Abstract
In postcolonial Africa the legal distinctions between tribal, private and state (or municipal) land, which include differential rights of access to land, have become a major contributor to the process of creating peri-urban settlement outside formal regulatory control. Colonial policies of indirect rule and urban management, consolidated under apartheid ideology, allocated land for Africans outside municipal boundaries in ‘locations’, and in rural areas under tribal, communal or customary tenure arrangements. Land for basic housing need can be obtained more easily and cheaply where customary land comes close to urban areas, although such areas generally lack the local government capacity to provide planning and infrastructure. A case study of such a settlement outside Gaborone, the capital of Botswana, explores some of the issues raised, and proposes more inclusive and pro-active approaches to the management of urban growth, including techniques of land pooling and reapportionment.

Introduction
The quotations in the title of this paper come from the 1991 Commission of Inquiry into illegal peri-urban housing in Botswana (Botswana Government 1991), which was disturbed to find ‘the eating up of agricultural land by towns and villages’, and that: ‘the best arable soils do not grow crops for human consumption but they grow houses for human shelter’ (pp.110-112). This concern over the conversion of farmland to urban uses faces most countries in the world, especially those subject to severe population and development pressures. Tough approaches to clearing squatter settlements are, however, increasingly criticised (Mulwanda and Mutale 1994). In Africa the management of land demands arising from urban growth is further entangled with the sensitive issue of communal, customary or tribal land tenure, often seen as an obstacle to the development of efficient urban land markets as well as agricultural productivity (Migot-Adholla and Hazell 1991; Bruce 1993).

Communal and individual land tenure systems can be seen as opposite ends of a spectrum of land rights. Distinctions between communal and individual tenure have deep historical roots, and Judaeic Old Testament law (Leviticus 25: 29-34) links them specifically to distinctions between urban and rural property:

‘Anyone who sells a house inside a walled city has the right to redeem it for a full year after its sale... But if it is not redeemed within a year, then the house within the walled city will become the permanent property of the buyer...But a house in a village – a settlement without fortified walls – will be treated like property in the open fields. Such a house may be redeemed at any time and must be returned to the original owner in the Year of Jubilee...After all, the cities reserved for the Levites are the only property they own in all Israel. The
strip of pastureland around each of the Levitical cities may never be sold. It is their permanent ancestral property.’ Such property rules endorsed the creation of property markets within urban areas, and the protection of communal rights outside, but said nothing about how the processes of urban expansion and population growth should be managed.

Communal or customary land management systems vest land in the tribe, group or community, with individuals in theory enjoying only user rights regulated by usually non-literate tradition and customs. The oft-quoted summary of traditional African attitudes to land is that ‘land belongs to a vast family of which many are dead, few are living and countless members are still unborn.’ (Meek 1946) Customary systems evolved under rural conditions where land was plentiful and communities were broadly homogeneous, but have proved resilient and adaptable under pressures of population and environmental change and colonial land policy (Platteau 1996).

Individual tenure, usually with title guaranteed by the state, has been connected with the emergence of land markets where property can be freely traded as a commodity. In colonial situations, land deemed to be ‘not in beneficial occupation’ was expropriated by the colonial administration, and could be transferred to individuals (usually from the colonising group) on licence, long lease or freehold. Newly created urban areas were controlled as government land, where individual title could be granted and western forms of municipal administration and service provision created.

In postcolonial Africa the legal distinctions between tribal, private and state (or municipal) land have contributed to creating the conditions for peri-urban squatter settlement outside formal regulatory control. Colonial policies of indirect rule and urban management had sought to exclude Africans from urban life, and offered them little or no opportunity to acquire land in urban areas. Such policies, consolidated in southern Africa by apartheid ideology, housed African urban workers in peri-urban ‘locations’, and indeed legally excluded them from owning property (Dubow 1989; Robinson 1996; Maharaj 1997), while in rural areas, outside municipal boundaries, access to land was still governed by tribal, communal or customary tenure arrangements. With housing and land increasingly difficult to get, and tightly regulated, within municipal areas, tribal land allocation systems offered a ‘safety valve’ where customary land comes close to urban areas, although such areas generally lack the local government capacity to facilitate planning and infrastructure provision.

