



University of the Witwatersrand, Johannesburg

School of Law

THE LEGITIMACY OF LAND USE PLANNING LAWS GOVERNING THE SPATIAL LOCATION OF URBAN FUNCTIONS: AN ASSESSMENT IN TERMS OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR).

Thesis submitted by:

Felemont Kayulayula Zilale Banda
[Student No. 790946]

In fulfilment of the requirements for the degree of

Master of Laws (by research)

In the School of Law at the University of Witwatersrand, Johannesburg, under the supervision
of **Dr. Thomas Coggin.**

Word count: 44 200.

September 2023.

ACKNOWLEDGMENTS

I would like to express my sincere gratitude to my supervisor, Dr. Thomas Coggin, for his unwavering guidance, support, and mentorship throughout the research process. He has always been available for guidance since I conceptualised the research idea. His invaluable advice and feedback were instrumental in the completion of this work.

I would also like to extend my heartfelt thanks to my wife, Ellen, daughter Mtendere and son Takhorwa for their patience and understanding during my absence. Their love and support were a constant motivation and inspiration during the research journey.

I am deeply grateful to the Malawi University of Business and Applied Sciences (MUBAS) for allowing me to undertake this research and for the sponsorship.

I would also like to acknowledge my friends and family, too numerous to mention, for their encouragement and support throughout this journey.

Lastly, I take full responsibility for any errors or faults that may be present in this work. I hope that the research will contribute to the advancement of legal knowledge in the field of urban law research.

ABSTRACT

The study's primary objective was to evaluate the legitimacy of Malawi's land use planning laws and regulations using ICESCR and Thomistic natural law frameworks. In order to achieve the primary objective, the study sought to explain the scope and nature of states parties' obligations in the implementation of economic, social, and cultural rights in the urban space; examine the legitimacy of land use planning laws governing the spatial location of urban functions; and analyse indicators of dissonance between discursive practices and written law in the urban space. In pursuit of these objectives, the study used a doctrinal research approach. The study thus analysed legislation, rules, regulations, orders, By-laws, authoritative court decisions, and planning-related literature. The study shows that states parties to the ICESCR do not attach spatial context to the Covenant obligations. As a result, they fail to ensure that the Covenant rights are enjoyed on an equal footing in the urban space among residents of different income statuses. The study has also found that, in order for land use planning laws to be legitimate, the state shoulder the obligation to ensure that the enacted planning laws are for the common good, do not impose unfair burdens on citizens, and are enacted with authority in line with consent and social contract doctrines. Land use planning laws in Malawi do not reflect the economic realities of urban citizens. These planning laws are neo-colonialistic as they principally reflect the European colonial planning paradigm, whose objective was the appropriation of resources to benefit the White settler community in colonial territories. Such a legislative background has resulted in the dissonance between the written law and discursive practices, which has caused a crisis of the legitimacy of land use planning laws as evidenced by massive noncompliance and the state's inability to enforce the laws in urban spaces. My central thesis demonstrates that the chaotic nature of urban development in Malawi emanates from the state's failure to enact legitimate fair laws from the perspective of low-income urban residents who are in the majority. The thesis is significant because it has revealed that states must review their laws in good faith and that a Thomistic reading of the laws would assist in aligning them with state-party obligations under the Covenant. Moreover, the thesis highlights the importance of land use planning laws reflecting urban citizens' socioeconomic needs, which is the principal condition precedent for the legitimacy of laws in the urban space.

DECLARATION

I declare that this dissertation is my own unaided work. It is submitted in fulfilment of the requirements for the degree of Masters of Law by research at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

FELEMONT KAYULAYULA ZILALE BANDA

Student No. 790946

26th February 2023.

ACRONYMS

AComHPR:	African Commission on Human and Peoples Rights.
ACHPR:	African Court of Human and Peoples Rights.
AHRLR:	African Human Rights Law Reports.
CESCR:	Committee on Economic, Social and Cultural Rights.
CESCR:	Centre for Economic, Social and Cultural Rights.
CRC:	Convention on the Rights of the Child.
COHRE:	Centre for Housing Eviction Rights.
CRPD:	Committee on the Rights of Persons with Disabilities.
ESC:	Economic, Social, Cultural.
ESCRs:	Economic, Social and Cultural Rights.
HRC:	Human Rights Council.
ICCPR:	International Covenant on Civil and Political Rights.
ICESCR:	International Covenant on Economic, Social and Cultural Rights.
IFAD:	International Fund for Agricultural Development.
IMF:	International Monetary Funds
MSCA:	Malawi Supreme Court of Appeal.
PALU:	Pan African Lawyers Union.
PPA:	Physical Planning Act.
TCPA:	Town and Country Planning Act.
RPPF:	Respect, Protect, Promote, Fulfil.
SERAC:	Social and Economic Rights Action.
UDHR:	Universal Declaration on Human Rights.
UN:	United Nations.
UN-Habitat:	United Nations Human Rights Programme.
WB:	World Bank

TABLE OF CONTENTS

ACKNOWLEDGMENTS	ii
ABSTRACT	iii
DECLARATION.....	iv
ACRONYMS	v
TABLE OF CONTENTS	vi
DEDICATION	viii
CHAPTER 1: INTRODUCTION.	1
1. Introduction.	1
1.1. Background.....	3
1.1.1. Land use planning legislative history in Malawi.....	3
1.1.2. The regulatory context of the Malawian urban spatial environment.	5
1.1.3. International law under the Malawi Constitution.	10
1.2. Problem Statement.....	12
1.3. Justification of the study.....	13
1.4. Methodology.	14
1.5. Delimitation of the scope of the study.	14
1.6. Thesis organisation.	15
1.7. Conclusion.	16
CHAPTER 2: STATES PARTIES' OBLIGATION UNDER THE ICESCR IN THE CONTEXT OF URBAN SPACE.....	18
2. Introduction.	18
2.1. Framing the urban space.....	19
2.1.1. Urban space as a physical entity.	19
2.1.2. Qualitative framing of urban space.	21
2.1.3. The concept of space and place.	21
2.1.4. Regulation of space and legal spatial parameters.....	23
2.1.5. Access to urban space and rights-sustaining services.....	24
2.2. Justification for using ICESCR.	26
2.3. The Spatial dimension of ICESCR in the context of the urban space.....	27
2.4. State party obligations under International human rights law.....	28
2.4.1. Nature of human rights obligations under the ICESCR.....	28
2.5. Typologies of States' human rights obligations.	29
2.5.1. The obligation to respect.....	30
2.5.2. The obligation to protect.....	33
2.5.3. The obligation to promote.	37
2.5.4. The obligation to fulfil.	39
2.6. Minimum core obligations.....	41
2.7. Progressive realisation.	44
2.8. Obligations of the international community.....	46
2.8.1. Justification for States Parties' extraterritorial obligations.....	47
2.8.2. Extraterritorial obligations.....	49
2.9. Conclusion.	51
CHAPTER 3: LEGITIMACY OF LAND USE PLANNING LAWS IN THE CONTEXT OF NATURAL LAW.....	52
3. Introduction.	52

3.1.	Conceptualising the term ‘legitimacy’ within the natural law framework.....	53
3.2.	An overview of natural law theory.	55
3.2.1.	Traditional natural law.	55
3.2.2.	Modern natural law.	57
3.3.	Critique of the Thomistic natural law theory.	59
3.3.1.	The positivist challenge.....	59
3.3.2.	The secular challenge.....	61
3.4.	Justification for adopting Thomistic natural law theory as the frame of analysis.	62
3.5.	The scope and nature of the concept of just law in Thomist natural law tradition.....	65
3.6.	Thomistic natural law critique of land use planning law.....	74
3.6.1.	Failure to serve the common good.....	74
3.6.2.	The law was enacted in excess of authority.....	78
3.6.3.	Imposition of unfair burdens on citizens.	84
3.8.	Conclusion.	87
4.	CHAPTER 4: DISSONANCE BETWEEN DISCURSIVE PRACTICES AND LAND USE PLANNING LAWS.....	88
4.1.	Introduction	88
4.2.	Discursive practices in Malawi’s urban space.	89
4.3.	Marginalisation of customary practices by the written law in the urban space.	91
4.4.	Vagrancy laws and criminalisation of access to the urban space.	100
4.4.1.	Regulation of urban functions.....	102
4.4.2.	Restriction of peddlers’ access to urban space and economic activities.	107
4.4.3.	Impact of vagrancy offences on socio-economic rights and access to the urban space.....	110
4.4.4.	Access to urban space and the offence of being idle and disorderly.....	110
4.4.5.	Access to urban public spaces and the offence of rogue and vagabond.....	114
4.4.6.	Offences relating to undesirable persons and access to urban space.	117
4.5.	Land use planning standards, regulations, and guidelines.	122
4.5.1.	Spatial Segregation.....	122
4.5.2.	Undue emphasis on planning as an exercise in physical planning and design.	126
4.5.3.	Failure to regulate the rental housing market.....	131
4.6.	Conclusion.	136
	CHAPTER 5: CONCLUSION.....	137
5.	Introduction.	137
5.1.	States Parties’ obligation under ICESCR in the urban space.....	138
5.2.	Legitimacy of planning law in the context of natural law.....	139
5.3.	Dissonance between discursive practices and land use planning laws.	141
5.4.	Conclusion.	143
	REFERENCES.....	145

DEDICATION

DEDICATION

To mum and dad, who toiled to see me reach this far!

CHAPTER 1

CHAPTER 1: INTRODUCTION.

1. Introduction.

The principal objective of land use planning is to meet the needs of land users and development, including urban development (residential, industrial, and institutional), transportation, agriculture, forestry, mining, and outdoor recreation.¹ Land use planning laws and regulations provide a regulatory framework for the spatial location of various urban functions on the urban landscape to actualise the purpose of land use planning by making it legally enforceable.² The rationale behind these laws and regulations is to ensure orderly and progressive urban landscape development, environmental sustainability and safety, maintenance of property values, and preservation and improvement of amenities, among others.³

However, in developing countries such as Malawi, where 40 to 80% of urban residents live in informal settlements⁴ and are below the poverty line, it is essential to assess the legitimacy of such a legal framework which appears to serve only the interests of the political class and high income to the exclusion of the majority. The conceptualisation of this study is thus on the premise that land use planning laws have led to the establishment of a framework that makes a large proportion of urban spaces and services inaccessible to most urban residents.⁵ However, because the standards of exclusion are provided by law, citizens and the state assume that such a framework is neutral and legitimate, considering that it applies equally to all the urban citizenry. CESC General Comment Number 20 points out that some laws, policies, or practices

¹ DV Nha 'The Role of Land-Use Planning on Socioeconomic Development in Mai Chau District, Vietnam' In Mai Van Thanh, Tran Ducvien, Stephen J Leisz *et al* (eds), *Redefining Diversity & Dynamics of Natural Resources Management in Asia* (2017) 2 87-111.

² Physical Planning Act 2016 Act 17 of 2016. See Preamble of the Act. Land Use Planning and Management Guidelines and Standards incorporated under reg 4 of the Physical Planning Regulations 2020 GN 31.

³ Ibid note 2.

⁴ National Report on Progress Made in the Implementation of the New Urban Agenda, March 2021, Government of Malawi p13 (National Report); Mabogunje A L 'Urban planning and the Post-Colonial State in Africa: A Research Overview.' (1990) 33(2) *African Studies Review* 121 – 203(Mabogunje).; Aronson D R 'Capitalism and Culture in Ibadan Urban Development' (1978) 7 *Urban Anthropology* 253-270.

⁵ National Report note 4.

appear neutral at face value but disproportionately impact the exercise of Covenant rights as distinguished by prohibited grounds of discrimination.⁶

Therefore, in the study, I assess the legitimacy of these land use planning laws and regulations in the context of state party obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR), especially concerning States parties' obligations under the Covenant. In conducting this assessment, I use the ICESCR and Thomistic perspective of natural law theory to evaluate the legitimacy of land use planning laws governing the spatial location of urban functions. First, the justification for using two frameworks is that the study focuses on the legitimacy of law in terms of States party obligations under the Covenant. I assess the State obligations aspect of the legitimacy of land use laws using the ICESCR. Secondly, I assess the legitimacy of land use planning laws in terms of the acceptability of planning laws using the criteria set in the Thomistic natural law perspective from which international human rights law is founded. From this angle, it is critical to assess the legitimacy of land use planning laws using the ICESCR and the Thomistic perspective of natural law for a holistic view.

The study's central thesis is that urban land use planning laws are a legal tool for producing urban spaces. Therefore, if the urban spaces produced by such laws make it difficult for low-income urban residents to enjoy their economic, social, and cultural rights (ESCRs), then such laws may, *prima facie*, be deemed unjust and illegitimate in terms of the Thomistic natural law theory. In pursuit of this thesis, the study investigated the legitimacy of maintaining land use planning laws and regulations in Malawi, which despite serving a certain public utility, have the practical effect of restricting the majority of urban residents from enjoying economic, social, and cultural rights as provided for under the Covenant.

⁶ See UN Committee on Economic, Social and Cultural Rights (ESCR) General Comment No. 20 Non-discrimination in Economic, Social and Cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) para 10.

1.1. Background.

In this section, I present the legislative background of the study in order to set the context within which I conducted the study. I start by highlighting the land use planning legislative history.

1.1.1. Land use planning legislative history in Malawi.

In their modern form, land use planning laws in Malawi owe their origin to the British colonial legislative framework.⁷ This origin can be traced to the British Colonial Secretary's circular of 1930 to Governors of British colonies stating the need for planning in colonial territories.⁸ This circular was immediately followed by the English Planning Act of 1932, which focused on housing and slum clearance provisions.⁹

The 1932 English Planning Act was subsequently revised, repealed, and replaced by the British Town and Country Planning Act of 1947.¹⁰ At independence in 1964, Malawi's Town and Country Planning legal framework and that of other post-colonial sub-Saharan African States were based on the British Town and Country Planning Act (TCPA), 1947. The first TCPA for Malawi (then Nyasaland) was the TCPA of 1948, almost duplicating the British TCPA in 1947.¹¹ The Nyasaland TCPA 1948 was amended in 1988 and 1991 and repealed in 2016 by replacing it with the Physical Planning Act 17 of 2016. Therefore, Malawi's urban landscape's spatial organization reflects the British planning legislative history and theory. In the main, the colonial planning philosophy reflects the Western hegemonic intellectual thought, which suppressed the indigenous modes of spatial organisation in colonial territories.¹²

⁷ See generally Mabogunje note 4; KGB Awuah, Felix Hammond, Robin Bloch et al 'Sub Saharan African Urban land use planning systems: The need for an economic appraisal (2010): In RICS/COBRA 2010 Conference available at https://www.researchgate.net/publication/287253638_Sub_Saharan_Africa_urban_land_use_planning_system_s_The_need_for_an_economic_appraisal> Accessed on 26 July 2022.

⁸ D Okpala, *Regional Overview of the Status of Urban Planning and Planning Practice in Anglophone (Sub-Saharan) African Countries* available at <http://www.unhabitat.org/grhs/2009> accessed 10 February 2018.

⁹ Ibid note 8.

¹⁰ Ibid note 8.

¹¹ Njoh A J 'Urban Planning as a tool of power and social control in colonial Africa.' (2009)24(3) *Planning Perspectives* 301-317.

¹² Chadzimula Molebatsi & Seabo B Morobolo 'Reading the place and role of endogenous governance structures in modernist physical planning: the case of the Bogosi and Kgotla in Botswana' (2021) 80(2) *African Studies* 136.

At independence, several Anglophone countries in Sub-Saharan Africa adapted the 1947 British TCPA. These adaptations mainly involved moving away from race-based land use zoning standards. For instance, during the colonial era, high-density residential areas were zoned for Africans, medium-density residential areas were zoned for Asians, and low-density residential areas were zoned for Europeans.¹³ The adaptations to the colonial urban land use laws after independence focused on creating distinct land use statuses whose legal access was dependent on socioeconomic status. Arguably, this has been the case due to the different pricing of plots and building standards for neighbourhoods in different density categories.

The latest revision to the principal legislation governing land use in Malawi was conducted in 2016 with the enactment of the Physical Planning Act No. 17 of 2016.¹⁴ The Law Commission Report on the Review of Land-related Laws informed the Act.¹⁵ An analysis of the Physical Planning Act and its associated regulations shows that the density-based separation of residential land use has been maintained.¹⁶ The current land use regulatory standards and guidelines are a legal tool for creating urban spatial segregation based on urban residents' social and economic status. It is, therefore, against this legislative context that this study sought to interrogate the legitimacy of the urban spatial governance legislative regime, which has created urban legal segregation based on socioeconomic status. The relevance of this research conceptualisation is grounded in the fact that the urban spatial environment in Malawi is predominantly composed of residents of low socioeconomic status relative to high-income residents.¹⁷ However, despite the urban spatial environment being predominantly comprised of low socioeconomic status residents, the law governing spatial organisation of the Malawi urban space does not reflect such a reality. The failure of the law to reflect reality exemplifies dissonance between the law in the statute books and reality on the ground. The legal planning regime leans more towards creating a modernist city. As a result, the state adopted western style planning

¹³ Okpala op cit note 8.

¹⁴ Physical Planning Act op cit note 2.

¹⁵ Law Commission Report on Review of Land Related Laws.

¹⁶ Reg 3 Op cit note 3 para 4.3.

¹⁷ National Report op cit note 4.

standards whose dissonance is manifested through noncompliance and the emergence of informal settlements. The present study investigates the legitimacy of such a legal planning framework.

1.1.2. The regulatory context of the Malawian urban spatial environment.

In this section, I provide a background of the legal framework which shapes the Malawi urban environment's spatial organization and the production of space. In particular, I discuss the Physical Planning Act, Local Government Act, and the Chiefs Act. These Acts provide a context of the nature of Malawi's urban space and how it is regulated and produced using the law.

The Physical Planning Act.

The spatial character and configuration of the Malawi urban spatial environment are determined by the interplay of several land-related laws which govern urban land use and ownership. The principal legislation which determines the spatial character, form, and configuration of urban land use and space in Malawi is the Physical Planning Act 2016. This Act establishes a basis for preparing physical development plans at national, regional, and local levels, shaping a spatial framework for coordinating and implementing a balanced development pattern and economic use of resources.¹⁸ Moreover, the regulations promulgated under the Act provide specific land-use standards and guidelines. Arguably, these regulatory standards and guidelines determine the land values in the urban landscape, which by default separates categories of urban residents in terms of legal access to various land use zones, urban functions, and social services. This study, therefore, discusses whether the existing land use planning laws in Malawi are a legitimate tool for determining the spatial organisation of the urban space. The discussion is in the context of urban residents' ability to enjoy the right to development as provided for in section 30 of the Malawi Constitution as read together with Article 11 of the ICESCR. In turn, the enjoyment of these rights depends on the residents' ability to legally access the urban space, its functions, zones, and social services.

¹⁸ Janet Banda , Felix Tukula and Davie Chilonga, 'Land Policy: Implementing the Physical Planning Act in the Context of Malawi Land Reform Program' paper presented at *Catalyzing Innovation: Annual World Bank Conference on Land and Poverty*, Washington DC March 25-9.

In particular, regulation 4 of the Physical Planning regulations under the Physical Planning Act incorporates Land Use Planning and Development Management Guidelines and Standards. These guidelines and standards provide specific and detailed parameters for land use in urban space.¹⁹ These standards imply that any development not complying with these standards is considered illegal. The question, therefore, is whether these guidelines and standards are a legitimate tool for urban governance and ordering urban functions in the context of the prevailing economic realities of the Malawian urban citizenry. This analysis is critical because the current land use planning laws force most urban residents to settle in zones that do not comply with the law, are involved in urban economic activities and functions that do not comply with the law, and are thus considered to be residing in illegal settlements. The presence of slum and informal settlement dwellers in the urban space is thus delegitimized by the operation of the very same law, which is meant to ameliorate their living.

Local Government Act

The Malawi Constitution provides for the creation of local authorities.²⁰ In particular, the Constitution provides that the local government shall be responsible for the welfare of the people over whom they have jurisdiction, promotion of infrastructural and economic development, execution of local development plans, encouragement of business enterprises, and delivery of essential and social services.²¹ The local government constitution and operation details are provided for in Local Government Act No. 42 of 1998. Arguably, local governments responsible for the governance of the urban space are responsible for creating urban spatial segregation through the promulgation of by-laws which, in most cases, aim at making most engagements with

¹⁹ For instance, chapter 4 of the Land Use Planning and Development Management Guidelines and Standards require residential, commercial, and industrial land development to meet certain standards in order for the urban planning committee to approve the concerned development. The standards relate to plot sizes; plot development; accessibility; plot shape; layout and orientation; accessibility; service and sanitation infrastructure; ancillary uses; plot boundaries; planning and building materials-e.g. requirement that the roof of the building should be of non-reflective material. These standards are unrealistically high for an urban population with above 70 per cent living in informal settlements.

²⁰ Malawi Constitution 1994 s146(1).

²¹ Ibid note 20.

the urban space by low-income residents illegal.²² For example, section 1 of the First Schedule of the Local Government (Blantyre City Council) (Peddlers) By-laws, 2005, makes it illegal for peddlers to trade within 300 metres of designated markets, hotels, and streets. Analysis of the restricted trading spaces shows that peddlers are almost excluded from the entire city. These By-laws are part of land use planning laws which the study investigated in terms of their legitimacy when viewed through the lens of Malawi's state party obligation under the ICESCR. The paradox of these land use laws and regulations is that whereas their legislative intent is the creation of liveable cities, in reality, these laws have resulted in bifurcated city space where access to adequate and quality social services is dependent on whether a resident has economic means or not. This bifurcation is manifested by the fact that recent studies have revealed that nearly 70 percent of urban residents in Malawi reside in slums and squatter settlements, which residents of limited economic means occupy.²³

Chiefs Act

Theoretically, the urban space in Malawi is governed by written law. However, at a practical level, the urban space is regulated by both written and customary law, implying that two systems of law govern the affairs of urban residents, land use and land ownership.

Customary law is presided over by village headmen and chiefs. Although in practical terms, the law applied in dispute resolution and land allocation in urban zones of low socioeconomic status²⁴ is customary law, written law makes it illegal for chiefs or traditional authorities to have jurisdiction in an urban area or city.²⁵ The problematic

²² Section 103 of the Local Government Act 42 of 1998 mandates local government to formulate By-laws for the governance of their jurisdictions. For instance, the Local Government (Lilongwe City Council) (Peddlers) By-Laws, 2018 makes it an offence for any person with a peddler's licence to be trading at one place for more than 30mins; It also does not recognise peddlers without a tricycle, handcart or motorcycle. It also provides for confiscation of foodstuffs. Also see Local Government (Blantyre City Council) (Peddlers) By-Laws, 2005.

²³ National Report op cit note 4.

²⁴ Ibid note 4. This report states that residents who reside in informal settlements constitute more than 70 percent of the urban population in Malawi. This stratum is known for their inability to legally access the formal zones of the urban areas due to economic incapacity.

²⁵ Section 3 of the Chiefs Act Chap 22.03 of the Laws of Malawi provides that chiefs shall not have jurisdiction in a city.; For a discussion on this position see Evance Mwathunga and Ronnie Donaldson, 'Urban land contestations, challenges and planning strategies in Malawi's urban areas' (2018) 77 *Land Use Policy* 1 at 5..

nature of the current arrangement is how a particular local government spatial entity attains the urban or city status (definition of a city/urban area). The current position is that the Minister of Local Government may, from time to time, by order published in the *Gazette*, declare any local government area to be a township or a municipality (urban area)²⁶. On the other hand, the president may confer the title and dignity of “City” on any municipality by order published in the *Gazette*.²⁷ Impliedly, once the Minister or the President has given any local government area an urban status, customary law ceases to apply, and traditional leaders lose jurisdiction.

Such land use laws are a source of the legitimacy crisis in applying land use laws. The basis for excluding the application of customary law in urban areas is unclear under the current planning legal regime. However, it can be argued that the basis could be a modern city's colonial principle that views customary law as unurban and uncivilised. There is, therefore, a disjuncture between the written law and practice in the urban space.²⁸

The population of urban residents who recognise the authority of traditional leaders or chiefs is from the low socioeconomic strata.²⁹ Arguably, most of this demographic do not have the economic capacity to comply with land use planning laws, guidelines, standards, and land ownership modes provided in the written law, hence their resort to customary laws. Land use planning laws and standards impede residents from low socioeconomic strata from accessing urban land legally, which depends on a resident's economic capacity to comply with land use planning laws. It is also important to note that most urban residents in Malawi are from a low socioeconomic stratum, which, according to recent studies, constitutes nearly 70 percent of the urban population in all four major cities-Lilongwe, Blantyre, Mzuzu, and Zomba.³⁰ From the perspective of

²⁶ Local Government Act op cit note 22 s4 ss 2.

²⁷ Ibid note 26 s 4 ss 3.

²⁸ Emile Zitzke, ‘A decolonial critique of Private Law and Human Rights’ (2018)34 *South Africa Journal on Human Rights* 492. This article argues that colonisation caused dominant private-law rules to flourish by annihilating, or in less severe cases deforming African version of law in a process which he calls epistemicide.

²⁹ National Report op cit note 4.

³⁰ Ibid note 29; *Urban Profiles for Blantyre, Mzuzu, Lilongwe and Zomba Cities in Malawi* (UN-HABITAT, 2011).

this demographic, they at least stand a better chance to have ‘legal’³¹ access to urban space through their recognition of traditional authority and customary laws. Traditional leaders allocate land to their subjects which they hold on trust, based on one’s membership to the community and not economic means. Although such a practice is proscribed³² in urban areas, traditional leaders continue to exercise it anyway.³³

Moreover, residents from low socioeconomic strata continue to recognise their traditional leaders as mediators in the adjudication of land use, land allocation, and land ownership disputes once an area is declared a city under the local government Act.³⁴ This state of affairs raises questions of a crisis of legitimacy regarding the laws which regulate the urban space given the peculiarities of the urban land use legal regime in Malawi’s urban space. This peculiar context and disjunctive land use regime make it compelling for this study to examine the legitimacy of a system of laws that deprives the majority of urban residents of enjoying their rights under both the Malawi Constitution and the ICESCR.

The irony of the Malawi’s urban land use regulatory framework is that it serves the interest of the few with the economic capacity to comply with the restrictive land use planning laws, guidelines, standards, and city by-laws. The question of whether one can comply with restrictive land use planning is one of the crucial determining factors of the quality of social services an urban resident can access legally, the type of housing they will be residing in, and even the land itself. Given that most social services are not adequate, compliance or noncompliance with standards and guidelines provided in the land use regulatory regime is determinative of one’s residential zone and whether a resident will have legal access to social services such as water supply, waste collection services, electricity connection, and infrastructure. Regrettably, land

³¹ The access is legal because it complies with customary modes of land allocation. However, in terms of written law, such allocation in urban areas is illegal as per s 3 ss 5 of the Chiefs Act.

³² Chiefs Act Op cit note 25. s 3 ss 5.

³³ Mwathunga & Donaldson op cit note 25.

³⁴ Ibid note 25 at 5; Cammack, D, Kanyongolo E, O’Neil T ‘Town chiefs’ in Malawi: Africa Power and Politics’ (2009) Working paper No3.

use planning and development guidelines and standards make it illegal for utility service providers to extend their services to noncompliant residents, making it easy for the limited services to be supplied sufficiently to urban residents of high socioeconomic status in the minority.³⁵

1.1.3. International law under the Malawi Constitution.

The present study is premised on the ICESCR because Malawi is a State party to the Covenant in terms of the Constitution of Malawi. The constitution of Malawi governs the relations between international law and domestic law.³⁶ Firstly, section 211 of the Malawi Constitution provides that ‘any international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement.’³⁷ Secondly, the Constitution provides that ‘international agreements entered into before the commencement of the Constitution and binding on the Republic shall form part of the republic's law unless parliament subsequently provides otherwise or otherwise lapses.’³⁸ This entails that under the Malawi Constitution, Malawi is bound by its international obligations once an Act of Parliament ratifies an international agreement. Arguably, although Malawi is yet to domesticate international agreements entered into before the commencement of this Constitution, such as the ICESCR, Malawi's citizens may find an ICESCR-based action against the government through Section 211(2) of the Malawi Constitution.³⁹

³⁵ Physical Reg. op cit note 2 reg 4.

³⁶ Op cit note 20 s 211 of the Malawi Constitution.

³⁷ Ibid note 36 s211 ss 1.

³⁸ Thomas Trier Hansen ‘Implementation of International Human Rights Standards Through the National Courts in Malawi’ (2002) 46(1) *Journal of African Law* 31-42.

³⁹ *In the Matter of the Adoption of Children Act and In the Matter of Chifundo James (An Infant)* Malawi Supreme Court of Appeal Adoption Appeal No. 28 of 2009. The Malawi Supreme Court of Appeal position on the status of international instruments has been wavering. In *Malawi Telecommunications Ltd v Makande & Omar* MSCA Civil Appeal No 2 of 2006, the same court held that since the 1966 Constitution did not expressly provide for the requirement of domesticating legislation for international treaties to apply in municipal courts, all treaties ratified before the 1994 Constitution took effect, formed part of the law of Malawi law in terms of section 211(2) of the Constitution even if no local legislation was enacted to translate them into domestic law. Ordinarily, this would have meant that the ICESCR was enforceable in the domestic jurisdiction. This position reversed the court’s earlier opinion that for international agreements to be binding on Malawi there has to be an Act of Parliament domesticating them. It therefore appears that the current position is that contained in the *Chakufwa Tom Chihana*, MSCA, Criminal Appeal No. 9 of 1992 case requiring domestication before an international agreement can be directly invoked in the local courts as the *Chifundo James* case is the latest decision on international agreements. However, given that most of ESCR are contained in the Universal Declaration on Human Rights (UDHR), they have crystallised into binding customary international law which is legally binding on Malawi by virtue of Section 211(3) of the Constitution. The wavering position of the MSCA therefore does not affect the applicability of ICESCR in Malawian courts.

Moreover, this Constitutional provision emphasises that Malawi assumes obligations under international law if Parliament has consented before the treaty's ratification.⁴⁰ It is also important to mention that the Malawi way of implementing international law is based on the notion that international law and national law are two distinct systems of law (dualistic system) and that international law only becomes applicable before national courts if the agreement has been incorporated into the laws of Malawi through an Act of Parliament.⁴¹

Hansen argues that in analysing section 211, it is worth noting that some treaties or conventions are part of Malawi law, although they have not been incorporated into the laws of Malawi through a specific Act nor published in the Malawi Gazette.⁴² In particular, section 211(2) of the Malawi Constitution provides that international agreements entered into by Malawi before the Commencement of the Constitution in 1994 shall be part of the Malawi laws.

This position is relevant with respect to the UN Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and Peoples Rights, the UN Convention on the Rights of the Child (CRC), and the ICESCR, among others.⁴³ Under Malawi's constitutional scheme, all these international agreements became part of the domestic law in Malawi by virtue of section 211(2) because Malawi ratified these before the commencement of the Constitution, and they are now enforceable as part of the domestic law.⁴⁴ Regarding the ICESCR, Malawi acceded to the Convention on 22nd December 1993⁴⁵ before the Republican Constitution was adopted in 1994. This entails that under the Malawi Constitutional order, Malawi is a State party bound by the obligations expected of all States parties to the Covenant. Thus, in this context, this study was framed with specific reference to the rights under the ICESCR and natural

⁴⁰ Supra note 39.

⁴¹ Supra note 39.

⁴² *Chidundo James and Makande cases* Ibid note 39.

⁴³ *Chidundo James and Makande cases* Ibid note 39.

⁴⁴ *Chidundo James and Makande cases* Ibid note 39.

⁴⁵ UN Treaty Body Database,

https://tbinetnet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CESCR&Lang=en Accessed on 25 August 2021.

law to assess the legitimacy of land use planning laws governing the spatial location of urban functions.

1.2. Problem Statement.

Several studies have been conducted on the rights contained in ICESCR in the context of access to land, urban services, and urban space.⁴⁶ Some studies have addressed housing and urban issues regarding the right to an adequate standard of living.⁴⁷ Others have focused on elements of socioeconomic rights in the context of the debate on a bundle of rights called the ‘right to the city.’⁴⁸ However, others have looked at the issue of access to land in the context of international human rights in general.⁴⁹

Moreover, economic, social, and cultural rights have also been the subject of several CESCR General Comments, and Special Rapporteur reports in the context of the nature of States parties' obligations⁵⁰ on the right to adequate housing⁵¹, the right to the highest attainable standard of health⁵² and on forced evictions⁵³ among others. However, there is a gap in studies examining the linkage between the rights in the Covenant and land use planning laws responsible for the production of the urban space. In particular, there are limited studies using the ICESCR and Thomistic natural

⁴⁶ See Anil Kalhan ‘Land Rights Issues in International Human Rights Law’ (2010) 4(1) *Malaysian Journal on Human Rights* 16.; Ponce, Juli, ‘Affordable Housing, Zoning and the ICESCR; Some lessons from the and South African experience’ (2017)1(1) *Journal of Comparative Urban Law and Policy*; Thomas Coggin & Marius Pieterse, ‘Rights and the City: An Exploration of the interaction between socio-economic rights and the city’ (2012)23 *Urban Forum* 257–278.

⁴⁷ See Juli Ibid note 46.

⁴⁸ See e.g. Coggin & Pieterse Ibid note 46.

⁴⁹ See e.g. Kalhan Ibid note 46.

⁵⁰ See CESCR General Comment No. 3: The Nature of States Parties’ Obligations, *Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23)*.

⁵¹ See CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), *Adopted at the Sixth Session of the Committee on Economic, Social and Cultural Rights, on 13 December 1991 (Contained in Document E/1992/23)*.; Balakrishnan Rajagopal, *Spatial segregation and the right to adequate housing*, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination, [49th Session 28 February 2022–1 April 2022, A/HRC/49/48].

⁵² See CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), *Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4)*.

⁵³ CESCR General Comment No. 14 Ibid note 51; CESCR General Comment 7. The right to adequate housing (Art.11.1): forced evictions: 20/05/97 < <https://www.refworld.org/docid/47a70799d.html>>.

law frameworks to assess the legitimacy of land use planning laws governing the spatial location of urban functions. Studies on the legitimacy of land use laws governing urban space are critical because 40 to 80 percent of residents in the urban spaces of the Global South reside in informal settlements.⁵⁴ It is, therefore, essential to assess how the dissonance between the socioeconomic realities on the ground and urban planning laws implicates the socioeconomic rights of low-income urban dwellers.

This study thus seeks to analyse the spatial content of the rights in the Covenant by assessing the legitimacy of land use planning laws governing the spatial location of urban functions using Malawi's urban land use planning laws as a case study from a Thomistic natural law perspective. The thesis of the study is that urban land use planning laws are a legal tool for producing urban spaces. Therefore, if the urban spaces produced by such laws make it difficult for low-income urban residents to enjoy their economic, social, and cultural rights (ESCR), then such laws may *prima facie* be deemed illegitimate in terms of Thomistic natural law perspective because of the manifest dissonance. The study thus forms a nuanced contribution to the debate on socioeconomic rights and land use planning laws from a Thomistic prism.

1.3. Justification of the study.

The relevance of this research is that it integrates planning theory and law as a mirrored epistemology – they both have similar aims predicated on ordering society. However, the elite use the process of translating urban planning theory into law to serve their interests. Ultimately, the process ends up being imbued with power that is largely disconnected from the everyday realities of the low-income urban citizenry.⁵⁵ Ironically, the low-income and informal settlement residents tend to dominate the demographics of most post-colonial urban environments in Sub-Saharan Africa.⁵⁶ This study is therefore relevant because it will endeavour to question the legitimacy of such

⁵⁴ Mabogunje op cit note 4.

⁵⁵ See generally Murray MJ. 'Taming disorderly City: The spatial landscape of Johannesburg after apartheid' 2008. *Ithaca: Cornell University*.

⁵⁶ Mabogunje op cit note 4.

use of state power as expressed through land use planning laws to generate and contribute to the discourse.

Therefore, this research will initiate debate on the legitimacy of maintaining laws that, on the surface, appear to apply equally to all citizens and serve some positive public utility but, in reality, excludes a majority of urban residents from enjoying economic, social, and cultural rights. The debate generated in the present study has the potential to inform law reform in Malawi to ensure that laws that the legislature enacts are aligned with countries' State Party obligations under the relevant international treaties and conventions such as the ICESCR.

1.4. Methodology.

This study will employ doctrinal research methods. The rationale behind adopting this research method was to determine the content of land use planning laws in Malawi. In other words, this method will answer the question, “what is the law on urban land use planning in Malawi?” In order to answer this question, the study will use statutory materials as the primary data source. In particular, the study will rely on legislation, rules, regulations, orders, By-laws, and authoritative court decisions. In order to determine the discursive practices of the urban spatial environment in Malawi, the study relied on urban planning literature on Malawi, background studies of the Malawi Urban Policy, Malawi Law Commission Report on Review of Land-related laws, government reports, UN-Habitat Reports, Special Rapporteur reports, UN General Comments, books, and journal articles.

1.5. Delimitation of the scope of the study.

The scope of the present study is limited to the analysis of land use laws that have an implication on the socioeconomic rights of urban residents. In particular, the study is limited to those rights implicated through interpreting and applying article 11 of the ICESCR within the urban space. The study, therefore, does not claim to deal with all the rights in the Covenant. Moreover, I acknowledge that the question of legitimacy may be approached from different jurisprudential perspectives. However, the analysis I adopted in this study approached the question of legitimacy from a Thomistic natural law perspective by focusing on the Covenant's rights.

1.6. Thesis organisation.

The study was conceptualised in order to explain the scope and nature of States parties' obligations in the implementation of economic, social, and cultural rights in the urban space; examine the legitimacy of land use planning laws governing the spatial location of urban functions using Thomistic natural law theory; and to analyse indicators of dissonance between discursive practices and written law in the urban space in the determination of the legitimacy of land use planning law. The thesis has been organised around three specific objectives from which I have derived three related research questions. In order to achieve these objectives, the study has answered the following research questions: What is the nature and scope of States parties' obligations in implementing economic, social, and cultural rights in the urban space? How is the Thomistic natural law theory relevant in determining the legitimacy of land use planning law? What are the indicators of dissonance between discursive practices and written law for determining the legitimacy of land use planning law in the urban space?

The thesis has been organised into five chapters, with chapters two, three, and four built from each research objective. In chapter one, I present an overview of the study regarding background, problem statement, study justification, methodology, and dissertation organization.

In chapter two, I first discuss the nature and scope of States Parties' obligations. Specifically, I discuss State Parties' obligations to respect, protect, promote, and fulfil the ESCR of urban residents. Secondly, I explain what these obligations entail in the context of the enjoyment of ESCR in the urban space. Thirdly, I discuss the principle of minimum core obligations provided in the Covenant. Next, I focus on the States Parties' pathways to progressively realising these minimum core obligations. Finally, regarding States Parties' obligations, I analyse and discuss the justification for the international community's role in the progressive realisation of minimum core obligations in the context of urban land use planning laws.

Chapter three discusses the relevance of Thomistic natural law theory in determining the legitimacy of land use planning law. I present a conceptualisation of the 'legitimacy of law' and its nexus to the concept of 'just law.' In this regard, first, I

argue for the interchangeable use of these two concepts in interrogating the legitimacy of land use laws. Secondly, I discuss an overview of natural law theory by presenting its two major variants: traditional natural law theory and modern natural law theory. Thirdly, I critique the Thomistic natural law tradition by presenting the two significant challenges to the theory, viz, the positivist challenge and the secular challenge. Next, I present the rationale for choosing the Thomistic natural law theory as the frame of analysis in the context of ICESCR. I hold the view that the Thomistic natural law tradition is the appropriate analytical framework because the present study is premised on human rights, and natural law was foundational to the emergence of human rights discourse. Later in the chapter, I present the scope and nature of the concept of just law within the Thomistic natural law tradition by analysing the three criteria of just law. Finally, I present a natural law critique of planning law using the three criteria of just law as a prism of analysis

In chapter four, I discuss discursive practices and lived experiences in Malawi's urban spaces in juxtaposition with the prevailing land use planning laws and Malawi's human rights obligations. In the main, I focus on customary practices in the urban space which have been made subject to the written law, criminalisation of coping norms and access to the urban space; the use of by-laws to outlaw access to urban space by low-income traders; the effect of high land use standards and regulations; the undue focus of planning as an exercise in physical planning and design by planning law. I dedicate chapter four to analysing the consistency or dissonance of land use planning laws governing spatial location of urban functions within the context of the discursive practices, prevailing socioeconomic realities of the residents in Malawi's urban space, and Malawi's State party obligations under ICESCR.

In chapter five, I make a concluding observation of the study's findings and offer recommendations for policy and further research.

1.7. Conclusion.

In this chapter, I observe that Malawi, a State party to the ICESCR, is obligated to ensure that it discharges its obligations in good faith. One way this good faith may be demonstrated is by enacting laws that are both acceptable to the majority of the

citizenry and ensure that the citizens enjoy their ESCRs. I note that in Malawi's urban space, there is massive noncompliance concerning land use laws governing the spatial location of urban functions. This observation is based on the fact that more than 70% of people live in settlements not recognised by land use laws. Therefore, such a scenario demonstrates that there is a possible problem with the legitimacy of the law such that citizens do not feel obligated to comply with it either because it does not represent their interests or it is beyond their practical capacity to comply in terms of what it demands. It is this realisation which forms the basis of the present study.

CHAPTER 2

CHAPTER 2: STATES PARTIES' OBLIGATION UNDER THE ICESCR IN THE CONTEXT OF URBAN SPACE.

2. Introduction.

Having set out the study's purpose, scope, and nature in chapter one, I will start by framing the concept of urban space in the present chapter. I then discuss urban spatial parameters, justification for using the ICESCR, and its spatial dimensions to set the context for the chapter. Next, I discuss States Parties' obligations under the ICESCR (the Covenant) and their implications for the legitimacy of land use planning laws governing the spatial location of urban functions. The broad argument of the study is that urban land use planning laws are a legal tool for producing urban spaces. Thus, if the urban spaces which the law produces make it difficult for low-income urban residents to enjoy their economic, social, and cultural rights (ESCR), then such laws may *premafacie* be deemed illegitimate. In support of this thesis, in the present chapter, I argue that States Parties are enjoined to discharge their obligation of conduct⁵⁷ concerning their obligations to respect, protect, promote, and fulfil (RPPF) human rights in the context of land use planning laws.⁵⁸

To elaborate on the study thesis in general and the present chapter argument in particular, firstly, I discuss the nature and scope of States Parties' obligations.⁵⁹ Specifically, the discussion highlights the States Parties' obligations to respect, protect, promote, and fulfil the ESCR of urban residents. Secondly, I explain what these obligations entail in the context of the enjoyment of ESCR in the urban space. Thirdly, the chapter addresses minimum core obligations in the Covenant.⁶⁰ Next, I focus on the States Parties' pathways to progressively realizing these minimum core obligations. Finally, regarding States Parties' obligations, I analyse and discuss the justification for the international community's role in the progressive realisation of minimum core obligations in urban land use planning laws.

