A Place We Want to Call Our Own

A study on land tenure policy and securing housing rights in Namibia

Land, Environment and Development (LEAD) Project
LEGAL ASSISTANCE CENTRE
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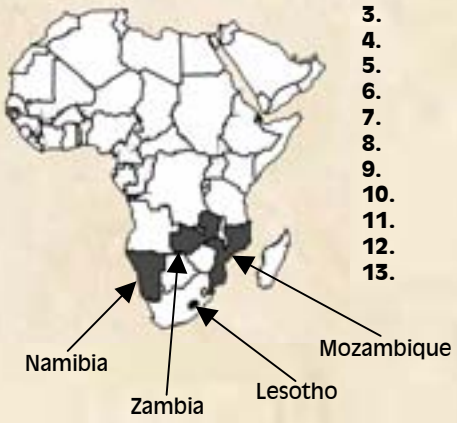
Willem Odendaal
LEAD Project, Windhoek, May 2005

Namibia's regions and urban centres

The UN Habitat Research and Development Centre in Katutura. Windhoek.

THE FULL UN HABITAT SOUTHERN AFRICA STUDY AREA



KEY TO THE REGIONS

1. **Omusati**
2. **Oshana**
3. **Ohangwena**
4. **Oshikoto**
5. **Okavango**
6. **Caprivi**
7. **Kunene**
8. **Otjozondjupa**
9. **Omaheke**
10. **Erongo**
11. **Hardap**
12. **Karas**
13. **Khomas**

1. Introduction and background

1.1 Historical background

Namibia, unlike other Southern African countries such as South Africa, Mozambique and Zimbabwe, has never developed large urban centres. This is because, firstly, Namibia has a small population and its environmental conditions are not favourable to a high population concentration, and secondly, Namibia has insufficient economic surpluses[1] to maintain specialised urban functions and its communities are located only marginally along regional trade and migratory routes.[2]

Under German colonial rule, Namibia, then known as German South West Africa, was divided into two sections. One section, called the Police Zone, was substantially cleared for white settlement. The other section comprised the northern and north-eastern parts of the country where "reserves" or "homelands" were created for the indigenous African population, whose movements outside these areas were restricted.[3]

After the German armed forces surrendered on 9 July 1915, Namibia became a British Protectorate with the British King's mandate held by South Africa. Under the Treaty of Versailles and the South African Parliament's South West Africa Act 49 of 1919, land held by the German colonial administration became Crown (or state) land of South Africa.

The "Police Zone" (south of the thick black line)

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1 In 1995 Namibia's Gross Domestic Product was N$11 470 million (US$3 100 million), with a per capita income of N$7 387 (US$ 1996) – triple the African continent's average. These statistics, however, conceal the fact that Namibia is rated as one of the world's most unequal societies, with the poorest 90% consuming significantly less than the wealthiest 10%. (Republic of Namibia, *Programme Review and Strategy Development Report*, October 1998, United Nations Population Fund, at 2.)

2 Tvedten I and Mupotola M, *Urbanisation and Urban Policies in Namibia,* NEPRU Working Paper No. 47, October 1995, Windhoek, at 7.

3 The boundary that divided the Police Zone from the northern and north-eastern parts spanned the north-central part of the country, extending from the Atlantic Ocean to Botswana in a northward-arching semi-circle. Administration in the "homelands" was left in the hands of the traditional leaders. Communities north of the Police Zone were not formally incorporated into the colonial administration until after 1900. Owamboland and the Caprivi Strip, for example, were incorporated only in 1908 and 1910 respectively, when it became necessary to create a source of cheap labour for colonial economic activities inside the Police Zone. (United Nations Institute for Namibia, *Namibia: Perspectives for National Reconstruction and Development*, Lusaka, 1988, at 30 and 31.)

Urban policy of both the German and South African colonial administrations was to create town centres as exclusive white residential, recreational and business areas. Throughout the colonial era, both public and private investment was concentrated in these town centres. The black population was allowed to move in mainly as contract labourers who lived in separate areas (townships) with housing and other social services inferior to those of "white areas". Permanent black urbanisation was discouraged, while a number of laws, such as pass laws and prohibition of urban land ownership, controlled most aspects of black residents' lives.[4]

Black people (mainly men) were recruited from communal areas to work as contract labourers in factories and service industries in commercial areas.[5] National apartheid policy did not allow for black urban migrants to bring their families to live with them in towns in commercial areas. Most men recruited from communal areas lived in single-quarter accommodation in the commercial areas. Development of informal settlements was also strictly regulated by apartheid policy. For example, residential growth in Katutura, a black township in Windhoek, was prohibited, one consequence being heavy overcrowding in the formal low-cost houses in Katutura before independence.[6] When restriction of movement was lifted at independence, men's single quarters in towns in commercial areas became the reception areas for newcomers, especially from rural areas, looking for employment opportunities. Men brought their families to live with them, which led to severe overcrowding in the single quarter units, and associated health and social problems.[7]

Urban development in northern communal areas during the colonial period was hindered by a lack of both public and private investment. Urbanisation started in earnest there only in the 1960s, in response to the administrative and military requirements of the South African Defence Force. At that time towns in these areas were administered by peri-urban boards and served as centres for the "homelands" created by the Odendaal Commission,[8] providing basic facilities such as government offices, hospitals, schools and police stations. Towns in communal areas also became segregated, with formal and fully serviced white residential and recreational areas and undeveloped informal settlements for black people. The 1960s also saw the development of formal townships for black people in communal areas, but on a much smaller scale than in the commercial areas.

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4 Christensen SF, Wolfgang W and Hojgaard PD, *Innovative Land Surveying and Land Registration in Namibia*, The Development Planning Unit, University College, London, 1999, at 5.

5 Namibia has a dual land ownership system. The Constitution vests the administration of communal land in the State. The State administers communal land in trust for the benefit of the traditional communities residing on these lands and for the purpose of promoting the economic and social development of the Namibian people. Communal land cannot be bought or sold. Commercial land can be bought by private individuals who become the owners of the land purchased. Under both the German and South African governments, commercial land was allocated along racial lines, a practice that resulted in long-standing grievances over commercial land ownership in the country.

6 Gold J, Muller A and Mitlin D, *The Principles of Local Agenda 21 in Windhoek: Collective action and the urban poor,* Urban Environment Action Plans and Local Agenda 21 Series Working Paper (December 2001), Human Settlements Programme, IIED, London, 2001, at 24.

7 Statement by Dr Libertine Amathila, Namibia's Minister of Regional and Local Government and Housing at the time, at the Habitat II Conference/City Summit in Istanbul, Turkey, on 3-14 June 1996 – conference report at <http://www.un.org/Conferences/habitat/eng-stat/4/nam4p.txt>.

8 Former South African Prime Minister HF Verwoerd appointed the Odendaal Commission in 1962 to advise the South African Government on how a policy of separate development could be implemented in Namibia.


A wealthy Windhoek suburb and a partially serviced Katutura informal settlement area in 2005. Though no longer strictly 'white' residential areas, the wealthy suburbs are still inhabited predominantly by whites.

The national system of separate urban development was relaxed in 1977 when influx control measures were abolished. In principle people could then move freely into towns and settle wherever they wished, but the employment situation and economic conditions still inhibited larger-scale urbanisation before independence.[9]

During 1978, with the formation of the parastatal Nasboukor (the then National Building Corporation), new suburbs were built, allowing for private ownership of urban land by black people for the first time. Self-help building in the formal urban sector was an unusual concept among families living in low-income areas. Movement controls ensured that those living in urban areas had formal employment and were either allocated rented housing owned by the municipality or purchasing housing from Nasboukor.[10]

At independence, apartheid policy was abolished and the new Constitution introduced the right of all Namibians to reside and settle in any part of the country.[11] This provoked a dramatic increase of informal settlement in Windhoek, mostly around Katutura. Many living in overcrowded conditions in Katutura moved onto vacant land nearby and many migrants from impoverished rural areas joined them.[12] These newly settled urban residents lived in very unhygienic conditions, without easily accessible water and sewerage facilities. In the early days of informal settlement in Windhoek, the Windhoek City Council (WCC) seemed powerless to stem the tide. Currently, the growing poorer city population profile points at a lower capacity of the city to generate income from rates and taxes annually. The WCC has attempted in recent years to match affordability levels (ability to pay) with an appropriate basic service for the city's poor population.

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9 Tvedten I et al., op. cit. (footnote 2), at 7; Gold J et al., op. cit. (footnote 6), at 24.

10 Gold et al., op. cit. (footnote 6), at 24.

11 Article 21(1)(h).

12 A survey conducted in Windhoek's informal settlements in 2001 indicated that residents had been living in their informal settlement for an average of 5.2 years and in Windhoek for an average of 12.4 years. These figures suggest that informal growth is not due so much to new rural immigrants building shacks in informal settlements as it is to people living in overcrowded conditions in the city moving out in search of more space for themselves and their families.

1.2 Legal system and governance structure

The legal system in Namibia is a combination of Roman Dutch law, common law inherited from South Africa and some old English law as well as customary law, the latter prevailing mostly in rural areas but there are also traces of it in urban areas.

The South West Africa People's Organisation (SWAPO) won 57% of the total vote in Namibia's first democratic national elections held in November 1989 under the international observation of the United Nations Transition Assistance Group (UNTAG). After the elections, an elected Constituent Assembly to draw up a constitution for a multi-party democracy with an executive president. In February 1990 the Constituent Assembly adopted a draft constitution. On 21 March 1990 Namibia became an independent state. The Constituent Assembly became the National Assembly and SWAPO President Sam Nujoma became the first President of the Republic of Namibia.

The Government of the Republic of Namibia is established as a democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all.[13] The main organs of state are the Executive, Legislature and Judiciary.

The Executive

The Executive is headed by the President assisted by the Cabinet. The President is obliged to act in consultation with the Cabinet.[14] Ministers oversee the activities of their respective ministries and inform the National Assembly and the public about those activities.

The President is elected by direct popular vote for five-year term of office and can be re-elected for a second term (Article 29(3)). President Nujoma, however, is currently serving his third[15] and final term as President. Statutory policy bodies, i.e. the Judicial Service Commission and National Planning Commission, advise the President on relevant matters of state.

Namibia is divided into 13 administrative regions and 102 constituencies.[16] A regional governor heads each region, elected regional councillors head the constituencies and elected local councillors form the municipal, town and village councils. Currently only one governor

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[13] Article 1 of the Constitution of the Republic of Namibia.

[14] The Cabinet consists of the President, Prime Minister, Deputy Prime Minister and Ministers appointed by the President. The Cabinet implements policy, guided by the Constitution and Acts of Parliament. The Prime Minister is the Chief Advisor to the President and the overall coordinator of the government offices, ministries and agencies.

[15] The fact that the first President of Namibia was elected by the Constituent Assembly rather than by direct popular vote for his first term in office led to an amendment of the Constitution, i.e. the addition of Article 134(3) which reads, "… Notwithstanding Article 29(3) [limiting a President's term of office to just two terms], the first President of Namibia may hold office as President for three terms."

[16] The delimitation and governance of regions by Regional and Local Councils are effected in accordance with Articles 102-111 of the Constitution. The Regional Councils Act 22 of 1992 and the Local Authorities Act 23 of 1992 further regulate the establishment, powers, duties and functions of the councils. The management and development role and functions of Regional Councils are stipulated in section 28 of the Regional Councils Act. These include: regional development planning in cooperation with the National Planning Commission; the establishment, management and control of settlement areas; and assisting Local Authority Councils in the exercise of their functions.

is a woman (the Governor of Omaheke Region) and only 6 of the 102 regional councillors are women.[17] According to the Association of Local Authorities in Namibia (ALAN), Namibia has a total of 37 municipal, town and village councils – 16 municipalities, 10 towns and 11 villages. Municipal councils have 7-15 members, town councils 7-12 members and village councils 5 members. In total there are 140 councillors making up the 37 councils, of whom 36 (25%) are women. Councillors are elected directly every five years. All local authorities (municipal, town and village) are given certain automatic powers, but villages may exercise these powers only if the Minister of Regional and Local Government and Housing considers them ready to do so. Central government can step in to help towns and villages that are having trouble providing adequate services to residents. The lack of development in most towns undermines the town councils' authority and ability to raise revenue from tax, and thus could jeopardise their political legitimacy.

A number of town councils in Namibia are in debt and most lack capacity. For example, NamWater, a state-owned entity and the bulk water supplier in Namibia, announced at the end of November 2004 that it would suspend its services to the towns of Khorixas, Okakarara, Opuwo, Karibib, Usakos, Rundu and Katima Mulilo if they failed to pay their debts by the beginning of December 2004. This came less than three months after NamWater entered into new water agreements with the same municipalities, in terms of which they are expected to pay in advance for the water supply as well as a portion of their debt.

During 2004 the Okakarara electricity supply was cut and the town was without water for weeks due to non-payment. Katima Mulilo managed for nearly a year with a reduced water supply – for most of the year water was supplied for only three hours a day. Usakos and Karibib have been battling to settle their water and electricity debts. Central government intervened in August 2004 by arranging with NamWater to freeze the debts and allow these municipalities to start with a clean slate. Government officials were sent to these troubled municipalities to improve debt collection mechanisms after the councils blamed the residents for failing to pay for services. In August 2004 NamWater's clients owed the company more than N$63 million (US$12 million), with town councils responsible for paying more than half of this figure.[18]

Namibia also has traditional authorities. Section 16 of the Traditional Authorities Act 25 of 2000 provides that a traditional authority shall exercise its powers and the performance of its duties and functions under customary law, as well as give support to the policies of central government, regional councils and local authority councils, and refrain from any act that undermines the authority of those institutions. However, the supportive role that traditional authorities are meant to play in relation to other authorities is not always well defined despite central government's efforts to define it, and despite the provisions of the Constitution, the Regional Councils Act, the Local Authorities Act, the Traditional Authorities Act and the Traditional Leaders Act.

Section 6 of the Traditional Authorities Act provides for the designation of traditional leaders. Members of a traditional community may follow their customary law to name a member of

[17] Information obtained from the Association of Regional Councils in Namibia on 20 July 2004.
[18] Dentlinger L, "Water cuts loom again", in *The Namibian*, 26 November 2004.

the community's royal family as community chief or head. In the absence of a royal family, the community may designate any community member as its chief or head. A community that designates a traditional leader must apply in advance to the Minister of Regional and Local Government and Housing for approval of the designation. If the Minister is satisfied that the designation meets all the requirements of the Act, he or she notifies the President, and the President gives recognition to the designation in the *Government Gazette*. No chief or head of a traditional community will be granted government recognition if the necessary information about the designation has not been published in the *Gazette*.

Chiefs and heads may not hold political office unless they take leave of absence from their posts as chiefs or heads. For each recognised traditional authority the central government pays an allowance to the chief or head and up to six senior traditional councillors and six additional traditional councillors.

'CHIEF' AND 'HEAD' DEFINED

The Traditional Authorities Act defines a traditional 'chief' or 'head' (or 'headman') as "the supreme traditional leader of a traditional community designated in accordance with the Act". Thus the Act does not specifically distinguish between a 'chief' and a 'head'.

The Act defines a 'chief' as a supreme leader of a traditional community who:

1) is from a royal family of a traditional community and who has been instituted as the chief or head of that traditional family; and
2) is recognised by the Minister of Regional and Local Government as a chief or head of a traditional community in terms of section 6 of the Act.

(section 1 read with sections 4(1)(a) and 6)

The Act defines a 'head' as a supreme traditional leader of a traditional community who has been designated as such and who:

1) is from a royal family of a traditional community and has been instituted as the chief or head of that traditional family;
2) is a member of a traditional community and has been appointed as the head of a traditional community; and
3) is recognised by the Minister of Regional and Local Government as a chief or head of a traditional community in terms of section 6 of the Act.

(section 1 read with sections 4(1)(a), 4(1)(b) and 6)

The Act is ambiguous on the distinction between a chief and a head, but it appears to say that a chief *must* be a member of a royal family whereas a head can be a member of a royal family or just of a traditional community.

To fully appreciate the distinction between a chief and a head, various factors may have to be taken into account, such as:

- the hierarchical structure in a traditional community (chiefs have a more senior position); and
- the function and duties of a chief or head within a traditional community (chiefs often have a final say in the election of heads).

The Legislature

The Legislature is the law-making arm of government. It also allocates money needed by the Executive to execute its functions, and exercises control over the government. The Legislature consists of two houses: the National Assembly and the National Council.

The National Assembly consists of 72 voting members elected directly on the basis of proportional representation for a term of five years, and an additional 6 non-voting members appointed by the President. Currently, 19% of all parliamentarians are women and 14.2% of all Cabinet members are women.

The National Council consists of 26 members (two per region) elected directly for a term of six years. The National Council reviews bills passed by the National Assembly and recommends legislation on matters of regional concern for consideration by the National Assembly.[19]

The Judiciary

In terms of Article 78 of the Constitution, judicial powers are vested in the Courts of Namibia, consisting of a Supreme Court, a High Court and Lower Courts throughout the country (magistrates' courts, regional and district labour courts, etc.). Namibia has an independent Judiciary, meaning that no member of the Cabinet or Legislature nor any other person can interfere with judges or judicial officers in the exercise of their judicial functions.

The Supreme Court is the highest court in Namibia. It is headed by a Chief Justice assisted by other judges. The Chief Justice is appointed by the President on the recommendation of the Judicial Service Commission established in terms of Article 85 of the Constitution.[20] The Supreme Court hears and adjudicates upon appeals emanating from the High Court, including appeals that involve the interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms it guarantees.[21]

The High Court is the second highest court in Namibia. It consists of the Judge President and other judges appointed by the President on the recommendation of the Judicial Service Commission. Of the 11 full-time judges, only two are female and seven are black.[22] The High Court has jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions, including cases that involve the interpretation, implementation and upholding of the Constitution. The High Court further has jurisdiction to hear and adjudicate upon appeals from lower courts. Cases involving land and housing disputes can be referred to a

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[19] Articles 63 and 74 of the Constitution outline the wide-ranging functions and powers of the two Houses of Parliament.

[20] The Judicial Service Commission makes recommendations with regard to all judicial appointments and disciplinary actions against a judge. The Judicial Service Commission consists of the Chief Justice, or the presiding officer of the Supreme Court, a judge nominated by the President, the Attorney-General and two representatives of the legal profession.

[21] The Supreme Court also deals with matters referred to it for decision by the Attorney-General under the Constitution, and with such other matters as may be authorised by Act of Parliament.

[22] Information obtained from the Registrar of the High Court, Mr Joubert, on 25 October 2004.

magistrate's court (a lower court) or the High Court.[23] In its present form the Agricultural (Commercial) Land Reform Act 6 of 1995 makes provision for the Land Tribunal to adjudicate on the price offered for a commercial farm for the purpose of expropriation, but the Land Tribunal has not yet been used for this purpose.

Lower Courts, established by Act of Parliament, have jurisdiction to adopt the procedures prescribed by such Act and the regulations made there under. Lower Courts have a magistrate or other judicial officers appointed in accordance with procedures prescribed by the applicable Act. Other important judicial officers are the Attorney-General and the Prosecutor-General, being the chief law enforcement officers in the government. Both are political appointments whose terms of office expire with that of the government under which they were appointed.

Chapter 10 of the Constitution provides for an Ombudsman to report to the National Assembly on his/her activities in investigating any irregularity or violation of fundamental rights by an organ of state or a private institution. The Constitution further enables the Ombudsman to take action through investigation and prosecution to remedy situations that contravene the law. The Ombudsman has the right to subpoena and question persons and refer matters to the courts.

1.3 Statistics and socio-economic data

The Republic of Namibia is situated in the south-western corner of Africa, bordering the Atlantic Ocean to the west, South Africa to the south, Angola to the north, Botswana to the east and Zambia and Zimbabwe to the north-east. With an approximate geographical land area of 824 200 km^2, Namibia is Southern Africa's most sparsely populated country. The population estimate in 2001 was 1 830 330,[24] or on average about two persons per square kilometre. Namibia enjoys a much more hopeful possibility of an orderly agricultural land reform process than many other African countries simply because there is so much land and so few people. But the trade-off here is that Namibia is a very arid country suited to only a few kinds of agriculture.[25] About half of the national population depend on subsistence agriculture in rural areas for a livelihood. Food shortages are a major problem in rural areas during prolonged periods of drought.[26]

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[23] Section 28(1)(g) of the Magistrates' Court Act 32 of 1944 gives jurisdiction in respect of any person owning immovable property within a district in actions involving such property or mortgage bonds thereon.

[24] Republic of Namibia, *2001 Population and Housing Census: National Report – Basic Analysis with Highlights*, July 2003, at 18. *The World Fact Book* published in July 2004 estimates the population of Namibia to be 1 954 033. This estimation takes into account the effects of excess mortality due to AIDS, which entails lower life expectancy, higher infant mortality and death rates, lower population and growth rates, and changes in population distribution in terms of age and sex. (*The World Fact Book*, July 2004, at <http://www.cia.gov/cia/publications/factbook/geos/wa.html>.

[25] Harring S and Odendaal W, *"One day we will all be equal …": A socio-legal perspective on the Namibian land reform process*, Legal Assistance Centre, Windhoek, 2002, at 8.

[26] Namibia can produce sufficient cereals to supply just over half of its domestic requirements. The remainder is imported, mainly from South Africa. Most other foods (about 40% of all foods) also come from South Africa. Kolberg H, *International Conference and Programme for Plant Genetic Resources: Country Report for Namibia* (July 1995), in Harring S and Odendaal W, ibid., at 13.

Namibia is a vast country with few people, but it is very arid and suited to only a few kinds of agriculture. About half of the national population depend on subsistence farming in rural areas for a livelihood, and food shortages are a major problem in rural areas during prolonged periods of drought.

According to the UNDP's *Namibia Human Development Report* of 1999, people living in rural areas have lower than average literacy rates (the national literacy rate in 1998 was 76%), and less access than urban dwellers to education, health care and employment opportunities.[27] In other words, the differences between rich and poor in Namibia are extreme, and this is a factor contributing to the rural-urban migration process that makes urban land reform and development policies challenging.

A major challenge facing Namibia's economy is to overcome its dependence on the mining sector. While the mining sector accounts for 20% of the country's GDP, it employs only about 3% of the population.[28] Two further aspects impact negatively on the Namibian economy: a high unemployment rate of 31% and an overall HIV/AIDS prevalence rate of around 20% (2000 estimates). Life expectancy is set to drop between 2005 and 2010 to just 45 years.[29] In 1999 HIV/AIDS was the number one cause of death, counting for 26% of all deaths in hospitals, while women counted for 54% of all new cases of infection. In 2000, 70 000 persons were diagnosed with HIV and 2 868 died of AIDS. The highest prevalence of HIV/AIDS in Namibia is in the urban areas of Oshakati (34%), Walvis Bay (29%), Katima Mulilo (29%) and Windhoek (23%).[30]

In 2001 an estimated 33% of Namibia's population lived in urban areas, an increase of 5% since the previous population and housing census in 1991.[31] Windhoek, the capital of and largest city in Namibia, with a population of 233 529, became the focal point of

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27 United Nations Development Programme, *Namibia Human Development Report 1999*: *Alcohol and Development in Namibia*, at 21; Republic of Namibia and United Nations Population Fund, *Programme Review and Strategy Development Report* (October 1998), at 2.

28 *The World Fact Book 2004*, supra note 17.

29 United Nations Development Programme, *Namibia Human Development Report 2000/2001: Gender and Violence in Namibia*, at 10.

30 Ibid., at 10 and 11.

31 Republic of Namibia, *2001 Population and Housing Census: National Report – Basic Analysis with Highlights*, July 2003, at 4.

rural-urban migration after independence.[32] With an annual urban growth rate of 5.4%, of which 3.9% is due to in-migration, it soon became apparent that a substantial increase in serviced land delivery was needed, particularly in Windhoek's low-income housing areas. [33]

Urban areas in Namibia have relatively more people in the economically active age groups (15-59 years) than rural areas, whereas rural areas have higher proportions of both young (0-14) and old (60+).[34] These statistics suggest that it is mainly people in the economically active age groups migrating from rural to urban areas in search of better work opportunities. An indication of informal settlement growth in urban areas over recent years is the fact that improvised housing (shacks) has become the second most common form of housing in urban areas after detached and semi-detached dwellings.[35]

In 2000 the informal settlement population of Windhoek was estimated to be 57 000 people and 8 000 households.[36] This number excludes backyard squatters in formal areas and many more families (±30 000) living in inadequate housing without any basic services, even if they have legal secure tenure, meaning that, for example, a woman who cannot pay sewerage, electricity or water bills can be evicted by law. On the whole it is estimated that 30% of Windhoek's population live in informal, unplanned (unsurveyed) settlements, in sub-standard structures with weak legal title or none at all. Fewer than 20% of informal settlement households are connected to a sewerage system. Most of these households have access to potable water from communal taps within walking distance. Another category of residents are those with secure tenure who are not connected to services – meaning that only one aspect of their human right to adequate housing (legal security of tenure) has been provided for. Limited housing is provided by private and public sector developers, but only to middle- and upper-income households, while low-income households lack access to credit facilities for housing.

