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“Application of the General Theory to Botswana”

Sara Ghebremusse*

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*Assistant Professor, Peter A. Allard School of Law, The University of British Columbia.

Application of the General Theory of Law and Development to Botswana

Sara Ghebremusse*

*Botswana has achieved significant socioeconomic development despite its low-income status in 1966 when colonial rule ended, earning it the status of an “African success story” and “African miracle”. Botswana’s development was achieved in great part to its abundance of natural resources (diamonds), in contrast to other African countries that displayed conditions affiliated with the “resource curse”: corruption, rent-seeking behaviour by the ruling class, Dutch disease, declining terms of trade, the absence of economic diversification, and even civil conflict. Despite its extensive coverage in political economy and development studies literature, Botswana’s socioeconomic development has yet to be interrogated through a law and development lens. Yong-Shik Lee offers a theoretical framework to conduct such an analysis in his article, *General Theory of Law and Development*, which proposes that law directly impacts development through three categorical Regulatory Impact Mechanisms: regulatory design; regulatory compliance; and quality of implementation. This article applies Lee’s theory to Botswana, making it one of the first applications of Lee’s theory to an African case study.*

Keywords: Botswana; Africa; Law and Development; General Theory of Law and Development; Mineral Resources (diamonds).

*Assistant Professor, Peter A. Allard School of Law, The University of British Columbia.

1. Introduction

This article explains Botswana's economic development outcome using Yong-Shik Lee's general theory of law and development (the "general theory").¹ Lee's newly advanced theory posits that law directly impacts development through "Regulatory Impact Mechanisms", which are comprised of three categorical elements: "regulatory design", "regulatory compliance", and "quality of implementation".² This article is one of the first attempts to apply Lee's theory to an African case study.³ From all of the possible countries to study, Botswana's status as an "African success story"⁴ and "African miracle"⁵ make it a worthwhile empirical study. Furthermore, Botswana's successful development outcome has yet to be interrogated through a law and development lens, which Lee's general theory provides.

Botswana has achieved significant economic growth and development despite its low-income status when it gained independence from Great Britain in 1966. Its location between South Africa and Germany's Southwest Africa colony meant Bechuanaland (Botswana's colonial predecessor) mainly served as a buttress to other colonial interests in the region, and was of little importance to the British empire.⁶ Britain's lack of interest in the colony was evident in its minimal investment—the physical infrastructure and political administration in Bechuanaland left Botswana with neither an indigenous economy nor an educated bureaucracy,⁷ and only 50-60km of paved roads.⁸ Today, Botswana is classified as an upper middle income country with a Gross Domestic Product of \$15.5 billion USD and GDP per capita of \$7,877 USD.⁹ The annual growth rate remained steady over the past decade, averaging 5 percent per annum.¹⁰

Botswana's development was possible in great part to its abundance of natural resources (diamonds), in contrast to other African countries that displayed conditions affiliated with the "resource curse".¹¹ Without the presence of sound institutions, natural resource endowment is typically viewed as a curse rather than a blessing because of the political and economic distortions that may arise, including corruption, rent-seeking behaviour by the ruling class, Dutch

¹ Y.S. Lee, *General Theory of Law and Development*, 50 Cornell Journal of International Law, no. 3 (2017), forthcoming.

² *Ibid.*, p. 5.

³ Lee previously applied his theory to South Korea, both in his forthcoming 2017 article, and in his draft paper *Law and Development: Lessons from South Korea* presented at the 2017 Law and Development Conference held at the University of Cape Town (September 7-8, 2017).

⁴ D. Acemoglu, S. Johnson, and J.A. Robinson, *An African Success Story: Botswana*, MIT Department of Economics Working Paper No. 01-37 (2001).

⁵ A.I. Samatar, *An African Miracle: State and Class Leadership and Colonial Legacy in Botswana Development* (Portsmouth, NH: Heinemann, 1999).

⁶ S.A. Beaulier and J.R. Subrick, *The political foundations of development: the case of Botswana*, 17 Constitutional Political Economy, no. 2 (2006), 103-115, at 108.

⁷ Samatar, *supra* note 5, p. 68.

⁸ Beaulier and Subrick, *supra* note 6, p. 104.

⁹ World Bank, "Botswana - Data", <<https://data.worldbank.org/country/botswana>>; Open Data for Africa, "World GDP per Capita Ranking 2017", <<http://botswana.opendataforafrica.org/sijweyg/world-gdp-per-capita-ranking-2017-data-and-charts-forecast/>>

¹⁰ World Bank, "Botswana Overview", <<http://www.worldbank.org/en/country/botswana/overview>>.