⁵⁷ CESCR General Comment No. 3 op cit note 50 para 1.

⁵⁸ Ibid note 57.

⁵⁹ See generally Ibid note 58.

⁶⁰ See Article 2 of International Covenant on Economic, Social and Cultural Rights (ICESCR).

Thus the principal argument in this chapter is that access to urban spaces denotes a rights-holder's access to urban land with secure tenure as a holder, owner, or tenant. Given that social, economic, and cultural rights are defined as rights of subsistence, survival, empowerment, and socialisation, access to urban land through secure tenure enables right-holders to demand access to essential urban services from duty bearers. With access to secure tenure, a right-holder possesses legal standing as against duty bearers responsible for providing essential urban services. These essential urban services are critical for the enjoyment of Covenant rights, ensuring citizens' subsistence, survival, empowerment, and socialisation in the urban space. Therefore, where urban land use planning laws do not enable urban residents to access urban land on a secure tenure basis, such laws may be deemed illegitimate for violating the Covenant. Therefore States Parties are enjoined to discharge their obligation of conduct⁶¹ concerning their RPPF commitments in the context of land use planning laws.⁶²

2.1. Framing the urban space.

Conceptually, urban space is either a physical or a qualitative entity, depending on the approach one adopts. In this section, I discuss the nature of urban space in terms of how it is produced by land use planning law. I argue that the type of urban space produced by law influences the enjoyment of economic, social, and cultural rights by right-holders.

2.1.1. Urban space as a physical entity.

Literature on urban studies shows four principal approaches for defining urban spaces in physical terms.⁶³ First is the use of population size. According to this approach, at some point along the rural-urban continuum population-size scale, deciding when a village becomes an urban area should be possible. In practice, this population-size

⁶¹ CESCR General Comment No. 3 op cit note 50 para 1.

⁶² Ibid note 62.

⁶³ Michael Pacione *Urban Geography: A global perspective*, 2 ed (2005) 24; Cf. John Agnew 'Space and Place' in J Agnew and D Livingstone (eds) *Handbook of Geographical knowledge* (2011) 1 & 6. ; Cf. Koops, B-J., & Galič M 'Conceptualising space and place: Lessons from geography for the debate on privacy in public' In T. Timan, B. Newell, & B-J. Koops (Eds.), *Privacy in public space: Conceptual and regulatory challenges* (2017) 6.

threshold varies over time and space.⁶⁴ In Sweden, for example, any settlement with more than two hundred inhabitants is classified as an urban area in the national census.⁶⁵ However, in the United States of America, any settlement with more than two thousand five hundred inhabitants is classified as an urban area.⁶⁶ This approach thus implies that a town in Sweden is classified as a village in the United States.

Secondly, in some countries, urban space is defined based on an economic base. This method combines the population-size criterion with other diagnostic criteria to define an urban area.⁶⁷ For example, in India, a settlement must have more than 75% of the adult male population engaged in non-agricultural work to be classified as urban.⁶⁸ Thirdly, other countries employ administrative criteria to classify an area as urban. In sub-Saharan African countries, this is the most common approach where towns and cities are defined according to legal or administrative criteria.⁶⁹ Thus, most countries' ministers or presidents can declare whether a particular spatial entity is a town or a city.⁷⁰ However, the definition by national governments leads to great diversity among countries, resulting in under bounding or overbounding problems.⁷¹ Overabounding implies classifying an area as urban when it does not meet the objective criteria for an urban area.

On the other hand, under bounding implies leaving out some adjacent areas that meet an urban area's objective standards from the legal descriptions of an urban boundary. In other words, overbounding and under bounding denote variations in the extent of land use which is functionally urban land versus what is contained in an urban area's

⁶⁴ Pacione op cite note 64 at 24.

⁶⁵ Ibid note 65. Cf. DBpedia-Urban areas in Sweden available at <https://dbpedia.org/page/Urban_areas_in_Sweden> Accessed on 22 July 2022.

⁶⁶ Pacione op cit note 64 at 24.; Cf. National Geographic, Resource Library, Encyclopaedic Entry 'Urban Area' available at <<https://education.nationalgeographic.org/resource/urban-area>> Accessed on 22 July 2022.

⁶⁷ Pacione ibid note 67 Cf. National Geographic Ibid note 67.

⁶⁸ Pacione ibid note 68 at 24.

⁶⁹ Pacione ibid note 69 at 24. Also Local Government Act op cit note 22 s 4; s 4 of Zambia Local Government Act 2 of 2019.; s 5 of the Kenya Local Government Act 1998 chap 265 of Laws of Kenya.

⁷⁰ See s 4 of the Malawi Local Government Act 42 of 1998; s 4 Zambia Local Government Act 2 of 2019.; s 5 of the Kenya Local Government Act 1998 chap 265 of Laws of Kenya.

⁷¹ Ibid note 71.

formal and legal boundary descriptions.⁷² This approach is applied in Malawi, Zambia, Kenya, and other Commonwealth countries.⁷³

Finally, is the use of functional definition. This definition addresses the problem of overbounding or under bounding inherent in the legal or administrative approach. The functional definition reflects the function of urban regions, which mirrors the extent of urban influence.⁷⁴ These four criteria for defining urban space relate to the physical structure of an urban space within which rights in the Covenant for the urban residents should be enjoyed.

2.1.2 Qualitative framing of urban space.

In contrast to definitions of urban space as a physical entity, an urban space may also be conceptualised as a quality.⁷⁵ Urban space as a quality is related more to the meaning of urban places and the effect of the urban milieu on peoples' lifestyles.⁷⁶ Thus, 'although urban spaces exist as physical objects, it is by no means certain that their inhabitants perceive them in the same way that they are objectively structured.'⁷⁷ Pacione thus argues that 'it is reasonable to think of an urban space as having both an objective physical structure and a subjective or cognitive structure.'⁷⁸

2.1.3. The concept of space and place.

Closely related to the idea of space is the concept of place.⁷⁹ Conceptually, the place is part of but different from space.⁸⁰ The place is a unique and special location in space, notable for the fact that the regular activities of human beings occur there.⁸¹ Regarding the ESCR, I argue that a place is where distinction occurs between right holders with

⁷² See John F. Long, David R. Rain and Michael R. Ratcliff *Population density vs urban population: comparative GIS studies in China, India and the United States* (2001) 2.

⁷³ Malawi Local Government Act; Zambia Local Government Act; Kenya Local Government Act op cit note 70.

⁷⁴ Pacione op cit note 64 at 24.

⁷⁵ Ibid at 24. Also see Petrovič, F.; Murgaš, F. 'Description Relationship between Urban Space and Quality of Urban Life. A Geographical Approach' (2021) 10 *Land*, 1337.

⁷⁶ Ibid.

⁷⁷ Ibid

⁷⁸ Ibid.

⁷⁹ Petrovič & Murgaš op cit note 76 para 1.1.2.

⁸⁰ Pacione op cit at note 64 at 29; Cf. Adams M. 'Quality of Urban Spaces and Wellbeing'. in Cooper R, Burton E Cooper CL (eds) *Wellbeing and the Environment: Wellbeing: A Complete Reference Guide* 2 ed (2014) 1–21.

⁸¹ Koops & Galič op cit note 64 at 6 Cf. Pacione op cit note 64 at 28-9.

access to essential services, goods, and assets for the enjoyment of the Covenant rights and those without access. The choice of where an individual right-holder appropriates as their place of residence, business, or socialisation within the urban space is dictated by multiple factors. These factors include the type of urban land use planning laws in force, the right-holder's social status, income level, and access to state power.⁸² Concerning the issue of space and power, Foucault noted that space is fundamental to the use of power such that those who wield power secure their space using the law to produce a place different from its surrounding.⁸³

Moreover, other scholars have argued that space is caught up in social relations, where physical spaces and the social life of citizens are shaped together in the process of space appropriation.⁸⁴ The urban environment has 'variegated ways in which spaces and social life are made through emergent patterns of use, their individual and social functions, and power relations.'⁸⁵ Therefore, to the extent that a place is a site where human activities occur and all they entail, it may furnish the basis of the human sense of identity, expression of power, and sense of community with others.⁸⁶ Put differently, places are unique sites in space where people live and work and where they form intimate and enduring connections.⁸⁷

In this regard, Pacione contends that space is more than a medium in which social, economic, and political processes operate.⁸⁸ Koops and Galič, on the other hand, claim that space is connected to the issue of power in that power determines how public and private spaces are shaped and who has access to them.⁸⁹ They argue that power comes down to someone getting another to do something the other would not otherwise do. The conceptual nexus between space and power involves brute force and limiting the other's decision-making through agenda-setting and using cultural, institutional, and

⁸² Koops & Galič op cit note 64 at 9.

⁸³ Ibid at 37.

⁸⁴ A. Madanipour, *Public and Private Spaces of the City* (2003) at 2–4.

⁸⁵ Koops & Galič op cit note 64 at 9.

⁸⁶ Pacione op cite note 64 at 28-9.

⁸⁷ Ibid at 28-9; Cf. Koops & Galič op cit note 64 at 9.

⁸⁸ Pacione op cit note 64 at 28-9.

⁸⁹ Koops & Galič op cit note 64 at 9. Cf. LA Staeheli and D Mitchell 'Spaces of Public and Private: Locating Politics' in C. Barnett and M Low (eds) *Spaces of Democracy: Geographical Perspectives on Citizenship, Participation and Representation* (2004) at 152.

architectural mechanisms that have a disciplining effect.⁹⁰ Arguably, in the context of urban space, agenda setting is the expression of power through land use planning laws, regulations, and by-laws. These laws and regulations define the architectural and planning trajectory which shapes the spatial organisation of the urban space and act as a brute force for its residents to act or develop in a manner consistent with the agenda set by law.

2.1.4. Regulation of space and legal spatial parameters.

The urban space is regulated by the legal practice of setting standards for regulating the development and utilisation of the urban space. Land use planning laws determine space's sizes, direction, distance, territoriality, and location within which the Covenant's rights may or may not be enjoyed. Thus urban space's dimensions of size, density, direction, distance, territory, and location influence urban development and human interaction because power holders determine them through land use planning regulations. These spatial parameters influence the enjoyment of the Covenant's rights because legal access to urban services and assets is conditional on the right-holders' ability or inability to comply with these parameters. In this regard, I argue that the Covenant rights have a spatial significance in the urban space expressed through urban land use planning laws.⁹¹

Size, density, direction, distance, territory, and location are, therefore, 'legal spatial parameters' determined by land use planning laws influencing the enjoyment of the Covenant rights. In other words, these legal spatial parameters dictate who has access to urban land, the type of land tenure a right holder will have, and the type of urban services, goods, and assets they will access. Ultimately, these legal spatial parameters determine the level of empowerment by urban residents, which correspondingly determines their ability to demand services, goods, and assets critical to the enjoyment of Covenant rights.

⁹⁰ See Koops & Galič op cit note 64 at 9; Also see generally S. Lukes, *Power: a Radical View* 2nd (2005).

⁹¹ Urban master plan, zoning scheme, land use regulations, building codes and local government by-laws set these spatial parameters. Clearly, the question of location (place) of urban residents within the urban space will be determined by these spatial legal parameters and therefore whether a right holder is able to access urban services critical to the enjoyment of the Covenant's rights or not. A low income right holder will be unable to access services in low density areas, close to good roads on account of high building standards set in land use planning laws and regulations. This result in what I call 'spatialisation' of economic, social and cultural rights because the enjoyment of economic, social and cultural rights varies spatially depending on one's location in the urban space.

2.1.5. Access to urban space and rights-sustaining services.

As discussed in the preceding sections, space has several characteristics which determine rights-holders access to urban space and services, goods, or assets critical to the enjoyment of Covenant rights. In this study, I refer to size, density, direction, distance, territory, and location as 'legal spatial parameters.' I premise the coinage of this terminology on the fact that minimum standards of these parameters in respect of various aspects of urban space development and utilisation are set by land use laws, standards, and by-laws.⁹² For instance, the law establishes minimum standards for plot size, minimum distance within which peddlers are not allowed, and minimum building lines, among others.⁹³ The fact that these parameters are in connection with spatial regulation of the urban space and established by law, violation of which attracts sanctions, implies that they are legal parameters with a spatial dimension. In this section, I endeavor to elaborate on the functions of these legal spatial parameters in mediating the exercise of Covenant rights in the urban space.

Firstly, distance and direction directly affect social networks, journeys to work, and physical access to place-based facilities.⁹⁴ Distance and direction as spatial parameters significantly impact levels of deprivation in urban areas, as they affect transportation expenditure. Additionally, the size and density of residential developments can affect the incidence of deviant behaviour and social pathologies.⁹⁵ In this regard, the size and density of a land use zone directly affect the level of physical safety for urban residents.⁹⁶

On the other hand, territoriality contributes to the formation of discrete sub-areas within cities, often segregated on ethnic or class lines.⁹⁷ Thus, partitioning space by local government boundaries based on urban land use regulations has implications for different locations' social composition and fiscal health, quality of life, and perceptions of safety within the urban space.⁹⁸

⁹² See chapter 4 of the Land use planning and development management guidelines and standards, 2014. Department of Physical Planning: Lilongwe.; s34 of the Physical Planning Act No. 17 of 2016; Also see the First schedule of the Local Government (Blantyre City Council)(Peddlers) By-laws 2005 GN 15/2015.

⁹³ See for example Local Government (Blantyre City Council) (Peddlers) By-laws, First Schedule. It specifies the minimum distance from specified central places within which peddlers are forbidden.

⁹⁴ Pacione op cit note 64.

⁹⁵ Ibid.

⁹⁶ Koops & Galič op cit note 64 at 35 para 4.3.

⁹⁷ Ibid at 35.

⁹⁸ Ibid at 35.

Therefore, I argue that urban land use planning laws affect what I call ‘spatialising’ the Covenant rights through ‘spatial, legal parameters such as size, density, direction, distance, territory, and location.’⁹⁹ The argument is that urban land use planning law dictates where essential services to the enjoyment of Covenant rights are located, are in adequate supply, or are scarce. Correspondingly, the location determines who may or may not have access to these services depending on where a right holder resides relative to the service(s)’ location in space. The location determines service access because, for a right holder to enjoy rights enshrined in the Covenant, there is a need to have access to services. These services include clean water provisions, decent schools, waste collection services, hospitals with medical supplies and adequate personnel, street lighting for safety, transportation infrastructure, and low-cost public housing, among others. These can be referred to as rights-supporting or sustaining services. Accessibility is physical in terms of distance to the service point and economic in terms of the cost of accessing the service. Thus, where a service is in a location that is expensive in terms of distance, travel time, and cost of the actual services charge, a right holder of limited means and income would be unable to access it. The failure implies that a right-holder cannot enjoy Covenant rights contingent on such services.

Land use laws determine the type and calibre of people a right holder will interact with to enjoy certain Covenant rights.¹⁰⁰ Moreover, land use laws and regulations dictate where right-holders of certain income and status can own land with or without secure tenure, rent adequate or inadequate housing, do business, or access recreational services.

Therefore, the nature of urban land use planning laws that a State Party enacts in the process of ‘spatialising’ Covenant rights will determine whether such laws are legitimate. Thus, where the ‘spatialisation’ process violates a States Parties’ human

⁹⁹ Perception of safety varies between low density areas and high density areas. e.g. see Koops & Galič, op cit note 64 at 35 para 4.3. This paragraph discusses issues of securitisation of public spaces demonstrating that in areas where the residents do not have power to use land use laws by excluding others, enjoyment of Covenant rights will be absent because their livelihood sustaining resources will be prone to theft; In addition, because of inability to exclude others using the law, urban services in high density areas will not be adequate for everyone causing insecurity to service supplies thereby adversely affecting enjoyment of the Covenant’s rights.

¹⁰⁰ E.g., in the context of variations in the quality of residential neighbourhoods.

rights obligations as against other States Parties or the right holders themselves, a conclusion would be that such land use laws are illegitimate to the extent of such violation.

2.2. Justification for using ICESCR.

Economic, social, and cultural rights can be defined as subsistence, survival, empowerment, and socialisation rights. As subsistence and survival rights, economic, social, and cultural rights aim to ensure an individual's survival or socioeconomic well-being by providing access to the physical necessities of life, such as health care, food, water, clothing, housing, sanitation, and social security.¹⁰¹ In this context, ICESCR is particularly relevant in the present study because of the critical role it can play in the lives of the vulnerable and disadvantaged groups in general and the urban poor in particular in enabling them to challenge conditions of poverty, deprivation, marginalisation, social exclusion, and domination.¹⁰² Thus, although the drafters of the ICESCR did not specifically have the vulnerable urban residents in mind, the constitutions of most States Parties to the Covenant incorporate ESCR as legally enforceable rights while some as non-enforceable principles of State policy.¹⁰³ Therefore, the fact that State parties acceded to the Covenant and incorporated its substance in their constitutions makes it fair, legitimate, and justifiable that their land use legislative measures be evaluated against the Covenant's standards.

In terms of the assessment of human rights, Raworth has argued that under the enjoyment approach, evaluation is premised on the substantial realisation of human rights, such as the number of persons living in informal settlements as a percentage of the population.¹⁰⁴ However, under the obligation approach, evaluation is premised on efforts of the government to improve its human rights record through legislative and

¹⁰¹ Henry Shue, *Basic Rights: Subsistence, Affluence and the US Foreign Policy* (1980) 22-3 and at 35.

¹⁰² Ibid; Also see, Danwood M. Chirwa *Towards binding economic, social and cultural rights obligations of non-state actors in international and domestic law: A critical survey of emerging norms* (Unpublished PhD Thesis, University of the Western Cape, 2005) 27.

¹⁰³ See Chirwa op cit note 60 at 258. Chirwa argues that the constitutions of Malawi, Eritrea, Ethiopia, the Gambia, Liberia, Namibia, Swaziland, Tanzania, Uganda and Zambia use a mixed model, protecting a few economic, social and cultural rights and the rest as non-enforceable principles of state policy. On the other hand, the constitutions of Benin, Cape Verde, São Tomé and Príncipe, Burkina Faso, Gabon, Madagascar, Mali, Niger, Togo, Seychelles, and South Africa recognise economic, social and cultural rights as fully justiciable.

¹⁰⁴ Raworth, K. 'Measuring human rights' (2001)15(1) *Ethics and International Affairs* 111-131.

budgetary measures.¹⁰⁵ This study thus proceeded along these premises in assessing the legitimacy of land use planning laws governing the spatial location of urban functions in terms of the Covenant.

2.3 The Spatial dimension of ICESCR in the context of the urban space.

I have so far addressed the concept of urban space and justification for using ICESCR in assessing land use planning laws governing the spatial location of urban functions. This section focuses on ESCR in the context of the urban space in general and their spatial dimension in particular. The aim is to situate the present study within the broader discourse on economic, social, and cultural rights, land use planning laws, and urban space.

Several studies have been conducted on the rights contained in ICESCR in the context of access to land, urban services, and urban space.¹⁰⁶ Some studies have addressed housing and urban issues in the context of the right to an adequate standard of living.¹⁰⁷ Others have focused on elements of socioeconomic rights in the context of the debate on a bundle of rights called the ‘right to the city.’¹⁰⁸ Yet others have looked at the issue of access to land in the context of international human rights.¹⁰⁹ Moreover, social, economic, and cultural rights have also been the subject of several CESCR General Comments and Special Rapporteur reports in the context of the nature of States Party obligations¹¹⁰, on the right to adequate housing¹¹¹, on the right to the highest attainable standard of health¹¹² and forced evictions¹¹³ among others. However, in these studies, there has been a lack of explicit attention to link the

¹⁰⁵ Raworth op cit note 106; Also See generally, Benjamin Davy & Sony Pellissery, ‘The citizenship promise (un)fulfilled: The right to housing in informal settlements’ 2013 *International Journal of Social Welfare* para s68-s84.

¹⁰⁶ See Kalhan op cit note 46 at 16; Ponce op cit note 46; Coggin & Pieterse op cit note 46.

¹⁰⁷ See e.g. Juli Ibid.

¹⁰⁸ See e.g. Coggin & Pieterse op cit note 46.

¹⁰⁹ See e.g. Kalhan op cit note 46.

¹¹⁰ See CESCR General Comment No. 3 op cite note 50.

¹¹¹ See CESCR General Comment No. 4 op cit note 51; Rajagopal op cit note 51.

¹¹² See CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), *Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4)*.

¹¹³ CESCR General Comment No. 14 op cite note 52. CESCR General comment 7 op cite note 53.

Covenant's rights and land use laws within the urban space. In particular, no studies appear to assess the legitimacy of land use planning laws governing the spatial location of urban functions in the context of ICESCR in the urban space. This study thus seeks to analyse the spatial content of the rights in the Covenant by assessing the legitimacy of land use planning laws governing the spatial location of urban functions using Malawi's urban land use planning laws as a case study. The study thus forms a nuanced contribution to the debate on economic, social, and cultural rights and land use planning laws.

2.4. State party obligations under International human rights law.

The scheme for implementing social, economic, and cultural rights under ICESCR is such that States parties to the Covenant have an obligation to respect, protect, promote, and fulfill the rights under the Covenant within the general framework of international human rights obligations. This scheme follows internationally accepted principles regarding all human rights, whether civil and political or social and economic.¹¹⁴ Thus, the evolving discourse on economic, social, and cultural rights has brought these four interrelated States' obligations to the fore.¹¹⁵ These obligations universally apply to all human rights and imply a combination of both negative and positive duties.¹¹⁶ This section firstly endeavors to discuss the nature of these four interrelated States Parties' obligations and their implication for the legitimacy of land use planning laws governing the spatial location of urban functions in terms of economic, social, and cultural rights, as provided in the Covenant.

2.4.1. Nature of human rights obligations under the ICESCR.

All human rights-economic, civil, social, political, and cultural impose negative and positive obligations on States, as is captured in the distinction between the duties to respect, protect, promote, and fulfil already discussed above. The first and most commonly drawn distinction is between positive and negative rights. For instance, civil and political rights are characterised as negative rights in that they only require

¹¹⁴ See *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* (SERAC Case) Comm. No. 155/96.

¹¹⁵ Kapindu, Redson Edward. 'Policies, Aspirations, or Rights-A Case for Mainstreaming Socioeconomic Rights in the Malawi Growth and Development Strategy (MGDS).' (2011) 14 *Yale Hum. Rts. & Dev. LJ* 34.

¹¹⁶ See *SERAC Case* supra note 116.

that government abstain from activities that would violate them.¹¹⁷ On the other hand, economic, social, and cultural rights require active intervention on the part of the government and cannot be realised without such intervention.¹¹⁸ It has also been argued that these rights may be categorised between those which are resource intensive and those which are cost-free in their enjoyment.¹¹⁹ Alston and Quinn, for instance, have argued that civil and political rights can be realised without significant costs being incurred.

In contrast, enjoying economic, social, and cultural rights requires a significant resource commitment. For those reasons, Alston and Quinn point out that civil and political rights can be immediately realised.¹²⁰ In contrast, economic, social, and cultural rights constitute no more than long-term aspirational goals.¹²¹ In this regard, the following section discusses the nature and typologies of the States' obligations in implementing the rights under the Covenant.

2.5. Typologies of States' human rights obligations.

Although the emergency of human rights as an organised body is accredited to the Universal Declaration of Human Rights (UDHR) Charter of 1948, the explicit typologies of States obligation which emanate from these rights were only conceptualised in 1980.¹²² The original typologies constituted four layers.¹²³ Eide Asbjørn argued that four layers of States' human rights obligations could be discerned and defined from the existing body of human rights.¹²⁴ He identified these layers of States obligations as an obligation to respect, protect, ensure, and promote.¹²⁵ However, over the years, these obligations have been revised to become a tripartite division of human rights.¹²⁶ However, The African Commission on Human Rights has

¹¹⁷ See *SERAC Case* supra note 116.

¹¹⁸ Ibid,

¹¹⁹ Ibid.

¹²⁰ Kapindu op cit note 117.

¹²¹ Ibid

¹²² See generally, Oliver De Schutter, *International Human Rights Law; Case, Materials, Commentary* (2010) 243.

¹²³ Ibid; Also see The Right to Adequate Food as a Human Right, Report prepared by A. Eide, E/CN.4/Sub.2/1983/25 (1983).

¹²⁴ See generally, Oliver De Schutter op cit note 124; Also see Eide op cit note 125.

¹²⁵ Ibid.

¹²⁶ See e.g. Eide op cit note 125 at 24 paras 112-114.

maintained the original four layers of obligations, slightly revising the obligation nomenclature.¹²⁷ Given that the present study pertains to human rights in the African context, I have adopted the typology with layers of obligations. Viz, the obligation to respect, protect, promote, and fulfil as is demonstrated below.

2.5.1. The obligation to respect.

The duty to respect is a negative one. It requires the state to refrain from interfering with the enjoyment of human rights.¹²⁸ Concerning economic, social, and cultural rights, a State has an obligation to respect the free use of resources such as land, housing, and other means of livelihood owned or at the disposal of the individual alone or in any form of association with others.¹²⁹ Respecting free use of resources entails that the state refrains from evicting residents from their houses based on violation of planning laws¹³⁰ and confiscating their merchandise based on breach of city trade by-laws. In this context, a State must refrain from enacting laws that interfere with citizens' access to essential assets necessary to enjoy the right to an adequate standard of living.¹³¹ Thus, a State Party which enacts land use planning laws whose effect is to exclude the majority of its urban residents from accessing critical assets and services for the exercise of rights under the Covenant would be violating its obligation to respect. Exclusionary legislation raises the costs of services or criminalises access to services by the mere fact that one is a resident of an informal settlement or conducts informal trade in an undesignated area.¹³² This argument is predicated on the fact that the enjoyment of the rights in the Covenant is contingent on access to services and assets which support the rights.¹³³ For instance, without access to assets and services such as land, housing, safe drinking water, energy for cooking

¹²⁷ See e.g. *SERAC Case* supra note 116 para 44.; Cf. De Schutter op cit note 124 at 243.; Cf. Henry Shue, 'The Interdependence of Duties', in Philip Alston and Katarina Tomasevski (eds.), *The right to food* (1985) 83–95 at 86 (Shue *The Interdependence of duties*).

¹²⁸ See *SERAC Case* supra note 116; Kapindu op cit note 117.

¹²⁹ Ibid.

¹³⁰ CESCR General Comment No. 4 op cit note 51 para 18.

¹³¹ Ibid para 8(b).

¹³² See s4 of chap 4 of the Land use planning and development management guidelines and standards op cit note 2 s4 of ch 4; s34 of the Physical Planning Act op cit note 2 s 34; Also see Peddlers By-Laws op cit note 22, First schedule.

¹³³ CESCR General Comment No. 4 op cit note 51 para 8(b).

and lighting, sanitation, and transportation, the right to adequate housing in the urban space would be a mirage.¹³⁴

Thus, where a State promulgates land use planning laws in which the majority of low-income residents are unable to either own or rent property in medium or low-density zones of a city because of the high property price, such laws would prima facie be inconsistent with a State's obligation to respect the citizens' enjoyment of socioeconomic rights.¹³⁵ Such laws would be inconsistent with the States Parties' obligation because they would constitute indirect discrimination against urban residents of low income or low socioeconomic status contrary to the non-discrimination principle espoused in article 2(2) of the ICESCR. This argument is grounded on high urban land use planning and building standards and regulations regarding plot sizes and building materials, which are responsible for high property prices and development costs in the urban space.¹³⁶ Such laws and regulations indirectly discriminate against residents of low social and economic status from accessing such properties.¹³⁷ CESCR states that indirect discrimination refers to laws, policies, or practices that appear neutral at face value but disproportionately impact the exercise of Covenant rights as distinguished by prohibited grounds of discrimination.¹³⁸ In this regard, land use laws restricting right-holders of low social and economic status from owning or renting land, houses, or other properties in medium and low-density residential zones constitute indirect discrimination. Therefore, the state is obligated to balance the interests of high-income and low-income rights holders by refraining from enacting land use laws that exacerbate property and service costs in the urban space as part of its obligation to respect.

¹³⁴ CESCR General Comment No. 4 op cit note 51 para 8(b).

¹³⁵ See generally, Trounstein, J 'The Geography of Inequality: How Land Use Regulation Produces Segregation' (2020) 114(2) *American Political Science Review* 443-455.

¹³⁶ See generally Wekwete K.H. 'Planning Law in Sub-Saharan Africa – A Focus on the Experience in Southern and Eastern Africa' (1995) 19(1) *Habitat International* 13 – 28.; Mabogunje op cite note 4 at 121–203.

¹³⁷ Chopin, I., Germaine, C. A *European Commission, Directorate-General for Justice and Consumers comparative analysis of non-discrimination law in Europe 2017 : the 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia and Turkey compared* (2017) <https://data.europa.eu/doi/10.2838/52129>.

¹³⁸ See CESCR General Comment No. 20 op cit note 6 para 10.

Failure to hold or own urban land with secure tenure and to rent a property with secure tenure strips right-holders of the power to demand essential urban services from duty bearers critical for the enjoyment of Covenant rights.¹³⁹ This argument is premised on the fact that States Parties to the Covenant undertook to guarantee that the rights enunciated in the Covenant will be exercised without discrimination.¹⁴⁰ A law, policy, or practice that appears neutral at face value but disproportionately impacts the exercise of Covenant rights as distinguished by prohibited grounds constitutes indirect discrimination.¹⁴¹

The obligation to respect also entails that States Parties shall recognize and respect existing access to the land of all legitimate tenure right holders, given that secure access to productive resources is essential for subsistence, survival, empowerment, and socialisation in the urban space.¹⁴² These resources include land with secure tenure, which is crucial for realising citizens' right to food and housing, which requires safe access to a place for shelter and home-based formal sector employment and domestic economic activities.¹⁴³

Uprimny and Windfuhr argue that the term "legitimate tenure rights holder" encompasses not only those with formal land titles but also those with customary, collective, or traditional tenure rights that might not be recognized by law.¹⁴⁴ States shall therefore refrain from infringing such legitimate tenure rights through land use planning laws that purport to illegalise them.¹⁴⁵ Moreover, regarding land use planning laws governing spatial locations of urban functions, the obligation to respect would entail that States Parties refrain from taking measures that prevent urban residents from possessing a reasonable degree of security concerning their relationship with urban land. The state should also refrain from interfering with legitimate tenure rights

¹³⁹ CESCR General Comment No. 4 op cit note 51 para 8(a).

¹⁴⁰ See ICESCR op cit note 60. Art 2(2).

¹⁴¹ See CESCR General Comment No. 20 op cit note 6 para 10.

¹⁴² See generally Chirwa op cit note 61.

¹⁴³ Rodrigo Uprimny and Michael Windfuhr, *CESCR General Comment No. 26 on Land and Economic, Social and Cultural Rights(Draft)*, 7th Session, 27 September –15 October 2021, Item 4 of the Provisional Agenda(E/C.12/70/R.1) para 19.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

holders through eviction, illegal land dispossession and appropriation, harassment, and other threats.¹⁴⁶ In addition, States Parties should refrain from any action compromising the legal security of land tenure held by urban residents and households.¹⁴⁷ Therefore, where land use laws governing spatial locations of urban functions interfere with urban citizens' secure tenure and legitimate tenure rights to expose them to landlessness or homelessness, a State Party violates its obligation to respect the ESCR of vulnerable urban residents.¹⁴⁸

It is also important to note that informal tenure exists in various forms, often due to overly complex legal and administrative requirements for land use change and development.¹⁴⁹ This observation is supported by Uprimny and Windfuhr, who argue that States Parties should refrain from putting in place laws and policies that delegitimize informal tenure for the very reason that holders of such legitimate or informal tenure do not act within the State laws.¹⁵⁰ For this reason, States Parties should refrain from any legislative measures which jeopardise the Covenant's spirit and purpose. Thus, I believe that the overall objective of urban land use planning laws governing the spatial location of urban function should be to support the enjoyment of the Covenant's rights, not to restrict their enjoyment based on land tenure.

2.5.2. The obligation to protect.

At a secondary level, a State Party is under obligation to protect right holders against others by legislation and provision of effective remedies.¹⁵¹ The obligation requires a State Party to protect beneficiaries of the protected rights against political, economic, and social interferences.¹⁵² In the *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria (SERAC Case)*, it has been argued that protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that

¹⁴⁶ Uprimny & Windfuhr op cit note 145 para 19.

¹⁴⁷ CESCR General Comment No. 4 op cit note 51 para 8(a).; Also see generally Uprimny & Windfuhr op cit note 145 para 19.

¹⁴⁸ See generally CESCR General Comment No. 4 Ibid.

¹⁴⁹ Uprimny & Windfuhr op cit note 145.

¹⁵⁰ Ibid.

¹⁵¹ See *SERAC Case* supra note 116; Kapindu op cit supra note 117.

¹⁵² Ibid.

individuals will be able to realise their rights and freedoms freely.¹⁵³ Concurring with this position, the CESCR observed that “States parties must give due priority to those special groups living in unfavorable conditions by giving them particular consideration.”¹⁵⁴

Thus, for a State Party to comply with the obligation to protect in the context of ESCR, policies and legislation should not be designed to benefit already advantaged social groups at the expense of others.¹⁵⁵ Among other factors, laws that benefit already advantaged few at the expense of different social groups contribute to the deprivation and urbanisation of poverty in the urban space. Arguably, a State where most of its urban residents live in squalor, tenements, squatter settlements, slums, or general informal settlements would violate its obligation to protect rights holders against others.¹⁵⁶ This position is grounded on the fact that urban residents reside in squalor, tenements, or slums partly because of a State Party’s failure to protect them from urban landlords, property owners, or holders through legislative failure in regulating property and rental prices. Urban property owners and holders often price their properties beyond the economic reach of most low-income residents, leaving them with no choice but to live in squalor to cope with their lack of access to adequate housing in the urban setting. It should also be mentioned that regulation of property or rental prices to balance the interest of both property owners and holders would not violate property owners’ Covenant rights because this social group already lives above the minimum core. On the contrary, property regulation and rental prices are consistent with the Covenant spirit and purpose because the rights under the Covenant are survival and subsistence rights.¹⁵⁷

Proceeding from the above, it is clear that State Parties’ failure to discharge their obligation to protect the rights of urban residents of low-income status against third parties within their jurisdiction, the majority of them are unable to either rent houses

¹⁵³ *SERAC Case* supra note 116; Kapindu op cit supra note 117.

¹⁵⁴ CESCR General Comment No. 4 op cit note 51 para 8.

¹⁵⁵ Ibid.

¹⁵⁶ Charles Abrams *Squatter Settlements: The Problem and the Opportunity: Ideas and Methods of Exchange* no. 63. (1964).

¹⁵⁷ See Chirwa op cit note 61 at 255.

or own land in planned residential or commercial areas with guaranteed tenure security. Ultimately, States Parties must ensure that urban residents of low income and socioeconomic status are protected against the capitalist market forces whose sole concern is to ensure that land use planning laws maintain high property values at the expense of the majority of low-income residents who cannot afford such high property values.¹⁵⁸ Urban residents of *low income* or *low socioeconomic status* deserve State protection because all States Parties undertook to ensure that the Covenant rights will be enjoyed without discrimination based on prohibited grounds of discrimination such as property, social origin, and other status.¹⁵⁹ Although income status and socioeconomic status are not expressly listed as prohibited grounds of discrimination in the Covenant, it is reasonable to argue that ‘income status and socioeconomic status’ fall within the property, social origin, or other status prohibited grounds of discrimination.¹⁶⁰ Moreover, CESCR confirms this position in its General Comment No. 20.¹⁶¹

In the context of land use planning laws, states are obligated to protect access to land by legitimate tenure rights holders.¹⁶² Thus, States should ensure that land use planning laws governing the spatial location of urban functions protect legitimate tenure rights holders from arbitrary eviction and that their access rights to the urban space are otherwise not extinguished by third parties.¹⁶³ States Parties should thus use urban land use planning laws and regulations to ensure that legitimate tenure rights are protected in all processes relating to urban land use rights readjustments, plot allocation, and determination of development planning applications. Such processes include transferring existing tenure rights and associated duties that are reached through voluntary or involuntary ways, such as transactions as a result of investments

¹⁵⁸ See for example the exclusionary nature of the law providing for the composition of Planning Committee in s20 of the Physical Act No 17 of 2016. Note that this is a committee which is responsible for making majority of planning decisions on location of urban functions. It is curious to note how this important committee does not include representative of the vulnerable groups in the urban landscape.

¹⁵⁹ See ICESCR op cit note 60 Art 2(2).

¹⁶⁰ See CESCR General Comment Number 20 op cit note 6 paras 24, 25 and 27.

¹⁶¹ Ibid.

¹⁶² Uprimny & Windfuhr op cit note 145.

¹⁶³ Ibid.

on land, redistributive reforms, and States' power of an eminent domain.¹⁶⁴ Moreover, the Special Rapporteurs on land and ESCR have argued that as part of the obligation to protect, States Parties must ensure formal recognition of the diverse tenure forms that may exist among the peoples and communities that constitute the State Party.¹⁶⁵ The obligation requires land use planning laws governing the spatial location of urban functions should recognise, legalise and uphold customary and other informal tenure regimes within human rights criteria.¹⁶⁶

The human rights obligation to protect in the context of urban space also demands that States Parties have safeguards and policies to protect legitimate tenure rights. In particular, States should protect rights relevant to an adequate standard of living¹⁶⁷ from risks that would derive from large-scale transactions in tenure rights in the urban space.¹⁶⁸ The protection is essential because large-scale land investments involve the risk of violating rights under the Covenant. They usually affect many small landholders with customary tenure who are often poorly recognised as informal land use title holders.¹⁶⁹ In this context, I take the view that to comply with the obligation to protect; States Parties should put safeguards such as ceilings on the size of permissible land transactions and that transfers exceeding a specific predetermined scale should be approved by Parliament.¹⁷⁰

States Parties shoulder the burden to ensure that land use planning laws governing the spatial location of urban functions contain detailed provisions guiding urban planning committees in approving or granting development permission. In particular, the decision on the type of urban functions and spatial location of such functions in the urban space should be informed by detailed regulatory standards and guidelines with particular attention to legal spatial parameters so as not to aggravate deprivations in

¹⁶⁴ See generally Uprimny & Windfuhr op cit note 145.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid; also see generally *Interpreting the Human Right to Land within the International Covenant on Economic, Social and Cultural Rights; Input into Proposed CESCR General Comment on Land* available at <https://www.hlrn.org/img/documents/GC_on_land_.pdf> accessed on 03/06/2022.

¹⁶⁷ ICESCR op cit note 60 art 11.

¹⁶⁸ See generally Uprimny & Windfuhr op cit note 145.

¹⁶⁹ United Nations Economic Commission for Africa (2014). Guiding principles on large scale land based investments in Africa. Addis Ababa, principle 17 (Economic Commission for Africa).

¹⁷⁰ See generally Uprimny & Windfuhr op cit note 145.

the urban space. Such an approach would be compatible with the exercise of the Covenant rights.

Therefore, for States Parties to discharge their obligation to protect Covenant rights, it is peremptory that they adopt bespoke land use legal frameworks. These frameworks should require business entities to exercise due diligence to identify, prevent and mitigate the negative impacts caused by their land-based investments on the urban residents' rights as contained in the Covenant.¹⁷¹ Such land use legal frameworks should thus avoid an increased concentration of land ownership and privileges amongst advantaged groups within land tenure regimes in the urban space.¹⁷²

It is also important to reiterate that States must adopt laws and policies guaranteeing that titling programs are not implemented solely to support the land sale and the commodification of land tenure.¹⁷³ If such laws or regulations are missing, titling pre-existing customary forms of tenure in urban space may result in more conflicts rather than more clarity and less security rather than more security.¹⁷⁴ Therefore, in terms of ESCR of urban residents, States parties would violate their obligation to protect the Covenant rights if their land use planning laws and regulations governing the spatial location of urban functions do not contain provisions on preventing commodification of urban land tenure rights.

2.5.3. The obligation to promote.

Closely related to the State's obligation to protect is the obligation to promote the enjoyment of all human rights and freedoms by promoting tolerance, raising awareness, and even building infrastructures.¹⁷⁵ Thus, in the context of land use planning laws, failure by a State Party to take deliberate steps through land use planning legislative measures to ensure the existence of minimum levels of essential public infrastructure for sanitation, water supply, waste collection, road networks, and

¹⁷¹ See generally Economic Commission for Africa op cit note 171 principle 17.

¹⁷² See generally, Uprimny & Windfuhr op cit note 145.

¹⁷³ Toulmin C & J. Quan (eds) *Evolving Land Rights, Policy and Tenure in Africa* (2000); Also see generally Uprimny & Windfuhr op cit note 145.

¹⁷⁴ Ibid.

¹⁷⁵ *SERAC Case* supra note 116; Kapindu op cit note 117.

housing would be inconsistent with the obligation to promote human rights.¹⁷⁶ Concerning promoting tolerance, it would appear that failure in land use planning laws to ensure the existence of inclusionary zoning in the urban environment would violate the obligation to promote ESCR. The absence of inclusionary zoning regulations aggravates the deprivation and vulnerability of low-income rights holders. The aggravation occurs through segregative regulations, which obstruct their access to essential urban services and impair their enjoyment of the Covenant rights.

As part of awareness raising, States Parties should define and prohibit spatial segregation in their land use planning laws as a violation of the right to non-discrimination, rights to an adequate standard of living, and right to participate in cultural life, among others. Arguably, failure by a State Party to ensure that victims of spatial segregation understand the conceptual and practical meaning of segregation and seek redress through courts would be inconsistent with the State Party's obligation to promote the rights under the Covenant.¹⁷⁷ Such a position is particularly true where a State Party's land use laws exclude most urban residents from owning or renting a property in designated planned areas of the urban space. Such exclusion frequently is a function of land use planning standards and regulations with face value neutrality but which have a practical segregative or discriminatory effect on the ground.¹⁷⁸

In the context of the urban space, the obligation to promote also entails that States Parties must facilitate and take measures and steps to provide information, targeted training, and means to develop the capacities of all parties concerned. It also includes developing operationalisation of access to land as an essential precondition towards the enjoyment of rights under the Covenant.¹⁷⁹ States Parties should ensure that standards and regulations on land use contain guidance on public awareness and public-service announcements on access to urban land as a method and approach to achieve equity, social cohesion, inclusive zoning, and realize a bundle of covenanted human rights by urban residents.¹⁸⁰

¹⁷⁶ See generally Rajagopal op cit note 51.

¹⁷⁷ Ibid.

¹⁷⁸ See CESCR General Comment No. 20 op cit note 6 para 10.