The second biggest city in Namibia is Oshakati, with a population of 42 649. Statistics for the period 1991-2001 indicate that Windhoek has widened the gap between itself and Oshakati. In 2001 Windhoek's primacy index was 4.3, meaning that Windhoek was 4.3 times bigger than Oshakati. Although about 60% of Namibia's population reside in the far north, only Oshakati, Ongwediva, Ondangwa, Rundu and Katima Mulilo can be categorised as 'urban centres'. Only Oshakati is among the five largest urban centres, while two coastal towns, Walvis Bay and Swakopmund, are the third and fourth largest respectively.[37] Rehoboth, the fifth largest urban centre, located about 90 km south of Windhoek, serves mainly as a commuter town for people working in Windhoek.

It is highly likely that Windhoek will maintain its urban centre primacy in the foreseeable future. National urbanisation management is essential for the development of new strategies to promote growth in rival towns and to balance urban growth within the country.

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[32] Ibid., at 21.
[33] Gold et al., op. cit. (footnote 6), at 24.
[34] Supra note 24.
[35] Ibid., at 50.
[36] The World Bank, *Upgrading Low Income Urban Settlements: Namibia Country Assessment Report*, January 2002, at 22.
[37] Windhoek City Council, "Conclusions and implications of various statistical reports for urbanisation management in Windhoek", unpublished report, 2001, at 5.

In addition to informal settlements in urban areas, squatter camps without proper basic services are growing into informal settlements near commercial farms. The background to this problem is that farmers (especially white commercial farmers) used to be heavily subsidised, but subsidies were scaled down considerably after independence. Minimum wage legislation was introduced with the Labour Act in 1992, which placed further financial stress on farmers. As a result, some farm workers were retrenched as it became increasingly difficult for farmers to afford farm worker wages. Farm workers also often lose their homes on farms after ownership changes hands. There is currently no effective legislation which secures long-serving farm workers any form of tenure rights on farms. Since the mid 1990s, a number of cases have been reported of retrenched, retired and dismissed farm workers setting up makeshift accommodation in corridors within commercial farming areas, often without adequate provision for basic services.

1.4 Civil society

The work of NGOs and CBOs

Non-governmental organisations (NGOs) and community-based organisations (CBOs) play an important role in the development and management of informal settlements in urban areas. This is particularly the case where public management structures have proven inefficient and inadequate and local authorities have realised that NGOs and CBOs have to be involved. In densely populated and informal settlement areas such as Windhoek, Swakopmund, Walvis Bay and some of the northern communal towns, NGOs such as the National Housing Action Group (NHAG), the Shack Dwellers Federation of Namibia and the Legal Assistance Centre (LAC) play important roles in lobbying for housing rights on behalf of informal settlers, and providing financial skills and legal aid to those who cannot afford to pay for these services. There are numerous other human rights organisations in Namibia dealing with land and housing rights, examples being the Urban Trust of Namibia, the Ada/Gui Elders Association, the Mabasen Group, the National Society for Human Rights, the Labour Research and Resource Institute, the Institute for Public Policy Research (IPPR) and the Namibia Economic Policy Research Unit (NEPRU).

The LAC was one of the first organisations to employ paralegals in different parts of the country to provide legal advice and legal education, but financial constraints forced the organisation to close some of its regional advice offices. This gave rise to an urgent need to train paralegals to take over the functions of the advices offices. In 2001, in collaboration with community organisations and activists, the LAC launched a Community Paralegal Volunteer Project with the aim of establishing a paralegal resource base in most parts of the country. The ultimate aim of this project is to set up community advice centres where people can obtain free legal advice. A total of 280 paralegals were trained in the period 2001-2003. The LAC provides legal knowledge, advice on specific issues and general skills to build the capacity of the volunteer paralegals and address their needs and problems. The LAC was also instrumental in establishing the Namibia Paralegal Association, a volunteer organisation dealing with the rights, duties and interests of paralegals. Paralegals work in all areas of the country, rural and urban, but focus on the neediest communities. They receive basic training on the Constitution and human rights, and advanced training in different areas of law and on specific Acts of Parliament (criminal procedure, labour, land, maintenance,

etc.), after which they are sent to test their skills in the field. Paralegals play a mediatory role in many cases, advising community members about claiming maintenance, dealing with domestic violence, etc. Most cases brought to the paralegals are labour disputes, and most labour disputes go to the district labour courts.

Women's Action for Development (WAD) is a self-help organisation that aims to uplift the socio-economic and socio-political situation of Namibian rural women primarily. WAD was established in 1994 and is active in six regions today, namely Omusati (north), Kunene (north-west), Erongo (west), Otjozondjupa (central-east), Omaheke (east) and Hardap (south). It intends expanding eventually to all 13 regions. WAD assists its members to establish "Women's Voice bodies" in the regions in which it is active.

The Women's Voice bodies, with seven members per region, address social problems in their respective communities, working through decision-makers, community leaders, traditional authorities and others to assist in solving problems and meeting a wide range of village needs. The Hardap Women's Voice, for instance, successfully lobbied authorities to erect a mortuary in one of the small villages in the region. Women's Voice bodies lobby authorities and their communities on educational problems and health problems including drug abuse, alcoholism and AIDS, and help ensure that jobs in a particular region are secured for people of that region. Women's Voice bodies also take up membership in development committees at local and regional level, and continuously encourage women to stand for election in these committees so that women come to hold positions of power in the regions.

The pre-independence regime actively discouraged and suppressed NGOs and CBOs, primarily because they were considered politically threatening. At the time of independence only two community-based housing groups were in operation, namely the Saamstaan Housing Co-op in Windhoek and the !Khara Tsasib Housing Association in Mariental.

Along with other groups, these two groups formed the Namibian Housing Action Group (NHAG) in November 1992 as an umbrella organisation for low-income housing groups. NHAG is managed by a board composed of representatives of member groups. A total of 30 member groups had been formed by 1992. The NHAG's main goal is to strengthen the member groups' capacity to secure housing for low-income households. Other objectives of the NHAG are:[38]

- to support members in negotiations over evictions, land issues and loans;
- to advocate for addressing the needs of low-income households in the formulation of housing policy, municipal regulations and standards;
- to empower communities to solve housing problems;
- to provide training in construction, brick-making and alternative building methods;
- to stimulate awareness and sharing of experience of housing-related procedure and organisational development;
- to establish links between grassroots organisations and larger service organisations in Namibia and abroad; and
- to provide and facilitate other services to assist members in acquiring shelter.

[38] Republic of Namibia, *The First National Development Plan (Volume 1)*, Windhoek, National Planning Commission, 1995, at 463.

The office of the Shack Dwellers Federation of Namibia (SDFN) in Katutura (left)**, and an example of an upgraded house in Omumbu, an informal settlement in Oshakati. Omumbu residents can upgrade their houses through housing loan schemes in which the SDFN plays an important role.**

NHAG member groups initially applied for loans from the Build Together Programme of the Ministry of Regional and Local Government and Housing (MRLGH). This programme has been in operation since the 1992/93 financial year.

The Twahangana[39] Loan Fund administered by the NHAG was established in 1995 as a mechanism to strengthen the capacity of member groups, manage funds and provide financial access to the poor. Over the past decade the fund has received donations from Norwegian, German and Spanish donors. Twahangana's primary function is to provide housing, small business and service loans. The terms and conditions on which saving group members can obtain a loan are based on:

- their active participation in the group's activities, wherein regular saving is an important requirement;
- how much the member can afford to pay each month;
- the cost of the house/business/service; and
- in the case of a housing loan, ability to pay 5% of the loan amount as a deposit.

Regional loan facilitators from the saving scheme network inspect the loan applications to ensure that the right procedures are followed and to approve the applications. A contract is signed with each member group and individual applicant. The procedure is as follows:

- The groups deposit the money directly into the bank.
- The office records the payment and informs each region about the status of the repayments.
- Any arrears may be followed up immediately by the members through the exchange programme.

In addition to the Twahangana Loan Fund, a saving programme was initiated by NHAG member groups in 1996, also named Twahangana. According to NHAG Director Dr Anna Muller, this programme strengthened saving groups to such an extent that saving has become the core organising principle in low-income urban communities. Before 1996, housing groups affiliated to the NHAG saved in an ad-hoc manner with each group

[39] Twahangana means "united" in Oshiwambo.

administering funds according to its own systems and rules. Saving was always an important activity of the housing groups, but not necessarily the central activity. With the Twahangana saving scheme in place and uniform administrative systems being applied, the members receive regular support for promoting internal control of savings. The members save in their own groups and borrow from their own group savings in emergencies and to supplement income. Following the structural changes, saving became the main activity bringing people together. It is also a tool for attracting resources such as land and loans.

The Shack Dwellers Federation of Namibia (SDFN) was established in October 1998 by the 30 housing groups affiliated to the NHAG. The SDFN is a network of housing saving schemes aiming to improve the living conditions of people living in shacks and rented rooms, or without any accommodation, while promoting women's participation. Following the SDFN's establishment, a dynamic 'people's movement' developed in Namibia, which to date encompasses 220 saving groups in 43 urban areas. The NHAG has an office in both Windhoek and Oshakati, and seven staff members in total. These offices serve as the treasuries for the SDFN's regional and national activities, and ensure equal distribution of resources. The seven staff members also advise group members and activity representatives, organise international exchanges,[40] facilitate contact with formal institutions for access to resources, assist the SDFN with policy-making and advise on legislation, document the experiences of the saving groups and administer Twahangana funds. The SDFN and Ada/Gui, an association for senior citizens and destitute children, maintain close relations with NGOs in formalising policy and management practices, and in administering urban service functions such as fee collection in close collaboration with public urban institutions.

According to SDFN National Co-ordinator Ms Edith Mbanga, the federation has made it possible for people with little income living in informal settlements to save money to buy a piece of land on which they can eventually build a house. Most participants in SDFN loan schemes are women, and women also play a significant role in managing group loan schemes in order to obtain secure land tenure and housing for themselves and their families.

Each saving group appoints a committee to manage the loan money. Exchanges among groups are facilitated to ensure a good understanding of the application, building procedures and administration of the funds. Each person's repayments are recorded in the person's own book, and the treasurer also keeps a record. Members are encouraged to start paying immediately and to repay the loan as quickly as possible. The monthly payments on housing loans are calculated to facilitate repayment within 11 years. For the first three months no interest is charged and payments are deducted from the capital amount. Thereafter the members pay 1% interest per month (to be reduced to 0.5% over a period of time) on a house loan.[41]

Income-generating loans are given at 2% interest per month and must be repaid within one year.[42] The maximum amount for a first loan is N$500 (US$84), and once this has been repaid the members can borrow another N$1 000 (US$167). A simple business plan is

[40] The federation is affiliated to Shack Dwellers International, which has organised exchanges between the Namibian federation and counterpart groups in South Africa, India and Zimbabwe.

[41] The current (November 2004) prime rate interest charge on housing loans is 12.5% per annum.

[42] Commercial banks currently charge 19% interest on personal loans per annum.

required. The total value of loans extended so far is N$9 234 516 (US$1 539 086). To date the SDFN has managed 579 house loans, 1 298 small business loans and 727 service loans.

SDFN members initiated an environmental health programme in 2001 to ensure sustainable improvements in their lives. The programme focuses chiefly on HIV/AIDS, tuberculosis, food security, environmental hygiene and communications between emergency services in the communities. In addition, the SDFN works closely with health workers at clinics where an emphasis is placed on first-aid training and provision of home-based care to HIV/AIDS sufferers.

As SDFN National Co-ordinator, Ms Mbanga's intention is to encourage more homeless people to join the federation. "It might not be easy to start with, but in the end you will rejoice because you are doing it for yourself," she concludes.

None of the above-mentioned organisations have a specific focus on land tenure, but all argue that loans and savings are the first step to secure tenure, hence their focus on loans and savings.

Campaign for secure land tenure

A Secure Land Tenure Campaign was launched in Namibia during the World Habitat Day celebration on 26 October 2002. This campaign forms part of UN Habitat's global campaign to address secure land tenure for all.

A subcommittee investigating issues pertaining to secure land tenure was formed in May 2003. Its primary task is to investigate existing housing legislation and practices. It is composed of the Ministry of Regional and Local Government and Housing (Habitat Division and Planning Division), the Ministry of Lands, Resettlement and Rehabilitation, the Shack Dwellers Federation of Namibia, the Namibia Housing Action Group, the National Planning Commission, the Habitat Research and Development Centre, the City of Windhoek and a town planning consultant. The subcommittee aims to secure land for at least 50% of all households in informal settlements and backyards by 2007. This aim should be regarded as a positive step in strengthening and finding alternative forms of secure land delivery for low-income households. People will be able to obtain secure tenure in Namibia when the Flexible Land Tenure Bill is promulgated and the registration system at the Deeds Office is up and running. Though it is not yet possible to obtain tenure, nobody to date has been evicted from a block on which they have acquired a 'starter title', which implies that the system is already operating as though the new law were in place.

In February 2004 the Habitat Research and Development Centre in Katutura was elected to facilitate a survey to obtain basic data from local and regional councils on the land tenure systems in their areas, and to determine the need for formal erven[43] in settlements, villages, towns and municipalities in Namibia.

The Minister of Regional and Local Government and Housing will submit the collected data to Cabinet. According to the Director of the Habitat Research and Development Centre,

[43] *Erven* is the plural of *erf*, and *erf* is an Afrikaans word for 'plot', 'stand', 'allotment', 'yard' or 'premises', commonly used in Namibian policies, legislation and legal documents.

Mr Jacques Korrubel, local and regional authorities have been very slow in responding to the survey. As regional councils lack proper record-keeping systems, they find it difficult to provide correct answers to questions about details such as the percentages and types of materials used for building houses. An information database is needed, and local and regional authority personnel will need training to create one.

According to Mr Korrubel, "Most people in Namibia still regard secure tenure as owning a brick house. We need to look at other cheaper and more effective housing construction alternatives if we want to accommodate the growing need for low-income housing in Namibia." The Habitat Research and Development Centre promotes the use of indigenous building materials and designs. The campaign focuses on providing housing by cheaper alternative means rather than on ownership of housing. Mr Korrubel pointed out that a lack of coordination between the relevant stakeholders at central government level often leads to a duplication of activities and wasting of resources.

2. Land tenure

An informal settlement development at Omumbu on the border of a proclaimed townlands area (Oshakati) and communal land.

2.1 Relevant constitutional provisions

Several articles in the Namibian Constitution apply to land and property.

Article 16(1) recognises the right of all persons to acquire, own and dispose of all forms of immovable and movable property in any part of Namibia, individually or in association with others, and to bequeath their property to their heirs or legatees. Article 16(2) authorises the State to expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by an Act of Parliament.[44] Article 21(1)(a) recognises every person's right to freedom of speech and expression, while 21(1)(h) states that every person has the right to reside and settle in any part of Namibia. Article 10(1) states that "[a]ll persons shall be equal before the law", and 10(2) prohibits discrimination on the grounds of sex, race, religion, economic status, etc.

Article 16 must also be read in the context of a further constitutional obligation of affirmative action as provided in Article 23(2), which states:

[44] Section 14(1) of the Agricultural (Commercial) Land Reform Act 6 of 1995 is the "Act of Parliament" that determines these "requirements and procedures".

> "Nothing contained in Article 10 hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social economic or educational imbalances in the Namibian society arising out of discriminatory laws or practices …."

Article 95(1) states that the State shall actively promote and maintain the welfare of the people by adopting policies aimed at, inter alia, the following:

> e) Ensuring that every citizen has a right to fair and reasonable access to public facilities and services in accordance with the law;
> j) Consistent planning to raise and maintain an acceptable level of nutrition and standard of living of the Namibian people and to improve public health;
> l) Maintenance of ecosystems, essential ecological processes and biological diversity … and utilisation of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future.

Article 98 deals with principles of economic order. Sub-article (2) provides that the economy shall be based on, inter alia, the following forms of ownership:

(a) public
(b) private
(c) joint public-private
(d) co-operative
(e) co-ownership
(f) small-scale family

Article 100 states, inter alia, that land belongs to the State if it is not otherwise lawfully owned. Rights to land have commonly been assigned to four categories:

- *State land*, used for nature conservation, game parks and military bases.
- *Urban land*, where standard concepts of state, municipal and private ownership apply within proclaimed boundaries under statutory law.
- *Commercial farmland*, or all freehold[45] agricultural land.
- *Communal land*, or all land used by indigenous Namibian communities but owned by the State – in effect the State holds land in trust for indigenous communities.

Article 129 empowers the National Planning Commission to determine the priorities and direction of national development, and to act as national advisor to the President on all matters pertaining to economic planning in the country.

The implication of the Constitution for land policy is that the latter may not prevent any Namibian from moving to, settling in and acquiring land in any part of the country. The fundamental right of every citizen to freedom of speech and access to information implies that all land use planning must involve adequate and appropriate consultation with all

[45] Private ownership of commercial farmland in Namibia is commonly referred to as 'freehold' ownership.

interested and affected parties. Land use plans must promote the well-being of all citizens by promoting access to services, facilities and resources on a sustainable basis. [46]

According to the Constitution, there are specific bodies established to govern national planning, including land use planning in the regions and urban areas. Coordination between these bodies is crucial.[47]

2.2 National laws on land and property rights

Agricultural commercial land

Agricultural (Commercial) Land Reform Act 6 of 1995

This Act provides for the acquisition of agricultural land by government for the purposes of land reform and redistribution to Namibian citizens. The land reform and redistribution process is focused on those "who do not own or otherwise have the use of agricultural land or adequate agricultural land, and foremost to those Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices" (Preamble).

The introduction of the Married Persons Equality Act 1 of 1996 entitled women farmers to equal as well as independent land ownership under the Agricultural (Commercial) Act. The Married Persons Equality Act abolished marital power, and section 5 provides for equal powers of spouses married in community of property.[48]

Communal land

Communal Land Reform Act 5 of 2002

This Act provides for the allocation of rights to communal land outside the boundaries of proclaimed towns. It further provides for the establishment of regional communal land boards, and for regulating the powers of chiefs, traditional authorities and boards in relation to communal land. There are 12 communal land boards. Only one region, Khomas, has no board because there are no communal areas in this region, whereas all of the other 12 regions are either wholly or partially communal areas. The function of these boards is to control the allocation of customary land rights by chiefs or traditional authorities. The boards are tasked to administer the entire system of granting, recording and cancelling these rights in consultation with traditional authorities. Communal land boards consist of representatives

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46 Republic of Namibia, *The Draft National Land Use Policy*, "Annexure A: Applicable Legislation, Policies and Regulations on Land Use Planning", Ministry of Lands, Resettlement and Rehabilitation, 2002, at 1.

47 Such bodies include local authorities and the Ministry of Regional and Local Government and Housing.

48 Section 5 reads:

"A husband and wife married in community of property have equal capacity –
(a) to dispose of the assets of the joined estate;
(b) to contract debts for which the joined estate is liable; and
(c) to administer the joined estate.

of traditional authorities, the farming community, the regional councils, women, the public service and conservancies in the boards' respective areas of jurisdiction.

Customary land rights that may be allocated in respect of communal land include:

- the right to a farming unit;
- the right to a residential unit; and
- the right to any other form of customary tenure as recognised by the Minister.

Joint titling is possible with the registration of land allotments on resettlement projects and communal land allocations. Land allocations to resettlement beneficiaries are known as 'allotments'. The allotments and houses on resettlement projects can be registered jointly in both spouses' names. There are also a number of resettlement projects on communal land.

This Act provides for the recording and registration of all land rights in communal areas, either as customary land rights or rights of leasehold – a process central government is funding. It also provides for the administration of customary rights along similar lines to those adopted in Botswana. In practice, national elites have enclosed large areas in which customary land rights prevail, but these rights are not surveyed and so lack effective legal protection. This is a problem in most communal areas. It is perhaps too early to detect how communal land boards are dealing with the issue of illegal fencing in communal areas, which the Communal Land Reform Act now deems a criminal offence.

The Act also provides for the equal right of women to apply for and be granted land rights in communal areas. Before the Communal Land Reform Act 5 of 2002, many women had little chance of acquiring land after their husband's death. Section 26(2)(b) of Act provides the following:

> "A customary land right ends when the person who held that right dies. The Communal Land Reform Act determines that a customary land right reverts back to the Chief or Traditional Authority who has to re-allocate it to the surviving spouse. If there is no surviving spouse, or the spouse refuses the allocation, the right has to be allocated to the child of either the first or a later marriage. The Chief or Traditional Authority must determine which child is entitled to the allocation of the right in accordance with customary law."

In other words, the Act provides that a widow has a 'first refusal' right to a customary land right. The LAC is busy with research to determine how traditional authorities are interpreting this provision of the Act. This right applies even if a widow remarries, but in practice most widows who remarry would probably move to the new spouse's house. The important point here is that a surviving spouse, man or woman, must have the first option to the property or customary land right. It is still too early to evaluate whether the communal land boards experience difficulty with this section of the law. If a widow has children but does not want to retain her property or customary land right, the children have first option, depending on their age. As all communal land is kept in trust by the government, no private ownership exists in communal areas and nobody can sell communal land, but a widow can have control over a plot, and can sell a house on that plot if the house is registered in her name – selling immovable property for personal gain is an uncommon practice in rural communal areas. A widow does not have an automatic right to moveable property in all cases.

On the edges of growing towns in communal areas, uncertainty is increasing over long-standing traditional land rights and how these will be affected by the expansion of urban boundaries and the establishment of municipalities. It is assumed that the Flexible Land Tenure Act, once in force, will address this issue, as it would apply to proclaimed towns in communal areas which are run by local authorities bound by the same laws, regulations and policies as towns situated outside communal areas. The Communal Land Reform Act applies only to *rural* communal areas, not to proclaimed urban/town lands in communal areas. The Flexible Land Tenure Act will legislate for low-income housing in communal urban/town lands.

Traditional Authorities Act 25 of 2000

This Act recognises traditional authorities as legal entities. It provides for their establishment and for the designation, election, appointment and recognition of traditional leaders, and defines their powers, duties and functions. The Council of Traditional Leaders assists the President with the administration and control of communal land. There are currently 86 recognised traditional authority leaders in Namibia, of whom only two are women. The primary functions of the traditional authorities are to promote peace and welfare among the community members, and to supervise and ensure the observance of the community's customary law.

With respect to land use planning, traditional authorities have the following duties under the Act:

- To assist and cooperate with the government, regional councils and local authority councils in the execution of their policies and to keep the members of the traditional community informed of developmental projects in their area.
- To ensure that the members of the traditional community use the natural resources at their disposal on a sustainable basis and in a manner that conserves the environment and maintains the ecosystems for the benefit of all persons in Namibia.

The implication of the Act is that traditional authorities have to be fully involved in designing land use plans and developing land in their areas. To succeed, they have to be sensitised to sustainable resource management and the need for gender-related land reform. Section 3(g) of the Traditional Authorities Act provides that traditional authorities should "promote affirmative action amongst the members of that traditional community as contemplated in Article 23 of the Namibian Constitution, in particular by promoting gender equality with regard to positions of leadership".

Urban land

Squatters Proclamation, AG 21 of 1985

This legislation deals with the prohibition of unlawful presence of persons on any land, or in any building or structure, and provides for the removal of such persons and the erection of buildings or structures by or for them. Proclamation AG 21 is still in force, but to the writer's knowledge it has never been applied in independent Namibia. It was introduced by the previous regime to control the development of spontaneous informal settlements,

especially after influx control measures were abolished through a general law amendment proclamation in 1977.

The principal idea behind the establishment of "Reception Areas" in independent Namibia was to provide temporary accommodation for people who occupy land illegally, with the understanding that such persons would be resettled in permanent housing at a later stage.[49] Hence in independent Namibia, illegal occupants of urban land enjoy de facto safeguards against arbitrary eviction.

2.3 Flexible Land Tenure Bill[50]

Background

Namibia's present system of land surveying, registration and development covers only part of the country due to the colonial policy of confining the majority of the national population to the former "homelands" (now communal areas) and barring homeland residents from owning land and securing tenure. An estimated 60% of the national population reside in areas historically excluded from any land registration system.[51] In many municipalities, towns, villages and settlements there is frustration about the inability to plan, survey and register land rights, and the difficulty of accessing credit for investment and development. In the rapidly expanding urban areas, many poor people from rural areas in search of work opportunities have no official right to own or even reside on the land on which they have settled. Others are uncertain about their long-standing traditional right to land on the edges of growing towns in communal areas, and do not know how their rights will be affected by the expansion of urban boundaries and the establishment of municipalities. Up to 100 000 families in Namibia face such problems. The solution for them is a cheap, accessible and creditworthy form of secure land tenure.

The only secure land tenure in Namibia at present is freehold title and leasehold title, because both titles can be used as collateral. However, many Namibians cannot afford these costly titles. In addition, the authorities and professionals do not have human and financial resources to provide freehold and leasehold titles in the quantity required for those who cannot afford such title.

Various options were considered for responding to these problems. It was decided that a parallel interchangeable property registration system will be developed for Namibia, where the initial secure right is not only simple and affordable, but also upgradeable according to what the resident, local authority and government need and can afford at a given time.

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[49] The World Bank, *Upgrading Low Income Urban Settlements: Namibia Country Assessment Report*, January 2002, at 17.

