, "Class and culture in a peasant economy", p. 107.

139 Republic of Botswana, *Tribal land (amendment of schedule) order, 1984: Statutory instrument no. 91 of 1984* (Gaborone: Government Printer, 1984).

140 Republic of Botswana, *Tribal land (amendment of schedule) order, 1986* (Gaborone: Government Printer, 1986); Manatsha, "Reflections on chiefs as ex officio members of the land boards", pp. 10-14.

141 Republic of Botswana, "Press release: Land board selection process to be uniform/standardised" (Gaborone: Ministry of Land Management, Water and Sanitation Services, 2020).

142 Republic of Botswana, *Report of the presidential commission of inquiry into the review of the constitution of Botswana*, p. 67.

In a democracy, citizens should, “have an equal say in the decisions that affect their lives”.¹⁴³

The article does not support the proposal to revert to *dikgosi*. Land is a very sensitive and easily politicised resource. Recurring political and civil conflicts in Africa are linked to land.¹⁴⁴ Therefore, it is critical that its administration is done by democratic institutions. Chieftainship is “inherently undemocratic”.¹⁴⁵ A *kgosi* is born and “never selected”.¹⁴⁶ The institution has no room to reform into a broad-based democratic institution. In South Africa, the chiefs’ role in land allocation has caused discontent in the rural areas.¹⁴⁷ In Ghana, chiefs are also involved in corrupt land dealings.¹⁴⁸ In Botswana, some *dikgosi* also abuse their powers to allocate land illegally. In July 2015, Botswana’s Minister of Lands and Housing, Prince Maele, was quoted saying,

[...] I admit that there is corruption in our land boards, but because the society helps them, it becomes very difficult to identify the culprits and rectify these issues. What hurts the most is that our community leaders are aiding this corruption. Our investigations reveal that Dikgosi play a part. Some Dikgosi would go as far as falsifying evidence to make sure certain people are given plots where they would not otherwise be allocated land.¹⁴⁹

With globalisation, the administration of land has witnessed breathtaking innovations. It is, therefore, critical that in Botswana, highly trained personnel (land board officers) should administer the land. The government should, however, ensure that *dikgosi* are genuinely consulted because they are the nearest leaders to Botswana in the rural areas. Tribal land constitutes 71 per cent of Botswana’s total land mass. People in the rural areas live under the tribal land tenure system. In 2022, Botswana’s total population was 2 346 179. Of this, 730 591 000 lived in the rural areas.¹⁵⁰ The TLA of 2018 requires a land board to consult the tribal administration and district council when formulating its policies.¹⁵¹ Based on the above, it would be unjustifiable to revert to *dikgosi*. The solution lies in the land boards’ genuine democratisation

143 AA Adegboye, “Consolidating participatory democracy in Africa: The challenges and the way forward”, *European Scientific Journal* 9 (2), 2013, p. 242.

144 Peters, “Inequality and social conflict over land in Africa”, pp. 287-290.

145 Ntsebeza, *Democracy compromised*, p. 14.

146 Schapera, *Handbook of Tswana law and custom*, p. 42.

147 Ntsebeza, *Democracy compromised*, pp. 13-35.

148 Kirst, “Chiefs do not talk law”, pp. 525-531.

149 “Maele blames *bogosi* for aiding land corruption”, *The Botswana Gazette*, 23 July 2015.

150 Statistics Botswana, “2022 population and housing census preliminary results v2”, < <https://www.ceicdata.com/en/botswana/population-and-urbanization-statistics/bw-rural-population>>, accessed 16 January 2024.

151 Republic of Botswana, *Tribal land act no.1 of 2018*, section 5 (5).

and capacitation, not aristocratic leadership. In 2012, a commentary in a local newspaper argued that, “Dikgosi should be reminded that they brought whatever they are complaining about upon themselves because before the arrival of democratic governance there was corruption in the allocation of land [...]”.¹⁵² The next sub-section focuses on the delays in tribal land allocation.