¹⁷⁹ See generally *Interpreting the Human Right to Land* op cit note 168.

¹⁸⁰ Ibid.

2.5.4. The obligation to fulfil.

The last layer of State obligations requires the State to fulfil the rights and freedoms it freely undertook under the various human rights regimes.¹⁸¹ It is a more positive expectation on the part of the State to move its machinery towards the actual realisation of the rights.¹⁸² The obligation to fulfil is directly related to the obligation to protect already discussed herein in that it consists in the direct provision of basic needs and services. These goods and services include food, water, sanitation, or resources that right holders may use to pursue their livelihoods¹⁸³, subsistence, survival, empowerment, and socialisation.¹⁸⁴ Arguably, this entails that a State has an obligation to ensure that urban residents have access to necessities essential for exercising the Covenant rights on a non-discriminatory basis. Thus, failure to remove differential treatment in access to basic needs and services based on a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources at the State Party's disposal to eliminate discrimination as a matter of priority.¹⁸⁵ Regarding land use planning laws, I take the view that States Parties should ensure that Covenant rights such as access to water, sanitation, energy services, and adequate housing should not be made conditional on a person's land tenure status, such as living in an informal settlement.¹⁸⁶

On the other hand, De Schutter argues that the duty to fulfill requires the duty bearer to adopt appropriate legislative, administrative, and other measures toward fully realising human rights.¹⁸⁷ Thus, a State would fail in its obligation to fulfill if its land use planning laws do not provide an enforceable environment within which rights holders can enjoy their ESCR. For instance, where urban land use standards and guidelines have onerous requirements demanding enormous capital outlay, which the

¹⁸¹ See generally *Interpreting the Human Right to Land* op cit note 168.

¹⁸² Ibid

¹⁸³ Ibid

¹⁸⁴ See generally Chirwa op cit note 61.

¹⁸⁵ See CESCR General Comment No. 20 op cit note 6 para 13.

¹⁸⁶ See General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant) Adopted at the Twenty-ninth Session of the Committee on Economic, Social and Cultural Rights, on 20 January 2003 (Contained in Document E/C.12/2002/11); CESCR General Comments Nos. 4 op cit note 51 & CESCR General Comment 20 op cit note 6.

¹⁸⁷ Oliver De Schutter *International Human Rights Law* (2010) 253.; Office of the High Commission for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* (2005) para. 47-48.(Principles on Human Rights to Poverty).

majority of its urban citizens cannot reasonably afford, a State would have failed to fulfill the rights under the Covenant. Such a law would have perpetuated discrimination in the enjoyment of the Covenant rights based on income status, which is a prohibited ground of discrimination given that income status is a variant of property according to CESCR General Comment Number 20.¹⁸⁸

The question of access to urban land on a secure tenure basis is critical to realising the Covenant rights because secure tenure empowers the right holder to demand essential services to enjoy Covenant rights from duty bearers. In the context of the urban space, the obligation to fulfil also entails that States Parties must ‘facilitate secure, equitable and sustainable access to use of and control over land for those who are landless or live in poverty.’ Such a position is particularly true for women and other marginalised sections of the urban space who do not have secure tenure. These vulnerable and marginalised sections include informal settlement dwellers; informal traders, and the homeless who depend on access to the urban land to realise their ESCR, such as the right to non-discrimination; adequate standard of living, culture, work, education, food, and housing, among others.

The obligation to fulfil further entails that States Parties should use the maximum of their available resources to progressively realise access to productive resources for individuals and groups whose rights to an adequate standard of living would otherwise be violated.¹⁸⁹ In the context of the urban space, this obligation implies that States Parties must take deliberate steps to realise urban residents’ access to land for urban agriculture, settlement, and trading for article 11 (2) of the ICESCR and other associated rights to be fulfilled. In this context, access to urban land should be understood as having secure tenure in terms of ownership, renting, or conducting trade without the threat of eviction. The crux of the argument on land access is that where land use planning laws and regulations are flexible and not overly rigid to allow rights holders to have secure tenure of urban land either as landlords, tenants, or traders, they will be empowered to demand urban services from duty bearers. The argument is critical because secure land tenure rights grant the beholder legal standing regarding

¹⁸⁸ CESCR General Comment No. 20 on cit note 6 para 25.

¹⁸⁹ See generally See Uprimmy and Windfuhr op cit note 145.

urban services as against duty bearers. In addition, right holders are empowered to carry out livelihood-sustaining activities using land-based transactions such as urban agriculture, business and property letting, or sub-letting. Therefore, I argue that as part of steps to ensure secure access to urban land, States Parties should enact land use planning laws that afford a realistic opportunity for residents to own, rent or use urban land for trade with secure tenure to support residents' enjoyment of Covenant rights.

2.6. Minimum core obligations.

Having introduced the nature of States Parties' obligations under article 2(1) of the Covenant, I now discuss the States Parties' obligation to ensure that their citizens enjoy the minimum core essentials of the Covenant rights. In its General Comment Number 3, the CESCR noted that a minimum core obligation to satisfy, at the very least, minimum essential levels of each of the rights is incumbent upon States Parties.¹⁹⁰ The CESCR points out that a State Party in which any significant number of individuals is deprived of essential foodstuffs, essential primary health care, basic shelter, and housing or the most basic form of education is *prima facie* failing to discharge its obligations under the Covenant.¹⁹¹ The Committee reiterated that if the Covenant were to be read so as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*.¹⁹² Moreover, the CESCR has argued that these core obligations are nonderogable.¹⁹³ The relevant paragraph of the CESCR General Comment provides that a State party cannot, under any circumstances, justify its non-compliance with the core obligations.¹⁹⁴

Thus, in urban land use planning laws, a State Party cannot invoke resource constraints as a defence for its failure to take appropriate legislative measures for realising the minimum core essentials of ESCR in the urban space. This argument is premised on the distinction between obligations of conduct and obligations of result.

¹⁹⁰ CESCR General Comment No. 3 op cit note 50.

¹⁹¹ Ibid.

¹⁹² Ibid; Also see generally Phillip Alston and Gerald Quinn 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987)9(2) *Human Rights Quarterly*.

¹⁹³ CESCR General Comment No. 14 op cit note 52.

¹⁹⁴ Ibid para. 47; Also see Kapindu op cit note 117; Sisule Frederick Musungu, *The Right to Health in the Global Economy: Reading Human Rights Obligations into the Patent Regime of the WTO-TRIPS Agreement* (unpublished LL.M. dissertation, Univ. of Pretoria 2001).

¹⁹⁵ Whereas the full realisation of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonable short time after the Covenant's entry into force for the States concerned.¹⁹⁶ Such steps should be deliberate, concrete, and targeted as clearly as possible toward meeting the obligations recognised in the Covenant.¹⁹⁷ The means which should be used to satisfy the obligation to take steps are stated in article 2(1) of the Covenant to be "all appropriate means including particularly the adoption of legislative measures."¹⁹⁸ Based on article 2(1) of ICESCR, a State cannot legitimately invoke resource constraints to justify its failure to meet minimum core obligations. This position is plausible because the enactment of laws relates to the obligation of 'conduct' rather than 'result.'¹⁹⁹ The performance of an obligation of conduct is not dependent on resource availability. The adoption of legislation measures relates to States' obligation of conduct, whose realisation is contingent on the concerned States' willingness to adopt legislative measures and not the availability of resources. This is more so because, under the obligation approach, the evaluation of the States' commitment to human rights is based on efforts of the government to improve their human rights record, such as legislative and budgetary measures. However, the enjoyment approach²⁰⁰ to evaluating human rights is based on statistical criteria.²⁰¹

Therefore, a State Party has to adopt urban land use planning laws that guarantee the right to adequate land and land-related facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups. The obligation of conduct demonstrates that a State is moving its machinery towards satisfying the minimum essential levels of the Covenant rights in the urban space by setting a conducive legislative rationale for resource mobilisation towards the progressive realisation of the covenanted rights in the future.

¹⁹⁵ See CESCR General Comment No. 3 op cit note 50 para 1.

¹⁹⁶ Ibid

¹⁹⁷ Ibid

¹⁹⁸ Ibid

¹⁹⁹ Ibid paragraph 1.

²⁰⁰ Raworth op cit note 106 at 111–131. In this article, Raworth has argued that under the enjoyment approach, evaluation of human rights is premised on substantial realisation of human rights such as number of persons living in informal settlements as percentage of the population. This approach can be distinguished from the obligation approach which focuses on efforts of states parties as demonstrated through legislative and budgetary measures.

²⁰¹ Ibid; Also See generally Davy & Pellissery op cit note 107 s68-s84.

In addition, a State will have to ensure that urban residents have minimum essential access to sufficient and safe land for personal and domestic use to provide an adequate standard of living and the corollary rights.²⁰² In addition, a State Party has to ensure equitable distribution of all available urban land-related resources, facilities, and services.²⁰³ A State Party which does not guarantee the right to adequate land on a secure tenure basis and land-related resources, facilities, and services on a non-discriminatory basis violates its obligation to provide minimum essential levels of the Covenant rights in the urban space.²⁰⁴

Moreover, to guarantee the minimum core essentials of the Covenant rights, a State Party has to ensure that personal security is not threatened when physically accessing land in the urban space.²⁰⁵ Added to that, States parties must “ensure that no one is rendered landless by means, actions, processes or factors, including but not limited to discrimination; dispossession; displacement, including forced eviction; denial (of use, access, etc.); scarcity of land; damage or destruction of land...”²⁰⁶ States Parties are further required “to take measures to prevent, treat and control diseases linked to pollution and other degradation of urban land, in particular ensuring access to adequate sanitation, alternative land in case of detriment to health, adequate housing or livelihood; accountability and liability for wrongful acts leading to land loss, pollution or degradation in the urban space.”²⁰⁷ In the context of the urban space, a State’s obligation of conduct will have been discharged upon a State Party, ensuring that urban land use planning laws provide mechanisms and guarantees that residents will have assets, goods, services, and entitlements at their disposal enumerated in the preceding paragraphs. It can thus be argued that land use planning laws governing the spatial location of urban functions which do not make provisions for the existence of the minimum core assets, goods, services, and entitlements in the urban space on a non-discriminatory basis would be inconsistent with the Covenant’s standards and thus

²⁰² See *Interpreting the Human Right to Land* op cit note 168 para 118.

²⁰³ Ibid para 118.

²⁰⁴ Ibid para 118.

²⁰⁵ Ibid

²⁰⁶ Ibid

²⁰⁷ Ibid para 118.

illegitimate as against individual right holders and other States Parties to the extent of that inconsistency.

2.7. Progressive realisation.

In this section, I discuss State Party obligations in ensuring that rights provided for in the Covenant are realised progressively. However, before a detailed treatment of the nature of obligations, it is essential to highlight a few general issues relating to the article which provides for these obligations. Article 2 of the ICESCR defines the scope and nature of States Party obligations under the Covenant. In particular, the article provides that States Parties to the Covenant have three principal obligations: which are; to take steps aimed at ensuring the progressive realisation of the rights under the Covenant, to ensure that where there are resource constraints, the State Party facing such conditions should ensure that its citizens are at least able to enjoy minimum core essentials of the rights under the Covenant and where applicable, a concerned State must seek international economic and technical assistance and those States Parties which can render such assistance bear the obligation²⁰⁸ under the Covenant to render such assistance.²⁰⁹ With such a background, it is now important to discuss what progressive realisation of the rights under the Covenant entails.

Alston and Quinn have argued that the concept of progressive achievement is, in many ways, the linchpin of the whole Covenant. Upon its meaning turns the nature of States' obligations.²¹⁰ Alston and Quinn further point out that most of the rights granted depend to varying degrees on the availability of resources. This fact is recognised and reflected in the concept of "progressive achievement."²¹¹ This concept mirrors the inevitably contingent nature of state obligations.²¹² This understanding is supported by the position adopted in the CESCR General Comment Number 3, in which it is argued that the concept of progressive realisation of all economic rights will generally not be achieved in a short period.²¹³ In this regard, the obligation differs significantly from

²⁰⁸ Sigrun I. Skogly & Mark Gibney, Economic Rights and Extraterritorial Obligations, in Shareem Hertel (eds) *Economic Rights: Conceptual, Measurement, and Policy Issues* (2007) 267.

²⁰⁹ See, generally CESCR General Comment No. 3 op cit note 50.

²¹⁰ Alston & Quinn op cit note 194.

²¹¹ Ibid

²¹² Ibid

²¹³ CESCR General Comment No. 3 op cit note 50.

that of article 2 of the ICCPR, which embodies an immediate obligation to respect and ensure all the relevant rights.²¹⁴ Nevertheless, the fact that realisation over time, or progressively, is foreseen under the Covenant should not be misinterpreted as depriving the Covenant of all its meaningful content.²¹⁵ On the other hand, it is a necessary flexibility device, reflecting the realities of the World and the difficulties involved for any country in ensuring full realisation of economic, social, and cultural rights.²¹⁶

The concept of progressive realisation is essential in assessing the legitimacy of land use planning laws, regulations, and guidelines in the context of the Covenant. The starting point in this argument is that for land use laws to be legitimate within the terms of the Covenant, the substantive provision of such laws must support the progressive realisation of the rights. The preceding proposition would be achieved by making the availability of minimum essential elements of Covenant rights mandatory within specified time frames in the State's jurisdiction.²¹⁷ The proposition is justified because progressive realisation implies that "...States parties should move as expeditiously as possible towards the realization of the rights. Under no circumstances shall this be interpreted as implying for States the right to defer indefinitely efforts to ensure full realization. On the contrary, all States Parties must begin immediately to take steps to fulfil their obligations under the Covenant..."²¹⁸ In this context, land use planning laws, regulations, and guidelines have to be assessed against this requirement to demonstrate whether such laws reflect a State which is moving expeditiously and has begun immediately to take steps towards fulfilling the rights in the Covenant.

Arguably, a State that has not started taking steps through the enactment of enabling legislation would violate its obligation to ensure the progressive realisation of the

²¹⁴ CESCR General Comment No. 3 op cit note 50.

²¹⁵ Ibid

²¹⁶ Ibid

²¹⁷ CESCR General Comment No. 4 op cit note 51 para 8(b) which outlines minimum core elements of the right to adequate housing. If States' land use laws and other related legislation do not make the availability of these minimum core elements of the Covenant rights mandatory within specified time frames within the scheme and spirit of progressive realisation, then such laws would *prima facie* be illegitimate for violating the Covenant's standards.

²¹⁸ The Limburg Principles on the Implementation of the International Covenant on Economic Social and Cultural Rights. < http://www.concernedhistorians.org/content_files/file/to/142.pdf > See Principles 21 to 24.

Covenant rights in the urban space. I take this view on the ground that enacting enabling legislation, being an obligation of conduct, is the first step towards the satisfaction of the progressive realisation of the Covenant rights in the urban space whose evaluation is premised on efforts undertaken by a State in question. However, the actual realisation, an obligation of result, is evaluated using a different criterion, the enjoyment approach, where the focus is on the number of persons as a percentage of the population enjoying a specific right.²¹⁹ Thus having land use laws that specifically make the availability of minimum core rights elements mandatory within the jurisdiction would enable rights-holders to enforce the Covenant rights through the courts. It is peremptory that enabling legislation provides a State with a legal basis for mobilising resources required for achieving the progressive realisation of the substantive Covenant rights in the long term.

Therefore assessment of land use planning laws and regulations in the context of the obligation to ensure progressive realisation relates to the State obligation of result in article 2 of the Covenant.²²⁰ Such a position entails that where existing land use planning laws do not provide measures and guarantee pathways for reducing urban citizens in informal settlements, the laws would not serve the common good of the urban residents. Such laws would have failed to provide a legislative route for the progressive realisation of the Covenant rights. Land use laws that provide clear pathways and approaches to guarantee that the majority of urban residents reside in formal residential zones have secure land tenure, conduct trade in designated urban spaces, and have access to urban services, goods, and assets will be deemed facilitative of the progressive realisation of Covenant rights. Moreover, the obligation to protect economic, social, and cultural rights also requires States to develop targeted, legally consistent, and sufficiently progressive policies to secure the rights contained in the Covenant.²²¹

2.8. Obligations of the international community.

In this section, I argue that in determining the legitimacy of land use planning laws, it is essential to assess legislative steps, measures, and actions taken by a State Party in

²¹⁹ Raworth op cit note 106 s68-s84.

²²⁰ Ibid.

²²¹ Ibid; See CESCR General Comment No. 3 op cit note 50.

satisfaction of its obligations under the Covenant as against other States parties. The argument is in respect of States obligation of conduct. Such an approach is particularly relevant when one considers the intent of article 2(1) of the ICESCR, which enjoins States Parties to seek technical and economic cooperation from the international community. Thus, where a State Party has violated the Covenant, such violation should be viewed in two realms: Firstly, the violation should be treated as a breach of its covenant obligations against individual rights holders within a particular State Party's jurisdiction. Secondly, such a violation should be treated as a breach of that State Party's obligations as against other State Parties to the Covenant. In this regard, I approached the assessment of the legitimacy of urban land use planning laws against a background of these two basic premises.

2.8.1. Justification for States Parties' extraterritorial obligations.

Before proceeding, it is crucial to highlight the basis and justification of extraterritorial obligations in international human rights law. The CESCR states that the phrase "to the maximum of its available resources" in article 2(1) of the Covenant includes "both the resources existing within a State and those available from the international community through cooperation and assistance."²²² This position has, however, been the subject of debate among scholars.²²³ The mention of "international assistance and cooperation" in article 2(1) of the Covenant raises the pertinent question of whether the Covenant and international law broadly impose socioeconomic rights obligations on the international community. In other words, whether there is an obligation to provide international assistance by developed countries on the one hand and, on the other hand, whether there is a right to receive international aid on the part of poorer or developing countries.²²⁴

Concerning the obligation to provide assistance by developed States and the right to receive assistance by developing States, Skogly and Gibney take the view that a person's home State is responsible in the first place for ensuring the realisation of socioeconomic rights, as well as all other rights. They argue that, the refusal of a State Party to look beyond the resources within its jurisdiction, despite the dictates of

²²² See generally Kapindu op cit 117.

²²³ Ibid; See also Skogly & Gibney op cit note 210 at 267.

²²⁴ Ibid at 267.

international human rights law is incompatible with States Parties obligations under international law.²²⁵ Moreover, the UN Charter supports the position taken by Skogly and Gibney.²²⁶ One of the purposes of the UN Charter is “to achieve international cooperation in solving international problems of an economic, social, cultural and humanitarian character and in promoting and encouraging respect for human rights and fundamental freedoms.” More specifically, as a point of law, the international community's obligation to respect the fundamental human rights interests of people in foreign countries derives from the UN Charter.²²⁷

Further, regarding land use laws that are inconsistent with the States Parties' obligation under the Covenant, I take the view that the responsibility for rich countries to assist derives from the colonial legislative land use planning and resource exploitation history.²²⁸ In most cases, the current bifurcated nature of urban spaces is a function of land use laws developed by the developed countries (the erstwhile colonial masters) to facilitate resource exploitation, segregation, and colonial domination.²²⁹ Thus the current deprivations by the majority of the rights holders in the enjoyment of economic, social, and cultural rights in the developing States emanate from urban spaces produced at the behest of colonial legal frameworks. It is thus legally imperative for the developed States to provide international assistance to developing countries and a moral obligation to remedy the human rights failures instigated by a long history of colonial subjugation. The colonial history and human rights failures are apparent through bifurcated cities dominated by squalor, slums, informal settlements, and a general absence of access to services, goods, and assets critical to the enjoyment of the Covenant rights in Sub-Saharan African States.²³⁰ To bolster the point, Henry Shue argues that ‘what is distinctive about the duty to aid is that it is what is owed to

²²⁵ See also Skogly & Gibney op cit note 210 at 267; Kapindu op cit note 117.

²²⁶ Article 1(3) of the United Nations Charter.

²²⁷ Ibid.

²²⁸ See generally Awuah, Hammond, Robin Block et al op cit note 7; Njoh op cit note 11 at 301 – 317.; Mwimba C. ‘The colonial legacy of town planning in Zambia’ *paper presented to South African Planning Institute international conference on planning Africa* (2002) 18 – 20 September, 2002, Durban, South Africa.; Wekwete op cit note 118 at 13 – 28 ; Mabogunje op cit note 4; Okpala op cit note 8.

²²⁹ Ibid.

²³⁰ See generally, Mabogunje op cit note 4 121-135. Wekwete op cit 118.

victims-the people whose rights have been violated.’²³¹ Thus, the duty to aid is primarily of recovery from failures in performing the duties to respect and protect.²³² The developing countries' failures in performing their human rights obligation can legitimately partly be attributed to the colonial legislative legacy. Therefore, there is a legitimate basis for the developed countries to remedy the human rights situation of developing countries through international assistance recognised in article 2(1) of ICESCR.

2.8.2. Extraterritorial obligations.

In addition to obligations within their respective jurisdictions, States Parties have international obligations within international humanitarian law. For instance, the obligation to respect requires that States Parties that are members of international financial institutions such as the World Bank (WB), International Monetary Fund (IMF), International Fund for Agricultural Development (IFAD), and regional development banks should take steps to ensure that their lending policies and other practices do not impair the enjoyment of Covenant rights in the urban spaces of other States Parties.²³³ The international community must therefore ensure that assistance is contingent on land use planning laws of a State in need of assistance being consistent with the spirit and intent of the Covenant. I, therefore, argue that where a State Party's land use planning laws in the urban space are inconsistent with the Covenant, such laws would be illegitimate on three grounds. Firstly, it would have been a basis for a State Party being denied development assistance by the international community on the ground of breach of its State Party's obligations as against other States Parties. Secondly, such inconsistency would have directly infringed on the urban citizen's ESCR. Thirdly, the deprivation of development assistance due to inconsistent land use planning laws would have compounded socioeconomic deprivations of the urban citizens in terms of the standard of living as envisaged in the Covenant. Therefore, the international community's obligations are relevant to the question of the legitimacy of land use planning laws in the urban space.

²³¹ Shue op cit note 129 at 86.

²³² Ibid at 86.

²³³ See generally *Interpreting the Human Right to Land* op cit note 168.

Further, the international community's obligation to protect the ESCR requires States Parties to establish the necessary regulatory mechanism to ensure that business entities that they are in a position to regulate do not impair the enjoyment of Covenant rights in land-related investments and land acquisitions in the urban spaces of other States Parties.²³⁴ Improperly regulated land investments and acquisitions may impair Covenant rights, resulting in displacement or resettlement without safeguards such as compensation, resettlement plan, or provision of alternative settlement land. States' obligations in this respect include but are not limited to ensuring that such investments and acquisitions are only carried out in jurisdictions where land use planning regulations are stringent enough so as not to be exploited by multinational corporations to the detriment of ESCR of urban residents. In the premises, I contend that it is essential to assess the legitimacy of land use planning laws governing the spatial location of urban functions to be conducted in terms of their ability to encourage foreign investments while simultaneously complying with the standards set by the Covenant. A State Party whose land use planning laws do not meet the Standards set by the Covenant would thus be depriving its citizens of investment opportunities; hence such laws would be illegitimate at face value.

As part of the international obligation to fulfil, States Parties should take collective action through international cooperation to support people and communities outside their national territories to realise the Covenant rights regarding the use of and access to urban land.²³⁵ Such support should include technical cooperation, financial assistance, institutional capacity development for land administration, urban planning, urban development control, knowledge sharing, assistance in developing land use planning laws, national tenure policies, and the transfer of relevant technologies.²³⁶ State Parties' land use planning laws governing the spatial location of urban functions, therefore, ought to be assessed in terms of their alignment to the spirit and intent of the Covenant. Failure of such laws to align with the Covenant would indicate the illegitimacy of such laws against other State Parties in the context of Article 2(1) of

²³⁴ See generally *Interpreting the Human Right to Land* op cit note 168.

²³⁵ Ibid.

²³⁶ Ibid.

the Covenant. This is because state parties may not cooperate with or assist a State Party whose land use laws violate the essential content of the Covenant rights.

2.9. Conclusion.

I have discussed States Parties' obligations under international human rights law in this chapter. In particular, I have noted that these obligations have a spatial context and implications on the spatial organisation of the urban space. I have also observed that the manner in which the urban space is spatially organised mirrors land use laws which in turn determines the spatial location of those who enjoy the Covenant's rights and those who do not over the urban space as defined by legal spatial parameters of size, distance, direction, and territoriality among others. On this basis, the chapter shows that to discharge their human rights obligations, States Parties shoulder the burden to ensure that their land use planning laws governing spatial locations of urban functions further the Covenant's spirit and intent. Thus, for States Parties' land use planning laws to be considered legitimate, States must ensure that they comply with their obligations against other States' Parties and individual rights holders within their respective jurisdictions. States Parties can achieve this by setting realistic land use standards which reflect the urban residents' deprivations as part of their obligation of conduct. The argument's significance in this chapter is that economic, social, and cultural rights have a spatial dimension. However, the state is obligated to ensure that the spatial dimension of the rights is brought to bear in the urban space by enacting urban land use planning laws that speak to the rights' essential contents under the covenant.

CHAPTER 3: LEGITIMACY OF LAND USE PLANNING LAWS IN THE CONTEXT OF NATURAL LAW.

3. Introduction.

In order to provide context for the present chapter, it is crucial to restate the study thesis that urban land use planning laws are a legal tool for producing urban spaces. Therefore, if the urban spaces created by such laws make it difficult for low-income urban residents to enjoy their economic, social, and cultural rights (ESCR), then such laws may, *prima facie*, be deemed unjust and illegitimate. In support of this thesis, in chapter two, I have discussed the scope and nature of States parties' obligations under the international human rights law regime and highlighted what these State parties' obligations entail within the urban space.

In the present chapter, first, I present a discussion on the conceptualisation of the 'legitimacy of law' as a concept and its nexus to the concept of 'just law.' In this regard, I argue for the interchangeable use of these two concepts in interrogating the legitimacy of land use laws. Secondly, I discuss an overview of natural law theory by presenting its two major variants: traditional natural law theory and modern natural law theory. Thirdly, I critique the Thomistic natural law tradition by presenting the two major challenges to the theory, the positivist and secular challenges. Next, I present the rationale for choosing the Thomistic natural law theory as the frame of analysis in the present thesis. I hold the view that the Thomistic natural law tradition is the appropriate analytical framework because the present study is premised on human rights, and natural law was foundational to the emergence of human rights discourse. Finally, I present the scope and nature of the concept of just law within the Thomistic natural law tradition by analysing the three criteria of just law. I then dedicate the bulk of the chapter to a natural law critique of planning law using the three criteria of just law as a prism of analysis.

3.1. Conceptualising the term ‘legitimacy’ within the natural law framework.

The present study evaluates planning law to determine its legitimacy within the natural law framework. It is, therefore, important to first delineate the scope and context of the term ‘legitimacy’ and its application in the context of natural law theory. I use the terms ‘legitimacy of law’ and ‘just law’ interchangeably in developing my thesis. The basis for adopting this approach is that in Aquinas’ natural law theory, the term he employs in evaluating positive law is ‘just law.’ However, in terms of analysis, the application of Aquinas’ three criteria of just law leads to the determination of whether a particular law is morally acceptable. The state of a law being acceptable or not acceptable in its target society is what, in the present chapter, is referred to as the ‘legitimacy of law.’ Alternatively, the analysis of the three criteria of just law leads to a finding of whether a law can be acceptable because of its beneficial character or it can be acceptable because citizens are afraid of sanctions that the State employs to enforce compliance. The acceptability of a law based on whether it is just or unjust defines its legitimacy. In view of the foregoing, I make the point that a law accepted solely for fear of State sanctions associated with violations, even where it is unjust, is illegitimate law. Therefore, the interchangeable usage of the terms ‘just law’ and ‘legitimacy of law’ is justified.

The term ‘legitimacy’ is etymologically derived from the Latin word “*ligitimus*” (lawful) as derived from *lex* (law).²³⁷ Thus, legal legitimacy may be defined as a ‘property of an action, rule, actor, or system which signifies a legal obligation to submit to or support that action or system.’²³⁸ Most importantly, to determine the legitimacy of law, there is a need to establish a ground for the binding force of law independent of coercive power imposed for non-compliance.²³⁹ This view is consistent with the natural law perspective, which holds that the rule of law has binding force if it meets the three criteria of just law.²⁴⁰ Legitimacy, or belief in the existence of a

²³⁷ C.A. Thomas *The Concept of Legitimacy and international Law* (2013) LSE, Society and Economy Working papers, 12/2013.

²³⁸ Ibid.

²³⁹ H.L.A. Hart *The Concept of Law* (1961). Hart identifies three grounds for the inadequacy of a coercive theory of law:

²⁴⁰ Brendan F. Brown ‘Thomas Aquinas Summa Theologica, the Treatise on Law, Questions 90-97 Inclusive’ (1952)1(2) *DePaul Law Review*.

legitimate order, entails ‘the prestige of being considered binding’ and has the consequence that those who accept the legitimacy of their laws will treat them as valid and just.²⁴¹

The concept of the legitimacy of law in the context of the present study is better understood by analysing the natural law theory proposed by Thomas Aquinas, also known as the Thomistic view.²⁴² Firstly, from a Thomistic perspective, a law is defined as ‘an ordinance of reason for the common good made by him who has care of the community and promulgated.’²⁴³ Thomistic scholars, therefore, argue that in light of natural law principles, laws framed by men are either just or unjust.²⁴⁴ It is contended that a law is not law merely because it is decreed by a sovereign²⁴⁵ or by the legislator's will.²⁴⁶ Thomism, therefore, holds that a law is a law if it meets the criteria for a ‘higher law.’ For example, a ‘law’ will be ‘law’ to its fullest sense if it meets the three criteria for a higher law: it should be for the common good, not impose unfair burdens on citizens, and not have been enacted without authority.²⁴⁷

The present study utilizes natural law theory to assess the extent to which enacted laws serve the needs of the community they seek to bind, do not exceed authority, and impose fair burdens on citizens. This approach is grounded in the fact that land use planning laws which are the subject of the present study, constitute positive law whose legitimacy ought to be assessed using the three enumerated criteria of just law. In the following sections, I discuss the overall framework of natural law and how legitimacy is determined based on the three criteria of just law.

²⁴¹ Brown op cit note 242.

²⁴² Thomas Aquinas: *Summa Theologica*, The Treatise on Law, Questions 90-97 Inclusive; Brown op cit note 242.

²⁴³ *Summa Theologia* on Law, Question 94, Article 4 para F; Ibid.; Cf. Hobbes, T. ‘Leviathan: Parts One and Two’ (1958).

²⁴⁴ Aquinas op cit note 244 Questions 90-97 inclusive; Brown op cit note 242; Finnis, John, "Natural Law Theories", *The Stanford Encyclopedia of Philosophy* (Summer 2020 Edition), Edward N. Zalta (ed.) available at <https://plato.stanford.edu/archives/sum2020/entries/natural-law-theories/> accessed 5 September 2021.

²⁴⁵ Ibid.

²⁴⁶ Ibid; J. Budziszewski, *Commentary on Treatise on Law* (2014).

²⁴⁷ Dimmock, Mark ; Fisher, Andrew. *Chapter 4. Aquinas's Natural Law Theory* In: *Ethics for A-Level: For AQA Philosophy and OCR Religious Studies* [online] 2017 available at <http://books.openedition.org/obp/4422> ; accessed on Accessed 4 September 2021; Aquinas op cit note 244 Questions 90-97.

3.2. An overview of natural law theory.

Conceptually, Thomistic natural law relates to a system of law predicated on close observation of human nature and anchored on values intrinsic to human beings, which can be deduced and applied independently of the law enacted by the State or society.²⁴⁸ According to this theory, all people have inherent rights conferred not through legislative enactment but by God, nature, or reason.²⁴⁹ Although I refer to natural law theory, in practice, there are several variants and perspectives whose views are characterised as natural law.²⁵⁰ To give perspective and context to the present discussion, I will consider the two broad categories of natural law theory in turn: traditional natural law theory and modern natural law theory.²⁵¹

3.2.1. Traditional natural law.

Traditional natural law theory is mainly associated with St Thomas Aquinas,²⁵² Hugo Grotius, Cicero, Pufendorf, and Finnis, among others.²⁵³ Traditional natural law theory presents a premise for the existence of a ‘higher law.’ In addition, traditional natural law theory sheds light on what consequences must follow and the response subjects should offer in situations where positive law conflicts with the higher law.²⁵⁴ The theory argues that there are standards against which positive or enacted law is judged, known as the ‘higher law,’ which is derived from divine evaluation, religious texts, and a careful study of human nature or consideration of nature.²⁵⁵ The traditional natural law theory attempts to guide citizens when the positive law contradicts the higher law.²⁵⁶ Traditional natural law holds that the relationship between natural law and legal precepts is fundamental for applying natural law principles to a given system.²⁵⁷

²⁴⁸ Finnis on cit note 246.

²⁴⁹ Kelsen Hans *General theory of law and State* (2017) 392.

²⁵⁰ See, e.g. Brian Bix ‘Natural law theory’ ch 13 In: Dennis Patterson *A companion to philosophy of law and legal theory* (2010) 211-215.

²⁵¹ Ibid.

²⁵² The variant of natural law as propounded by St Thomas Aquinas is also called ‘thomism’ or ‘thomist(ic) view/perspective’.

²⁵³ Bix op cit note 252 at 211-215. Cf. Denise Meyerson *Understanding Jurisprudence* (2007).

²⁵⁴ Bix op cite note 252 at 211.

²⁵⁵ Ibid at 211.

²⁵⁶ Ibid.

²⁵⁷ Luis Cortes *The Disfigured Face: Traditional Natural Law and its Encounter with modernity* (2008) xi.

The best-known ancient formulation of the natural law position was offered by Cicero, who characterised it as ‘the right reason in agreement with nature.’²⁵⁸ He argued that natural law is of universal application, unchanging and everlasting. Cicero contended that ‘natural law does not lay its commands or prohibitions upon good men in vain.’²⁵⁹ This formulation implies that natural law does not restrain human conduct, which benefits humanity.²⁶⁰ Cicero’s position on natural law fortifies the position that natural law derives its principles from nature and is universal and unchanging. However, there is no consensus as to whether the source of natural law is God, nature, or reason among natural law theorists.²⁶¹ Thus, even within the traditional natural law approach itself, there are variations. For instance, on the one hand, Thomas Aquinas contends that genuine or just positive law is derived from nature and God. He argues that a just law is consistent with natural law requirements as ordained by God.

On the other hand, traditional natural law theorists Gregory Rimini and Hugo Grotius argue that natural law does not require the existence of God for its validity.²⁶² Rimini and Grotius take a secular position and contend that natural or positive law complies with the requirements of reason ‘rather than divine command, purpose, will or wisdom.’²⁶³ According to this view, positive law is genuine or just if enacted in compliance with the laws of nature as discerned by human reason. Human reason, in this sense, denotes human thought premised on empirical evidence and logic rather than emotion.²⁶⁴ Impliedly, Gregory Rimini and Hugo Grotius suggest that Aquinas’ reliance on divine command, purpose, will, or wisdom in his natural law postulation is not a proper basis for determining whether a positive law is genuine or just because it is not premised on evidence and logic.

²⁵⁸ Cicero, 1928, *Republic* III.xxii.33, at 211). Cf. Hobbes, 1958 ch 13 at 109; Also see Nicola-Ann Hardwick *How radically did Hobbes depart from the natural law tradition?* (2011) < <https://www.e-ir.info/pdf/7110>>.

²⁵⁹ Ibid.

²⁶⁰ Ibid.

²⁶¹ E.g. Bix op cit note 252 Cf. the views of Hugo Grotius (1925) and Thomas Aquinas at 211-215.

²⁶¹ See Ibid at 211.

²⁶² See e.g. Finnis *J Natural Law and Natural Rights* (1980) 54.; Bix Ibid at 215. Cf. Grotius, H. 1925. *De Jure Belli ac Pacis Libri Tres*, tr. F. Kelsen.

²⁶³ See e.g. Finnis op cit note 264 at 54.; Bix Ibid at 215. Cf Grotius Ibid.

²⁶⁴ Mercier Hugo and Sperber Dan *The Enigma of reason* (2017) 2.

The variations notwithstanding, the analysis adopted in the present study follows the Thomistic view. Thomism places the issue of ‘just law’ at the centre of any inquiry about the validity and legitimacy of positive law, which provides proper criteria for the analysis. Against this background, the issue of just law is discussed in more detail later in the chapter.

3.2.2. Modern natural law.

The other variant of the natural law approach may be labeled as modern natural law tradition in general because it also embodies a variety of perspectives within it.²⁶⁵ Modern natural law tradition arose as a response to legal positivism and how positivists portrayed natural law theory.²⁶⁶ Modern natural law theory is best understood by its contrast to legal positivism as opposed to its similarity to the traditional natural law theory of Aquinas, Hugo Grotius, Cicero, Pufendorf, and Finnis.²⁶⁷ The origin of modern natural law is attributed to the Hart-Fuller debate.²⁶⁸ The Hart-Fuller emerged from an academic exchange between Lon Fuller and HLA Hart, published in the Harvard Law Review in 1958 on morality and law.²⁶⁹ Hart believed that it is unnecessary that laws must satisfy specific morality demands. He argues that the existence or validity of the law cannot be measured by its merits or demerits.

In his view, a law exists regardless of whether society likes or dislikes it.²⁷⁰ Laws do not cease to exist based on moral criticism.²⁷¹ In response to Hart’s propositions, Fuller argues that legal procedures are derived from norms of justice with a moral dimension. He argues that procedures embodied in a legal system are morally crucial

²⁶⁵ See e.g. Bix op cit note 252 at 218-224. Cf. Lon Fuller argues that a valid law must pass an internal morality test. His argument is premised on the process through which a law must go through rather than its moral content. Ronald Dworkin on the other hand argues that the validity of law is dependent on the ability for judges to decide cases on the basis of moral propositions grounded on past official acts such as statutes, judicial decisions or constitutions.

²⁶⁶ Ibid at 218.

²⁶⁷ Ibid.

²⁶⁸ Fuller LL ‘Positivism and Fidelity to Law – A Response to Professor Hart’.(1958) 71*Harvard Law Review* 630–72 . Cf. Hart , H. L. A. ‘Positivism and the Separation of Law and Morals’.(1958)71 *Harvard Law Review* 593–629 .

²⁶⁹²⁶⁹ Ibid.

²⁷⁰ Sonali Banerjee ‘The Relevance of the Hart-Fuller debate relating to law and morality-A critical analysis (2017) 4(2) *International Journal of Law and Legal Jurisprudence Studies* 122-133.

²⁷¹ Ibid.

in determining whether a set of rules count as a legal system.²⁷² In his view, for a law to be called law in a true sense, it must pass a moral function test. Where rules do not conform to the moral function test, they do not count as law.²⁷³ Likewise, the modern natural law approach to the analysis of positive law holds that moral evaluation of some sort is required in describing law in general, particular legal systems, or the validity of individual norms, laws, or rules.²⁷⁴ For example, Lon Fuller holds the view that a valid law ought to meet the internal morality test, which has eight parameters.²⁷⁵ By internal morality of law, Fuller emphasised the ability of law to comply with a set process instead of its moral content.

On the other hand, Dworkin argues that judges are enjoined to apply legal principles based on moral propositions grounded on past official acts such as statutes, judicial decisions, and constitutions in deciding cases.²⁷⁶ He believes that when judges are confronted with several theories for the resolution of a case, they are obliged to choose the theory that results in the best moral outcome and makes the law the best it can be.²⁷⁷ In this sense, both Fuller and Dworkin are among modern natural law theorists whose views are consistent with the natural law tradition but not of a similar perspective to the traditional natural law theory of Aquinas, Cicero, Grotius, Pufendorf, and Finnis. Therefore, the modern natural law theory is a response to legal positivism, which emphasises the separation of law and morality. In other words, modern natural law theory argues that it is impossible to properly understand or describe a positive law without conducting a moral evaluation of the positive law within a particular jurisdiction. The moral evaluation of law provides a criterion for determining whether a particular system of rules is properly constructed and succeeds

²⁷² Banerjee op cit note 273 at 122-133.

²⁷³ Ibid. Fuller op cit note 270 at 630-72.

²⁷⁴ Bix op cite note 252 at 218.

²⁷⁵ See e.g. Ibid at 219. These parameters are that: laws should be general; laws should be promulgated that citizens might know the standards to which they are held; retrospective rulemaking and application should be minimised; laws should be understandable; laws should not be contradictory; laws should not require conduct beyond the abilities of those affected; laws should remain relatively constant through time and there should be congruence between the laws as announced and their actual administration. Also See Fuller LL. *The Morality of Law* (1969) rev ed. 33-91.

²⁷⁶ Ibid.

²⁷⁷ Ibid at at 222.

in effectively guiding behaviour.²⁷⁸ Where a system of rules is so poorly constructed that they cannot guide behaviour, the citizens or critics are justified in withholding the label 'law' from them. It is against this premise that the modern natural approach, like the traditional law approach, rejects Hart's position, which asserts that the validity of law is not measured by its merits, demerits, or moral praiseworthiness.

3.3. Critique of the Thomistic natural law theory.

Having presented an overview of the natural law theory, I now focus on the criticisms which have been levelled against the Thomistic view of natural law. There is little doubt that the Thomistic natural law theory has been debated for ages. Through these debates, several weaknesses of the theory have been highlighted. The Thomistic natural law critique can loosely be categorised as positivist and secular challenges to natural law theory. In this section, I discuss these criticisms and justification for adopting the Thomistic perspective of natural law theory despite its weaknesses.

3.3.1. The positivist challenge.

The positivist challenge to natural law is grounded in the belief that law should be separated from morality.²⁷⁹ This view takes issues with the reliance of the Thomistic natural law theory on human nature to determine what just law is.²⁸⁰ Theorists of positivistic persuasion argue that it is problematic for a law to rely on human nature because human nature is interpreted differently. They hold that because human nature is interpreted differently, natural law is unreliable, given its assertion that the moral law of human nature is known by genuine human reason.²⁸¹ In their view, laws are made by man to organise society, and there is no necessary connection between law and morality.²⁸²

Thomistic natural law theory has been criticized for its difficulty in determining human nature's essential or moral praiseworthy traits. For example, traditional Thomistic natural law theory has picked out positive traits, such as the desire to know

²⁷⁸ Bix op cit note 252 at 219.

²⁷⁹ See generally Kelsen Hans *Pure Theory of Law Translated by Knight* (1960) (1934); Robert Afamefuna Igwebudu & Ignatius Nnaemeka Onwuatuegwu 'Separation Thesis of Law and Morality' in H.L.A. Hart: *An Appraisal of H. L. A. Hart's Concept of Law* (2020) 3(8) *EAS J Humanit Cult Stud* 349-356 at 1.