[50] This section has been drafted with the assistance of Mr Søren Christensen who works for the Lands Project run by the Ibis Project funded by the Danish Government. In 1994 the Lands Project undertook a study at the request of the MLRR on how to provide secure tenure for informal urban settlers. Mr Christensen played a leading role in this study and co-wrote the policy document that served as background material for the drafting of the Flexible Urban Land Tenure Bill, i.e. Christensen SF and Højgaard PD, "Report on a Flexible Land Tenure System for Namibia", Ministry of Lands, Resettlement and Rehabilitation, 1997.

[51] Republic of Namibia, *2001 Population and Housing Census: National Report – Basic Analysis with Highlights*, July 2003, at 3.

Makeshift housing in Katutura (left) **and Omumbu informal settlement in Oshakati.**

In 1994 the MLRR launched a pilot programme to investigate options a parallel interchangeable property registration system and solutions to potential problems. At the end of 1997 the ministry completed its investigation and produced a policy document. The policy received Cabinet approval and the system was named the Flexible Land Tenure System. This system is designed to be maintained locally in a land rights office by fewer skilled personnel than are needed in the present system, which makes it affordable.

During the three-year pilot programme period, by means of pilot studies and pilot projects, the system developed not merely from a theoretical viewpoint, but also through practical experimentation in the informal urban settlements, utilising and consulting with the actual beneficiary communities. Further, consultancy workshops were held with all stakeholders (professionals, NGOs, etc.) throughout the process. In 2000 the ministry opened the first land rights office in Oshakati to implement elements of the new registration system in practice. To date more than 2 000 plots have been surveyed and demarcated.

The drafting of the bill laying down the Flexible Land Tenure System turned out to be more time-consuming than anticipated. A final bill completed in February 2004 still needs Cabinet approval.

Investigation of the Flexible Land Tenure System

The model selected for the parallel interchangeable property registration system[52] was tested during the above-mentioned pilot programme through a series of pilot projects and studies undertaken from June 1995 to November 1996. The pilot projects and studies addressed practical land surveying and related planning issues, and identified different surveying and registration approaches to upgrading tenure in different environments. New approaches to surveying were compared to the approach taken under the present system, and the costs of time, materials, skills and accuracy were assessed, as were the pros and cons of using computers to record land surveys. To achieve community participation in the adjudication and planning of an area, CBOs in informal settlements were involved in the pilot projects.

An important hypothesis tested during the pilot programme was that properly trained para-professional land measurers could do adequate survey work under the supervision of

[52] "Parallel" indicating a system with different levels of tenure and "interchangeable" indicating the possibility of moving from one level to another.

experienced land surveyors. Selected trainee land measurers were involved in the pilot projects to enable an assessment of their ability and further training needs.

The pilot programme evaluated the present land registration system in Namibia in terms of certainty of title as perceived by system users, and assessed the minimum requirements for the maintenance of an unambiguous property registration system. It also investigated the possibility of a local authority, CBO or other body issuing tenure documents based on a local registry map.

Proposal for new tenure types

At the end of the investigation it was recommended that two new types of tenure, the starter title and the landhold title, be introduced in addition to the existing freehold title. The starter title is a statutory form of tenure registered in respect of a block of land. This title gives the holder the right –

(a) to perpetually occupy a site within a block or in a similar block (the exact site within the block is not defined); and
(b) to transfer or otherwise dispose of the occupancy right subject to a group constitution requiring group consent to transfers.

Servitudes or mortgages cannot be registered until individual household sites are defined.

The landhold title is a statutory form of tenure incorporating all of the most important aspects of freehold ownership, but without all the complications of full ownership. This title gives the holder the right to occupy a defined site in perpetuity and to transfer or otherwise dispose of the right. Thus a landhold title can be mortgaged.

Starter and landhold titles are interchangeable in that the starter title can be upgraded to a landhold title or even a freehold title in accordance with certain prescribed procedures.

According to section 10(1)(e) of the Flexible Land Tenure Bill, the holder of a starter title may transfer his/her rights to any other person, whether the other person is his/her heir or whether the transfer is another transaction recognised by law. In addition, section 12(6)(c) provides that the relevant authority may impose conditions, prohibiting the transfer of the plot to another person.[53] Such relevant authority in a proclaimed town/urban area located in a communal area would be the town/urban area's local authority. Each block system has a constitution that gives equal protection to all members regardless of sex. It is therefore possible to register a landhold title in the name of either or both spouses.

While a whole block[54] is registered as a single entity in freehold ownership at the Deeds Office in Windhoek, a starter and landhold title will be recorded at a district land rights

[53] These conditions are –

(i) before a specified period of time since the acquisition of the rights has elapsed; (ii) unless the permission of the relevant authority has been obtained; or (iii) unless any other specified condition has been fulfilled.

[54] A block is obtained by a saving group that forms an association after drawing up a constitution. Once the deeds registration process is complete (once the Flexible Urban Land Tenure Bill is promulgated), the group will obtain freehold title.

office. The data will be transferred via electronic communication links and the record will be kept at the Directorate of Deeds, with permanent copies backed up on computer and archived. Registry records should be easily available for inspection throughout Namibia.

Neither a conveyancer nor a legal practitioner is required to prepare starter and landhold title documents. The range of transactions will be limited and it is foreseen that a registration officer (para-professional) will be trained by the Deeds Registry to process the transaction registered at the Deeds Office. The land rights office staff will also be trained by the Deeds Registry to assist people in preparing transfer agreements and other simple transactions.

A landhold title site will be indicated on a cadastral map. This is a map prepared by a land measurer based in a land rights office, in accordance with set procedure and to a standard to be prescribed in the regulations for the Flexible Land Tenure System.

Recognition of the starter and landhold titles will remain parallel to the existing registration system. This means that the same land parcel will be the subject of registration in both the starter title and landhold title computer-based registry, and in the Deeds Registry. However, the Deeds Registry will reflect only the ownership of the whole block of land and the fact that a starter or landhold title registry exists. Individual starter or landhold title rights within the block will not be visible in the Deeds Registry, but only in the starter or landhold title registry in a land rights office.

Each land rights office will be staffed with a land manager, a registration officer and a land measurer (the latter two being para-professionals). Formalisation of informal settlements will be effected by the land measurer working with the land manager so as to bring an informal land delivery system into the wider urban management system. This partnership should link the local community with professionals in the locality and the various authorities involved in the land delivery process. It is expected that the land measurer will speak the local language and understand local customs and practice. The MLRR funds the land rights offices and employs the para-professionals. Mechanisms to counter corruption in land delivery are also the responsibility of this ministry. Complaints about corruption can also be taken to the Ombudsman.

The Flexible Land Tenure System is designed for and will be applied in all urban areas[55]. Thus all people living in informal settlements will have the same rights to the land whether the land is located in a communal area or a commercial area. Since the Communal Land Reform Act applies only to rural communal areas and not to proclaimed urban/town lands in communal areas, the Flexible Land Tenure Act will apply in the latter areas.

Current status of the bill

Cabinet approved the principles of the new system in 1997 and the MLRR established a project for its implementation. The first draft of the Flexible Land Tenure Bill was produced in 1999 and the fourth and final bill was completed in February 2004.

[55] Urban areas are municipalities, towns, villages and settlements as defined in the Local Authorities Act. Peri-urban land within a municipal boundary is also considered part of the applicable urban area.

A land rights office has been established in Oshakati in line with the requirements of the proposed system. In the last few years over 2 000 plots have been surveyed. As the bill has yet to be promulgated, it is not yet possible to issue any starter and landhold title certificates, but people living in the upgraded settlements have started to behave as though they have official rights to the land on which they live: it is noticeable that more people are investing in brick houses than before the settlements were upgraded.

The para-professionals to administer the system are trained through established courses at the Polytechnic of Namibia – diploma courses in land measuring (cadastral surveying), land registration and land management.

There is presently no official strategy for implementing the new legislation. The Flexible Land Tenure Project has experienced difficulty getting the bill onto the political agenda because the government has numerous other very important and pressing land reform programmes to attend to, for example the commercial agricultural land reform programme. It may thus be unrealistic presently to expect huge financial investment in the Flexible Land Tenure System to come entirely from the regular government budget. External assistance from major financial donors should be sought to extend the system nationally, at least in the short to medium term. The MLRR approached GTZ in May 2004 with a proposal for financial and technical support, especially with the computer-based registering system. GTZ indicated its willingness to support the Flexible Land Tenure System, but this support did not materialise in 2004. The MLRR has been slow to respond to the GTZ initiative to finalise plans and implement some of the system's technical aspects, thus no official agreement between the MLRR and GTZ has been reached as yet on the technical support needed from GTZ.[56]

Lessons learned

The Flexible Land Tenure System is not yet in operation, thus the lessons learned to date relate to the investigation and subsequent piloting of the system:

1. Cooperation between the community and the local authority

The formalisation process will succeed only if there is understanding, respect and co-operation between the community and the local authority, and these must be strived for so as to create a positive environment for further development of the settlement area. The investigation brought to light that a local authority and the community it serves have to discuss the formalisation process thoroughly before it begins. A requirement for this discussion could be a recommendation on the bill. The local authority should not view communities as antagonists struggling for power, but rather as partners in development. It should also be understood that communities can carry out functions on behalf of a local authority, which would free local authority resources for other pressing tasks. Even so, communities should be aware of the limitations of their local authorities, especially financial limitations, and not demand service improvements that neither the community nor the local authority can afford.

[56] Conversation with GTZ Namibia's Sector Coordinator for Natural Resources and Rural Development, Mr Albert Engel, on 2 August 2004.


The LEAD Project in 2004 conducted interviews and facilitated workshops on the Communal Land Reform Act with local authorities and community interests groups in different regions.

2. Access to additional land for allocation to people displaced by upgrading

During the investigation and pilot implementation it was found that limited access to vacant town council land in both communal and commercial areas made the relocation of residents from dense areas impossible. It also made the formalisation process more difficult to explain to the residents and hampered the adjudication process. In some cases it would have been impossible to reach an agreement without accommodating more than one household on a plot. The process would have been less problematic had vacant land been available from the local authority for relocation. It has been found that no formalisation scheme can fulfil its potential, and no scheme can even be implemented, without additional land for allocation to those displaced by planning, reduction of overcrowding and so on. In addition, unless land is available for starter and landhold title developments, ongoing migration will place pressure on blocks already formalised for squatters. The bill should also require an assessment of additional land for relocation. Furthermore, the allocation and registration of blocks are addressed in the bill but the town planning aspect is not, and this is another recommendation for improving the bill.

It is likely that the only land available for relocation will be communal land on the edges of an already urbanised area. Though many hold the view that the State owns such land and should be able to deal with it as it sees fit, the Constitution requires that the rights to such land held by certain citizens must be formally acquired. These rights are allocated by the local traditional authority and include communal tenure rights for residential and agricultural purposes, such as planting crops and grazing stock. Certain local authorities in northern Namibia together with central government have learned that these rights cannot be extinguished merely by ordering such landholders to leave. The Flexible Land Tenure System seeks not to extinguish rights but rather to formalise existing rights, in a manner that allows for traditional rights to prevail in a peri-urban area. The system should also serve as a guideline to local authorities in communal areas on how to deal with urban land claim disputes, especially in peri-urban areas where traditional authorities may feel that they have a right to deal with such issues ahead of the local authorities.

The way forward

The introduction of the concept of a parallel land registration system in the mid 1990s brought high hopes to many informal urban inhabitants. The enthusiasm and support for the project shown during the various consultation forums clearly indicated an urgent need to take appropriate measures to address the security uncertainties facing thousands of people in informal urban areas. But the project implementation has not proceeded as anticipated and the stakeholders have yet to see significant tangible results outside the pilot areas. In the last five years the project has not moved beyond the consultation and pilot phases, and there is growing impatience and disappointment due to what the stakeholders see as a slow pace of progress. Implementation cannot continue until a number of institutional, technical, legal and financial issues have been resolved.

2.4 Customary law

Land control and 'ownership'

All communal land is owned or kept in trust by the government. Thus communal land cannot be used as collateral to secure bank loans. Communal land is controlled by traditional leaders, mostly men, who allocate the land, and by the people who utilise it.

In most communal areas in Namibia, traditional leaders (chiefs, heads, *indunas* and kings) control the land. With the possible exception of the Nama in the south of the country, the traditional leaders controlling communal land are all men, and communal land is usually distributed to other men. The common communal land distribution process is that a man (hardly ever a woman) who wants land in a particular area approaches the traditional leader of that area who allocates a piece of land for which the leader is paid. Though such payment is now forbidden by the Communal Land Reform Act, apparently the practice persists. Once the man has been given the land, he controls its utilisation. Among the Lozi in the Caprivi, land is often distributed to extended families who distribute it to men as they marry and bring their wives to live in the their village. It is still common in many communal areas for married and unmarried women to gain access to land through a husband, brother, uncle or parental family. Hence control of land is almost always in the hands of men.

Unfair or unequal distributions of communal land are still common, whereby traditional leaders have larger pieces of land than others, as do wealthier persons who can afford to pay a leader more for land. Traditional leaders are in fact perceived by most people in communal areas to be the only ones benefiting from the control of communal land because they are paid for each piece of land distributed. But there are those who believe that the people allocated land benefit equally from having control over their own fields for crop production and livestock grazing.

The way land is controlled has changed since independence because, by virtue of Article 21(h) of the Constitution permitting any Namibian to live anywhere in the country, people from any community can move into any area and pay more than local community members for land. A common concern in communal areas is that proper land management structures in these areas are lacking, causing environmental degradation.

Land use

The people who use land are not necessarily the same as those who control land. Only among the Nama in the south do most community members feel that both men and women use land, though men control it. In Khomas Region, due to private land ownership, those who own land are generally the same people who control and use it. In Kavango, Omusati, Ohangewena, Oshana, Oshikoto, Otjizondjupa and Caprivi Regions, traditional leaders and household heads, in most cases men, control land, while women are the primary users of land. In Owambo and Lozi societies particularly, women are primarily responsible for tilling fields and gardens and planting crops, while men (more often boys) are responsible for managing livestock. The most common land uses are crop production and livestock grazing, with crop sales and business initiatives being important spinoffs of land use.

Namibian Constitution, Article 66

Article 66 of the Constitution provides that both customary law and the common law of Namibia in force on the date of independence shall remain valid to the extent that such customary or common law does not conflict with the Constitution or any other statutory law. Article 66 also provides that any part of common or customary law may be repealed or modified by an Act of Parliament, the application of which may be confined to particular parts of Namibia or particular periods.

Community Courts Act 10 of 2003

The aim of this Act is to bring the traditional court system into the mainstream of justice administration in Namibia. It provides for the recognition and establishment of community courts, and for giving these courts the power to enforce their decisions. Community courts will function as lower courts. None have been established as yet, and traditional authorities have until the beginning of December 2004 to apply in writing to the Minister of Justice for community courts for their traditional communities.

Section 12 of the Act gives community courts the jurisdiction in rural communal areas to hear and determine any matter relating to a claim for compensation, restitution or any other claim recognised by customary law, but only if –

a) the cause of the action of such matter or any element thereof arose within the area of jurisdiction of that community court; or
b) the person (or persons) to whom the matter relates believes that the community court is closely connected with the customary law.

In other words, community courts (to include traditional authority representation) and the communal land boards (provided for under the Communal Land Reform Act) do have jurisdiction to solve communal land disputes outside proclaimed communal town/urban areas. For solving housing and property disputes within proclaimed communal urban/town areas, it is still anticipated that civil law procedures will apply. It is not yet clear what role community courts will play in solving housing inheritance and marital property disputes between persons who recognise a specific traditional authority but reside in an area outside of that authority's jurisdiction. Also there is little clarity on the exact boundaries of jurisdiction

of local and traditional authorities around proclaimed communal urban/town lands.[57] It could happen, for instance, that a couple married under customary law and residing in or near a proclaimed communal urban/town accept the jurisdiction of the community court and prefer to solve a housing inheritance or marital property dispute through community court arbitration rather than civil court procedures.

Finally, the Communal Land Reform Act applies only to rural communal areas and not to proclaimed urban/town lands in communal areas, and the Flexible Land Tenure Act, once in force, will apply for low-income housing in communal urban/town lands.

2.5 Land policy

National Land Policy of 1998

This policy provides for a unitary land system for the country that accords all citizens equal rights, opportunities and security across a range of land tenure and management systems. The policy contains a special gender provision, in line with Article 95 of the Constitution, according women the same status as men with regard to all forms of land rights, either as individuals or as members of family land ownership trusts. The policy provides that all widows and widowers are entitled to retain the land rights they enjoyed during their spouse's lifetime.[58] It provides for multiple forms of land rights ranging from customary grants to leaseholds and freehold titles, licences, certificates or permits and state ownership. In addition it sets the direction for addressing the situation of the urban poor: informal settlements will receive attention through appropriate planning, land delivery and tenure, registration and financing, with environmental sustainability borne in mind.

The policy requires the establishment and proclamation of urban areas as townships and municipalities where appropriate, to promote decentralisation and the close involvement of communities in their own administration. There are still inadequacies to address in the present proclamation process, particularly in respect of the tardiness of the process and the lack of provisions for dealing with rights and property existing prior to proclamation. To address these inadequacies, the proclamation procedures as well as legislation such as the Town Planning Ordinance 18 of 1954 and Township and Division of Land Ordinance 11 of 1963 are being reviewed. The policy also states that particular attention must be given to establishing a transparent, flexible and consultative local authority planning system and development regulations.

The policy recommends the enactment of legislation enabling the compulsory acquisition of land by central or local governments for public purposes in accordance with Article 16 of the Constitution. The compulsory acquisition of commercial agricultural land for public purposes is provided for in the Agricultural (Commercial) Land Reform Act, but there is no similar provision in legislation pertaining to urban land reform.

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[57] World Bank, *Comparative of Land Administrative Systems: Critical Issues and Future Challenges – Preliminary Report*, August 2003, at 49.

[58] Republic of Namibia, *National Land Policy*, Ministry of Lands, Resettlement and Rehabilitation, 1998, at 1.


Two informal settlement development projects in Oshakati: Oshoopala (left)**, with the Oshoopala Community Centre in the foreground, and Omumbu.**

National Resettlement Policy of 2001 and Affirmative Action Loan Scheme

The land reform programme has two components, namely the Resettlement Programme and the Affirmative Action Loan Scheme.

1) The Resettlement Programme

Access to land with secure tenure is one of the aims of the National Resettlement Policy.[59] Other principal objectives of the policy and resettlement programme are:

- to redress the imbalances of the past in the distribution of economic resources, particularly land and secure tenure; and
- to offer citizens an opportunity to reintegrate themselves into society after many years of displacement by colonialism, the war of liberation and other adverse circumstances.

Since independence the government has purchased approximately 142 farms for resettlement. A number of the resettlement projects are dependent on government drought aid. The National Resettlement Policy provides that the MLRR must analyse applications for resettlement and judge applicants on the basis of their economic status. Government has classified the categories of settlers as follows:[60]

a) People who have no land, no income and no livestock.
b) People who have no land or income, but who have some livestock.
c) People who have no land but do have income or livestock, and who need land on which to resettle with their families and graze their stock.

Through the MLRR government has to prioritise the groups of beneficiaries in the resettlement programme. The primary target groups are San community members, ex-soldiers, returnees (people who lived in exile when Namibia was under South African rule), displaced

[59] Republic of Namibia, *National Resettlement Policy*, Ministry of Lands, Resettlement and Rehabilitation, 2001, at 3.
[60] Ibid.

people, people with disabilities and people living in overcrowded communal areas.[61] By this definition, virtually all residents of the communal areas, almost 800 000 people, qualify for inclusion in the programme, as do virtually all those residing on the fringes of Namibia's cities and towns.[62] Indeed it appears that virtually all 'poor' people in the country qualify as beneficiaries.

2) The Affirmative Action Loan Scheme

The Affirmative Action Loan Scheme (AALS) managed by the Agricultural Bank of Namibia (Agribank) on government's behalf was introduced by Cabinet in 1992. The main purpose of the AALS is to resettle well-established and strong communal farmers in commercial farming areas to minimise the pressure on grazing in communal areas. By 2004, emerging black commercial farmers had purchased about 544 farms through the AALS – nearly four times the number of farms acquired by the MLRR for its resettlement programme. Despite this impressive transfer of land ownership from mainly white to black hands, the AALS has not been free of controversy: it was briefly suspended from the last quarter of 2003 until the first quarter of 2004 due to government owing Agribank millions of dollars in respect of interest on the scheme. In March 2004 it was reported that at least 199 or around 37% of the 544 AALS farmers had defaulted on their payments.[63] In December 2004 government suspended its 35% guarantee on AALS loans, meaning that prospective farmers now first have to pay 10% of the purchase price before they can qualify for a loan.

In January 2005 Agribank placed a moratorium on the AALS, stating that farm prices have skyrocketed out of control, mainly because buyers had access to large loans and were buying farms at inflated prices. Agribank found that the AALS was no longer sustainable, being unaffordable for buyers due to the loan amount far exceeding the production value of many of the farms purchased. In some cases the farm had a lesser production value than that quoted when the loan was applied for, while in other cases the valuation was based on full-scale production. In this regard, some AALS farmers are under-utilising their farm in that they have fewer cattle than the farm's carrying capacity permits. This appears to have had a negative knock-on effect on the AALS since full-scale production is regarded as critical to the success of the AALS.

2.6 Tenure types

The National Land Policy accords equal status under the law to several forms of land rights and several categories of land rights holders. The types of lands rights are described in Table 1 opposite. The categories of land rights holders are: individuals; families that are legally constituted as family trusts in order to assure specified individuals and their descendants of shared land rights; legally constituted bodies and institutions to exercise joint ownership rights; duly constituted co-operatives; and the State. [64]

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[61] The Agricultural Bank Amendment Act 27 of 1991 and the Agricultural Bank Matters Amendment Act 15 of 1992 introduced, among others, the Affirmative Action Loan Scheme (AALS) (see next section).

[62] Harring S and Odendaal W, op. cit. (footnote 25), at 54.

[63] The Namibian, *Angula Admits AA Loan Scheme Defective*, 23 March 2004

[64] Republic of Namibia, *National Land Policy,* Ministry of Lands, Resettlement and Rehabilitation, 1998, at 3.

Table 1: TENURE TYPES

TYPE	CHARACTERISTICS	LEGAL BASIS
Customary land rights	Communal land is vested in the government, which administers it in trust for the benefit of traditional communities residing on that land. A chief or traditional authority has the primary power to allocate customary land rights. However, the communal land board in which area the traditional community is located must ratify the allocation before it is legally valid. Customary land rights in communal areas include (a) a user right to a farming unit; (b) a user right to a residential unit; (c) a user right to any other form of customary tenure that is recognised and described by the Minister in the *Government Gazette*. These rights can be transferred, inherited or held jointly by spouses.	▪ Schedule 5(1) of the Namibian Constitution ▪ Communal Land Reform Act 5 of 2002
Freehold title	Ownership can be held in perpetuity, transferable alienable, and may be obtained through prescription. It may be seized (expropriated to serve the public interest on a just compensation basis).	▪ Article 16 of the Constitution ▪ Section 14(1) of the Agricultural (Commercial) Land Reform Act 6 of 1995
Leasehold title	Secure long-term registered leases that may be transferred, inherited, renewed or mortgaged are made available in both *communal and commercial* areas, primarily for business purposes. These leases are all for a period of 99 years. Communal land boards may grant rights of leasehold for any portion of communal land, but only if the relevant Traditional Authority consents. Shared leasing would be possible under the Close Corporation Act 26 of 1988 if, for example, a right of leasehold is to be obtained for agricultural purposes or establishing a tourist camp in a communal area as a joint venture that has registered itself as a close corporation.	▪ Common law ▪ Communal Land Reform Act ▪ National Resettlement Policy ▪ National Land Policy
Permission to Occupy (PTO) – to be phased out during the next two years.	PTOs can be cancelled administratively – no due process and security of tenure uncertain – and cannot be legally transferred. The PTO certificates currently granted by the MLRR will be phased out within three years after the introduction of the Communal Land Reform Act. Existing PTO holders will be entitled to apply to their communal land board for conversion of the title to leasehold.	Part I of the Local Authorities Act 23 of 1992 refers to various aspects of PTO rights held in communal areas. At independence several proclamations dealing with land rights issues in communal areas were repealed. Communal Land Reform Act 5 of 2002

Table continues ...