The colonial and postcolonial creation of illegal settlements has been well researched in the context of South Africa (Hindson and McCarthy 1994)). This paper explores the tensions between customary and individual land tenure systems under pressures of rapid urbanisation in Botswana, and links to a research project recently approved by DFID on land titling and peri-urban development in Africa and the Caribbean. When pressure of population and rural poverty forced migration to the towns, together with natural growth and new household formation within the existing urban population, it was in the villages around the capital that housing land in informal shack settlements could be most easily and cheaply obtained through informal land subdivision and dealing, in breach of customary land allocation rules. A case study is presented of such settlements outside Gaborone, the capital of Botswana, drawing upon research by postgraduate and undergraduate students at the University of East London. Much
publicity was given in Botswana to the dramatic uncontrolled development of the Mogoditshane area, and a Government Commission of Inquiry took place in 1991, following which various recommendations and initiatives were made, some successful, some not.

**Background to the Mogoditshane informal settlements**

Botswana (formerly Bechuanaland) has a land area of some 580,000 sq. km, over 60% of it desert, and a small and sparse population of 1.3 million people (1991 census). The country has experienced rapid urbanisation and large rural/urban migration, especially around the capital, Gaborone. In 1991 half of the national population lived within 100 km of the capital, and the proportion of urban to total population rose from 4 per cent at independence in 1966, to 9 per cent in 1971, and by 1991 to a striking 45.7 per cent (Habana 2000). A National Settlement Policy (1998) and Housing Policy (1999) has attempted to tackle the ever-escalating trend of urbanisation in Botswana.

Land in Botswana is held under three different tenure arrangements: freehold/leasehold 6 per cent, state land 23 per cent (formerly crown lands), and Tribal Land 71 per cent. Freehold title in the colonial period was for Europeans only, and was after independence replaced with leasehold (under a 99-year term for residential, less for others), subject to an approved cadastral survey, but the procedure proved to be too expensive for most citizens, and was not responsive to the pressures of rapid urban growth. A lesser category of tenure, called Certificate of Rights (COR), was, therefore, introduced in 1975, which conferred user rights on land which still belonged to the State and was administered by the local authority. This system, supported by the Self Help Housing Agency Scheme (SHHA), avoided the need for expensive surveys and conveyancing, replaced rates with a fixed service levy, and allowed titles to be progressively upgraded. It now applies to 75 per cent of all plots in towns, and is supported by free government surveys, physical planning and land administration. A related delivery programme, the Accelerated Land Servicing Programme (ALSP), doubled the number of available plots in towns and shifted the land problem from lack of serviced plots in towns to lack of development finance. The SHHA scheme was then proposed for decentralisation into customary tenure areas where some 80 per cent of the population lived.

Tribal or customary tenure applied to nearly three-quarters of the land area, and much former state land (24 per cent of all land) was transferred to it after independence. The system was codified by the colonial protectorate administration following the anthropological research of Professor Schapera (1933 and 1943), and eight Tribal Territories were designated, with land vested in the tribe and administered by Chiefs as trustees. Within these areas ownership could be granted to the State for national development purposes (e.g. mining). Twelve tribal land boards were created in 1970 (with many subordinate boards), with membership both official and elected. They were intended to guarantee access to land and guard against land grabbing. The Tribal Land Act 1968 required the boards to hold land ‘in trust for the benefit of the tribesmen of that area’ (no reference made to rights of women), but additionally ‘for the purpose of promoting the economic and social development of all the people of Botswana’.
Three land tenure types existed within tribal land: residential plots in village/urban areas, ‘masimo’ (ploughing fields around the village, although they could be up to 30 miles away), and ‘moraka’ (cattlepost), with hunting areas beyond. ‘Tribesmen’ were guaranteed an allocation of these three types. Masimo was intended for open access outside the ploughing season, but fencing (to keep out animals) has gradually conferred all-year exclusivity for the occupiers. After independence new types of leases were introduced: common law leases (99 or 50 years, pledgable) and residential leases, obtained on application at the land board by tribal members. The normal type of customary lease had unlimited duration but were not pledgable as collateral.