¹¹ P. Martin, *A Closer Look at Botswana's Development: The Role of Institutions*, 9 Paterson Review (2008), 35-54, at 36.

disease,¹² declining terms of trade, the absence of economic diversification, and even civil conflict.¹³

To apply Lee's general theory to Botswana's law and development, this paper is divided as follows: section 2 identifies the applicable law as well as the development objectives that spearheaded Botswana's economic growth. Section 3 then applies the "regulatory impact mechanisms" portion of the general theory. Section 4 concludes by evaluating the general theory's applicability to explaining Botswana's socioeconomic outcome, and assesses the impact of law on Botswana's development.

2. Law and development in Botswana

2.1 Applicable law

Determining which law to examine forms part of the first prong of the general theory. Lee stipulated that in the context of law and development, "law" refers to both formal state law, and informal customary law.¹⁴ In Botswana's case, formal state law is the focus of analysis for two main reasons. First, Botswana adopted a Westminster democratic system similar to Great Britain's, where the power to make law rests with two key branches of the state—parliament and the executive.¹⁵ Botswana's parliament consists of a unicameral Assembly that is responsible for debating and passing laws "for the peace, order, and good government of Botswana."¹⁶ The executive branch, made up of the president, vice-president, and cabinet, also possesses constitutionally granted law-making powers.¹⁷ Unlike Westminster-style democracies such as Great Britain, however, greater power rests with the executive to challenge laws proposed by parliament: the president can withhold signing bills, which results in their return to the assembly.¹⁸ As a result of this power imbalance, Botswana's president has been a key figure in the country's nation-building project.

Secondly, Botswana's socioeconomic development has been a state-led project since independence. The Botswana state's role is often compared to the East Asian Tigers, like South Korea, Taiwan, and Singapore, resulting in the country being described as a developmental state.¹⁹ Botswana's transformation from one of the world's poorest countries in 1966, to a n upper middle-income country today is attributed to a number of factors characteristic of the developmental state: a development-oriented political leadership willing to intervene in the economy; an autonomous and effective bureaucracy; a production-coordinated private sector; and performance-oriented governance.²⁰ A key feature of Botswana's developmental state is the

¹² As part of the resource curse, Dutch disease refers to the decline other industries experience due to a strengthening exchange rate caused directly by increased levels of resource extraction (Richard Auty, *Sustaining Development in Mineral Economies* (New York: Routledge, 1993), p. 3).

¹³ Martin, *supra* note 11, p. 38.

¹⁴ Lee, *supra* note 3, p. 6.

¹⁵ Beaulier, *supra* note 6, p. 109.

¹⁶ Constitution of Botswana, 1966, s. 86.

¹⁷ *Ibid*, ss. 47, 49-50.

¹⁸ Beaulier, *supra* note 6, p. 109.

¹⁹ D. Sebudubudu, "The Institutional Framework of the Developmental State in Botswana", in P. Mbabazi and I. Taylor (eds.), *The Potentiality of 'Developmental States' in Africa: Botswana and Uganda Compared* (Dakar: CODESIRA, 2005).

²⁰ P. Meyns and C. Musamba, *The Developmental State in Africa: Problems and Prospects*, INEF Report 101/2010, p. 42.

relationship between the national government and private sector entities. Early on during the post-colonial period, the government of Botswana partnered with foreign transnational corporations to develop new industries, particularly the mining sector.²¹ One such example of this was the 50-50 joint venture between the Government of Botswana and the De Beers Centenary AG.²² Contracts and other binding agreements framed these public-private partnerships, and are also an important consideration in the “law” contemplated in law and development.

Due to Botswana’s state-led development through such mechanisms as legislation and contracts, formal state law is exclusively examined in this application of Lee’s general theory. However, despite this focus, customary law and traditions remain a part of the law-making process in Botswana. Broad based participation, coupled with a consensus-driven approach, were used in traditional political settings during colonial rule. This practice continued after independence, with slight variations to account for the prominent role of the bureaucracy and evolving elite interests.²³

2.2 Development objectives

Lee’s general theory adopts the definition of development as “a progressive transformation of the economy and society.”²⁴ Although Lee acknowledges that the precise nature of this transformation is subject to debate, he embraces a joint interpretation of development focused on both economic and social objectives, with the former being central to achieving the latter.²⁵ Thus, “economic development” in the general theory is focused on economic growth indicators (i.e. gross domestic product, employment, inflation), while “social development” includes such objectives as “political freedom, democratic governance, gender equality, protection of environment, access to education, protection of the environment, and the rule of law.”²⁶