Starter title	This is a statutory form of tenure registered in respect of a block of land. It gives the holder the rights: (a) to perpetual occupation of a site within the block or in a similar block (the exact site within the block is not defined); and (b) to transfer or otherwise dispose of the occupation right subject to a group constitution requiring group consent to a transfer.	Section 10 of the Flexible Land Tenure Bill (4th draft)
Landhold title	This is a statutory form of tenure with all of the most important aspects of freehold ownership but without the complications of full ownership. This title gives the holder the right to occupy a defined site in perpetuity and to transfer or otherwise dispose of such right. Thus the owner would be able to mortgage this title.	Section 9 of the Flexible Land Tenure Bill (4th Draft)
Prescription	Section 1 of the Prescription Act 68 of 1969 defines prescription as follows: "A person shall become the owner of a thing which he has possessed openly and if he where the owner thereof for an uninterrupted period of thirty years or for a period which together with any periods for which such a thing was so possessed by his predecessors in title, constitutes an uninterruptible period of thirty years." The prescription period is 30 years (Prescription Act 68 of 1969). Since independence there have been four cases of prescription: ▪ *H Charney & Co (Pty) Ltd v Segall & Matheson Properties* 1995 NR 148 (HC) ▪ *Seaflower Whitefish Corporation v Namibia Ports Authority* 1998 NR 316 (HC) ▪ *Seaflower Whitefish Corporation Ltd v Namibian Ports Authority* 2000 NR 57 (HC) ▪ *Bank Windhoek Ltd v Kessler* 2001 NR 234 (HC)	Section 1 of the Prescription Act 68 of 1969
Informal tenure	Various informal tenure types probably still exist in the form of permission to stay on land based on payment of utility bills, taxes, political patronage, perceived secure tenure, etc.	
State ownership – though not a tenure title, this category is included for the sake of comprehensiveness	Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and exclusive zone of Namibia belong to the State if they are not otherwise lawfully owned.	Article 100 of the Constitution

All other town/urban land (in communal and commercial areas) that is proclaimed as part of a town in terms of the Local Authorities Act, but which is not held through any of the forms of land right described above, is registered in the name of the government or a local authority. Such land is intended to be subdivided, serviced and sold to the public with freehold title.

Namibia's total land area of 824 200 km^2 can be divided into categories as set out in Table 2.[65]

[65] Republic of Namibia, "Draft National Land Use Planning Policy", Ministry of Lands, Resettlement and Rehabilitation, 2002, at 2.

Table 2: LAND CATEGORIES

LAND CATEGORY	KM²	% OF TOTAL AREA
Rural Private Land	355 907	43.2
Communal Land	326 293	39.5*
National Parks	114 500	13.9
'Registered' Diamond Areas	21 600	2.6
Urban Private Land	5 900	0.7
Total	**824 200**	**100%**

* This includes 420 surveyed farms expropriated under the Odendaal Plan of 1963/4

Source: Draft National Land Use Planning Policy, Ministry of Lands, Resettlement and Rehabilitation, at 2.

Of the total landmass, 688 207 km² or 83.5% is available for the country's urban and rural populations with different land rights for occupation and utilisation.

According to the National Land Policy, freehold title is the only form of secure, registerable title available in urban areas. It affords the holder ownership that is transferable, inheritable and valid as collateral against a loan.[66] Under the Flexible Land Tenure Bill, government endorses the idea that urban dwellers, especially in the informal settlements, should be entitled to hold rights to urban land on the basis of group tenure. This applies especially where a community wants to retain a customary tenure arrangement already existing for communal town land areas, or where community development organisations (Namibia Housing Action Group, Shack Dwellers Federation of Namibia, etc.) decide to acquire land to facilitate an urban housing development project.

[66] Republic of Namibia, *National Land Policy*, Ministry of Lands, Resettlement and Rehabilitation, 1998, at 7 and 8.

3. Housing

A block in a Katutura informal settlement area being serviced for sale to the block residents with secure land and housing tenure.

3.1 Relevant constitutional provisions

The Namibian Constitution does not directly provide for the protection of housing rights. However, sub-article (1) of Article 13 on Privacy provides, inter alia, that "no persons shall be subjected to interference with the privacy of their homes …".

Article 95 of the Constitution, on Promotion of the Welfare of the People, provides that the State must actively promote and maintain the people's welfare by, inter alia, adopting policies to ensure that every citizen has fair and reasonable access to public facilities and services in accordance with the law (sub-article (e)). It can be assumed that public facilities and services include basic services such as water supply, adequate shelter and sewerage removal. Such services should be provided without discrimination and in line with Article 10(2) which states that "No person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, or social or economic status."

Furthermore, Namibia has subscribed to a number of international treaties that are binding on the State by virtue of Article 144 on International Law. Articles 144 and 95(e) together create the condition of an enforceable right to housing. In terms of Article 144, international public law forms part of Namibian law: "The general rules of public international law and international agreements binding upon Namibia shall form part of the law of Namibia."

These international resolutions should be widely disseminated and understood as a tool to advance the protection of low-income households' rights, and especially women's rights to land, property and housing.

3.2 Housing policy

National Housing Policy of 1991

At independence the government identified as one of its priorities the provision of adequate and affordable housing to all Namibians. To ensure a sound and comprehensive approach to housing development, a Housing Policy Advisory Committee was appointed soon after independence. Consisting of representatives of all private and public interests groups, the committee drafted the first National Housing Policy (NHP), adopted by Cabinet in 1991.[67]

Formulating the NHP involved analysing the housing situation in Namibia at independence, developing a broad framework for action to be taken in the sector and identifying areas requiring further study.[68] The NHP aims to secure housing and tenure for all members and types of households in Namibian society on land and in buildings for rent or purchase. It aims to benefit "… *all* members and types of households of the society who require furtherance (financial assistance, education, training and advice) in order to participate in one of the programmes, schemes and projects offered by the private or public instruments …".[69]

The NHP states that government's role in the housing sector is to facilitate and promote partnership networks between the public and private sectors, local authorities, regional councils, NGOs, CBOs and individuals. It appears from the policy that government will intervene only to resolve issues of access to serviced land and means of finance that are beyond an individual's control and capacity. The policy states that the primary responsibility for housing provision lies with the head of each household.[70]

Despite its scant reference to low-cost housing, the policy does recognise the achievements of the Shack Dwellers Federation of Namibia and other saving groups that have built homes for their members. The policy advises central government to support such efforts through the MRLGH.[71] The policy does not address women nor female-headed households specifically, which many consider a shortcoming.

Section 6 of the National Housing Policy and Strategy document states:

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67 The First National Development Plan published in 1995 refers to the National Housing Policy adopted in 1991 – see Republic of Namibia, *The First National Development Plan (Volume 1)*, National Planning Commission, 1995, at 467. The Housing Policy has been updated several times since. A still unofficial fifth draft (2004) has been produced, and the ministry might produce further drafts.

68 Ibid., at 468.

69 Ministry of Regional and Local Government and Housing, "The National Housing Policy of Namibia" (5th draft), 2004, at 9.

70 Ibid., at 6.

71 Ibid., at 13.

(d) The Government intends to subsidise only those income earners whose monthly family income is less than a predetermined amount set by the Minister from time to time. This subsidy will be in the form of a one-time up-front cash payment to the local authority or developer on behalf of the purchaser upon sale of the plot of land with or without improvements.
(e) The irrecoverable capital costs of such projects (projects relating to upgrading of infrastructure) should therefore be paid directly from State revenue in accordance with national priorities.

3.3 Housing legislation

Low-cost housing

National Housing Development Act 28 of 2000

This Act establishes a National Housing Advisory Committee to advise the Minister of Regional and Local Government and Housing on any aspect of national housing, including the formulation and implementation of specific policies and programmes relating to low-cost housing.

Section 8(1) of the Act provides for Housing Revolving Funds to be established by regional and local authorities to be used for low-cost housing. According to section 9, the objectives and purposes of a Housing Revolving Fund are:

(a) to grant loans to persons for the purchase of constructing or acquiring low-cost residential accommodation, or for the purposes of acquiring land (in geographical areas);
(b) to acquire land or materials for the purpose of constructing low-cost residential accommodation in geographical areas, to construct such accommodation and to let or sell such accommodation to any person;
(c) to grant loans to persons for the purpose of constructing low-cost residential accommodation in geographical areas on behalf of other persons;
(d) and to do anything which is necessary in order to attain the objects and purposes of this Act.

Section 9 further provides for the establishment of Decentralised Build Together Committees for each region, to deal with applications for assistance from the Housing Revolving Funds. The functions of Decentralised Build Together Committees include:

(a) informing the inhabitants of a geographical area about the existence, objectives and purposes of a Housing Revolving Fund;
(b) receive applications from persons who apply for assistance from a Housing Revolving Fund;
(c) determine whether applicants are eligible by virtue of their being inhabitants of a geographical area, for assistance by a Housing Revolving Fund;
(d) submit applications referred in paragraph (b), together with written recommendations made by the Committee to the regional and local authority council concerned;
(e) submit quarterly reports to the regional council or local authority council concerned relating to –

i. the activities of a Housing Revolving Fund within; and
ii. the housing needs of the inhabitants of the geographical area concerned; and

(f) perform such other functions as the Minister may designate to it in writing. [72]

The functions, duties and responsibilities of regional councils in the land and housing delivery process are also defined in the National Housing Development Act. These include:

- the reporting of problems to the MRLGH concerning housing in the various regions of the country;
- the preparation of regional housing policies;
- the responsibility to increase and sustain regional land and housing development, especially in neglected rural areas; and
- acting as the supervisor of village councils and settlement areas with regard to housing as contemplated in the National Housing and Development Act.

Local Authorities Act 23 of 1992

Functions of local authorities in relation to housing are defined in the National Housing Development Act and the Local Authorities Act. They include:

- formulating local housing policies;
- developing land for housing;
- developing plots at a cost affordable for the low-income population through subsidies, community work and appropriate technologies; and
- overseeing the housing construction process.

National Housing Enterprise Act 5 of 1993

This Act provides for the continued existence of a national housing corporation to provide for the housing needs of Namibia's inhabitants, and for changing this entity's name from National Building and Investment Corporation to National Housing Enterprise (NHE). It sets down the NHE's powers, duties and functions, and the duties and responsibilities of parastatal enterprises such as the NHE in the provision of housing. The NHE is a parastatal that caters mainly for lower- and middle-income groups. It has operated since 1993 without direct subsidy allocations from government's development budget as it can raise capital from the private sector and utilise returns on investments in housing. Finance is provided to households based on their ability to make the repayments.[73] Though in theory the NHE caters for lower-income households, the vast majority of its loan beneficiaries are middle-income households that can afford NHE support.

Rental tenure rights and protection

The Roman-Dutch law rule *huur gaat voor koop* (lease overrides sale) applies in Namibia. The mere contract between the lessor and lessee offers sufficient protection to the lessee.

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[72] Section 29 of the National Housing Development Act.

[73] Republic of Namibia, *The First National Development Plan (Volume 1)*, Windhoek, National Planning Commission, 1995, at 463.

In other words, the lessee can enforce his/her right against the lessor even if he/she is not in control of the premises and even if his/her right has not been registered.[74]

However, depending on whether it is a long or short lease, control or registration is a requirement for the establishment of a lessee's real right. Section 1(2) of the Formalities in Respect of Leases of Land Act 18 of 1969 applies to long leases entered into for a period of at least 10 years, or for the natural life of the lessee or another person mentioned in the lease, or long leases that from time to time are renewable at the will of the lessee, either indefinitely or for periods which together with the first period amount to at least 10 years. Section 1(2) further provides that no long leases will be valid against creditors or successors under onerous title of the lessor for a period longer than 10 years, unless: (i) it is registered; or (ii) the creditor or successor had knowledge of the lease.

On the other hand, a short-term lessee who is not in control obtains a personal right only. A lessee can in good faith enforce this right against the lessor, but not against any third party, such as a purchaser. Under a short-term lease the lessee's real right vests in his/her obtaining control. Where the purchaser has received actual notice of the lease, the lessee is protected.[75]

Rent control

The control of rent payable for leased dwellings, and the periods of notice with which lessors of business premises and dwellings must comply, are determined by the Rents Ordinance 13 of 1977. The Ordinance provides for the establishment of rental boards consisting of the local magistrate of the area who acts as chairperson, and four additional members. The primary function of the rental boards is to ensure that reasonable rent is charged for dwellings in their respective areas. The boards are responsible for reviewing rental prices on a continual basis or at least once a year. A number of factors are taken into consideration in the reviews, such as the area in which premises are situated, the rate of inflation and the rising costs of services such as water and electricity supplies. A decision of a magistrate's court can be appealed in the High Court.

Eviction

According to the Windhoek Municipality, eviction is uncommon. An eviction is usually due to water and electricity payment arrears continuing for long periods. Namibia inherited South Africa's common law eviction procedures, which generally still apply.[76]

The procedure that the Windhoek Municipality follows before an eviction order is issued to a person in arrears with municipal bills must be in line with the Local Authorities Act. The City has to find a balance between socio-economic needs and rendering affordable sustainable services, and an eviction is the very last sanction exercised by the City after all else has failed. If an acceptable arrangement cannot be made with a defaulter and there are no assets whatsoever to be used to repay municipal rates or services rendered, the matter

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74 Scott S, Brink PD and Knobel IM, *Law of Property*, University of South Africa, 2003, at 202 and 203.
75 Ibid., at 204.
76 See Legal Assistance Centre and Law Society of Namibia, "Debt Collection and the Role of the Sheriff/ Messenger of the Court" (unpublished paper), at 1-4.

is handed over to the City's legal practitioners to seek the necessary relief in either the Magistrate's Court or the High Court.[77] This usually happens after a period of 1-2 years of defaulting. There are currently 59 000 account holders in arrears, owing the City a total of N$180 million (US$2.57 million). Legal procedures in cases of payment arrears may result in removal of movable property for auction, monthly deductions from the debtor's salary or an eviction order.

The following housing alternatives are available to people who have been evicted:

1) Upgrading areas

In identified upgrading areas, the first aim is to accommodate those in need of settlement. If this is not possible due to a dangerous situation or because the density has been exceeded, the community is consulted on how to finalise the upgrading area, or who to relocate to affordable alternative housing in 'green fields'. People evicted may be among those relocated.

2) Formal housing or land sold in instalments

The house owner is first invited to seek an alternative solution such as transferring the financial obligation to an identified family member or caretaker, or securing accommodation elsewhere. If no alternative is found, and if the city has a bond secured or the arrear amount is unacceptably high, the matter will be dealt with in terms of the magistrate's court or High Court procedures. A property is not attached if the amount owing is minimal. Accounts are handed over to legal practitioners only if 'unacceptably high', and this would depend on individual circumstances. The City has a policy not to evict pensioners and registered receivers of state welfare support.[78]

3.4 Tenure types

Rental

Though backyard shack dwellers may have the house owner's permission to rent or sublet a shack, building regulations are being violated.

[77] Disputes involving a property value of N$25 000 (US$3 500) are referred to a Magistrate Court, while disputes involving a property value of more than N$25 000 are referred to the High Court.

[78] Interview with Ms JS de Kock, Corporate Legal Advisor, Municipality of Windhoek, 5 August 2004.

4. Inheritance and marital property legislation

Namibia has a complex structure of civil and customary laws that govern inheritance and marital property rights. Civil inheritance and marital property legislation in Namibia has been influenced mainly by Roman Dutch law, the common law inherited from South Africa, and by old English law. The two basic marital property regimes for civil marriages are 'in community of property' and 'out of community of property'.

The National Co-ordinator of the Shack Dwellers Federation of Namibia (SDFN), Ms Mbanga, in the yard of her house on a block in Katutura being serviced for sale to residents under an SDFN loan scheme.

4.1 Relevant constitutional provisions

Article 14(1) of the Namibian Constitution states, inter alia, that "Men and women … shall be entitled to equal rights as to marriage, during marriage and at its dissolution," while Article 14(3) provides that the family is "… entitled to protection by society and the State". Article 23 on Apartheid and Affirmative Action calls for legislation, policies and practices to encourage and enable women to play a full, equal and effective role in the political, social, economic and cultural life of the nation, in consideration of the fact that women in Namibia

have traditionally suffered special discrimination. Article 95 on the Promotion of the Welfare of the People calls for enactment of legislation to ensure equal opportunity for women, and makes equal remuneration of men and women, as well as maternity and related benefits for women, government issues.

The Constitution prohibits discrimination against women on the basis of their gender. Article 10(1) states that "All persons shall be equal before the law." Article 10(2) lists "sex" as one of the prohibited grounds of discrimination, and Article 16(1) gives any person the right "… to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees".

Article 16 on Property must also be read in the context of a further constitutional obligation to affirmative action, in Article 23(2), which states:

> "Nothing contained in Article 10 hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out discriminatory laws or practices …."

It is thus clear that the Constitution provides for women and men to have an equal right to secure land tenure and property ownership.

4.2 Legislation on inheritance

There is an overlapping and confusing set of old inheritance-related laws still applicable in Namibia, some of which violate Article 16 of the Constitution by discriminating on the basis of race, examples being the Administration of Estates Act of 1965, the Native Administration Proclamation of 1928, the Intestate Succession Ordinance of 1946 and the Administration of Estates (Rehoboth Gebiet) Proclamation of 1941. Only one court to date, hearing the case of *Berendt v Stuurman*, has found these laws unconstitutional, and the Court ruled that all of these laws must be amended by mid 2005.

Testate succession is regulated by a valid will in which the deceased has stipulated how succession to her/his property must take place. Husband and wife have an equal right to draw up a will, and neither husband nor wife has a duty to leave any part of his or her estate to the surviving spouse or the children born of the marriage.

But, race- and gender-based restrictions on the power to draw up a will are imposed by the Native Administration Proclamation 15 of 1928.[79] For example, a black person living in the old Police Zone has full power to bequeath his or her estate in a will, whereas a black *man* outside the Police Zone does not have full testamentary freedom, and a black woman outside cannot leave a will at all, since the colonial government did not take into consideration the fact that a black woman married under customary law can also leave a

[79] Hubbard D and Zimba E quoted in LeBeau D, Iipinge E and Conteh M (authors), *Women's Property and Inheritance Rights in Namibia*, Pollination Publishers, University of Namibia, Windhoek, 2004, at 24.

will. A man does not have the legal power to bequeath, by means of a will: (1) moveable property allotted to or accruing under customary law to any woman he lived with in a customary union; or (2) any moveable property accruing under customary law to a particular 'house'. Property in these two categories must be distributed according to customary law.[80]

For intestate succession, inheritance is determined by the Intestate Succession Ordinance 12 of 1946, but this law discriminates on the basis of race. Only if the black deceased is a widower, widow or divorcee of a civil marriage in community of property or under ante-nuptial contract, and only if he or she was not survived by a partner in a customary union entered into after the dissolution of such marriage, will the property devolve as though the black deceased had been a "European". (See section 4.4 on customary law for a discussion on what happens when a black person leaving no valid will dies outside the former Police Zone.)

The Ordinance provides for the following categories of intestate inheritance heirs:

(1) The surviving spouse of every person who dies either wholly or partly intestate:

(a) If the spouses were married *in* community of property and if the deceased spouse leaves any descendent entitled to succeed *ab intestatio*, the surviving spouse will succeed to the extent of a child's share, or to so much as together with the surviving spouse's share in the joint estate does not exceed six hundred pounds [today N$50 000 or ±US$7 000] in value[81] (whichever is the greater).

(b) If the spouses were married *out of* community of property and if the deceased spouse leaves any descendant entitled to succeed *ab intestatio*, the surviving spouse shall succeed to the extent of a child's share or to so much as does not exceed six hundred pounds in value[82] (whichever is the greater).

(c) If the spouses were married either in or out of community of property, and the deceased spouse leaves no descendent who is entitled to succeed *ab intestatio*, but leaves a parent or a brother or a sister (whether of full or half blood) who is entitled so to succeed, the surviving spouse shall succeed to the extent of half share or to so much as does not exceed six hundred pounds in value[83] (whichever is the greater).

(d) In any case not covered by paragraph (a), (b) or (c), the surviving spouse shall be the sole intestate heir.

In a civil marriage, if the deceased has no creditors to whom debts must be settled from the estate, the surviving spouse has a first claim on the land and house. In a customary marriage, under section 26 of the Communal Land Reform Act, when a person dies the customary land right reverts back to the chief or traditional authority for reallocation. The chief or traditional authority must relocate the right either to the surviving spouse, who

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80 Ibid.

81 The Ordinance is amended by Ordinance 6 of 1963 and Act 15 of 1982, both of which substituted the amounts referred to in section 1(c). (The amounts currently applicable are all set at N$50 000 (US$8 000)).

82 See footnote 63.

83 See footnote 63.

must consent to the allocation of the right to her/him, or to a child of the deceased if there is no surviving spouse or if the spouse does not accept the allocation of the right.

In a civil marriage sons and daughters have equal inheritance rights, but the Communal Land Reform Act provides that customary law must be applied if there is no surviving spouse or if the spouse does not accept the allocation of the right. In either of these cases the Act provides that the right should be allocated to a child of the deceased whom the chief or traditional authority deems entitled to the allocation in accordance with customary law. This provision can work against girls and younger sons of the deceased as most customary law systems in Namibia follow the rule of male primogeniture, i.e. the eldest son inherits the assets of the deceased.

The Administration of Estates Act 66 of 1965 as amended in South Africa in November 1979 governs the liquidation and distribution of the estates of deceased persons. This Act is not applicable to the "Rehoboth Gebiet". The Administration of Estates (Rehoboth Gebiet) Proclamation 36 of 1941 regulates the administration of estates in Rehoboth.[84]

4.3 Legislation on marital property

Marriage in community of property means that all of the belongings and debts of the husband and wife are pooled in a joint estate. Everything that belonged to the husband and wife before the marriage becomes part of the joint estate, along with any money earned or property acquired by either of them during the marriage.

Marriage out of community of property means that the husband and wife have separate belongings and debts. Everything that belonged to the husband before the marriage remains his and everything that belonged to the wife before the marriage remains hers. Each keep their own earnings and ownership of property remains with the person who acquired it.

The Married Persons Equality Act 1 of 1996 provides for gender equality in *civil* marriages and is not applicable to customary marriages. This Act abolishes the common law rule by which a husband acquired marital power over the person and property of his wife. The Act provides that the effect of the abolition of the marital power is "… to remove the restrictions which the marital power places on the legal capacity of a wife to contract and litigate, including but not limited to, the restrictions on her capacity to register immovable property in her name".

The default position on *civil* marital property differs for some black people in Namibia. The Native Administration Proclamation 15 of 1928, part of which is still in force in independent Namibia, sets a different rule for civil marriages of black people north of the old Police Zone on or after 1 August 1950. These marriages are automatically *out of* community of property, unless a declaration establishing a different property regime was made to the marriage officer one month before the marriage. Until this law is changed – Parliament has

[84] See also section 4.4.4 on Customary Law for a discussion on the Administration of Estates Act 66 of 1965, the Administration of Estates (Rehoboth Gebiet) Proclamation 36 of 1941 and the Native Administration Proclamation 15 of 1928, part of which is still in force in independent Namibia, which sets a different rule for civil marriages of black persons north of the old Police Zone on or after 1 August 1950.

until June 2005 to change it – black people north of the Police Zone may choose from among the old regimes, and have their estates administered either by a magistrate's court which does not charge for administration, or through the Master of the High Court which charges an administration fee.

Customary marriage places a number of restrictions on women. All customary marriages are potentially polygamous, and none are registered in Namibia at present. Customary marriage is regulated primarily by unwritten customary laws that differ from one community to another. In the Herero community, for example, a civil marriage is usually *in* community of property, but husband and wife have separate moveable property under customary law.[85]

Evidence suggests that it is not uncommon in all regions except the Caprivi for a couple to marry under civil *and* customary law, and to rely on different legal and social norms depending on the couple's situation.[86] The Caprivi, where civil law has less influence, was administered for a long time by South Africa's then Transvaal Administration rather than by the South West Africa Administration, and customary law applications there have differed from those in the other communal areas.

Civil marriage seems to be gaining popularity in all regions except the Caprivi partly due to the influence of Christianity. According to the 2001 Population and Housing Census, 26% of the national population are married under civil law, 9% are married according to custom, 3% are divorced, 4% are widowed and 56% have never married.[87] Civil marriage has gained popularity in Katutura, Windhoek, in recent years, applying to almost half of all conjugal households there in the early 1990s, while customary marriage in Katutura has become extremely rare. However, civil marriage in Katutura often incorporates elements of customary marriage, such as bridewealth, thus the two systems are intertwined.[88]

A bill on customary marriage is under discussion and review by the Law Reform and Development Commission. It is expected that this legislation will bring customary marriage more in line with the Married Persons Equality Act 1 of 1996. It is expected that the new legislation will deal with problematic situations arising from a clash of civil and customary law. For example, if a man practises polygamy according to custom, and cohabits with a second wife while still in a civil marriage to his first wife, and if the first wife dies, he has a right to inherit her property.

4.4 Customary law

Discrimination on the grounds of sex is present in some aspects of customary law and is unconstitutional, but there have been no court challenges to customary law on this ground in independent Namibia. Article 66 of the Constitution provides that both customary law and

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[85] Hubbard D, "Proposals for Law Reform on the Recognition of Customary Marriages", Legal Assistance Centre, Windhoek, 1999, at 39.

[86] Ibid., at 37.

[87] Republic of Namibia, *2001 Population and Housing Census: National Report – Basic Analysis with Highlights*, July 2003, at 4.