6.2 Delays in the Allocation of Tribal Land (Residential)

The Report of the Presidential Commission notes that, “Various individuals and groups lamented poor land management, with emphasis on delay in allocation and corruption of Land Boards across the country”.¹⁵³ The land boards’ mandate is to administer land on behalf of Batswana, “for the purpose of promoting the economic and social development of all the people of Botswana”.¹⁵⁴ They should, “ensure the equitable distribution of land” to Batswana.¹⁵⁵ The TLA of 2018 and the Revised Land Policy place land at the centre of development. Yet, Batswana opined that because of the delays, they miss out on the opportunities associated with access to and ownership of land. In fact, “without access to land many peoples find themselves in a situation of great economical insecurity”.¹⁵⁶ A UNDP study on *Inequality in Botswana* states that, “The Gini coefficient for land value is 0.75 indicating the presence of high inequality”.¹⁵⁷

The government blames the delays in allocation on factors such as the unavailability of serviced land, high demand for residential land in the peri-urban villages, and the shortage of tribal land in the land-starved districts, such as the NED and SED (Figure 1). In 2021, the national waiting list stood at 637 399, of which 540 240 were for tribal (residential) land. State land, including the Self-Help Housing Agency, accounted for 97 159 applicants.¹⁵⁸ In 2023, the Mogoditshane Sub Land Board waiting list was 120 000 for residential plots.¹⁵⁹ Due to the shortage of residential land in the peri-urban villages, the government introduced a controversial quota system. It prioritises (on a 70:30 ratio) the allocation of residential tribal land to the “indigenes” or “locals” of a particular tribal territory.¹⁶⁰ In Africa, the tendency to exclude other

152 “Dikgosi shouldn’t be cry-babies”, *Mmegi*, 26 September 2012.

153 Republic of Botswana, *Report of the presidential commission of inquiry into the review of the constitution of Botswana*, p. 64.

154 Republic of Botswana, *Tribal land act no.1 of 2018*, section 5.

155 Republic of Botswana, *Tribal land act no.1 of 2018*, section 5 (2) (b).

156 J Gilbert, “Land rights as human rights: The case for a specific right to land”, *International Journal on Human Rights* 10 (18), 2013, p. 115.

157 Martorano *et al.*, “Inequality in Botswana”, p. 32.

158 “Number of land seekers in Botswana keeps growing”, *Sunday Standard*, 8 July 2021.

159 “Mogoditshane land board backlog at over 120 000 applications”, *Botswana Guardian*, 21 March 2023.

160 Manatsha and Morapedi, “Reflections on a quota system for tribal land allocation”, pp. 63-77.

citizens and refer to them as “outsiders” is growing.¹⁶¹ Also, in Africa, the, “rights of access to, and use of, sources of livelihood are still apportioned on the basis of territorially achieved identity”.¹⁶²

Legally, in Botswana, one can access land anywhere in the country. The Revised Land Policy states that each citizen is eligible for only two plots, one on state land and another on tribal land. Additional land can be acquired through the market. The Revised Land Policy states that, “Waiting lists will be maintained where necessary”.¹⁶³ The TLA of 2018 also empowers a land board, “to do anything and enter into any transaction to facilitate the proper discharge of any function conferred upon it under this Act”.¹⁶⁴ The land boards defend the long waiting lists by citing relevant legislation. The government has since decided to allocate unserviced land. The policy has always been to allocate serviced land.¹⁶⁵ The President argued that this was aimed at reducing, “the waiting lists and the turnaround time for land allocation”.¹⁶⁶

Allocating un-serviced land may exert a huge financial burden on the allottees. Moreover, those who fail to develop their land can still have it repossessed by the land boards, as per the TLA of 2018 and the Revised Land Policy. Allocating unserviced land may also lead to uncoordinated developments and unintended consequences, such as health hazards and crime. Studies have shown this, especially in the peri and urban areas.¹⁶⁷ In Harare, for instance, the occupation of unserviced land, which began in 2000, led to the outbreak of diseases and the devaluing of property.¹⁶⁸ The South African Housing and Infrastructure Fund stresses the benefits of servicing land because not having services, “significantly lowers the value of one’s property”.¹⁶⁹ These are the issues that the government of Botswana should (re)consider.