Both economic and social development formed the crux of Botswana’s development objectives since it gained independence from Great Britain in 1966. It’s characterization as the “African miracle” and “African success story” is due both to the unanimous view that Botswana has achieved many of its development objectives, and that it has avoided the “African growth tragedy” that afflicted other countries across the continent.²⁷ Unlike other states across Sub-Saharan Africa that experienced low economic development since the 1970s, Botswana managed to maintain consistent economic growth spurred by diamond mining. To help explain Botswana’s historical development success, and to illustrate its recent development objectives, this section will discuss the country’s socioeconomic conditions at independence, in addition to its post-colonial development trajectory.

Abdi Ismail Samatar succinctly described Botswana at independence as “an impoverished society” that “lacked two main ingredients necessary to transform its economy: educated and

²¹ K. Jefferis, *The role of TNCs in the extractive industry of Botswana*, 18 *Transnational Corporations*, no. 1 (2009), 61-92, at 62.

²² *Ibid.*, p. 65.

²³ Acemoglu et al., *supra* note 4, p. 3.

²⁴ Lee, *supra* note 3, p. 7

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ Beaulier, *supra* note 6, p. 105.

skilled labour and immediately exploitable natural resources.”²⁸ He further detailed Botswana’s “shallow financial base from which to launch a development program’, as well as its “[dependence] on [Britain’s] financial support to balance its annual budget.”²⁹ The shortage of employment opportunities in the country further impeded its development prospects at independence.³⁰ Despite the significant obstacles the country’s new leadership faced in 1966, they embarked an ambitious development that aimed to improve socioeconomic conditions. Remarking on Botswana’s status at independence on its tenth anniversary, the new president Seretse Khama said

When we attained independence in 1966 we had no economic base from which to proceed with the development of our country. Our chances of survival as a viable country were almost nil but we were not discouraged nor could we ever willingly return to the old days of colonial neglect. Having accepted the challenges of independence we had no other alternative but to get down to work to make our independence a meaningful one.³¹

Thus, “the very process of nation-building after independence took on a nature that was inspired by the fundamental task of development.”³² To achieve this, the Botswana Democratic Party (BDP) adopted the methodology used by the Protectorate Administration in its final years of existence: centralized development planning.³³

Botswana’s initial priorities in this area were to “establish a coordinated institutional capability and to attract sufficient public and overseas private funds.”³⁴ Four years after independence, the Ministry of Finance and Development Planning (MFDP) was established as the centralized “institutional brain of the economic policy-making process.”³⁵ The Ministry became responsible for: planning, coordinating, and budgeting all development activities; overall design of the state’s financial affairs; the implementation of development projects; and negotiating and liaising with aid agencies.³⁶

Under the leadership of Vice-President Quett Masire, the MFDP undertook development planning through six-year National Development Plans, which addressed both social and economic development objectives.³⁷ Not only did the Plans contribute to creating and implementing a coherent developmental vision for the state, but the government procedure that was developed to produce the Plans entrenched a consensus-driven process that resisted destructive neo-patrimonial and rent seeking behaviour.³⁸ For example, Botswana’s current NDP 11³⁹ includes the following objectives:

²⁸ Samatar, *supra* note 5, p. 62.

²⁹ *Ibid*, p. 63.

³⁰ *Ibid*, p. 64.

³¹ I. Taylor, “Botswana’s Developmental state and the Politics of Legitimacy”, in G. Harrison (ed.), *Global Encounters: International Political Economy, Development, and Globalization* (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2005), p. 45.

³² *Ibid*.

³³ Samatar, *supra* note 5, p. 83.

³⁴ *Ibid*.

³⁵ *Ibid*, p. 85.

³⁶ *Ibid*.

³⁷ J.C. Leith, *Why Botswana Prospered* (Montreal: McGill-Queen’s University Press, 2005), at 58.

³⁸ Martin, *supra* note 66, p. 42.

³⁹ Botswana, National Development Plan 11, Volume 1 (April 2017-March 2023).