[88] Pendleton W, *Katutura*: *A Place Where We Stay,* 1994, at 82 and 90, quoted in Hubbard D, op. cit. (footnote 84), at 37.

the common law in force on the date of independence will remain valid to the extent that the customary or common law do not conflict with the Constitution or any other statutory law. Article 66 further provides that any part of the common or customary law may be repealed or modified by an Act of Parliament, and that the application thereof may be confined to particular parts of Namibia or particular periods. The property arrangements applying to customary marriage are determined solely by customary law.[89]

In matrilineal societies such as the Owambo and Kavango in Namibia, the custom is that the spouses have some control over their own individual property in respect of marriage, divorce and inheritance. Matriliniality and matrilocality determine the laws of inheritance and succession, as well as post-marital residence, thus women should benefit from the system. But in customary practice, both matrilineal and patrilineal systems tend to discriminate against women. Under the Owambo and Kavango systems, a wife must have her husband's consent for some property transactions, but a husband does not need his wife's consent. Furthermore, immovable property such as a house tends to be treated as 'male property' regardless of which spouse actually acquired it, and the control of movable property such as cattle usually vests in the wife's male relatives.[90]

According to the Native Administration Proclamation, if a black person dies outside the old Police Zone, leaving no will, his or her property will be distributed as follows:[91]

- If the deceased at the time of his/her death was –

  1) a partner in a civil marriage in community of property or under ante-nuptial contract; or
  2) a widower, widow or divorcee of a civil marriage in community of property or under ante-nuptial contract

  and was not survived by a partner to a customary union entered into subsequently to the dissolution of such marriage, then the property shall devolve as if he or she had been a "European"(i.e. as provided by the Ordinance of 1946).

- If the deceased does not fall into one of these categories, the property will be distributed according to "native law and custom".

Furthermore, the administrative procedures relating to deceased estates depend to a great extent on the racial classification of the deceased. The Administration of Estates Act 66 of 1965 is applicable only to white and 'coloured' persons, meaning that their estates are administrated by the Master of the High Court. If the deceased was classified as a "Baster",[92] the estate would be administered by a magistrate under the Administration of Estates (Rehoboth Gebiet) Proclamation 36 of 1947. The estates of black persons are administrated by magistrates in terms of the Native Administration Proclamation.

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89 Hubbard D and Zimba E, op. cit. (footnote 78), at 21.
90 Hubbard D, op. cit. (footnote 84), at 38.
91 Ibid.
92 The Basters are the offspring of Nama and Dutch settlers from South Africa who settled in the Rehoboth area in the 1800s. Their home language is Afrikaans, also spoken by many white Namibians. *Baster* means 'mixed'.

The practice in Namibia's communal areas is that, upon the death of a land rights holder, the land is usually allocated to the husband or another male member of the deceased's family. In some communities this has often led to the problem of a widow being stripped of land and household goods by a husband's extended family members when he dies. To address this discriminatory practice of denying land to a woman after her husband's death, section 26 of the Communal Land Reform Act 5 of 2002 provides the following:

> "A customary land right ends when the person who held that right dies. The Communal Land Reform Act determines that a customary land right reverts back to the Chief or Traditional Authority who *has* to re-allocate it to the surviving spouse. If there is no surviving spouse, or the spouse refuses the allocation, the right has to be allocated to the child of either the first or a later marriage. The Chief or Traditional Authority must determine which child is entitled to the allocation of the right in accordance with *customary law* (section 26(2)(b)). Customs regarding the division of property upon death vary greatly between communities. However, this provision that the allocation of land is to be allocated in accordance with customary law can work to discriminate against girls and the younger sons of the deceased, as most customary law systems follow the rule of male primogeniture, i.e. the eldest son inherits the assets of the deceased. This provision may also discriminate against children born out of wedlock."[93]

A possible loophole in the Act, and one that should be monitored, is that it may not protect a spouse who is pressurised into refusing a property allocation. For example, in the case of *Kauapirura v the Herero Traditional Authority* in 2001, a woman who had been in a common law relationship approached the High Court to prevent her own and her children's disinheritance when her late partner's estate was being divided among his relatives according to their customary law. This case challenged the Native Administration Proclamation provisions that all movable property of a native man who lived in a customary union with a woman, and all other property not distributed in terms of a will, has to be divided according to customary law when he dies.[94] The case was settled out of court with mother and children inheriting. However, due to the out of court settlement, the constitutionality of the common law rule that children born out of wedlock cannot inherit from their father on an equal footing with legitimate children if the father has left no will, went unchallenged.

In the case of *Berendt v Stuurman* in 2003, the Court found that several sections of the Native Administration Proclamation violate the prohibition on racial discrimination in Article 10 of the Constitution. As already noted, in some circumstances this proclamation treats the estates of deceased blacks as though they were "European", while providing in other circumstances that the estates should be distributed according to "native law and custom". Parliament has been given a deadline of 30 June 2005 to replace this offensive legislation. As an interim measure, heirs of black estates can choose between a magistrate and the Master of the High Court as an administrator. The *Berendt v Stuurman* case is significant in that it helped to speed up the removal of some of the last remaining discriminatory laws concerning inheritance and marital property in Namibia.

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[93] Malan J, *Guide to the Communal Land Reform Act, Act No 5 of 2002,* Legal Assistance Centre and Namibia National Farmers Union, Windhoek, July 2003, at 13.

[94] Menges W, "Outdated laws face challenge", in *The Namibian*, 13 June 2001.

4.5 The National Gender Policy

Namibia adopted a National Gender Policy in 1997. It outlines the framework by which implementation of constitutional provisions can be encouraged, supported and sustained, but makes no direct reference to either land or housing. It states that due to traditional attitudes and gender stereotyping, women continue to be under-represented in all sectors of Namibian society.[95]

The government therefore recognises that empowerment of women and gender equality are prerequisites for achieving sustainable political, social, cultural and economic security in Namibia, and seeks to attain these prerequisites through affirmative action policies and by supporting the integration of women and a gender perspective into the mainstream of national, regional and local development initiatives.[96]

Since independence, women's organisations and government policies such as the National Gender Policy have helped to enhance the social status and political power of women in Namibia. Development indicators such as life expectancy and school enrolment are higher for Namibian women today than for men. Life expectancy for women is 50 years while for men it is 48,[97] and the combined primary, secondary and tertiary enrolment rate for women is 84% while for men it is 80%.[98] Still, women remain generally disadvantaged in terms of economic well-being. The female GDP still is much lower than the male GDP because women occupy fewer high-ranking posts in the different economic sectors and women still earn lower salaries than men. For example, in 1998 the real GDP per capita for women was N$3 513 (US$586) while for men it was N$6 852 (US$1 142).[99] Another concern is that HIV prevalence among young women (aged 15-24) is estimated at 18.8-20.8% while the estimate among young men is 7.9-10.4%.[100] Women are biologically more vulnerable than men to HIV transmission – it is generally accepted that male-to-female transmission of HIV is more likely than female-to-male transmission. Furthermore, women in Namibia tend to get infected at a younger age than men, which can be attributed to behavioural patterns and the overall social fabric of Namibian society. Thus the consequences of unprotected sex can be especially serious and life-threatening for women.

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95 Republic of Namibia, *National Gender Policy*, Department of Women Affairs, Office of the President, 1999, at 7.

96 Ibid.

97 Republic of Namibia, *National Resettlement Policy*, Ministry of Lands, Resettlement and Rehabilitation, 2001, at 4.

98 Human Rights and Documentation Centre (University of Namibia), "Research and Teaching on Human Rights, Gender Issues and Democracy in Southern Africa", at <http://www.hrdc.unam.na/home.htm>.

99 Ibid.

100 United Nations Development Programme, *Namibia Human Development Report 2000/2001: Gender and Violence in Namibia*, at 13.

5. Poverty reduction strategy

Makeshift housing in Omumbu informal settlement in Oshakati

5.1 Introduction

Namibia presents a unique situation in that it did not have to formulate a poverty reduction strategy and plan in the traditional sense. With its relatively high per capita income, Namibia cannot be categorised as a Highly Indebted Poor Country, nor does it qualify for a Poverty Reduction and Growth Facility, but it does have a poverty reduction strategy authored under the tutelage of the World Bank and United Nations Development Programme (UNDP).

5.2 The Namibian National Poverty Reduction Action Programme (NNPRAP), 2001-2005 and Poverty Reduction Strategy Plan (PRSP)

The familiar sectors of education, health, agriculture, etc. are identified in the NPRAP and Poverty Reduction Strategy Plan (PRSP), and for each sector "actions" are formulated, these being statements of intent on the steps to be taken to achieve the objectives identified. The PRSP takes the familiar approach of identifying strategies, targets and indicators for various

initiatives, and includes dedicated sections on monitoring and review, with a budgetary link. An interesting addition to the paper is a set of 10 principles to underlie the design and operation of any poverty reduction strategy in Namibia. Though the need to address gender issues is one of these principles, the strategies formulated to uphold it are weak.

Urban land

Urban land is dealt with in the PRSP under the sub-heading "Urban title" in a section addressing small and medium enterprise development, which is telling considering that this section targets primarily people in business. The paper notes that indigenous people in business, due to their lack of collateral, are disadvantaged when it comes to borrowing from commercial banks. To remedy this, it recommends "elimination of constraints that have been experienced by those with *de facto* rights to urban land so they can obtain titles to these assets and hence be in a better position to obtain bank credit".[101] The reference to de facto rights is actually a reference to the Permission to Occupy (PTO), a form of tenure in the former "homelands", which banks today regard as insecure tenure. In these areas PTOs should be converted into "leasehold title deeds"[102] by 2005.[103] All PTOs in communal areas are to be converted into leaseholds as the Communal Land Reform Act provides. This will be done mainly for agricultural purposes and tourist camps, and this conversion applies only for rural PTOs. Urban PTOs, according to the National Land Policy of 1998, will be phased out as the full range of existing and projected forms of tenure becomes available. The paper notes that the conversion process has been slow to date due to constraints on land valuation conducted by local authorities. Also, business owners holding a de facto title have to give up their right to the land by selling it, which holds them back. To solve this problem, the ministry concerned intends to conduct a vigorous awareness campaign and speed up the process of creating valuation rolls. More surveyors and town planners will be trained to meet the target of devising town planning schemes and guide plans for all Namibian towns and settlements by 2005.

In the latter part of this section, the PRSP moves away from the sole concerns of business and urban land. It notes that the proclamation of towns and villages has brought relief to business owners, but not to poor citizens living in informal settlement areas who cannot obtain title. It further notes that "in the rapidly expanding urban areas, many poor people have no official rights to the land on which they have settled … [and] it is difficult for poor rural people who come to the urban areas in search of job opportunities to find vacant land on which to settle".[104] The action formulated to deal with this is implementation of the Flexible Land Tenure System by local authorities. The document further states that "the outcome of the efforts shall be measured by how many communities in targeted towns have registered starter titles and how many have used these titles as collateral for loans (both for housing and small business)".[105]

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[101] PRSP at page 54.
[102] The NPRAP uses the term 'free title', which seems to mean 'freehold' title.
[103] PRSP at page 54.
[104] PRSP at page 55.
[105] PRSP at page 55.

Rural land

> "Whilst it is recognised in the [Poverty Reduction Strategy] and elsewhere that poverty can be found in urban, peri-urban as well as rural remote locations, the rural areas of Namibia deserve particular attention."[106]

In general, rural Namibia receives a lot of attention in the PRSP, with special mention in almost all of the sectoral strategies, but little is said about the role of rural land in poverty alleviation. Land redistribution can be considered a vehicle for poverty alleviation, and the PRSP mentions that the skewed distribution of commercial land has enhanced household vulnerability and poverty among the majority of the nation's farmers.

Gender

A principle underlying all poverty reduction strategies is 'ensuring gender responsiveness'. This is in recognition of the fact that poverty has a gender dimension that should be taken into account throughout the design, implementation and monitoring of poverty reduction measures.[107] Apart from this, gender issues receive little attention in the NPRAP, and the link between gender, land reform and poverty is not addressed at all.

Summary

The PRSP proposes the Flexible Land Tenure System as a means for the urban poor and people in informal settlements to register their rights to land. It views this extension of tenure to the poor as a means for them to obtain loans and start businesses. While providing urban tenure security for the poor is commendable, relying on collateralisation as a product of this process seems optimistic – if experience in other countries is anything to go by. It is important that provision of secure tenure be seen as a poverty alleviation strategy. Rural land reform, on the other hand, is scarcely mentioned in the PRSP, and in view of the land redistribution process in Namibia progressing slowly, as is widely known, more direct linkages would have been useful. Finally, Namibia fails to address gender issues adequately in its programmes and strategies, an obvious shortcoming.

[106] PRSP at page 43.
[107] PRSP at page 21.

6. Land management systems

Omumbu informal settlement in Oshakati

6.1 Main institutions involved

Ministry of Lands, Resettlement and Rehabilitation (MLRR)

The MLRR was established in 1990 as the main actor in the planning and administration of land. The MLRR presently coordinates land use planning through its Inter-Ministerial Standing Committee for Land Use Planning (IMSCLUP). The Agricultural (Commercial) Land Reform Act provides for the establishment of a Land Reform Advisory Commission composed of 16 members selected from the public and private sectors.[108]

The MLRR Directorate of Survey and Mapping provides services to support land use planning and administration of land in urban areas. It provides information for the planning exercises of the Directorate of Lands in the MLRR, but also to other governmental and private institutions as well as the general public.

[108] Republic of Namibia, *The First National Development Plan (Volume 1)*, Windhoek, National Planning Commission, 1995, at 206.

The Directorate of Lands advises on land use planning and administration of land on a broad inter-sectoral level. This includes advising the MLRR Directorate of Resettlement and Rehabilitation which is responsible for planning and implementing resettlement schemes. Currently these schemes provide mainly for agricultural land uses.

The MLRR is also responsible for the administration of land in terms of cadastral boundaries, transfer and ownership. This work is done through the Office of the Surveyor-General and the Registrar of Deeds. In addition, the ministry aims to provide simple, affordable and faster forms of secure land tenure to low-income communities and informal settlers in particular.[109]

The MLRR has also been responsible for the development of a parallel interchangeable property registration system for Namibia, with a view to making an initial secure tenure right simpler, more affordable and upgradeable according to what a resident, a local authority and the government need and can afford at a given time. A pilot programme was launched in 1994 to identify the components of such a registration system. At the end of 1997 the ministry completed this project and produced a policy document. Cabinet approved the policy and the system was named the Flexible Land Tenure System. The system is designed to be maintained locally in a land rights office by fewer skilled personnel than are needed in the present system, which makes it affordable. The MLRR has been responsible for drafting the Flexible Land Tenure Bill, but the MRLGH will be responsible for implementing this law.

A major challenge facing the MLRR is the legacy of different types of land ownership in Namibia, which represents a complex and sometimes inefficient legal framework for land use planning. Government officials often have to deal with numerous different systems within the jurisdiction of each authority at national, regional or local level. The difficulty of dealing with this legal legacy compounds the already difficult task of planning for sustainable, integrated and equitable land use and development in Namibia.[110]

Ministry of Regional and Local Government and Housing (MRLGH)

As the only ministry involved in housing provision, the MRLGH has the responsibility of facilitating the provision of housing, human settlement and development of shelter, and promoting development of sustainable human settlements combining economic, social and environmental protections. Development of urban areas involves numerous activities. The provision of urban land, housing and urban services is the direct or indirect responsibility of the MRLGH and the local authorities. Other services, such as education, health and creation of employment opportunities, are responsibilities of other ministries. However, they are all closely linked to urbanisation and urban development. Urbanisation policy is the responsibility of the MRLGH in collaboration with the National Planning Commission.

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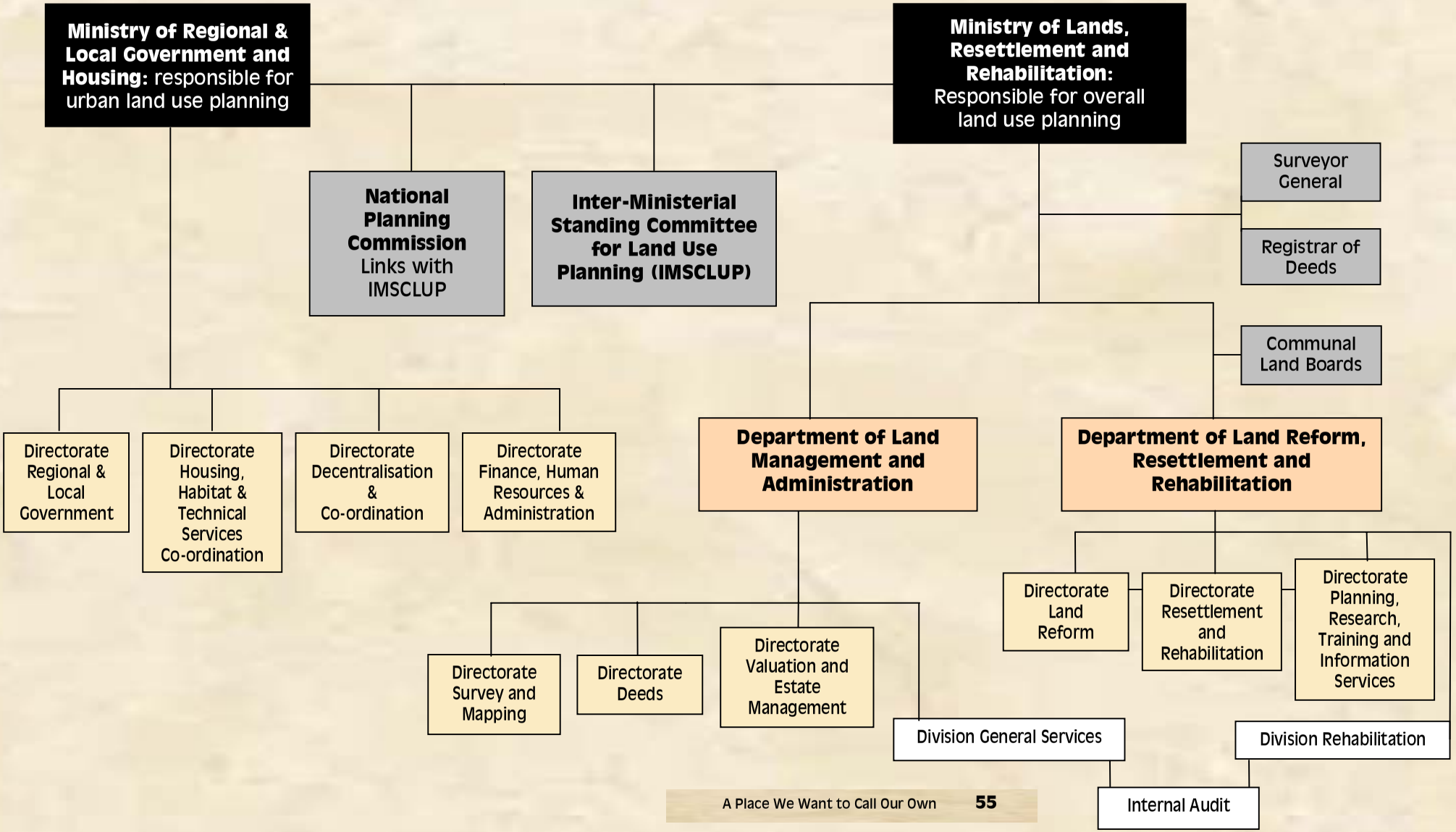
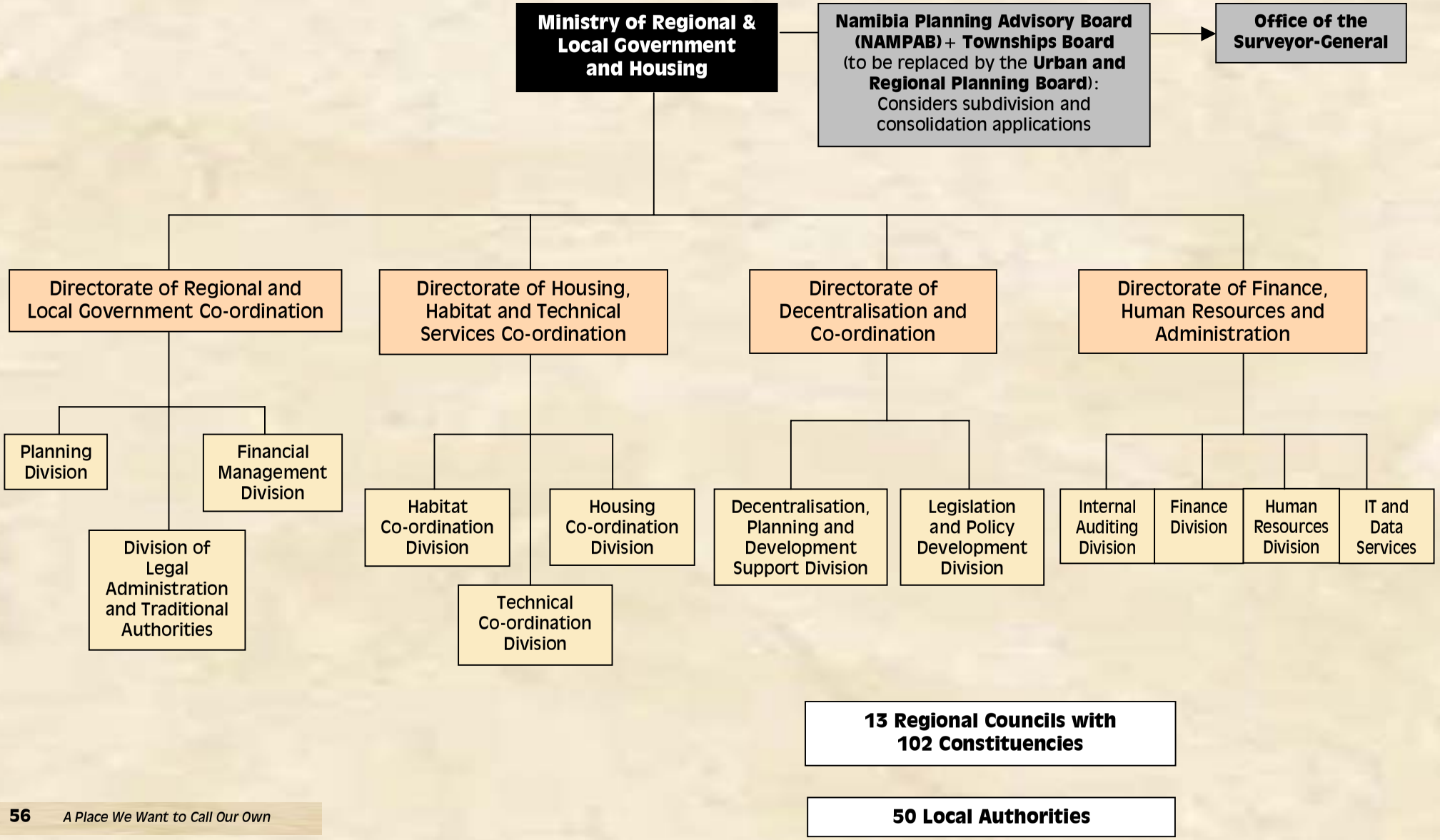
[109] Ministry of Regional and Local Government and Housing, "The National Housing Policy of Namibia" (5th draft), 2004, at 20.

[110] Republic of Namibia, "Draft National Land Use Planning Policy", Ministry of Lands, Resettlement and Rehabilitation, 2002, at 3.

Government structure for land administration




Ministry of Regional & Local Government and Housing
Namibia Planning Advisory Board (NAMPAB) + Townships Board (to be replaced by the Urban and Regional Planning Board): Considers subdivision and consolidation applications
Office of the Surveyor-General
Directorate of Regional and Local Government Co-ordination
Directorate of Housing, Habitat and Technical Services Co-ordination
Directorate of Decentralisation and Co-ordination
Directorate of Finance, Human Resources and Administration
Planning Division
Financial Management Division
Division of Legal Administration and Traditional Authorities
Habitat Co-ordination Division
Housing Co-ordination Division
Technical Co-ordination Division
Decentralisation, Planning and Development Support Division
Legislation and Policy Development Division
Internal Auditing Division
Finance Division
Human Resources Division
IT and Data Services
13 Regional Councils with 102 Constituencies
50 Local Authorities

A substantial number of the activities of regional and local authorities are coordinated through the MRLGH. The ministry is subdivided into four directorates: the Directorate of Regional and Local Government Co-ordination; the Directorate of Housing, Habitat and Technical Services Co-ordination; the Directorate of Decentralisation and Co-ordination; and the Directorate of Finance, Human Resources and Administration. The Directorate of Regional and Local Government Co-ordination is subdivided into four Divisions, namely the Divisions of Local Government Co-ordination, Town and Village Administration, Regional Government Co-ordination, and Town and Regional Planning.[111]

The main functions of the MRLGH regarding local government are:

1) coordination and management of regional and local government;
2) rendering town and regional planning services to regional and local government (in accordance with the Local Authorities Act of 1992);
3) dealing with specific matters concerning towns and villages in terms of the Town Planning Ordinance and the Township and Division of Land Ordinance of 1963 (both amended);
4) acting as a secretariat for the Namibia Planning Advisory Board (NAMPAB);
5) training officials of regional councils and local authorities; and
6) presenting development budgets to the NPC on behalf of regional, town and village councils. [112]

Other ministries

The other ministries responsible for issues relating to urban management and development are the Ministry of Labour, the Ministry of Health and Social Services, the Ministry of Education, the Ministry of Mines and Energy and the Ministry of Works, Transport and Communication. The NPC is responsible for national prioritisation in economic planning, including regional planning.