161 P Geschiere and F Nyamnjoh, “Capitalism and autochthony: The seesaw of mobility and belonging”, *Public Culture* 12 (2), 2000, p. 433.

162 G Kibread, “Revisiting the debate on people, place, identity and displacement”, *Journal of Refugee Studies* 12 (4), 1999, p. 387.

163 Republic of Botswana, *Revised land policy*, section 58 (v), (vi).

164 Republic of Botswana, *Tribal land act no. 1 of 2018*, section 3 (3), also section 5 (2) (d).

165 Republic of Botswana, *Revised land policy*, section 80; Republic of Botswana, *Botswana land policy*, section 80.

166 Republic of Botswana, *SONA by His Excellency Dr Mokgweetsi E. K. Masisi* (Gaborone: Government Printer, 2020), p. 39.

167 V Watson and M McCarthy, “Rental housing policy and the role of the household rental sector: Evidence from South Africa”, *Habitat International* 22 (1), 1998, pp. 49-56; JL van Gelder, “Paradoxes of urban housing informality in the developing world”, *Law and Society Review* 47 (3), 2013, pp. 493-522.

168 R Makumire, *The effects of occupying unserviced stands in periurban neighbourhoods* (Einbeck: LAP LAMBERT Academic Publishing, 2016).

169 South African Housing and Infrastructure Fund, “Servicing land thought paper”, p. 4, <https://www.sahiffund.co.za/documents/SAHIF-THOUGHT-PAPER_Servicing%20Land_OCTOBER%202020.pdf>, accessed 25 January 2024.

The economically and financially weak may also end up selling their land to the rich. This would lead to the concentration of land among the few rich and elites. There is evidence of the elite using the loopholes in the TLA to amass chunks of land from the poor. This would defeat the goals and objectives of the Revised Land Policy and the TLA of 2018.¹⁷⁰ In March 2023, the Minister of Lands and Water Affairs revealed that, “the transfer of land rights by Batswana has increased significantly following the increase in [un-serviced] plot allocations”.¹⁷¹

The government has reiterated its priority to service land because, “access to serviced land plays a critical role in development, in terms of land for both commercial and residential purposes”.¹⁷² It has since introduced the Public-Private Partnership (PPP) model to speed up land servicing. Using this model, it, “has been able to involve private sector firms in land servicing and delivery of projects without explicit contracts”.¹⁷³ The United Nations Economic Commission for Europe (UNECE) encourages using the PPP model in land administration. The UNECE and the International Federation of Surveyors have developed, “principles to support and guide United Nations member States wanting to work in partnership with the private sector to improve land administration infrastructure and services”.¹⁷⁴ There appears to be a consensus among academics that in future, land administration will rely heavily on the PPP model.¹⁷⁵ The next section looks at the (illegal) transactions in land, a growing phenomenon.

6.3 The (Illegal) Selling of Land

The “illegal” transaction in land is a worldwide problem. In Brazil, for instance, the situation is compounded by the legal system which, “aims neither to solve land conflicts justly nor to decide their legal merits through adjudication”.¹⁷⁶ In

170 Republic of Botswana, *Revised land policy*, pp. 12-13; Republic of Botswana, *Tribal land act no. 1 of 2018*, section 4.

171 “Govt worried by high transfers of land rights by Batswana”, *The Botswana Gazette*, 8 March 2023.

172 Republic of Botswana, *2022 budget speech* (Gaborone: Government Printer, 2022), p. 8.

173 FT Kalabamu and PK Lyamuya, “An assessment of public-private-partnerships in land servicing and housing delivery: The case study of Gaborone, Botswana”, *Current Urban Studies* 5, 2017, p. 502.

174 United Nations Economic Commission for Europe (UNECE), “Public-private partnership in land administration”, 2021, p. 1, <https://unece.org/sites/default/files/2021-10/PPPs_LA_E.pdf>, accessed 15 January 2024.

175 SE Kasala and MM Burra, “The role of public private partnerships in planned and serviced land delivery in Tanzania”, *iBusiness* 8, 2016, pp. 10-17; P Krigsholm *et al.*, “Pathways for a future cadastral system: A socio-technical approach”, *Land Use Policy* 94 (104504), 2020, pp. 1-12.

