6 Legal issues

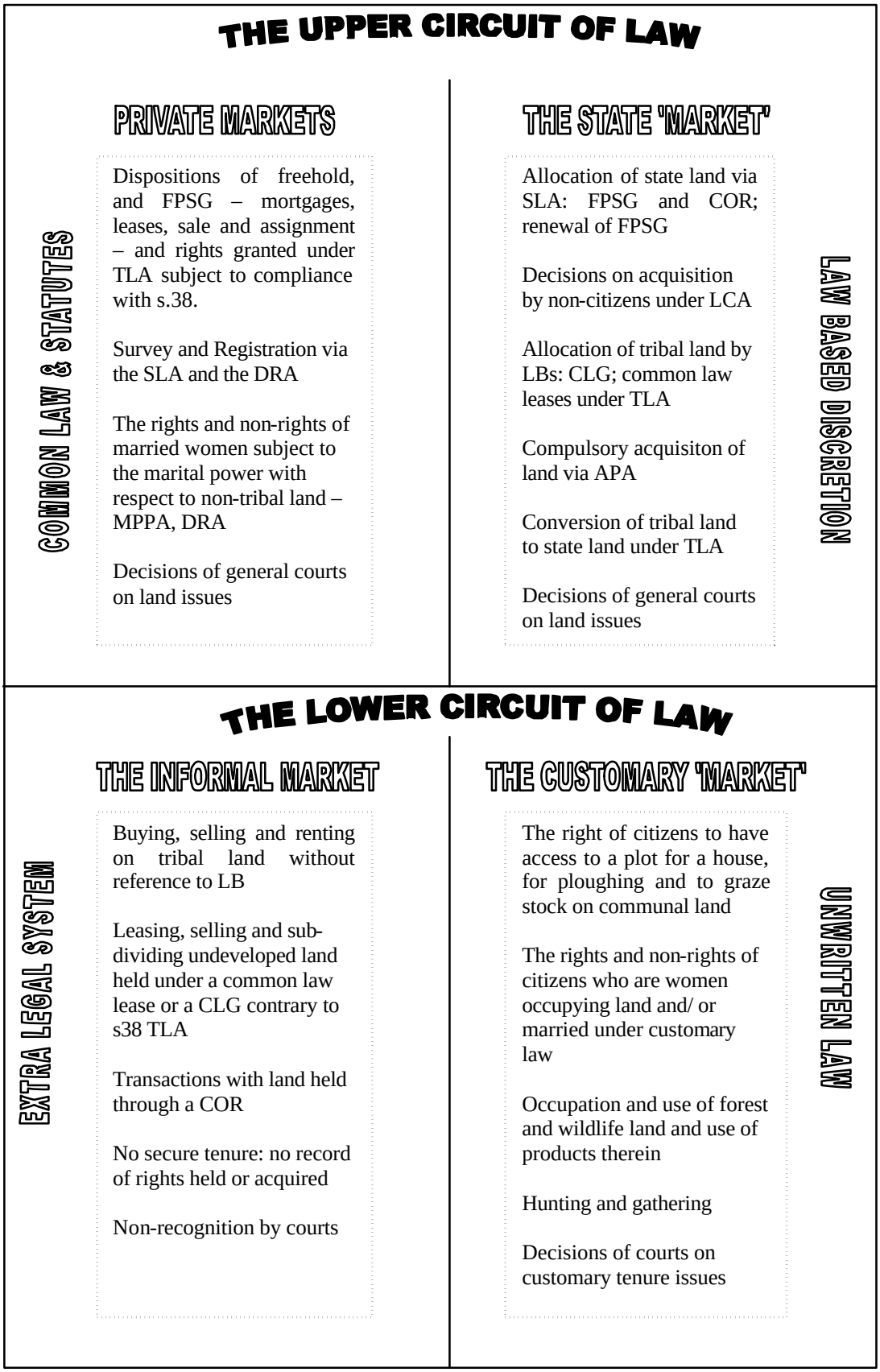
6.1 Introduction

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
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 acquisiton of land via APA
Conversion of tribal land to state land under TLA
Decisions of general courts on land issues
COMMON LAW & STATUTES
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 sub-dividing 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
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
EXTRA LEGAL SYSTEM
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 in1996. 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 that 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.