In the 1980s the village of Mogoditshane, outside Gaborone, came to symbolise the problems of illegal peri-urban settlement in Botswana. Gaborone had experienced tremendous pressure for land because of the shortage and high price of house-plots, combined with a tough anti-squatting policy within the city boundaries. People turned to the adjacent tribal land board area for plots newly created around existing villages, believing that they were exercising their birthright. The government, concerned about the proliferation of illegal land transactions and uncontrolled house-building, appointed a ‘Presidential Commission of Inquiry to look into the Land Problems of Mogoditshane and Other Peri-Urban Villages’ (Botswana Government 1991), which toured the villages, held public meetings and interviewed some four hundred individuals. It found at least eight hundred illegally created plots, and in effect a total collapse of the legal procedures for allocating land. Among the abuses it found were:

- **Unauthorised subdivision.** The owners of ploughing fields (masimo) had been subdividing and selling land to individuals without the consent of their land board. Such informally allocated plots created unplanned and haphazard developments that were subsequently difficult to provide with infrastructure. Field owners were either selling the whole land or subdividing it into 40m by 40m plots (1600 m²), encouraged by unofficial land brokers.

- **Unauthorised change of use and development.** Changes of use from masimo land to residential were not approved either by the land board or the planning authority before the new owners started to build houses. (Commercial plots were not affected, since official titling documentation was essential before loans and mortgages could be obtained.)

- **Unauthorised recipients.** Tribal land was intended only to be allocated to ‘tribesmen’ on demand, but the Tribal Land Act in 1993 replaced the term ‘tribesman’ with the wider one of ‘citizen’, which had the effect of opening up applications for free plots from those not local to the land board area. In 2000 a long-awaited Presidential Commission found parts of the constitution to be discriminatory by referring only to the main clan groups, excluding others.

- **Land board irregularities.** With only a handful of subdivisions taking place officially, the Commission found that Land Board members and officials were selling plots, issuing fraudulent ownership certificates and without planning permission. Officials had insufficient education/training or experience and low salaries, and often failed to follow procedure or keep adequate records.
The participants in these extralegal practices were uncontrite and defiant in their evidence to the Presidential Commission. The holders of tribal land rights, often handed down over several generations, believed they owned their land in perpetuity, and that they could sell, sub-divide or convert it to other uses, while no effective sanctions were available to the land boards (‘dogs without teeth’, as they were called). The squatters felt justified in their action because of the failure of government to allocate enough land at a price they could afford, and because leading Batswana, including senior politicians, were engaging in suspicious land transfers. ‘Why should they sit back when these responsible people accumulate large chunks of land and enrich themselves’ (Botswana Government 1991). For example land compulsorily acquired for a commercial centre had been transferred by the Minister to a Member of Parliament, over-ruling the Land Board.

Response to the Commission
Following the report of the commission, a government paper was published with proposed remedies (Botswana Government 1992). The Government established a Task Force to monitor illegal land developments assisted by nine police officers. To identify illegal structures (in the absence of reliable land board records or large scale up-to-date maps) Government surveyors interviewed plot occupiers and mapped all structures with standard basic mapping techniques, assisted by aerial photography and large scale digital mapping of the area at 1:5 000 scale. Illegal land developments still continued, which the Task Force was powerless to prevent, other than warning the developers to stop. A new subordinate land board to the Kweneng Land Board was created, headed by a senior and experienced officer (deputy board secretary), and provided with a survey section, and the Government also established a Land Tribunal to speed up land procedures. All illegally acquired but unused and undeveloped land in the peri-urban villages was to revert to the land board (such undeveloped land adjacent to built-up areas often had been allocated before the establishment of Land Boards, and had no legal records of ownership, since the chiefs had not keep records and land boards did not pursue them).

Meanwhile High Court case law was eroding the position of the land boards. The case of Kweneng Land Board and K.Matlho (Misca 137 of 1990) legitimated the sale of masimo land within village boundaries, undermining the role of tribal land tenure and reinforcing the trend towards individual freely transferable title. A ruling in the Court of Appeal gave field owners the right to dispose of their fields to whoever they wished, for allocations before 8 July 1994, and compels the Land Board to issue titles for such land. In another case an individual bought a piece of land and constructed an expensive dwelling house; the Land Board successfully petitioned the High Court for an eviction order, only for the appellant to appeal to the responsible Minister who waived the court order.