- Macroeconomic Strategies:***
- Developing diversified sources for economic growth;
 - Using domestic expenditures as a source for growth and employment creation;
 - Expanding the export-led growth strategy;
 - Ensuring a conducive environment for the private sector to grow the economy and employment creation;
 - Securing a regulatory framework for doing business and competing globally.
- Economy and Employment:***
- Improving the quality and relevance of education and training;
 - Improving educational quality and skills development to promote workforce productivity;
 - Improve capacity in research and innovation;
 - Develop an entrepreneurial culture to foster manufacturing in technological industries.
- Sustainable Environment:***
- Ensure a healthy environment for a healthy population;
 - Encourage sustainable management of natural and cultural resources;
 - Develop climate change adaptation and mitigation strategies;
 - Support sustainable human settlements.
- Governance, Safety and Security:***
- Further enhance citizen participation;
 - Promote government transparency through the creation of two new audits;
 - Modernize the courts through measures such as e-Government, simplified rules of courts, and reduced litigation costs;
 - Promote gender equality and women's empowerment.
- Social Upliftment:***
- Combat rural poverty;
 - Support the development of small, medium, and micro-enterprises;
 - Continue the provision of social safety nets;
 - Eradicate absolute poverty;
 - Improve access to quality health care services.

Botswana's state-led development planning and implementation resulted in the country achieving one of the highest average annual growth rates in the latter part of the twentieth

century (10.7 percent between 1974 and 1992).⁴⁰ This economic growth continued into the twenty-first century, with average rates of 5 percent per annum over the last decade.⁴¹ In addition to its successful economic development, Botswana's social development achieved favourable results in education (88.5 percent literacy rate;⁴² universal primary education; 9 percent of GDP directed towards education funding⁴³) and health (64.5 years life expectancy at birth;⁴⁴ reductions in HIV prevalence rate among adults ages 15-49 from 26 percent in 2000 to 22.2 percent in 2015⁴⁵). Despite its successes, however, Botswana maintains a high unemployment rate of 17.8 percent, which has stalled efforts to combat income equality and reduce poverty.⁴⁶

3. Application of the regulatory impact mechanisms

This section examines Lee's proposed mechanisms by which law impacts development—the Regulatory Impact Mechanisms. Each categorical element—regulatory design, regulatory compliance, and quality of implementation⁴⁷—is applied to the Botswana case study.

3.1 Regulatory design

Regulatory design “analyses how law is designed to achieve a development objective”, and consists of the following sub-elements: anticipated policy outcome; organization of law, legal frameworks, and institutions; and adaptation to socioeconomic conditions.⁴⁸

3.1.1 Anticipated policy outcome

The first sub-element, anticipated policy outcome, refers to the outcome of a policy that law is anticipated to deliver. Botswana's diverse development objectives were implemented through a wide spectrum of policies across a range of areas. Despite these seemingly disparate policies, it can be argued that Botswana's range of development policies had, at a minimum, the anticipated outcome of positively impacting social or economic development, either at the state- or individual-level. At the state-level, this included growth-promoting policies that covered the important areas of minerals, land and agriculture, international trade, money, exchange rates, fiscal revenues, fiscal expenditure, labour market, state-owned enterprises, and industrialization.⁴⁹ At the individual-level, development policies were designed to impact health, gender equality, and rural poverty reduction.

The table below summarizes some of Botswana's key state-level development policies since independence and their anticipated outcomes:⁵⁰

⁴⁰ Samatar, *supra* note 5, p. 65.

⁴¹ World Bank, Botswana-Overview, available at <<http://www.worldbank.org/en/country/botswana/overview>>, accessed 21 November 2017.

⁴² United Nations Development Programme, Botswana Human Development Report, available at <<http://hdr.undp.org/en/countries/profiles/BWA>>, accessed 21 November 2017.

⁴³ World Bank, *supra* note 36.

⁴⁴ UNDP, *supra* note 37.

⁴⁵ *Ibid.*

⁴⁶ World Bank, *supra* note 36.

⁴⁷ Lee, *supra* note 3, p. 9.

⁴⁸ *Ibid.*, p. 10.

⁴⁹ Leith, *supra* note 33, pp. 59, 97.

⁵⁰ The data summarized here is taken from Leith, *supra* note 33, pp. 59-101; Acemoglu et al., *supra* note 4, pp. 16-19; and G.S. Maipose, *Institutional Dynamics of Sustained Rapid Economic Growth with Limited Impact on Poverty*