The IMSCLUP is an MLRR initiative intended to address the need for inter-ministerial coordination. The committee's primary objective is to coordinate land use planning in Namibia until such time as a central and recognised institution is established. Through IMSCLUP government raises awareness among the relevant ministries of the need for integrated planning in cooperation with communities.

Urbanisation policy is the responsibility of the MRLGH in collaboration with the NPC. Article 129 of the Constitution provides the following:

> (1) There shall be established in the office of the President a National Planning Commission, whose task shall be to plan the priorities and direction of national development.
> (2) There shall be a Director-General of Planning appointed by the President in terms of Article 32(3)(i)(dd) hereof, who shall be the head of the National Planning Commission and the principal adviser to the President in regard to all

[111] Republic of Namibia, *The First National Development Plan (Volume 1)*, Windhoek, National Planning Commission, 1995, at 449.
[112] Ibid.

matters pertaining to economic planning, and who shall attend Cabinet meetings at the request of the President.

(3) The membership, powers, functions and personnel of the National Planning Commission shall be regulated by Act of Parliament.

Regional councils

The functions, duties and responsibilities of regional councils in the land and housing delivery process are defined in the National Housing Development Act. These include:[113]

- reporting to the MRLGH on problems concerning housing in the different regions of the country;
- formulating regional housing policies;
- increasing and sustaining regional land and housing development, especially in neglected rural areas; and
- acting as the supervisor of village councils and settlement areas[114] with regard to housing as contemplated in the National Housing and Development Act.

There seems not to be a clear perception of the role and responsibilities of regional councils for urban areas, and the Regional Councils Act of 1992 is not very specific on these. The Flexible Land Tenure Bill does not mention any role for the regional councils, but it is foreseen that when the bill becomes law the local authority will still handle the land administration of each urban area, while the MLRR, MRLGH and the local authority council may establish a Local Property Office to deal with registration under the two new tenure systems. The MRLGH provides financial support to local authorities whose tax bases do not provide sufficient revenue for these activities. The impact of regional councils on urbanisation is potentially considerable because they are responsible for development in the regions as well as for the location and design of infrastructure and social services that influence urban migration.

Communal land boards

According to section 4 of the Regional Councils Act, the Minister of Lands, Resettlement and Rehabilitation must in writing request the Minister of Regional and Local Government and Housing, the Minister of Agriculture, Water and Rural Development and the Minister of Environment and Tourism, as well as the traditional authority/ies and conservancy/ies concerned, to nominate people for appointment to a communal land board. Should the

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[113] Ministry of Regional and Local Government and Housing, "The National Housing Policy of Namibia" (5th draft), 2004, at 15.

[114] Section 31(1) of the Regional Councils Act describes a "Settlement Area" as follows:

If a regional council is, in respect of any area falling within the region in respect which it has been established, but outside any local authority area, of the opinion –

(a) that by reason or circumstances prevailing in such area provision should be made for the management, control and regulation of matters pertaining to the health and welfare of the inhabitants of such area;

(b) that by reason of circumstances prevailing in such area, the area is an area which ought to be developed so as to be established as a local authority, the regional council may by notice in the Gazette declare such area to be a settlement area, and shall specify in such notice the name assigned to, and the boundaries determined of such area.

traditional authority/ies or conservancy/ies fail to nominate someone, the ministers must appoint suitable people. The members of a communal land board elect the chairperson. Section 24 of the Act deals with ratification of customary land rights allocations. The chief or traditional authority has the primary power to allocate customary land rights, but a customary land right allocated by a chief or traditional authority does not suffice to give the applicant the right to use the land. Use of the land becomes a right only once the relevant communal land board has ratified the allocation. The chief or traditional authority must inform the board of a customary land right allocation within 30 days of making the allocation, and must give the board all pertinent information about the allocation. A communal land board has the following powers regarding a customary land rights allocation:

(1) It can ratify the allocation if it is satisfied that the allocation was properly made.
(2) It can refer the matter back to the chief or traditional authority to reconsider in the light of the Board's comments.
(3) It can veto the allocation if the right is to an area of land to which another person has a right, or if the size of the land allocated exceeds the maximum prescribed size, or if the right has been allocated for land reserved for common usage or for any purpose in the public interest.

In summary, the board must decide whether the chief or traditional authority made the allocation in accordance with the provisions of the Regional Councils Act. To do this, the board may enquire into the matter and consult with other people. Once it has ratified the allocation of a customary land right, the board must do the following:

(1) Ensure that the right is registered in the correct register in the name of the applicant.
(2) Issue a certificate of registration to the applicant.
(3) Keep a duplicate copy of all certificates of registration at the board's office.

Section 33 of the Regional Councils Act deals with the registration of leasehold rights. Once an application for a right of leasehold has been granted by the board, the board must do as follows:

- Ensure that the right is registered in the prescribed register and in the name of the applicant.
- Issue a leasehold to the applicant.
- Register the right of leasehold under the Deed Registries Act 47 of 1937 if the land in question has been surveyed under the Land Survey Act 33 of 1993 and the duration of the lease is 10 years or more.

The maximum period for a leasehold is 99 years, but the board and the person who applied for and received the right of leasehold must together determine the period. Leases for longer than 10 years are not valid unless approved by the Minister of Lands.

Local authority councils

Local authorities own most of the land in urban areas and formal rural areas. They are responsible for the development of land for housing, and for the sale of residential plots that are transferable with freehold title. The Local Authorities Act 23 of 1992 placed

designated urban areas in the former "homelands" in a position to provide freehold title. The functions of local authority councils with regard to housing are defined in the Local Authorities Act and the National Housing Development Act. Some of the functions are:[115]

- to prepare local authority housing policies;
- to develop land for housing;
- to develop plots at a cost affordable for low-income people through subsidisation, community work and appropriate technology; and
- to oversee the housing construction process.

The Division of Land Boards, Tenure and Advice within the MLRR Directorate of Land Reform is responsible for issuing Permission to Occupy (PTO) Certificates in rural communal areas. Local authorities are responsible for registering urban PTOs in communal areas. Section 4(1) of the Flexible Land Tenure Bill provides that the Minister of Lands, Resettlement and Rehabilitation, after consultation with the Minister of Regional and Local Government and Housing, may by notice in the *Government Gazette* establish a land rights office for the area specified in the notice as the area of jurisdiction of that office. In other words, local authorities will also be responsible for carrying out the provisions of the Flexible Land Tenure Act in terms of registering the two new tenure systems. Section 13(2) of the bill provides that once the establishment of a starter title scheme has been approved, the relevant local authority must send a notice to that effect to the Registrar of Deeds and to the registrar of the local property office under whose jurisdiction the land falls.

The Local Authorities Act furthermore distinguishes between municipalities, towns and villages. Municipalities represent the highest level of local authority and are divided into Part I Municipalities such as Windhoek, Swakopmund and Walvis Bay, and Part II Municipalities such as Gobabis, Grootfontein, Karibib, Karasburg, Keetmanshoop, Mariental, Okahandja, Omaruru, Otjiwarongo, Outjo, Tsumeb and Usakos. Part I Municipalities have more administrative autonomy and more councillors than Part II Municipalities. Section 21(1) of the Local Authorities Act provides that every local authority council should have a management committee, and section 26(1) provides that the functions of the management committees should be:

(a) to ensure that the decisions of the local authority council are carried out;
(b) to consider any matter entrusted to the local authority council by virtue of any provisions of this Act or any other law in order to advise the local authority council on such matter;
(c) to prepare and compile for the approval of the local authority council the estimates and supplementary estimates of revenue and expenditure of the council;
(d) to control the expenditure of moneys voted by the local authority council in its approved estimates and additional estimates and all other moneys or funds made available to the local authority council;
(e) to report at meetings of the local authority council on the exercise of the powers and the performance of the duties and functions of the management committee;
(f) to exercise any power conferred upon the management committee under any provision of this Act or any other law; and
(g) to exercise any power of the local authority council delegated to the management committee by the local authority.

[115] Supra note 106 at 16.

Above:: **A toilet facility in Oshoopala informal settlement in Oshakati, built by the Oshakati Town Council**
Top right: **Provision of electricity to Oshoopala.**
Below: **A communal water tap in a Katutura back yard.**
Below right: **A communal water tap on a Katutura pavement.**

Further, a local authority "may establish from time to time such committees as it may deem necessary to advise it on the exercise of any of its powers or the performance of any of its duties and functions, and may appoint such members of the management committee or such other persons as it may deem fit to be members of such committees".

Municipalities

A municipality is a legal body with its own assets, consisting of a proclaimed town layout with town lands for future extension.[116] All municipalities have an organised and formal administrative structure, performing the functions of a local authority. They are divided into departments for general administration, finance, health and engineering. Their functions include water supply, provision of sewerage and drainage systems, refuse removal, construction and maintenance of streets and public places, supply of electricity and gas, and facilitation of housing development. They are in principle independent of higher authorities, both administratively and financially. A municipality's main sources of income are local rates, charges and fees for provision of urban services (water, electricity, sewerage, etc.), and sales and taxation of land. Central government contributes to municipal income by

[116] Republic of Namibia, *The First National Development Plan (Volume 1)*, Windhoek, National Planning Commission, 1995, at 452.

means of loans for development purposes and subsidies for roads, traffic control and fire brigades.

With the steady influx of people from the regions to Windhoek, especially to the informal parts of Katutura, the costs of developing urban services are likely to increase considerably in the next few years. There is also an influx to informal settlements of people who have lived in formal parts of Katutura for some time, and even some who were born in Katutura, presumably due to finding it increasingly difficult to pay home utility bills. Their presence in the informal settlements could further increase the cost of urban services.

Towns and villages

Towns are proclaimed and surveyed in accordance with the procedures laid down in the Townships and Division of Land Ordinance of 1963, while villages are not covered in this legislation.[117] Since independence several towns in communal areas have been proclaimed as municipalities, which allow them to generate additional income through charges for water, electricity, sewerage and rent paid for using land. In most towns the MRLGH is responsible for local authority administration and personnel. Most towns are not self-supporting and rely on central government to cover salaries and some maintenance costs.[118] The lack of development in most towns currently undermines the authority of the town councils, which could jeopardise their political legitimacy. As mentioned in section 1 of this report, all local authorities (municipalities, towns and villages) have some automatic powers, but a village may exercise these powers only if the Minister of Regional and Local Government and Housing considers it ready to do so. A village council elects a chairperson and vice-chairperson, who play a similar role to that of mayors and deputy mayors in larger local authorities. The central government can step in to help towns and villages that have difficulty providing adequate services to their residents (as seen in the NamWater case referred to in section 1 of this report).

Another point that should be noted is that there are headmen involved de facto in land administration in informal settlements, especially in proclaimed towns in communal areas where the headmen have a strong de facto influence on local authority affairs.

Office of the Surveyor-General and Directorate of Survey and Mapping

The Directorate of Survey and Mapping consists of three divisions: Division of Mapping and Geographical Information System; Division of Cadastral and Geodetic Surveys; and Division of Planning, Marketing and Administration. The directorate is the national survey and mapping authority in Namibia providing professional services and advice to the government, parastatals, private companies and the general public on all land surveying and mapping matters. Its role is defined in the Land Survey Act 33 of 1993. The directorate's tasks are:

- examination and approval of cadastral survey records, diagrams and general plans;
- digitisation and revision of topographical maps;
- creation of a digital cadastral database;

[117] Ibid., at 453.
[118] Ibid.

- acquisition of up-to-date aerial photography; and
- capacity-building within the MLRR.

Division of Mapping and Geographical Information System (GIS)

This division is responsible for:

- revision of maps
- planning and supervision of aerial photography contracts;
- digitisation and maintenance of digital databases;
- formulation, development and coordination of national GIS policy;
- provision of specialised services such as scanning and vectorising of maps and other graphic documents; and
- provision of professional advice on mapping, GIS and remote sensing.

Division of Cadastral and Geodetic Survey

This division plays an important supporting role in the implementation of land reform measures such as land acquisition for resettlement, and in provision of secure tenure through registration of deeds. This division is also responsible for the examination and approval of all cadastral surveys and plans required to support the registration of immovable properties. It plays an active role in the township proclamation process by coordinating all township surveys in collaboration with the MRLGH.

Directorate of Deeds Registry

This directorate has two offices, namely the Windhoek Deeds Office and the Rehoboth Deeds Office. The directorate serves as the national cadastral authority in the country. The deeds registries render professional services and advice to line ministries, parastatals, local authorities, legal practitioners and the general public on all matters relating to the registration of immovable and movable properties. The deeds registry functions are outlined in the Deeds Registries Act 47 of 1937 and the Registration of Deeds in Rehoboth Act 93 of 1976.

Land rights offices – all within the MLRR

Directorate of Land Reform

The Directorate of Land Reform consists of two main divisions, namely the Division of Land Boards, Tenure and Advice, and the Division of Land Use Planning and Allocation, and a third division called the Valuation and Estate Management Unit. The directorate's main function is to administer the Agricultural (Commercial) Land Reform Act 6 of 1995 and the Communal Land Reform Bill passed recently by the National Assembly. The directorate also developed and is implementing the National Land Policy. The directorate's objectives are as follows:

1) To acquire land for resettlement and developmental purposes.
2) To guide the formulation of rural land development plans to ensure optimal use of scarce and fragile natural resources.

3) To prepare plans for specific land use options and coordinate future land use planning in the country.
4) To allocate communal land for farming and business purposes.
5) To determine land value and other government properties for various uses.
6) To protect the inalienable right of every citizen to have access to land.
7) To collect and keep baseline data on natural resources.

Directorate of Resettlement and Rehabilitation

This directorate consists of two divisions, namely the Division of Resettlement and the Division of Rehabilitation. The directorate is responsible for resettling landless and displaced Namibians to enable them to attain an acceptable level of social and economic development. It is also responsible for developing and maintaining the capacity to raise awareness of and economic means for integrating people with disabilities into mainstream Namibian society. This enables people with disabilities to afford and utilise all means of education, employment and development available to other citizens.

Division of Resettlement

This division is primarily responsible for all resettlement activities in the MLRR, including provision of basic amenities and facilities to landless and destitute Namibians.

This division is also responsible for implementing development projects with the aim of improving the economic and social status of previously disadvantaged communities. During the last 10 years, projects such as the Excelsior Rural Development Project in Westfallen, Bernafey, Skoonheid, Drimiopsis, Mangheti Dune, Bravo, Tsintsabis, Otjihao, Bagani, Onandandja, Omega and Chetto have been established under this division's jurisdiction. Through the resettlement programme, some previously disadvantaged groups such as San communities, ex-combatants and displaced farm workers have received housing and land for agricultural activity. Since the resettlement programme's inception, the MLRR has built and allocated 160 houses to beneficiaries in different regions.

The MLRR has already introduced a long-term lease agreement with the incumbent resettlement programme beneficiaries. This has given new impetus to the programme in general and will raise revenue to secure the programme's long-term sustainability. Lease agreements will encourage beneficiaries to increase the productivity of their plots and add value to the resettlement programme.

Division of Rehabilitation

The main function of this division is to facilitate increased access to services for people with disabilities so as to enhance their integration into the wider community and enhance their dignity and social well-being. This division is responsible for implementing the National Disability Policy through a community-based rehabilitation programme. This programme has three main components:

(1) Disability resource centre
(2) Income-generating activities
(3) Human resources development and support to disabled people's organisations

In the last 10 years this division has established projects for people with disabilities in several parts of the country, examples being the Hangatena Project in Omaheke Region, the Iileni Mwitaleleko project in Oshikoto Region, the Morgenson Project in Karas Region, the Hainyeko Bakery in Oshikoto Region, the Windhoek Disability Resource Centre, the Keetmanshoop Disability Resource Centre and the Keetmanshoop Disability Resource Centre.

Directorate of Land Reform

Division of Land Boards, Tenure and Advice

The MLRR is responsible for the overall administration of state land, including communal land. Currently the traditional authorities are responsible for allocating and cancelling land rights for customary utilisation. They are also responsible for allocating land rights for business purposes in communal areas. For the smooth administration of communal land, the ministry has planned for establishing regional land boards throughout the country. These statutory bodies will strengthen the institutions already involved in the administration of communal land.

This division is responsible for issuing Permission to Occupy (PTO) Certificates to successful applicants in communal areas. It also attends to land disputes and adjudicates in communal area conflicts.

Division of Land Use Planning and Allocation

This division is responsible chiefly for developing plans for commercial and communal land use. It is also mandated to execute the following functions:

1) Assessment and acquisition of land/farms for resettlement purposes.
2) Collection of baseline data on biophysical and socio-economic environments with the aim of evaluating the suitability of land for specific uses under certain levels of management.
3) Demarcation of farms into units as stipulated in the Commercial (Agricultural) Land Reform Act 6 of 1995.
4) Assistance and support of decision-makers at local, regional and national levels in all aspects of sustainable land use as a natural resource for development.
5) Testing of land utilisation against the overall development objectives, policies and appropriateness of implementation of land reform programmes.
6) Provision of guidelines for drafting legislation on land tenure, land administration and land use planning.

Valuation and Estate Management Unit

In accordance with the Cabinet decision to establish a centralised government unit to handle valuation and estate management, the MLRR is in the process of establishing such a unit within its Directorate of Land Reform. The main tasks of this unit will be as follows:

1) Valuing commercial agricultural land/properties offered to the government for sale.
2) Providing professional advice on valuation to ministries, government agencies and parastatals.

3) Implementing land tax, and developing and maintaining an asset register.
4) Valuation for stamp duty and transfer duty, and developing estate plans.
5) Valuation for disposal/lease of state properties such as farms.

6.2 Informal settlements and the formal system

The two main pieces of legislation presently governing land use planning and management in Namibia are:

- the Town Planning Ordinance 18 of 1954; and
- the Townships and Division of Land Ordinance 11 of 1963.[119]

The Ordinance of 1954 provides for town planning schemes, and for reconstruction and redevelopment of areas already subdivided in such a way as to effectively promote health, safety, order, amenity, convenience and general welfare. A town planning scheme must contain such provisions as necessary for regulating, restricting or prohibiting the development of an area to which the scheme applies, and generally for carrying out any of the objectives for which the scheme is created. The MRLGH is drafting a Town and Regional Planning Bill to replace the Ordinances. The bill will replace the Namibia Planning Advisory Board and the Townships Board established by the Ordinance of 1963 with one Urban and Regional Planning Board. The objectives of this board will be to coordinate, evaluate and supervise structure planning, zoning schemes, policy planning and standards, subdivision and consolidation of land, establishment of new towns and other planning matters. The bill requires that national, regional and urban structure plans be prepared. [120] These plans will have statutory status in terms of the new Act. It will therefore be possible to enforce the Act's provisions for a specific area.

The national structure plan to be included in the bill will deal with spatial aspects of Namibia's social and economic development, with its content prescribed by regulation. A regional council must prepare regional structure plans and sub-regional structure plans, if desirable, for its region. The regional structure plan must deal with spatial aspects and potential for social and economic development of areas in a region, and must contain policy statements, background studies, reports and maps as will be prescribed by regulation. Regulations for the Town and Regional Planning Bill are being drafted.

The overall aim of a "strategic physical planning process" as defined in the bill is to ensure orderly, coordinated, efficient and environmentally sound social and economic development and proper use of land. This legislation will also require local authorities to prepare zoning schemes for their areas of jurisdiction. These schemes will govern the land use rights of each erf in the area, and owners will apply to the local authority to rezone their land. Furthermore, the Urban and Regional Planning Board will consider subdivision and consolidation applications, after which the procedure will continue to the Office of the Surveyor-General.

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[119] The Townships and Division of Land Amendment Act 21 of 1998 amended the Ordinance in order to include certain townships to be listed as First Schedule townships, and to provide that the Minister may vary the conditions of title in respect of the erven in those townships.

[120] Republic of Namibia, *The Draft National Land Use Policy*, "Annexure A: Applicable Legislation, Policies and Regulations on Land Use Planning", Ministry of Lands, Resettlement and Rehabilitation, 2002, at 5.

The implications of the Act for land use planning and management are as follows:[121]

- The strategic physical development planning process provides for the integration of all sectoral aspects of sustainable development and covers all aspects as necessary to ensure harmonious and environmentally sound development in the regions.
- The opportunity exists to merge this process with the MLRR regional land use planning process to ensure integration and avoid an overlap of responsibilities.[122] As noted earlier, the MLRR developed the Flexible Land Tenure Bill but the MRLGH will implement it, thus strong coordination between these ministries will be necessary for the system to work.

The upgrading and development of informal settlements in Namibia are subject to formal town planning schemes. A criticism of present building standards is that they are often inappropriate for informal residential development in that construction costs are too high. Almost 80% of building materials for the housing sector are imported and very expensive due to high transport costs.[123]

The extreme poverty of informal settlers places modern housing materials and construction beyond their reach. Shacks are often built with any materials found, and most materials used do not provide adequate protection from the weather. Temperatures in Windhoek can vary widely due to the city's high altitude and dry desert climate. Summer temperatures can reach highs of ±40°C while on winter nights temperatures can drop to ±5°C. Virtually none of the thousands of shacks in Windhoek's informal settlements offer adequate protection against such extreme temperature fluctuations. Insufficient access to electricity renders these informal settlers dependent on fuels such as wood and paraffin for cooking and heating. A recent survey conducted by the Renewable Energy and Efficiency Bureau of Namibia (R3E Bureau) indicated that wood consumption costs an informal household as much as N$10 (US$1.66) per day or N$300 (US$50) per month to satisfy only basic cooking needs.[124] Paraffin and candles for lighting are additional expenses. The latter fuels are the predominant cause of shack fires.

Research was conducted in early 2004 by the R3E Bureau, a non-profit association, in collaboration with the Ministry of Mines and Energy, the SDFN, the NHAG and the CoW to identify low-cost do-it-yourself methods to upgrade shack homes in Windhoek to make them more comfortable by making them less susceptible to the external climate. A shack was refurbished using reeds from riverbeds, off-cut cloth from a local textile factory and card-board from a nearby dump site to produce effective insulation. Measurements were taken throughout the process and the refurbished shack proved 4°C cooler during the day and 2°C warmer at night. The UN Habitat Research and Development Centre in Katutura, in which the R3E is housed, is built almost entirely from alternative low-cost materials such as clay and car tyres, and serves as an excellent example of what can be achieved with such materials.

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[121] Ibid.

[122] For example, section 7(e) of the Flexible Land Tenure Bill provides that, "In order to satisfy itself of the desirability of the establishment of the scheme concerned, the relevant authority … must consider all relevant legislation and any town planning scheme applicable to the area in which the piece of land concerned is situated."

[123] Ibid., at 466.

[124] Information obtained from R3E Bureau on 9 July 2004.

According to Dr Muller of the NHAG, local authorities have become more flexible in recent years in seeing to the needs of informal settlers wanting to develop the land on which they reside. Towns such as Otjiwarongo, Keetmanshoop, Omaruru and Henties Bay have in recent years permitted low-income households to build with clay. Development of informal settlement areas is now generally included in Namibian town planning schemes. In this regard the CoW has a clear strategy for identifying informal settlement areas, how they should be upgraded and where informal settlers should reside. According to Mr Opperman, a town planner with Urban Dynamics in Windhoek, conventional town planning laws have become more flexible in recent years so as to meet the specific needs of informal settlements (to do with site sizes, road widths, flood-prone areas, etc.). Mr Opperman explains that some town councils have amended their town planning schemes to make provision, in cases where many people live in a block system, for formalising blocks as low-income settlements and meeting their housing needs. A good example of such a settlement is Evululuko in Oshakati which is currently being formalised.

Where the land registration process is linked to planning regulations, Dr Muller explains that certain restrictions have been overcome with the communal block development strategy. Local authority regulations currently seem to require that a block in its totality fulfils certain planning requirements, e.g. that the block be treated as a single development entity rather than individual plots being developed as separate entities. Block development does not require registration of individual rights, but only community registration, thus planning approvals do not hold up registration of land rights. However, the process of approving block and land development is generally slow, and undeveloped land usually has to be serviced, which requires financing that is seldom readily available to low-income households.

The Ibis Advisor on Land Surveying and Land Administration with the MLRR Lands Project, Mr Søren Christensen, is of the opinion that the Namibian cadastral system is unable to meet the demand for surveyed plots in the informal settlements, which further slows down the process of delivering land to informal settlers. Initiatives underway to generate computerised coverage of all cadastral and administrative boundaries will advance the processes of land evaluation, land taxation, development planning and land administration, and the Flexible Land Tenure System.[125] Time will tell whether these initiatives suffice to meet the demand for surveyed plots in the informal settlements.

In summary, to solve some of the above-mentioned problems concerning informal settlement and formalisation, plans must be adapted to the reality of informal settlements, and informal settlements must be legally isolated from conventional planning laws. While the allocation and registration of blocks are given attention in the Flexible Land Tenure Bill, a shortcoming of the bill is that the town planning aspect is not given attention.