176 J Holston, “The misrule of law: Land and usurpation in Brazil”, *Comparative Studies in Society and History* 33 (4), 1991, pp. 695-725.

China, a study has found a growing trend in illegal land transactions in urban areas since 2000.¹⁷⁷ Manase Chiweshe details rampant illegal transactions in land in the urban and peri-urban areas of Zimbabwe. He concludes that the so-called land barons, “use corruption to swindle home seekers of their money”.¹⁷⁸ Botswana is no exception. Studies have analysed the extent of illegal land dealings in its urban and peri-urban areas. These transactions involve many players, such as plot holders, land board officials, lawyers, businesspeople, chiefs, citizens and non-citizens, and syndicates.¹⁷⁹

Botswana complained to the Presidential Commission that there is a, “seemingly significant amassing of land by foreigners”, and it raises, “fears that indigenous Botswana and future generations will be left without land to own and occupy”.¹⁸⁰ A UNDP report on *Inequality in Botswana* explains this fear, “The emotional and cultural resonance of land may exacerbate issues of land acquisition, ownership and accumulation of land by non-citizens”.¹⁸¹ Theoretically, Botswana’s fears fit in the discourse of autochthony, which links, “identity and space”, “enabling the speaker to establish a direct claim to territory by asserting that one is an original inhabitant, as ‘son of the soil’”.¹⁸² The Revised Land Policy allows the transaction of land in the market.¹⁸³ It, however, “Encourage[s] citizens’ retention of rights to land”¹⁸⁴, and bars anyone from alienating, “their last residential plot acquired directly from the Land Authority”.¹⁸⁵ The Revised Land Policy states that anyone who alienates their land, “may not be eligible for allocation of land in the same category”.¹⁸⁶ Botswana proposed to the Presidential Commission that the law should prohibit the selling of, “land allocated [...] by Land Boards to non-citizens, and instead [people] should only lease such land to non-citizens”.¹⁸⁷ The Commission agreed. Debates on land often raise issues of exclusion and belonging. For instance, during the Presidential Commission of Inquiry, the

177 L Hongping *et al.*, “Market-led transactions and illegal land use: Evidence from China”, *Land Use Policy* 84, 2019, pp. 12-20.

178 MK Chiweshe, “Money, power and the complexities of urban land corruption in Zimbabwe”, *African Journal of Land Policy and Geospatial Sciences* 3 (5), 2020, p. 131.

179 F Kalabamu and P Lyamuya, “Small-scale land grabbing in greater Gaborone, Botswana”, *Town and Regional Planning* 78, 2021, p. 43; Manatsha, “Reflections on the acquisition of land by non-citizens”, pp. 187-188.

180 Republic of Botswana, *Report of the presidential commission of inquiry into the review of the constitution of Botswana*, p. 65.

181 Martorano *et al.*, “Inequality in Botswana”, p. 37.

182 KC Dunn, “Sons of the soil’ and contemporary state making: Autochthony, uncertainty and political violence in Africa”, *Third World Quarterly* 30 (1), 2009, p. 113.

183 Republic of Botswana, *Revised land policy*, section 58 (ii).

184 Republic of Botswana, *Revised land policy*, section 51 (iii).

185 Republic of Botswana, *Revised land policy*, section 69 (iv).

186 Republic of Botswana, *Revised land policy*, section 69 (iii).

187 Republic of Botswana, *Report of the presidential commission of inquiry into the review of the constitution of Botswana*, pp. 162-163.

tone of the debate was autochthonous. Autochthony means, “from the soil itself”, and it, “implies intimate, aboriginal connection with territory: indeed, it is sometimes rendered as “sons of the soil””.¹⁸⁸