²⁸⁰ See e.g. Murphy M Stanford Encyclopaedia of Philosophy [online], *The Natural Law Tradition in Ethics* (2008) Available: <http://plato.stanford.edu/entries/natural-law-ethics/> Accessed: 06 August 2022.

²⁸¹ Stephen O. Sullivan and Phillip A Pecorino (2002) *Ethics* Online Textbook.

²⁸² Igwebudu & Onwuatuegwu op cit note 281 at 2.

the truth, choose good, and avoid evil.²⁸³ However, positivists such as Hobbes have found human beings essentially selfish. Hobbes contends that ‘all that men have in common is the ‘continual fear and danger of violent death’ and the condition of ‘war of every man against every man.’²⁸⁴ He argues that ‘as pre-mature death is less likely in times of peace, men are willing to agree to form a peaceful society, as this is in every man’s self-interest.’²⁸⁵ The ‘passions that incline men to peace are fear of death, the desire of such things as are necessary to commodious living, and a hope by their industry to obtain them.’²⁸⁶ Hobbes concludes that it is questionable that behaviours in accordance with human nature are morally right and behaviours not in harmony with human nature are morally wrong, given that human conduct is motivated by selfish interests and not necessarily the desire to do good.²⁸⁷ Thus, even if it can be accepted that human beings have certain natural propensities, are natural law theorists justified in claiming that those propensities or tendencies should be developed or encouraged? In other words, what justification do natural law apologists have for only accepting positive human behaviour and rejecting negative behaviours as unnatural? Yet they are both human behaviours endowed by nature. On what grounds are natural law theorists justified for the choice of good human tendencies only and not bad tendencies, yet they are both natural human propensities?²⁸⁸ In this regard, positivists disagree with the foundational reasoning in Thomistic natural law.

It has been argued that the intrinsic nature of humans as it pertains to establishing laws may not be the same for animals, which presents contradictions within the natural law theory itself. The reasoning behind this criticism is that human beings and animals are a product of nature. Therefore if natural law is inspired by nature, then a similar behavioural pattern should have been observable in humans and animals, which is not the case in reality. According to this view, human behaviour may rely solely on the environment that one is exposed to, including social class, education, and upbringing, which casts doubt that human behaviours are purely based on natural human

²⁸³ Igwebudu & Onwuatiegwu op cit note 281 at 2. Cf. Hobbes op cit note 245.

²⁸⁴ Hobbes op cit note 260 at 107-108.

²⁸⁵ Hampsher-Monk, I. *A History of Modern Political Thought: Major Political Thinkers from Hobbes to Marx* (1992) 30.; Also see Hardwick op cit note 260.

²⁸⁶ Hobbes op cit note 260 at 109; Also see Hardwick Ibid.

²⁸⁷ Ibid.

²⁸⁸ Sullivan & Pecorino op cit note 282.

instincts.²⁸⁹ Positivists are, therefore, in significant doubt as to whether the foundational basis of natural law theory is valid and reliable.

3.3.2. The secular challenge.

The secular opposition to natural law theory questions the reliance by Thomistic natural law theorists on God as the reason why nature has the order it has. Theorists like Aristotle, Hobbes, and Hugo do not believe this order was divinely inspired.²⁹⁰ They question whether the alleged natural moral order requires that everyone should believe that there is God who has produced it. The secular position on natural law is consistent with the evolutionary theory, which challenges much of the basis of natural law, thinking that there is a natural moral order. In terms of the evolutionary theory, species have developed the way they have out of survival needs, not divine inspiration.²⁹¹ These views render the natural law theory of dubious standing in analytical jurisprudence. However, despite these challenges, natural law has emerged as the foundation of natural rights and is foundational to international human rights law, as discussed in *section 3.4* of this chapter.²⁹² Thus, although legal scholars of secular orientation challenge the foundational premise in Thomism, natural law theory remains at the core of the origin of human rights discourse. It is essential to acknowledge that the fundamental reasoning in natural law is the thinking that positive law should be consistent with moral norms. In this view, both secular natural law theorists and divinely inspired theorists agree in principle.²⁹³ Their only difference is the weight attached to the belief in God when assessing the theory's veracity. From this premise, it is clear that regardless of the divide one ascribes to, natural law theory remains fundamental and foundational to international human rights law upon which the present thesis is derived.²⁹⁴ In the next section, I extend this argument to make a case for the choice of the Thomistic natural law perspective in the present study.

²⁸⁹ See generally Sullivan & Pecorino op cit note 282.

²⁹⁰ Ibid.; Hobbes op cit note 260 at 109; Hardwick op cit note 260.

²⁹¹ See generally Charles Darwin *On the origin of species* (1859)
<https://www.vliz.be/docs/Zeecijfers/Origin_of_Species.pdf.

²⁹² See Bix op cit note 252 at 215.

²⁹³ Ibid at 215.

²⁹⁴ Ibid at 215.

3.4. Justification for adopting Thomistic natural law theory as the frame of analysis.

Although natural law theory has several shortfalls, it remains a valuable framework for conceptualising human rights-based analysis of the utility of laws in an unequal society. In this section, I provide the rationale for choosing natural law theory as a framework for analysing the legitimacy of land use planning laws governing the spatial location of urban functions.

One principal objection against the theory is whether it is derived from God, nature, or reason. Secular natural law theorists are the architects of this criticism of Thomistic natural law theory.²⁹⁵ However, both Thomists and secular theorists agree that any positive law should be consistent with natural law to be deemed just and legitimate. They both argue that any human-made law must comply with natural law to be just. The only difference in their perspectives is that secular natural law theorists do not believe that the validity of natural law depends on God but on reason.

On the other hand, Thomists believe that the validity of natural law is divinely inspired.²⁹⁶ Thus, the requirement that human-made law be consistent with natural law is common between Thomistic natural law apologists and its critics within the traditional natural law divide.²⁹⁷ Given that leading natural law theorists agree on the fundamental utility of the theory, the application of Thomistic natural law in the present study is therefore merited despite the disagreements on the source of the theory's validity.²⁹⁸

Hobbes argues that the human desire for good over evil is motivated by selfish interests.²⁹⁹ He thus contends that the good deeds of human beings should not be attributed to nature, as proposed by Thomism. It is important to note that the merits of the utility of Thomistic natural law theory do not hinge on the reasons which motivate

²⁹⁵ See e.g. Hobbes op cit note 260 at 109; Hardwick op cit note 260.

²⁹⁶ Denise Meyerson 'Understanding jurisprudence' (2007) 36.

²⁹⁷ Zbigniew Orbik *Human Rights in the light of the concept of natural law* (2019), Silesian University of Technology Publishing House, Scientific papers of Silesian University of Technology Organisation and Management Series No.140 at 276.

²⁹⁸ Aquinas, (1993), Qu. 96, art. 4, corpus at 324–26; Cf. Bix op cit note 252.

²⁹⁹ Hobbes op cit note 260 at 107–108.

human beings in their conduct. The Thomistic formulation of the test for analysing the utility of positive law is anchored on its three criteria for determining whether a human-made law is just or unjust, as discussed in *section 3.5* of the present chapter. In any case, even the definition of natural law offered by Hobbes supports the notion that positive law ought to comply with certain precepts to be legitimate. Hobbes defines natural law³⁰⁰ as ‘a precept or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life or takes away the means of preserving the same and to omit that by which he thinks it may best be preserved.’³⁰¹ The criticism that the theory may not be derived from divine providence or that human behaviour is motivated by selfish interest relates to the means, reasoning, or methodology of arriving at the natural law theory itself and not its utility. Regarding the utility of the theory on the moral evaluation of positive law, Thomism is the proper frame of analysis despite the criticism associated with the methodological reasoning behind the theory because it offers proper criteria for analysing positive law, as discussed in *section 3.5* of the present chapter.

Most importantly, the present study is substantially anchored on international human rights law, whose origin is derived from natural law theory.³⁰² The nexus between natural law and natural rights is foundational in the evolution of human rights discourse and key foundational domestic and international human rights instruments.³⁰³ For instance, key foundational human rights instruments such as The Act of Abjuration of the Dutch Declaration of Independence (1581), The Declaration of Independence (1776) of the United States of America, The Declaration of the Rights of Man and of the Citizen (1789) of France, The Universal Declaration of Human Rights (1948) of the United Nations and The European Convention on Human Rights (1953) of the Council of Europe are all founded on natural law theory in the main.³⁰⁴ The doctrine of natural rights justified the American and French revolutions, whose iconic expression was the United States Declaration of Independence of

³⁰⁰ Hobbes calls ‘natural law’ as ‘law of nature’.

³⁰¹ Hobbes op cit note 245.

³⁰² E.g. see Bix op cit note 252 at 215.

³⁰³ See e.g. Article 1 of the UDHR; United States Declaration of Independence of 1776; The Declaration of the Rights of Man and of the Citizen (1789) of France.

³⁰⁴ See e.g. Bix op cit note 252 at 215; Meyerson op cit note 298 at 36.

1776.³⁰⁵ In particular, the declaration proclaimed a statement grounded in natural law as follows:

‘We hold these truths to be self evident that all men are created equal, that they are endowed by their Creator with certain unalienable rights that among these are life, liberty, and pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it’³⁰⁶

The wording of the United States Declaration of Independence of 1776 demonstrates that natural rights, which are also referred to as ‘fundamental rights,’ ‘basic rights,’ ‘birth rights,’ or ‘human rights,’ are founded in natural law.³⁰⁷ Moreover, the conception in the nomenclature of rights is generic and refers to civil rights, civil liberties, and economic, social, and cultural rights.³⁰⁸ This position is also borne out in article 1 of the UDHR, which provides that ‘all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.’³⁰⁹

Orbik bolsters the position that human rights are founded on natural law. He holds that the concept of human rights is a twentieth-century name for what has been earlier called ‘natural rights of man.’³¹⁰ Orbik’s position supports the Greek cosmopolitan philosophy, which views equality among all men and natural law as universal.³¹¹ It is important to note that equality among all men is at the core of human rights paradigms, which signify the precedential value of natural law in the evolution of human rights.³¹² Moreover, Stoic philosophers advocated that human beings are created equal and that all inequalities among human beings constitute a violation of

³⁰⁵ Meyerson op cit note 298 at 36.

³⁰⁶ Ibid at 36.

³⁰⁷ Orbik op cit note 299 at 276.

³⁰⁸ Ibid at 276.

³⁰⁹ Orbik op cit note 299 at 277.

³¹⁰ Ibid at 277.

³¹¹ Ibid at 277.

³¹² See e.g. UDHR op cit note 305 See preamble and article 1.; Preamble to the United Nations Charter 1945.

natural law.³¹³ The Stoic's position further fortifies the view that natural law is foundational to human rights as we know them today. The foundational nature of natural law theory in the evolution of natural rights to human rights is also exemplified by the Magna Carta of 1215, the Petition of Rights of 1628, the Bill of Rights of 1688, the American Bill of Rights 1791 and the French declaration of the Right of Men of 1789.³¹⁴ This context demonstrates the central nature of natural law theory in the evolution of human rights discourse.

During the Renaissance period and beyond, discussions about natural law were tied in with assertions about natural law as the basis of the argument for natural rights (later referred to as human rights).³¹⁵ Hugo Grotius³¹⁶ and Samuel Putendorf were prominent theorists whose writings on natural law significantly influenced international human rights law development.³¹⁷ Thus, despite the shortfalls of the natural law theory, I have adopted the natural law reasoning in problematising the legitimacy of land use planning law in the urban space. This is particularly relevant because all the modern human rights instruments on domestic and international planes post-UDHR are a mere restatement of the rights in the UDHR and UN Charter. The fact that natural law forms the foundation of all human rights justifies the adoption of natural law theory in the present study, which is premised on the compliance of land use planning laws with the three precepts of just law espoused in Thomistic natural law theory.

3.5. The scope and nature of the concept of just law in Thomist natural law tradition.
In the present chapter, I have so far presented an overview of the natural law theory and its variants, a critique of the theory, and a justification for its adoption as a frame of analysis. In this section, I focus on the concept of just law as formulated in the

³¹³ Dhand H 'Teaching Human rights: A Handbook for teacher education' (2002) Bhopal: Authors Press.

³¹⁴ See e.g. Orbik op cit 299 at 277. Cf. Richard. H. Helmholtz, "Magna Carta and the Law of Nature," (2016) 62 *Loyola Law Review* 1.

³¹⁵ Bix op cit note 252 at 215.

³¹⁶ Grotius argued that the need for self-preservation in natural law justifies the desire to defend one's life and acquire possessions. The desire for human fellowship justifies the need to refrain from inflicting injury and from seizing possessions. This view is reflected in human right to life, property, and dignity, right not to be tortured and subjected to inhuman and degrading treatment in modern human rights instruments. See e.g. Andrew Blom, 'Hugo Grotius (1583-1645)' Internet Encyclopaedia of Philosophy available at <<https://iep.utm.edu/grotius/#H4>> accessed 24 September 2022.

³¹⁷ Jeremy Seth Gedder 'Natural Rights and History: Hugo Grotius's Modern Translation of Natural Rights and History: Hugo Grotius's Modern Translation of Aristotle' (2016), Assumption University: Digital Commons <<https://digitalcommons.assumption.edu/cgi/viewcontent.cgi?article=1039&context=political-science-faculty>>

Thomist traditional natural law theory. I start by presenting an overview of the scope and nature of the concept of ‘just law.’ Subsequently, I apply the criteria of just law to critique planning law in general and the codification of master planning ideologies into planning law in particular.

The Thomistic position on natural law holds that positive law should meet three criteria to qualify as a just law.³¹⁸ Thus, Thomists argue that firstly, the law must have been enacted for the common good; secondly, the lawgiver must not have exceeded his authority; thirdly, the law’s burdens on its citizens must have been imposed fairly.³¹⁹ Within the Thomistic scheme of natural law theory, a law that meets these three criteria is deemed to have met the dictates of a ‘higher law.’³²⁰ Aquinas, therefore, asserts that failure concerning any of the three criteria makes it a perversion of the law and an act of violence rather than the law because an unjust law is no law at all.³²¹

A brief expose of Aquinas's three criteria of just law is warranted because of its conceptual centrality to the question of legitimacy, which is foundational in the present study. The nexus between a just law and the concept of the legitimacy of law is that where law lacks the moral force to command obedience among those it seeks to bind, such law would be unjust and, therefore, illegitimate. Thus an analysis that leads to a finding that a particular law is unjust would invariably translate into a determination of illegitimacy within the framework of the present study. In this regard, the concept of just law is used interchangeably with the legitimacy of law. I now proceed to consider each one of these criteria in turn.

The natural law concept of ‘common good’ can be defined broadly as a state of affairs in which each individual is flourishing within a political community and a political community as a whole.³²² It has been argued that political community members stand

³¹⁸ Cf. Lon Fuller’s internal morality of law.

³¹⁹ Aquinas op cit note 300 at 324-26; Cf. Bix op cit note 252.

³²⁰ See Bix Ibid at 211.

³²¹ Aquinas op cit note 300 at 324.

³²² George Duke ‘The common good’ In: G Duke & RP George(eds) *The Cambridge companion to natural jurisprudence* (2017) 369-396 at 376.

in a social relationship. This relationship also requires them to think and act in ways that embody a particular form of mutual concern.³²³ On the other hand, Waheed observes that the concept of the 'common good' relates to facilities that members of a community provide to all members to fulfil a relational obligation they all have to care for each other and for specific interests they have in common.³²⁴

In the present study, the common good include facilities such as the road system, waste management, police protection, public school, clean water and air, the courts and the judicial system, public transportation, civil liberties, public safety, and other services whose delivery is for the public benefit among others.³²⁵ Within the context of the urban space, urban services are within the ambit of common good conceptualisation. Urban services are a common good because they constitute facilities that public functionaries provide on behalf of the citizens to benefit the urban community as a whole. In this context, urban services serve relational obligations.³²⁶ Therefore, concerning natural law theory, for a law to be just, it has to meet the criteria of the common good in that the law should facilitate the provision of public goods and services for the benefit of citizens.³²⁷ The law should not hinder the delivery of and access to public goods and services by the general citizenry within a jurisdiction. I, therefore, take the view that for a law concerned with regulating the urban space to meet the criteria of the common good, it has to be enacted to facilitate delivery and access to common good services in compliance with a political community's relational obligation.³²⁸ Arguably, this natural law analysis entails that an unjust law may also be illegitimate for lacking moral force to bind the target citizens in society. In this instance, a law would lack moral force if it is a stumbling block for most individuals in a political community to access common good services.

A critical feature of the criteria of the common good in the just law/legitimacy discourse within the urban space is the notion of moral norms in the urban space. For

³²³ Hussain, Waheed, "The Common Good", *The Stanford Encyclopedia of Philosophy* (Spring 2018 Edition), Edward N. Zalta (ed.), < <https://plato.stanford.edu/archives/spr2018/entries/common-good/> >.

³²⁴ Ibid.

³²⁵ Ibid. Cf. Duke op cit note 324 at 376.

³²⁶ Waheed op cit note 325.

³²⁷ Aquinas op cit note 300 at 324-6

³²⁸ Waheed op cit note 325.

instance, Tuori argues that the functioning of legal order and its efficiency requires its empirical legitimacy, its acceptance, and in turn, requires of law a substantial correspondence to morals and concepts prevailing in a society.³²⁹ Therefore, a synopsis of moral norms in the urban space is of essence to situate the natural law theory within the urban space.

Moral norms within the urban space.

Moral norms are standards by which social behaviour is evaluated. According to Bogdanova, moral norms are an element of social consciousness. They embody a model and reference point for behaviour. They regulate a person's relations with society and its members and monitor individual behaviour.³³⁰ On the other hand, Dubreuil and Gregoire observe that moral norms are practices that are followed unconditionally upon emotional reactions.³³¹ The obligatory or prohibitive force of moral norms is based on the influence of social thought and existing habits and traditions.³³²

Some norms are statistical regularities one notices in society.³³³ In the context of urban spaces of the Global South, the tone set by laws, regulations, and State policies towards social facts in the urban spaces is of precedential value to the emergence and development of moral norms. In this regard, I hold the view that the land use regulatory tone set in the legal framework is indicative of the nature of acceptable urban moral norms. It influences social thought, existing habits, and traditions in the urban space. The reason is that these laws, regulations, and State policies set the standards for acceptable and repugnant conduct in the context of existing social facts. Social facts in the urban spaces of the Global South include residential zones built using low-cost construction materials, living in marginal areas, the majority living in shacks, living close to industrial zones, living in zones without piped water, with poor

³²⁹ K. Tuori, 'Discourse Ethics and the Legitimacy of law' (1989) 2 *Ratio Juris*, 1989) 125-143.

³³⁰ O.S. Bogdanova 'The role of moral norms in the behaviour of young schoolchildren' (1974) 17(1) *Soviet Education* 22-38 at 22.

³³¹ Benoit Dubreuil and Jean-Francois Gregoire 'Are moral norms distinct from social norms? A critical assessment of Jon Elster and Cristina Bicchieri. (2013) 75 *Theory Decis* 137-152.

³³² Bogdanova op cit note 332 at 22.

³³³ See e.g. <<https://ethics-of-ai.mooc.fi/chapter-1/3-values-and-norms>>; Cf Dubreuil & Gregoire op cit note 333 at 139-142.

sanitation, without electricity and without complying with land use regulations.³³⁴ The question of urban moral norms arises when one evaluates the statistical regularities of the State's attitude towards the above-enumerated social facts. In most jurisdictions, the law harshly treats residents living in the enumerated conditions on the pretext of serving their interests, ensuring a high standard of urban living, and for the general good of citizens. At face value, such a legislative scheme would be justified as morally acceptable for appearing to safeguard the health interests, the safety of the public, and desirable urban living. However, urban living conditions in the Global South are far much complex, rendering applying universal standards of land use laws inappropriate³³⁵ and almost morally objectionable. Urban living is complex in the Global South because of the predominant nature of the informal sector, whose income is unpredictable.³³⁶ One characteristic of good law within the natural law tradition is that it should not require conduct beyond the abilities of those it targets.³³⁷ The socioeconomic conditions in the Global South require pragmatism in the process of enacting land use laws. However, most land use laws in the Global South demand standards that most residents cannot meet because of their low-income earning capacities.³³⁸ I take this position cognisant that the very same laws considered unjust in the Global South would pass for just laws in the urban spaces of the Global North on account of citizens' ability to comply with them owing to better socioeconomic conditions.

I argue that to understand the evolution of norms in the urban space, one must distinguish between norms set at an individual level and those set at the State level. At

³³⁴ See generally Mabogunje op cit note 4; Awuah op cit note 7 Geoffrey Payne 'Lowering the ladder: Regulatory frameworks for sustainable development'(2001)11(2-3) *Development in Practice* 308-318 at 309.; Majale, M., *Towards Pro-poor Regulatory Guidelines for Urban Upgrading*. In: *A Review of Papers presented at the International Workshop on Regulatory Guidelines for Urban Upgrading*, Held at Bourton-on-Dunsmore, May 17-18 2001.

³³⁵ See generally Mabogunje op cit note 4; Awuah Ibid; Payne Ibid at 309; Majale Ibid.

³³⁶ See generally Mabogunje Ibid at 121-130.

³³⁷ See e.g. Bix op cit note 252 at 219. See Lon Fuller's requirement No. 6 of good law.

³³⁸ Laws ought to be grounded in reality and not on fanciful aspirations beyond a State's economic means. The fact that the laws applicable in the urban spaces of the Global South have largely resulted in the proliferation of informal settlement on a grand scale, is an indicator that they are not grounded in reality hence lacking pragmatism. The emergency of informal settlement cannot merely be attributed to the challenges of implementation and enforcement, when the laws themselves lack legitimacy. The prevailing laws should not have been enacted in the first place as evidenced by large scale non-compliance through the colonisation of the urban space by informal settlements.

an individual level, these norms may be determined by personal experiences, conscience, and observation of individual attitudes toward social facts.³³⁹ However, at the State level, these norms are determined by assessing the tone projected by laws, regulations, and policies governing social facts. Ultimately laws, regulations, and policies transform into standards that become reference benchmarks for morally acceptable human conduct and repugnant ones within a defined society. Laws and regulations influence social thought and existing habits and traditions at an individual level.³⁴⁰ In the Global South, urban living is dominated by suboptimal living conditions, such as living in squatter settlements and conditions that do not generally meet the criteria for adequate housing.³⁴¹ However, the tone set by the State through legislation and policies on urban land use project the impression that citizens living in such conditions are undesirables and criminals.³⁴² It is at this stage that laws raise moral questions.

Ordinarily, legislation and policy demonstrating abhorrence for living in squatter settlements, marginal zones, and disaster-prone zones should be applauded as morally upright. However, the nature of legislation governing urban functions in the Global South is morally repugnant to good conscious within the Thomist natural law tradition for failing to serve the common good and for what Lon Fuller calls ‘demanding conduct beyond the abilities of those affected.’³⁴³ Of what value is a law aimed at saving lives by prohibiting settlements in disaster-prone areas and living in inadequate housing if it renders the very people it intends to save destitute, homeless, criminals, vagrants, and outcasts within urban spaces? Therefore, I take the view that the State’s desire to protect its citizens using stringent laws is morally dubious and illegitimate if the adopted legislative mechanism fails to serve the citizenry’s interest but only serves an alternative imagined reality.

³³⁹ Bogdanova op cit note 332 at 22.

³⁴⁰ Ibid at 22.

³⁴¹ See CESCR General Comment No. 4 op cit note 51 para 8.

³⁴² See e.g. Section 185 of the Penal Code, Cap 7.01 of the Laws of Malawi.; Local Government (Blantyre City Council) (Peddlers By-laws). Section 3 of these by-laws provides that no person shall carryout the business of a peddler within the areas specified in the first schedule of the by-laws. Section 1 and 2 of the first schedule of these by-laws delineates areas within which a Peddler’s licence is inoperative.

³⁴³ See e.g. Bix op cit note 252 at 219.

The current land use law governing the urban space in the Global South, which also shapes urban morality, is predominantly shaped by the States' visions and imagination of developing world-class cities within their respective jurisdictions. In support of this position, Gertner postulates that 'in the new more aesthetic framework, the law crafts fields of intelligibility by disseminating standardised aesthetics norms. Spaces are known to be illegal, deficient or normal, based on their outer characteristics.'³⁴⁴ This suggests that the desire to have world-class cities results in states enacting laws beyond the capabilities of those affected, contrary to Fuller's perspective of natural law.³⁴⁵ More often, this takes place at the expense of citizens' immediate survival needs in the urban space hence the emergence of slums because the alternative imagined world-class urban space is incompatible with the immediate survival needs of citizens.

It is, therefore, morally reprehensible if a State's regulatory regime does not comport to an everyday reality and consequently leaves people destitute because it is trying to imagine an alternate reality not founded on contextual pragmatism. Appearing to protect people on paper through black letter law is far worse without providing them with practical alternatives to their prevailing living conditions. In terms of natural law, any positive law that renders most people destitute, homeless, and criminals is morally repugnant, unjust, and illegitimate regardless of its good intentions. Such a law would not have been enacted for the common good and, therefore, unjust in the Thomistic natural law theory.

According to the Thomistic natural law tradition, for a law to be just, it must not have been enacted in excess of the lawgiver's authority.³⁴⁶ This view is consistent with social contract theory which holds that legitimacy and moral right to use state power is justified and lawful only when consented to by the people over whom that political power is exercised.³⁴⁷ Thus, a law enacted in excess of States parties' binding treaty

³⁴⁴ Ghertner DA. *'Rule by aesthetics: World-class city making in Delhi'*.(2010) 287.

³⁴⁵ See e.g. Bix op cit note 252 at 219.

³⁴⁶ Aquinas op cit note 300 at 324-6; Cf. Bix Ibid.

³⁴⁷ The New Jersey Centre for Civic Education, Rutgers University. 'What does "consent of the governed" mean'? available at <<https://civiced.rutgers.edu/documents/civics/middle-school-civics/civic-concepts/81-consent-of-the-governed/file>> accessed on 25 September 2022. Cf. Cassinelli CW (1959). 'The "Consent" of the Governed'(1959) 12(2) *Western Political Quarterly* 391–409 at 392.

obligations and national constitutional dictates would have been enacted in excess of authority.³⁴⁸ This position is also consistent with the consent theory of authority, which states that authority is legitimate only if subjects or citizens have consented to it.³⁴⁹ In this regard, John Locke argued that in a state of nature, no one has the right to rule over another without consent because everyone is sovereign.³⁵⁰ In modern democracies, the terms and conditions of a social contract are contained in a constitution.³⁵¹ In Malawi, for example, section 12 of the Constitution emphasises the conditions precedent to the exercise of state power by public functionaries. It is expressed in unequivocal terms as follows:

(a) all legal and political authority of the State derives from the people of Malawi and shall be exercised in accordance with this Constitution solely to serve and protect their interests;

(b) all persons responsible for the exercise of powers of State do so on trust and shall only exercise such power to the extent of their lawful authority and in accordance with their responsibilities to the people of Malawi;

(c) the authority to exercise power of State is conditional upon the sustained trust of the people of Malawi, and that trust can only be maintained through open, accountable, and transparent Government and informed democratic choice;

From the above discourse, it is clear that a constitution is the basis of a social contract between citizens and public functionaries who exercise state authority. In many democratic constitutions in Africa, the social contract principle, which provides a route for citizens' expression of consent to be governed, is contained in the preamble.³⁵² The preceding provides sufficient evidence that citizens' consent for authority to be governed is expressed through their respective national constitutions and legislative provisions on the franchise.³⁵³

³⁴⁸ Article 26 on the Vienna Convention on the Law of Treaties.

³⁴⁹ Christiano, Tom, "Authority", *The Stanford Encyclopedia of Philosophy* (Summer 2020 Edition), Edward N. Zalta (ed.), <<https://plato.stanford.edu/archives/sum2020/entries/authority/>>.

³⁵⁰ The New Jersey Centre for Civic Education op cit note 349.

³⁵¹ See e.g. Cassinelli op cit note 349 at 392.

³⁵² See e.g. The Preamble to the Constitutions of Kenya, Ghana, Zimbabwe and Zambia.

³⁵³ See e.g. section 12 of the Malawi Republic Constitution; The Preamble to the Constitution of Kenya, Ghana, Zimbabwe and Zambia. Cf. Cassinelli, op cite note 349 at 392-394.

According to John Rawls, authority is legitimate only if it acts under principles agreed to by the subjects.³⁵⁴ Rawls' view entails that where laws are enacted outside a State's parties' binding treaty obligations and constitutional dictates, such laws would have been enacted in excess of authority. Such conduct would therefore make the laws enacted by such a government unjust and thus illegitimate. The preceding position is premised on the understanding that citizens consent to be governed within the terms and conditions of the social contract as expressed through their sovereign will in their national constitutions. Moreover, the issue of consent to be governed within the natural law tradition is of considerable antiquity. Its iconic expression is in the United States Declaration of Independence of 1776.

Thomism also holds that one of the requirements for a law to be just is that the burdens it imposes on citizens should be fair.³⁵⁵ A law that imposes demanding requirements on the citizens is a pervasion of the law. It is a pervasion because it imposes obligations that citizens cannot comply with.³⁵⁶ The corollary of this view is that participants in a community or cooperative enterprise governed by the rule of law should share in both the benefits and burdens associated with the cost of submitting to the community's laws.³⁵⁷ Concurring with this view, Hart argues that 'when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to those restrictions when required, have a right to a similar submission from those who have benefited from their submissions.'³⁵⁸ Hart's view entails that a law has to ensure that the burdens on citizens should be fairly imposed so that there is equitable sharing of benefits and burdens. Therefore, a law that fails to achieve this basic tenet would be deemed unjust in terms of natural law and, thus, illegitimate for failure to command moral binding force from the citizens through its unfairness. Having discussed the Thomistic synopsis of just law, in the next section, I focus on a critique of planning law from a Thomistic natural law perspective.

³⁵⁴ See generally, Rawls, John, and *Political Liberalism* (1996).

³⁵⁵ Aquinas op cit note 300 at 324-6

³⁵⁶ See generally Bix op cit note 252.

³⁵⁷ Horton, J. 'Political Obligation (2010) 87; Moraro, P. Punishment, Fair Play and the Burdens of Citizenship (2019) 38. *Law and Philos*, 289–311.

³⁵⁸ Simmons AJ *Justification and Legitimacy: Essays on Rights and Obligations* (2001)30.

3.6. Thomistic natural law critique of land use planning law.

In this section, I argue from the perspective of Sub-Saharan Africa that the codification of master planning ideologies into planning law constitutes unjust law because it does not serve the common good; the process of codifying it into law was and is in excess of authority. In addition, it imposes unfair burdens on citizens through the zoning schemes, which contain extremely high standards that the majority cannot comply with. In general, the master planning-based law is inconsistent with Thomism, is unjust, and therefore illegitimate. It is pertinent to mention that master planning as a legal requirement³⁵⁹ and as a theory is foundational to most Sub-Saharan States' urban development approaches.³⁶⁰ State parties following these approaches enact unjust laws. The laws are unjust because they result in the emergence of informal settlements in the urban spaces, criminalise housing coping strategies, and urbanises poverty.³⁶¹ I now evaluate master planning-based law in the context of each of the three criteria of just law within the natural law framework to determine its legitimacy as an instrument for the production of urban space.

3.6.1. Failure to serve the common good.

Analysis of the master planning-based land use laws shows that it does not serve the common good. As already stated, the concept of common good relates to a state of affairs in which each individual within a political community and the political community as a whole is flourishing.³⁶² The 'common good' concept may also refer to facilities in which community members share a common interest.³⁶³ In the context of the urban space, examples of common goods include facilities collectively referred to as urban services.³⁶⁴ From a natural law angle, a master plan³⁶⁵ is not compatible with the principle of the common good. Firstly, urban planning law based on master planning is predominantly viewed as an exercise in physical design along the lines of

³⁵⁹ See part II of the British Town and Country Planning Act (TCPA) 1947. Malawi Physical Planning Act No. 17 of 2016 part IV on plans and plan making.

³⁶⁰ See generally Mabogunje op cit note 4; Awuah op cit note 7; Keeble, L. '*Principles and Practice of Town and Country Planning*', (1952); Nigel Taylor. '*Urban Planning Since 1945*' (1998).

³⁶¹ Ibid.; Penal Code op cit note 344. s 185.

³⁶² Duke op cit note 324 at 376.

³⁶³ Ibid.

³⁶⁴ Duke op cit note 324 at 376.

³⁶⁵ Taylor op cit note 362; UN-HABITAT, *Planning Sustainable Cities: Policy Directions: Global report on Human Settlements* (2009).

architectural model design.³⁶⁶ Because of this approach, the resultant planning laws do not ensure provision for and access to adequate urban social services for all. The reason is that the legal spatial parameters set in master planning-based laws are not suited to the conditions of Sub-Saharan Africa. These laws are predominantly an instrument for shaping the desired modernist physical outlook of the city at the expense of economic, social, and cultural aspects.³⁶⁷ For example, Payne observes that the building regulations for cities in the Global South are based on Western countries, making them unrealistic and unsuitable.³⁶⁸ The preceding suggests that such laws do not represent the lived experiences of the citizens and therefore lack moral binding force from a natural law perspective.

The foregoing finds support in the literature, which shows that during the formative years of planning law, town planners' prime task was producing plans such as urban plans, regional plans, and neighbourhood plans, among others, and nothing else.³⁶⁹ Urban planning literature further shows that these plans were required to be as detailed as possible to guide future development.³⁷⁰ The plans were an instrument for the precision detailing sites for particular uses.³⁷¹ In other words, a plan was required in principle to '...show the extent and form of a town/city at some specific date in future when, all being well, the plan would be realised or completed.'³⁷² The law failed to provide a clear road map for ensuring that the outcome was for the common good regarding service access. These services include road infrastructure, police protection, public schools, clean water and air, public transportation, and public safety.³⁷³

From these premises, I contend that the legal production of urban space was unjust and fraught with illegitimacy with the enactment of the British Town and Country Planning Act of 1947. Colonial administrators subsequently deployed this Act to colonial territories to support settler resource appropriation and race-based land use

³⁶⁶ Ibid.

³⁶⁷ See generally UN-HABITAT Ibid.

³⁶⁸ Payne op cit note 336 at 309.

³⁶⁹ See Keeble op cite note 362; Taylor op cit note 362.

³⁷⁰ See e.g. Ibid ch1.

³⁷¹ Ibid; Also see generally Mabogunje op cit note 4; Awuah op cit note 7.

³⁷² Ibid.

³⁷³ Waheed op cit note 325.

segregation model of spatial organisation.³⁷⁴ The law was designed to ensure the appropriation of the urban space for the benefit of white settlers to the exclusion of the majority African populace.³⁷⁵ The appropriation of the urban space for the settler elite to the exclusion of the African populace demonstrates that the land use planning legislative scheme was not designed to serve the common good hence unjust. Against this background, I argue that planning law was not meant to serve the common good right from its inception, hence being illegitimate *ab initio*.

Moreover, the literature suggests that the administrative procedures under the prevailing planning laws in developing economies are a source of delay and a means of extracting money by local bureaucrats from developers.³⁷⁶ These urban planning law challenges adversely impact the enjoyment of the Covenant's rights. It has been argued that the failure to radically amend these laws despite these glaring shortfalls is fear on the part of Sub-Saharan African leaders and the elite of losing power and control over resource allocation.³⁷⁷ Arguably, the other motivating factor behind maintaining these laws despite all the enumerated shortfalls is that it benefits the elites by eliminating competition for prime land. The current land use regulations appear neutral at face value. Still, in practical terms, it perpetuates what the CESCR in General Comment Number 20 calls indirect discrimination³⁷⁸ against low-income urban dwellers. The prevailing land use regulations thus disadvantage low-income urban residents. This is because the regulations make it impossible for low-income people to compete equally for legal access to urban space, assets, and services. Thus, the preceding clearly shows that the prevailing land use laws do not serve the common good.

³⁷⁴ See generally Mabogunje op cit note 4; Awuah op cit note 7.

³⁷⁵ See e.g. Coggin T 'Recalibrating Everyday Space: Using Section 24 of the South African Constitution to Resolve Contestation in the Urban and Spatial Environment' *PER / PELJ* 2021(24). Coggin argues that the State has a duty to ensure that environmental rights are enjoyed on a wider scale that goes beyond individual injustices and towards community justice. He argues that the State has a duty to ensure that every day space does not become the preserve of those with the means – to shape space according to their own anti-public interests. Although this argument has been raised in reference to Section 24 of the South African Constitution, the argument in respect of the State's role in the regulation of space applies with equal force in respect of colonial approach to the regulation of urban space. The colonial State approach to urban planning in colonial territories was to use planning law to shape urban space in favour of White settlers. The colonial planning law thus constituted unfair burdens on the indigenous as it made it impossible for the indigenous communities to access the urban space on similar terms as the White settlers.

³⁷⁶ Awuah Ibid.

³⁷⁷ See generally, Wekwete op cit note 118 at 13-28.; Mabogunje op cit note 4.

³⁷⁸ CESCR General Comment Number 20 op cit note 6 para.10(b)

Scholarship further suggests that there has been a growing class bias in developing African cities since political independence.³⁷⁹ The new political class and bureaucratic and business elites have taken over the former European reservations in all countries outside of South Africa.³⁸⁰ This political and business class has maintained or improved their high housing standards. At the same time, most of the urban population continues to inhabit squalid, over-crowded, and poorly serviced shantytowns or slums.³⁸¹ It must be mentioned that this type of housing accounts for 40 to 80 percent of many African cities.³⁸² Slums and informal settlements are where the struggle for survival in the urban space is fought.³⁸³ For instance, Chirwa has argued that economic, social, and cultural rights are rights of subsistence, survival, empowerment, and socialisation.³⁸⁴ In this context, it is nearly impossible for the urban poor to realise these rights where the prime purpose of urban land use planning law is the commodification of urban land and its services for the benefit of the political class, bureaucrats, and big investors. It is against this background that Thomistic natural law theory holds such an approach as inconsistent with the common good precepts hence unjust and illegitimate on that footing.

Surprisingly, the urban planning response to the problems of housing, unemployment, service inefficiencies, and landlessness for the majority of urban residents who, in Africa, are by definition poor has been to impose on them a system of segregation in land use based on social status or class.³⁸⁵ Zoning, as this process is usually called, has resulted in a heightened expense of daily transportation for the poor around the city, with little or no access to urban services and land, making it impossible to realise the Covenant's rights.³⁸⁶ Arguably, these planning laws serve as a legal avenue for local authorities to evade their obligation of providing urban services to the informal settlement dwellers deemed illegal urban residents. From a legal standpoint, local

³⁷⁹ Mabogunje op cit note 4 at 121-150.

³⁸⁰ Ibid.

³⁸¹ Ibid.

³⁸² Ibid.

³⁸³ Ibid; Also see generally UN-HABITAT op cit note 367; National Report op cit note 4 at 13.

³⁸⁴ See generally Chirwa op cite note 61.

³⁸⁵ Mabogunje op cit note 4.

³⁸⁶ Mabogunje op cit note 4.

authorities have no obligation to provide urban services to right-holders who are considered illegal settlers.³⁸⁷ It is such a practice that Thomists abhor and deems repugnant to the dictates of morality and just law for not serving the common good.

3.6.2. The law was enacted in excess of authority.

In this section, I argue that the law was enacted in excess of authority contrary to the principle of just law upon which the assessment of legitimacy is premised. This argument is founded on the fact that the British Town and Country Planning Act of 1947 was enacted after the UN Charter was already in force in 1945.³⁸⁸ By the terms of article 55 of the UN Charter, nations are enjoined to promote ‘high standards of living, full employment, and conditions of economic and social progress and development’ and to promote ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.’ On the contrary, the law codified master planning ideologies and legislated planning as an exercise in physical design.³⁸⁹ Social and economic planning was expressly excluded from planning law.³⁹⁰ This law was enacted in violation of article 55 of the UN Charter and was, therefore, in excess of authority.

From a Thomistic natural law perspective, the authority to govern is grounded in the social contract between the citizens and those in authority.³⁹¹ This contract is premised on citizens’ consent expressed through a State’s Constitution and legislative provisions on the franchise. The consent theory demands that those bestowed with the fiduciary responsibility to wield State power should govern only based on terms and conditions as set out in the social contract document, which is a constitution.³⁹² These constitutions require respect for international instruments to which a State acceded.³⁹³

³⁸⁷ Informal settlers are subjected to evictions through trespass claims in the law of tort or criminal trespass in criminal law.

³⁸⁸ See the UN Charter 1945. It was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945.

³⁸⁹ See part II of the TCPA 1947; Cf. Taylor op cit note 362 at 14; Keeble op cit note 362 at 1.

³⁹⁰ See e.g. Taylor Ibid at 14; Keeble op cit note 362 at 1.

³⁹¹ The New Jersey Centre for Civic Education op cit note 349. Cf. Cassinelli op cit note 349 at 392.

³⁹² The preamble of Constitutions of majority of constitutional democracies in Africa make it clear that a Constitution is the supreme authority. The preamble expresses the consent and sovereign will of the people that they consent to be governed solely on the basis of the Constitution. From a social contract theory within the natural law tradition, a constitution is a contract document between the citizens and their governors in which the terms of the social contract are contained.

³⁹³ See e.g. section 211 of the Malawi Constitution.; Article 12(b) of Zimbabwe Constitution; Article 40(c) of Ghana Constitution; Article 2(5) of the Kenya Constitution.; Article 231 of the South African Constitution.

However, even after the adoption of the United Nations Declaration on Human Rights (UDHR) in 1948, post-colonial States have largely failed to amend the version of planning law which was deployed to colonial territories to reflect the terms of article 25 of UDHR, which urges States to ensure that:

‘everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in the circumstances beyond his control.’³⁹⁴

Therefore, this model of planning law was in excess of the UN Charter and the UDHR. By being in excess of these critical international law instruments, States acted in excess of the authority to respect international agreements as provided in their respective national constitutions.³⁹⁵ This conduct renders the enacted land use laws unjust because they were enacted without authority within the meaning of natural law. Thus, the planning law, which came to be the model law for Sub-Sahara Africa planning law, was illegitimate right from its conception.

Whether land use planning laws based on master planning ideas are in excess of authority may also be approached from a decolonial perspective. To properly understand this view, it is of essence to note that decoloniality is the thinking developed in response to coloniality. Quijano defines coloniality as a ‘hegemonic model of power, and that has created a capitalist worldview dominated by Europe.’³⁹⁶ Coloniality also refers to the ‘underlying logic upon which Western empires founded themselves, justified their imperial expansion and their intervention over the world.’³⁹⁷ Within the decolonial model, ‘Europe’s hegemony over the new mode of global power concentrated all forms of subjectivity, culture, and especially knowledge and the production of knowledge under its hegemony.’³⁹⁸ The critical feature of decolonial

³⁹⁴ Article 25 of the Universal Declaration on Human Rights.