Restrictive conditions of title

Restrictive conditions of title are registered against the title deeds of erven in a proclaimed township. These conditions restrict the uses of erven, and may include prohibiting the subdivision of a property or the erection of a building on a property unless it complies with

[125] *Namibia Cadastral Template Report (2003): A Worldwide Comparison of Cadastral Systems*, cadastral country reports based on a jointly developed PCGIAP/FIG template, Department of Geomatics, University of Melbourne, 2003, at 7.

The UN Habitat Research and Development Centre in Katutura is built almost entirely from alternative low-cost materials such as clay and car tyres, and serves as an excellent example of what can be achieved with such materials.

certain requirements, such as that it must have a specific type of roof. The sale of property may also be restricted by a will, for example when a parent bequeaths a property to his/her child on the basis that the property may not be sold before the child reaches a certain age.[126] The key intention of the Flexible Land Tenure Bill is to remove restrictive conditions for informal settlement on a particular parcel of land. Without such conditions, the development of a parcel of land can be planned for as necessary, without the need for a conveyancer to handle complex transactions, but rather with a local property officer using pro forma computer forms.

Local authorities in Namibia generally have their own guide master plans, development frameworks and town planning schemes which together determine a broad land use pattern for present and future development. A town planning scheme is used to regulate services

[126] Restrictive conditions of title imposed on land by wills and similar instruments can be removed in terms of the Immovable Property (Removal of Restrictions) Act 94 of 1965. The Removal of Restrictions Ordinance 15 of 1975 provides for the alteration, suspension or removal of restrictions on the uses of land. Applications are made to the High Court for an order authorising the lifting of the prohibition that will be granted only if there is a good reason for lifting it. (Namibia Estate Agents Board, *Real Estate Study Guide,* 2001, at 47.)

such as protection of public health, safety and welfare. A town planning scheme contains the following basic information:[127]

- *Use Zones*: This refers to the purposes for which buildings may be erected and used, such as "Residential" (e.g. houses) or "General Residential" (e.g. flats and townhouses).
- *Density Zones*: This refers to the number of dwellings that may be erected on a property, or to a minimum erf size required for a house. This information is important in considering the subdivision potential of a property or the number of dwelling units that may be erected on a property.
- *Floor Area Rations* (FAR): This refers to the total floor space of buildings that may be built on a property.
- *Height*: This refers to the number of storeys permitted on a property. Height can be expressed as a number of storeys or as the height above ground level in metres.
- *Coverage*: This refers to the amount of land that may be covered by the buildings on a property.
- *Building Restriction Areas*: This refers to areas along the street boundary or the side and rear boundaries which may not be built upon – commonly referred to as 'building lines'.
- *Parking*: This refers to the number of parking bays required in residential, business and similar developments.

As noted above, town planning has not been dealt with in the Flexible Land Tenure Bill, and this shortcoming could have consequences for informal settlements in that the necessary regulatory aspects of town planning would be absent.

Land dispute settlement mechanisms

Land disputes are formally dealt with through the civil courts, such as the magistrates' courts and High Court. The communal land boards under the Communal Land Reform Act are supposed to deal with immovable property disputes, such as those involving customary land rights. Community courts are not yet in operation, but one might expect that they will deal only with movable property disputes. This is because the Communal Land Reform Act deals with immovable property, so the community courts would probably refer all issues pertaining to immovable property to the communal land boards and deal only with movable property disputes. The Act does not address the issue of 'property grabbing' involving moveable property such as livestock and household goods. It is hoped that the community courts will be able to address this issue. While the Act would give women much greater security of tenure on communal land, according to the National Co-ordinator of the Shack Dwellers Federation of Namibia, Ms Mbanga, people living on block systems usually deal with urban land disputes through internal leadership structures rather than seeking external legal advice. Ms Mbanga describes civil court procedures as often being too complicated, formal and expensive for low-income households.[128]

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[127] Namibia Estate Agents Board, ibid., at 50.

[128] The option of a group claim exists. In 2004 the Ada/Gui Senior Citizens and Destitute Children Association requested the LAC to apply to the High Court to challenge the Windhoek Municipality's policies on provision of basic services such as water. The case was settled out of court and LAC has played a mediatory role between the applicable community and the Municipality, and the latter has reconnected the water supply to the community.

Traditional authorities, chiefs and headmen play a mediatory role in settling land disputes among their community members in communal areas, but not on proclaimed town lands except in unusual circumstances. The challenge for land dispute settlement mechanisms in communal areas is to break with the tradition of discriminatory practices against women and uphold their right to obtain and inherit land. The Communal Land Reform Act 5 of 2002 was introduced to address discriminatory practices still in effect in some customary land dispute mechanisms. However, contrary to the Act's objective to address discriminatory practices against women, if customary law is to be applied rigidly as provided by section 26(2)(b) of the Communal Land Reform Act (see section 4.4 on customary law in this report), it would surely have a detrimental effect on efforts to promote gender equality and raise the position of women in traditional Namibian society.

The City of Windhoek recently adopted a strategy to prevent land invasions with assistance from community leaders, especially in the upgrading areas where a land invasion could have a detrimental affect on an area.[129]

Administration of estates (procedures)

As explained earlier in this report (section 4.4 on customary law), the following rules apply for the administration of estates:

- The Master of the High Court administers estates of white and 'coloured' deceased persons (Administration of Estates Act 66 of 1965).
- Magistrates administer estates of deceased persons classified as "Baster" (Administration of Estates (Rehoboth Gebiet) Proclamation 36 of 1947).
- Magistrates administer estates of black persons (Native Administration Proclamation 15 of 1928). However, since the *Berendt v Stuurman* case of 2003, heirs of black estates have been able to choose between a magistrate and the Master of the High Court as an administrator, this being an interim measure pending the replacement of existing discriminatory legislation.

Administration of estates by a magistrate

In terms of section 18(6) of the Native Administration Proclamation of 1928, the Administration of Estates Act of 1965 is applicable only to black persons who left valid wills, and only in respect of property of that the deceased was entitled to dispose of in terms of a will. Sections 18(1) and (2) of this proclamation specifically exclude the capacity of a black person to leave a will in respect of assets that must devolve to certain persons in terms of customary law. For example, section 18(1) states that "All moveable property belonging to a Native and allotted by him or accruing under native or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under native law and custom." In addition, section 18(2) provides that "All other property of whatsoever kind belonging to a Native shall be capable of being devised by will. Any such property not devised shall devolve and be administrated according to native law and custom." In other words, according to this proclamation, moveable property cannot be bequeathed in a will whereas immovable can be. There are no other provisions in this proclamation relating to the rights of a surviving spouse.

[129] According to the Corporate Legal Advisor of the Windhoek Municipality, Ms JS de Kock.

No fees are payable for estates administration in terms of this proclamation. Moneys due to minor and absent heirs are paid to the local magistrate. No provision is made in the proclamation as to how these funds must be administered or for payment of interest on the inheritance of a minor. Before remarrying, a surviving spouse must obtain a certificate from the magistrate confirming that the inheritances of majors and minors have been paid or secured. [130] The process through a magistrate is less formal and more decentralised than the process through the Master of the High Court, but the latter process is far more thorough and effective.

Administration of estates by the Master of the High Court

The objective of the first consultation that a deceased person's family has with the Master's office is to gather the information needed for administering the estate. Once all the necessary information has been obtained, the Master of the High Court in Windhoek must be informed of the estate. The Master in Windhoek will open a file and allocate an estate number to serve as a reference in all correspondence with the Master. The Master then appoints an executor by issuing a Letter of Executorship. The executor must place a newspaper notice inviting creditors to prove their claims within a specified period.

In terms of the Administration of Estates Act of 1965, an executor must open a bank account in the name of the estate. The minimum requirement for opening an account is a deposit of N$100 (US$16.66). Once all necessary information is obtained from family members regarding assets and liabilities, valuations are conducted and balance certificates obtained. This information is required for transferring the assets into the names of the heirs, but also for drafting the liquidation and distribution account for submission to the Master. If the estate is insolvent, the executor must report this to the Master in terms of section 34 of the Administration of Estates Act.

If the value of the estate is less than N$30 000 (US$5 000), the Master will instruct the executor as to how the estate must be administered. If the value of the estate exceeds this amount, the executor must report the matter to the creditors and ask whether the estate must be sequestrated in terms of the Insolvency Act or whether the executor must administer the estate in terms of the provisions of section 34 of the Administration of Estates Act. If the creditors instruct the executor to sequestrate the estate, an application must be made to the High Court in terms of the Insolvency Act. Once the order is granted, a trustee will be appointed to continue administering the estate, with the executor still accounting for and distributing any funds reverting to the deceased estate.

How the executor deals with the various assets depends on the financial position of the estate and the number of heirs. Decisions are made in consultation with the heirs. Once all necessary information about the estate has been obtained, the executor must draft a liquidation and distribution account for submission to the Master. The account provides information on the administration of the estate by the executor, and important information for interested parties wanting to know what the executor has done. The Master examines the form and content of the liquidation and distribution account. If the account is incorrect,

[130] Justice Training Centre, University of Namibia, *Administration of Estates, Practical Legal Training*, at 43-45, 98 and 99.

the Master issues a query sheet listing all the preliminary requirements. These must be complied with before the Master will accept that the account is correct.

Once the Master is satisfied that the account has been correctly drawn, the account may be advertised in terms of section 35 of the Act as lying for inspection for a period of 21 days. Any person dissatisfied with the account may object to it during this period in terms of section 35 of the Act. Once the account has lain for inspection free from objections, or if the objections have been disposed of in the prescribed manner, the executor must give effect to the account by paying out the heirs within two months of the account being lain for inspection, transferring the property into their names. After giving effect to the account, the executor must lodge his/her final requirements with the Master. This entails lodging of the heirs' acquaintance, receipts submitted by creditors, proof of transfer of fixed property and a complete set of bank statements and paid cheques. The executor also debits his/her fees at the lodging stage. The executor's fee is 3.5% of the gross value of assets in an estate.[131]

In summary, the administrations of estates procedures applicable to whites and 'coloureds' are clear and relatively easy to understand in that detailed provisions regulate the succession and administration of these estates. These estates are administered under the supervision of a specialist office, that of the Master of the High Court. On the other hand, the law regulating the estates of black people who die without leaving a will still appears to sow confusion as the administration of estates by magistrates' courts often lacks the proper supervision that obtains in the High Court.[132]

Administration of estates upon divorce

Divorce in respect of a civil marriage

For a civil marriage, a divorce can be granted only by the High Court in Windhoek – magistrates' courts do not have any jurisdiction over divorce cases. There are four grounds for divorce: (1) adultery; (2) malicious desertion; (3) imprisonment for at least five years of a spouse who has been declared a habitual criminal; or (4) incurable insanity of a spouse which has lasted for at least seven years.

Malicious desertion is the most common ground for divorce. It can mean actual physical desertion, a continual refusal to engage in sexual relations with a spouse, or a situation where one spouse makes married life unbearable for the other, such as a marriage involving domestic violence. Adultery is invoked more rarely, perhaps because this ground requires that the third party be named. The other two grounds are never invoked in practice.

These grounds, with the exception of incurable insanity, are based on the outdated principle of fault – the idea that one spouse must be guilty of committing some type of wrong against the other. Unlike the laws of most countries today, Namibian law does not allow for a divorce to be granted simply because the couple's marriage has broken down.

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[131] Ibid.

[132] Hubbard D and Zimba E, op. cit. (footnote 78), at 26.

How a couple's property is divided upon divorce depends on the marital property regime applying to the marriage. If married in community of property, the spouses' joint marital estate will be divided into two equal parts. If married out of community of property, the spouses will retain their separate property. In practice, couples divorcing almost always reach agreement on how their property will be divided without judicial intervention.

A divorce of a civil marriage often involves an order for the maintenance of minor children of the marriage, and the economically weaker spouse (almost always the wife) may also ask for maintenance. However, unlike child maintenance, spousal maintenance can only be ordered by a court in favour of the 'innocent party' to the divorce. In practice, however, maintenance is also usually resolved by agreement between the spouses without the need for judicial intervention.

The Law Reform and Development Commission is in the process of considering reforms to Namibia's outdated divorce law.

Divorce in respect of a customary marriage

Namibia's various customary law systems recognise a number of grounds for divorce, i.e. adultery committed by the wife, taking a second wife without the consent of the first, barrenness, and various unacceptable practices such as drunkenness, witchcraft and child neglect.

The fact that several of these grounds apply only to the wife (adultery, barrenness and witchcraft), and at least one applies only to the husband (taking an additional wife without the first wife's consent), probably violates Article 10(2) of the Constitution forbidding sex discrimination, as well as Article 14(1) which guarantees men and women equal rights as to marriage, during marriage and at its dissolution. Another sex-based inequality arises from the fact that some traditional communities require the return of *lobola* or bridewealth before a divorce can be effected.

Customs regarding property division upon divorce vary greatly between communities. Traditionally, *lobola* and the obligations of kin networks ensure that women and children are adequately taken care of following a divorce. However, in many communities these mechanisms are either no longer adequate or no longer functional. The maintenance procedures under the Maintenance Act apply for both civil and customary marriages, but women in some communities feel that it is culturally and socially inappropriate to make use of these mechanisms.

The extended families of the spouses play a big role in mediating to resolve marital disputes, along with community elders and other members in some cases. Divorce is usually achieved through an informal procedure without any intervention from traditional leaders, who tend to get involved only if there are issues that the couple and their families cannot resolve among themselves. Here again, law reform pertaining to the recognition of customary marriage may institute a more formal procedure for divorce that extends into the customary arena some of the protections afforded to civil marriages. It has been suggested that the Namibian Constitution could be interpreted to *require* that the courts hear divorce cases where customary marriage applies. Article 12(1)(a) of the Constitution gives every person the right "to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law" in order to determine "civil rights and obligations". Since

divorce actions clearly involve civil rights and obligations, it may be that the Constitution obliges the general law courts to provide a "fair and public hearing".

Housing rights protection: Most relevant jurisprudence

In the case of *Government of the Republic of South Africa and Others v Grootboom and Others* (1) SA 46 (CC), the South African Constitutional Court had to decide whether section 26 of South Africa's Constitution imposes a duty on the State to provide temporary housing or shelter to persons in desperate need. This precedent-setting housing case charted a new course for the judiciary in South Africa as it sought to give substantive meaning to the socio-economic rights enshrined in the Constitution. It ushered in an evolution of constitutional thinking that impacts on the economic and social disparities between rich and poor.

However, the extent to which Namibians can rely on the judgement to obtain individual relief when facing homelessness is still open to debate. Though South African judgements do hold considerable sway in Namibian courts, Namibia's Constitution does not have a provision similar to section 26 of the South African Constitution, affording housing rights protection to the homeless. Article 95(e) of the Namibian Constitution nevertheless requires the State to actively promote and maintain the welfare of citizens by adopting policies to ensure that every citizen has a right to fair and reasonable access to public facilities and services in accordance with the law. Furthermore, Namibia has subscribed to a number of international treaties that are binding on the State by virtue of Article 144 of the Constitution. Articles 144 on International Law and Article 95(e) on Promoting the Welfare of the People together create the condition of an enforceable right of access to housing. In terms of Article 144, international public law forms part of Namibian law. Article 144 provides that "The general rules of public international law and international agreements binding upon Namibia shall form part of the law of Namibia."

An example of a case that invoked Articles 144 and 95(e) was that of *Kauapirura v the Herero Traditional Authority* in 2001, covered in this report in section 4.4 on customary law. As noted there, the common law rule said to be unconstitutional went unchallenged because the case was settled out of court. The case of *Berendt v Stuurman* in 2003, also covered in section 4.4, is an example of a case that invoked Article 10 of the Constitution, prohibiting racial discrimination. As already noted, this case is significant in that it helped to speed up the removal of some of the last remaining discriminatory laws concerning inheritance and marital property in Namibia.

6.3 Local laws and policies

Housing Policy of the City of Windhoek (CoW)[133]

The CoW Housing Policy serves as a guideline in addressing the need for access to housing and security of land tenure. The policy's vision is to provide adequate and affordable access to land with secure tenure, housing and services for all low-income residents of the city, as a means to reduce poverty and improve quality of life among the poor. The policy objectives are:

[133] Information on the Housing Policy of the City of Windhoek was obtained from the Windhoek Municipality's Corporate Legal Advisor, Ms JS de Kock, in August 2004.

- to strive towards providing all low-income target groups of the city with a range of access and housing options in accordance with their levels of affordability;
- to establish uniform housing standards for different development options;
- to set parameters for orderly incremental upgrading;
- to facilitate access to land, services, housing and credit facilities;
- to establish a participatory process for self-reliance and partnerships, and to facilitate self-help development;
- to secure land tenure;
- to promote a safe and healthy environment; and
- generally to improve quality of life.

The primary objective of this policy is to facilitate access to land, services and housing, but according to the Windhoek Municipality, this objective is inextricably linked to affordability, cost recovery, sustainability and replicability. The capacity to extend services and housing is increasingly dependent on cost recovery via contributions, user charges, taxation and loan repayments. CoW Corporate Legal Advisor Ms de Kock stated that the Windhoek City Council (WCC) receives no subsidy to provide for the needs of the poor. Though the State does subsidise local authorities to help with low-income housing construction and upgrading of land and infrastructure, it appears that Windhoek is the exception as central government views the WCC as a wealthy council that can do without state subsidies.

Credit control

Without substantial subsidy assistance from government, the land and housing needs of the growing low and ultra low-income populations of Windhoek would scarcely be met – only about 16% of the 17 700 low-income households currently in need of land can physically afford a 300 m^2 erf in a serviced communal township. This fact makes low-income land delivery through private ownership particularly difficult and invariably slow. Until land is made available, increasing numbers of urban migrants will settle on marginal land.

Credit control procedures

The Housing Policy should be read together with the council's credit control procedures. Though the council has a credit control policy, self-help groups are accountable and have to act in solidarity to effect payments for land, services and housing. In this regard the policy provides the following:

- Incentives for regular payments could increase access to housing loans or upgrading erf loans and different types of land title.
- A more humanitarian approach is followed and officials have been charged to adopt a different attitude, refraining from aggression and upholding the principles of good governance.
- Face-to-face meetings with communities twice annually on an ad hoc basis to ensure that information is conveyed and to stress payment responsibilities. A 'culture of payment' should be promoted.
- The codes of conduct should be drafted in such a manner as to ensure that members of self-help groups understand the consequences of payment default. For example, the control body is to give defaulting members warnings to comply, and sanctions will be applied where default persists. Eviction should be the last resort.

Above:
A Katutura informal settlement block being serviced for sale to residents with secure tenure under a loan scheme administered by the Shack Dwellers Federation of Namibia (SDFN). In the right-hand photo, SDFN Co-ordinator Ms Mbanga who lives on this block, shows the photographer the newly installed water taps in her kitchen.

Left:
Another Katutura block that has been serviced under an SDFN scheme.

Below:
One of the residents of the latter block in her kitchen which now has water taps and electricity.

Handling of payment default

The defaulter could seek a relative to take over the payment obligation as a first alternative. Should the default persist, eviction could be contemplated as the last alternative, provided that the principles of the Local Authorities Act are adhered to.

Section 61 of this Act provides the following remedies where a person remains in default on a loan repayment:

> If any person to whom a housing loan has been granted fails to comply with any term or condition on which such loan was granted to him or her, the local authority council may –
>
> (a) in addition to any other steps which the local authority council may lawfully take, by notice in writing of at least one month, require such person to make such additional payments, not exceeding four per cent per annum, calculated on the

initial amount of the housing loan in question, or such amount as supplemented by any further loan granted under section 60,[134] as the case may be, as may be determined by the local authority council, in reduction of the capital amount owing;

(b) by notice in writing of at least three months, claim the capital amount and any interest owing in respect of the housing loan, including any such further loan, from such person and take such legal steps as the local authority council may deem fit to recover such amount and interest.

Local authority regulations

Most urban/town areas have their own municipal or town bodies that make regulations and by-laws to deal with their local issues, and these bodies have the power to enforce the rules. Town planning schemes are essential for managing and controlling land use and land development, and are usually designed to meet the specific needs of a specific municipal or town body. Katima Mulilo in Caprivi Region is the only town in Namibia that does not have a town planning scheme, and consequently finds it difficult to manage and control land use. Town, regional and local bodies have the power to legislate on their own affairs as long as their acts and conduct do not conflict with the overall guidelines laid down in the Constitution. Their laws and acts are subject to judicial review.[135]

Windhoek developed a number of formal low-income housing schemes in 1991-1999. The serviced plots existing then were unaffordable for the vast majority of the people targeted. In response to the influx of poor urban migrants, the Windhoek City Council in 1991-1994 developed three reception areas intended to serve as *temporary* settlement areas. It was believed that once a new household found its feet in the city, it would move from the reception area to a fully serviced area. The reception areas were provided as a top-down emergency initiative developed and implemented by city planners and engineers to deal with what was perceived as a temporary nuisance.[136] However, household income levels in these areas have remained very low, and few households have moved out. The CoW's efforts to resettle some households proved very slow and met with resistance by occupants of the reception areas, while spontaneous settlement beyond these areas has grown significantly.[137]

Among the lessons learned from the reception area experience is that the participation of informal settlers is essential in the initial planning and implementation of low-cost housing schemes. Affordability is another key consideration in this initial process. Moreover, security of tenure appears to be a major requirement in the case of urban settlers and should be a key component of upgrading/housing programmes.[138]

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[134] Section 60 of the Local Authorities Act provides that:

(1) a local authority council may grant to the owner of a dwelling a further loan for the improvement or repair of such dwelling; and

(2) if the loan of such further loan exceeds the amount actually owing by the owner concerned under the first mortgage bond securing such housing loan, the local authority shall register a further mortgage bond over the property on which the dwelling in question is constructed.

[135] Interview with Mr Opperman, a town planner with Urban Dynamics, Windhoek, July 2004.

[136] World Bank, *Upgrading Low Income Urban Settlements: Namibia Country Assessment Report*, January 2002, at 17.

[137] Ibid., at 22.

[138] Ibid., at 18.

7. Implementation of land and housing rights

Omumbu informal settlement in Oshakati

7.1 Implementation of policy and legislation

Due to political sensitivity around the agricultural land reform process, the MLRR does not seem to have focused closely on the urban Flexible Land Tenure System, and Parliament has not yet passed the Flexible Land Tenure Bill. It would have made sense for the MLRR and MRLGH to have collaborated from the start in drafting the bill, and it would make sense for both ministries to implement this legislation rather than the MRLGH doing so alone.

In some low-income housing schemes there has been conflict around flexible tenure due to rights of occupancy being linked to membership of a scheme. Such conflict is to be expected because, for as long as there is no law in place, rights cannot be officially registered and groups have to revert to their respective membership rules, whether or not the rules accord with the bill. Once enacted, the bill will make it easier for groups to resolve internal conflict.

The bill could also be considered for rural areas. In practice the real need for acquiring land for low-income housing is in peri-urban and urban areas around larger towns rather than in rural villages. However, a low-income household may wish to settle in a rural village and the bill could give such a household secure tenure.

There appears to be coordination difficulty among ministries involved in implementing and administering the National Housing Policy. The MLRGH currently plays the leading role in providing a framework for implementing the policy. This ministry is involved particularly in decision-making and provision of technical assistance and financial support to the Twahangana fund (discussed earlier).

Regarding the right to transfer of communal land, law reform has been enacted to protect women, while reform regarding other property is to be enacted in the context of the recognition of customary marriage. It will be necessary to assess the effectiveness of the Communal Land Reform Act in practice after it has been in place for some time to determine whether this legislation has any effect on inheritance of other forms of immovable property such as a homestead.

7.2 Cultural issues

While discriminatory customary practices and patriarchal attitudes are a problem in rural areas, they do not seem to be a major factor hampering implementation of the Flexible Land Tenure System because, for example, many women having a starter or landhold title are single mothers and the sole breadwinners for their dependants. As noted earlier, women in Windhoek's informal settlement areas especially are actively involved in saving schemes with a view to improving their housing conditions. The policy of the Shack Dwellers Federation of Namibia is to encourage women to participate in saving schemes and constructing their houses. In the experience of the National Co-ordinator, Ms Mbanga, women tend to be more punctual than men in repaying loans.

7.3 Race issues

Race was the focal issue under colonial rule in that the majority of non-white people were excluded from accessing privileges enjoyed by virtually all whites (better education, work opportunities, income, health, housing, etc.). In the post-independence era, problems of inequity are attributable chiefly to class rather than race issues, though the latter are certainly still at play in pockets of Namibian society. Since independence, by virtue of affirmative action and other policies supporting previously disadvantaged Namibians, a so-called 'black elite' has emerged country-wide, but Namibia's poorest people still tend to hail from the black population. As already noted in this report, Namibian society rates among the world's most unequal societies, and could even be the most unequal if the Gini coefficient is used as an indicator of wealth and income disparity. The disparity in Namibia appears to be attributable more to class than to race, but there is no doubt that on the whole, whites still enjoy a higher standard of living than blacks. Whites who found the post-independence political dispensation untenable sought 'greener pastures' in South Africa (while apartheid was still in force), or in Europe, North America or Australia.