The Revised Land Policy and the TLA give preference to citizens whenever any land is alienated. The policy states that any alienation, “to non-citizens will be subject to advertisement of notice of intention to alienate”.¹⁸⁹ In his 2020 SONA, President Masisi noted that, “land is an important resource that we must jealously guard, it is our heritage, and selling it should be discouraged for the benefit of our future generations”.¹⁹⁰ Botswana sell undeveloped tribal land even though it is illegal as per the TLA. In state and tribal land, “restrictions on further alienations of undeveloped land have proved exceedingly difficult to enforce”.¹⁹¹ Section 33 (1) of the TLA permits anyone to sell their land provided it is developed and/or meets the stipulated conditions. Non-citizens can also acquire “developed” tribal land, as per the TLA.¹⁹²

As for freehold land, the Land Control Act of 1975 allows its perpetual ownership, and it can be sold undeveloped. The secondary acquisition of any land in the open market is limitless. In the 1990s, citizens and non-citizens were involved in rampant illegal land dealings in tribal land to circumvent the housing problem in the peri-urban and urban areas. In April 2015, when parliament debated the draft of the land policy, which was passed in July 2015 and revised in 2019, Gaborone South Member of Parliament (MP) Kagiso Molatlhegi decried that foreigners buy land from citizens cheaply, develop it and rent out apartments or resell houses to citizens steeply. Molatlhegi wanted the land policy to prohibit the ownership of land by foreigners.¹⁹³

Botswana’s parliament has not outlawed the secondary acquisition of land by non-citizens. In Mozambique, the constitution outlaws the transfer of land by sale or purchase to non-citizens.¹⁹⁴ Tanzania’s National Land Policy also states that, “Non-Citizens and foreign companies will not be allowed to acquire land through transfer or purchase of customary land”.¹⁹⁵ The Ghanaian constitution declares that, “No interest in or right over any land in

188 S Jackson, “Sons of which soil? The language and politics of autochthony in eastern DR Congo”, *African Studies Review* 49 (2), 2006, p. 98.

189 Republic of Botswana, *Revised land policy*, section 69 (v).

190 Republic of Botswana, *SONA by His Excellency Dr Mokgweetsi E. K Masisi*, 2020, p. 39.

191 Ng’ong’ola, “Reflections on Botswana’s 2015 land policy”, p. 120.

192 Republic of Botswana, *Tribal land act no. 1 of 2018*, sections 33 (1), 234 (1), 35, and 36.

193 “Molatlhegi worried by expatriates buying land in Botswana”, *Sunday Standard*, 16 April 2015.

194 Republic of Mozambique, “*Mozambique’s constitution*”, article 109 (2).

195 The United Republic of Tanzania, *The land act no.4 of 1999*, 4.2.4 (iv).

Ghana shall be created which vests in a person who is not a citizen of Ghana a freehold interest in any land in Ghana”.¹⁹⁶ Botswana, as argued, adopted a dual legal system, and retained freehold land tenure. The TLA tries to address secondary dealings in tribal land,

Any person who proposes to enter into transaction [...] with a non-citizen shall, not less than 30 days prior to the proposed date of such transaction, publish a notice in the *Gazette* and in at least one newspaper circulating in Botswana [...]”¹⁹⁷

Among other things, the notice shall give, “a reference to the right of any citizen of Botswana interested in entering into a similar transaction in respect of the property in question to receive priority notwithstanding the proposed transaction set out in the notice”.¹⁹⁸ However, this shall not apply when a non-citizen acquires land through inheritance or when the land is, “transferred to a non-citizen in execution of a court order resulting from divorce proceedings”.¹⁹⁹ In Malawi too, the transfer of private land, by sale or tender, is invalid unless the intention to sell, “has been published in a newspaper in daily circulation in Malawi not less than 21 days before the date of sale”.²⁰⁰ Should the constitution be reviewed, Botswana may consider inserting a clause that prohibits non-citizens’ ownership of land, as is the case in Ghana and Mozambique. The next section examines the colonial land question, as raised by Botswana.

6.4 The Colonial Land Question

In postcolonial Africa, the land question is, “an example of historical injustices colliding with demands for contemporary fairness”.²⁰¹ Scholars such as Sam Moyo, Thembela Kepe, Horman Chitonge, Ruth Hall, and Ntzebeza have argued that there is a need to decolonise the land question in Africa. In their view, the fact that national constitutions in Africa still protect colonial land

196 Republic of Ghana, “*The constitution of Ghana*”, chapter 21, part III, article 266 (1), <<https://constitutionnet.org/sites/default/files/Ghana%20Constitution.pdf>>, accessed 4 January 2023.