³⁹⁵ See e.g. section 211 of the Malawi Constitution.; Article 12(b) of Zimbabwe Constitution; Article 40(c) of Ghana Constitution; Article 2(5) of the Kenya Constitution.; Article 231 of the South African Constitution.

³⁹⁶ Quijano, Anibal. ‘Coloniality And Modernity/Rationality’(2007). *Cultural Studies* 21 (2–3)168–179.

³⁹⁷ Mignolo, Walter D. The Prospect of Harmony and the Decolonial View of the World(2012). <http://waltermignolo.com/the-prospect-of-harmony-and-the-decolonial-view-of-the-world/> at1.

³⁹⁸ Anibal op cit at 540.

thinking is ‘the displeasure with hegemonic approaches to knowledge and knowledge production founded on the Western epistemic canons and its tendency to view everything outside the Western intellectual tradition as inadequate.’³⁹⁹ Decoloniality, therefore, challenges the hegemonic tendencies of Western systems of thought and encourages intellectual awakening that there are diverse knowledge systems to behold.⁴⁰⁰ Molebatsi and Morobolo have argued that in doing so, the ‘decoloniality scholarship does not seek to reject and discard the Western epistemic canons but seeks to dislocate the Western suppression of other epistemic traditions.’⁴⁰¹ In the context of planning law in colonial territories, the European powers imposed modernist physical planning law on the footing that the indigenous spatial organisation systems in colonial territories were inadequate and unsuitable. In some respects, the imperial authorities failed to recognise the spatial organisation of the urban space before their arrival.⁴⁰² In doing so, the West enacted planning laws based on master planning ideologies without the authority of the indigenous populace in the colonial territories. For instance, modernist planning principles, whose violent expressions we see in master planning laws,⁴⁰³ were introduced by Europeans to colonial and post-colonial States as universal and appropriate planning principles to be embraced by the colonial and post-colonial States without regard to variations in economic and social, and cultural contexts.⁴⁰⁴ This approach of enacting laws demonstrates that these land use planning laws were enacted without the authority of the governed and were, therefore, unjust and illegitimate in the natural law theory.

³⁹⁹ Sihlongonyane, Mfaniseni Fana. 2015. ‘Empty Signifiers of Transformation in Participatory Planning and the Marginalization of Black People in South Africa’(2015)30(1) *Planning and Practice Research* 30 (1): 83-100.

⁴⁰⁰ Chadzimula Molebatsi & Seabo B Morobolo ‘ Reading the place and role of endogenous governance structures in modernist physical planning: the case of the Bogosi and Kgotla in Botswana(2021)80(2) *African Studies* 134-152; Mignolo op cit note 399 at 1.

⁴⁰¹ Molebatsi & Morobolo op cit note 402 at 136.

⁴⁰² See e.g. Wafae Bouallala ‘Street Vending in Downtown Rabat: in Resistance to Imported Urban Models’ in: Alem Gebregiorgis G, Namangaya, AH, Greiving S & Kombe, WJ (eds) *Planning Cities in Africa* (2022). In ch 3 Wafae Bouallala argues that *Souks* (Arab word for market place) was a unique urban form in Morocco with impactful social implications. However, the French introduced their own urban form through planning policy and legislating which translocated the central role of *Souks* without the consent of the indigenous on the basis of hegemonic Western thought and intellectual cannons.

⁴⁰³ E.g. criminalisation of housing coping strategies, segregation of residential neighbourhood based socioeconomic class, setting of high planning standards that majority cannot comply with and criminalisation of itinerate in urban spaces.

⁴⁰⁴ See e.g. Bouallala op cite note 404 at 143.

I have so far demonstrated that the colonial land use planning laws were illegitimate right from when the British Town and Country Planning Act was enacted in 1947. It is generally accepted that modern-day land use planning in Sub Sahara Africa is rooted in Europe's mainly British, French, German, Belgian, and Portuguese colonisation of Africa at the turn of the 19th century.⁴⁰⁵ Colonial forms of urban development characterise the majority of Sub-Saharan African countries.⁴⁰⁶ The motivation for introducing urban land use planning by European colonialists may have varied among the colonies in Sub-Saharan Africa. However, the general consensus is that the initial driver for its introduction was motivated by Europeans' health concerns and subsequently creating an appropriate mechanism for exploiting and appropriating the resources in Africa for their benefit.⁴⁰⁷ Thus, the origins of urban development planning in colonised countries were informed by concerns of early colonial administrators to construct new settlements with adequate public health and infrastructure standards for their occupation.⁴⁰⁸ Evidence shows that earlier British town planning activities in its colonies included: road improvements, slum clearance, housing for the areas they ruled directly, layouts, building of administrative headquarters, and railway construction.⁴⁰⁹ The foregoing further underpins the hegemonic approach to European planning law, which was imposed on the colonial territories without the authority of the governed.

Earlier forms of colonial urban land use planning in Africa were also characterised by segregation based on race and ethnicity, especially in the residential accommodation arena.⁴¹⁰ These segregation principles were more stringent in countries where white settlers were plenty, and it did not matter the colonial master involved.⁴¹¹ In Kenya, for example, such segregation in earlier plans of Nairobi was manifested in creating separate zones for railway employees, European and Asian traders, and Asian and

⁴⁰⁵ Mabogunje op cit note 4 Awuah *et al* op cite note 7.

⁴⁰⁶ Wekwete op cit note 118 at13-28.

⁴⁰⁷ Ibid.

⁴⁰⁸ Rakodi C. 'Forget planning, put politics first? Priorities for urban management in developing countries'. (2001) 3(3) *International Journal of Applied Earth Observation and Geoinformation*; Mabogunje op cite note 4 at 121-150.

⁴⁰⁹ Wekwete op cit note 118 at13-28.

⁴¹⁰ Mabogunje op cit note 4 at 121-129.

⁴¹¹ Ibid.

African labourers.⁴¹² In Cameroon and Madagascar, the British type of physical segregation tilted along the lines of race, while that of the French was based on culture.⁴¹³ In this respect, the British overtly implemented their racial segregation by defining the minimum distance between residential zones of Whites and non-Whites⁴¹⁴ in land use regulations.⁴¹⁵ However, the French colonial authorities avoided including overt racist clauses in their planning regulations for fear that it would be received unfavourably by the French metropolitan public.⁴¹⁶ Instead, they used material-specific standards to regulate building activities in the city's most desirable areas.⁴¹⁷ Thus, although the French did not explicitly include racist provisions in their land use regulations, racially segregated residential settlement patterns were achieved through subtle measures such as subdivisions and building codes that severely disadvantaged indigenous and non-White residents.⁴¹⁸ Although there was this difference in approach to land use planning law, it is clear that the laws were imposed on the indigenous contrary to the just law requirement that the governed need to consent.

In Ghana, the excesses of the law were manifested through 'spatial, racial segregation in British colonial administrators occupying large bungalows with luxurious compound on large tracts of land where all amenities and infrastructure were provided while the indigenous lived in deplorable areas.'⁴¹⁹ In Malawi, high-density residential areas were zoned for Africans; medium-density residential areas were zoned for Asians, and low-density residential areas were zoned for Europeans.⁴²⁰ Similar experiences in Zambia, Uganda, Zimbabwe, Tanzania, Gambia, and Sierra Leon were apparent.⁴²¹ No indigenous community could have given authority to laws that disadvantaged them, suggesting that they were enacted without lawful authority.

⁴¹² Ibid

⁴¹³ Njoh op cit note 11 at 301-317.

⁴¹⁴ E.g. Indigenous and Asians.

⁴¹⁵ Ambe J. Njoh 'Colonial philosophies, urban space, and racial segregation in British and French colonial Africa' (2008) 38(4) *Journal of Black Studies* 584. (Njoh *Colonial Philosophies*).

⁴¹⁶ Ibid at 584.

⁴¹⁷ Ibid.

⁴¹⁸ Ibid. Cf. Wright, G. *The politics of design in French colonial urbanism* (1991) 277.

⁴¹⁹ Konadu-Agyemang K. 'The Political Economy of Housing and Urban Development in Africa: Ghana's Experience from Colonial Times to 1998' (1998). *Praeger Publishers*.

⁴²⁰ See generally, D Okpala op cit note 8.

⁴²¹ Ibid. Also see Mwimba op cit note 230.

As time went on and mainly after World War II, colonial governments passed primary urban planning land use legislation along the lines of their home countries that sought to make urban planning a comprehensive government activity.⁴²² By the 1950s, the French colonial administration had passed laws requiring urban master plans for significant settlements in their territories.⁴²³ European authorities wanted to create a replica of their African towns such that the laws passed were duplicates of similar laws in Europe.⁴²⁴ Consequently, planning legislations in the form of Town and Country Planning Acts or Ordinances were enacted in Northern Rhodesia (Zambia-1929); Kenya (1936); Ghana (1945); Nigeria (1946); Malawi (1948), and Tanzania (1956).⁴²⁵ All these laws were enacted along the lines of earlier British Town Planning Acts and without the consent or authority of the indigenous people.⁴²⁶

This planning legislation espoused rationalist principles and the use of master plans.⁴²⁷ Underlying the planning regimes created by these colonial legislations was segregation, which sets out four fundamental principles.⁴²⁸ Firstly, the unifunctional land use principle which signifies the specialisation of land uses such as industrial, housing, commercial, recreation, and religious buildings, among others. Secondly, the principle of discreet zoning denoting the legal manifestation of land use specialisation carved out under the unifunctional land use principle and defining permitted and non-permitted land uses and standards like plot sizes for residential housing development.⁴²⁹ Thirdly, the regulatory principle ensured that the ideals espoused under the land use segregation concept are achieved through a regulatory procedure for conformity to planning standards. Finally, the principle of consensus, which signifies homogeneity of interest and harmony in society, is that all governmental decisions are taken in the public's best interest.⁴³⁰ However, given that the land use planning laws were premised on residential racial segregation, the best attraction was

⁴²² Awuah *et al* op cit note 7.

⁴²³ Njoh op cit note 11.

⁴²⁴ Ibid.

⁴²⁵ Awuah *et al* op cit note 7.; Njoh Ibid; Mwimba op cit note 230; Wekwete op cit note 118; Mabogunje op cit note 4; Okpala op cit note 8.

⁴²⁶ Ibid.

⁴²⁷ Ibid

⁴²⁸ Mabogunje op cit note 4 at 121-140.

⁴²⁹ Mabogunje op cit note 4 at 121-40.

⁴³⁰ Ibid.

only concerning the White settler public and not the general indigenous public. In such circumstances, it can hardly be said that these laws were enacted with the public's authority.

3.6.3. Imposition of unfair burdens on citizens.

Further to the requirement that a law should be for the common good and not be in excess of authority, a law should also not impose unfair burdens on citizens to qualify as a just law. In this respect, I take the view that the colonial land use planning model law imposes unfair burdens on citizens because of onerous planning legal spatial parameters.⁴³¹ Studies have shown that urban informality in the Global South is one of the results of colonial policies on land use planning.⁴³²

The master planning ideologies codified into law are unreasonably stringent and mostly exotic to African economic conditions. They are exotic because the demanded legal spatial parameters and standards are such that most urban residents cannot afford them. Payne notes that 'many planning regulations, standards, and administrative procedures have been inherited or imported from countries where economic, social, and climatic conditions are significantly different from those prevailing in the Global South.' The result is that these planning standards are honoured more in breach than in compliance because the urban spaces have mostly been colonised by informality, demonstrating non-compliance on an industrial scale.

Thus from a natural law perspective, the burdens it imposes on citizens are neither fair nor equitably shared. For a law to be just and legitimate, citizens must share burdens and benefits without regard to social status.⁴³³ However, land use planning laws that most Sub-Saharan African States use disproportionately impose burdens on the low-income category of urban residents while awarding benefits to the high-income residents. For example, by setting extremely high legal spatial parameters, the high-income population systematically eliminates competition for prime land in the urban space because very few people can meet these high legal spatial parameters. On the contrary, the burdens arising from environmental pollution generated by industrial

⁴³¹ See e.g. Payne op cit note 336. At 309; Majale op cit note 336.

⁴³² Kita M, & Okyere SA 'Rethinking urban informality and informal settlements growth in urban Africa: a literature discussion' (2015)17(2) *J Sust Dev Africa* 101-24;

⁴³³ Simmons op cit note 360 at 30.

activities and flood risks primarily affect low-income people because they reside in unsafe zones of the urban space as a housing coping strategy. The preceding thus renders land use planning law responsible for the legal production of urban space in Sub-Saharan Africa unjust and illegitimate.

Such an approach to planning is illegitimate as it fails to consider urban residents' economic, social, and cultural rights. These land use planning laws directly violate urban citizens' economic, social, and cultural rights and violate State parties' obligations as against other States parties under the Covenant. The principle of *pacta sunt servanda* requires that parties to a treaty must perform it in good faith and should be legally bound by it.⁴³⁴ Therefore State parties that enact land use laws that do not protect their citizens' economic, social, and cultural rights fail to perform their Covenant obligations in good faith. Such failure renders their land use planning laws illegitimate for having undesirable effects on the citizens.

To demonstrate that colonial land use planning laws were fixated on the physical aspects of the city at the expense of economic, social, and cultural elements, detailed zoning plans specified how particular sites were to be used and developed.⁴³⁵ Keeble called these 'master plans' urban/town planning theories.⁴³⁶ However, while the master plan portrayed an ideal vision of the future city, the land use zoning scheme was the primary legal tool for implementing these visions.⁴³⁷ This legal concept justified based on the rational need for separating conflicting land uses, originated in Germany and was adopted across the United States and Europe in the early part of the 20th century.⁴³⁸ In particular, the middle and high-income groups used it to maintain property prices and prevent invasion by the 'less desirable' lower-income residents, ethnic minorities, and traders.⁴³⁹ Thus the idea that planning can be used as a means of social and economic exclusion is not new.⁴⁴⁰ Admittedly, the maintenance of such land use planning laws constitutes unfair burdens on the citizens because it violates State

⁴³⁴ See Article 26 of the Vienna Convention on the Law of Treaties 1969.

⁴³⁵ Taylor op cit note 362.

⁴³⁶ Taylor op cit note 362.

⁴³⁷ See generally UN-HABITAT op cit note 367.

⁴³⁸ See generally UN-HABITAT op cit note 367.

⁴³⁹ Ibid.

⁴⁴⁰ Ibid.

parties' obligations under the Covenant. These laws also commoditise access to urban land and services, ignoring the inhabitants' economic, social, and cultural rights and hence unjust.

Studies show that after independence, Sub-Saharan African governments have not found the need to change colonial urban land use planning laws.⁴⁴¹ However, scholarship on the subject suggests that these colonial land use planning laws are responsible for the too centralised planning system, are time-consuming, have rigid procedural requirements, have a weak regulatory enforcement mechanism, create constraints on the supply of developable land, and are responsible for haphazard, informal settlement development.⁴⁴² Other studies have also found that this form of urban land use regulatory framework imposes significant adverse impacts on social welfare and economic productivity and has led to the sub-optimal distribution of land resources, with the poor bearing the brunt.⁴⁴³ These adverse effects manifest in poor infrastructural services with profound health implications and high costs in the land development process in terms of time and extra payments that must be made to facilitate work. The adverse effects also manifest through constraints on the supply of developable land, unauthorised and slum developments, and breaches of land use planning laws and regulations.⁴⁴⁴ For instance, Payne has observed that the proportion of people unable to comply with land use laws has reached a critical mass that enables people to act with relative impunity in undertaking further illegal developments.⁴⁴⁵ The fact that spatial and legal parameters are too high, complicated, and in a foreign language has been identified as partly responsible for the non-observance of the land use laws and regulations as they are seen not to serve the needs of the citizenry.⁴⁴⁶ This trend has emerged as a land use regulation challenge because it threatens public

⁴⁴¹ See e.g. Awuah *et al* op cit note 7; Wekwete op cit note 118 at 3-28; Mabogunje op cit note 4. UN-HABITAT op cit note 367.

⁴⁴² Ibid.

⁴⁴³ See generally, Farvacque C. & McAuslan, P. 'Urban Management Programme: Reforming urban land policies and institutions in developing countries' (1992); Dowall D. E. & Clark, G. 'Urban Management Programme – A Framework for Reforming Urban Land Policies in Developing Countries.' (1996); Awuah *et al* op cit note 7.

⁴⁴⁴ See generally, Farvacque & McAuslan op cit note 445; Dowall & Clark op cit note 445; Awuah *et al* op cit note 7.

⁴⁴⁵ Payne op cit note 336 at 309; Majale op cit note 336.

⁴⁴⁶ Ibid.

respect for all other rules and official regulations.⁴⁴⁷ Most importantly, these features of land use laws represent unfair burdens on citizens.

3.8. Conclusion.

In this chapter, I have discussed the legitimacy of law and ‘just law.’ I have argued that these two concepts should be used interchangeably based on their conceptual nexus. I have shown that for a law to be deemed just and legitimate, it has to be enacted to serve the common good, should not be in excess of authority, and law’s burden must be imposed fairly on citizens. Despite some of its weaknesses, I have also demonstrated that natural law theory is the appropriate framework for analysing the legitimacy of land use planning laws. In the main, the justification for adopting the natural law perspective is that the rights in ICESCR are founded on natural rights. The findings in the chapter provide a compelling basis for states to ensure that their legislation-making process meets the basic tenets of a legitimate law. The analysis in this chapter is valuable because it reveals that land use planning laws are of limited utility if the citizens do not consider them acceptable. Natural law theory demonstrates that citizens in the urban space will obey the law if they find such laws beneficial and do not demand what the citizens cannot afford. The contention in this chapter is significant because it shows a link between the acceptability of laws and their ability to facilitate the enjoyment of ESCRs in the urban space. Moreover, the chapter reveals that citizens’ protests against undesirable laws can derail a state’s development agenda. For instance, a land use planning legal framework aimed at developing a modernist city has resulted in the emergence of slums at an uncontrollable rate in most sub-Saharan African countries. States parties should therefore conduct an analysis of the extent to which land use planning laws comply with the criteria for just law and legitimacy in terms of Thomistic tradition. Such an analysis will assist in designing measures to enhance states’ compliance with obligations under the ICESCR and the progressive realisation of human rights because citizens would be taken on board. This position is based on the finding that the prevailing colonial-based planning laws were enacted without authority as it was principally anchored on Western hegemonic thought, which failed to recognise the existing forms of spatial organisation at the dawn of the colonial planning regime.

⁴⁴⁷ Payne Ibid at 309.

CHAPTER 4

4. CHAPTER 4: DISSONANCE BETWEEN DISCURSIVE PRACTICES AND LAND USE PLANNING LAWS.

4.1. Introduction

In chapter three, I argued theoretically that for land use planning laws to be considered legitimate, they ought to comply with a higher law in the legal production of urban space. The present chapter extends the arguments in chapters two and three but at a practical level by analysing the prevailing land use planning laws governing the spatial location of urban functions in Malawi. The principal argument in the present chapter is that although some aspects of Malawi's prevailing land use laws reflect practical realities in the urban space, overall, the law either omits critical provisions or contains provisions that are disjunctive to reality. I have focused on three indicators of dissonance: the marginalisation of customary law in the urban space, the State's use of vagrancy laws to criminalise access to urban space, and the use of stringent regulations to regulate the urban space.

In order to elaborate on this chapter's argument, firstly, I discuss discursive practices in Malawi's urban space. I argue that it is critical for land use planning laws to reflect the discursive practices in the urban space. Such an approach is necessary to ensure land use compliance with rules and regulations. Citizens are more likely to comply with rules without the need for sanctions if they are realistic about what is demanded of them and if they consider what the law demands to be acceptable and legitimate.⁴⁴⁸

Secondly, I focus on the marginalisation of customary law in the urban space. I discuss the conflict between law as practiced on the ground in the Malawi urban space and statutory law. I argue that there is dissonance between customary law, which constitutes part of the discursive practices on the one hand, and written laws related to land use on the other. The argument emphasises that dissonance between customary and written law has resulted in the subjugation and marginalisation of customary law within the urban space. This subjugation and marginalisation have limited citizens'

⁴⁴⁸ Jackson Jonathan, Ben Bradford, Mike Hough *et. al* 'Why do people comply with the law? Legitimacy and the influence of legal institutions' (2012) 52(6) *British Journal of Criminology* 1051 at 1052.

right to participate in cultural life under ICESCR and the Malawi Constitution without complying with the criteria for limiting rights under article 4 of the Covenant and section 44 of the Malawi Constitution.

Thirdly, I discuss the application of vagrancy laws to criminalise access and production of urban space. I argue that the State's use of vagrancy laws to criminalise access to the urban space demonstrates dissonance between discursive practices and economic reality. I observe that using vagrancy laws amounts to the criminalisation of poverty, unemployment, and homelessness for the convenience of urban high-income residents such as landlords, business persons, and municipal authorities. The crux of the argument is that where there is congruency between discursive practices, economic reality, and the law, the State would have no reason to deploy vagrancy laws to restrain some citizens from accessing the urban space.

Finally, I focus on land use planning standards, regulations, and guidelines. In this respect, I advance the view that the prevailing regulations and standards have produced a discriminatory urban space incompatible with States parties' obligations under the Covenant. I ground this argument on prevailing spatial segregation, exclusion of low-income residents, and growing spatial inequality from the majority's failure to meet the requirements of the rules in the formal space.

4.2. Discursive practices in Malawi's urban space.

In developing countries, the urban physical space is a forum for contestation, negotiation, and struggle for survival between various players.⁴⁴⁹ The contestations, negotiation, and struggle for survival in the urban space endow it with meaning.⁴⁵⁰ The interactions between the various players in the urban space produce unique life experiences among those involved. These unique experiences define the nature of urban living from the perspective of those who live and practice it. From these lived, urban experiences emerge discursive practices, a set of norms that develop within a

⁴⁴⁹ Beatrix Busse 'Practices of discursive urban place-making in Brooklyn, New York; (hidden) digital and embodied discourse' (2021) *Text and Talk* 1-25.; Ignasi Malizani Jimu 'Negotiated economic opportunity and power: Perspectives and Perceptions of street vending in Urban Malawi' (2005)30(4) *Africa Development* 35-51.

⁴⁵⁰ Busse op cit note 451at 1-25.

particular socio-spatial setting. Foucault refers to these discursive practices as a body of rules and a set of regularities.⁴⁵¹

In the context of planning, Pløger stresses the importance of considering planning as a discursive practice producing a sense of place, place identity, and common cultural schemes.⁴⁵² These discursive practices are essential because they shape the meaning of place.⁴⁵³ It, therefore, entails that to regulate a particular socio-spatial setting legitimately, there ought to be a substantial correspondence between discursive practices and the rules. Such correspondence ensures the acceptability of the rules regulating the subjects within a defined socio-spatial environment. For instance, Tuori has argued that the functioning of legal order and its efficiency requires its empirical legitimacy and acceptance, which in turn, requires of law a certain substantial correspondence to the moral norms and concepts prevailing in a society.⁴⁵⁴ Contrariwise, where there is dissonance between discursive practices, socioeconomic reality, and laws, a crisis of legitimacy develops to the extent that the legal order descends into chaos as subjects do not respect laws, regulations, and rules.⁴⁵⁵ The legal chaos relates to the dissonance between discursive practices and land use regulations, which David Simon has ably described.⁴⁵⁶ Simon argues that ‘prevailing conditions of formal planning systems had become increasingly irrelevant in many African cities and have been ignored or bypassed in practice when it suited high-income⁴⁵⁷ residents.’⁴⁵⁸ The high standards and stringent regulations inspired by the modern city visions of African governments⁴⁵⁹ have become the cause for massive noncompliance with land use laws and regulations, thereby producing informality on a grand scale.⁴⁶⁰ The massive informality and irregularity have resulted in rent-seeking opportunities by

⁴⁵¹ Carol Bacchi and Jennifer Bonham (2014) ‘Reclaiming discursive practices as an analytic focus: Political Implications’ *Foucault Studies No. 17* 173-192.

⁴⁵² John Pløger ‘Millennium Urbanism-discursive planning’ (2001)8(1) *European Urban Regional Studie*: 63-72.

⁴⁵³ Ibid.

⁴⁵⁴ Tuori op cit note 331 at 125-143.

⁴⁵⁵ See e.g. Payne op cit note 336 at 309.

⁴⁵⁶ David Simon ‘Uncertain times, contested resources: discursive practices and lived realities in African urban environments’ (2015) 19(2-3) *City* 221-225.

⁴⁵⁷ High income residents in this sense refer to citizens with requisite income sufficient to comply with standards set in land use planning regulations and by-laws. In some context these are also called elite or privileged.

⁴⁵⁸ Simon op cit note 458 at 221-225.

⁴⁵⁹ See generally UN-HABITAT op cit note 367.

⁴⁶⁰ See e.g. National Report op cit note 4 at 13.

elites to exploit residents without legal rights by charging punitive rents with impunity.⁴⁶¹ Ultimately, this state of affairs illustrates the dissonance between the spirit of land use planning laws to ensure the existence of orderly modernist cities on the one hand and the residents' lived experiences of survival on the other. The residents cannot comply with the law not out of choice or ill will but because the laws demand high capital outlay in the form of building materials, plot sizes, and other amenities required to obtain planning permission.⁴⁶² Land use laws should reflect discursive practices in the urban space to ensure spatial, legal order, and compliance. Having conceptualized the nature of discursive practices in the urban space, the rest of the chapter discusses three factors, which I describe as indicators of dissonance in the urban space within the context of urban planning law and discursive practices. These indicators are the marginalization of customary practice in the urban space, the State's use of vagrancy laws to criminalize access to urban space by low-income people, and the use of stringent urban planning regulations in the governance of urban space. In the next section, I start by analyzing the first indicator of dissonance between the law governing the production of urban space and peoples' discursive practices. I discuss how the written law marginalizes the practice of customary law in urban spaces in Malawi to render it illegitimate from the Thomistic perspective of natural law.

4.3. Marginalisation of customary practices by the written law in the urban space.

In this section, I discuss the conflict between law practiced on the ground in the Malawi urban space and statutory law. I argue that there is dissonance between customary law which constitute part of the discursive practices, and written laws related to land use. The dissonance between customary law and written law has resulted in the marginalisation of customary law within the urban space and the violation of the right to take part in cultural life both under ICESCR and the Malawi Constitution.⁴⁶³ The discussion proceeds on the basis that customary law is one of the

⁴⁶¹ Simon op cit note 458 at 221.

⁴⁶² See e.g. Section 54 of Physical Planning Act No. 17 of 2016 which prohibits developers from commencing any development before being granted development permission. For a developer to obtain development permission, they are required to demonstrate to the relevant planning committee that their development plans meet the minimum land use development planning standards and guidelines.

⁴⁶³ See article 15(1) (a) of the ICESCR and Section 26 of the Republic of Malawi Constitution, 1994.

elements of the right to culture under the Republic of Malawi Constitution and the ICESCR.⁴⁶⁴

Article 15(1) (a) of the ICESCR enjoins States parties to the Covenant to recognise the right of everyone ‘to take part in cultural life.’ According to CESCR, culture, for the purposes of implementing Article 15(1)(a) of the Covenant, include, among others ‘...man-made environments, food, clothing, shelter and the arts, customs, and traditions through which individuals, groups of communities express their humanity and the meaning they give to their existence and build their world view...’⁴⁶⁵ In terms of the CESCR, customs and traditions from which customary law is derived are part of the constitutive elements of the right to culture under the Covenant⁴⁶⁶ within the pluralistic legal systems of most African states.⁴⁶⁷

Muna Ndulo has observed that ‘the national legal system of a typical African State is pluralistic and comprises African customary law, religious laws, received law and legislation.’⁴⁶⁸ Conceptually, it should be noted that customary law is the law of various indigenous ethnic groups of Africa.⁴⁶⁹ During the pre-colonial era, customary law was the dominant form of law among African States, having its sources in the practices and customs of the people.⁴⁷⁰ In a typical African country such as Malawi, most citizens organise their personal affairs according to and subject to customary law.⁴⁷¹ In Malawi, such an arrangement finds support in the Constitution.⁴⁷² Under the Malawi Constitution, customary law is recognised as a valid source of law in section 200 and as part of the country’s laws with the same status as Acts of Parliament and common law, provided that it is consistent with the Constitution. This recognition has

⁴⁶⁴ CESCR General Comment No. 21 Right of everyone to take part in cultural life (art. 15 para 1(a), of the International Covenant on Economic Social and Cultural Rights para 13.

⁴⁶⁵ Ibid para 13.

⁴⁶⁶ Ibid para 13.

⁴⁶⁷ Muna Ndulo ‘African customary law, customs and women’s rights’(2011) 18 *Indiana Journal of Global Studies* 87-120.

⁴⁶⁸ Ibid.

⁴⁶⁹ Ibid.

⁴⁷⁰ Ibid.

⁴⁷¹ See generally, Ibid at 87-120.; Malawi Human Rights Commission ‘Cultural Practices and their Impacts on the enjoyment of human rights, particularly the rights of women and children in Malawi (2006).

⁴⁷² See e.g. sections 26, 110(3) and 200 of the Republic of Malawi Constitution 1994.

no geographical restriction in terms of application and practice. The only condition to which customary law is subjected is that it has to be consistent with the Constitution, just like common law and Acts of Parliament. The recognition of customary law under section 200 of the Malawi Constitution implies that customary law is a valid source of law in Malawi.

The prevailing statutory scheme begs the question of whether the State understands customary law as a valid source of law in the Malawian urban environment. The application of section 3(5) of the Chiefs Act suggests not, a position which is discussed further later in the chapter in juxtaposition with section 200 of the Malawi Constitution. The Constitution further provides that the legislature may establish traditional courts, which are to be presided over by lay persons or chiefs.⁴⁷³ Regarding geographical jurisdiction, the Constitution does not exclude any part of the Country from the application, exercise, and practice of customary law. Given that the Constitution explicitly provides that traditional courts shall be presided over by chiefs, I argue that this implies that chiefs have jurisdiction over customary law matters in urban and rural areas without the need for permission from any authority. Therefore, citizens are expected to practice, arrange their personal affairs, and found legal claims based on customary law in urban and rural areas without any restriction and before chiefs as competent presiding officers.⁴⁷⁴ I hold the view that the law cannot legitimately force citizens to abandon their customs by virtue of their urban residential status. From the foregoing, it is clear that any law which purports to vitiate or abrogate the application of customary law in urban areas would be inconsistent with the Constitution in terms of both sections 5 and 110(3) of the Republic of Malawi Constitution.⁴⁷⁵ In support of this position, Mwambene argues that any legislation that

⁴⁷³ See section 110(3) of the Republic of Malawi Constitution.

⁴⁷⁴ The Law Commission Report on the Review of Traditional Courts Act observes that, chiefs are more competent to preside over customary law matters as compared to professional magistrates. See Special Law Commission Report on the Review of Traditional Courts Act (2007) at 12.

⁴⁷⁵ Section 5 of the Republic of Malawi Constitution provides that any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid. Section 110(3) of the Republic of Malawi Constitution provides that Parliament may make provision for traditional or local courts presided over by lay persons or chiefs: Provided that the jurisdiction of such courts shall be limited exclusively to civil cases at customary law and such minor common law and statutory offences as prescribed by an Act of Parliament. The Constitution in section 110(3) assumes that the original jurisdiction in respect of matters founded in customary law shall be vested either in lay persons or chiefs who are well versed in the customary law of the area in which a particular traditional court is located. As the Law Commission Report on the Review of Traditional Courts concluded that lay person or chiefs have special orientation and competence to

purports to vary, alter or abrogate any rule of African customary law must not constitute an unjustifiable infringement on the right to take part in cultural life.⁴⁷⁶ Restriction of chiefs from exercising their jurisdiction in urban areas cannot be justified under the Malawi Constitutional dispensation.⁴⁷⁷ Moreover, the Special Law Commission on the Review of Traditional Courts Act acknowledged that magistrates do not have the competence to handle disputes founded in customary law as compared to chiefs.

Additionally, the Chiefs Act does not provide any legitimate purpose for restricting the jurisdiction of chiefs in urban areas who are recognised as competent presiding officers in respect of causes of actions founded in customary law.⁴⁷⁸ Moreover, it could not have been the spirit and intention of the Constitution to vest the jurisdiction of presiding over customary matters on magistrates who do not have the requisite competencies to handle customary matters.⁴⁷⁹ The Constitution clearly states that Traditional Courts shall have jurisdiction over customary law and shall be presided over by either lay presiding officers or chiefs.⁴⁸⁰ Crucially, in terms of section 110(3) of the Malawi Constitution, the jurisdiction over customary law is not restricted to rural areas only, it includes urban areas. It is, therefore, unconstitutional that an Act of Parliament purports to oust the jurisdiction of chiefs in urban areas. The fact that the Courts Act allows the treatment of customary law as a question of fact is again problematic because such an arrangement reduces customary law to a subordinate status relative to the written law.⁴⁸¹ Yet the Constitution treats customary law on equal

handle customary law than professional magistrates.-See Report of the Special Law Commission on the Review of the Traditional Courts Act 2007 at 12.

⁴⁷⁶ Lea Mwambene 'Marriage under African customary law in the face of the Bill of Rights and International human rights standards in Malawi' (2010) 78 *African Human Rights Law Journal*.

⁴⁷⁷ See, sections 5, 110(3), 200 of the Republic of Malawi Constitution.

⁴⁷⁸ Special Law Commission Report on the Review of Traditional Courts Act at 12.

⁴⁷⁹ Ibid at 12.

⁴⁸⁰ Section 110(3) of the Republic of Malawi Constitution.

⁴⁸¹ See, Section 64 of the Courts Act chap 3.02 of the Laws of Malawi which provides that if in any proceeding a matter of customary law is material, such law shall be treated as a question of fact for purposes of proof. In determining such law the court may admit the evidence of experts and persons whom the court considers likely to be well acquainted with such law. This provision amounts to reducing customary law to a subservient position to Common Law and Acts of Parliament which under section 110(3) of the Republic of Malawi Constitution have been accorded the status of law on an equal footing.

standing with the written law.⁴⁸² Surprisingly, section 64 of the Courts Act and 3(5) of the Chiefs Act treat customary law as subordinate to written law contrary to the Constitution.

Moreover, in the absence of an operational Local Courts Act⁴⁸³, the default position is that customary law is presided over by village headmen and chiefs in traditional forums, both in rural and urban areas. As a matter of fact, the law applied in dispute resolution in the traditional forums in urban spaces of low socioeconomic status⁴⁸⁴ is customary law.⁴⁸⁵ However, written law makes it illegal for chiefs or traditional authorities to have jurisdiction in urban areas without written permission from a local authority.⁴⁸⁶

I contend that the legal position of the Chiefs Act is problematic because it subjects customary law in urban areas to the western notions of governance. Ideologically, section 3(5) of the Chiefs Act expresses neo-colonialism. It views the traditional leadership structures from a western perspective and as unsuitable for the civilised urban space. It is against this understanding that traditional leaders are not allowed to exercise their authority in the urban space without permission from leaders with western notions of governance.⁴⁸⁷ The Chiefs Act is, therefore, paternalistic in this regard, for it purports to decide on behalf of urban citizens as to what law is good for them. The requirement for permission in section 3(5) of the Chiefs Act amounts to substituting traditional leadership and imposition of western style leadership on local inhabitants.⁴⁸⁸ The legal position espoused in the Chiefs Act does not help where there is a dispute founded on customary law whose resolution turns on the interpretation of customary law. Thus the Chiefs Act constitutes an unjustifiable limitation on the right

⁴⁸² Section 110(3) of the Republic of Malawi Constitution.

⁴⁸³ The Courts Act had not yet been operationalised as the time of this study.

⁴⁸⁴ National Report op cit note 4 at 13. This report states that residents who reside in informal settlements constitute more than 70 percent of the urban population in Malawi. This stratum is defined by their inability to legally access the formal zones of the urban areas.

⁴⁸⁵ Mwathunga & Donaldson op cit note 25 at 5.

⁴⁸⁶ Section 3(5) of the Chiefs Act chap 22.03 of the Laws of Malawi.

⁴⁸⁷ Nicholson Caroline 'A critical analysis of the role of traditional leadership in modern South African law' (2006) *Fundamina: a Journal of Legal History* 184-192.

⁴⁸⁸ Ibid.

to take part in cultural life under both the Malawi Constitution and ICESCR and only serves to delegitimise customary law.

This position is in line with Terrence Ranger, who has argued about the imposition of invented European traditions by colonial powers aimed at altering African ideologies to recognise the ‘omniscience, omnipotence and omnipresence of the European monarchy.’⁴⁸⁹ It must be noted that the practice of customary law relates to exercising the right to participate in cultural life under section 26 of the Malawi Constitution and article 15(1) (a) of the ICESCR.⁴⁹⁰ For section 3(5) of the Chiefs Act to constitute a legitimate limitation on exercising the right to take part in cultural life, it must comply with section 44 of the Malawi Constitution and article 4 of the ICESCR.

Failure to comply with section 44 of the Malawi Constitution and article 4 of the ICESCR would entail that the restrictive law was enacted without authority and, therefore, illegitimate within the Thomistic natural law tradition. The requirement for permission from local councils in order for chiefs to exercise jurisdiction in urban areas has no legitimate purpose in a democratic society and is unreasonable. I take this view because the Local Government Act allows traditional leaders to form part of the local council as non-voting members.⁴⁹¹ Therefore, there is no justification for ousting the exercise of their traditional jurisdiction, yet they are legally co-opted in councils because of the same customary jurisdiction they are not allowed to exercise in urban areas.

I argue that section 3(5) of the Chiefs Act is illegitimate for its noncompliance with the higher law in terms of natural law.⁴⁹² Section 3(5) of the Chiefs Act is also illegitimate because it deprives the majority of urban residents of the right to

⁴⁸⁹ Terrence Ranger ‘The invention of tradition in colonial Africa’ in Hobsbawn and Ranger (eds) ‘The invention of tradition’ (1983) 211.; Nicholson op cit note 489.

⁴⁹⁰ See, CESCR General Comment No. 21 op cit note 466 para 13. In this General Comment, CESCR concluded that customs from which customary law is derived is an aspect of the right of everyone to take part in cultural life under article 15(1)(a) of the ICESCR.

⁴⁹¹ See section 5(1)(b) of the Local Government Act 42 of 1998; Mwathunga & Donaldson op cit note 25 at 5.

⁴⁹² Kelsen Hans op cit note 281.

participate in cultural activities in the form of customary practices.⁴⁹³ Moreover, by making the exercise of customary law in urban space conditional on permission from urban councils, Malawi is violating its human rights obligation to respect the right to take part in cultural life under international law.⁴⁹⁴ States parties' obligation to respect is a negative one in that it only requires that a State refrain from interfering with the citizens' enjoyment of the Covenant rights.⁴⁹⁵ Moreover, within the scheme of economic, social, and cultural rights, the discharge of the obligation to respect is not contingent on the availability of resources compared to the obligation to protect, promote and fulfil, which requires the availability of resources.

The conflict between customary law and written law is aggravated by the problematic nature of the current statutory arrangement, which is prone to political abuse. The current statutory arrangement is that a particular local government spatial entity attains the town, city, or municipal status by a mere political declaration under the Local Government Act.⁴⁹⁶ The current position allows the local government minister to declare any local government area as a township or a municipality (urban area) if he so wishes.⁴⁹⁷ Likewise, by order published in the Gazette, the president may confer the title and dignity of "city" on any municipality.⁴⁹⁸ Impliedly, once the minister or the president has given any local government area an urban status, traditional leaders' application of customary law is contingent on written permission from a local government urban council and thus limited. Such a practice is tantamount to making the enjoyment of human rights contingent on getting permission which is contrary to the nature of human rights. A right-holder does not require permission to enjoy human rights because human rights are entitlements at the disposal of all human beings.

The legal architecture under the Chiefs Act⁴⁹⁹, Local Government Act⁵⁰⁰ vis-à-vis the Malawi Constitution, and the Covenant is tenuous under the international human rights

⁴⁹³ National Report op cit note 4 at 13. This report states that over 70 percent of residents in the Malawi urban space live in informal settlements.

⁴⁹⁴ See generally *SERAC Case* supra note 116; Kapindu op cit note 117.

⁴⁹⁵ Ibid.

⁴⁹⁶ See s 4(2)(3) of the Local Government Act 42 of 1998.

⁴⁹⁷ S 4(2) of the Local Government Act 42 of 1998.

⁴⁹⁸ Ibid s 4(3)

⁴⁹⁹ See e.g. s 3 of the Chiefs Act.

regime. It is tenuous because the Chiefs Act makes enjoyment of the right to culture in the urban space subject to the permission of a local government council. This arrangement is, therefore, not in line with international human rights standards of the principle of inalienability of human rights.⁵⁰¹ This principle is to the effect that no one can have his or her human rights taken away other than in specific situations.⁵⁰² The mere fact that an area has been declared a town, municipality, or city is not a legitimate purpose for limiting the enjoyment of a right to take part in cultural life.⁵⁰³ Arguably, enacting a law that impairs the enjoyment of the right to take part in cultural life amounts to the alienation of one's right and is incompatible with the Covenant.⁵⁰⁴ The limitation in the Chiefs Act, therefore, does not meet the criteria for limiting human rights under article 4 of the ICESCR.

Crucially, more than 70 percent of urban residents of low socioeconomic status still find customary law as the applicable law for resolving their land-related and other disputes.⁵⁰⁵ This implies no legitimate reason for limiting the right to culture under the Chiefs Act going by the natural law tradition and international law principles.⁵⁰⁶ According to the natural law theory, laws should serve the common good and not merely for the good of those who promulgate them or special groups.⁵⁰⁷

Further, it is essential to note that although the Chiefs Act outlaws the exercise of customary jurisdiction in the urban space, section 5 of the Local Government Act allows traditional authorities to be part of the local government councils.⁵⁰⁸ The

⁵⁰⁰ Section 4(2) of the Local Government Act 42 of 1998.

⁵⁰¹ See Human Rights: A basic handbook for UN staff: Office of the High Commissioner for Human Rights available at < <https://www.ohchr.org/sites/default/files/Documents/Publications/HRhandbooken.pdf>> accessed on 18 July 2022. (Human Rights Hand book for Un staff).

⁵⁰² Ibid.

⁵⁰³ The Limburg Principles op cit note 220 principles 46-57.

⁵⁰⁴ Ibid; Also see article 4 of the ICESCR; Section 3(5) of the Chiefs Act which is a national law limiting the right provided for in article 15 of the ICESCR is inconsistent with the Covenant because it is arbitrary in that it does not provide guidelines upon which the grant or refusal of permission by the local government council for a chief to exercise jurisdiction in an area may be based.

⁵⁰⁵ Mwathunga & Donaldson, op cit note 25 at 5.; Cammack, Kanyongolo & O'Neil 2009 op cit note 34.