7.4 Access and affordability issues

Affordability of serviced municipal land is subject to, among other things, land management and layout regulations. When informal settlements are to be proclaimed, layout plans must be submitted to the Namibia Planning Advisory Board (NAMPAB) and the Townships

Informal settlement in Katutura. Thousands of low-income households live in unplanned urban settlements, often without secure tenure and basic needs such as clean water and electricity.

Board for approval. The Townships Board has recently rejected plans for the layout of Swakopmund's informal settlement area, known as the DRC (Democratically Resettled Community). The board's rejection was due to concerns that the geometric design of the settlement allows for only four rows of erven between two streets, with limited, unusable access to the middle two rows.[139] Such a design, it is feared, may lead very quickly to a massive concentration of people in a very small area, and thus urban decay, slum conditions and social evils in the neighbourhood. However, the design reflects that cost was of major importance, whereas social needs, acceptability, climate (wind, temperature, fog) and geographical conditions were low-ranking issues.[140]

On the one hand, these regulations prescribe that certain environmental and public health regulations have to be adhered to, while on the other hand they challenge town planners to produce affordable and accessible layout plans conforming to standard land management and layout plans. Access to basic services remains a problem for many in the very low-income sector of Namibian society. The legal framework for managing water resources in Namibia is still based on the Water Act 54 of 1956 developed for South Africa, a water-rich country with dissimilar climatic conditions to those of arid Namibia. This legislation bases abstraction of rights over "private water", vesting the "sole and exclusive use and enjoyment of private water in the owner of the land on which such water is found", and thus effectively excludes non-land owners, i.e. the majority of the population, from having adequate and equitable access to water.[141] Government intends to replace this legislation and update the entire regulatory framework for managing water resources. The new Water Bill in the pipe-line would give rise to new institutions regulating the industry – among them an independent pricing regulator to deal with affordability issues. The new policy framework based on the bill is designed to redress inefficient water resource management, and sets out government's policy on water resource development, utilisation, management and protection.[142]

The National Water Policy adopts the following basic principles for integrated water resource management:[143]

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[139] Barnard M, "DRC layout plan nixed", *The Namibian*, 3 August 2004.
[140] Ibid.
[141] Republic of Namibia, *The Draft National Land Use Policy*, "Annexure A: Applicable Legislation, Policies and Regulations on Land Use Planning", Ministry of Lands, Resettlement and Rehabilitation, 2002, at 12.
[142] Ibid., at 13.
[143] Ministry of Agriculture, Water and Rural Development, *National Water Policy* (White Paper), 2002, at 23.

- *Ownership:* The limited and vulnerable water resources are an indivisible national asset whose ownership is vested in the State on behalf of the whole society.
- *Equity:* All Namibians will have a right of access to sufficient safe water for a healthy and productive life.
- *Promotion of development:* Namibia's water resources should be utilised, developed and managed in such a way as to promote equitable socio-economic development without jeopardising the benefits and opportunities of future generations.
- *Economic value:* The scarcity and vulnerability of Namibia's water resources require that their economic value be recognised, and that their abstraction, management and conservation are efficient and cost-effective.
- *Awareness and participation:* The planning and management of water resources and services must facilitate awareness and participation among all stakeholders at all levels.
- *Openness and transparency:* Reliable water resource management information systems should be developed and made accessible to the public.
- *Decentralisation:* Management of water resources and services will be decentralised to the lowest practical level while government focuses on policy and standard setting, regulation and facilitation.
- *Ecosystem values and sustainability:* Harmonisation of human and environmental requirements, recognising the role of water in supporting ecosystems.
- *Integrated management and planning:* Water resources form part of an interconnected natural environmental system on which society depends. Management of the system will be integrated across environmental, economic and social dimensions.
- Clarity of *institutional roles and accountability*.
- *Capacity-building:* Institutional and human development at all levels.
- *Shared watercourses:* Namibia will strive to promote equitable and beneficial use of international watercourses.

In April 2004 the Minister of Agriculture, Water and Rural Development, Helmut Angula, denied claims that government was making water unaffordable. He explained that provision of water comes with a lot of investment, which makes it impossible to provide free water in Namibia. Bulk water supply for pensioners is sold at N$3,70 per cubic metre (1 000 litres) a month, about 30 cents less than the standard rate of just over N$4,00.[144] NamWater, a state-owned entity) maintains that it operates on a cost-recovery basis and ploughs all profits back into building and maintaining water infrastructure.[145]

7.5 Education and awareness-raising issues

Educated people (mainly urban dwellers due to their having easier access to information and 'street wisdom') tend to be more critical of discriminatory customary practices and more aware of their inheritance rights and legal instruments, such as written wills, which do not exist in customary inheritance systems.[146] By means of wills, more and more widows

[144] Dentlinger L, "No Free Water says Angula", in *The Namibian*, 13 April 2004.
[145] Ibid.
[146] LeBeau D, Iipinge E and Conteh M (authors), with legal analysis by D Hubbard and E Zimba, *Women's Property and Inheritance Rights in Namibia*, Pollination Publishers, University of Namibia, Windhoek, 2004, at xiii.

and children in Namibia are gaining economic security and protection from looting of their property by greedy extended family members.

Over the years, the LAC has contributed to awareness-raising and advocacy on gender issues by means of pamphlets, booklets with simplified and local languages, and paralegal networks. In its litigation activities the LAC focuses primarily on constitutional and human rights cases in anticipation that the outcome of each case will have a broader impact on Namibian society. Apart from these general human rights cases, the LAC deals with cases involving discrimination against people living with HIV and AIDS, and cases involving land and housing disputes. Legal aid is provided by the Ministry of Justice's Directorate of Legal Aid, a statutory body established by the Legal Aid Act 29 of 1990. As per the provisions of Article 96(h) of the Constitution, the primary responsibility of this directorate is to render legal aid to those who cannot afford the services of legal practitioners.

7.6 Impact of HIV/AIDS on land and housing rights

HIV/AIDS has little effect on distressed land sales in Namibia, and the epidemic does not seem to have reached the same critical level as in some other African countries, but there are cases of HIV-positive people finding it difficult to access a home loan.

8. Good practices

Informal settlement in Katutura

8.1 Land Management Diploma[147]

During the late 1990s the MLRR and the International Institute for Aerospace Survey and Earth Sciences (ITC) in the Netherlands agreed to implement a manpower development programme for land surveying which has since been institutionalised at the Polytechnic of Namibia. One aim of the programme is to generate, through institutional support and manpower development, a team of trained Namibian staff to strengthen the Directorate of Survey and Mapping (DSM). Another aim is to lay a good foundation for generating Namibian land use planners, land surveyors, geodesists, hydrographers, photogrammetrists, cartographers, and GIS and Remote Sensing Experts. Twenty students have graduated from this programme and all have joined the DSM. Included in their employment packages are a number of fellowships for further training abroad in land surveying.

The Land Management Diploma programme introduced in 2000 covers five specialised fields, namely Land Use Planning, Land Measuring, Land Valuation, Urban Land Use Management and Land Registration, all sharing core modules. In the first semester the students can specialise in the field of their choice. The theory-practical ratio in the course

[147] Information obtained from the Faculty of Natural Resources and Management at the Polytechnic of Namibia.

curriculum is 50:50. The students must undergo compulsory in-service training in the third and fifth semesters of the programme under the supervision of experienced land surveyors. It is expected that graduates will put their new practical skills to use in helping the MLRR to implement, maintain and develop the Flexible Land Tenure System. Upon graduating, diploma students become para-professionals. A diploma graduate would be able to work, for example, as an assistant to a professional land surveyor. The Polytechnic is also set to introduce a B. Tech qualification in 2005 and 2006 (in Land Use Planning, Land Measuring, Land Valuation, Urban Land Use Management and Land Registration), which will enable Land Management Diploma graduates to upgrade their qualifications to become fully professional. Some B. Tech courses will be introduced in 2005 and others in 2006.

8.2 CBO, NGO and government partnerships

The NHAG, SDFN and MRLGH have established effective partnerships among themselves to take up informal settlement challenges. The partnerships have facilitated dialogue between the two disparate housing groups that were previously inaccessible to one another. The MRLGH, NHAG and the SDFN meet regularly to discuss and prioritise issues such as loan schemes, land ownership and servicing before taking action. Since independence the SDFN and NHAG have been carrying out functions for local authorities to free up local authority resources for other pressing tasks. At the same time the SDFN and NHAG have become aware of the limitations facing local authorities, especially financial, in that they do not demand service improvements which neither they nor the local authorities can afford. In this regard, since its inception in 1995, the Twahangana Loan Fund has served as an excellent example of how CBO, NGO and government partnerships can meet each other half way to give poor people access to finance.

8.3 City of Windhoek

As the largest municipality in Namibia, the CoW has played a leading role in developing solutions to informal settlement challenges. It has demonstrated a willingness to overturn conventional approaches to standards and regulations so as to reach low-income groups with improvements affordable to them. The CoW's land use and town planning policies acknowledge the importance of representative organisations and seek to create and nurture them so as to strengthen local networks and group saving schemes within low-income neighbourhoods. Consequently the foundations are in place for a cost-effective participatory strategy to provide better housing and services to the most marginalised members of society. In practice the CoW is implementing the Flexible Land Tenure System despite the bill not yet having been passed.

8.4 Social and economic empowerment of women in the SDFN

Women have fewer opportunities than men to raise their income and socio-economic status so as to acquire secure tenure in urban areas. However, as noted earlier, most participants in SDFN loan schemes are women, and women also play a significant role in managing group loan schemes in order to obtain secure land tenure and housing for themselves and their families.

8.5 Low-cost housing alternatives

As mentioned in section 4.7, research was conducted in early 2004 by the R3E Bureau, a non-profit association, in collaboration with the Ministry of Mines and Energy, the SDFN, the NHAG and the CoW, to identify low-cost do-it-yourself methods to upgrade shack homes in Windhoek to make them more comfortable by making them less susceptible to the external climate. This project is still fairly new, and further research is needed to assess whether it could be replicated in other parts of the country.

8.6 Sustainable development and environmental health programme

In 2001, members of the SDFN initiated an environmental health programme to promote sustainable improvements in their own lives. The programme addresses issues relating to HIV/AIDS, tuberculosis, food security, environmental hygiene and communication between emergency assistance providers in the communities. In addition, the SDFN works closely with health workers at clinics where an emphasis is placed on first-aid training and provision of home-based care to HIV/AIDS sufferers.

9. Conclusions

A shebeen in Omumbu informal settlement in Oshakati

When Namibia attained independence in 1990, the new Constitution introduced the right to all Namibians to reside or settle in any part of the country (Article 21(1)(h)), which guarantees all Namibians greater freedom of movement and life choices. This constitutional provision has arguably contributed to an increased outflow of people from rural areas to urban areas in search of better living and working conditions. In turn this regular rural-urban migration flow contributes to the fact that thousands of low-income households live today in unplanned urban settlements, often without secure tenure and basic needs such as clean water and electricity. To address the challenges facing informal settlers, government developed new policies and structures to accommodate the ever-increasing segment of the population living in low-cost informal settlements in a flexible and efficient manner.

When the MLRR introduced the Flexible Land Tenure System, it raised expectations of improving the overall living conditions of the urban poor. But several obstacles still exist that would prevent the system from operating smoothly. Firstly, there is a lack of the technical skills required to secure the system's long-term sustainability, but as noted earlier, it is expected that Land Management Diploma graduates from the Polytechnic of Namibia will strengthen the MLRR's technical capacity in the near future. Secondly, if the Flexible Land

Tenure Bill is not passed soon, the financial implications for securing the system's long-term success could be significant. Fortunately the necessary political support for the system was secured with Cabinet approval of the concept in 1997. Stakeholders such as the SDFN, NHAG and the various group loan schemes have shown eagerness to participate in making a long-term success of the system. The challenge now is to take the steps necessary to speed up full implementation of the Flexible Land Tenure System so as to revitalise the hopes and aspirations of the thousands of poor families living in informal settlements. Government has committed a substantial amount of funding to the system since 1998. However, considering the current annual allocation of funds and other available resources to the system, it may take at least two decades for the benefits of secure title to be extended to the majority of poor people living in informal settlements. It is therefore important that the benefits derived from the system are maintained so as to keep up the momentum. This is essential to ensure that social and political support is maintained and that the participants do not lose faith and start doubting the system objectives.

A further important conclusion of this study is that law reform in Namibia should focus more on the equitable distribution of property upon divorce and death. Vulnerable people such as rural women and orphans particularly need protection from the existing discriminatory and unconstitutional customary laws. What is significant in this regard is that law reform on inheritance of communal land has already taken place to protect women, while law reform on other property will be enacted in the context of the recognition of customary marriage. It will be necessary to assess the application of the Communal Land Reform Act in practice once it has been in place for some time to gauge whether it has any effect on inheritance of other forms of immovable property such as a homestead. Community courts, once in operation, will hopefully be effective in addressing movable property disputes, especially those involving 'grabbing' of property such as livestock and household goods.

10. Recommendations

A small-scale communal agricultural project at _____ in_____.

10.1 Coordination

Land management

The Flexible Land Tenure Bill could be considered for rural areas as well. Successful implementation of the Flexible Land Tenure System in urban areas could foster a more integrated and better-coordinated land management effort in rural areas. However, the focus of the bill should remain urban and peri-urban areas until such time as the system has proven to work in these areas. The real need for acquiring land for low-income housing is currently in urban and peri-urban areas rather than rural villages.

Policy and legislation

Access to additional land for allocation to those displaced by upgrading is an important issue that should be given attention in the Flexible Land Tenure Bill and System. During the investigation and pilot implementation of the system it was found that no formalisation scheme can reach its full potential, and none can be implemented, without access to additional land for allocation to those displaced by planning, reduction of overcrowding,

etc. Unless land is available for starter and landhold titles, continuing migration will place pressure on existing blocks already formalised for squatters.

Flexible Land Tenure System

If the formalisation process under the Flexible Land Tenure System is to succeed, it is crucial to attain understanding, respect and cooperation between the community and the local authority. This has to be constantly worked on so as to create a positive environment for future development of a settlement area. The investigation of the system demonstrated that a local authority and community have to discuss the formalisation process thoroughly before it begins.

Ministries

The MLRR was responsible for drafting the Flexible Land Tenure Bill, but the MRLGH will be responsible for implementing it. It would have made more sense for both ministries to have been involved in the drafting from the outset, and it makes sense for them to jointly implement the Flexible Land Tenure Act rather than the MRLGH doing so alone.

10.2 Incorporating informal settler participation and needs into policy

Affordability of serviced municipal land is one important feature of land management policy formulation, and it is often subject to land management and layout regulations. Experience with informal settlement policy formulation has shown that top-down decision-making, without considering the needs of those affected by a policy, can lead in a very short period to a high concentration of people in a small area, and thus urban decay, slum conditions and social evils in the neighbourhood. It is important that social needs, affordability, acceptability, climate and geographical conditions are ranked higher in decision-making around proclamations of informal settlements.

10.3 Constitutional protection

The Namibian Constitution does not directly provide for the protection of housing rights. However, Article 13(1) provides, inter alia, that "No persons shall be subject to interference with the privacy of their homes … ." This provision should be widely understood and used as a tool to advance the rights of low-income households and especially women to land, property and housing.

10.4 Law reform

Communal Land Reform Act 5 of 2002

Section 26 of this Act possibly violates Article 10(2) of the Constitution (prohibition of discrimination on the basis of sex). The Act states that the right should be allocated to a child of the deceased whom the Chief or Traditional Authority determines to be entitled

to the allocation in accordance with customary law. Most customary law systems allow for the eldest son to inherit the assets of the deceased. Since this provision could work against girls, younger sons and children born outside marriage, it should be amended.

Flexible Land Tenure Bill

A provision is needed in the bill to safeguard women's and children's rights within a block (as the Communal Land Reform Act does), i.e. inheritance rights, joint starter/landhold titles and equal decision-making for the block.

While the allocation and registration of blocks are given attention in the bill, a shortcoming of the bill is that the town planning aspect is not given attention. It is therefore recommended that the legislators include in this legislation a compulsory town planning provision to guide authorities when new blocks are allocated and registered.

The land surveying and registration of rights proposed for the Flexible Land Tenure System require a legal framework to give legal credibility to the processes through which different rights can be created and conferred. The system will require a simpler and speedier process of developing layout plans and obtaining permission to develop urban lands. In addressing problems linked to informal settlement and the formal system, plans must be adapted to the reality of informal settlements, and informal settlements must be legally isolated from conventional planning laws. The legislation should allow for realistic standards in developing individual plots in informal settlements.

Legislation on customary marital property, divorce and inheritance

The accrual principle, according to which wealth accumulated during a marriage is shared, and property belonging to each spouse before the marriage remains each spouse's separate property, could be of use in reforming unconstitutional customary laws on inheritance and marital property rights. The accrual principle could be introduced into customary law, providing a remedy for the subordinate position of women with respect to property, while still respecting the traditional significance of different forms of property. It is suggested that one uniform succession and inheritance law is needed for all Namibians, with decentralised features and more accessible procedures. In addition, the grounds for divorce under customary law should be the same for men and women.

10.5 Poverty reduction

The NPRAP and PRSP should give attention to the issue of women's equal rights to access, own and control land. The programme should target peri-urban or communal areas on the edges of towns and specify that the Flexible Land Tenure Bill covers these areas as long as they are located within a municipal boundary. Areas can be brought within municipal boundaries by ensuring that the Flexible Land Tenure System is adhered to in formalising them, and by applying the system flexibly. The traditional rights to these areas should be recognised ("traditional urban"), and with community consent, the traditional land rights to these areas could be registered as landhold titles within blocks. The traditional leaders in these areas would then have to be included in decision-making on the areas, i.e. they would

form part of the municipal structure. This would counteract possible conflict arising over the jurisdictions of the local authority and traditional authority.

10.6 Governance

Decentralised local government should be coupled with decentralisation of fiscal powers and resources. However, it is presently doubtful that all local authorities in Namibia have the necessary skills, capacity and financial sources to function as decentralised units not under central government control. To assist smaller struggling municipalities to become more efficient and less dependent on central government, larger municipalities in the vicinity could take over some responsibilities. In addition the Ministry of Regional and Local Government and Housing could create a bureau of experts that the smaller municipalities could draw on.

10.7 Institutional reform

Strengthening government and local authority capacity

There is a need for qualitative information on the type of management and capacity training needed in local authorities. Regarding the strengthening of urban infrastructure capacity and services, the provision of new services and maintenance of the existing services depend on the availability of finance and the affordability levels in the urban population. To manage this complex task, local authorities will have to share with each other their experiences of good practice and their knowledge of user-friendly mechanisms for generating information on targets, costs, timing and capacity.

Integration

It may be wise to integrate customary land tenure systems with the formal urban land administration systems, especially in communal areas where customary tenure features prominently, to ensure security of tenure for all. Integrating customary and formal land administrations systems could prevent potential conflict in so-called 'grey areas' where it is not certain whether a disputed piece of land falls under the jurisdiction of the town council or the traditional authority.

Accessibility

The Flexible Land Tenure Bill should make provision for resolving disputes over inheritance, marriage, informal unions and group rights, and the role of customary functionaries in relation to land designated as urban should be considered in the system. In this regard the formal legal system should be made more accessible to low-income households.

For example, the High Court in Windhoek is not accessible to all Namibians who want to obtain a divorce. It is recommended that the administration of estates, including that under customary law, be dealt with in future by lower courts, circuit courts and mobile courts under High Court supervision. Such a structure would improve the accessibility and effectiveness of the court system as a whole to the benefit of all. Also, accessibility to the land rights

offices provided for in the Flexible Land Tenure Bill should be improved by means of opening more of these offices in more and more areas. It is expected that this will be done once the bill has been passed and funding is available.

Coordination

In terms of coordinating the legislative, technical and social context of the proposed flexible tenure system, it is recommended that the following institutional model of Christensen and Juma is adopted:[148]

- A local property office, drawing on local expertise to resolve disputes and increase accessibility, while carrying out the planning, surveying and registration process.
- A computer-based registration system.
- A landhold title audit by the Windhoek Deeds Registry.

In addition, land rights offices, resorting under the MLRR (or more specifically under the main Deeds Office in Windhoek), should be established in local areas and in regional councils (thereby integrating MLRR and MLRGH responsibilities for effective management of the Flexible Land Tenure System). These offices should be established in areas where the pressure for such services is greatest, and a sensible regional balance should be carefully ensured. It is proposed that the first land rights office be established in Windhoek so as to test the procedures and the computer system before replication elsewhere.

Technical capacity-building

The MLRR should consult private short- and long-term experts, especially in the initial phase of implementation in the areas of planning, conveyancing, surveying and on-the-job training of registration officers. In certain local authorities or regional councils, the duties of a land measurer, a registration officer and a local office manager could be combined or performed by seconded employees with the necessary skills. For larger local authorities, the post of local property office manager may require a full-time employee.

Computerisation of the FLTS registration process

It is recommended that a computer-based registration system is introduced to handle the registration of the starter and landhold titles. The advantages would be as follows:

- Starter and landhold title records would be easily shared and accessible throughout the country.
- It will be easy to convert and upgrade the tenure type once the data is available in digital form.
- A national uniform system can be maintained without local variation and therefore facilitate data integration and consistency.
- A basis is created for a national land information system outside the areas not yet in the national cadastre.

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[148] Christensen SF and Juma SY, *Bringing the Informal Settlers under the Register – The Namibian Challenge*, International Conference on Spatial Information for Sustainable Development, Nairobi, Kenya, 2-5 October 2001 at 9.

Harmonising informal settlement planning with the formal system

It is recommended that conventional planning laws be adapted to reflect the reality of informal settlements. Town planning aspects of informal settlements should also be given specific attention in the Flexible Land Tenure Bill.

Reviewing the estates administration procedure

It is recommended that a simplified and more accessible administration of estates procedure be introduced to operate parallel with the current more technical procedure. The difference would not depend on someone's race, but on the value of the estate. For example, lower-level courts accessible to people all over the country should be strengthened to deal with the administration of estates of a certain value. The estates administration procedure should be simplified so that everybody can understand it, and the High Court should supervise the lower courts.

Affordability and acceptability

Affordability and acceptability should be ranked higher in the decision-making process when informal settlements are proclaimed. In addition, acceptable environmental and public health standards should be maintained with the implementation of informal settlement layout plans.

Further research needed

Informal settlement households in Namibia tend to maintain close social-economic links with their rural areas of origin, which has implications for their social organisation, economic conditions and long-term commitment to urban settings. Updated information on topics such as cultural, social and economic characteristics of migrating households, regional variations in the extent and pattern of migration and the potential of regional urban growth centres for curbing or redirecting migration is needed for developing strategies to bring about a sustainable economic base for low-income households in urban settlement areas.

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Jana De Kock, Corporate Legal Advisor, City of Windhoek, 5 August 2004.

Albert Engel, Sector Coordinator for Natural Resources and Rural Development, GTZ Namibia, 2 August 2004.

Jane Gold, previously a town planner in the Ministry of Regional and Local Government and Housing, now a consultant, 16 June 2004.

Mike Kavekotora, Chief Executive Officer, National Housing Enterprise, 24 June 2004.

Jacques Korrubel, Director, Habitat Research and Development Centre, 4 August 2004.

Irene Marenga, Administrator, Association of Regional Councils in Namibia, 21 July 2004.

Edith Mbanga, National Coordinator, Shack Dwellers Federation of Namibia, 11 and 14 June 2004.

Anna Muller, Director, Namibia Housing and Action Group, various contacts during June and July 2004.

Maureen Nau/oas, Acting Chief Administration Officer, Association of Local Councils in Namibia, 21 July 2004.

Fenny Nauyala, Deputy Director, National Build Together Programme, Ministry of Regional and Local Government and Housing, 11 June 2004.

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Joas Santos, Executive Director, Urban Trust of Namibia, 11 June 2004.

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Francois Swartz, Director, International Development Consultancy, 7 June 2004.

Acronyms and abbreviations

ALAN	Association of Local Authorities in Namibia
CBO	community-based organisation
CoW	City of Windhoek
DRC	Democratic Republic of the Congo (name of township in Swakopmund)
DSM	Directorate of Survey and Mapping
GIS	Geographical Information System
IMSCLUP	Inter-Ministerial Standing Committee for Land Use Planning
IPPR	Institute for Public Policy Research
LAC	Legal Assistance Centre
MLRR	Ministry of Lands, Resettlement and Rehabilitation
MRLGH	Ministry of Regional and Local Government and Housing
NAMPAB	Namibia Planning Advisory Board
NEPRU	Namibia Economic Policy Research Unit
NGO	non-governmental organisation
NHAG	National Housing Action Group
NHE	National Housing Enterprise
NHP	National Housing Policy
NNPRAP	Namibian National Poverty Reduction Action Programme
NPC	National Planning Commission
NPRAP	National Poverty Reduction Action Programme
PRSP	Poverty Reduction Strategy Plan
PTO	Permission to Occupy
R3E Bureau	Renewable Energy and Efficiency Bureau of Namibia
SDFN	Shack Dwellers Federation of Namibia
SWAPO	South West Africa People's Organisation
UNDP	United Nations Development Programme
UNFPA	United Nations Population Fund
UNIN	United Nations Institute for Namibia
UNTAG	United Nations Transition Assistance Group
WAD	Women's Action for Development
WCC	Windhoek City Council

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