Policy Area	Sample Policies	Anticipated policy outcome
Minerals	<ul style="list-style-type: none"> • <i>Mines and Minerals Act, 1967</i>; • <i>Mines and Minerals Act, 1999</i>; • Establishing agreements directed at state-ownership in mineral extraction (Debswana, the joint-venture with De Beers, and the Okavango Diamond Company). 	Vested mineral rights in the state so that mineral wealth was directed to national purposes. This included using such measures as royalties, equity shares, and state ownership of extractive enterprises along the value-chain.
Trade	<ul style="list-style-type: none"> • Renegotiation of the Southern African Customs Union (SACU) agreement in 1969; • Special protections for beef exports in the 1975 Lome Convention. 	Increase government revenues and access to foreign markets for key exports.
Money	<ul style="list-style-type: none"> • <i>A Monetary System for Botswana</i>, Government Paper No. 1 (1975); • Creation of the Bank of Botswana. 	Create a new currency (the pula, launched in 1976), and establish the framework for monetary policy that was advantageous to domestic business, and the national economy.
Labour market	<ul style="list-style-type: none"> • <i>National Policy on Incomes, Employment, Prices and Profits</i>, Government Paper No. 2 (1972); • Public sector-led skills training. 	Establish a national minimum wage that varied by sector, and combat unemployment by increasing available skilled labour.
State-owned enterprises	<ul style="list-style-type: none"> • Creation of the National Development Bank (1965), and the Botswana Development Corporation (1970); • Creation of public enterprises providing utilities including water, electricity, telephones, and transportation. 	Support the development of indigenous businesses and investment, and ensure the provision of essential services without draining government revenue.

Industrialization	<ul style="list-style-type: none"> • Financial Assistance Policy (1985); • Industrial Development Policy (1996); • Citizens Entrepreneurial Development Agency; • Economic Diversification Drive (2011-2016). 	Diversify the economy beyond minerals extraction.
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In addition to these growth-promoting policies, the government of Botswana introduced social development policies aimed at improving outcomes for individual Batswana. Some notable examples include the *National Policy for Rural Development*,⁵¹ the *National Policy on Gender and Development*,⁵² and the *National Policy on HIV and AIDS*.⁵³ All of these policies complement Botswana's main social development policy—the NDPs.

3.1.2 Organization of law, legal frameworks, and institutions (LFIs)

This sub-element of regulatory design recognizes the importance of legal frameworks and institutions to ensuring effective development-facilitating policies and legislation.⁵⁴ Botswana's legal frameworks and institutions were highly centralized, which allowed the government to direct top-down development policies that were implemented using available government resources. Vital to the effectiveness of Botswana's LFIs were its civil service, and various public sector institutions specifically created to support development-facilitating policies.

Autonomous bureaucratic institutions necessary to ensure the NDPs effectiveness were also introduced by the Botswana government in the years after independence.⁵⁵ Key to their success was the government's recognition that political interference, indigenizing the civil service, and creating a non-meritorious bureaucracy would hinder its early productiveness. Botswana's early post-colonial civil service was based on a Weberian-model that attempted to maximize the knowledge of expatriate Britains who remained in the country.⁵⁶ Further contributing to the bureaucracy's effectiveness was their quick assimilation into the policy-making bloc, and their favourable intersection with political and economic elites. This close relationship between the bureaucracy and the ruling party resulted in the civil service becoming a recruitment site for senior positions in the ruling party, and the state.⁵⁷

⁵¹ *National Policy for Rural Development*, Government Paper No. 2 (May 1973).

⁵² *National Policy on Gender and Development*, available online at <<http://www.gov.bw/en/Ministries--Authorities/Ministries/Ministry-of-Labour--Home-Affairs-MLHA/Ministers-Speeches/THE-NATIONAL-POLICY-ON-GENDER-AND-DEVELOPMENT/>>, accessed 25 November 2017.

⁵³ *National Policy on HIV and AIDS*, available online at <<http://www.gov.bw/en/Ministries--Authorities/Ministries/State-President/National-AIDS-Coordinating-Agency-NACA1/Tools--Services/Services--Forms/HIV-and-AIDS-Policies/>>, accessed 25 November 2017.

⁵⁴ Lee, *supra* note 3, p. 14.

⁵⁵ Sebudubudu, *supra* note 16, p. 81.

⁵⁶ Taylor (2005), *supra* note 27, p. 45.

⁵⁷ *Ibid*, p. 49.

The national government also established centralized ministries empowered to direct development planning, and minerals governance. The Ministry of Finance and Development Planning was mandated to carry out the government's developmental planning, and became the centrepiece of the developmental state.⁵⁸ Similarly, the Department of Mines, the precursor to the current Ministry of Minerals, Energy, and Water Resources, was designated the designer of the country's early mineral governance regime, which included developing the fiscal regime entailing the royalty rate, and equity sharing option.⁵⁹

Complementing the civil service's work were a number of public sector institutions, including the Botswana Development Corporation, the Botswana Enterprise Development Unit, the National Development Bank, and the Trade and Investment Promotion Agency.⁶⁰ These entities were tasked with promoting industrialization through infrastructural development and investment, credit and service support for Botswana small business, and trade promotion within and beyond SACU.⁶¹ The creation of these institutions helped ensure the effective implementation of Botswana's development policies through specialized organizations with the knowledge and capacity to support the state's agenda.