⁵⁰⁶ Ibid. Also see, The Limburg Principles op cit note 220 principles 46-57.

⁵⁰⁷ Dimmock & Andrew op cit note 249; Thomas Aquinas: Summa Theologica, The Treatise on Law, Questions 90-97.

⁵⁰⁸ See Section 5 of the Local Government Act, Cap 22.01 of the Laws of Malawi.

implication is that there is no legitimate reason for outlawing the exercise of customary jurisdiction within the urban space. This view is premised on the fact that the same law allows traditional leaders to be taking part in the council's deliberations by virtue of their traditional jurisdiction.⁵⁰⁹ Thus, it is odd that the Chiefs Act requires permission from the local council to exercise customary jurisdiction within the urban space. Yet, the same traditional leaders legally sit in the local government councils whose participation in deliberations may influence urban governance decisions. It is, therefore, plausible to argue that the current statutory scheme has no legitimate purpose apart from limiting the practice of customary law in the urban space without complying with article 4 of the ICESCR. The prevailing statutory arrangement in this regard is not only odd but is a mark of statutory ambivalence and a source of the crisis of legitimacy in the law governing urban land use. Evidence suggests that the basis for excluding the application of customary law in the urban space is founded on a modern city's principles. The modern city principle views anything traditional or customary as nonurban and uncivilised therefore belonging to the village.⁵¹⁰ The first president of Malawi, for example, is on record to have said that:

‘cities were meant for civilised persons, and that in that regard people should be able to differentiate life in the city from that of the village. If you should be proud of the city, don't bring village life into the city.’⁵¹¹

The above quotation shows the political attitude towards customary practices, which are viewed as not belonging in the urban space but rather in the village. It is, therefore, clear that the law restricting the right to take part in the cultural right does not pass the criteria set in article 4 of the ICESCR for limiting rights. The population of urban residents who recognise the authority of traditional leaders or chiefs is from the low socioeconomic strata residing in informal settlements.⁵¹² It is also important to note that most urban residents in Malawi are from a low socioeconomic stratum which, according to recent studies, constitutes nearly 70% of the urban population in all four

⁵⁰⁹ See Section 5 of the Local Government Act, Cap 22:01 of the Laws of Malawi

⁵¹⁰ Jimu op cit 451 at 35-51.

⁵¹¹ See Daily Times 1 September 1988; Jimu Ibid at 44; Liam Riley, *The Political Economy of Urban Food Security in Blantyre, Malawi: The African Institute Occasional Paper Series* (2012) at 5.

⁵¹² National Report op cit note 4 at 13.

major cities- Lilongwe, Blantyre, Mzuzu, and Zomba.⁵¹³ Low-income residents recognise customary law even though written laws proscribe traditional leaders' jurisdiction and application of customary laws in urban areas. Moreover, residents from low socioeconomic strata continue to recognise their traditional leaders as mediators in adjudicating customary disputes, land allocation, and land ownership disputes once an area is declared a town, municipality, or city under the Local Government Act.⁵¹⁴ The scheme under the Chiefs Act is therefore motivated by the attitude that customary law does not belong to the urban space, although the Malawi Constitution recognises it as a valid source of law.

This state of affairs raises questions of a crisis of legitimacy. The crisis relates to laws regulating the urban space in the context of the economic peculiarities of most of Malawi's urban residents. Therefore, the marginalisation of customary law in the urban space is at variance with the requirement of just law in terms of the Thomistic perspective of natural law. Section 3(5) of the Chiefs Act as part of the land use for the legal production of urban space is, therefore, illegitimate. It is illegitimate because it was not enacted for the common good because it restricts the majority of urban citizens who would have rather had their customary disputes adjudicated by chiefs. Section 3(5) of the Chiefs Act is also illegitimate because it was enacted based on the western notions of governance and is therefore without authority as it violates the rights of the very citizens it seeks to bind without meeting the criteria for limiting rights under article 4 of ICESCR and section 44 of the Malawi Constitution.

4.4. Vagrancy laws and criminalisation of access to the urban space.

In this section, I argue that one of the features which demonstrate dissonance between discursive practices, such as the economic circumstances of residents in the urban space on the one hand and the law responsible for the legal production of urban space on the other is the use of vagrancy laws to criminalise access to the urban space.⁵¹⁵ The crux of the argument is that where there is congruency between discursive practices, and the law governing the spatial location of urban functions, the State would have no reason to deploy vagrancy laws to restrain some citizens from

⁵¹³ Ibid at 13; Urban Profiles op cit note 30.

⁵¹⁴ Mwachungu & Donaldson op cit note 25 at 5; Cammack, Kanyongolo & O'Neil op cit note 34.

⁵¹⁵ See section 185 of Penal Code, Cap 7.01 of the Laws of Malawi.

accessing the urban space. I start by highlighting a synopsis of the evolution of vagrancy laws and their rationale.

A vagrant is defined as ‘anyone belonging to the several of idle or disorderly persons and vagabonds.’⁵¹⁶ Thus ‘anyone who, not having a settled habitation, strolls from place to place; homeless idle wanderer’ falls in the category of a vagrant.⁵¹⁷ Gardener observes that vagrancy is a state or condition of wandering from place to place without a home, job, or means of support.⁵¹⁸ In this regard, vagrancy should be understood as misconduct brought about by a perceived socially harmful condition or mode of life.⁵¹⁹ Legal scholarship on the origins of vagrancy agrees that the first fully-fledged vagrancy statute was passed in England in 1349.⁵²⁰ Literature suggests that vagrancy laws were designed to force labourers to accept low wages to ensure the landowners an adequate labour supply at a price they could afford.⁵²¹ The impetus for these vagrancy laws was to institute an anti-migration policy for wage stabilisation.⁵²² Adler has contended that lawmakers charged that vagrants, predominantly paupers, overburdened relief institutions, transmitted lethal diseases that decimated urban populations and introduced disorder.⁵²³ Although the purpose for which the vagrancy laws were originally enacted lapsed, vagrancy laws have remained on the statute books in most African countries.

Vagrancy laws were introduced in Africa and the commonwealth by the British colonial masters to keep the colonial territories smoothly running.⁵²⁴ Vagrancy offences were introduced through a model criminal code drafted by the British colonial office based on the English vagrancy Act of 1834.⁵²⁵ The model code was

⁵¹⁶ B. Gardener(ed) Black’s Law Dictionary (2009) 1689.

⁵¹⁷ Ibid at 1689.

⁵¹⁸ Ibid.

⁵¹⁹ Advisory Opinion on the Request by the Pan African Lawyers Union (PALU) Regarding the Compatibility of Vagrancy Laws with the African Charter of Human and Peoples’ Rights and other Human Rights Instruments Applicable in Africa (Afr. Ct. H.P.R.) No. 001/2018. 4 December 2020.<<https://www.african-court.org/cpmt/storage/app/uploads/public/60f5743a6/60f5743a61e75369142990.pdf>>

⁵²⁰ William J. Chambliss ‘A sociological analysis of the law of vagrancy (1964) 67 *Soc Problems* 67 68.

⁵²¹ Ibid at 69.

⁵²² Foote C ‘Vagrancy type law and its administration’(1956) 106 *University of Pennyslavanian Law Review* 615.

⁵²³ Jeffrey S Adler ‘A historical analysis of the law of vagrancy’ (1989)27(2) *Criminology*209-229.

⁵²⁴ *Mayeso Gwanda v The State* Constitutional Cause No. 5 of 2015.

⁵²⁵ *Mayeso Gwanda* case supra.

introduced in 1916 for Nigeria, 1934 for the Gambia, 1934 for Malawi, 1930 for Zambia, 1950 for Uganda, 1964 for Botswana, 1955 for Seychelles, and 1930 for Tanzania.⁵²⁶ These vagrancy laws aimed to ensure that the homeless, rogues, thieves, beggars, peddlers, and wanderers without means of support were apprehended under the broad scope of the statutes.⁵²⁷ Adler notes that ‘most early modern statutes stipulated that vagrants should be transported to their towns of birth, thereby relieving large cities of the burden of providing poor relief for tens of transients who migrated to urban centres.’⁵²⁸ Other accounts suggest that vagrancy laws were enacted to curtail the mobility of persons and criminalise begging, thereby ensuring the availability of cheap labour to land owners and industrialists while limiting the presence of undesirable persons in the cities.⁵²⁹ Other legal scholars argue that vagrancy laws were enacted to reduce the cost incurred by local municipalities to look after the poor.⁵³⁰ Yet others hold that the vagrancy statutes served to prevent property crimes by creating offences providing broad discretion to law enforcement officials.⁵³¹ The foregoing synopsis in the evolution of vagrancy laws provides context to the philosophy behind vagrancy laws contained in Malawi’s Penal Code and various by-laws promulgated for the regulation and production of urban space, which I now proceed to discuss.

4.4.1. Regulation of urban functions.

One way in which urban functions are regulated is through the use of planning by-laws. In general, planning by-laws are for development management support which acts as part of a broader national regulation and specifies aspects which are local but within a national policy and legal framework.⁵³² The Constitution of Malawi provides for the creation of local authorities.⁵³³ In particular, the Constitution provides that the local government shall be responsible for the welfare of the people over whom they

⁵²⁶ *Mayeso Gwanda* supra note 526.

⁵²⁷ Beier, A.L. ‘Vagrants and the social order in Elizabethan England. Past and Present’ (1974) 64 (August): 3-29, p. 11.; Davies, CSL. Slavery and Protector Somerset; the Vagrancy Act of 1547. *Economic History Review* (1966) 19 (December): 533-549 at 534.

⁵²⁸ Beier, A.L. ‘Vagrants and the social order in Elizabethan England. Past and Present’ (1974) 64 (August): 3-29, p. 18-22.

⁵²⁹ See e.g. *PALU Advisory Opinion* supra note 521.

⁵³⁰ Chambliss op cit note 522 at 68. Cf Adler op cit note 525 at 209-229.

⁵³¹ Adler Ibid at 209-229.

⁵³² Chapter 3 of Land Use Planning and Management Guidelines and Standards 2014.

⁵³³ Section 146(1) of the Malawi Constitution.

have jurisdiction, promotion of infrastructural and economic development, execution of local development plans, encouragement of business enterprises, and delivery of essential and social services.⁵³⁴ The local government constitution and operation details are provided for in Local Government Act No 42 of 1998.

I contend that the failure of Malawi as a state party to the ICESCR to ensure the enjoyment of ESCRs is incompatible with the principles upon which state authority is exercised. The incompatibility renders these by-laws without authority and, therefore, unjust and illegitimate in terms of natural law. In making this argument, I rely on section 12 of the Malawi Constitution, which provides that:

‘all legal and political authority of the State derives from the people of Malawi and shall be exercised in accordance with this Constitution solely to serve and protect their interests; and that all persons responsible for the exercise of powers of State do so on trust and shall only exercise such power to the extent of their lawful authority and in accordance with their responsibilities to the people of Malawi.’

I, therefore, argue that these by-laws lack pragmatism. I hold this view on the basis that they demonstrate dissonance between the prevailing socioeconomic situation and the law in the urban space. This dissonance further renders by-laws which are part of the general land use planning laws, unjust and illegitimate.

Arguably, local governments responsible for the governance of the urban space are responsible for creating urban spatial dichotomies. These spatial dichotomies are created through the promulgation of by-laws which make most engagements with the urban space by low-income residents illegal and precarious.⁵³⁵ A case in point is section 1 of the first schedule to the Local Government (Blantyre City Council)

⁵³⁴ Section 146(1) of the Malawi Constitution

⁵³⁵ Section 103 of the Local Government Act mandates local government to formulate By-laws for the governance of their jurisdictions. For instance, the Local Government (Lilongwe City Council) (Peddlers) By-Laws 2018 makes it an offence for any person with a peddler’s licence to be trading at one place for more than 30mins; It also does not recognise peddlers without a tricycle, handcart or motorcycle. It also provides for confiscation of foodstuffs. Also see Local Government (Blantyre City Council) (Peddlers) By-Laws, 2005.

(Peddlers) By-laws, 2005, discussed in *section 4.4.2* of this chapter. These by-laws make it illegal for peddlers to conduct their economic activities within defined perimeters of designated markets, hotels, and streets, limiting their right to economic activity in the urban space. Under the Malawi Constitution, ‘no restrictions or limitations may be placed on exercising any rights and freedoms provided for in the Constitution other than those prescribed by law, which is reasonable, recognized by international human rights standards and necessary in an open and democratic society.’⁵³⁶ The criteria to be complied with in restricting rights under the Covenant are also contained in article 4 of the ICESCR. In essence, a State is at liberty to restrict some ESC rights provided that the restriction is prescribed by law, is reasonable, recognized by international human rights standards, and necessary in an open and democratic society.⁵³⁷ The State, for example, may legitimately limit the right to economic activity such as itinerate trading based on consumer protection, public health, and safety.

On the contrary, by-laws in the Malawi urban space are applied indiscriminately regardless of whether they promote consumer protection, public health, or safety. Such an approach is problematic because it does not meet the criteria for limiting rights. The regulations and by-laws limiting such rights ought to be scrutinized in light of the limitation constitutional provisions and article 4 of the ICESCR to ensure that they do not unreasonably burden citizens’ rights to economic activity. Restrictions that serve no legitimate and compelling public purpose should not stand.⁵³⁸

Regarding the right to the economic activity of itinerate traders, the State has no legitimate public purpose of limiting their economic activities in terms of location because the Constitution entitles any person to pursue legitimate economic activities and livelihood anywhere within the borders of Malawi.⁵³⁹ The restriction of economic activity regarding location within the urban space does not serve any legitimate purpose as it is for the mere convenience of those with requisite resources to access urban space legally and not for consumer protection, public health, or safety. The

⁵³⁶ See section 44 of the 1994 Republic of Malawi Constitution; Article 4 of the ICESCR.

⁵³⁷ Ibid.

⁵³⁸ Chirwa op cit note 61 at 307.

⁵³⁹ Section 29 of the Republic of Malawi. This section is complementary to articles 6, 7 and 11 of ICESCR.

general view is that informal traders are an inconvenience to the aesthetic vision of the city, which the State imagines as an alternative to reality.⁵⁴⁰ Analysis of the restricted trading spaces shows that peddlers are excluded from freely trading in all strategic markets and business zones. Worst of all, the by-laws further provide that the council may confiscate items of a peddler who contravenes or fails to comply with the by-laws and dispose of them as it deems fit without providing for the right to be heard in terms of rules of natural justice.⁵⁴¹ Thus, it is very doubtful if this requirement meets the State party's human rights obligation to respect the enjoyment of the Covenant's rights, including the right to work, employment, and the right to enjoy the highest standard of living. This view is supported by Chirwa, who argues that 'at the heart of the right to engage in economic activity is the duty by the State to refrain from interfering with people's economic activities and the means by which they undertake those activities.'⁵⁴² A citizen whose merchandise has been confiscated without being heard loses his or her right to (self) employment, work, and consequently, the right to the highest standard of living.⁵⁴³ The obligation to respect requires a State party to the Covenant to refrain from interfering with the enjoyment of citizens' human rights within its jurisdiction.⁵⁴⁴ In particular, the State has an obligation to respect the free use of means of livelihood at the disposal of its citizens.⁵⁴⁵ Thus, by having by-laws that empower local government authorities to interfere with citizens' livelihoods without due process and compensation, the State violates its obligation to respect.⁵⁴⁶ Ultimately the land use regulations and by-laws as part of the general land use planning law are rendered illegitimate within the Thomistic perspective of natural law. Moreover, the by-laws impose unfair burdens on the citizens. Firstly, they restrict the peddlers from carrying out their activities within the perimeters of certain designated zones.⁵⁴⁷ The restricted areas constitute almost the entire strategic zones where one can conduct meaningful trading. Secondly, the by-laws require peddlers to be moving

⁵⁴⁰ See Ghertner op cit note 346 at 287.

⁵⁴¹ See Section 13 of the Local Government (Blantyre City Council) (Peddlers) By-laws.; Section 10 of Local Government (Blantyre City) (Trade and Business) By-Laws; Section 13 of Local Government (Blantyre City) (Liquor) By-Laws.; Cf. section 43 of the Republic of Malawi Constitution.

⁵⁴² Chirwa op cit note 61 at 307.

⁵⁴³ Articles 6, 7 and 11 of the ICESCR.

⁵⁴⁴ See *SERAC Case* supra note 116; Kapindu op cit note 117.

⁵⁴⁵ Ibid

⁵⁴⁶ Ibid.

⁵⁴⁷ See e.g. First schedule of the Local Government (Lilongwe City Council) (Peddlers) By-Laws 2018.

once every thirty minutes for at least ninety-one metres.⁵⁴⁸ These requirements in the by-laws are not only onerous but amount to unfair legal burdens on the citizens and serve no legitimate purpose in terms of consumer protection, public health, or safety. According to Aquinas, such laws are unjust and illegitimate.

Moreover, the confiscation and disposal of goods by the council without the owner being given a chance to be heard amount to arbitrary deprivation of property contrary to the Malawi Constitution.⁵⁴⁹ This approach is contrary to the spirit of the Covenant, which enjoins States parties to ensure that rights in the Covenant are subject only to such limitations as are determined by the law and necessary in an open and democratic society.⁵⁵⁰ However, confiscation of peddlers' goods under the by-laws is contrary to the Constitution, which entails that the by-laws are unlawful.⁵⁵¹ Thus any confiscation of goods based on unlawful by-laws amount to arbitrary deprivation of property under the Malawi Constitution.

The irony of these land use laws and regulations is that whereas their legislative intent is the creation of liveable, orderly, and progressive cities⁵⁵², in reality, these laws have resulted in bifurcated urban spaces. The urban spaces are bifurcated because they have been divided into two distinctive parts whose access is based on the income status of residents. The cities have been bifurcated because the by-laws and land use regulations have created dichotomies regarding who can legally have access to the trading and housing spaces designated as such by the law between low-income citizens and those with high income. Access to adequate land, housing, quality social services, and formal trading spaces depends on a resident's financial ability to acquire or rent residential or trading spaces designated by planning law. This state of affairs amounts to discrimination in terms of access to urban space based on one's social origin and income status under article 4 of the ICESCR. This bifurcation is manifested by the fact that most urban residents in Malawi reside in slums and squatter settlements.⁵⁵³ The

⁵⁴⁸ See e.g. s 7(2) of the Local Government (Lilongwe City Council) (Peddlers) By-Laws 2018.

⁵⁴⁹ See s 28(2) of the Malawi Constitution 1994.

⁵⁵⁰ See e.g. Article 4 of the ICESCR.

⁵⁵¹ See s 28(2) of the Malawi Constitution 1994. Cf. Article 4 of the ICESCR.

⁵⁵² See the preamble of the Physical Planning Act 17 of 2016.

⁵⁵³ National Report op cit note 4 at 13.

bifurcation implies that the laws are not for the common good and, therefore, unjust in natural law.

4.4.2. Restriction of peddlers' access to urban space and economic activities.

The State uses by-laws to limit peddlers' free access to urban space. A peddler is defined as any person who goes from place to place selling or exposing for immediate delivery any goods or foodstuffs carried with him or her on a tricycle or handcart.⁵⁵⁴ Section 4(1) of the Peddlers by-laws provides that no person shall carry on the business as a peddler unless he has a peddler's licence issued by the council. Section 4(3) of the peddlers' by-laws provides that no person shall carry on the business of a peddler within the areas specified in the first schedule of the by-laws. Section 1 of the first schedule of the peddlers'-by laws describes the restricted areas within which a peddler's licence is invalid.⁵⁵⁵

The effect of these restrictions is that peddlers and other itinerant traders are excluded from freely carrying out their economic activities from almost the entire city and within the vicinity of township markets for reasons which serve no legitimate purpose. However, under the Malawi Constitution, 'every person has a right to freely engage in economic activity, to work and to pursue a livelihood of choice anywhere in Malawi.'⁵⁵⁶ Therefore, it is antithetical to principles of good law that by-laws being subsidiary legislation, contradict an established constitutional position. Moreover, the Constitution unequivocally allows anyone to pursue a livelihood anywhere within Malawi. The fact that by-laws define perimeters⁵⁵⁷ within which peddlers are not allowed to pursue a livelihood of their choice is inconsistent with the Constitution.⁵⁵⁸ Ironically, under the penal code, a person is subject to a removal order if he or she has no regular employment or other reputable means of livelihood and cannot give a good

⁵⁵⁴ Section 3 of Local Government (Blantyre City Council) (Peddlers) By-Laws.

⁵⁵⁵ Section 1 of the first schedule of the Local Government (Blantyre City Council) (Peddlers) By-Laws provides that 'peddler licence is not valid for trading within the following areas(a) 100metres, in all directions of the boundary of Blantyre market. 300metres, in all directions of the boundary of Limbe, Soche, Ndirande markets, Telephone exchange at Ginnery Corner, 300metres from where one or more footstalls have been erected by the council, 300metres radius from the junction of Chipembere Highway, Clock tower, 300 metres of the boundary of Shire Highlands Hotels in Limbe.

⁵⁵⁶ Section 29 of the Republic of Malawi Constitution.

⁵⁵⁷ See e.g. The first schedule of the Local Government (Blantyre City Council) (Peddlers) By-Laws.

⁵⁵⁸ Section 5 of the Republic of Malawi Constitution provides that 'any act of Government or any law that is inconsistent with the provisions of this constitution shall to the extent of such inconsistency be invalid.

account of himself or herself.⁵⁵⁹ Whereas the vagrancy laws require individuals to demonstrate a reputable livelihood and regular employment to justify their presence in the urban space, by-laws make it impossible for some people to freely carry out their legitimate livelihood of choice within Malawi's urban space in line with the Constitution. This position in the by-laws infringes on the right to employment, right to work, right to an adequate standard of living, and right to non-discrimination.⁵⁶⁰ The citizen whose legitimate livelihoods of choice are the business of peddling are prevented from creating regular employment for themselves and others; are denied the opportunity to pursue a reputable livelihood of choice; are denied the opportunity to find a settled home in the urban space; and the opportunity to give a good account of themselves when confronted by law enforcement agents. Consequently, they are disadvantaged economically to the extent that they cannot enjoy the right to work, employment, and an adequate standard of living. Crucially, the definition of peddler only targets those who use handcarts or tricycles.⁵⁶¹ This means a person may lawfully carry out the same trade as a peddler if he or she uses a car. Admittedly, this position of the law discriminates against peddlers without cars.

I hold the view that the only legitimate restrictions the State is entitled to enforce are where peddlers are engaging in livelihood or economic pursuits which impair the enjoyment of other people's enjoyment of Covenant rights with respect to public health, safety, and consumer protection.⁵⁶² Rights may be legitimately restricted on public health, safety, and consumer protection because these aspects are fundamental to the enjoyment of ESCRs by the public. The challenge with the current state of by-laws is that they are applied mechanically without regard to the nature of itinerate trade being restricted and the public threat it imposes. The prevailing by-laws are mechanically applied even where there is no threat to public health, safety, or consumer protection. Thus any limitation of rights using by-laws has to ensure that it serves a legitimate public purpose. Anything short of that violates peddlers' enjoyment of ESC rights. Such rights include the right to work, employment, non-discrimination,

⁵⁵⁹ See section 185(3)(b) of the Penal Code, chap 7.01 of the Laws of Malawi.

⁵⁶⁰ See articles 4, 6, 7 and 11 of the ICESCR.

⁵⁶¹ Under the Peddlers By-Laws, a 'peddler' means any person who goes from place to place selling or exposing for immediate delivery any goods or foodstuffs which he carries with him or on a tricycle or handcart and the word "peddle" has a corresponding meaning.

⁵⁶² Chirwa op cit note 61.

and an adequate standard of living under the Covenant and;⁵⁶³ the right to property, economic activity, and development under the Malawi Constitution.⁵⁶⁴

The restrictions on the economic activities of peddlers in the urban space imply that they cannot improve their economic situation to access housing in formal urban residential locations. Failure to access housing in the formal urban residential space means they cannot demonstrate that they have a settled home within the framework of vagrancy offences under the penal code. This conflict of laws between the Constitution, criminal statute, and by-laws speak to the dissonance between the prevailing realities on the ground and the written law and indicates a crisis of legitimacy in land use laws. Ultimately, land use planning laws create a vicious cycle of the very same vagrancy the laws are intended to prevent.

The State expects a peddler to demonstrate that he has a reputable means of livelihood to avoid a removal order from the urban space. However, urban land use laws make it almost impossible for these peddlers to carry out the very same reputable livelihood the State expects a citizen to demonstrate to justify his presence in the urban space. In terms of natural law theory, such types of laws are classic examples of laws that impose unfair burdens on the citizens, are unjust, and therefore illegitimate.⁵⁶⁵ According to Thomistic natural law theory, laws are supposed to be enacted for the common good, should be enacted with authority, and should not impose unfair burdens on citizens.⁵⁶⁶ It is clear that where laws require citizens to justify their presence in urban space by demonstrating regular employment, reputable means of livelihood, a settled home, and a good account of their presence, it is not expected that the same laws should be prohibiting citizens from achieving the very same requirements it demands of them.

It is thus evident that through the conflict between the Constitution, penal code vagrancy provisions, and by-laws, the State violates its obligation to respect the Covenant rights. In terms of the Covenant, the State has an obligation to respect the

⁵⁶³ Articles 2, 6, 7 and 11 of the ICESCR.

⁵⁶⁴ Sections 28, 29 and 30 of the Malawi Constitution.

⁵⁶⁵ Aquinas op cit note 300 at 324-6; Cf. Bix op cit note 252.

⁵⁶⁶ Aquinas op cit note 509 Questions 90-97 Inclusive; Brown op cit note 242.

free use of resources such as land, housing, and other means of livelihood owned or at the disposal of an individual alone or in any form of association with others.⁵⁶⁷ By preventing the peddlers and other itinerant traders from carrying out the livelihoods at their disposal, the State thus violates citizens' economic, social, and cultural rights such as (self) employment, work, non-discrimination, and an adequate standard of living. After violating the citizens' rights, the State further criminalises the failure to demonstrate a reputable livelihood and regular employment that the state itself has occasioned.

4.4.3. Impact of vagrancy offences on socio-economic rights and access to the urban space.

Apart from the principal land use planning legislation,⁵⁶⁸ the Malawi legal framework also uses criminal law to regulate and produce urban space. The offences that the state deploys in regulating and producing urban space fall under nuisances and offences against health and convenience.⁵⁶⁹ In particular, these are vagrancy-related offences whose origin, as already discussed, is traceable to the British model criminal code.⁵⁷⁰ Some vagrancy offences are enforced through by-laws promulgated under the Local Government Act already discussed in this chapter. In the subsequent section, I analyse vagrancy provisions in the penal code, which constitute part of the Malawi urban law, and argue that they violate several economic, social, and cultural rights under the ICESCR. I also demonstrate that these laws express dissonance between the socioeconomic realities in the urban space and land use laws. I contend that the vagrancy laws in the Penal Code are unjust and illegitimate in terms of the Thomistic natural law perspective. I further argue that the use of these vagrancy offences through the Penal Code and local government by-laws in the regulation and production of urban space is incompatible with States parties' obligation under the ICESCR.

4.4.4. Access to urban space and the offence of being idle and disorderly.

The offence of idle and disorderly conduct is one of the vagrancy offences which the State in regulating access to urban space and general urban land use deploys. In the

⁵⁶⁷ See *SERAC Case* supra note 116.

⁵⁶⁸ Among others, these laws include Physical Planning Act 17 of 2016, Local Government Act 42 of 1998, Environmental Management Act 16 of 2017, Land Act 16 of 2016, and Registered Land Act Chap 58.01 of the Laws of Malawi.

⁵⁶⁹ See Chapter XVII of the Penal Code Cap 7.01 of the Laws of Malawi.

⁵⁷⁰ See the Judgement of Ntaba J in *Mayeso Gwanda* supra note 526.

present analysis, statutory provisions target prostitutes and persons with disabilities.⁵⁷¹ In these two offences, the criminalised conduct is ‘behaving disorderly or in an indecent manner’ for prostitutes and ‘wandering while exposing wounds or deformities to obtain or gather alms’ for those with disabilities.’⁵⁷² It must be pointed out that these provisions are incompatible with articles 2 and 3 of the ICESCR on the right for everyone not to be discriminated against in the enjoyment of Covenant rights. Discrimination is defined as ‘any distinction, exclusion or restriction which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.’⁵⁷³ In addition, the offence which criminalises exposure of wounds and deformation for purposes of obtaining or gathering alms violates article 4 of the Convention on the Rights of a person with Disabilities(CRPD), which enjoins States parties to ‘take all measures, including legislative to modify or abolish existing laws, regulations, customs and practices that constitutes discrimination against persons with disabilities.’⁵⁷⁴ The maintenance of section 180(f) of the Penal Code to restrict access to public space by persons with disabilities indicates that Malawi as a State party is failing to comply with the right to non-discrimination under article 2 of the ICESCR and article 4 of CRPD. Moreover, the terminology used, such as (exposing wounds and deformity) in the provision assumes that people with disability have a choice to hide their deformities, and if they do not hide them, then they ought to lose their right to free movement and, therefore ought not to have access to the urban public space. This provision presumably ensures that persons with disabilities should not be in public spaces for being a nuisance to good order, given that the offence is under the chapter on nuisances and offences against health and convenience.

⁵⁷¹ See section 180(a) and (f) of the Penal Code Cap 7.01 of the Laws of Malawi.

⁵⁷² Ibid.

⁵⁷³ Article 2 of the Convention of the Rights of Persons with Disabilities (CRPD).

⁵⁷⁴ Article 4(1) (b) of the Convention of the Rights of Persons with Disabilities (CRPD).

Concerning the targeting of women for the disorderly offence under section 180(a) of the Penal Code, the case of *Bridget Kaseka and Others v R*⁵⁷⁵ is illuminating. The accused were convicted in the magistrate court on an idle and disorderly offence under section 180 of the Penal Code. The convicts appealed to the High Court of Malawi. Brief facts were that police visited accommodation houses where the appellants were found in rooms. Some had male companions, but others were alone. Police assumed that they were in the accommodation houses for immoral purposes, arrested them, and charged them for being idle and disorderly, contrary to section 180(e) and (f) of the Penal Code. On appeal, Justice Chinangwa argued that in dealing with sections 180(e) and (f) of the Penal Code, booking a room at an accommodation facility on its own would not make one an idle or disorderly person. The State has to prove that one is a common prostitute and was soliciting.⁵⁷⁶ From the court's finding in *Kaseka*, it is clear that the offence of idle and disorderly behaviour is discriminatory in that it purports to restrict women's access to public spaces for being suspected of behaving in a disorderly and indecent manner. For example, the court noted that only women were arrested, leaving out men who were found together with women, yet the State did not give any justification for only arresting women. The result was that the conviction was quashed. Moreover, the Penal Code does not define 'disorderly or indecent conduct.'

In *Mayeso Gwanda v R*,⁵⁷⁷ the court observed that section 39(1) of the Malawi Constitution gives every person the right to freedom of movement and residence within the borders of Malawi. A law that purports to restrict the right must therefore meet the criteria for limiting rights under article 4 of the ICESCR. Looking at the circumstances with which the State agents effects arrests, I take the view that arresting citizens without any evidence that they were involved in a criminal enterprise is arbitrary, does not serve any legitimate purpose, and, therefore, not in keeping with international human rights standards and not necessary in an open and democratic society.⁵⁷⁸

⁵⁷⁵ [1999] MLR 116 (HC) at p. 118.; Also see *Pempho Banda and 18 others v The Republic* Review Case No. 58 of 2016.

⁵⁷⁶ *Bridget Kaseka and Others v R* [1999] MLR 116 (HC) at p. 118 paras (c) and (f).

⁵⁷⁷ *Mayeso Gwanda case* supra 526.

⁵⁷⁸ See article 4 of the ICESCR.

The offence of idle and disorderly conduct is vague and allows law enforcement officers broad discretion to arbitrarily arrest whomever they deem unsuitable for the urban public space, which aligns with the rationale behind vagrancy laws. The African Court on Human and people Rights (ACHPR), in its PALU advisory opinion, noted that ‘vagrancy laws employ vague, unclear and imprecise language which does not give sufficient guidance to the citizens on what the law prohibits while at the same time conferring broad discretion on law enforcement agents in terms of how to enforce vagrancy laws.’⁵⁷⁹ Consequently, vagrancy laws are prone to abuse, often to the detriment of the marginalised sections of society, such as suspected prostitutes and those with disabilities.

Regarding the rationale behind vagrancy offences, prostitutes and people with disabilities are all assumed to be undesirables and not worth being in urban public spaces to avoid inconveniencing the public and municipal authorities. The African Commission on Human and Peoples Rights (ACoMHPR) in *Purohit and Moore v The Gambia*⁵⁸⁰ concluded that using words such as ‘lunatics’ and ‘idiots’ to refer to persons with mental disabilities dehumanises and denies them their dignity. Likewise, the ACHPR, in the PALU advisory opinion, held that terms such as ‘undesirables’ reflect an outdated and largely colonial perception of individuals without any rights, and their use dehumanises and degrades individuals with perceived lower status.⁵⁸¹

In view of the foregoing, I take the view that vagrancy provisions used for regulating access to urban public space, which criminalise exposure of wounds and deformations in respect of people with disabilities, dehumanise them. The law creates the impression that the mere presence of persons with disabilities in the urban public space is to expose wounds or deformations to obtain or gather alms. It completely ignores the fact that the nature of some disabilities is such that they are naturally exposed to the public without any intention on the part of the bearer to use them to obtain alms. If passersby in the public space sympathise with such a person and offer

⁵⁷⁹ *PALU Advisory Opinion* supra note 521 para 71.

⁵⁸⁰ Communication No. 41 of/2001 16th Activity Report 2002-2003 Annex VII&40.

⁵⁸¹ *PALU Advisory Opinion* supra note 521 para 71.

alms, the law enforcement agents interpret such action as having been induced by the person with a disability by using his or her wounds and deformations to solicit, which is dehumanising.

These vagrancy provisions demonstrate dissonance between perceived low-income urban residents' experience and what the law assumes and demands. Consequently, the offences imposed unfair burdens on the citizens and were enacted without authority from a decolonial and natural law perspective. These laws do not serve the common good as they create the impression that a segment of the urban residents is a nuisance to those with legal access to the urban space. Based on the Thomistic natural law perspective, the result is that such laws are unjust and illegitimate.

4.4.5. Access to urban public spaces and the offence of rogue and vagabond.

Section 184 of the Penal Code constitutes several vagrancy offences called rogue and vagabond.⁵⁸² It should, however, be mentioned right at the outset that of these offences, section 184(1)(c) was declared unconstitutional by the Malawi Constitutional Court in *Mayeso Gwanda v The Republic*.⁵⁸³ However, the rest of the offences are still in force. In this section, I deal with provisions directly impacting citizen access to the urban space. In particular, I focus on provisions dealing with a suspected or reputed thief, having no visible means of subsistence, and being unable to give a good account of oneself.⁵⁸⁴ I have already observed that vagrancy laws are reputed as vague and imprecise.⁵⁸⁵ In the PALU advisory opinion, the African Court on Human and Peoples

⁵⁸² Section 184(1) of the Penal Code defines a rogue and vagabond as:

- (a) every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence;
- (b) every suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of himself;
- (c) every person found in or upon or near any premises or in any road or highway or any place adjacent thereto or in any public place at such time and under such circumstances as to lead to the conclusion that such person is there for an illegal or disorderly purpose;
- (d) every person who, without the prior consent in writing in that behalf of the District Commissioner, collects or makes any appeal for subscriptions of money in any public place in such District Commissioner's District for any purpose;
- (e) every person who has collected money by subscription in any place in Malawi, who fails to produce to a District Commissioner or to publish in a newspaper named by a District Commissioner, correct accounts of any money received by such subscription and of the disposal thereof, when called upon so to do by such District Commissioner.

⁵⁸³ Constitutional Cause No. 5 of 2015.

⁵⁸⁴ See section 184(1)(b) of the Penal Code Cap 7:01 of the Laws of Malawi.

⁵⁸⁵ *PALU Advisory Opinion* supra note 521 para 71.

Rights observed that vagrancy law uses terminology and expressions such as ‘loitering,’ ‘having no visible means of support,’ and failing to ‘give a good account of oneself.’ Such expressions cannot give citizens a sufficient indication of the prohibited conduct. On the other hand, such laws, when in the hands of law enforcement agents, are dangerous for human rights violations and abuse because of the broad discretion it grants them and the expansive interpretation possibilities it offers. The offence of rogue and vagabond as it relates to a suspected or reputed thief is one such vague and imprecise offence against vagrancy.

I, therefore, take the view that using the offence of rogue and vagabond to restrict access to urban space is illegitimate and renders the law unjust in terms of the natural law theory. The offence targets suspected or reputed thieves who do not have visible means of subsistence and cannot give a good count of themselves. The offence purports to absolve the responsibility of the state to create employment or a favourable environment for employment. Article 6 of the ICESCR enjoins States parties to the Covenant to ‘recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts and to take appropriate steps to safeguard this right.’⁵⁸⁶ States parties are further enjoined ‘to achieve the full realization of the right to work by providing ‘technical and vocational guidance and training programs, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.’⁵⁸⁷

Concerning being arrested for failure to demonstrate that one has a reputable means of subsistence, the court in *Mayeso Gwanda* held that section 30(2) of the Malawi Constitution suggests that the State has a duty to provide employment to its citizens. Therefore, the State cannot use its failure to discharge Covenant and constitutional obligations to arrest citizens who fail to give an account of their means of livelihood after failing to secure employment. In the case of *R v Balala*⁵⁸⁸ for example, a policeman found a juvenile walking around at a trading centre during a patrol, after

⁵⁸⁶ Article 6(1) of the ICESCR.

⁵⁸⁷ Article 6(2) of the ICESCR.

⁵⁸⁸ [1997] 2 MLR 67. Also see *Republic v Ganizani* and 4 Others Confirmation Case No. 29 of 1999.

questioning him, he came to the conclusion that the juvenile had no permanent home and no visible means of livelihood yet the accused juvenile had told the policeman that he came to the trading centre to look for employment. This shows that the offence of ‘rogue and vagabond’ has no legitimate purpose apart from restricting poor people’s access to urban public spaces. By maintaining vagrancy laws which require citizens to justify their presence in the urban space, the law subjects the enjoyment of the right to free movement to a limitation which, although determined by law, is not necessary in an open and democratic society.⁵⁸⁹ A citizen need not give an account of himself or have a visible means of subsistence to enjoy the right to free movement, including being idle in the urban public space. In particular, the Constitution of the republic of Malawi enshrines the right to free movement and residence in section 39, which entitles every person to a right of free movement and residence within the borders of Malawi.

I hold the view that the full latitude of this right includes the right to be idle at any place within the borders of Malawi without the need to explain one’s means of subsistence or the reasons for being idle at any urban public place.⁵⁹⁰ Restricting access to urban space based on rogue and vagabond offences, therefore, constitute unjust law and is illegitimate in natural law theory. It also demonstrates a disjuncture between the low-income residents’ lived experience and land use planning laws for producing urban space.

⁵⁸⁹ Cf. Chirwa op cit note 61 at 374. Chirwa has argued that the right to free movement and residence can be limited when it is necessary to protect national security, public order, public health or morals or the right and freedom of others. However, law enforcement agents arrest people on the basis of section 184(1) (b) of the Penal Code Cap 7.01 of the Laws of Malawi by mere suspicion that someone may be a suspected thief, has no visible means of income and has not given a good account of himself even where no reasonable grounds exist that a crime has been committed or is about to be committed. Also see *Thomas Brown v R Criminal Appeal No. 24 of 1996*(unreported) where Tambala J in a rogue and vagabond offence created under section 184(1)(c) of the Penal Code Cap 7.01 of the Laws of Malawi (now declared unconstitutional) argued that it was not an offence merely to be loitering in any place as there were many non-crime related reasons why a person could be loitering such as poverty, unemployment and homelessness. In the same way, a person arrested for an offence under section 184(1)(b) of the Penal Code may be idle and without visible means of subsistence for reasons unrelated to crime such as poverty, unemployment and homelessness.

⁵⁹⁰ Human Rights Committee General Comment No. 27: Article 12 (Freedom of Movement *Adopted at the Sixty-seventh session of the Human Rights Committee, on 2 November 1999 CCPR/C/21/Rev.1/Add.9, General Comment No. 27. (General Comments) (Contained in document CCPR/C/21/Rev.1/Add.9)*; para 5; Chirwa op cit note 61 at 372.

4.4.6. Offences relating to undesirable persons and access to urban space.

The offence against undesirable persons in urban areas is created under section 185 of the Penal Code.⁵⁹¹ This offence is one of the vagrancy offences whose origin and evolution has been discussed in *section 4.4* of the present chapter. By operation of section 185 of the Penal Code, it is an offence for certain categories of citizens called the ‘undesirables’ to access and reside in the urban space.⁵⁹² In terms of the scope of the offence, an undesirable person is anyone convicted under the rogue and vagabond offences under section 184 of the Penal Code;⁵⁹³ anyone without regular employment or other reputable means of livelihood cannot give a good account of himself or herself.⁵⁹⁴ The offence also includes any person without a settled home in an applicable township, municipality, or city and any person whose last place of ordinary residence is outside the township, municipality, or city.⁵⁹⁵ The State’s objective in this regard is achieved through the power to order the removal of undesirable persons from urban areas granted to magistrates.⁵⁹⁶ One of the grounds upon which a magistrate may make a removal order is where the ‘undesirable’ person has no regular employment or other reputable means of livelihood and cannot give a good account of himself.⁵⁹⁷

The removal order targets persons having no settled home within urban areas whose district of origin or last place of ordinary residence is outside the designated urban areas. The law provides that to determine whether a person has a settled home within a designated urban area, he or she must ordinarily be resident in the designated urban area.⁵⁹⁸ However, a person may also demonstrate that he or she has a settled home in an applicable area if he has been for a period or periods amounting in the aggregate to

⁵⁹¹ Cap 7.01 of the Laws of Malawi.

⁵⁹² See Section 185 of the Penal Code, Cap 7.01 of the Laws of Malawi.

⁵⁹³ Note that of these rogue and vagabond offences, the offence created under section 184(1)(c) was declared unconstitutional in *Mayeso Gwanda v The Republic* supra note 526. However other rogue and vagabond offences under section 184 are still in force.

⁵⁹⁴ See s 185(1) (a)& (b); section 185(4) of the Penal Code, Cap 7.01 of the Laws of Malawi.

⁵⁹⁵ See s 185(1) (a)& (b); section 185(4) of the Penal Code, Cap 7.01 of the Laws of Malawi.

⁵⁹⁶ See s 185 of the Penal Code, Cap 7.01 of the Laws of Malawi.

⁵⁹⁷ See s 185 of the Penal Code, Cap 7.01 of the Laws of Malawi.