The Department of Town and Regional Planning in 1992 prepared detailed layout plans for 24 000 residential plots, 28 commercial, 132 industrial, 27 civic and community, 13 recreational plots, with open spaces and infrastructure (roads, power and telephones). The area had been declared a Planning Area since 1986, but permissions for subdivision and change of use had been neglected, and detailed planning layouts not implemented. The 24 000 residential plots based upon the approved layouts in Mogoditshane were to be surveyed within twelve months from May 1993, and handed over to the land board for allocation. To design these layouts
the physical planners required accurate base maps quickly and a compromise was reached to select priority blocks and have surveyors update the maps using traditional field measurements (Total Stations). Surveyors from different Land Boards were redeployed for the task, and this allowed the first detailed plans to be completed comprising 10 000 plots.

The biggest test to comprehensive planning came when surveyors went on the ground to start placing beacons, only to find non-conforming subdivisions, unauthorised structures (houses, fences etc) and land occupied by denying them access. The surveyors had no authority to remove obstructing property, and the land board was powerless to act. As a result most areas covered by approved layouts were not surveyed, even with the hiring at a cost of 1 million pula of additional private surveyors. Surveying in tribal areas is more expensive, quite part from the illegal development at Mogoditshane, because plots were often non-standard and required time-consuming fixing of polygon boundary points.

By April 1999 a total of 3590 residential, 28 commercial and 132 industrial plots had been surveyed and handed to the Land Board for allocation. Of the residential plots, 2935 had been allocated, while the remaining 655 were held up because former owners refused compensation or for other legal complications. The estimated plot demand was steadily increasing meanwhile: in 1993 the projected demand for 1997 was 20 000, and by 1997 it had risen to an estimated 29 391. For the plots which could be allocated, advertisements soon after began to appear in the press for sale, as individuals sought to sell on their official allocation.

With land boards and district councils effectively powerless to enforce against illegality, the Government introduced a mandatory P5000 fine to those who had acquired land illegally (as identified by the Task Force in 1992), for each plot of 1600 m2, increased proportionately for larger plots. Some 3000 people were given this mandatory fine, but by April 1999 only 99 had fully paid and 18 were paying by instalment. As an incentive to pay the fine an automatic title from the Land Board (customary lease) was offered, but most plot occupiers, having already paid the field owners for their plot, expected the field-owner to pay the mandatory fine.

Indeed, it was money and compensation that proved most difficult in the protracted negotiations between government representatives and illegal occupiers. The government position was that tribal land was not owned by the occupiers, and therefore any compensation payment to them was for improvements only. Land required for government purposes (such as the planned expansion) on tribal land, was calculated according to uniform national compensation guidelines, making no allowance for the particular land pressures around the capital, and giving land boards no power to negotiate based on market conditions. Even when Government increased the compensation payable (to P700 per hectare in 1992; P800 in 1998; P1950 in 2000), this was still less than 1992 prices. One hectare could subdivide into 6 plots at P15000-P30000 each, forty times higher than official figures. Thus in peri-urban areas the Government was seeking to deny people the true betterment value of their land and a chance to participate in the development gain from urban expansion.

A decade on from the Mogoditshane Commission of Inquiry there is still bitter confrontation between field owners and government policy. The parastatals had
placed their infrastructure according to the approved plans but high-voltage power lines cannot be switched live without physically removing the squatters. The Government still attempts to remove squatters with bulldozers, contrary to the spirit of the UNCHS Global Campaign for Secure Tenure. Land users still refuse to give up their land to implement the rest of the layouts, and some of the more enterprising have prepared their own allocation lists and handed them over to land boards as a basis for negotiation.