3.1.3 Adaptation to socioeconomic conditions

As Botswana's early development policies proved successful, government priorities evolved to account for the country's changing socioeconomic conditions. Through subsequent policy and legislation, the Botswana government maintained its development agenda by adapting to changes in the economy, and developing new institutions and private sector relationships. Botswana's evolving activities in its mineral sector are one such example.

Mineral extraction was critical to ensuring sustainability and economic growth in Botswana since independence. Soon after independence, the Botswana government encouraged the exploration of its resources by foreign mining companies, which led to the discovery of mineral reserves in several locations.⁶² To promote this investment in the diamonds sector, Botswana entered into an agreement with De Beers, the world's leading diamond mining company, to establish the Debswana joint venture in which the state held a 50 percent stake.⁶³ Over the past two decades, Botswana's government recognized the need to promote economic diversification away from diamonds, and create more linkages between mining and other industries, while also ensuring a steady revenue stream from the mining sector. Mineral beneficiation policies were one way in which the Botswana government created more industrial linkages and promoted economic diversification. Expanding the country's downstream mineral production was an important component of this policy identified in the 11th National Development Plan.⁶⁴ The Diamond Technology Park built in Gaborone was one investment aimed at promoting beneficiation. The Park incubates small-scale companies (and their spinoffs) that cut, polish, and sell diamonds under the banner of the government's diamond sales

⁵⁸ Meyns and Musamba, *supra* note 17, p. 47.

⁵⁹ Meyns and Musamba, *supra* note 17, p. 48; Jefferis, *supra* note 18, p. 80.

⁶⁰ Samatar, *supra* note 5, pp. 141, 147.

⁶¹ *Ibid*, p. 143.

⁶² Acemoglu et al., *supra* note 4, p. 24.

⁶³ *Ibid*, p. 17.

⁶⁴ The Government of Botswana, National Development Plan 11 Volume 1, April 2017 - March 2023, available at <<https://www.tralac.org/images/Resources/By%20country/Botswana/Botswana%2011th%20National%20Development%20Plan%202017-2023.pdf>>, accessed 24 May 2017.

corporation, Okavango Diamond Company.⁶⁵ Along with the Park, Botswana successfully negotiated the relocation of De Beers' rough diamonds sales operations from London to Gaborone.⁶⁶ Recent statistics indicate the efforts to encourage downstream mining are successful: more than 3,000 are employed in polishing operations (up from 500 in 2006), and polished diamond exports totalled \$800 million USD in 2013, compared to \$100 million USD in 2008.⁶⁷

Further pushing the need to diversify Botswana's economy is the recent slowdown in the global price for rough and polished stones in 2015 and 2016.⁶⁸ Lower global demand also led Debswana to cut its 2015 production target by 3 million carats to 20 million carats.⁶⁹ Exacerbating lower global diamond prices and demand is Botswana's dwindling reserves. Recent modelling estimates that the decline in Botswana's diamond reserves could lower the country's Gross Domestic Product per capita by 48% by 2027, when the effects will likely earliest be felt.⁷⁰

3.2 Regulatory compliance

The "regulatory compliance" element of the Regulatory Impact Mechanisms examines the general public's compliance with the law, which Lee argues is vital for law to have any impact on development.⁷¹ It is divided into two sub-elements: general regulatory compliance, and specific regulatory compliance.

3.2.1 General regulatory compliance

General regulatory compliance accounts for the public's overall level of compliance with laws, in addition to the public's confidence in the state implementing the law.⁷² Borrowing Lee's adoption of the Rule of Law Index to measure general regulatory compliance in South Korea,⁷³ Botswana level of overall public compliance is similarly strong. Both the World Justice Project's most recent Rule of Law Index, and the Ibrahim Index of Africa Governance rule of law indicator rank Botswana among the top three African countries.⁷⁴

⁶⁵ R. Young, "Botswana: From sleepy backwater to global mining hub", available at <<http://www.bbc.co.uk/news/business-23771552>>, accessed 9 April 2017; "Diamond Technology Park Botswana", available at <<http://www.safdico.com/Diamond-Technology-Park>>, accessed 9 April 2017.