197 Republic of Botswana, *Tribal land act no. 1 of 2018*, section 34 (1).

198 Republic of Botswana, *Tribal land act no. 1 of 2018*, section 34 (1) (e).

199 Republic of Botswana, *Tribal land act no. 1 of 2018*, section 34 (2) (a), (b).

200 Republic of Malawi, *Land act no. 16 of 2016* (Republic of Malawi: Government Printer, 2016), section 38 (i).

201 JL Gibson, “Land redistribution/restitution in South Africa: A model of multiple values, as the past meets the present”, *British Journal of Political Science* 40 (1), 2010, p. 135.

“theft” undermines social justice and redistributive reforms.²⁰² In Botswana, during the Presidential Commission of Inquiry, Batswana living in the land-starved districts, encircled by freehold farms, complained that some of these farms are unutilised.²⁰³ The author could not find data to verify this. The areas stated in the report are: Ghanzi, Chobe, NED, SED, Tswapong, Kgalagadi, Bobirwa, Tuli Block, and Lobatse. The UNDP study found a, “high share of freehold land” in the Central District, Kweneng District, Southern District, and SED.²⁰⁴ Batswana complained that, “some of the farms restricted access and use by communities of natural resources, such as rivers and flora and fauna”.²⁰⁵ Historically, this is true.²⁰⁶

Responding to Batswana's concerns, the Presidential Commission recommended that, “Government should compulsorily acquire freehold farms [and] proclaim them tribal land, and hand them to the relevant Land Boards for allocation to Batswana”.²⁰⁷ The report does not clarify what to “compulsorily acquire” mean. Therefore, there is a need to define “compulsory acquisition” or, more appropriately, “expropriation”. In law, “compulsory acquisition [...] refers to the process by which a person’s rights and interests in property are divested and acquired by the state or some specified authority, without the need for the expropriatee’s consent or co-operation, and sometimes without regard to compensation”.²⁰⁸ In Botswana, the government can expropriate any property, as provided for by/in the constitution, but must compensate.

One example of a colonial land question worth noting is the contentious land question in the NED. It reached Botswana’s parliament in August 2003. Robert Molefhabangwe, then a Botswana National Front MP, tabled a motion calling for the expropriation of the land owned by the Tati Company in the NED and Francistown.²⁰⁹ Parliament rejected it, arguing that the government

202 T Kepe and R Hall, “Land redistribution in South Africa: Towards decolonisation or recolonisation?”, *Politikon* 45 (1), 2018, pp. 128-137; Moyo, *African land questions*; Hall, “Land restitution in South Africa”, pp. 659-661; H Chitonge, “Trails of incomplete decolonisation in Africa: The land question and economic structural transformation”, *African Study Monographs: Supplementary Issue* 57, 2018, pp. 21-43; L Ntsebeza, “This land is our land”, <<https://foreignpolicy.com/2018/05/03/this-land-is-our-land/>>, accessed 10 January 2024.

203 Republic of Botswana, *Report of the presidential commission of inquiry into the review of the constitution of Botswana*, p. 163.

204 Martorano *et al.*, “Inequality in Botswana”, p. 37.

205 Republic of Botswana, *Report of the presidential commission of inquiry into the review of the constitution of Botswana*, p. 163.

206 Morapedi, “Land restitution”, pp. 520-545.

207 Republic of Botswana, *Report of the presidential commission of inquiry into the review of the constitution of Botswana*, p. 163.

208 C Ng’ong’ola, “Compulsory acquisition of private land in Botswana: The Bonnington Farm case”, *Comparative and International Law Journal of Southern Africa* 22 (3), 1989, p. 299.