⁵⁹⁸ See s 185 of the Penal Code, Cap 7.01 of the Laws of Malawi.

not less than eighteen months during the two years immediately preceding the month then current, ordinarily resident in such an urban area.⁵⁹⁹

From the foregoing conception of the offence, I observe that the criminalisation of failure to have a settled home in an urban area is disjunctive to the reality of the Malawi urban space. More importantly, the law creating the offence is incompatible with States parties' obligations under the ICESCR. A strict interpretation of the provision creating the offence, which requires a person to have a settled home in order to be a lawful urban resident, renders all informal settlement dwellers subject to a removal order under section 185(1) (a) and (b) of the Penal Code as read together with sections 54 and 58(1) (a) of the Physical Planning Act No. 17 of 2016.⁶⁰⁰ The reason is that in terms of the Physical Planning Act No. 17 of 2016, development in urban areas and the whole of Malawi⁶⁰¹ can only proceed based on planning permission granted by the relevant planning committee unless it is permitted development.⁶⁰² Since informal settlements develop without planning permission, all houses developed in these informal settlements are subject to demolition enforcement orders.⁶⁰³ Demolition of houses invariably means that the enforcement may result in over 70 percent of the urban residents being subject to removal orders from urban areas and criminal sanctions being imposed on them.⁶⁰⁴ Such a scenario is exemplified by operation

⁵⁹⁹ See Section 185 of Penal Code, Cap 7.01 of the Laws of Malawi.

⁶⁰⁰ These provisions prohibit the carrying out of any development without development the grant of development permission from the relevant authority and where unauthorised development takes place, it has to be demolished.

⁶⁰¹ See e.g. section 43A of the Physical Act 17 of 2016; Section 6 of the Physical Planning (Amendment) Act No. 12 of 2022.

⁶⁰² See section 7 of the Physical Planning Amendment Act No. of 2022, and 54(1) of the Physical Planning Act No. 17 of 2016. 'Cf. first schedule to the Physical Planning Act No. 17 of 2016; Section 13 of the Physical Planning (Amendment) Act No. 12 of 2022.

⁶⁰³ See s 58(1) of the Physical Planning Act 17 of 2016.; See e.g. United Nations IRIN Humanitarian Information Unit Report 11 August 2005. <https://reliefweb.int/report/malawi/malawi-govt-threatens-evict-informal-settlers>. Accessed on 4/11/2022. The report indicates that the permanent secretary for Lands, Housing and Urban Development said that the ministry would demolish all structures illegally erected on city land, as the law prohibits the 'carrying out of any development activity on any land within a planning area without obtaining permission.' When this approach, is read together with section 185 of the Penal Code, it means 70 percent of the population will be rendered without a settled home and therefore be subject to removal orders or criminal sanctions under section 185 of the Penal Code. The National Report op cit note 4 at 13. The report states that over 70 percent of residents of the Malawi urban population live in informal settlements. p13

⁶⁰⁴ See e.g. Derick Matsengarwodzi 'Bulldozed: Zimbabweans losing their homes to a land dispute-Aljazeera Report 11 January 2021 <https://www.aljazeera.com/features/2021/1/11/bulldozed-the-zimbabweans-losing-their-homes-to-a-land-dispute> accessed on 4/11/2022.; United Nations IRIN Humanitarian Information Unit Report 11

*Murambatsvai*⁶⁰⁵ in Zimbabwe, in which the Regional Town and Country Planning Act⁶⁰⁶ was used as justification by the government to demolish houses of more than 700,000 residents, thereby indirectly affecting 2.3 million people.⁶⁰⁷ In the case of Malawi, enforcement of section 58(1)(a) of the Physical Planning Act would result in over 70 percent of urban residents being removed and rendered criminally liable. This indicates a crisis of legitimacy because it brings citizens' acceptance of such laws into question due to the incompatibility between the urban socioeconomic reality and the law, as demonstrated by the scale of non-compliance.

The basis for this view is that in terms of the law, residents who reside in informal settlements, slums, and squatters cannot be regarded as having a settled home in the urban areas since their presence in the urban space is outside the legal planning framework. Arguably, any person whose presence in the urban area is inconsistent with the law can be served with an enforcement notice, a stop order, or a notice to demolish the building under the Physical Planning Act No. 17 of 2016.⁶⁰⁸ Moreover, the penal code also makes it an offence for any person to occupy or use any land without the consent of the title holder.⁶⁰⁹ Therefore, informal settlement dwellers may also be subject to criminal sanctions for unauthorised land development on which they construct their dwelling structures.⁶¹⁰

August 2005. <https://reliefweb.int/report/malawi/malawi-govt-threatens-evict-informal-settlers>. Accessed on 4/11/2022. These reports demonstrate that authorities do demolish informal settlement housing using planning laws and that these laws are enforced in fact without regard to income status of residents.

⁶⁰⁵ Also called operation restores order/ clean up/ drive out rubbish.

⁶⁰⁶ See section 32. This provision is in similar terms with section 58 of the Malawi Physical Planning Act No. 17 of 2016. In particular compare section 32(2)(c) of the Zimbabwe Regional Town and Country Planning Act, Cap. 29:12 of the Laws of Zimbabwe against section 58(1)(a) of the Malawi Physical Planning Act No. 17 of 2016. Both these sections empower the State to demolish unauthorised building.

⁶⁰⁷ UN-Habitat 2005a. 'Report on the findings mission to Zimbabwe to assess the scope and impact of Operation Murambatsvina by the UN Special Envoy on human settlements issues in Zimbabwe Mrs. Anna Kajumulo Tibaijuka'. Nairobi: UN- Habitat at 32-34.; Stephen Berrisford and Michael Kihato 'The role of planning law in evictions in sub-Saharan Africa (2006) 37(1) *South African Review of Sociology* 20-34 at 23.

⁶⁰⁸ See sections 55, 58(1)(a) 59 and 61.

⁶⁰⁹ See section 316 of the Penal Code, Cap 7.01 of the Laws of Malawi. The punishment for unauthorised use of land upon being found guilty under this section is 3 years.

⁶¹⁰ See section 316 of the Penal Code, Cap 7.01 of the Laws of Malawi. The punishment for unauthorised use of land upon being found guilty under this section is 3 years.

This entails that over 70 percent of the residents in urban areas cannot be considered as having a settled home because any time the local authority can order demolition of their 'homes' or the State can move the courts for the imprisonment of the illegal occupiers of land under section 316 of the Penal Code. Such a state of affairs demonstrates a lack of recognition of the urban space's discursive practices and strenuous economic realities. The discursive practices in this context are that residents' survival in urban areas depends on utilizing informal settlements by constructing homes without the consent of title holders. The State should have recognised this fact instead of criminalizing people's urban housing coping strategies, homelessness, and poverty. Therefore, the prevailing land use laws are inconsistent with the socioeconomic status of urban residents and are illegitimate. It is thus clear that the law requiring persons without a settled home to be removed from urban areas is unjust and illegitimate in terms of natural law theory, as posited by Aquinas.

The illegitimacy of vagrancy offences under section 185(4) of the Penal Code is also evident by the fact that they criminalise the state of being without regular employment or other reputable means of livelihood. It is important to emphasise that section 185(4) of the Penal Code is one of the vagrancy laws which are vague and imprecise such that it fails to give sufficient guidance to citizens as to what type of conduct is prohibited.⁶¹¹ For example, how does a person demonstrate that they have regular employment to avoid being removed from the urban space? What type of livelihood is considered reputable? How does one give an account of himself to the satisfaction of law enforcement agents at the point of the arrest? However, for present purposes, it suffices to state that under section 39 of the Malawi Constitution, citizens are entitled to freedom of movement and residence. A person is not required to demonstrate that they have regular employment to be a legitimate resident in the urban space or anywhere within the country's borders.⁶¹² It is also not a requirement for a person to demonstrate that they have reputable means of livelihood to be a lawful resident of a particular city or town.

⁶¹¹ *PALU Advisory Opinion* supra note 521 para 71.

⁶¹² UN HR Committee General Comment No. 27 op cit note 592 para 5; Chirwa op cit note 61 at 372.

With respect to the available authorities, I hold the view that freedom of movement and residence includes the freedom not to provide any justification for being a resident of a particular urban area or any place within the country. Any requirement for a person to justify his or her presence at a particular location within a country's borders amounts to an unjustified limitation of the right to freedom of movement and residence.⁶¹³ In any case, it is the responsibility of the State to create an environment where citizens have regular employment and a reputable livelihood.⁶¹⁴ Therefore, the State cannot use its own Covenant obligation breaches to remove citizens from urban areas.⁶¹⁵ The restriction of access to urban space for being without a settled home or failure to have regular employment or reputable means of livelihood is tantamount to the criminalisation of poverty. I hold this view because citizens often fail to have settled residence and regular employment in a town, municipality, or city because of poverty. In the end, the state should provide social security to those without enough means of support and not subject them to removal orders from cities based on vagrancy laws. Such an approach is indicative that the laws do not reflect the prevailing situation in urban space, impose unfair burdens on citizens, and are not for the common good; hence unjust and illegitimate in terms of natural law tradition.

Vagrancy laws are implemented through the Penal Code, by-laws, and planning regulations. The discussion has shown that the State is compelled to deploy vagrancy laws because of the dissonance between discursive practices and written laws. This combination of urban law has created a bifurcated urban space whose access is based on the socioeconomic status of urban residents. The Penal Code, by-laws, and planning regulations contain restrictions that do not comply with the limitation clauses

⁶¹³ Although the right to freedom of movement and residence is a right under ICCPR, it is important to a discussion on rights under ICESCR because of the principle of interdependence of rights. The vagrancy offences which restrict the right to freedom of movement and residence affect the enjoyment of a number of rights under ICESCR e.g. the right to adequate standard of living and employment (Articles 6 and 11 of ICESCR respectively). A person may be arrested and be subjected to a removal order while in the process of searching for regular employment and a settled residence. Any arrest before he secures employment or settled residence in an urban area would thus amount to a violation of his rights under the ICESCR.

⁶¹⁴ See article 6 of the ICESCR.

⁶¹⁵ Under articles 6 and 9 of the ICESCR States parties are enjoined to provide technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment and to recognise the right of everyone to social security and social insurance.

under the Malawi Constitution and article 4 of the ICESCR. The dissonance in the laws is apparent because whereas the Penal Code requires citizens to provide a good account of themselves to be legal residents in urban spaces, the by-laws and planning regulations restrict the citizens from undertaking their livelihoods of choice within the urban space freely. Such a state of affairs demonstrates a misalignment between the law, discursive practices, and the State's vision of an ideal city. Vagrancy laws, therefore, violate state party obligations under the Covenant and are illegitimate in terms of Thomistic natural law tradition.

4.5. Land use planning standards, regulations, and guidelines.

Urban governance in Malawi is partly implemented through land use planning and development management guidelines and standards. These constitute part of the regulations for the spatial location of urban functions under the Physical Planning Act No. 17 of 2016. Analysis of these regulations, standards, and guidelines illustrates that although they were promulgated with good intentions⁶¹⁶, they have resulted in the violation of Malawi's State party obligations under the Covenant. The rationale for land use planning and management guidelines and standards is to create an enabling environment for an adequate standard of living and housing, infrastructure, social service development, local economic development, trade, attractiveness, investment, urban renewal, and slum upgrading.⁶¹⁷ However, as the study findings show below, these guidelines and standards have only managed to achieve spatial segregation.

4.5.1. Spatial Segregation.

The current spatial configuration of the Malawi urban landscape shows that the objectives of land use planning standards and guidelines have only been achieved in low-density and partially in medium-density residential zones. Low and medium-density urban residential spaces are developed orderly and have substantial access to

⁶¹⁶ See the preamble of the Physical Planning Act 17 of 2016 which declares that it is 'an act to make provision for physical planning and the orderly and progressive development of land in both urban and rural areas; to preserve and improve amenities thereof...'; Also see, Land Use Planning and Development Management Guidelines and Standards/Manual 2012, op cit note 2. Section 2.1.1 of these guidelines and standards declares that the objective of planning and decision-making is to achieve orderly, co-ordinated, efficient social and environmental sustainability for economic development and to secure the proper use of land for urban and rural growth. These declarations are indicative of good intentions for enacting the land use laws.

⁶¹⁷ See ch 4 of Land Use Planning and Management Guidelines and Standards Ibid.

urban social services. For example, over 70 percent of urban residents in Malawi live in informal settlements, slums, or squatters.⁶¹⁸ This observation is consistent with the finding of the Special Rapporteur on the right to adequate housing, in which he reports that a significant pattern of spatial segregation is the proliferation of informal settlements in the peripheries of the cities.⁶¹⁹

Like in other urban spaces in the world, slums in the Malawian urban space are characterised by physical and social deterioration in which satisfactory family life is impossible.⁶²⁰ Bad housing is the primary indicator of slum conditions which entail ‘dwellings that have inadequate light, air, toilet, and bathing facilities that are in bad repair, damp and improperly heated; that do not allow family privacy; that is subject to fire hazard, and that overcrowd the land, leaving no space for recreational use.’⁶²¹ Most importantly, housing in informal settlements does not meet the criteria set in CESCR General Comment Number 4.⁶²²

In terms of CESCR General Comment Number 4, it is clear that Malawi’s conduct is incompatible with its obligations under the Covenant for failing to take steps to ensure that the housing situation of the majority of its urban residents has legal security of tenure, have available services, materials, facilities, and infrastructure; is affordable; habitable; accessible; are situated in proper locations; and are culturally adequate.⁶²³ It is essential to note that regardless of the state of economic development at which Malawi stands, there are certain steps in respect of core obligations which, as a State party, it ought to take within a reasonable time.⁶²⁴ In the Strategy for Shelter and other international analyses, it has been ‘recognised that many of the measures required to promote the right to housing would only require the abstention by the government

⁶¹⁸ National Report op cit note 4 at 13.

⁶¹⁹ Rajagopal op cit note 51. Cf. generally Mabogunje op cit note 4 at 121-150.

⁶²⁰ Ibid.

⁶²¹ Ibid.

⁶²² See CESCR General Comment No. 4 op cit note 52 para 8.

⁶²³ Ibid para 8.; Preliminary Report of the Special Rapporteur on the Right to Education, Ms Katarina Tomaserviski submitted in accordance with Commission on Human Rights Resolution 1998/33, E/CN.4/1999/49, 13 January 1999, paras 42-74); De Schutter op cit note at 253.

⁶²⁴ See e.g. CESCR General Comment No. 3 op cit note 50 para 2.

from certain practices and a commitment to facilitating “self-help” by affected groups.’⁶²⁵

In the context of Malawi, the State ought to refrain from land use planning laws and regulations that stifle the land supply required for developing low-income residential housing.⁶²⁶ I take this position cognisant that land use laws are essential for orderly development planning. However, the cumbersome nature of these land use laws is problematic for everyone. Firstly, even for those with adequate resources to enable them to comply, the process is inordinately protracted, making compliance extremely difficult, thereby creating a false law. Secondly, the cumbersome laws end up criminalising those who cannot afford to comply with them; it creates the conditions under which slums emerge. These are settlements that fall through the cracks.⁶²⁷ Settlements that fall through the cracks are those which emerge because of the inefficiencies in the planning law. The legislative process has either omitted to address the conditions which create slum emergence, or the State machinery is no longer paying attention to the fact that the cumbersome land use planning laws create slums. Third, the cumbersome nature of these laws closes off land supply and hides the core issue of challenges in land supply. The lengthy process of acquiring leases creates an illusion that the land is available and that the developers are failing to comply with the law, yet the problem is the law itself. Overall, the regulatory procedures are a source of delay in the supply of land required for development such that the whole development process is rendered expensive for developers.⁶²⁸ Where developers succeed in obtaining a lease and planning permission, they are forced to charge high rentals to recoup their investment outlay, whose cost is aggravated by the complicated land use regulatory procedures.⁶²⁹

⁶²⁵ CESCR General Comment No. 4 op cit note 51.

⁶²⁶ See e.g. Chapter 3 of Land Use Planning and Management Guidelines op cit note 2.

⁶²⁷ National Report op cit note 4. At present more than 70 percent of the settlements in Malawian urban space do not comply with land use planning laws.

⁶²⁸ See, e.g. Land Use Planning and Development Management Manual op cit note 2. The guidelines in section 3.2.3.1 lists seven steps required for the plot allocation process to be completed in an area with a layout plan, while section 3.2.3.2. lists fourteen steps required for land in areas without a layout plan to be legally available for development. These steps are unduly long and a source of inordinate delays in making land required for residential development available to developers.

⁶²⁹ See e.g. Land Use Planning and Development Management Manual op cite note 2. See Section 3.2.3.1 and 3.2.3.2 to understand the complicated nature of the process.

Moreover, the situation in Malawi is compounded by the nature of its land use legislative regime, which aggravates the situation by making its land use standards unreasonably high and in favour of the already privileged groups.⁶³⁰ The class of urban residents with requisite resources is the one which has the capacity to access land in prime zones legally. In this regard, I contend that Malawi's failure to satisfy its obligations concerning the adequate standard of living and housing⁶³¹ under the Covenant is not only caused by resource limitation but also emanates from its failure to take positive steps to enact legislation that facilitates citizens' enjoyment of ESCRs.⁶³² Ultimately, the State is obliged to monitor and regulate discriminatory practices and prejudicial behaviour by private actors that exacerbate segregation, as guided by international human rights standards.⁶³³

For instance, the Local Government (Amendment) Act No. 10 of 2017 provides that a local council may dispose of land held by it.⁶³⁴ However, the law does not go far enough to provide that such land may be disposed of for the benefit of most citizens who lack basic access to land necessary for an adequate standard of living. Additionally, Malawi's national land policy declares that it is a central goal of government policy to ensure that the housing delivery system enables all income groups to access adequate housing.⁶³⁵ Inexplicably, this policy aspiration has not been translated into law. Failure to translate such a critical policy commitment into law may violate the State party's obligation to fulfil the right to the highest standard of living. This argument is predicated on the fact that most urban residents in Malawi live in informal settlements because the land market favours a class of people with resources

⁶³⁰ See Chapter 4 of Land Use Planning and Management Guidelines and Standards op cit note 2. This chapter stipulates standards on plot sizes for high density, medium density and low density residential areas. The nature and intent of these standards is to preserve property values in certain locations. The result is that only the high income groups benefit from such land use regulations as it ensures that very few residents can compete for ownership or rent of plots/ houses in such locations. Also see paragraph 11 of CESCR General Comment Number 4 which specifically states that policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others.

⁶³¹ Article 11 of the ICESCR.

⁶³² Cf. section 2 of the Department of Human Settlements and Urban Development Act, Philippines Republic Act No. 11201.

⁶³³ Rajagopal op cit note 51.

⁶³⁴ Section 35 of the Local Government Amendment Act 10 of 2017.

⁶³⁵ See e.g. section 6.10 of the Malawi National Land Policy 2002.

to enable them to comply with stringent and restrictive land use planning regulations. Urban land has been commoditised instead of being structured for the common good, rendering the law unjust within the natural law tradition.

In terms of CESCR General Comment Number 3, State parties are enjoined to guarantee that the rights in the covenant are enjoyed without discrimination. States are required to take deliberate, concrete, and targeted steps toward ensuring access to land within the framework of land use planning laws governing the spatial location of urban functions.⁶³⁶ By failing to ensure that most urban residents have basic access to land, the State violates its obligation to ensure citizens enjoy rights under the Covenant without discrimination based on socioeconomic status.

As a matter of commitment to its human rights obligation pertaining to the right to the highest standard of living, the Republic Act No. 11201 of the Philippines provides that the State shall ensure that underprivileged and homeless citizens have access to an adequate, safe, secure, habitable, sustainable, resilient and affordable home.⁶³⁷ On the contrary, in Malawi, such a law is non-existent despite the national urban policy and national urban policy recognising the need for inclusive urban planning.⁶³⁸ Enacting a law similar to that of the Philippines' section 2 of the Human Settlement and Urban Development Act would demonstrate the State's commitment to its socioeconomic rights obligations on the right to an adequate standard of living upon which a host of other ECS rights are predicated. Over and above that, it provides a basis for resource mobilisation, justification for international cooperation, and a basis for the underprivileged and homeless to assert their right to an adequate standard of living through the litigation route.

4.5.2. Undue emphasis on planning as an exercise in physical planning and design.

In this section, I argue that an understanding of the theoretical basis which guided the review process of the TCPA 1988 is critical to the debate on the legitimacy of the current land use planning laws. The current Physical Planning Act⁶³⁹ is a product of

⁶³⁶ See . General Comment No. 3 op cite note 50 para 2.

⁶³⁷ See Philippines Republic Act op cit note 634. s 2 of the Act. Through this Act Philippines as a State party to the ICESCR has converted a statement of policy into law thereby domestication the ICESCR.

⁶³⁸ See e.g. Section 3.4 of the Malawi National Urban Policy, (2019).

⁶³⁹ Act 17 of 2016.

the Law Commission report on the review of land-related laws.⁶⁴⁰ The Law Commission recommended renaming the Town and Country Planning Act (TCPA) as Physical Planning Act.⁶⁴¹ In its reasoning, the Commission argued that ‘matters of town and country planning have evolved to encompass physical planning.’⁶⁴² The Commission argued that TCPA was not comprehensive enough to encompass physical planning, rural development and district administration matters. On this basis, the Commission observed a need to adopt a comprehensive statute to encompass these matters.⁶⁴³ However, the historical evolution in the development of the Act does not support the position adopted by the Commission in support of the renaming of the Act.

A reading of TCPA clarifies that it was premised on physical planning, contrary to the Commission’s argument that TCPA did not encompass physical planning matters.⁶⁴⁴ Part IV of the TCPA outlines three types of plans, named ‘physical development plans.’⁶⁴⁵ Therefore, it was disingenuous for the Commission to suggest that the TCPA 1988 was outdated because it did not encompass physical planning matters, rural development, and district administration issues.⁶⁴⁶ Firstly, the TCPA 1988 contained substantial matters on rural development. The word ‘country’ in the name ‘Town and Country Planning Act’ refers explicitly to areas outside the urban area or rural areas.⁶⁴⁷ Therefore, it indicates that rural development planning issues were central in the TCPA 1988. Sections 19, 20, and 52(2) (e) of TCPA 1988 prove that fact.⁶⁴⁸ Secondly, the district administration was substantially provided for in the TCPA 1988, as

⁶⁴⁰ Final Report of the Law Commission of the Review of the Land Related Laws (2006) 42.

⁶⁴¹ Ibid at 42.

⁶⁴² Ibid at 42.

⁶⁴³ Ibid.

⁶⁴⁴ Taylor op cit note 362 at 14; Keeble op cit note 362 at 1.

⁶⁴⁵ See section 20-31 of TCPA 1988, Division II (National Physical Development Plan); Division III (District Physical Development Plan); Division IV (Local Physical Development Plan). Cf. sections 24-42 of the Physical Planning Act (PPA) No. 17 of 2016. A comparison of the repealed TCPA 1988 and 2016 casts down on the Commission’s arguments that matters of town and country planning have evolved to encompass physical planning. Physical planning matters have always been the core of town and country planning since the British TCPA of 1947.

⁶⁴⁶ See Law Commission Report on the review of Land related Laws at 42; Taylor op cit note 362 at 14; Keeble op cit note 362 at 1; Section 20-31 of TCPA op cit note 647.

⁶⁴⁷ See e.g. <https://dictionary.cambridge.org/dictionary/english/country>. Accessed on 30 August 2022.

⁶⁴⁸ See e.g. sections 19; 20; 52(2)(e) of the Town and Country Planning Act 1988.

sections 9(5), 10, 12(3), 13, 18, 24, 25, and 26 show.⁶⁴⁹ Therefore, the Commission was not justified in arguing that the TCPA 1988 did not encompass these matters.

Although the Commission was correct in arguing that the Act was outdated and needed a review, it advanced an inaccurate premise to justify critical recommendations.⁶⁵⁰ Consequently, the inaccurate justification resulted in legislation that does not serve the purpose and does not address the mischief it ought to have addressed. Instead, it only serves to maintain the modernist planning status quo.⁶⁵¹ Land use planning laws continue to unduly emphasise planning as an exercise in physical planning and design emanating from problem misdiagnosis during the law review process. The critical issues of adequate, safe, and affordable housing, homelessness, slums, squatter, and informal settlements were not addressed in the Act.⁶⁵²

It is essential to acknowledge that Physical Planning Act No. 17 of 2016 devolved the practice of district development planning to local governments.⁶⁵³ This devolution attempted to resolve participatory issues that bedevil the modernist planning approaches.⁶⁵⁴ However, scholarship on the subject suggests that modernist

⁶⁴⁹ See e.g. sections 9(5); 10; 12(3); 13; 18; 24; 25; 26 of the Town and Country Planning Act 1988. Cf. Physical Planning Act No.17 of 2016. See, Part IV, Division III.

⁶⁵⁰ E.g. It is not correct that matters of town and country planning have evolved to encompass physical planning. Had the Commission consulted critical literature on matters of planning preceding the British TCPA 1947, it should have been obvious that the premise it advanced for changing the name of the Act was a misrepresentation. See e.g. Taylor op cit note 362 at 14; Keeble op cit note 362 at 1; Cf. Law Commission Report on the Review of Land Related Laws at 42.

⁶⁵¹ UN-HABITAT op cit note 367 ch 1. In chapter 1 of this global report, the authors presents a comprehensive discussion of the challenges of modernists planning approaches of the type contained in the Physical Planning Act 17 of 2016. They explain the reasons why this planning approach is not well suited to developing countries like Malawi.; Also see Stephen Berrisford and Michael Kihato 'The role of planning law in evictions in sub-Saharan Africa(2006)37(1) *South African Review of Sociology* 20-34 at 29.

⁶⁵² See e.g. PART VI (Special areas) of the Physical Planning Act No. of 2016 which tangentially provides for housing matters using imprecise statutory language instead of specifically providing for critical issues of homelessness, affordable housing, slums and squatter settlements. Cf. Section 6.10 of the Malawi National Land Policy 2002 which declares that it is central government policy to ensure that housing delivery system enables, all income groups to have access to housing.; Cf. Malawi National Urban Policy 2019 'Policy priority area 4: Shelter, Infrastructure and Services' at 12.

⁶⁵³ See e.g. section 31 of the Physical Planning Act 17 of 2016.

⁶⁵⁴ See e.g. UN-HABITAT op cit note 367 at 10; Mabogunje op cit note 4; Note that TCPA 1988 is premised on modernist planning approaches. For discussion on modernist planning UN-HABITAT op cit note 367 ch 1.

approaches to planning in developing countries result in planned urban cores surrounded by informal and slum settlements despite the devolution.⁶⁵⁵ In Malawian cities, for example, urban cores are surrounded by informal settlements and slums. Informal settlements primarily happen because of the modernist approach to physical planning, which emphasises planning standards that the majority cannot comply with.⁶⁵⁶ This is the challenge that any planning law should address and not perpetuate. To address this problem, the law must reflect the prevailing socioeconomic practices in the urban space, such as residents' income levels. One school of thought suggests that the planning challenges encountered in sub-Saharan Africa emanate from the problems with implementation and not the planning law itself.⁶⁵⁷ However, the concern with poor implementation is misplaced because many planning laws either cannot or should not be implemented at all because their very existence is a source of planning challenges.⁶⁵⁸ Even if they were to be enforced, they would have had little effect on the scale of challenges faced by most African cities.⁶⁵⁹ For example, the Centre for Housing Eviction Rights (COHRE) has enumerated various demolitions of development based on noncompliance with planning laws in various countries, yet the scale of noncompliance persists and has not abated.⁶⁶⁰

Despite the numerous challenges emanating from the modernist planning approach, the Physical Planning Act 2016 has entrenched planning as an exercise in the physical planning and design of human settlements. It has failed to transform planning into an inclusive activity that reflects society's socioeconomic composition.⁶⁶¹ Low-income housing, homelessness, and safe, affordable, and adequate housing are conspicuously missing in the Act.⁶⁶² It is, therefore, doubtful if the entrenchment of planning as an exercise in physical planning and design is progressive as per the rationale for

⁶⁵⁵ UN-HABITAT op cit note 367 at 1010.

⁶⁵⁶ Urban Profiles op cit note 30; National Report op cit note 4 at 13.

⁶⁵⁷ See Wekwete op cit note 118.

⁶⁵⁸ Berrisford & Kihato op cit note 653 at 29.

⁶⁵⁹ Ibid at 29.

⁶⁶⁰ COHRE 2005c. *Evictions Monitor*. I (3) August, Geneva: Centre for Housing Rights and Evictions (COHRE); Also see, Berrisford & Kihato op cit note 653 at 22.

⁶⁶¹ UN-HABITAT op cit note 367 ch 1 at 10.

⁶⁶² See e.g. section 2 of the Philippines Republic Act op cit note 634. This Act provides specific elements of the issues of adequate housing in line with its human rights obligations under article 11 of ICESCR.

reviewing the TCPA 1988.⁶⁶³ The prevailing scholarship has documented challenges of modernist planning approaches in developing countries, which the review process largely failed to address.⁶⁶⁴ More importantly, the section which discusses the rationale for reviewing the TCPA does not demonstrate any awareness of the planning discourses preceding the British TCPA 1947 upon which the TCPA 1988 was based.⁶⁶⁵ There is no demonstration of awareness of the conception of physical planning and the debates which preceded the enactment of TCPA 1947. Had the Commission reviewed the debates on planning thought before the TCPA 1947, it would have been evident that TCPA 1988 made extensive provisions for physical planning. Consequently, the review could have addressed the issues identified by the most recent planning debates on the challenges of modernist planning visions in developing countries.⁶⁶⁶

It is important to note that most States are realising that equating land use planning the same as physical planning is not serving the common good. However, some States continue to perpetuate the notion of equating land use planning to physical planning. Such States include Uganda, Kenya, and Malawi. These States call their principal land use planning legislation physical planning, entrenching the colonial planning thought.⁶⁶⁷

For the Physical Planning Act to be progressive, it should have been reflective of the urban space's economic, social, and cultural conditions. Housing is the major

⁶⁶³ See e.g. Mabogunje op cit note 4 at 21 – 203; UN-HABITAT op cit note 367. The authors discuss the challenges and criticism levelled at this form of planning. They argue for the need to reform this planning approach as being retrogressive in that it does not reflect the realities on the ground.

⁶⁶⁴ Ibid.

⁶⁶⁵ See e.g. Taylor op cit note 362 ch 1.; Keeble op cit note 362 Cf. Law Commission Report on the Review of Land Related Laws at 42.

⁶⁶⁶ See generally, Wekwete op cit note 118; Mabogunje op cit note 4; Njoh op cit note 11 at 301-317.; Stephen Berrisford 'Revising Spatial Planning Legislation in Zambia' (2011)22 *Urban Forum* 229-245.

⁶⁶⁷ See e.g. Uganda Physical Planning Act 8 of 2010; Kenya Physical Planning Act 2010, ch 286 of the Laws of Kenya.; Malawi Physical Planning Act 17 of 2016. Cf. In Tanzania, their land use planning legislation is called 'Land Use Planning Act 2007'; In Zambia it is called 'Urban and Regional Planning Act 2015'; In Ghana it is called 'Land Use and Spatial Planning Act 2016'; In South Africa it is called 'Spatial Planning and Land Use Management Act 2013'. Although the name, itself may not be an indication that the law address critical planning issues, however, it demonstrates awareness that land use planning is broader than physical planning. With such awareness a state can proceed to address the critical issues of colonial inspired legislation which was premised on physical planning.

challenge in Malawi, affecting the ESCR. Therefore, the policy aspiration on inclusive urban development and housing contained in the national land and urban policies should have been expressly incorporated in the Act.⁶⁶⁸ This approach would have been progressive and compliant with the Covenant and international best practices.⁶⁶⁹ Such an approach would have provided rights holders with a concrete basis for a litigation route for enforcing their rights.⁶⁷⁰ Therefore, I hold the view that renaming the ‘Town and Country Planning Act’ as the ‘Physical Planning Act’ does not represent progression but rather retrogression. The Physical Planning Act has cemented the status quo of modernist planning thought which is unsuitable for Malawi's economic conditions. More importantly, it is an expression of dissonance between discursive practice and the physical planning law, rendering it illegitimate within the Thomistic tradition.

4.5.3. Failure to regulate the rental housing market.

In this section, I contend that one way through which land use planning laws for the production of urban space are deemed unjust and illegitimate is through their failure to regulate the rental housing market. Under the ICESCR, States parties are enjoined to ‘recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions.’⁶⁷¹ States parties are further enjoined to take appropriate steps to ensure the realisation of this right.⁶⁷² In addition, section 30 of the Malawi Constitution obliges the State to take measures for the realisation of access to food, shelter, and infrastructure and the eradication of inequality. Arguably, this

⁶⁶⁸ See e.g. section 6.10 of the National Land Policy (2002); National Urban Policy 2019 at 12, priority area number 4. Cf. Philippines Republic Act op cit note 634. S2. The Philippines Act specifically provides for policy aspiration into law. This approach allows rights-holders to approach the courts with a more concrete basis as opposed to merely relying on the provisions of the ICESCR and the Constitution.

⁶⁶⁹ See e.g. Ibid.

⁶⁷⁰ See. e.g. *Gable Masangano v Attorney General and 2 Others*, Constitutional Case Number 15 of 2007. In this case, the Court accepted to adjudicate on a question which involved socio economic rights of prisoners by relying on a specific Statute (Regulations under the Prisons Act), the Malawi Constitution and State’s obligations in the fulfilment of human rights. This was against the States argument that socio economic rights are not justiciable. The Court also dismissed the Sate’s argument that it was failing to meet her minimum core obligations on the basis of insufficient resources. The court argued that the State cannot be allowed to renege on its obligations as a duty bearer on the basis of lack of resources. Also see Chirwa op cite note 61 at 259.

⁶⁷¹ See Article 11.

⁶⁷² Ibid.

provision in the Malawi Constitution is an adaptation of the rights in the Covenant.⁶⁷³ One way through which the right to an adequate standard of living may be realised in Malawi's urban space is by regulating the rental housing market.

Moreover, the inclusion under section 30 of the Malawi Constitution of the right contained in article 11 of the Covenant speaks to the significance of the right to the citizens of Malawi. This view is premised on the fact that the Malawi Constitution does not protect all the ESCR as contained in the Covenant.⁶⁷⁴ It is even more interesting to note the generous interpretation attached to article 11 of ICESCR by the CESCR in its General Comment No. 4 on the Right to Adequate Housing. In particular, General Comment No. 4 observes that:

“the right to housing should be seen as the right to live somewhere in security, peace, and dignity. This is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. This “the inherent dignity of the human person” from which the rights in the Covenant are said to derive requires that the term “housing” be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources. Secondly, the reference in article 11(1) must be read as referring not just to housing but to adequate housing. As both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 have stated; “Adequate shelter means... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities- all at a reasonable cost”⁶⁷⁵

⁶⁷³ See e.g. Article 11(1) of the ICESCR.

⁶⁷⁴ Chirwa op cit note 61 at 258.

⁶⁷⁵ CESCR General Comment No. 4 op cit note 51Cf. generally *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC). Discusses matters relating to article 11 under the South African constitution.

Despite the clear obligation assumed by the State under the Covenant, Malawi has not enacted any legislation to effectuate its commitment with respect to housing issues in the context of article 11 of the ICESCR. In order to fulfil the obligation toward citizens' rights to an adequate standard of living and adequate housing, the State is required to enact laws which facilitate access to adequate housing by low-income residents. However, no law currently regulates the rental housing market regarding rental charges and affordability. Housing rental regulation is crucial because it facilitates accessibility to adequate housing by low-income people at an affordable value, ensures social integration, and reduces spatial segregation.⁶⁷⁶ Although there is no consensus on the benefits of rent regulation, the majority of States in sub-Saharan Africa remain favourably disposed toward rent controls.⁶⁷⁷ Regulation of rentals that landlords charge their tenants ensures that the State works towards the progressive realisation of the Covenant rights without being constrained by the non-availability of resources. To ensure that the State facilitates the realisation of the right to adequate housing in the urban space, rental regulation should reflect the peculiarities of potential tenants in the urban space and their prevailing income earning capacities. Where the chargeable rentals in the formal housing market are unregulated, the majority of residents in the urban space resort to informal housing as a way of coping with the unaffordability of adequate housing. Such a trend perpetuates spatial segregation along income lines and suppresses social integration among urban residents.

Most state parties in sub-Saharan Africa have enacted laws to demonstrate the importance of rental regulation in the progressive realisation of Covenant rights. Rent regulation legislation is currently in place in jurisdictions such as Zimbabwe, Zambia, Kenya, Uganda, and South Africa.⁶⁷⁸ By enacting rent regulation legislation, these

⁶⁷⁶ Haffiner Marietta, Marja Elsinga and Joris Hoekstra 'Access and affordability: Rent regulation' *International Encyclopedia of housing and home* (2012) 40-45. p.41-42.

⁶⁷⁷ See, e.g. See Regulation 27 of Rent Regulations 2007, Statutory Instrument No. 32 of 2007 under sections 23 and 24 of Zimbabwe Housing and Housing Building Act, Cap. 22:07; s10 Zambia Rent Act No. 13 of 1994, Cap 206 of Laws of Zambia.; Section 2 of Uganda Rent Restriction Act, 2020, Cap 231 of Laws of Uganda. s10 of Kenya Rent Restriction Act, Cap 296 of the Laws of Kenya, Rev 2010.; Article 5(3)(c) of South Africa Rental Housing Act No. 50 of 1999.; Also see Haffiner Marietta, Marja Elsinga and Joris Hoekstra Ibid at 41.

⁶⁷⁸ See, e.g. See Regulation 27 of Rent Regulations 2007, Statutory Instrument No. 32 of 2007 under sections 23 and 24 of Zimbabwe Housing and Housing Building Act, Cap. 22:07; s10 Zambia Rent Act No. 13 of 1994, Cap 206 of Laws of Zambia.; s 2 of Uganda Rent Restriction Act, 2020, Cap 231 of Laws of Uganda. s 10 of Kenya

state parties have discharged their obligation of conduct in ensuring the progressive realisation of the right to an adequate standard of housing. The obligation to take legislative measures through rental legislation does not depend on resource availability. Any State party committed to its human rights obligations under the Covenant in specific reference to article 11 can therefore discharge the obligations without being constrained by resource availability.

The prevailing practice for Malawi is that landlords have unlimited discretion to charge rentals without restriction as to the amount of advance payment, nature of tenancy agreements, rental deposit requirements, and currency in which the rentals are quoted. Regulation of the rental housing market is critical in the urban space in Malawi. The reason is that most residents have informal jobs, their income is below the average cost of living, inflation is high, the currency is unstable against the dollar, and very few people live in owner-occupied houses. The majority of the people can thus not afford access to adequate housing in an environment where rent is not controlled. It is, therefore, not pragmatic that landlords demand three months' rental payment plus a deposit in advance from tenants whose income is either one month's salary or from unstable and unpredictable informal sources.⁶⁷⁹ Therefore, failure to control the rental housing market in the urban space is a breach of the state party obligation to fulfil the minimum core obligations regarding the rights to an adequate standard of living. A right holder without adequate housing cannot enjoy other Covenant rights. The human right to 'adequate housing, derived from the right to an adequate standard of living, is of central importance for all economic, social, and cultural rights.'⁶⁸⁰ A person cannot enjoy the right to education, work, employment, the highest standard of physical and mental health, social security, and the right to take part in a cultural right if the right to adequate housing is violated. All the covenant

Rent Restriction Act, Cap 296 of the Laws of Kenya, Rev 2010.; Article 5(3)(c) of South Africa Rental Housing Act No. 50 of 1999. These regulations prohibit the charging of rental fees beyond 1 month, 2 months or 3 months. In the case of Zimbabwe, charging rentals in foreign currency is also prohibited. In the case of Malawi, there is currently no law regulating rental charges beyond the agreed monthly amount or charging in foreign currency.

⁶⁷⁹ See generally Liam Riley 'Operation dongosolo and the geographies of urban poverty in Malawi' (2014) 40(3) *Journal of Southern African Studies* 443-458.

⁶⁸⁰ CESCR General Comment No. 4: op cit note 51 para 1.

rights require adequate housing to be enjoyed and be meaningful.⁶⁸¹ Failure of land use laws to regulate the housing market indicates dissonance between the prevailing economic reality and the law. Such dissonance in the law renders it an illegitimate tool for governing urban space in terms of natural law theory because it fails to address most urban residents' housing needs.

Currently, landlords with properties in prime residential zones make it a pre-condition in the tenancy agreement that tenants should pay three months, six months, or even a year rentals in advance plus one month's rental deposit fee.⁶⁸² However, the earning capacities of many residents are such that they cannot afford this arrangement because their incomes are just enough for subsistence.⁶⁸³ It is, therefore, ironic that the State has left the issue of rent regulation to market devices in a country dominated by economically vulnerable citizens and without adequate social housing. In the process, the State has failed to discharge its human rights obligation to fulfil the rights under the Covenant. The result is that housing, land markets, and urban land acquisition have been commoditised due to the absence of regulation or control. Only those citizens in the high-income categories can afford legal access to rented adequate housing markets, thus forcing many people into substandard informal housing.

In terms of States parties' obligations, a State ought to enact laws providing that a landlord is only entitled to one-month rental charges in advance in line with the prevailing status of urban residents. The current position in Malawi is that even tenants who would otherwise afford to rent adequate housing cannot do so because of the tendency of land landlords to demand three months' advance payment. I take the view that the number of people living in informal settlements would somehow decrease had there been regulation of three months advance rental payment requirement. The result is that the informal housing sector has taken hold in Malawi's urban space. The omission in the present land use laws of provisions to regulate and control the rental

⁶⁸¹ Ibid.

⁶⁸² See. e.g. Malawi Daily Times News Adverts and The Nation News Paper Advert. Malawi daily news papers contain a column where estates agents advertise houses to let. Most of these advertisements require that there be a 3 months advance payment by a tenant before occupation. In addition most high end properties are quoted in United States Dollars yet Kwacha is the legal tender in Malawi.

⁶⁸³ See generally Liam Riley op cite note 681.

housing market is thus not for common good and imposes unfair burdens on citizens contrary to natural law, making the land use laws illegitimate.