Comments
What wider lessons can be learned from the land management problems of Botswana and Mogoditshane? Unprecedented population pressure has outpaced the rate at which infrastructure and housing can be provided, notwithstanding the range of government land delivery programmes, and a failure of executive capacity by government has resulted in a loss of public confidence. At the same time a loophole in the structure of land tenure created opportunities for speculative private land developers. This loophole was the contrast between the slow delivery of public sector serviced land within the municipal area, and the availability of plots on peri-urban land nearby poorly managed under tribal land boards. The zoning, plan-making and control functions of official land use planning were ineffective in peri-urban areas under customary tenure, not keeping pace with demand and insufficiently in contact with development on the ground. The land boards, set up after independence to guard communal land resources against land grabbers, proved ineffective.

Institutional capacity can be strengthened, particularly at local level. The attempt of government to manage urban development through a variety of ‘packaged development’ programmes has had some success, but is increasingly viewed as an imposed top down exercise by central authorities, not demand driven or responsive to local opinion (Farvacque and McAuslan 1992). A more robust local land management structure would combine technical functions (such as planning and infrastructure) and tribal land management with more inclusive community participation (Christensen and Hojgaard 1997; Home and Jackson 1997). Limited resources and the rapid pace of development have made monitoring and record-keeping inadequate and ineffective. The lack of basic up-to-date land information for peri-urban areas under customary tenure requires new approaches, with opportunities created by the new digital data technologies of GPS and GIS for data capture and integration (Fourie and Nino-Fluck 1999). The functions of land use planning by District Councils and land management (allocation) under Land Boards might be integrated under one authority, allowing integrated planning and land board records of legal titles (customary and common law leases) and approved/actual physical land use.

The tribal land board system was at the time of independence a potent symbol of the new nation-state managing its land resources for the benefit of the people and community rather than foreign colonial interests. The uncontrolled development at Mogoditshane has damaged public confidence in the system, exposing the land boards as ineffective, liable to corruption, and inadequately managed and resourced. The winding-up of the tribal land tenure system is not a realistic or practical political option, but a more strategic approach to urban expansion through transfer of tribal land to a development agency should be possible, and indeed did occur in part with the creation of the subordinate land board. In this way the special pressures of urban
expansion could be recognised, and the alienation of land to individual owners managed through a market process. A more enabling approach to sub-division and sub-leasing would improve public confidence in the system. Changes in the legal status of use rights under customary tenure would clarify and strengthen individual ownership, allowing progressive conversion to registered leasehold title in certain conditions (similar to leasehold extension and enfranchisement in the United Kingdom). New tenure types have already been introduced into tribal land law, but the executive capacity of local land management and levels of public awareness and willingness to conform to the procedures are lagging.

While the costs of land registration with full cadastral survey have sometimes discouraged land developers, the other extreme still exists in tribal areas, where people do not bother to collect their free customary certificates (which constitute the overwhelming majority of titles issued) from the land board offices. After all, if customary title is an oral agreement with the community, then why bother with a written paper to confirm it? If, however, the benefits of planned layouts and infrastructure provision are to be realised, the costs of orderly land delivery and infrastructure will need to be recovered from those beneficiaries somehow. At present the nominal charges for common law titles and annual leases are insufficient even to support a competent land information system, while a property rating system has yet to be introduced in tribal areas. Customary land-holders are unable to access existing credit institutions, and the issue of credit depends less upon title than disposable incomes (Botswana Government 1986).

A more effective intervention could be through land pooling techniques, a process for the distribution of the financial benefits of urban development between the parties, ensuring for the occupier a share of the added value or betterment created when farmland is converted to urban use. The limitations of the official compensation code were exposed by the unauthorised land market of Mogoditshane, which could achieve land values many times the official compensation paid out on improvements only. There are numerous approaches of land pooling and similar mechanisms for distributing the benefits of urban expansion between the owners, developers and public enabling agencies (Archer 1999). The concern must be, however, that yet another bureaucratic procedure would be by-passed by the speedy, if risky, operation of the informal land market.

Public confidence in government management of land resources needs to be rebuilt, through better public awareness of the general social benefits of an orderly land delivery and land market process, reducing risk, disputes and other inefficiencies. Land pooling programmes have the advantage of creating opportunities for the different stake-holders to work in partnership, and achieve a measure of consensus. At present, the apparent chaos of the peri-urban settlements of Gaborone, and the loophole of a weak tribal land board system, work to the advantage of a small number of unscrupulous land grabbers, but the longer term social benefits of orderly urban expansion

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References