⁶⁶ Diamond Trading Company Botswana Sales Agreement, available at <<http://www.dtcbotswana.com/about-us/sales-agreement/>>, accessed 11 June 2017.

⁶⁷ R. Weldon and R. Shor, *Botswana's Scintillating Moment*, 50 *Gems & Gemology*, no. 2 (2014), available at <<http://www.gia.edu/gems-gemology/summer-2014-weldon-botswana-scintillating-moment>>, accessed 2 June 2017.

⁶⁸ J. Neicho, "Shine starts to fade on Botswana's diamond dividend" (28 January 2016), available at <<https://www.theguardian.com/global-development/2016/jan/28/botswana-diamond-mines-tourism-transport-agriculture-karowe>>, accessed 2 June 2017.

⁶⁹ "Botswana's Debswana cuts diamond production due to market downturn" (11 September 2015), available at <<http://www.reuters.com/article/botswana-diamonds-idUSL5N11H16120150911>>, accessed 2 June 2017.

⁷⁰ Neicho, *supra* note 63; R. Grynberg, "And we will live like Swazis" (17 November 2014), available at <<http://www.sundaystandard.info/and-we-will-live-swazis>>, accessed 2 June 2017.

⁷¹ Lee, *supra* note 3, p. 15.

⁷² *Ibid.*

⁷³ Lee, *supra* note 3, p. 16.

⁷⁴ World Justice Project, Rule of Law Index 2016 - Botswana, available at <<http://data.worldjusticeproject.org/#/groups/BWA>>, accessed 27 November 2017; and 2017 Ibrahim Index of African Governance, available at <<http://iiag.online>>, accessed 27 November 2017.

Further evidence of general regulatory compliance in Botswana is the legitimacy of the state through decades long public support of its initiatives and policies. The civil wars and political instability common to other parts of Africa never took place in Botswana. Its peace and minimal political dissent indicates the public supported and endorsed the government's economic and development planning.⁷⁵ The government's legitimacy was also secured through continued support for the BDP that was buttressed by the state's mineral-fuelled growth. Relying more extensively on mineral revenues limited the government's reliance on taxes generated from the middle- and lower-classes, which yielded more socioeconomic benefits for these groups, and protected them from state exploitation.⁷⁶

3.2.2 Specific regulatory compliance

In the case of Botswana, specific regulatory compliance should be evaluated horizontally across different state institutions, and vertically between the national government and specific elements in society who were partners in the country's development. Since Botswana's development project was state-centric and relied heavily on the participation of various state actors, institutional acceptance of the government's agenda across all ministries was crucial to ensuring its effectiveness. Once broad-based compliance was achieved across government, specific regulatory compliance with private sector actors was required to ensure development-facilitating policies and legislation were effectively implemented.

Horizontal compliance across Botswana state institutions is illustrated by the government's efforts to ensure widespread support and agreement with a policy during its development process, and subsequently during the implementation phase. The practice of reaching widespread agreement across the national government is a continuation of Botswana's pre-colonial and colonial political decision-making processes. It encompasses Botswana's traditional institutions, the consensus-seeking approach to policy formulation, and the creation of broad political coalitions established after independence that placated the elite.⁷⁷

The country's early efforts to promote consensus-building and broad based institutional participation within government helped stimulate compliance across departments. This allowed for better coordination in the planning of development objectives, particularly the NDPs.⁷⁸ The preparatory process for the NDPs typically extended over multiple years, and included consultations at sub-national regional and local governments, as well as various non-elected municipal authorities.⁷⁹

Vertical compliance is visible through private sector participation in the formulation and implementation of development policies. One such example is the High Level Consultative Council. Chaired by the President, the Committee includes top ministry officials and members of the private sector who meet twice a year to consult on industrial and economic development policies.⁸⁰ In addition to private sector compliance achieved through consultation, the

⁷⁵ Meyns and Musamba, *supra* note 17, p. 25.

⁷⁶ Samatar, *supra* note 5, p. 74.

⁷⁷ Acemoglu et al, *supra* note 4; Leith, *supra* note 33; and Martin, *supra* note 9.

⁷⁸ L. Adamolekun and P. Morgan, *Pragmatic institutional design in Botswana—salient features and an assessment*, 12 *International Journal of Public Sector Management*, no. 7 (1999), 584-603, at 598.