209 “Molefhabangwe queries Tati Company title deed”, *Botswana Daily News*, 5 August 2003.

uses the “willing buyer, willing seller” policy.²¹⁰ True to this, in November 2023, the government purchased 45 000 hectares of land owned by the Tati Company at BWP1.4 billion.²¹¹ Detailing the history of the land question in the NED, a retired High Court judge, John Mosojane, wrote an open letter to the Minister of Lands and Housing. He argues that the government should not have spent such huge money purchasing the land. Instead, he says, the government should institute a legal suit demanding reparation from the British government.²¹²

During the Presidential Commission of Inquiry, Botswana criticised the market approach to the land they believed was “stolen” by the colonisers.²¹³ In fact, some scholars argue that it is counterproductive for African governments to follow the market approach strictly.²¹⁴ Thus, “the resolution of the land question in all its various dimensions across Africa remains key to a complete decolonial project”.²¹⁵ In 2007, some residents in the NED accused the Tati Company. They insisted that it, “stole our land and rendered our people destitute [...] [It] had no mercy, so why is government being so patient and lenient with them at our expense [...]”.²¹⁶ In discussing South Africa’s land question, James L Gibson avers that the rule of law should prevail in a democratic society.²¹⁷ What follows is the discussion on acquiring tribal land for public purposes.

6.5 Compulsory Acquisition of Tribal Land for Public Use, and Compensation

The compulsory acquisition of land is the power of the state. When exercising that power, it does not necessarily require the consent of the owner or occupant.²¹⁸ In various jurisdictions, including in Botswana, national constitutions refer to compulsory acquisition as being done for “public

210 “Parliament rejects land motion amendment”, *Botswana Daily News*, 8 August 2003.

211 “Government acquires 45 000 hectares of Tati [Company] land”, *Botswana Daily News*, 9 November 2023.

212 “An open letter to Minister of Lands and Water Affairs”.

213 Republic of Botswana, *Report of the presidential commission of inquiry into the review of the constitution of Botswana*, pp. 161-163; “An open letter to Minister of Lands and Water Affairs”.

214 Moyo, *African land questions*; Kepe and Hall, “Land redistribution in South Africa”, pp. 128-130.

215 Chitonge, “Trails of incomplete decolonisation in Africa”, p. 23.

216 “Tati Company stole our land”, *The Voice*, 3 April 2007.

217 J.L. Gibson, *Overcoming historical injustices: Land reconciliation in South Africa* (Cambridge: Cambridge University Press, 2009), pp. 134-135.

218 J.M. Lindsay, “Compulsory acquisition of land and compensation in infrastructure Projects” (Washington DC: The World Bank, 2012), p. 1.

interest”, “public good”, and “public purposes”.²¹⁹ However, “public interests” could be vague and/or manipulated. Compulsory acquisitions are preferred when governments want land for infrastructural development.²²⁰ Invariably, competing claims over land negatively affect the unregistered customary land. Studies detail how governments sometimes expropriate customary land from the poor under the pretext of “public interests”.²²¹ The issue of compensation is invariably contentious. However, the general consensus is that, “a fair or just compensation should be paid to the affected persons”.²²² Generally, the principle is that the expropriation should not impoverish anyone “for public benefit”.²²³ Despite this, inadequate compensation often causes disputes. In some instances, claimants get their compensation late.²²⁴

In Botswana, the public should be educated on the legal process of compulsory acquisition of tribal land for public use. During the Presidential Commission of Inquiry, the general feeling was that the land boards were acquiring land arbitrarily. Apart from the TLA, the constitution also allows the compulsory land acquisition for public interest. But what constitutes “public interest” is sometimes contested.²²⁵ The 1955 Acquisition of Property Act applies to freehold and state land only.²²⁶ The land board consults, or should consult, those directly affected by the compulsory acquisition. Botswana also complained to the Presidential Commission that, “compensation for compulsory acquisition of tribal land by Government and Land Board is inadequate when compared to compensation for acquisition of freehold land”.²²⁷ They proposed that when compulsorily acquiring tribal land, the government should use the, “market rate”²²⁸, and the Commission agreed. The report states that compensation should be “adequate”. It is important to contextualise this within the framework of the repealed TLA, the 2018 one, and the Revised Land Policy. The comments, proposals, recommendations,

219 Lindsay, “Compulsory acquisition of land”, p. 1.

220 DN Lekgori *et al.*, “Nuances of compulsory land acquisition and compensation in Botswana: The case of the Pitsane-Tlhareselele road project”, *Journal of African Real Estate Research* 5 (1), 2020, pp. 8-11; Ng’ong’ola, “Compulsory acquisition of private land”, pp. 299-319.