4.6. Conclusion.

In this chapter, I have investigated three indicators of dissonance in Malawi's urban space. These indicators of dissonance are the marginalisation of customary law in the urban space, the State's use of vagrancy laws to criminalise access to urban space, and the use of stringent and inadequate regulations to regulate the urban space. The chapter demonstrates that the human rights obligations of a state party go beyond being a mere signatory. It demands that a state discharge its obligations in good faith. Concerning Malawi, the chapter's findings provide a compelling basis for Malawi to review its urban land use planning legislation. Such a review will assist the State in complying with its obligations and aligning them with the urban residents' needs. Through the analysis, I have shown that although the written law restricts the practice of customary law by traditional leaders in the urban space, most urban residents recognise customary law and rely on it for dispute resolution. This approach has resulted in the loss of respect for written law because it does not reflect the aspirations of most of those it seeks to bind. It has thus become almost impossible to enforce the existing land use planning laws effectively. This finding provides a clear case justifying the need to realign Malawi's urban planning legislative framework instead of maintaining outdated laws that no one respects. This position is evidenced by the emergence of squatter settlements at more than 70 percent of the urban population. Finally, the analysis has shown that the State has failed to take legislative measures which would have provided a statutory basis for the delivery of affordable housing on an equitable footing through rental housing market regulation and control. By failing to enact such laws, citizens' ESCR rights in the urban space have been rendered hazy and difficult to claim against the duty bearers through the litigation model. This omission in the law has rendered land use planning laws unjust and illegitimate in terms of the ICESCR and natural law frameworks which require urgent remedying.

CHAPTER 5: CONCLUSION

5. Introduction.

The present chapter serves to make concluding observations derived from the findings of the study. I highlight the study's major contribution to socioeconomic rights and land use planning law discourse. I further highlight the significance and value of the study based on ICESCR and a Thomistic perspective. The study set out to achieve three objectives, viz: explain the scope and nature of State parties' obligations in implementing economic, social, and cultural rights in the urban space; examine the legitimacy of land use planning laws governing the spatial location of urban functions using Thomistic natural law theory; and analyse indicators of dissonance between discursive practices and written law in the urban space in determining the legitimacy of land use planning law.

The study's main findings demonstrate that for urban residents to enjoy ESCRs, it is essential that the law regulating the urban space reflects discursive practices. I have demonstrated that, for state parties to achieve their Covenant obligations in the urban space, it is essential to derive the spatial content of economic, social, and cultural rights. However, as demonstrated through the findings, in Malawi, the law governing spatial organisation in the urban space leans more towards the creation of modernist cities than towards ensuring that citizens enjoy economic, social, and cultural rights. The significance of these findings is that States parties in developing countries that follow the modernist approach to planning need to introspect as to whether the modernist approach to planning law is in the public's best interest who are predominantly of low-income.

Thus, for urban planning law to move away from the modernist approach to planning law, there is a need to ensure that land use planning laws are just and legitimate. Land use laws may be just and legitimate if enacted for the common good, do not impose unfair burdens on the citizens, and are based on the authority granted to the State by the citizens under consent and social contract theories as expressed through national

constitutions. The position advanced in this thesis is critical because it integrates two frameworks in assessing the legitimacy of land use planning law. It shows that the legitimacy of land use planning law and enjoyments of ESCRs is tenable where the prevailing law is for the common good, was enacted with authority, and does not impose unfair burdens in terms of Thomistic natural law tradition. I now proceed to make specific observations on the significance of the findings under each research objective as reflected in the chapter findings within the context of the overall thesis argument.

5.1. States Parties' obligation under ICESCR in the urban space.

Chapter two is centred on States' party obligations under the ICESCR. In this chapter, I demonstrate that it is not enough for a country to enact laws for the spatial organisation of the urban space. Such laws must create an environment where urban citizens can enjoy economic, social, and cultural rights. The chapter demonstrates that ICESCR is a critical framework for assessing the urban land use planning laws to determine whether the State is creating a favourable environment for the enjoyment of the rights contained in the Covenant. The ICESCR is related to the Thomistic natural law tradition because international human rights law is founded in the Thomistic natural law tradition. I have thus shown that where the law meets the standards set in Thomistic natural law, such law is more likely to favour the enjoyment by citizens of economic, social, and cultural rights.

The findings in the chapter show that without a proper understanding of the difference between obligations of conduct and obligations of result, States parties are unlikely to discharge their obligations in line with the spirit and intent of the Covenant. The chapter highlights the significance of understanding that enacting laws as a measure towards the realisation of ESCRs is an obligation of conduct, not contingent on resource availability. I show that to discharge the obligation of conduct, a State party does not need the availability of resources but only willingness to enact legislation. Thus the laws should be such that they are aligned with the discursive practices of the majority of urban citizens.

I note that these states' obligations have a spatial context and implications on the spatial organisation of the urban space. The spatial organisation determines the spatial location of those who enjoy the Covenant's rights and those who do not enjoy these rights over the urban space. This finding is significant because it reveals that to discharge their human rights obligations, States Parties must ensure that their land use planning laws governing spatial locations of urban functions further the Covenant's spirit and intent. Thus the manner in which the urban space is spatially organised mirrors land use planning laws. States parties must therefore ensure that their urban planning land use laws comply with their obligations against other States Parties and individual rights holders within their respective jurisdictions. I demonstrate that States Parties can ensure the enjoyment of ESCRs by setting realistic land use standards which reflect the urban residents' deprivations as part of their obligation of conduct.

5.2. Legitimacy of planning law in the context of natural law.

In chapter three, I discussed the concepts of 'legitimacy of law' and 'just law.' The chapter emphasises the importance of ensuring that the business of law-making goes beyond merely enacting laws. The analysis demonstrates that the value of any law is in the degree to which it is acceptable by its citizens. The chapter illustrates that when citizens do not consider the law governing their affairs acceptable, they are unwilling to comply even with reasonable laws. For example, because urban laws do not correspond with discursive practices, most citizens do not comply.

The discussion in chapter three illustrates that the State is overwhelmed by the magnitude of those who do not comply. Given that those who cannot comply because of the practical impossibilities are in the majority, the State machinery is overwhelmed to the extent that it cannot enforce even the laws that ordinarily would have been possible to enforce. The thesis demonstrates that understanding Thomistic natural law and its weaknesses is essential to implementing the ICESCR. For example, the progressive realisation of the rights in the Covenant depends on the acceptability of the laws a state enacts. The analysis demonstrates that to enact laws for the common good of citizens, it is essential to understand the concept of just law within the Thomistic natural law tradition. The finding shows that the urban space is a product of

hegemonic western planning thought imposed on Malawi's urban space. This finding points to the need for the State to continuously review the law to determine whether the present trajectory is achieving the modernist vision manifested in the planning law. The relevance of the chapter argument is that the continuous review of the laws in line with the just law conceptualisation and States obligations under the Covenant will ensure that the urban development trajectory is not off tangent. It is doubtful that laws which are unacceptable by its citizens may contribute to the development of a country even where the laws contain ambitious laws.

I have thus demonstrated that apart from the ICESCR, the Thomistic natural law theory is the appropriate framework for analysing the legitimacy of land use laws despite some of its weaknesses. Whereas the ICESCR has been applied to assess the extent to which the State parties comply with their Covenant obligations, the justification for combining it with the natural law perspective is that the rights in ICESCR are founded on natural rights. It was, therefore, valuable to apply both ICESCR and Thomism to evaluate the legitimacy of laws in the light of human rights-based discourse for a nuanced view.

Given the foregoing, the chapter illustrates that the continued use of colonial land use planning laws, despite their apparent weaknesses, violate States party obligations under the Covenant. In particular, these violations render land use planning laws illegitimate because they are enacted in excess of States parties' treaty obligations. Thus, I have found that the colonial planning laws were enacted without authority because they were principally anchored on Western hegemonic thought. Western planning thought failed to recognise the existing forms of spatial organisation at the dawn of the colonial planning regime. The significance of this analysis is that it brings to the fore the problematic nature of maintaining laws anchored on unrealistic city visions of world-class cities where the economic conditions do not support such an urban development approach.

Moreover, I have found that urban land use planning laws governing the spatial location of urban functions in the post-colonial sub-Saharan States are similar to urban planning colonial legislation. Analysis has shown that the urban planning laws being

enforced in most of these countries have adopted the British TCPA of 1947, which emphasised urban planning as an exercise in physical planning. Consequently, urban residents' economic, social, and cultural rights have been ignored, thereby violating the principle of the common good, which is central to the Thomistic natural law tradition.

5.3. Dissonance between discursive practices and land use planning laws.

The principal argument in chapter four is that although some aspects of Malawi's prevailing land use planning laws serve public utility in the urban space, the law either omits critical provisions or contains disjunctive provisions to reality. Thus, the failure to enact provisions aligned with the practical realities of the urban space is problematic because it encourages the emergence of settlements that do not comply with the law at a mass scale. Therefore, the State has a moral and legal duty to ensure that the laws that govern the urban space do not segregate the majority.

Chapter four illustrates that the planning trajectory adopted by the State is at variance with some provisions of the Malawi Constitution and the ICESCR. Currently, the law governing the urban space appears to be diametrically at variance with the fact that customary law is a valid source of law in Malawi. Land use planning laws ignore customary law's importance to urban residents' lives. This finding is significant because it goes to the very root of the most outstanding problem of noncompliance with planning laws in urban spaces. It demonstrates that a country cannot make any meaningful development planning progress if the laws segregate critical elements of its citizens' lives. Thus, the modernist approach and the desire for a world-class city is self-defeating because cities do not become modern and world-class by the mere fact that policymakers wish them to be. Chapter four's findings highlight that developing modern-class cities goes beyond having modernist planning laws. It requires the law to reflect the discursive practices so as to have incremental urban development than the current situation, which fails to recognise the environment within which urban development planning occurs.

Moreover, the overall value of the argument throughout the thesis is that it highlights how conflicting laws can derail urban planning objectives. It demonstrates that laws such as vagrancy offences contradict the States party obligations under the Covenant and are detrimental to the modernist project advocated in the planning law. For instance, chapter four analysis has demonstrated that a low-income urban citizen cannot demonstrate a reputable livelihood demanded in the Penal Code because city by-laws make it impossible for low-income citizens to carry out legitimate livelihoods in the urban space. The significance of such a finding is that the State must ensure that laws governing the urban space are streamlined to suit the prevailing context. Failure to streamline the laws creates false laws and conditions under which slums, urban socio-pathologies, and other urban vices emerge.

I have observed that, primarily, the prevailing land use planning laws do not reflect the unique nature of the socioeconomic status of most urban residents in Malawi, as they are based on an imagined alternative reality of how ideal cities ought to be. I have found that although the written law restricts the practice of customary law by traditional leaders in the urban space, most urban residents recognise customary law and rely on it for dispute resolution. This approach has resulted in the loss of respect for written law because it does not reflect the majority of those it seeks to bind such that it has become almost impossible to enforce the existing land use planning laws effectively.

Moreover, by restricting access to urban space, I have argued that the State violates its obligation to ensure that rights under the Covenant are enjoyed without discrimination based on one's socioeconomic status. I have further observed that emphasis on planning as an exercise in physical planning and design has negatively affected the provision of facilities necessary to enjoy economic, social, and cultural rights. In particular, I note that the review of the TCPA 1988 was premised on an inaccurate rationale. The significance of this finding is that it demonstrates that misdiagnosis of a problem during law review results in bad law. In the present case, the enactment of the Physical Planning Act 17 of 2016 has failed to address pertinent issues which affect the enjoyment of ESCR in the urban space. The argument I am advancing is significant because it shows that current urban land use planning laws do not address

challenges at the core of the urban development approach in Malawi. The State, therefore, must ensure that pertinent problems, such as the provision of affordable and adequate housing, are addressed in the law because they are at the core of the emergence of informal settlement housing in urban spaces.

Finally, I have noted that the State has failed to take legislative measures which would have provided a statutory basis for the delivery of affordable housing on an equitable footing through rental housing market regulation and control. By failing to enact such laws, citizens' ESCRs in the urban space have been rendered hazy and difficult to claim against the duty bearers through the litigation model. This omission in the law has rendered land use laws unjust and illegitimate in terms of the natural law theory. The thesis has shown that it is not enough to have urban land use planning laws, such laws should be capable of assisting the State to realise its intended urban planning goals. Fundamentally, the thesis argument is critical because it has brought to the fore the inconsistency among laws that are clogging the realisation of ESCRs and ensure that laws are just and legitimate even when viewed from a Thomistic natural law angle.

5.4. Conclusion.

The State parties to the ICESCR must discharge their obligation of conduct by enacting laws that provide an enabling environment for achieving economic, social, and cultural rights. As a State party to the ICESCR, Malawi should, therefore, immediately enact land use legislation to facilitate achieving the enjoyment of ESCRs within the urban space. Such legislation should include repealing vagrancy laws and laws that proscribe the exercise of customary law in the urban space. Having found that largely the written urban land use planning laws do not represent the interest of the citizens, as evidenced by the massive noncompliance observed through the emergence of informal settlements, the law must be reviewed to include the provision of affordable housing expressly. Implementing these suggestions would not require the availability of resources because they are more to do with the obligation of conduct than the obligation of result, which requires the availability of resources. It is also essential to conduct further research on the systematic use of vagrancy and land use planning laws in commodifying the urban space to benefit propertied groups. This

suggestion is in the context of the observation that land use planning laws are shaped mainly by the need to serve the interest of the urban residents with adequate resources as opposed to the low-socioeconomic citizens who are in the majority but voiceless. The emergence of informal settlements in developing countries may, to a great extent, be a by-product of the need to protect the interest of the few, which the majority protest by doing the opposite of what the law seeks to impose in an inconsiderate fashion. Such a study would help understand the hegemonic commoditisation of the urban space and the emergence of settlements of protests. Overall, the thesis is valuable to understanding the reasons behind massive noncompliance prevalent in the urban space, the emergence of informal settlements, and ways of addressing these challenges using the law.

REFERENCES.

REFERENCES.

Journal Articles.

Anil Kalhan, 'Land rights issues in international human rights law' (2010) 4(1) *Malaysian Journal on Human Rights*.

Aronson, D. R. 'Capitalism and culture in Ibadan urban development' (1978) 7 *Urban Anthropology* 253-270.

Beatrix Busse 'Practices of discursive urban place-making in Brooklyn, New York; (hidden) digital and embodied discourse' (2021) *Text and Talk* 1-25.

Beier, A.L. 'Vagrants and the social order in Elizabethan England'(1974)64 *Past and Present* 3-29.

Benjamin Davy & Sony Pellissery, 'The citizenship promise (un)fulfilled: The right to housing in informal settlements' (2013) 22 *International Journal of Social Welfare*: s68-s84.

Benoit Dubreuil and Jean-Francois Gregoire 'Are moral norms distinct from social norms? A critical assessment of Jon Elster and Cristina Bicchieri.(2013)75 *Theory Decis*, 137-152.

Brown, D, & F. Brendan. 'Aquinas: Summa Theologica, The Treatise on Law, Questions 90-97 inclusive.' (2015) 1(2) *DePaul Law Review* 312.

Carol Bacchi and Jennifer Bonham (2014) 17 'Reclaiming discursive practices as an analytic focus: Political Implications' *Foucault Studies* 173-192.

Cassinelli, C. W The "Consent" of the Governed (1959)12(2) *Western Political Quarterly*, 391-409.

Chadzimula Molebatsi & Seabo B Morobolo 'Reading the place and role of endogenous governance structures in modernist physical planning: the case of the Bogosi and Kgotla in Botswana(2021) 80(2), *African Studies* 134-152.

Coggin T 'Recalibrating Everyday Space: Using Section 24 of the South African Constitution to Resolve Contestation in the Urban and Spatial Environment' (2021)24 *PER / PELJ*.

David Simon 'Uncertain times, contested resources: discursive practices and lived realities in African urban environments' (2015)19(2-3) *City* 221-225.

Davies, C.S.L. Slavery and Protector Somerset; the Vagrancy Act of 1547(1966)19 *Economic History Review* 533-549.

Emile Zitzke, 'A decolonial critique of Private Law and Human Rights'(2018) 34(3) *South Africa Journal on Human Rights* at 492.

Evance Mwachunga and Ronnie Donaldson, 'Urban Land Contestations, challenges, and planning strategies in Malawi's urban areas' (2018) 77 *Land Use Policy* at 5.

Foote C 'Vagrancy type law and its administration' the *University of Pennsylvania Law Review* (1956) 106.

Fuller, L. L. 'Positivism and Fidelity to Law – A Response to Professor Hart.' (1958) 71 *Harvard Law Review*: 630 – 72.

Geoffrey Payne 'Lowering the ladder: Regulatory frameworks for sustainable development' (2001)11 *Development in Practice* 308-318

Gregoire 'Are moral norms distinct from social norms? A critical assessment of Jon Elster and Cristina Bicchieri. (2013) 75 *Theory Decis* 137-152.

H.L.A. Hart: An Appraisal of H. L. A. Hart's Concept of Law' (2020)3(8) *EAS J Humanit Cult Stud* 349-356.

Hart HLA. 'Positivism and the Separation of Law and Morals.' (1958) 71 *Harvard Law Review* 593 – 629.

Haffner Marietta, Marja Elsinga and Joris Hoekstra 'Access and affordability: Rent regulation' *International Encyclopedia of housing and home* (2012) 40-45 Elsevier 41-42.

Ignasi Malizani Jimu 'Negotiated economic opportunity and power: Perspectives and Perceptions of street vending in Urban Malawi' (2005) 30(4) *Africa Development* 35-51.

Jeffrey S Adler 'A historical analysis of the law of vagrancy'(1989) 27(2) *Criminology* 209-229.

John Pløger 'Millennium Urbanism-discursive planning' (2001) 8(1) *European Urban Regional Studies* 63-72.

K. Tuori, 'Discourse Ethics and the Legitimacy of law' (1989) 2 *Ratio Juris*, 1989)125-143.

Kapindu, Redson Edward. 'Policies, Aspirations, or Rights-A Case for Mainstreaming Socioeconomic Rights in the Malawi Growth and Development Strategy (MGDS).' (2011) 14 *Yale Hum. Rts. & Dev. LJ* 34.

Kita M, & Okyere SA 'Rethinking urban informality and informal settlements growth in urban Africa: a literature discussion.' (2015)17(2) *J Sust Dev Africa* 101–124.

Lea Mwambene 'Marriage under African customary law in the face of the Bill of Rights and International human rights standards in Malawi'(2010) *African Human Rights Law Journal* 78.

Liam Riley 'Operation dongosolo and the geographies of urban poverty in Malawi' (2014)40(3) *Journal of Southern African Studies* 443-458.

Mabogunje A.L. 'Urban planning and the post-colonial state in Africa: A research overview.' (1990) 33 *African Studies Review* Vol. 33, No. 2, 121 – 203.

Moraro, P. Punishment, Fair Play and the Burdens of Citizenship (2019)38 *Law and Philos* 289–311.

Muna Ndulo 'African customary law, customs and women's rights' (2011) 18 *Indiana Journal of Global Studies* 87-120.

Nicholson, Caroline 'A critical analysis of the role of traditional leadership in modern South African law' (2006) *Fundamina: A Journal of Legal History* 184-192.

Njoh A.J. 'Urban Planning as a tool of power and social control in colonial Africa.' (2009) 24(3). *Planning Perspectives*, 301 – 317.

O.S. Bogdanova 'The role of moral norms in the behaviour of young schoolchildren' (1974)17(1) *Soviet Education* 22-38.

Petrovič, F.; Murgaš, F. 'Description Relationship between Urban Space and Quality of Urban Life. A Geographical Approach. (2021) 10 *Land* at 1337.

Phillip Alston and Gerald Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) *Human Rights Quarterly*, The Johns Hopkins University Press.

Ponce, Juli, 'Affordable housing, zoning, and the ICESCR; Some lessons from the and South African experience' (2017) 1(1) *Journal of Comparative Urban Law and Policy* at 18.

Quijano, Aníbal. 'Coloniality And Modernity/Rationality'(2007). *Cultural Studies* 21 (2–3): 168–179.

- Rakodi C. 'Forget planning, put politics first? Priorities for urban management in developing countries'. 2001 *International Journal of Applied Earth Observation and Geoinformation*.
- Raworth, K. 'Measuring human rights' (2001) 15(1) *Ethics and International Affairs* 111–131.
- Richard. H. Helmholz, 'Magna Carta and the Law of Nature' (2016) 62 *Loyola Law Review* 869.
- Robert Afamefuna Igwebudu & Ignatius Nnaemeka Onwuatuegwu; Separation Thesis of Law and Morality in H.L.A. Hart: An Appraisal of H. L. A. Hart's Concept of Law. (2020)3(8) *EAS J Humanit Cult Stud* 349-
- Sihlongonyane, Mfaniseni Fana 'Empty Signifiers of Transformation in Participatory Planning and the Marginalization of Black People in South Africa' (2015). *Planning and Practice Research* 30 (1):83–100.
- Sonali Banerjee 'The Relevance of the Hart-Fuller debate relating to law and morality-A critical analysis' (2017) 4(2) *International Journal of Law and Legal Jurisprudence Studies* 122-133.
- Stephen Berrisford and Michael Kihato 'The role of planning law in evictions in sub-Saharan Africa' (2006)36(1) *South African Review of Sociology* 20-34.
- Stephen Berrisford 'Revising Spatial Planning Legislation in Zambia' (2011) 22 *Urban Forum* 229-245.
- Thomas Coggin & Marius Pieterse, 'Rights and the city: An Exploration of the interaction between socio-economic rights and the city' (2012) 23 *Urban Forum* 257–278.
- Thomas Trier Hansen, Implementation of International Human Rights Standards through the national courts in Malawi (2002) 46(1) *Journal of African Law* 31-42.
- Trounstein, J. 'The Geography of Inequality: How Land Use Regulation Produces Segregation' (2020) 114(2) *American Political Science Review* 443-455.
- Wafae Bouallala 'Street Vending in Downtown Rabat: in Resistance to Imported Urban Models' in: Alem Gebregiorgis, G., Namangaya, A. H., Grieving, S., & Kombe, W. J.(eds) 'Planning Cities in Africa—Current Issues and Future Prospects of Urban Governance and Planning: An Introduction.' (2022) In *Planning Cities in Africa*.
- William J. Chambliss 'A sociological analysis of the law of vagrancy (1964)12 *Soc Problems* 1964) 67.

Wekwete K.H. 'Planning Law in Sub-Saharan Africa – A Focus on the Experience in Southern and Eastern Africa'. (1995) 19(1) *Habitat International* 13 – 28.

Books and Book and Chapters

A. Madanipour, *Public and Private Spaces of the City* Routledge (2003).

Adams, M. 'Quality of Urban Spaces and Wellbeing.' In Cooper, R., Burton, E., Cooper, C.L., (eds) *Wellbeing and the Environment: Wellbeing: A Complete Reference Guide*, 2 ed. John Wiley & Sons: Hoboken, NJ, USA (2014).

B. Gardener(Ed) *Black's Law Dictionary* (2009) 1689.

Brian Bix 'Natural law theory' ch 13 in: Dennis Patterson (eds) *A companion to philosophy of law and legal theory* (2010) Blackwell Publishing Limited Oxford.

Cicero *Republic* (1928)

Denise Meyerson '*Understanding Jurisprudence*' (2007) Routledge Cavendish.

Dhand H *Teaching Human rights: A Handbook for teacher education* (2002) Bhopal: Authors Press

Danwood M. Chirwa, *Human Rights under the Malawi Constitution* Juta Academic (2012)

D.V. Nha, 'The Role of Land-Use Planning on Socioeconomic Development in Mai Chau District, Vietnam' In Mai Van Thanh *et al.* (eds), *Redefining Diversity & Dynamics of Natural Resources Management in Asia*, (2017) Vol. 2, Elsevier.

D. E. & Clark, G. *Urban Management Programme – A Framework for Reforming Urban Land Policies in Developing Countries*. (1996). The World Bank, Washington DC

Farvacque C. & McAuslan, P. *Urban Management Programme: Reforming urban land policies and institutions in developing countries*. (1992). World Bank, Washington DC.;

Finnis J. *Natural Law and Natural Rights*. (1980) Oxford Clarendon Press.

Fuller, L. L. '*The Morality of Law*,' (1969) rev ed. New Haven, CT: Yale University Press.

George Duke 'The common good' In: G Duke & RP George(eds) *The Cambridge companion to natural jurisprudence* (2017), New York: Cambridge University Press.

Ghertner, D. A. '*Rule by aesthetics: World-class city making in Delhi*.' (2010) University of California, Berkeley.

Grotius, H. *De Jure Belli ac Pacis Libri Tres* (1925) tr. F. Kelsen. Oxford: Clarendon Press.

- Hampsher-Monk, I. *A History of Modern Political Thought: Major Political Thinkers from Hobbes to Marx* (1992) Oxford: Blackwell Publishers Ltd.
- Henry Shue, *Basic Rights: Subsistence, Affluence, and the US Foreign Policy* (1980) Princeton University Press
- Horton, J. *Political Obligation*: Palgrave Macmillan' (2010)
- H.L.A. Hart, *The Concept of Law* (1961).
- Hobbes, T. *Leviathan: Parts One and Two* (1958) New York: The Liberal Arts Press
- John Agnew 'Space and Place' in J. Agnew and D. Livingstone (eds), *Handbook of Geographical knowledge*. London: Sage.
- J. Budziszewski, *Commentary on Treatise on Law*, Cambridge University Press (2014).
- Keeble, L. 'Principles and Practice of Town and Country Planning,' (1952) London.
- Kelsen Hans *Pure Theory of Law*. (1960)(1934)Translated by Knight Berkeley CA: University of California.
- Konadu-Agyemang K. '*The Political Economy of Housing and Urban Development in Africa: Ghana's Experience from Colonial Times to 1998*'. (1998) Praeger Publishers, Westport.
- Koops, B-J., & Galič, M. (2017). 'Conceptualising space and place: Lessons from geography for the debate on privacy in public.' In T. Timan, B. Newell, & B-J. Koops (eds.), *Privacy in public space: Conceptual and regulatory challenges* Edward Elgar Publishing.
- L.A. Staeheli and D. Mitchell, 'Spaces of Public and Private: Locating Politics' in C. Barnett and M. Low (eds), *Spaces of Democracy: Geographical Perspectives on Citizenship, Participation, and Representation* (Sage, 2004) 152.
- Luis Cortes '*The Disfigured Face: Traditional Natural Law and its Encounter with modernity* '(2008) Fordham University Press.
- Mercier Hugo and Sperber Dan *The Enigma of reason* (2017) Cambridge MA Havard University Press.
- Michael Pacione, *Urban Geography: A global perspective*, 2 ed (2005) Routledge New York.
- Mignolo, Walter D. *The Prospect of Harmony and the Decolonial View of the World* (2012).
- Murray, Martin J. *Taming the disorderly city: Taming the Disorderly City* (2008) Cornell University Press.

Nigel Taylor. '*Urban Planning Since 1945*' (1998) Sage Publications: London

Oliver De Schutter, *International Human Rights Law*, 2010, Cambridge: Cambridge University Press. P. 253.;

Office of the High Commission for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* (2005) 47-48.

Rawls, John, '*Political Liberalism*' (1996) New York: Columbia University Press.

Simmons, A. J. 'Justification and Legitimacy: Essays on Rights and Obligations.' (2001). Cambridge: Cambridge University Press.

Sigrun I. Skogly & Mark Gibney, 'Economic Rights and Extraterritorial Obligations,' in *Economic Rights: Conceptual, Measurement, and Policy Issues* 267 (2007) (eds) Shareem Hertel.

S. Lukes, *Power: a Radical View* (2005) 2 ed, Palgrave Macmillan.

Shue, Henry. 'The interdependence of duties.' In *The right to food*. 1984 Brill Nijhof 83-96.

Stephen O. Sullivan and Phillip A Pecorino 'Ethics' (2002) Online Textbook: Queensborough Community College.

Summa Theologia on Law, Question 94, Article 4, Paragraph F

Terrence Ranger 'The invention of tradition in colonial Africa' in Hobsbawm and Ranger (eds) *The invention of tradition* (1983).

Thomas Aquinas: Summa Theologica, The Treatise on Law, Questions 90-97.

Toulmin, C. and J. Quan (eds.) *Evolving Land Rights, Policy and Tenure in Africa* (2000) London: DFID-IIED-NRI.

UN-HABITAT, *Planning Sustainable Cities: Policy Directions: Global report on Human Settlements*. (2009)(abridged edition) Earthscan: London.

UN-HABITAT, 'Planning sustainable cities: Global report on human settlements' (2009), Earthscan: London. Chapter 1

William J. Chambliss 'A sociological analysis of the law of vagrancy 12 *Soc Problems* 67(1964). p. 68.

Wright, G. *The politics of design in French colonial urbanism*. (1991) Chicago: University of Chicago Press.

Thesis

Danwood Chirwa *Towards binding economic, social and cultural rights obligations of non-state actors in international and domestic law: A critical survey of emerging norms*: (unpublished PhD Thesis, University of the Western Cape 2005).

Sisule Frederick Musungu, *The Right to Health in the Global Economy: Reading Human Rights Obligations into the Patent Regime of the WTO-TRIPS Agreement* (unpublished LL.M. dissertation, Univ. of Pretoria 2001).

Conference Proceedings.

Auwah, K.G. *et al.* 'Sub Saharan African Urban land use planning systems: The need for an economic appraisal (2010): In RICS/COBRA 2010 Conference.

<https://www.researchgate.net/publication/287253638_Sub_Saharan_Africa_urban_land_use_planning_systems_The_need_for_an_economic_appraisal>

Janet Banda, Felix Tukula and Davie Chilonga, 'Land Policy: Implementing the Physical Planning Act in the Context of Malawi Land Reform Program' *Catalyzing Innovation: Annual World Bank Conference on Land and Poverty, Washington DC* March 25-9.

Majale, M., 'Towards Pro-poor Regulatory Guidelines for Urban Upgrading. In: A Review of Papers presented at the International Workshop on Regulatory Guidelines for Urban Upgrading, Held at Bourton-on-Dunsmore, May 17–18 2001.

Mwimba C. 'The colonial legacy of town planning in Zambia' (2002). *Paper presented to South African Planning Institute international conference on planning Africa*, 18 – 20 September 2002, Durban, South Africa.

Websites

Andrew Blom, 'Hugo Grotius (1583-1645)' Internet Encyclopaedia of Philosophy available at <<https://iep.utm.edu/grotius/#H4>> accessed on 24/09/2022.

Charles Darwin 'On the origin of species (1859) available at <https://www.vliz.be/docs/Zeecijfers/Origin_of_Species.pdf> accessed on 9/01/2023.

.

DBpedia-Urban areas in Sweden available at <https://dbpedia.org/page/Urban_areas_in_Sweden> (accessed on 22/07/2022).

Definition of 'country' available at <<https://dictionary.cambridge.org/dictionary/english/country>>. Accessed on 30/08/2022.

D Okpala, 'Regional Overview of the Status of Urban Planning and Planning Practice in Anglophone(Sub-Saharan) African Countries' available at <http://www.unhabitat.org/grhs/2009> accessed 10 February 2018.

Dimmock, Mark; Fisher, Andrew. *Chapter 4. 'Aquinas's Natural Law Theory' in Ethics for A-Level: For AQA Philosophy and OCR Religious Studies* [online]. Cambridge: Open Book Publishers, 2017. available at <http://books.openedition.org/obp/4422> accessed on 04/09/2021.

Christiano, Tom, 'Authority' *The Stanford Encyclopedia of Philosophy* (Summer 2020 Edition), Edward N. Zalta (ed.), available at <https://plato.stanford.edu/archives/sum2020/entries/authority/> >. Accessed on 09/01/2023.

Finnis, John, 'Natural Law Theories' *The Stanford Encyclopedia of Philosophy* (Summer 2020 Edition), Edward N. Zalta (ed.), available at <https://plato.stanford.edu/archives/sum2020/entries/natural-law-theories/> (accessed 5/09/2021).

Finnis John 'Natural law theories' In: Zalta, Edward N. (ed) *The Stanford Encyclopaedia of Philosophy* (Summer 2020 ed) Metaphysics Research Lab, Stanford University available at <https://plato.stanford.edu/entries/natural-law-theories/> accessed on (accessed 5/09/2021).

Hussain, Waheed, 'The Common Good' *The Stanford Encyclopedia of Philosophy* (Spring 2018 Edition), Edward N. Zalta (ed.), available at <https://plato.stanford.edu/archives/spr2018/entries/common-good/> accessed on 09/01/2023.

Human Rights: A basic handbook for UN staff: Office of the High Commissioner for Human Rights available at <https://www.ohchr.org/sites/default/files/Documents/Publications/HRhandbooken.pdf> accessed on 18/07/2022.

Jeremy Seth Geddert 'Natural Rights and History: Hugo Grotius's Modern Translation of Natural Rights and History: Hugo Grotius's Modern Translation of Aristotle' (2016), Assumption University: Digital Commons available at <https://digitalcommons.assumption.edu/cgi/viewcontent.cgi?article=1039&context=political-science-faculty> accessed on 09/01/2013.

The Limburg Principles on the Implementation of the International Covenant on Economic Social and Cultural Rights. available at http://www.concernedhistorians.org/content_files/file/to/142.pdf .

The New Jersey Centre for Civic Education, Rutgers University. ‘What does “consent of the governed” mean?’ available at <<https://civiced.rutgers.edu/documents/civics/middle-school-civics/civic-concepts/81-consent-of-the-governed/file>> accessed on 25/09/2022.

Weihua He ‘The Prospect of Harmony and the Decolonial View of the World: Weihua He Interviews Walter Mignolo’ (2014) available at <https://criticallegalthinking.com/2014/06/12/prospect-harmony-decolonial-view-mignolo/> accessed on 09/01/2023.

Murphy, M. Stanford Encyclopedia of Philosophy [online], ‘The Natural Law Tradition in Ethics’ (2008) at available at <http://plato.stanford.edu/entries/natural-law-ethics/>, [Accessed: 06/08/2022].

National Geographic, Resource Library, Encyclopaedic Entry ‘Urban Area’ available at <<https://education.nationalgeographic.org/resource/urban-area>>. (accessed on 22/07/2022).

Nicola-Ann Hardwick ‘How radically did Hobbes depart from the natural law tradition?’ (2011) found at <<https://www.e-ir.info/pdf/7110>> accessed on 9/01/2023.

The New Jersey Centre for Civic Education, Rutgers University. ‘What does “consent of the governed” mean?’ available at <<https://civiced.rutgers.edu/documents/civics/middle-school-civics/civic-concepts/81-consent-of-the-governed/file>> accessed on 25/09/2022.

UN Treaty Body Database available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CESCR&Lang=en accessed on 25 August 2021.

Values and norms available at <<https://ethics-of-ai.mooc.fi/chapter-1/3-values-and-norms>> accessed on 09/01/2023.

General Comments

CESCR General Comment No. 3: The Nature of States Parties’ Obligations, *Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23).*

CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), *Adopted at the Sixth Session of the Committee on Economic, Social and Cultural Rights, on 13 December 1991 (Contained in Document E/1992/23).*;

CESCR General comment 7. The right to adequate housing (Art.11.1): forced evictions: 20/05/97. < <https://www.refworld.org/docid/47a70799d.html> >

CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), *Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4).*

CESCR General Comment No. 20 Non-discrimination in Economic, Social and Cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights).

CESCR General Comment No. 21 Right of everyone to take part in cultural life (art. 15 para 1(a), of the International Covenant on Economic, Social, and Cultural Rights.

CCPR General Comment No. 27: Article 12 (Freedom of Movement *Adopted at the Sixty-seventh session of the Human Rights Committee, on 2 November 1999*
CCPR/C/21/Rev.1/Add.9, General Comment No. 27. (General Comments) (Contained in document CCPR/C/21/Rev.1/Add.9); para 5

Rodrigo Uprimny and Michael Windfuhr, *CESCR General Comment No. 26 on Land and Economic, Social and Cultural Rights(Draft)*, 7th Session, 27 September –15 October 2021, Item 4 of the Provisional Agenda(E/C.12/70/R.1). para-19.

Interpreting the Human Right to Land within the International Covenant on Economic, Social and Cultural Rights; Input into Proposed CESCR General Comment on Land available at https://www.hlrn.org/img/documents/GC_on_land_.pdf accessed on 03/06/2022.

Special Rapporteur Reports

Balakrishnan Rajagopal, *Spatial segregation and the right to adequate housing*, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination, [49th Session 28 February 2022–1 April 2022, A/HRC/49/48].

Preliminary Report of the Special Rapporteur on the Right to Education, Ms. Katarina Tomaserviski, submitted in accordance with Commission on Human Rights Resolution 1998/33, E/CN. 4/1999/49, 13 January 1999.

UN Conventions and Treaties.

Convention of the Rights of Persons with Disabilities (CRPD).

United Nations Charter

Vienna Convention on the Law of Treaties.

Declarations

Declaration of the Rights of Man and of the Citizen (1789) of France.

United Nations Declarations on Human Rights 1948.

United States Declaration of Independence of 1776.

Reports

COHRE 2005c. *Evictions Monitor*. I (3) August, Geneva: Centre for Housing Rights and Evictions (COHRE).

Malawi Human Rights Commission ‘Cultural Practices and their Impacts on the enjoyment of human rights, particularly the rights of women and children in Malawi.(2006) Lilongwe.

National Report on Progress Made in the Implementation of the New Urban Agenda, March 2021, Government of Malawi.

UN-Habitat 2005a. ‘*Report of the fact-finding mission to Zimbabwe to assess the scope and impact of Operation Murambatsvina by the UN Special Envoy on human settlements issues in Zimbabwe, Mrs. Anna Kajumulo Tibaijuka.*’ Nairobi: UN- Habitat. p. 32-34.

Urban Profiles for Blantyre, Mzuzu, Lilongwe, and Zomba Cities in Malawi (UN-HABITAT, 2011).

United Nations IRIN Humanitarian Information Unit Report 11 August 2005. Available at <https://reliefweb.int/report/malawi/malawi-govt-threatens-evict-informal-settlers>. Accessed on 4/11/2022.

The Right to Adequate Food as a Human Right, Report prepared by A. Eide, E/CN.4/Sub.2/1983/25(1983).

European Commission, Directorate-General for Justice and Consumers, Chopin, I., Germaine, C. (2017). *A comparative analysis of non-discrimination law in Europe 2017: the 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia, and Turkey compared*, Publications Office. Available at <https://data.europa.eu/doi/10.2838/52129>.

Law Commission Reports

Special Law Commission Report on the Review of Traditional Courts Act (2007).

Law Commission Report on Review of Land Related Laws(2006).

Working Paper

Cammack, D., Kanyongolo, E., O’Neil, T., 2009. ‘Town chiefs’ in Malawi: Africa Power and Politics, Working Paper No.3. ODI, London.

C.A. Thomas, 'The Concept of Legitimacy and international Law' LSE, Society, and Economy Working papers, 12/2013, London School of Economics and political science Department.

Charles Abrams 'Squatter Settlements: The Problem and the Opportunity.' Ideas and Methods of Exchange no. 63' (1964) Washington D.C: Office of International Affairs, Department of Housing and Urban Development.

Liam Riley, 'The Political Economy of Urban Food Security in Blantyre, Malawi' The African Institute Occasional Paper Series (2012).

United Nations. Economic Commission for Africa (2014). ' Guiding principles on large scale land-based investments in Africa' Addis Ababa, principle 17.

Zbigniew Orbik 'Human Rights in the light of the concept of natural law' (2019), Silesian University of Technology Publishing House, Scientific papers of Silesian University of Technology Organisation and Management Series No.140.

Malawian Cases.

Bridget Kaseka and Others v R [1999] MLR 116 (HC).

In the Matter of the Adoption of Children Act and In the Matter of Chifundo James (An Infant).

Gable Masangano v Attorney General and 2 Others, Constitutional Case Number 15 of 2007.

Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC).

Pempho Banda and 18 others v The Republic Review Case No. 58 of 2016.

Mayeso Gwanda v The State Constitutional Cause No. 5 of 2015.

R v Balala 1997] 2 MLR 67.

Republic v Ganizani and 4 Others Confirmation Case No. 29 of 1999.

Thomas Brown v R Criminal Appeal No. 24 of 1996(unreported)

International Cases.

Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria(SERAC Case) Comm. No. 155/96.

Advisory Opinion on the Request by the Pan African Lawyers Union Regarding the Compatibility of Vagrancy Laws with the African Charter of Human and Peoples' Rights and other Human Rights Instruments Applicable in Africa (Afr. Ct. H.P.R.) No. 001/2018. 4 December 2020. <<https://www.african-court.org/cpmt/storage/app/uploads/public/60f574/3a6/60f5743a61e75369142990.pdf>>

Legislation

Constitution

Constitution of the Republic of Malawi

Constitution of the Republic of Ghana,

Constitution of the Republic of Kenya,

Constitution of the Republic of Zimbabwe

Constitution of the Republic of Zambia.

Statutes

British Town and Country Planning Act 1947.

Department of Human Settlements and Urban Development Act, Philippines Republic Act No. 11201.

Environmental Management Act No. 16 of 2017.

Physical Planning Act 2016, Act No. 17 of 2016.

Penal Code, Cap 7.01 of the Laws of Malawi.

Land Act No. 16 of 2016.

Malawi Local Government Act No. 42 of 1998.

Malawi Town and Country Planning Act 1988.

Chiefs Act Cap 22.03 of the Laws of Malawi.

Zimbabwe Regional Town and Country Planning Act, Cap. 29:12 of the Laws of Zimbabwe.

Zambia Local Government Act No. 2 of 2019.

Kenya Local Government Act 1998. Chap 265 of Laws of Kenya.

Registered Land Act Cap 58.01 of the Laws of Malawi.

Uganda Physical Planning Act No. 8 of 2010.

Kenya Physical Planning Act 2010, Chapter 286 of the Laws of Kenya.;

Malawi Physical Planning Act No. 17 of 2016.

Tanzania Land Use Planning Act 2007

Zambia Rent Act No. 13 of 1994, Cap 206 of Laws of Zambia.

Uganda Rent Restriction Act, 2020, Cap 231 of Laws of Uganda.

Kenya Rent Restriction Act, Cap 296 of the Laws of Kenya, Rev 2010.

South Africa Rental Housing Act No. 50 of 1999.

Subsidiary legislation

Land Use Planning and Management Guidelines and Standards incorporated under Regulation 4 of the Physical Planning Regulations 2014. Department of Physical Planning: Lilongwe.

By-laws

Local Government (Blantyre City Council) (Peddlers) By-laws.

Local Government (Mzuzu City Council) (Market) By-Laws.

Local Government (Blantyre City Council) (Market) By-Laws

Local Government (Lilongwe City Council) (Peddlers) By-Laws 2018

Local Government (Blantyre City) (Trade and Business) By-Laws.

Local Government (Blantyre City) (Liquor) By-Laws.;

Policies

Malawi National Land Policy 2002.

Malawi National Urban Policy 2019.

Newspapers.

Derick Matsengarwodzi 'Bulldozed: Zimbabweans losing their homes to a land dispute- Aljazeera Report 11 January 2021 available at

<https://www.aljazeera.com/features/2021/1/11/bulldozed-the-zimbabweans-losing-their-homes-to-a-land-dispute>. Accessed on 4/11/2022.

Daily Times 1 September 1988.