⁷⁹ *Ibid.*

⁸⁰ Taylor, *supra* note 27, p. 50.

government's negotiated agreements with various businesses, particularly mineral extraction corporations, produce further acceptance of the state's development-facilitating agenda.⁸¹

3.3 Quality of implementation: state capacity and political will

Lee's final Regulatory Impact Mechanism, "quality of implementation", captures the state capacity and political will necessary to effectively implement development-facilitating laws and policies.⁸² In Botswana, visionary leadership was decisive to setting and maintaining its developmental course after independence in 1966. A strong central government was central to the nation-building project for President Khama because it limited the influence of external actors on the decision-making process.⁸³ During colonial rule, the British Protectorate's administration decentralized some decision-making power to wealthy, cattle-owning chiefs in an effort to maintain a semblance of traditional authority, but ultimately created divisive, conflicting interests within the country.⁸⁴ Independence raised the challenge of unity the country around a common agenda, while appeasing the traditional political and economic elite without vesting full control with them, or diminishing central government authority through their influence. President Khama's vision for a strong central government respected the influence of traditional rulers, but purposely made them less powerful by not entrenching any role for them in country's constitution.⁸⁵ The Botswana constitution vested greater decision-making power with a small group of leaders—namely, the president and cabinet—who were faced little to no opposition in carrying out their economic and political objectives from the legislature.⁸⁶ Despite purposefully situating power in a tiny sector of the state, making it potentially vulnerable to elite capture, President Khama appeased elite interests by focusing early national development planning on the concerns of rural areas, the richest at the time.⁸⁷ Coincidentally, elites in government made use of the policy and legislative process to move the developmental project forward by providing public goods and investment in rural health, infrastructure, and education.⁸⁸

To further ensure the state's capacity to implement development objectives, President Khama proposed vesting mineral rights in the state rather than individual tribes in the year prior to independence. He declared in the Bechuanaland Democratic Party's (the precursor to the Botswana Democratic Party) 1965 Election Manifesto that "[c]onsequently leaving mineral rights vested in tribal authorities and private companies must necessarily result in uneven growth of the country's economy, as well as deprive the Central Government of an important source of revenue for developing the country."⁸⁹ This policy proposal soon became entrenched in legislation following independence in the form of the 1967 *Mines and Minerals Act* (the "Act").⁹⁰

In addition to vesting mineral rights in the national government, President Khama's government moved quickly to foster further benefits from potential mineral resources. The

⁸¹ Jefferis, *supra* note 18, p. 83.

⁸² Lee, *supra* note 3, p. 18.

⁸³ Acemoglu et al., *supra* note 4, p. 15.

⁸⁴ Samatar, *supra* note 5, p. 47.

⁸⁵ Adamolekun and Morgan, *supra* note 69, p. 588.

⁸⁶ Acemoglu et al., *supra* note 4, p. 99.

⁸⁷ Martin, *supra* note 9, p. 42.

⁸⁸ *Ibid.*

⁸⁹ Leith, *supra* note 33, p. 60.

⁹⁰ Acemoglu et al., *supra* note 4, p. 15.

importance of visionary leadership was most crucial in the years immediately following independence because mineral deposits had not yet been discovered in the country. To encourage exploration, Botswana entered into a strategic partnership with De Beers, the world's leading diamond mining corporation, to create Debswana. The 50-50 joint venture generated significant revenue for the central government, which was then directed towards infrastructure projects, and funding for health and education.⁹¹

President Khama's early commitment to social and economic development continued through the government's formalization of development planning through the NDPs. Not only did the Plans contribute to creating and implementing a coherent developmental vision for the state, but the government procedure that was developed to produce the Plans entrenched a consensus-driven process that resisted destructive neo-patrimonial and rent seeking behaviour.⁹² Development planning was also conducted at the highest levels in the Vice-President's office, where the Ministry of Finance and Development Planning was housed.⁹³ Quett Masire's leadership role in Seretse Khama's government as Vice-President, and later as his successor, was key to establishing the NDPs development and implementation process.⁹⁴

4. Conclusion

Lee's general theory provides a new way to examine Botswana's socioeconomic development. The country's progress has been lauded as a "miracle" and a "success story" because of the sound institutions and policies it implemented soon after independence. While other social science disciplines relied on established theories to explain Botswana's success, a theory to explain the impact of law on Botswana's development was not yet available. Lee's general theory offers this framework. The theory's Regulatory Impact Mechanisms explain how Botswana's state-led development-facilitating policy and legislation were effective. By evaluating their design, compliance, and quality of implementation, it is evident that Botswana law directly impacted socioeconomic development.

⁹¹ Martin, *supra* note 9, p. 43.

⁹² *Ibid*, p. 42.

⁹³ Taylor, *supra* note 27, p. 53.

⁹⁴ Leith, *supra* note 33, p. 121.