221 K Lanz *et al.*, “Land grabbing, the state and chiefs: The politics of extending commercial agriculture in Ghana”, *Development and Change* 49 (6), 2018, pp. 1526-1552; Wily, “The law is to blame”, pp. 733-757.

222 Lekgori *et al.*, “Nuances of compulsory land acquisition”, p. 2.

223 Lekgori *et al.*, “Nuances of compulsory land acquisition”, p. 2.

224 Lekgori *et al.*, “Nuances of compulsory land acquisition”, pp. 8-11.

225 Lekgori *et al.*, “Nuances of compulsory land acquisition”, p. 2.

226 Republic of Botswana, *Acquisition of property act* (Gaborone: Government Printer, 1955).

227 Republic of Botswana, *Report of the presidential commission of inquiry into the review of the constitution of Botswana*, p. 163.

228 Republic of Botswana, *Report of the presidential commission of inquiry into the review of the constitution of Botswana*, p. 163.

and conclusions the public and the commissioners arrived at were mainly based on the repealed TLA.

The TLA of 2018 states that, “In determining the amount of the compensation [...] the State shall have regard to” (b) “the market value of the property at the date of service of the notice to vacate the land”.²²⁹ The Revised Land Policy only states that the government will pay “adequate compensation”.²³⁰ The word “adequate” is subject to abuse. It seems the Presidential Commission and the public overlooked what the 2018 TLA says about the acquisition of tribal land for public interest and compensation. This is not to say that it addresses the concerns raised in the Commission’s report. However, it is important for the Commission to have directly referred to it on this issue. The public views on compensation were mainly based on the repealed TLA, probably because the 2018 TLA started operating on 20 April 2022. When compulsorily acquiring tribal land, the state shall grant compensation and may also allocate another land if available. Section 32 (3) of the TLA explains the conditions under which compensation shall be paid.²³¹ This answers the concerns that compensation for tribal land is “inadequate”. The government is, or should be, bound by the 2018 TLA to offer compensation at market value.

7. CONCLUSION

The land question is a political, complex, and emotive issue across Africa. It is not surprising that in Botswana, it dominated the Presidential Commission of Inquiry into the Review of the Constitution. It is progressive that Botswana raised the issue at that level. The issues raised are not necessarily peculiar to Botswana. For example, the role of chiefs in land administration is contentious across Africa. In Botswana, they play no active role. Instead, the land boards administer the land. The land boards only need to be fully democratised, capacitated, and given autonomy to do their work. The land board concept can benefit other African countries. Botswana did not experience widespread colonial land expropriation, but some regions did. The government should consider land restitution in addition to the extant practice. This would cater for the communities that were affected by colonial land alienation. Allocating un-serviced land may lead to health hazards, haphazard development, and social ills.

229 Republic of Botswana, *Tribal land act no. 1 of 2018*, section 32 (3) (b).

230 Republic of Botswana, *Revised land policy*, section 83 (vi).

231 Republic of Botswana, *Tribal land act no. 1 of 2018*, section 32 (2) (3) (b).

The compulsory acquisition of customary/tribal land for “public interests” is widespread in Africa. Compulsory acquisition is the power of the state, and it does not require the consent of the landholder. However, the government should employ the participatory development model in such cases. It is progressive that the TLA of 2018 commits the government to compensate tribal land at market rate. This can be emulated elsewhere in Africa. At independence, Botswana retained a dual legal system. Freehold land was retained. For legal and monetary reasons, it is difficult for the government to acquire freehold land for redistribution to the communities, which need land for residential, ploughing, and grazing purposes. The slow pace of land allocation contributes to the illegal transactions in land. In general, Botswana can learn from countries with entrenched land rights in their constitutions. The absence of enforceable land rights in the constitution is a concern in a democratic society.